



EQUALITY ROUNDTABLE DIALOGUE REPORT

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Equality

human rights

discrimination
democracy

challenges of racism

Soweto Hotel, Kliptown Square
27 March 2014

equality vulnerability



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1. Foreword by the Chairperson of the South African Human Rights Commission, Advocate Mabelde Lourence Mushwana

On the occasion of South Africa's twentieth anniversary as a democratic nation, there are numerous reasons to pause and reflect on the extent to which the objectives of a non-racist, non-sexist society - in terms of the Constitution of the Republic of South Africa, 1996 (the Constitution) - have materialised. The end of apartheid also marked a new beginning for the country, characterised by the striking down of discriminatory laws, the entrenchment of a constitutional dispensation centred on human rights and freedoms and the creation of institutions dedicated to support the flourishing of our democracy, including the South African Human Rights Commission (the SAHRC or the Commission).

Notwithstanding the numerous achievements that we can attest to over the past twenty years, there remain a number of considerable challenges in respect of the advancement of the right to equality for all people in South Africa. The South African Human Rights Commission regularly receives complaints of alleged unfair discrimination on the basis of race, gender, disability and other grounds prohibited by section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 (PEPUDA). This is illustrative of the fact that we continue to face challenges in translating the aspirations of the Constitution into real, lived experiences of equality.

The Round Table Dialogue was envisaged as an opportunity to engage with key stakeholders on the right to equality and to critically reflect on progress made thus far. In addition, the dialogue was intended as a means of concretising a way forward that might aid the nation, and the Commission, in advancing the realisation of the right.

I am proud to present the Report of the SAHRC's Round Table Dialogue on Equality, and hope that it might contribute to enriching discourse on the subject as well as offering an avenue for further engagement.

Advocate ML Mushwana
Chairperson of the South African Human Rights Commission

2. Acknowledgements

The South African Human Rights Commission wishes to acknowledge the contributions of the following participants at the Round Table on Equality:

- Advocate Mabedle Lourence Mushwana-Chairperson of the South African Human Rights Commission
- Mr John Jeffery MP - the Honourable Deputy Minister of Justice and Correctional Services
- Mr Kayum Ahmed - former Chief Executive Officer of the South African Human Rights Commission
- Professor Shadrack Gutto - University of the South Africa
- Professor Pierre de Vos - University of Cape Town
- Professor Frans Viljoen - Centre for Human Rights, University of Pretoria
- Mr Irfaan Khalil - Durban Magistrates' Court
- Sicelempilo Shange-Buthane - Consortium for Refugees and Migrants in South Africa
- Ms Danaline Franzman - Department of Justice and Correctional Services
- Ms Nonhlanhla Mkhize - Durban Gay and Lesbian Health Centre

3. List of Abbreviations and Acronyms

AU	African Union
BBBEE	Broad-Based Black Economic Empowerment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRL	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
CORMSA	Consortium for Refugees and Migrants for South Africa
CGE	Commission for Gender Equality
DHA	Department of Home Affairs
DHET	Department of Higher Education and Training
DIRCO	Department of International Relations and Cooperation
DOJCD	Department of Justice and Constitutional Development
DOJCS	Department of Justice and Correctional Services
DOL	Department of Labour
DOP	Department of Police
ECs	Equality Courts
ERC	Equality Review Committee
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPRD	International Convention on the Protection and Promotion of the Rights of Persons with Disabilities
KZN	Kwazulu-Natal
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
NAP	National Action Plan to Combat Racism, Racial Discrimination. Xenophobia and Related Intolerances
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PPPFA	Preferential Procurement Policy Framework Act
SAHRC	South African Human Rights Commission
SALGA	South African Local Government Association
UN	United Nations
WCAR	World Conference against Racism

4. Introduction

4.1 The South African Human Rights Commission

The Commission is an institution established in terms of section 181 of the Constitution to strengthen constitutional democracy in the Republic. Its mandate is to promote respect for human rights and to contribute towards the development of a culture of human rights in South Africa. Furthermore, the Commission has a promotional mandate to ensure the protection, development and attainment of a culture of human rights in South Africa.

Section 184 (2) of the Constitution states that:

The SAHRC has the powers, as regulated by national legislation, necessary to perform its functions, including the power to:

1. investigate and to report on the observance of human rights;
2. take steps to secure appropriate redress where human rights have been violated;
3. carry out research; and
4. educate

In respect of the right to equality, section 1 of the Constitution lists South Africa's founding values, noting that the nation is one sovereign, democratic state founded on:

- a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b. Non-racialism and non-sexism.
- c. The supremacy of the constitution and the rule of law.
- d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The achievement of equality is thus a fundamental objective behind South Africa's democratic dispensation and its significant place in the Constitution needs to be met by a similar prioritisation in policy and discourse. The right to equality is further entrenched by section 9 of the Constitution which provides that:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The national legislation envisaged in section 9(4) of the Constitution was promulgated in the form of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).¹

PEPUDA seeks to promote the achievement of equality and to prevent unfair discrimination and in that regard endeavours to facilitate the transition to a democratic society united in its diversity and guided by the

¹ Act No. 2 of 2000.

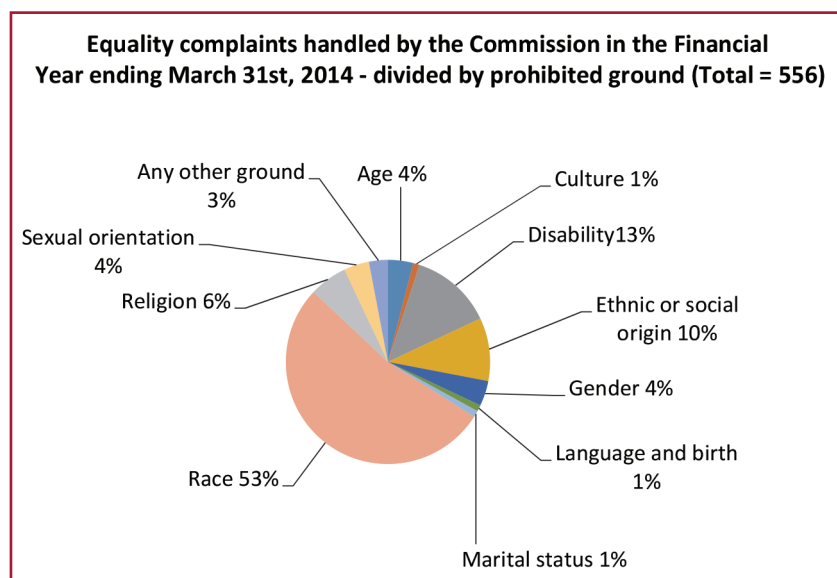
principles of equality, fairness, equity, social progress, justice, human dignity and freedom.² PEPUDA explicitly delineates the prohibited grounds for unfair discrimination. The list of prohibited grounds for discrimination in PEPUDA mirrors those found in section 9 (3) the Constitution, though PEPUDA expands the prohibited grounds of discrimination to include:

- b) Any other ground where discrimination based on that other ground:
 - i. Causes or perpetuates systemic disadvantage
 - ii. Undermines human dignity; or
 - iii. Adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground [listed in the section 1].³

South Africa is also a signatory or has ratified several international instruments that are designed to promote equality and prohibit unfair discrimination. Among these are:

- i. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);⁴
- ii. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and⁵
- iii. The International Convention on the Protection and Promotion of the Dignity and the Rights of Persons with Disabilities (CRPD).⁶

Following the passing of the first president of a democratic South Africa, Nelson Mandela, on 5 December 2013, the Round Table on Equality was conceived as an opportunity for reflection about progress made, and how far South Africa still needs to go to realise the transformation objective of substantive equality. The significance of the event was further underlined by the fact that the year 2014 marked 14 years since the enactment of PEPUDA. The event was hosted on the 27th of March 2014, during Human Rights Month. In addition, the Soweto Hotel in Kliptown was marked for its proximity to Kliptown Square; the site of the signing of the Freedom Charter. Numerous stakeholders from government, civil society and the academic community were invited to participate in the Round Table on Equality and to offer insights into the underlying manifestations of inequality which continue to plague South Africa. The Round Table on Equality thus reflected on the 20th anniversary of South Africa's democratic transition and sought to examine progress in advancing the right to equality. Notwithstanding numerous achievements in other areas, violations of the right to equality remain commonplace despite South Africa's democratic dispensation, as demonstrated by the number of complaints received by the Commission alleging violations of this right (see figure below).



² See Preamble to PEPUDA.

³ See the definition of "prohibited grounds" in section 1 of PEPUDA.

⁴ (1965)660 UNTS 195.

⁵ (1979) UN Doc A/34/46.

⁶ (2006) UN Doc A/61/49.

5. Background

In order to seek clarity on the persistent challenges to the advancement of the right to equality in South Africa, and in accordance with its mandate relating to the promotion of human rights as well as to conduct education in this regard, the Commission conceived of the Round Table as a suitable platform through which open debate and constructive dialogue could be promoted by means of engagement with multiple stakeholders.

The objectives of the Round Table entailed open and honest debate on various thematic areas on equality by experts and practitioners on equality on the opportunities and challenges of translating the normative values into reality. In that regard, the participants made key recommendations directed at the Commission, the government and other stakeholders and the recommendations are encapsulated in this report on the Round Table on Equality (the Report).

The Report captures the central aspects of the various presentations made at the event and presents these thematically, engaging with key debates on the subject of the realisation of the right to equality. In addition to the incorporation of key insights from presentations and discussions, the report includes recommendations on the way forward for the SAHRC, organs of State and other relevant stakeholders.

The Report is structured as follows. It starts by providing an overview of the promotion and protective mandate of the SAHRC in respect of the right to equality and its relation to other Chapter 9 Institutions since the inception of the Commission, including the conduction of investigations, hearings and the role of Section 11 Committees. This is followed by a summary of some of the major cases that the Commission has addressed, either through litigation or alternative dispute resolution mechanisms. The interface between the Commission and other Chapter 9 Institutions supporting democracy such as the CRL Rights Commission and the CGE as well as the need to develop effective inter-commission governance relations and increase coordination at operational levels was also probed. The Report explores specific equality related themes such as the protection of the right to equality under the current legislative framework such as PEPUDA. This is followed by an examination of the suitability and effectiveness of the special mechanisms established by PEPUDA to promote equality and prevent unfair discrimination such as ECs and the ERC as well as procedures followed in dealing with equality and discrimination cases in the ECs. Other themes addressed include sexual orientation and equality; migration and the rights of non-nationals followed by an analysis of the National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerances. South Africa's international and regional human rights obligations relating to the promotion of equality and the prohibition of unfair discrimination are explored, followed by an analysis of the application of PEPUDA in the private sector. While the Round Table engaged a number of issues, these should not be accepted to be exhaustive parameters for further engagement regarding progress. The key findings from the Round Table Dialogue, the key recommendations and the conclusion are to be seen in the context of the areas specifically explored during the Round Table discussions.

6. Key issues emerging from the Round Table Dialogue on Equality

6.1 An overview of the promotion and protective mandate of the SAHRC in respect of the right to equality and its relation to other Chapter 9 Institutions since its inception

In seeking to advance the right to equality in pursuance of its constitutional and legislative mandate, the Commission uses all of its powers and functions in the pursuit of a more just and equitable society. It does this through its regular activities including handling complaints alleging discrimination, publishing the Annual Equality Report⁷ and monitoring the use of Equality Courts (ECs) throughout the country.

⁷ Section 28 (2) of PEPUDA requires the Commission, annually, to issue a report 'on the extent to which unfair discrimination on the basis of race, gender and disability persists in the Republic, the effects thereof and recommendations on how best to address the problems'.

Following is a brief exposition of the Commission's work in advancing the right to equality since inception, as alluded to by Adv Mushwana and Mr. Ahmed during the Round Table Dialogue.

6.1.1. Complaints to the Commission

Since the Commission's inception in 1995, equality matters have been a significant theme in terms of the complaints received. One of the first complaints received by the Commission was the *Elias Mohlaping* case, in relation to discrimination on the basis of disability. The Commission handled several other cases in 1995 premised on allegations of unfair discrimination, such as the case of *Karen George* who was supported by the Commission when she successfully sued the Department of Education for discrimination on the basis of sex and marital status. In addition, the Commission handled the matter of the *Groblerdsdal School*, where it intervened after a child was expelled on the basis of his race, ultimately securing his readmission. These cases demonstrate the significance of the Commission's role in promoting human rights. They further illustrate that consistent vigilance and provision of redress are necessary to ensure that victims of violations of the right to equality are able to access justice.

Complaints of violations of the right to equality have been received in every year since the Commission was established. The Commission has never shied away from carrying out its mandate, often seeking redress through the courts where necessary. In 1996, for example, the Commission joined the National Coalition for Gay and Lesbian Equality in an application to declare the criminalising of consensual same sex conduct unconstitutional. This case emerged after numerous complaints were received that year. It is however worth noting that 12 years later, the Commission again received over 300 complaints of hate speech on the basis of discrimination related to sexual orientation when John Qwelane published his column '*Call me names, but gay is not okay*' in the *Sunday Sun*. The Commission again approached the courts to ensure that this matter was addressed in keeping with the provisions of the Constitution and PEPUDA. Litigation in this matter is in progress and the Commission is of the view that the determination of this matter through the courts will contribute significantly to the interpretation of provisions in PEPUDA. It must, however, be noted that that for a holistic approach to promote equality and eradicate unfair discrimination, litigation should not be seen as the only appropriate strategy. A holistic approach requires multifaceted strategies to support collective efforts to eradicate unfair discrimination. For this reason, the Commission has undertaken to revitalise its public education, public policy and advocacy initiatives to promote equality and eradicate racism, sexism and homophobia as well as ensuring meaningful engagement and constant dialogue.

The number of complaints received by the Commission has increased dramatically in the years since its inception. Equality complaints are no exception, with over 450 complaints on the basis of unfair discrimination registered by the Commission in the year ending March 2013. A staggering 45% of these were complaints of unfair discrimination on the basis of race, and 11% were related to disability status. While litigation as a strategy to secure enforcement and deterrence is ongoing both in the equality and high courts, the rate of complaints indicate that levels of conscious awareness of the right and challenges in securing respect for the rights remain in spite of significant work done by the SAHRC and other stakeholders to ensure that South Africa becomes a more equal society.

6.1.2. Investigations, hearings and Section 11 Committees

Some of the most widely publicised issues in South Africa's political and social landscape are categorised by violations of the right to equality. In 2008, four white students at the University of the Free State were videotaped abusing black workers on their campus in what came to be known as the *Reitz* incident. In the wake of this incident which garnered national and international attention, the Commission took several steps that demonstrated its ability to act through the use of its investigative mandate and, importantly, its commitment to using alternative dispute resolution mechanisms, most notably that of reconciliation. Amidst calls for retribution and even threats of violence, the Commission facilitated a reconciliation ceremony at the University, where the students and workers came together to amicably resolve the matter. In addition, the

Commission assisted the University in the establishment of a human rights desk, housed at the University's Institute for Justice and Reconciliation.

Further afield, in 2012, Thabang Makgoang, a student at North West University died during an initiation ceremony and the Commission was asked by the Department of Higher Education and Training (DHET) to examine whether this was racially motivated. This prompted a national investigative hearing, the findings of which will be published in the coming months. This illustrates, firstly, that the Commission remains actively engaged in efforts to investigate violations of the right to equality and offer redress when they occur. Secondly, however, it is indicative of the pervasiveness of the challenges South Africa faces in promoting this right.

In 2008, South Africa witnessed deadly acts of xenophobic violence committed against non-nationals. Predictably, these incidents received widespread attention throughout the world. The Commission conducted advocacy and outreach campaigns to sensitise South Africans about the rights of non-nationals and held open hearings on xenophobia and the need for tolerance. The Commission remains actively involved in the development of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances (NAP), a plan which is much needed and which is intended to fulfill the commitments South Africa has made in relation to the Durban Declaration and Programme of Action, adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerances in 2001 (WCAR).

These commitments notwithstanding, almost daily incidences of violence continue to occur against non-nationals, demonstrated by cases such as the murder of a young Somali boy in 2013 which was examined by the Commission's roundtable on non-nationals in the Eastern Cape. The Commission invites further input and engagement on these matters to translate normative commitments into practice. Methods of doing so include hearings; investigations; and engagements with civil society, known as Section 11 committees and deriving their name from the South African Human Rights Commission Act.⁸

Notwithstanding the work of the SAHRC, obstacles to social cohesion, rooted in fears and prejudices, continue to plague South African society, manifested in the daily experiences of people like Samson Silinda, who, despite receiving redress with the assistance of the Commission after his employer and a customer committed an act of hate speech against him, was eventually dismissed from his job. Likewise, it is manifested in the brutal murder and rape of 26 year-old Duduzile Zozo who, despite having all of the legal rights to cohabit with a partner of her choice, was killed because of her sexual orientation. The Round Table, therefore, invited speakers to consider how the Commission might redouble its own efforts in advancing the right to equality while also alluding to the need for broader social change.

6.2 The interface between the SAHRC, CGE and CRL Rights Commission with regard to equality and non-discrimination

Section 184 of the Constitution defines the promotional, protective, investigative, monitoring, research, educational and redress securing functions of the Commission. However, these functions need to be premised on the shared constitutional prescripts for all the Chapter 9 Institutions under section 181 of the Constitution, starting with their "independence" and the obligation to be "impartial" and to operate "without fear, favour or prejudice". Section 181 further obliges other organs of State not to interfere with the functioning of these institutions, and to give them adequate support that enhances their effectiveness. Clearly, this includes financial and other resources requirements.

Since the SAHRC and other Chapter 9 Institutions are performing constitutional obligations, they are obliged by the Constitution to perform their functions "diligently and without delay".⁹ The above constitutional imperatives are to be read and given meaning in the context of the constitutionally required legislation for each of the Chapter 9 Institutions. As the State has human rights obligations under regional and international

⁸ Act No. 40 of 2013.

⁹ Section 237 of the Constitution.

law, including periodic treaty reporting obligations, in line with the Constitution¹⁰ and binding commitments in specific treaties, it is expected that the SAHRC and other Chapter 9 Institutions whose mandate is the promotion and protection of human rights also comply with international and regional normative standards and best practices.

Monitoring by constitutional human rights institutions (South African as well as international) of how South Africa meets its regional and international human rights imperatives with regard to treaty obligations are critical in informing progress toward attainment of equality. National government departments have responsibilities with regard to monitoring, reporting and implementation of regional and international imperatives, and where appropriate, must make themselves open to consultation and specialised professional guidance and support from relevant Chapter 9 Institutions.

The SAHRC has an overarching mandate derived from the Bill of Rights as well as regional and international treaty obligations. The CGE's mandate focuses on gender equality, which is also broad and cross-cutting. A general tendency for institutions dealing with issues of gender is to place greater emphasis on the promotion and protection of equality for women and the girls. This is not surprising given the prevalence of patriarchy in society and its marginalisation of females. Given this reality, how do the CGE and the SAHRC interface in dealing not only with the right to equality and prevention of unfair discrimination but also with all the other rights and freedoms in the Bill of Rights in respect of women and girls? Rights of women and girls are not confined to section 9 of the Constitution. As generally marginalised groups, the rights of women and girls require additional attention to ensure that they are able to enjoy all their other rights and freedoms equally, and without discrimination. In order to ensure this, the CGE and the SAHRC must develop and strengthen effective inter-Commission relations, and increase coordination at operational levels.

The same challenges arise in the relations between the SAHRC and the CRL Rights Commission, and between the latter and the CGE. Cultural, religious and linguistic communities are integral parts of society and are intrinsic elements of the right to equality in South Africa. For the full realization of the rights and obligations in respect of language, culture, tradition and practice, flowing from the Bill of Rights, as well as other regional and international laws that bind the Republic of South Africa, the strength of relationships and interrelated work must more closely be scrutinised and addressed.

6.3. The right to equality and the current legislative framework

Significantly, while the Constitution concretises equality as one of its principal founding values, the right is also embedded in so many provisions of the Constitution. For example:

1. Section 25 (5) requires the State to ensure that citizens "gain access to land on equitable basis";
2. In criminal justice proceedings, the State has the obligation to provide an accused person who is not able to hire the services of a legal practitioner with a legal representative to prevent substantial injustice from occurring – this is to enhance equality of arms between the prosecuting authority and the accused person;¹¹
3. It is also a constitutional imperative that in the appointment of judicial officers, racial and gender equality should be a factor for consideration¹²

Furthermore, all organs of State and the three spheres of government (national, provincial and local) have constitutional obligations to ensure that, in procuring goods and services, those who were previously excluded because of unfair discrimination should be given preferential treatment.¹³ This is demonstrative of the fact that the right to equality can and should be thought of as an over-arching right to be incorporated into all aspects of law and policy.

¹⁰ Sections 231, 232 and 233 of the Constitution.

¹¹ In terms of Section 35 of the Constitution.

¹² Section 174 (2) of the Constitution.

¹³ Section 217 of the Constitution.

The year 2014 marks 14 years since the enactment of PEPUDA. PEPUDA has a peremptory constitutional mandate and thus it enjoys mandatory constitutional hierarchy above other pieces of legislation¹⁴ Despite the priority the Constitution gives to the legal framework promoting the achievement of equality and the combating of unfair discrimination, there have been considerable delays in the promulgation of promotional aspects of PEPUDA.

Chapters 5 and 6 of PEPUDA that provide for the State and private persons to promote equality and non-discrimination through awareness creation, development of action plans, codes of conduct, assistance and training and information campaigns, have not been declared for commencement by the Executive as required by the law making process. As a result, required regulations have not been put in place. This includes the laudable provisions in PEPUDA for special measures to promote equality with regard to race, gender and disability.¹⁵ These delays were noted as a significant impediment to the realisation of the right to equality in South Africa. A potential explanation for the failure to meet constitutional obligations may be related to uncertainty as to whether government has the professional capacity and resources to fully meet its obligations to promote and monitor the implementation of the required legislation. A participant at the Round Table noted that government had recently commissioned a study to examine how PEPUDA could be amended and the promotion regulations narrowed in scope.¹⁶ The fact that this was done without prior consultation with the Equality Review Committee (the ERC) or Chapter 9 Institutions is concerning. The inactivity in respect of the promulgation of the promotional mandates contained in PEPUDA should be rectified if the full potential of Chapter 9 institutions in respect of the promotion of equality is to be harnessed. This includes the broad mandate of the SAHRC in respect of the protection and promotion of the right to equality.

6.4 An examination of the suitability and effectiveness of the special mechanisms established by PEPUDA: Equality Courts and the Equality Review Committee

The importance of PEPUDA in expanding the list of the prohibited grounds of non-discrimination and the pursuit of equality was emphasised at the Round Table. In particular, a participant cited the simplified procedures in ECs, and the broad scope of remedies introduced by PEPUDA as examples of the desire to see ECs promoting access to justice where violations of the right to equality had occurred. In 2009, the then Minister of Justice and Constitutional Development had established all magisterial districts as ECs, while the Justice College continues to train EC clerks. Noteworthy was an acknowledgement that the ECs at the magistracy levels are underutilised, and public education and awareness about them should be intensified.

Data for 2012/2013 shows there were only 310 matters brought to ECs throughout country. Out of these, 57 were dismissed, judgements were handed down in 6 cases, 66 were referred to other courts and alternative dispute resolution forums and 6 were settled out of court. Of all the complaints, the majority were brought by persons between the ages of 20 and 40, with 75% by Africans followed by 12.21% by coloured complainants. Hate speech complaints constituted 43%, and unfair discrimination 25% of the total number of complaints. The majority of the equality cases are dealt with in the lower courts but Gauteng, the Western Cape and KwaZulu-Natal (KZN) have had a significant number of cases at the high courts. A break-down by province in that period reflects that the Eastern Cape had 18 cases; Free State had 21 cases; Gauteng had 35 cases; KZN had 191 cases; Mpumalanga had 18 cases; North West had 10 cases; and the Western Cape had 17 cases. Surprisingly, in 2012/2013 there were no equality cases filed in Limpopo and Northern Cape. It was further pointed out that specialised training for presiding officers at ECs has been carried out for a long time, but that there is need for continuing education in addition to the training of new officers.

¹⁴ SBO Gutto, 2001: Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making (New Africa Books, Cape Town) pages 11-16 and 198-199; see also SBO Gutto's contribution in C Albertyn, B Goldblatt and C Roederer (eds.) Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000 (Wits University Press, 2001), Chapter 1 "Introduction", chapter 6 "Prohibited grounds II" and chapter 8 "Illustrative list of Unfair Practices in Certain Sectors".

¹⁵ Section 28 of PEPUDA. See also Gutto: Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making, chapter 7.

¹⁶ A Kok & L Xaso (circa 2013-2014): Final Report: Proposed amendments and proposed regulations relating to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Foundation for Human Rights, Johannesburg).

Numerous speakers at the Round Table dialogue pointed out the importance of continuing education for judicial officers that serve in the ECs, and aspiring judicial officers under the auspices of the South African Judicial Education Institute lead by the Chief Justice, but in collaboration with the legal practitioners' professional bodies and legal scholars. Laws and social contexts are, and must be, embedded in the curriculum. Section 180 of the Constitution provides for such ongoing training and also for court processes that are flexible and provide for participation by the litigants and their immediate communities. This is to prevent mere formalism in the justice system. However, simply training presiding officers without updating them and sustaining continuous professional development is not sufficient. In addition, training of presiding officers without training clerks and other front-line service providers risk alienating people who approach ECs seeking redress.

The Round Table explored the procedures followed in dealing with equality and discrimination cases in the ECs – processes that are accommodative, flexible, aided and depart from the formalistic traditional court rules and procedures. Amongst others, a participant pointed to the difference between the “passive” and “active” roles of the courts as critical to the paradigm of justice. The EC presiding officers are not meant to be so-called mere “neutral umpires”, as is the case in traditional adversarial civil and criminal justice system that is dominant in South Africa.

A particular emphasis on the nature and effectiveness of EC orders and remedies also served to highlight the challenges and opportunities for advancing substantive rather than merely formal equality. Orders and remedies are at the core of whether substantive justice or formal justice prevails in equality and non-discrimination challenges. The issue of remedies emerged as a major area requiring effective training for presiding officers for effective remedies to be provided in response to equality violations. PEPUDA seeks more preventive and reparative, than retributive justice. This paradigmatic shift is one of the challenges facing judicial officers who operate at all spheres of law, and not only at ECs. Managing this aspect is critical in the training stages, and in the monitoring of the impact and effectiveness of the role of the judiciary in advancing equality and non-discrimination in society.

Participants expressed concern at the lack of continuing legal education for presiding officers in the ECs and the deteriorating state of operation of the ERC. In addition to the ECs, the ERC was conceived as an important statutory body for monitoring the implementation of PEPUDA, and the practical impact of all legislation directed at achieving substantive equality in society and preventing unfair discrimination in South Africa. Technically, the ERC is an advisory organ to the relevant Department responsible for the administration of justice.¹⁷

In essence, the ERC is supposed to be a barometer on issues of equality, not only for the DOJCS, but also for Chapter 9 Institutions and other statutory bodies that are charged with the responsibility of enforcement or monitoring equality issues and the prevention of unfair discrimination in the country. To this end, the ERC should be expected to take a primary role in assessing or monitoring the implementation of a number of pieces of legislation, not only PEPUDA¹⁸ Without prejudice to the dedicated specific statutory bodies, this includes monitoring of the Employment Equity Act (EEA);¹⁹ the Preferential Procurement Policy Framework Act (PPPFA);²⁰ the Broad Based Black Economic Empowerment (BBBEE) Act;²¹ and the Protection from Harassment Act.²² The ERC must also provide oversight on the implementation and impact of Women Empowerment and Gender Equality legislation once enacted.²³

17 Sections 32 and 33 of PEPUDA.

18 See section 33(1)(b) of PEPUDA.

19 Act No. 55 of 1998.

20 Act No. 5 of 2000.

21 Act No.46 of 2013.

22 Act No. 17 of 2011.

23 The 2013 Bill that was passed in the National Assembly has been considered to be one that needs to be tagged under procedures of section 76, and not section 75 of the Constitution, by the Joint Tagging Mechanism of Parliament and the State Law Advisers. The consultative processes have delayed the enactment of the legislation.

Unfortunately, the ERC is beset with problems impacting on its functionality. It was conceived and set up to advise the Minister responsible for the administration of justice about the operation of PEPUDA and other laws that impact on equality and the prevention of discrimination as enjoined under section 33 of PEPUDA. As such its mandate extends beyond PEPUDA and requires multifaceted knowledge competency, not only of its members, but also of its administrative/support staff.

In practice, over 14 years since the enactment of PEPUDA, the DOJCS has not established a dedicated and adequately resourced unit to provide administration/support to the ERC as required by PEPUDA.²⁴ Equally problematic is the appointment of serving judges as members of the ERC. Court schedules make it difficult for judicial officers to dedicate sufficient time to serve on the ERC, let alone to attend its meetings.

Similar problems were identified at the level of members of Parliament. The members representing Parliament in the ERC change frequently, impacting significantly on the efficacy of the ERC. This challenge in respect of the operations of the ERC was identified as a primary cause for the delays to the progressive achievement of equality in the country. In addition, the composition of the ERC, its structure and location of its administration/support services were identified for urgent attention.

6.5 Sexual orientation and equality

Sexual orientation is among the listed grounds that may constitute unfair discrimination prohibited in section 9 (3) of the Constitution. The ground was broadened through the Judicial Matters Amendment Act, No. 22 of 2005 which expressly included intersex persons within the definition of sex. Notwithstanding these advancements, systemic challenges to the realisation of the right to equality of sexual minorities remain.

These include:

1. Systemic unfair discrimination against people whose sexual orientation is not specifically or expressly recognised and represented in many local languages;
2. Persistent criminal hate speech and acts against African gays, lesbians, bisexuals, transgender and intersex persons; and
3. Poor levels of awareness even at the level of the judiciary. A case in point occurred through the court in Limpopo Province sentencing two gay men to ten years in prison for sodomy, demonstrating levels of awareness of the rights of minorities in the judiciary.

Some achievements were also noted by a participant at the Round Table, including:

1. The positive extension of the right to donor insemination to gay couples and the right of asylum for persons persecuted on the basis of their sexual orientation; and
2. Acknowledgement of child adoption rights for gay or lesbian couples.

Many of the advances in respect of the right to equality and non-discrimination were made through court decisions. One participant pointed out to the apparent misconception in society that Lesbian, Gay Bisexuals, Transgender and Intersex (LGBTI) persons are located only in major cities like Cape Town, Durban and Johannesburg. The reality is that sexual minorities are present in every society. The nuances and complexities experienced by sexually minorities need to be more closely examined and understood as a matter of some urgency to begin to realistically address unfair discrimination experienced and perceived as part of the lived reality for such persons.

The promotion of equality and prevention of unfair discrimination by the SAHRC and the CGE should be holistic in order to meet the guarantees afforded in the Constitution. Numerous bodies which used to be flourishing forums for the promotion of the rights of sexual minorities have since become defunct.

²⁴ Section 33 (5) of PEPUDA.

An attendee pointed out that in the KZN Province for example, a Human Rights Forum and Democracy Assemblies that brought together government departments, civil society organisations and Chapter 9 Institutions contributed strongly to progress in respect of awareness and protection, but such structures and organisations are no longer as vibrant.

Similarly, it is important that society evolves as discourse changes, especially on gender issues. Society still uses old categories in various registers such as “F” for female and “M” for male but does not accommodate those who are transgender. Diversities in sexual orientation should lead to developing appropriate tools of social engagement and a societal level acceptance of sexual diversity. Advocacy and education on the part of the SAHRC, the CGE and civil society can significantly strengthen the acknowledgement and acceptance of sexual diversity in South Africa.

Notwithstanding the significant challenges alluded to in respect of the full realisation of the right to equality for LGBTI people in South Africa, there have been some positive initiatives between 2005 and 2014. Organisations such as the South African National Civic Organisation and local Victim Empowerment Forums are active in advocating for the rights of LGBTIs. The National Hate Crime Campaign is also gaining some ground, while hate crimes legislation needs to be urgently enacted. Accordingly, a participant at the Round Table argued that the prevalence of violence and discrimination against sexual minorities is an indication that there remain considerable challenges which will require sustained commitment, including the enactment of this legislation and the promotion of LGBTI rights through advocacy and education initiatives.

6.6 Migration, equality and the rights of non-nationals

It is well-documented that migrants contributed significantly to the building of South Africa’s economy, especially in the mining and agricultural sectors during the colonial and apartheid eras. Many of these immigrants lived and worked in South Africa for generations. A participant at the Round Table pointed out that misinformation leads to anti-migrant sentiment in South Africa. She further suggested that the gendered discourse that points to migrants as “taking South African women” is improper and not shared by South African women.

Protecting and promoting the rights and freedoms of all categories of immigrants is an important feature of the promotion of the right to equality. There is an urgent need for public education to help people understand the myriad obligations the State has towards permanent residents, asylum seekers, refugees, expatriates employed in different professions and levels in the country, tourists, and other immigrants (documented and undocumented). Although the prohibited grounds for unfair discrimination in section 9 of the Constitution do not include a person’s “nationality”, the Bill of Rights in the Constitution has only a few provisions that expressly preserve rights and freedoms to citizens of the Republic.

These are:

1. Political rights (section 19);
2. The right to enter, to remain in and to reside anywhere in the Republic, and the right to a passport (section 21);
3. The right to a profession, occupation and trade (section 22); and
4. The duty on the state to foster conditions which enable citizens to gain access to land on an equitable basis (section 25 (5)).

Arguably, all other rights and freedoms in the Bill of Rights, including life, dignity, equality, culture, religion, language, association, assembly, security of the person, housing, shelter for children, social security, education, and health ought to be enjoyed equally by nationals/citizens and non-nationals who are in the country.

The issue of “nationality” was introduced in the directive principles in section 34 of PEPUDA to ensure that non-nationality should not be a ground for denial of equality in line with the Constitution as well South Africa’s regional and international treaty obligations. Regrettably, the ERC has not yet made a pronouncement on the inclusion of this ground in the list of prohibited bases for unfair discrimination.

Successful prosecution and punishment of the perpetrators would deter the phenomenon of acts of criminal violence against non-nationals across South Africa. This requires substantial engagement on the part of the Department of Police, along with the DOJCS to interrogate the root causes of violence against non-nationals and the administration of justice when the rights of these individuals are violated. In addition, efforts on the part of the Department of Home Affairs (DHA) and the Department of Labour (DOL) to engage with organised labour to combat the narrative of “they are taking our jobs” which is needed at a broad structural level.

6.7 The National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerances

One of the presentations delivered at the Round Table focused on updating participants on the processes that South Africa has adopted in the past, where the country is at present, and what is envisaged for the future in policies and actions to combat racism, racial discrimination, xenophobia and related intolerance. It was pointed out that “racism, racial discrimination, xenophobia and related intolerance” was the theme of the United Nations (UN) WCAR held in Durban from 31 August to 8 September 2001. The outcomes of the WCAR were the Declaration of the World Conference (Durban Declaration) and the Programme of Action of the World Conference (Durban Programme of Action). It was pointed out that the Round Table Dialogue on Equality needed to be appreciated as a concrete expression of what the Durban Declaration prescribed for the UN member states at the national level.²⁵

In order to implement South Africa’s commitment to the Durban Declaration and the Durban Programme of Action, the NAP is being developed through involvement and participation of relevant government departments, Chapter 9 Institutions and civil society organisations. The DOJCS was, and remains, the focal point for the NAP for purposes to combating racism, racial discrimination, xenophobia and related intolerance, though the Commission remains involved through participation in a national consultative forum with other Chapter 9 Institutions, civil society and the academic community.

The NAP has however not been finalised since the process was first engaged on in 2001. Delays in the finalisation of the NAP are regrettable, particularly in light of South Africa’s history, its role as the host to WCAR and its obligations in respect of the Durban Declaration. It is therefore essential that the NAP is fully consulted on, reaches finalisation as soon as possible and that effective and comprehensive awareness-raising, as well as, monitoring and evaluation, are incorporated as integral components of a finalised plan.

6.8 International and regional obligations

A speaker at the Round Table suggested that the apartheid regime gave a “cold shoulder” to international human rights because its policies, laws and practices were in violation of human rights, especially those promoting equality and combating discrimination. Since 1994, South Africa has returned to the fold as a respected member of the international community. Notwithstanding the firm commitment to human rights since then, there are challenges that still require attention.

The need to find the right balance between “national interests” and the constitutional imperatives and regional and international obligations was stressed. This issue has been highlighted in cases of denial of sexual orientation equality rights in countries like Nigeria and Uganda. It was argued that the Department of International Relations and Cooperation (DIRCO) has not been at the forefront of engaging countries that deny or violate the equality rights of LGBTI individuals and that such a stance arguably contributes to a less tolerant climate on the continent.

²⁵ Durban Declaration, paragraph 112.

It was further pointed out that being a member state of the African Union (AU) should not prevent South Africa from expressing concerns when other AU member states violate human rights that the Constitution protects. National interests should not be used as a shield while constitutional imperatives are being eroded. South Africa, through DIRCO, ought to urge the AU and its member States to change their attitudes on sensitive issues.

Another significant challenge relates to ratification of international human rights treaties. South Africa has ratified the ICERD and the ICCPR but has been reluctant to ratify the ICESCR. At the time of the Round Table on Equality, ratification of the ICESCR had not occurred. A speaker noted that this was perhaps because of the perceived implications and obligations that might arise out of ratification. This is despite the fact that South Africa participated in the drafting of the Optional Protocol to the ICESCR.²⁶

Significant delays in the State's meeting of its international reporting obligations were also alluded to as being a considerable challenge. South Africa tends to be formalistic in its approach to the periodic reports required by the international human rights treaties. An example is the ICERD, where a report submitted in 2004 was considered in 2006 by the relevant treaty committee but subsequent periodic reports had not been submitted. Furthermore, South Africa has yet to submit a report to the UN Human Rights Committee on the ICCPR. The ICCPR is very important for equality rights and freedoms. One participant, therefore, questioned whether the State's unresponsiveness to reporting reflected a lack of capacity to prepare the reports, or a lack of political will.

Another important impediment to the full realisation of all rights and freedoms in South Africa is the failure to domesticate international human treaties that South Africa has ratified. "Domestication" is a process in international treaty law in terms of which States that have ratified international treaties proceed to incorporate such treaties into their domestic laws. Domestication enhances enforcement of human rights treaties and it is an essential part of a State Party's obligations under a number of instruments. The State should therefore take note of its obligations to domesticate treaty instruments and to incorporate these instruments into national law.

The importance of ratification of international instruments is certainly notable. Nonetheless, international human rights treaties should not only be ratified and domesticated, but must effectively be implemented. Failure to implement treaty commitments means that such instruments remain laws in books but not in the daily lived experiences of South Africa's inhabitants. The real test, argued a speaker, is how such treaty commitments affect the daily lives of people in rural and urban areas and centres, the poor and all marginalised and vulnerable individuals.

6.9 The application of PEPUDA to the private sector

There is a central role for the private sector in the protection and promotion of the right to equality. As a participant noted on the occasion of the Round Table Dialogue, "where the law fails to regulate and prohibit forms of discrimination by private institutions, the promise of achieving equality contained in the South African Constitution will remain unfulfilled". The horizontal application of PEPUDA is therefore a significant component of the achievement of the constitutional promise of equality.

The peremptory nature of PEPUDA means that its application to the private sector supersedes provisions in other legislation which may be applicable, creating clear compliance for the sector with PEPUDA. The manner in which complaints of alleged violations of the right to equality in the private sector will resemble the analysis which a court might undertake if the complaint related to an organ of State. An analysis of the fairness or unfairness of discrimination would need to be undertaken in order for the court to establish whether a violation of PEPUDA has taken place. Notwithstanding the listed prohibited grounds, the inclusion of a prohibition of discrimination on the basis of "any other ground" that might extend disadvantage or

²⁶ It should be noted that South Africa has since ratified the ICESCR on the 12th of January, 2015.

undermine human dignity, coupled with case law such as *Hofmann v. South African Airways*²⁷ is illustrative of the fact that discrimination takes many forms and must be assessed according to a number of criteria. A number of factors should be considered, including the justifiability of the discrimination in order to achieve South Africa's transformation goals.

Other factors, as listed in section 14 (3) of PEPUDA include:

- (a) Whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact or likely impact of the discrimination on the complainant;
- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) accommodate diversity.

Overall, violations of the right to equality which take place within the private sector would need to be viewed in context and an analysis thereof would require a court or adjudicating body to pay due mind to the need for South Africa's transformational and diversity-promoting objectives to be met. A participant cited the *Harksen v Lane*²⁸, *Hoffmann v South African Airways*²⁹ and *MEC for Education: Kwazulu-Natal and Others v Pillay*³⁰ cases as examples that illustrated the Constitutional Court's willingness to enforce the right to equality and to develop jurisprudence on matters of unfair discrimination, even in relation to the private sector.

PEPUDA places a significant obligation on private entities as well as organs of State with regard to equality and non-discrimination. However, the "public" nature of the service or benefit derived from a private institution would determine how onerous such an obligation would be, suggesting that PEPUDA places varying degrees of responsibility on parties. Even so, the obligation to advance the right to equality and to respect the right to dignity of all persons cannot and should not be understated if the promise of South Africa's constitutional dispensation is to be realised. The private sector, therefore, must make a concerted effort to engage with the provisions of PEPUDA and seek avenues for realising its aspirations as a matter of responsibility rather than simply choice.

7. Findings and key recommendations

Judging by the number of complaints received by the Commission, as well as the varied perspectives of participants at the Round Table, unfair discrimination remains a significant obstacle to the full realisation of the right to equality. Its inter-relation to a number of basic rights and complexity in the South African narrative create new opportunities to explore strategies to overcome unfair discrimination. Numerous inter-related challenges and obstacles were outlined by participants, some of which pose complex and nuanced concerns. Others however addressed challenges which are known and where responses for the address of the problems have simply been too slow. Nonetheless, there was common consensus that positive action must be taken by both State and non-state actors to advance the realisation of the right to equality in South Africa.

²⁷ 2001 (1) SA 1 (CC).

²⁸ 1998 (1) SA 300 (CC).

²⁹ Note 33 above.

³⁰ 2008 (1) SA 474 (CC).

Given South Africa's history of discrimination, it is imperative that South Africa takes a global lead in preventing discrimination. The Commission, in particular, has a significant role to play in this regard and its activities demonstrate an abiding commitment to the advancement of substantive equality in South Africa. Nonetheless, delays in the implementation of the promotional mandates contained in PEPUDA and in the finalisation of the NAP demonstrate that the role of the Commission could be harnessed further if the institutional environment for such progress permits. In addition, there is an urgent need for Chapter 9 Institutions (including the SAHRC) to redouble efforts aimed at inculcating a culture of human rights and responsibilities in society. This will necessitate working together with organised civil society organisations, community based organisations, professional associations, business, educational institutions, the media and traditional leaders amongst others.

The success of the NAP requires the establishment of mechanisms for monitoring (assessing effectiveness) and evaluation (overall assessment of achievements). Evaluation should consider the NAP itself as well as its implementation. The Commission, other Chapter 9 Institutions, and civil society, must be involved in this evaluation. In particular, both the implementing unit or institution (DOJCS) and an independent structure (such as the SAHRC) will need to evaluate and compile reports on the performance of the plan after a year of its implementation. It is also important that the Steering Committee structure be maintained as a consultative structure during the implementation phase, and for it to assist in creating awareness and ensure engagement at grassroots level.

It should be noted that widening socio-economic inequalities and poverty in society also contribute significantly to discrimination. This impedes the realisation of social, economic and cultural equality rights and freedoms for the majority of individuals and is also manifested in race and gender characteristics. Similarly, the urban-rural divide – with conditions in the rural areas being markedly worse off than in the major urban centres, except for the small minority of wealthy business people located in these rural areas – also perpetuates inequalities that can lead to systemic discrimination and marginalisation of the most vulnerable. Given the interrelatedness and interdependence of rights, these inequalities and systemic forms of discrimination contribute to widespread violence during public service delivery protests. They also manifest in discriminatory attacks against non-nationals, as seen throughout South Africa in 2014 and 2015. It is therefore essential that any analysis of the right to equality also recognises the role of historical and political disadvantage and how this might contribute to the vulnerability of specific individuals to human rights violations.

Economic inequality goes hand in hand with other forms of inequality, and must, therefore, be addressed at a systemic level if discrimination itself is to be addressed. There is a need for special focus on the social conditions of miners, as well as the inequalities and social exclusion experienced by persons living on farms and in rural areas, and the challenges these people face in experiencing their rights to access to housing, education, health, water and sanitation.

Arguably, policies aimed at addressing racism and sexism are not being implemented robustly enough. They remain intrinsically connected to social, economic and cultural inequalities that were inherited from the colonial and apartheid era. Moreover, the exclusion of employment equity in the implementation of equality within the scope of PEPUDA requires revisiting. There is strong impetus for the linking of PEPUDA and the EEA more closely.³¹ The same applies to the BBBEE Act and the PPPFA. The different pieces of legislation that deal with inequality and affect people in multifaceted ways must be implemented comprehensively rather than in isolation. At the very least, there should be coordinated implementation strategies to ensure that their combined impact is monitored and measurable. As mentioned, the inactivity of the State in relation to the promulgation of Chapters 5 and 6 of PEPUDA can have a negative effect on the advancement of the right to equality. This requires urgent rectification, along with appropriate resourcing.

31 Act No. 55 of 1998.

Nationalistic approaches to the pursuit of eliminating inequalities that do not adequately combine the use of local legal frameworks, regional and international obligations tend to weaken the impact of the Constitution, the laws and policies dealing with discrimination. Consequently, the domestication of human rights is needed. There is also an urgent need for concerted public education and advocacy to help people understand the different obligations the state has towards non-nationals and to promote recognition that discrimination against these individuals is contrary to the spirit and purport of the Constitution.

In respect of access to remedies, it is clear that further strengthening of EC structures is needed. Intervention by the DOJCS through the employment of varied strategies would aid in the usage and the effectiveness of ECs. Key among these strategies is the training of presiding officers as well as continuing education initiatives. Similarly, poor awareness of these forums is ultimately a significant impediment to their usage and, by implication, to their utility. If access to justice for victims of violations of the right to equality is to be secured, urgent intervention is necessary.

The Round Table Dialogue also clearly established that PEPUDA applies to all private institutions. Contrary to popular belief, private institutions cannot escape from the ambit of PEPUDA by invoking other rights. As such, the private sector must be sensitive towards the existence of institutionalised racism, and be prepared to work with civil society, communities, professional associations, government departments and Chapter 9 Institutions to inculcate a culture of human rights and to eliminate violations of the right to equality that occur within the spaces that they occupy.

7.1 Recommendations on advancing the right to equality

Several recommendations emerged through the discussions which provide tangible action steps to expedite reform and accelerate the realisation of substantive equality. The recommendations are recorded below in summary.

- a. With regard to PEPUDA: The DOJCS must provide the SAHRC with time-bound plans for the activation of Chapters 5 and 6 of PEPUDA by the end of the 2015/16 financial year.
- b. With regard to discrimination: By the end of the 2015/16 financial year, the South African Local Government Association (SALGA) must provide feedback on plans to develop and implement legislative approaches along with advocacy and outreach strategies that can be implemented at local community level. Facilitated experiential learning for community members would also aid in addressing the challenges of inequality and discrimination. Attention must be focused on the need for all levels of government and society to have strong strategic corrective, deterrent and remedial measures in place against discrimination. In support of this, public awareness must also be increased through education, advocacy, research and other forms of social vigilance and activism.
- c. With regard to the NAP: The DOJCS must endeavour to adopt of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) by the end of the 2015/2016 financial year. NAP must be aligned to existing government priorities (such as the National Development Plan and Social Cohesion Strategy), while taking into account the involvement and consultation of all stakeholders. The role of Chapter 9 Institutions (especially the SAHRC) must be reinvigorated and public awareness of the NAP must be raised. Although the NAP should be open to continuous reviews and adjustment of the strategies and activities planned, it is suggested that the time frame for the implementation, monitoring and evaluation of the NAP be three (3) years.

- d. With regard to ERC and ECs: The DOJCS must re-assess the functionality of ECs, considering resource constraints. Further, the membership of serving judges and parliamentarians on the ERC must be reconsidered and recommendations must be made to the Minister of Justice and Correctional Services (formerly Justice and Constitutional Development) concerning procedures to be followed in appointing members of the ERC, as well as providing criteria for qualification as a community representative. Finally, the DOJCS must raise public awareness of the right to equality and of the ECs as forums where access to remedy may be facilitated.
- e. With regard to non-nationals: The DHA must provide the Commission with a time-bound plan for the timely and effective provision of documentation (such as refugee or asylum-seeker permits in terms of the Refugees Act, No. 130 of 1998) for non-nationals by end of the 2015/16 financial year. Furthermore, the Department must indicate how it will advocate for the rights of non-nationals through public education and awareness-raising activities.
- f. With regard to the private sector: Chambers of commerce must engage with constituents on the measures to address unfair discrimination in the private sector and provide feedback to the Commission on the agreed upon plans and structures by the end of the 2015/16 financial year. In particular, the private sector must ensure that it is able to meet its obligations in respect of the promotion of equality and the prevention of unfair discrimination. Both the EEA and PEPUDA strictly prohibit unfair discrimination, and while the sector has formally embraced the EEA, the objectives of PEPUDA appear not have been adopted to the same extent. The sector must work toward substantive compliance with both pieces of legislation beyond compliance for the purposes of limiting reputational risk. In addition the private sector must consider its potential power and influence, and the impact of its actions (or omissions) in perpetuating disadvantage and unfair discrimination.

8. Conclusion

The achievement of equality is a fundamental objective of South Africa's democratic dispensation and its significant place in the Constitution needs to be met by a similar prioritisation in policy and discourse. Overall, the Round Table Dialogue reflected broad representation, a diverse range of ideas, expertise and multi-disciplinary responses identifying challenges, best practise and areas for reform. Given the subject matter of the dialogue, discussions were robust and ideas were expressed and explored with vigour.

The SAHRC, as a national human rights institution, has recorded and taken heed of important recommendations emerging from the dialogue. These recommendations in many instances support ongoing work of the Commission in so far as advocating for reform, protection of rights and increasing rights literacy are concerned. Other recommendations however, particularly in respect of the private sector, bring new dimensions to focus area work in respect of business and human rights, creating important opportunities to deepen this work. The recommendations emanated from fruitful and sometimes animated presentations and discussions during the Round Table Dialogue. In recording this significant engagement, the Commission notes the need for more frequent, stimulating and ongoing engagements of this nature in all of the spaces in our country.

The Commission acknowledges and thanks all participants at the Round Table Dialogue on Equality and re-iterates its commitment to the realisation of a more equal South Africa.

democracy
discrimination

equality

human rights

discrimination democracy

challenges of racism



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