



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

**Report of the National Hearing on Racism and Social Media in
South Africa
15 – 16 February 2017**

August 2017

(For internal use only)

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EXECUTIVE SUMMARY

Racism, racial bias and racial discrimination expressed on social media platforms in South Africa is routine and pervasive. Although South Africa has implemented a number of measures post-Apartheid to combat and eradicate racism, the phenomenon of racial bias and unjustifiable discrimination is still prevalent, and social media platforms provides a fertile breeding ground through which it manifests, and is proliferated, allowing for real-time widespread harm and further entrenching hatred. In every-day life the legacy of race based hate and other prejudice find expression in a myriad of both nuanced and direct ways. In the domestic environment with undertones of racism ever-present, social media is not the exclusive mechanism through which hate, prejudice and racism is propounded. Social media platforms are however a powerful mechanism through which the right to freedom of expression, access to information, the search for truth, and robust public debate can be fostered. Tension does exist between the potential for social media platforms to promote democracy, and the risks which materialise when such platforms are used to publicise and propagate racist speech, thereby exacerbating social fissures in society and undermining democracy. The adverse impacts of such conduct to the basic rights of individuals, communities and society as a whole are immeasurable.

In fulfilment of its constitutional and legislative mandate, the South African Human Rights Commission (SAHRC or Commission) hosted a National Hearing on racism and social media on 15 and 16 February 2017. The SAHRC determined that despite South Africa's significant gains in advancing the ideals of a non-racist democracy premised on the rule of law, human dignity and the achievement of equality; persistent social divides often times perpetuated on social media necessitate further, constructive dialogue between the country's various constituent groups.

The objectives of the National Hearing and the Report are intended to:

- Provide a frame of reference in the context of rapid developments taking place in the information and communications sector, for the need to increase awareness of racism on social media and applicable legislation; the consequences where hate crimes are committed, and in respect of remedies to empower those affected by racial discrimination.
- Provide a platform for the sharing of information regarding issues which are emerging or have yet to emerge, and to encourage engagement about the evolution of internet rights; the roles and responsibilities of stakeholders such as private intermediaries and public bodies;

- Expand and enhance the SAHRC's own approach to issues of racism, racial discrimination and social cohesion, both in the context of investigating alleged violations of rights and; in terms of recommendations from the SAHRC for reforms intended to strengthen the protection of rights. In particular, in line with its monitoring mandate, the National Hearing would allow the SAHRC to understand more fully how government envisions implementing the National Action Plan (NAP). Moreover, and in light of the intended promulgation of legislation aimed to curtail hate crimes and hate speech, the Hearing presented an opportunity to enquire from implementing authorities, such as the National Prosecuting Authority (NPA) and the South African Police Service (SAPS), about measures in place to investigate complaints pertaining to racially motivated hate crimes or hate speech;
- Document inputs, learnings and experiences of a diverse range of stakeholders and expert panellists about hate crimes and, social media;
- Encourage, in the absence of formal controls, the need for the promotion of self-awareness and self-regulation for users of social media platforms;
- Initiate conversation, and discussion about social media and hate speech at all levels in society;
- Provide a reference for legislative reform, policy development and; both government and private sector responses to racism, as well as to promote informed debate within South African society and;
- Contribute to regional and international efforts in the search for meaningful standards, and reforms for the protection of basic rights

This Report therefore is not intended to serve as a determination arising from a conventional hearing undertaken by the Commission in response to specific violations received in the form of complaints. Accordingly the Report does not make findings that address specific allegations of rights violations. However, the Hearing instead seeks to expand understanding, and encourage navigation of a terrain that poses challenges to societies globally in the wake of a technological era which tests traditional social and legal paradigms. The Report therefore engages with submissions provided by diverse stakeholders to the Hearing Panel and documents recommendations designed to promote social cohesion and which aligns with the objectives of South Africa's NAP, the National Development Plan (NDP) and the Sustainable Development Goals (SDGs).

The following recommendations arose from engagements with the submissions to the Hearing:

1. The DOJCD should consider the potential remedies provided in the Harassment Act to complement those provided in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA), particularly in light of the limited resources available for conducting investigations arising from violations conducted through social media. The protection orders provided for in the Harassment Act may result in achieving both individual redress for harm suffered through online racist expression, while at the same time generating the requisite public censure required to change social behaviour and combat systemic discrimination.
2. The DOJCD should actively promote and strengthen the Equality Courts and provide the necessary resources required for their effective functioning.
3. The NPA, together with the SAPS, needs to strengthen data collection mechanisms to account for the number of individuals within South Africa exposed to human rights violations on the grounds listed in PEPUDA, including race, ethnicity, gender or religion.
4. The SAHRC must work with regulatory bodies, such as ICASA, DOJCD, the Information Regulator of South Africa, and private intermediaries such as Google to determine how best online hate speech may be combatted, what the roles and responsibilities of active parties in the process of information communication are, and how collective efforts may be brought to bear to assist in combating online hate speech and promoting the values of the NAP, whilst still remaining within the confines of its enabling legislation.
5. The SAHRC must work together with Internet service providers and social media platforms, and regional and international bodies, to advance an understanding of the importance of promoting freedom of expression, while limiting forms of expression that undermine human dignity recognised in human rights instruments subscribed to globally and in the South African Constitution.
6. Engagement between stakeholders such as the DOJCD and the Law Reform Commission, other regulatory bodies such as the Information Regulator and ICASA, civil society organisations, internet and social media providers and hosts; chapter 9 bodies and the public to establish roles, responsibilities and consequences where administrators and hosts fail to adequately regulate content which is hate speech in a reasonable and timely manner is strongly recommended.
7. The active and public promotion, together with monitoring of progressive achievement of the objectives of the NDP and NAP, particularly those objectives which relate to social cohesion promotion by Government departments, including the DOJCD, DAC, DBE and DHET, is strongly advocated. Such initiatives should endeavour to advance the awareness of the South African public on the political, economic, and social

dimensions of racism and the manner in which it inhibits the advancement of the country's democratic processes.

8. The DOJCD should actively promote efforts to implement the NAP as a matter of priority and; take further steps to ensure the review and operationalisation of Chapter 5 of PEPUDA.
9. Government departments should continue to support the important work undertaken by various civil-society organisations on issues pertaining to social cohesion and the advancement of substantive equality, including the SAHRC.

These recommendations are intended to strengthen the realisation of the goals envisioned in the South African Constitution. The recommendations recognise that as demands on our democracy and contemporary society change response to technology, so must the role of governmental entities and responsible duty bearers in fulfilling their constitutional mandates. The SAHRC recognises that developments require that combatting racism and racial discrimination must occur both inside and outside of traditional legal frameworks. Contemporary manifestations of racism and racial discrimination, exemplified by bias and hate speech on social media platforms, require rethinking the approach to individual accountability and the relationship between natural persons, private entities like social media platforms and public entities like the SAHRC. Moreover, it bears emphasis that social media constitutes a powerful mechanism that can be used to promote democracy through robust freedom of expression, or detract from our constitutional vision if used to disseminate racist expression. Lessons should accordingly be drawn from how such platforms have been used in the past. This Report hopefully will contribute to the building of a foundation for future endeavours in achieving the goal of a vibrant democracy free from divisive racial discrimination.

LIST OF ACRONYMS

ACHPR - African Commission on Human and People's Rights

CHP - Complaints Handling Procedures

CERD - Committee on the Elimination of Racial Discrimination

DAC - Department of Arts and Culture

DBE - Department of Basic Education

DHET - Department of Higher Education and Training

DOJCD - Department of Justice and Constitutional Development

FXI - Freedom of Expression Institute

HRC - Human Rights Committee

ICASA - Independent Communications Authority of South Africa

ICCPR - International Covenant on Civil and Political Rights

ICERD - International Convention on the Elimination of All Forms of Racial Discrimination

ICT - Information and Communication Technology

IJR - Institute for Justice and Reconciliation

LGBTQI - Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Intersex

NAP - National Action Plan to Combat Racism, Racial Discrimination, Xenophobia, and Related Intolerances

NDP - National Development Plan

NPA - National Prosecuting Authority

PEPUDA - Promotion of Equality and Prevention of Unfair Discrimination Act

SAHRC - South African Human Rights Commission

SAPS - South African Police Service

UDHR - Universal Declaration of Human Rights

UN - United Nations

UNESCO - United Nations Educational, Scientific and Cultural Organisation

CHAPTER 1: Introduction

1.1. Background

'...there are many bridges yet to be crossed in our journey from crude and legalised racism to a new order where social cohesion, equality and effortless observation of the right to dignity is a practical reality.' - Mogoeng CJ¹

In believing that South Africa is united in its diversity, the Constitution of the Republic of South Africa, 1996 (Constitution) establishes a framework to [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.² Crucially, through recognition of the rights to equality and dignity, the Constitution enables redress for past and persistent racial discrimination. However, frequent outbursts of race-related statements on social media platforms – and the public outrage and media-driven conversations that ensue – signify that race relations continue to be an area of significant contention in South Africa.

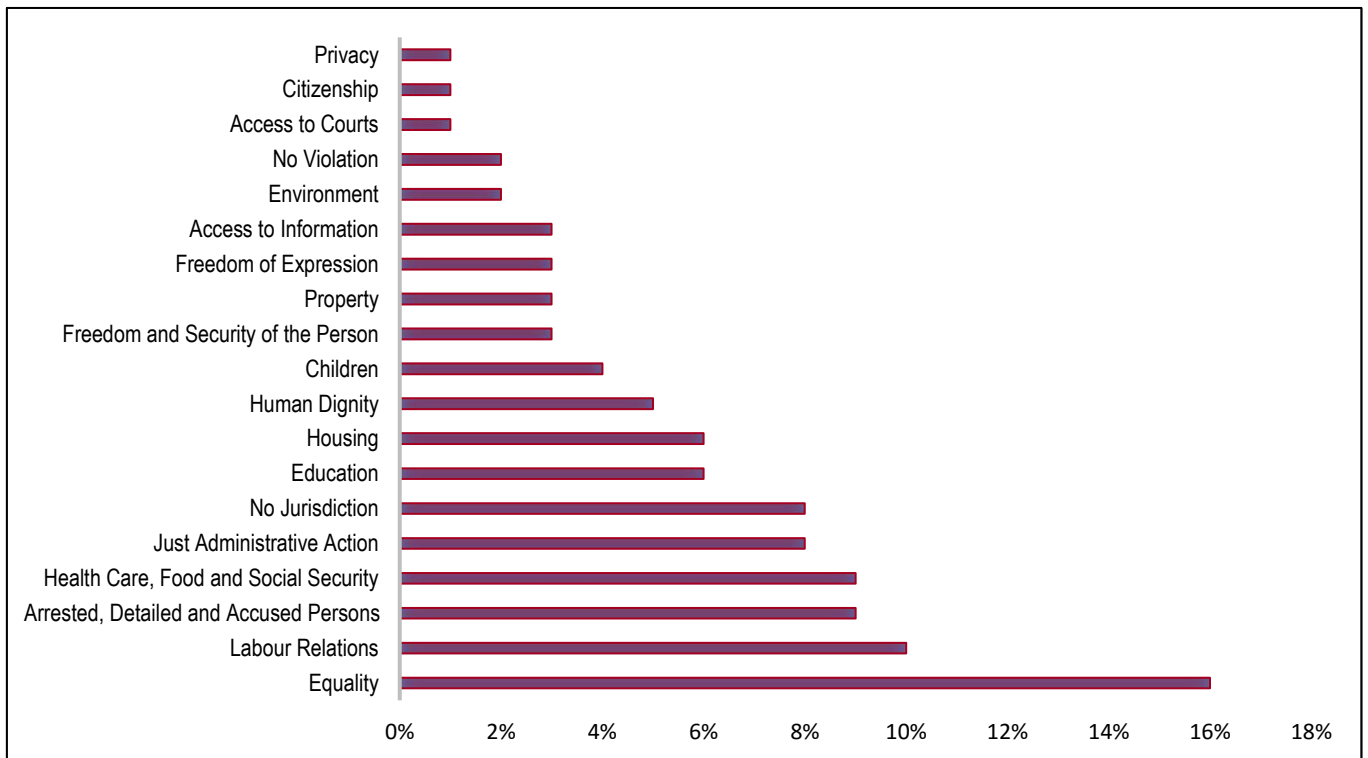
The controversial matters involving violations of basic rights such as equality and dignity in the matters of *Penny Sparrow*, *Justin van Vuuren*, *Chris Hart*, *Velaphi Khumalo*, and *Matthew Theunissen*, all emanated on the basis of their comments on social media platforms, and are indicative of evolving challenges in addressing racist attitudes and behaviour in South Africa. These complaints have since their determination attracted a great deal of media attention, and have been relied on by more than one body to argue their respective interpretations and positions involving the right to equality.

The complaints above are not unique, as they reflect the entrenched and often unspoken patterns of racism in the country. Complaints trends to the SAHRC are indicative in fact of the prevalence of race based hate and prejudice are high, with such complaints constituting 16 percent of the total complaints received by the Commission 2015/16 (see Figure 1 below). Furthermore, a closer examination of complaint trends reveals that the majority of labour-related complaints arise from allegations of racism in the workplace.

¹ *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*, CCT 19/16 at para 1.

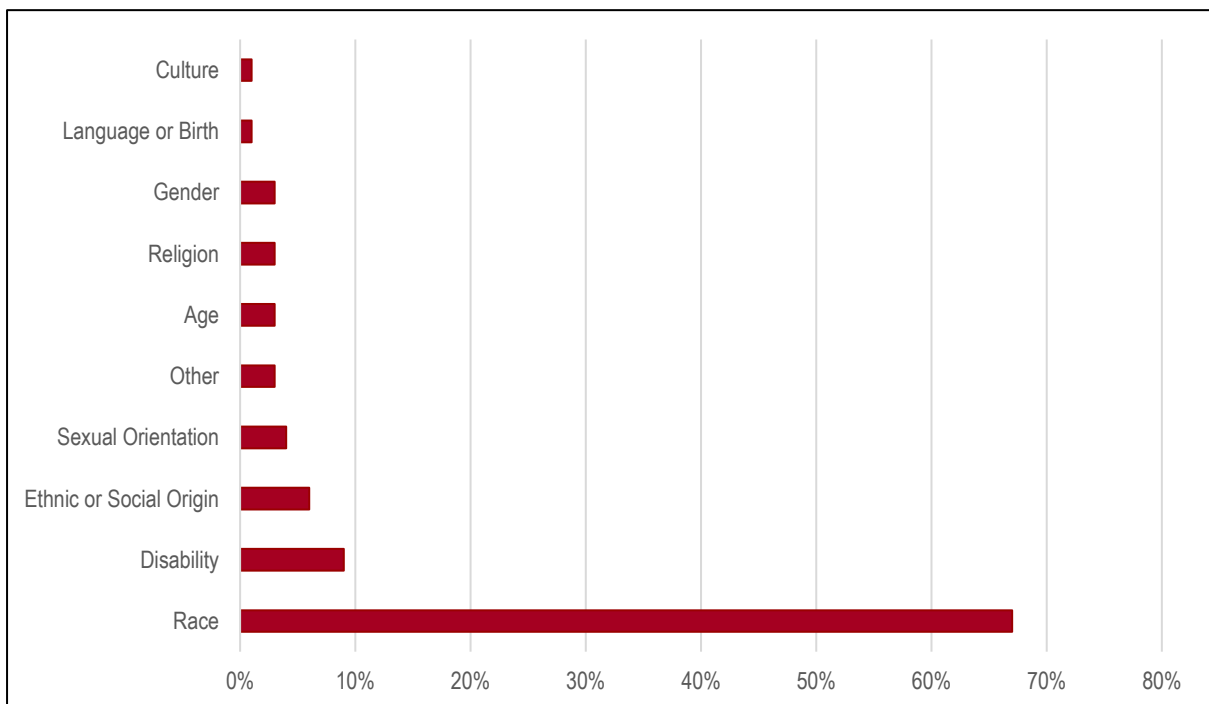
² The Constitution of the Republic of South Africa, 1996, *Preamble*.

Figure 1: Complaints Received by the SAHRC, 1 April 2015 – 31 March 2016



In 2015/16, 505 complaints, or two-thirds, of the total equality-related complaints the SAHRC received were classified as race-related discrimination (see Figure 2 below).

Figure 2: Equality-Related Complaints from the Public Received by the SAHRC 1 April 2015 – 31 March 2016.



The SAHRC's ultimate objective is to facilitate and entrench a culture of respect for human rights in a society characterised by substantive equality, dignity and non-discrimination. To this end, the SAHRC frequently represents complainants in the Equality Courts and has conducted investigative hearings into issues of transformation in higher education and discrimination in the workplace. The SAHRC sought to catalyse national attention and conversation about race at its 20th anniversary commemoration in March 2016. In the Midrand-Declaration against Racism, the SAHRC reiterated its commitment to contribute substantively to the constitutional ideals of a non-racial, non-sexist democracy. The SAHRC has further played a crucial role in the development of South Africa's NAP and proposed legislation dealing with hate crimes and hate speech, intended to assist South Africa to meet its international treaty and regional obligations. These efforts however, are unlikely to provide a complete solution to the matter of racism in South Africa.

South Africa's endeavours in seeking to combat all forms of racial discrimination must recognise that legal frameworks and responses on their own cannot address the nuances associated with allegations of racism and racial discrimination. As highlighted throughout this Report, contemporary manifestations of racism, particularly on social media platforms, require creative and dynamic interventions. Such interventions will benefit from considerations of individual accountability, our historical legacy of Apartheid, and existing political and socio economic polarities in the country. The inherent dignity of all people should inform how we engage in this very unique South African landscape, together with other role players such as business.

The NDP envisions that by 2030, South Africans will be more conscious of what they have in common than of their differences. It recognises that while progress has been made toward the advancement of a tolerant society that is not divided by race, the inherent disadvantage attached to race, class, space, and gender has not been fully reversed. Racism on social media platforms and the vitriol that it so often produces, illustrate the urgent need for intervention and leadership by the SAHRC in confronting racism and racial discrimination as systems of historic power and subjugation. The National Hearing presented an opportunity for the SAHRC to contribute toward the development of a more comprehensive understanding of how racism and racial discrimination manifest in contemporary South Africa in the context of social media.³

³ Further details of the methodology adopted to conduct the Hearing can be found at the end of this Report, marked Annexure 'A'.

1.2. Structure of the Report

In light of the fact that one of the SAHRC's goals is to promote social cohesion in South Africa, the Report is confined to making recommendations that align with the objectives articulated in South Africa's NAP and the NDP. The scope of this report does not extend to making findings that address allegations of specific rights violations either by the State or by individuals. Such complaints are addressed on a case by case basis through the procedures of the SAHRC. The Report is instead informed by the submissions and interactions in the course of the Hearing proceedings, including written submissions received from stakeholders.⁴

The objectives of the National Hearing and the Report are intended to:

- Provide a frame of reference in the context of rapid developments taking place in the information and communications sector, to the need to increase awareness of racism on social media and applicable legislation, consequences where hate crimes are committed, and in respect of remedies to empower those affected by racial discrimination.
- Provide a platform for the sharing of information regarding issues which are emerging or have yet to emerge and to encourage engagement about the evolution of internet rights; the roles and responsibilities of stakeholders such as private intermediaries and public bodies;
- Expand and enhance the SAHRC's own approach to issues of racism, racial discrimination and social cohesion, both in the context of investigating alleged violations of rights and in terms of recommendations from the SAHRC for reforms intended to strengthen the protection of rights. In particular, in line with its monitoring mandate, the National Hearing would allow the SAHRC to understand how the government envisions implementing the NAP, once finalised. Moreover, and in light of the intended promulgation of legislation aimed to curtail hate crimes and hate speech, the Hearing presented an opportunity to enquire from implementing authorities, such as the National Prosecuting Authority (NPA) and the South African Police Service (SAPS), about measures in place to investigate complaints pertaining to racially motivated hate crimes or hate speech;
- Document the inputs, learnings and experiences of a diverse range of stakeholders and expert panellists about hate crimes and, social media;
- Encourage, in the absence of formal controls, the need for the promotion of self-awareness and self-regulation for users of social media platforms;

⁴ The Hearing Transcripts will be made available on the official SAHRC website.

- Initiate conversation, and discussion about social media and hate speech at all levels in society;
- Provide a reference for legislative reform, policy development and; both government and private sector responses to racism, as well as to promote informed debate within South African society and;
- Contribute to regional and international efforts in the search for meaningful standards, and reforms for the protection of basic rights

The Report accordingly aims to increase awareness of racism and racial discrimination on social media and applicable legislation and remedies to support and inform efforts to eradicate intolerance and hatred. In addition, is the recognition that the real and long term impacts of hate crime on individuals, communities and society are immeasurable; providing compelling impetus for measures to prevent, heal and eradicate resulting dehumanisation of people.

The Report is structured as follows:

- **Chapter 2: *Legal Framework Regulating Racism and Social Media in South Africa*** – This chapter provides a brief overview of key human rights standards and obligations emanating from the domestic, regional and international human rights framework that prohibit expressions of racism in South Africa, including on social media platforms.
- **Chapter 3: *Contemporary Manifestations of Racism in Post-Apartheid South Africa and on Social Media*** – This chapter discusses the complexities of addressing racism and identifying racist conduct or expression in the context of social media, including how racism manifests in overt and covert forms on social media platforms.

Chapter 4: *Participatory Democracy: Social media as a Tool to Advance, or Hinder, Social Progress* - This chapter unpacks the contribution that social media has made toward the advancement of freedom of expression as an integral value of South Africa's democracy, including the role that social media plays in creating solidarity between and within communities, and challenging institutions of power that may limit the advancement of human rights. This chapter also highlights the divisive role that social media can play in reinforcing existing social fissures, fuelling perceptions of division, and providing a distorted version of reality.

- **Chapter 5: *Access to Remedies*** - This chapter considers the role of legal interventions, such as PEPUDA, in advancing substantive equality and changing social behaviours.

It unpacks how the law can be utilised to attain individual redress through the Equality Courts, and the public condemnation that cases involving racial discrimination attract. It also considers how the SAHRC can advance substantive equality through systemic interventions that provide for the promotion of equality and what complaints mechanisms are available to users of social media platforms.

- **Chapter 6: *Interventions to Combat Racist Hate Speech and Build Social Cohesion*** - This chapter examines initiatives undertaken by various government departments responsible for building social cohesion in implementing the objectives of the NDP and the **NAP**. It also considers the remedies provided in the Protection from Harassment Act, 2011 (Harassment Act), and how the mechanisms can be used to address hate speech.

Chapter 7: *Domestic, Regional and International Approaches to Freedom of Expression and Combating Online Hate* - This chapter discusses the implications of the proposed Prevention and Combating of Hate Crimes and Hate Speech Bill. It highlights a number of implications raised in submissions and whether such interventions may advance substantive equality and address both subtle and covert forms of racism on social media. It also provides a comparative analysis of countries that have confronted the challenges presented by social media in fuelling social divide and the various strategies and approaches that have been adopted in these contexts.

- **Chapter 8: *Conclusion and Recommendations*** – The Report concludes by recognising that in light of the SAHRC’s deep commitment to promoting tolerance, dignity, social cohesion, and equality, there is a need for it to strategically respond to the complexity of issues examined in this report.

CHAPTER 2: Legal Framework Regulating Racism and Social Media in South Africa

A brief overview of key human rights standards and obligations contained in domestic, regional and international human rights frameworks that prohibit expressions of racism in South Africa, including on social media platforms, and which inform the content of this Report, is outlined below.

2.1. Domestic Legal Framework

2.1.1. The Constitution of the Republic of South Africa, 1996

Section 9(3) of the Constitution, provides that no person may be unfairly discriminated against on the basis of their race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Moreover, section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.

The Constitution guarantees the rights to:

- privacy, which includes the right not to have the privacy of one's communication infringed upon (section 14);
- freedom of religion, belief, and opinion, specifically stating that everyone has the right to freedom of conscience, thought, belief, and opinion (section 15);
- freedom of expression, which includes the freedom of the press and other media, and the freedom to receive or impart information or ideas (section 16); and
- the right to access information, including access to any information held by the State, or another person and that is required for the exercise or protection of any rights (section 32).

However, it is important to note that the right to freedom of expression excludes from its ambit of protection propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, religion, or gender, and constitutes incitement to cause harm.

2.1.2. The Promotion of Equality and Prevention of Unfair Discrimination Act

PEPUDA further aims to give effect to the constitutional right to equality and was promulgated in fulfilment of the State's duty to enact national legislation that aims to prevent or prohibit unfair discrimination and to promote the achievement of equality. The purpose of PEPUDA is to 'facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by principles of equality, fairness,

equity, social progress, justice, human dignity and freedom'.⁵ With respect to the prohibition of unfair discrimination on the ground of race in particular, section 7 of PEPUDA states that no person may disseminate any propaganda or idea, which promotes the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence.

2.2. Regional Legal Framework

Regionally, South Africa is party to the African Charter on Human and People's Rights, 1981 (African Charter). The African Charter emphasises that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples,' and that achieving these ideals requires the dismantling of all forms of discrimination, 'particularly those based on race, ethnic group, colour, sex, language, religion or political opinions.'⁶ Article 2 of the African Charter prohibits any form of discrimination on the basis of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any other status. Article 5 of the African Charter further provides that every individual has an inherent dignity which must be respected. In terms of Article 9 of the African Charter, every individual has the right to receive information, and the right to express and disseminate their opinions within the law.

To give further expression to the rights contained in Article 9 of the African Charter, and in light of the digital media age, the African Commission on Human and People's Rights (ACHPR) has issued the Declaration of Principles on Freedom of Expression in Africa and adopted the Resolution on the Right to Freedom of Information and Expression on the Internet in Africa. This is discussed in further detail in Chapter 7 of this report.

2.3. International Legal Framework

South Africa is party to the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination, 1969 (ICERD). The ICCPR recognises that, in accordance with the Universal Declaration of Human Rights (UDHR), the inherent dignity of the human person is the foundation of freedom, justice, and peace in the world. The ICCPR prohibits forms of discrimination of any kind, on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin,

⁵ Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, *Preamble*.

⁶ African Charter on Human and People's Rights, 1981, *Preamble*.

property, birth, or any other status (Article 2), in addition to providing for the right to human dignity (Article 6). Article 19 of the ICCPR provides that everyone has the right to hold opinions without interference, and the right to freedom of expression, which includes the freedom to seek, receive, and impart information and ideas of all kinds either orally, in writing, or in print, through any media of their choice.

The ICERD recognises the proclamation in the UDHR, which provides 'that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin.'⁷ Importantly, Article 2 of the ICERD specifically calls on States to condemn racial discrimination, to pursue all appropriate means to eliminate all forms of racial discrimination, and to actively promote understanding among all races.

⁷ International Convention on the Elimination of All Forms of Racial Discrimination, 1969, *Preamble*.

CHAPTER 3: Contemporary Manifestations of Racism in Post-Apartheid South Africa and on Social Media

'...we cannot afford to shirk away from those difficult questions of the past, of structural power imbalances, of just the sheer task of redress.... we have to get used to, in the age of social media and a new media more generally, we have to get used to notions of being personally disrupted, and disruptions are oftentimes a good way to hold the mirror up to self, to institutions, to society...' – FW De Klerk Foundation (extracts from Hearing record).

South Africa's transition from apartheid has resulted in significant political, social, economic, and ideological shifts. As noted by the Hearing Panel, all South Africans, regardless of race, are afforded the protections provided for in the Constitution, including the rights to freedom of expression, assembly, and association, amongst a host of other civil, political, economic, social, and cultural rights. However, despite the right to equality guaranteed in the Constitution and its enabling legislation, various communities in the country's population continue to be excluded from the benefits of South Africa's constitutional democracy on the basis of their race.

In South Africa, racial categorisation, enshrined in law by the Population Registration Act of 1950, was the foundation of the Apartheid State. South Africans were not only classified in accordance to their descent or biological markers, but also on the basis of cultural markers of appearance or general acceptance. Segregation was extended to virtually all aspects of social interaction, including hospitals, schools, universities, transport, and most municipal facilities such as parks and beaches. Apartheid-era laws and policies also ensured the privileged economic and political dominance of the white minority, thus reinforcing both poverty and inequality of the black majority.⁸ While race-based legislation has since been abolished, post-apartheid South Africa remains characterised by legacies of apartheid.⁹

In its 2015 South African Reconciliation Barometer,¹⁰ The Institute for Justice and Reconciliation (IJR) found that South Africans continue to associate with their own racial and language groups. It further found that only a minority of those interviewed were of the view that they did not experience racism in their daily lives, while a majority were of the view that

⁸ Seekings, J. (2007) "Race, discrimination and diversity in South Africa", *Centre for Social Science Research*, Working Paper No. 194.

⁹ Ibid.

¹⁰ The South African Reconciliation Barometer measures South Africans' attitudes towards national reconciliation, social cohesion, transformation and democratic governance.

race relations since 1994 have either stayed the same or deteriorated. Inequality between rich and poor, which is still reflected along racial lines, continues to be the most frequently mentioned source of social division in the country.¹¹ The lack of accessible sustainable economic growth and opportunities for both black and white South Africans has resulted in perpetual blaming of the 'other'.¹²

The IJR also reports that most interracial interaction among South Africans appears to take place in public places, such as places of work, study, or shopping centres and that interaction is limited in intimate or private spaces, such as in homes and social gatherings. Citizens who are materially advantaged report higher levels of interracial interaction than those who are not.¹³ Therefore, it appears that South Africans continue to battle with solidifying the foundation of social cohesion required to achieve the once sought after 'rainbow nation' ideal, and have yet to concretely define what may constitute racist conduct across racial groups. For people born after the fall of apartheid, the official post-apartheid discourse of the 'rainbow nation' couched in the values of democracy and non-racialism, is met with suspicion and criticism.¹⁴ Frequent protests across South Africa's universities relating to general feelings of exclusion amongst various groups of South Africa's diverse student population highlights that 'everyday racism', if ignored and overlooked, builds over time into larger patterns of exclusion and discrimination.¹⁵

With a diverse composition of languages, religions, and cultures, 'everyday racism' manifests in a number of ways in South Africa. In respect of language, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities submitted that English remains the dominant language of formal institutional communication. However, for the majority of South Africans, English is not their first language but many people are compelled to communicate in English in order to advance socially, politically and, economically.¹⁶

The exponential rise in complaints received by the SAHRC alleging racism on social media platforms demonstrates the immense challenge that the post-apartheid state continues to

¹¹ Hofmeyr, J. & Govender, R. (2015) "National reconciliation, race relations and social inclusion", *Institute for Justice and Reconciliation*, South African Barometer Briefing Paper 1: 8 December 2015.

¹² Nelson Mandela Foundation (2017) "Submission to the South African Human Rights Commission", 13 February 2017.

¹³ Ibid.

¹⁴ Walker, M. (2005) "Race is now here and race is everywhere: narratives from black and white South African university students in post-apartheid South Africa", *British Journal of Sociology of Education*, 26 (1), 41-54.

¹⁵ Ibid.

¹⁶ Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (2017) "Racism and Human Rights Conference: Human Rights Commission", *National Hearing on Racism and Social Media*, 15- 16 February 2017.

confront in tackling the legacy of racialised social engineering. While some of the complaints constitute explicit examples of hate speech prohibited by law, such as the use of the “*k-word*”, many complaints alleging hate speech on the basis of race are more opaque. While these complaints could be considered statements removed from the provocation of open violence or forceful segregation which characterised expressions of ‘old’ apartheid-era racism, they have the potential to inflict greater harm, particularly when assumptions made about specific racial groups have been normalised or accepted in everyday discourse.¹⁷

When compared to older forms of media and communication, the Internet presents a novel interactive platform for communication. Before the advent of the Internet, what is now viewed as online conversation was confined to private and personal spaces between people who knew each other. Today, the Internet¹⁸ provides a neutral space that is free from external social hierarchies, is inclusive and accessible, can expand possibilities for association by like-minded individuals, and can offer psychological comfort and spiritual support.¹⁹

The Internet’s penetration into daily life has also encouraged wider participation in the construction of online identities.²⁰ A large component of expressing our identities is the ability to reference our desires for affiliation and recognition, and to distinguish ourselves from others. Our identities are not fixed nor are they absolute; rather, our identities are in the process of continued change and formation, depending on the context in which we find ourselves.²¹ The Internet has therefore become a medium where many people feel that they are freely able to express themselves, and the varied nuances of their identities. For many, the internet allows such expression and circumvents the barriers traditionally posed by ‘real’ or physical contact based interaction. In this way, social media becomes an extension of reality with constant interaction between ‘virtual’ and ‘real’ world identities where the lines between the two often blur.²²

The perceived and real expressions of racism on social media platforms has reopened racial wounds and highlights the broader and systemic issue of racism that continues to persist in

¹⁷ Van Dijk, TA. “New(s) Racism: A discourse analytical approach” in S Cottle (ed.), *Ethnic Minorities and the Media*, 33-49.

¹⁸ In South Africa, roughly 41% of South Africans are able to access the Internet “anywhere”, while only 10% have access to the Internet at home. See StatsSA (2014) *General Household Survey: 2013*.

¹⁹ Brock, A (2009) “Who do you think you are? Race, representation and cultural rhetoric in online spaces”, *Poroi*, University of Iowa, 6 (1)

²⁰ Ibid.

²¹ Walker, M. (2005) “Race is nowhere and race is everywhere: narratives from black and white South African university students in post-apartheid South Africa”, *British Journal of Sociology of Education*, 26 (1), 41-54.

²² Ahmed Kathrada Foundation (2017) “Cyber racism: SAHRC submission prepared by the Ahmed Kathrada Foundation and ROi Africa”, National Hearing on Racism and Social Media, 15- 16 February 2017.

South Africa's political, economic, and social structures.²³ Social media has provided a platform that has altered the way that members of society are able to interact with one another. Moreover, if social media is an extension of reality, racial expression and propagation can be said to be both *reflective* of 'real world' racism and an *influencer* of 'real world' racism. Consequently, it must be treated with the same seriousness and veracity with which 'real' racism would be treated.²⁴

At the same time, while online posts of this nature may cause hurt and anger, they likewise solicit the necessary outrage to confront systemic discrimination and provide further insight into conversations and views that many South Africans may not have access to in their private spaces. Social media platforms are crucial in providing information, advocacy, and assistance when human rights violations occur and can be a force for positive change.²⁵ This is particularly true for those who may not have access to recourse to report alleged violations; thus, social media becomes an easier channel to highlight issues that may exist outside of the realm accessed by mainstream media.

There is little doubt that social media platforms provide a vital and profound means through which many members of society express themselves, regardless of age, social status, race, gender, sexuality, or religion. It is also the means through which many South Africans who live with the pain and indignity inflicted by apartheid, express themselves. As noted by the Hearing Panel, racist statements made online may not constitute the incitement of imminent violence. However, they are a product of past violence which has continuing reverberations and could more firmly embed pre-existing fissures contributing to the potential for violence. While these statements may not cause physical harm to one's body or property, they do cause psychosocial damage, which in many respects are difficult to quantify, measure and overcome.

If left unchecked, the dehumanising effects of racist behaviours and utterances pose a real setback to South Africa's social cohesion project. As highlighted by the FW De Klerk Foundation:

²³ Nelson Mandela Foundation (2017) "Submission to the South African Human Rights Commission", National Hearing on Racism and Social Media, 15- 16 February 2017.

²⁴ Ahmed Kathrada Foundation (2017) "Cyber racism: SAHRC submission prepared by the Ahmed Kathrada Foundation and ROi Africa", National Hearing on Racism and Social Media, 15- 16 February 2017

²⁵ FW De Klerk Foundation (2017) "Submission by the FW De Klerk Foundation to the South African Human Rights Commission", National Hearing on Racism and Social Media, February 2017.

'Racism of any kind is invidious. It is hurtful and it is painful. The task of defining racism and its impacts is a gargantuan one, but unless there is some measure of understanding the concept, its presence will remain the perennial elephant in the South African room. An earnest set of conversations, like that proposed by the SAHRC, is necessary to distinguish between how racism is defined, its manipulation, perhaps for populist and politically expedient outcomes, and how, as a nation, we grapple with the kind of non-racist society we would want to create in order that our Constitution and its core values become a reality for all'.²⁶

²⁶ FW De Klerk Foundation (2017) "Submission by the FW De Klerk Foundation to the South African Human Rights Commission", National Hearing on Racism and Social Media, 15-16 February 2017.

CHAPTER 4: Participatory Democracy: Social Media as a Tool to Advance, or Hinder, Social Progress

'On the topic of racism, we find an alarming level of double standards in the way in which our society at large deals with racism. These double standards are particularly also manifested in the way that many media institutions report on racism'. - Afriforum (extracts from Hearing record)

'...there is, right now, a huge global conversation about hate speech online, about racism online, about the role that social media platforms play in large global conversations, and dealing around how we get along, and I think what is important to remember is that social media platforms are mirrors...' – Facebook (extracts from Hearing record).

The quote by Afriforum highlights the complex nature of, and perceived inconsistencies with, the manner in which allegations of racism are responded to in South Africa. As highlighted during the Hearing, other than the prohibition of explicit words or phrases that the Courts have found to constitute hate speech, South Africans have yet to reach a common understanding of what constitutes racist conduct.²⁷ These complexities are exacerbated by the inconsistencies in which incidents of racism are picked up in the media and what gains traction on social media platforms.

The role of the media in knowledge generation cannot be underestimated. Media publication through text, print, and imagery remains the primary source of knowledge, attitudes, and ideologies for many people. When popular media discourse is combined with a lack of alternative sources, it allows for discriminatory views to be repeated and entrenched in society.²⁸ This is particularly the case in contexts where those who hold opposing views to what is published by mainstream media houses are marginalised. Social media has thus become a medium to challenge the views espoused by more traditional media outlets, such as newspapers or television news.

In terms of social media usage, at the time of the Hearing, the two most active platforms amongst South Africans are WhatsApp (33%) and Facebook (30%). Most of Facebook's users are between the ages of 20-29 (41%), with senior citizens above the age of 60

²⁷ Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017, p95.

²⁸ Van Dijk, TA. "New(s) Racism: A discourse analytical approach" in S. Cottle (ed.), *Ethnic Minorities and the Media*, 33-49.

constituting just 7% of users.²⁹ In South Africa, there are roughly 13 million Facebook users (globally, there is an estimated 1.8 billion Facebook users), 7.4 million Twitter users, 8.28 million YouTube users, and 2.68 million Instagram users. The number of Facebook users increased by 8% in 2012, while Twitter increased by 12%, YouTube by 15%, and Instagram by 133% during the same period. The majority of South Africans (77%) access their social media platforms from their mobile devices, such as smartphones and tablets.³⁰

South Africa also has one of the largest telecommunications markets on the African continent. Mobile phones have fast become more popular than computers for accessing the Internet. This has largely been accelerated by low-cost communication outlets and applications that have a high uptake in resource-constrained communities.³¹ In 2016, it was estimated that there were 26.84 million active internet users (roughly 48% of the total population), 13 million active social media users, 85.53 million mobile connections, and 10 million active mobile social users in South Africa. This is interesting in that roughly 55.5% of South Africa's population live below the upper-bound poverty line of R1 138 per month and 26% are unemployed.³² On average, South Africans spend approximately five hours per day accessing the internet via a computer or tablet, three hours accessing the internet via mobile phone, three hours accessing social media via any device, and only two-and-a-half hours viewing television.³³

From these statistics, it is clear that social media and the internet more broadly have brought rapid economic and social benefit to the South African landscape, particularly among the population under the age of 35 (commonly referred to as 'millennials'), which constitutes more than two-thirds of South Africa's total population.³⁴ According to Facebook, the internet sector comprised 2.5% of South Africa's Gross Domestic Product (GDP) in 2016, which is an estimated USD 8 billion. Facebook thus views itself as a tremendous driver of economic activity and job creation globally. Facebook claims that it generates USD 227 billion in global economic activity and supports an estimated 4.5 million jobs, which it expects to continue to grow.³⁵

²⁹ Snyman, A. (2016) "Social Media – The Latest South African Stats", *WebAfrica*, available at: <https://www.webafrica.co.za/blog/social-media-2/social-media-latest-south-african-stats/>

³⁰ Ibid.

³¹ Imaginet (2014) "The reality of mobile usage and social media growth in South Africa", available at <http://www.imagi-social.co.za/reality-mobile-usage-social-media-growth-south-africa/>.

³² Statistics cited from StatsSA.

³³ Shezi, L. (2016) "SA's 26.8 million internet users spend almost three hours a day on social media", available at <http://www.htxt.co.za/2016/04/29/the-stuff-south-africa-26-8-mil-internet-users-spend-most-their-time-doing-online/>.

³⁴ StatsSA (2016) "Mid-year population estimates: 2016".

³⁵ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p 103.

Social media is one of the preferred means through which millennials and generations thereafter connect with each other. These interactions do not have a limited scope and include the private, the personal matters and pure information sharing. In doing so the technological generation is part of a community. Submissions indicated that social media provides an opportunity for users to gain insight into the lives of friends, including what they are thinking about, and what information (such as articles or videos) their friends find interesting. Importantly, social media, particularly Facebook, has become a tool to access news and information. Research conducted in the United States has found that roughly 88% of millennials access their news from Facebook. Not only do they read the news, but they also engage with what they read on social media more than traditional media platforms due to Facebook's interactive features, such as 'liking', commenting on, or sharing a posted news story. Millennial users are also not afraid to expose themselves to a variety of opinions on social media and further investigate those opinions, even if different to their own, due to the diversity of opinions and viewpoints streamed to their newsfeeds. Consequently, social media platforms like Facebook in fact broaden the worldviews of its users exponentially in unlimited ways, rather than narrows them.³⁶

Beyond the social and community aspects of social media, millennials are also using these platforms to communicate their views and actively participate in the political, economic, and social trajectories of their countries. Globally, young people are optimistic about the future and consider themselves to be 'global citizens' with a sense of a shared humanity. They are concerned with issues surrounding climate change and the destruction of natural resources, in addition to corruption and the lack of State accountability. Honesty, transparency, and accountability are therefore key considerations for effective local and global governance for millennials throughout the world. In line with ideas surrounding the Fourth Industrial Revolution, young people everywhere identify technology as crucial for job creation and access to the economy. However, they are cautious about the role technology plays in their private lives and society. For young people located in both the Global North and South, freedom is associated with 'equal access' to opportunities for everyone, which includes access to health care, education, and employment. Young people have been found to be more empathetic toward refugees and have expressed disappointment in the management of the current refugee crisis.³⁷

³⁶ American Press Institute (2015) "How Millennials use and control social media".

³⁷ World Economic Forum (2016) "Global Shapers: Annual Survey 2016".

Thus, social media has had a positive impact on shaping its users' civic and political engagement. Its increasing usage demonstrates that it has become a source from which its users are not only able to acquire knowledge from their friends but are also able to receive information that can reinvigorate the democratic process.³⁸ The opportunity that social media presents to learn what is happening around us, reflect on it, and discuss it with others constructively affects the political realm and facilitates the development of a cohesive community by enabling citizens to engage in civic action.³⁹ The simplicity of the platform also enhances the manner in which people are able to access information and strengthens community ties as users constantly update their social media sites on issues that are relevant to them and their virtual community of 'friends'. In this way, relationships of reciprocity and trust are formed, which creates further opportunity for civic and political engagement.⁴⁰

Throughout the world, social media platforms have been used to organise and challenge state policies and promote a sense of community and collective identity amongst marginalised groups. Social media platforms have also been used to establish connections with other social movements and publicise causes to gain international support, transcending the divides of time and space.⁴¹ In addition, internet-based communication offers a means for those without resources to actively participate in democratic processes that in the past may have been restricted by financial constraints.⁴²

In South Africa, the use of social media as a tool for social change has been evident with the #FeesMustFall movement. As noted by the Hearing Panel, social media was used by many young South Africans to express their frustration and challenge the *status quo* of poverty and inequality between rich and poor, which continues to predominantly be reflected along racial lines. There is an assertion made by those who support the movement that colonialist structures still exist in practice,⁴³ and social media platforms have provided an opportunity for young people at universities across the country to connect and share similar feelings of exclusion.

The importance of social media as a positive contribution towards sustaining South Africa's vibrant democracy was reiterated by Facebook during the Hearing. Facebook states that 'the

³⁸ De Zuniga *et al* (2012) "Social media use for news and individuals' social capital, civic engagement and political participation", *Journal of Computer-Mediated Communication*, 17, 319-336.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Eltantawy, N. & Weist, J. (2011) "Social Media in the Egyptian Revolution: Reconsidering Resource Mobilisation Theory", *International Journal of Communications*, 5, 1207-1224.

⁴² *Ibid.*

⁴³ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p72.

platform should be a platform for challenging expression, it should be a platform for debate, it should be a platform for dialogue, but it should not be the type of platform that makes it so that people feel that they cannot share, or they feel unsafe online....South Africa is a vibrant democracy with strong traditions for supporting expression...'.⁴⁴ Indeed, Facebook has highlighted the platform's importance for expressing political speech that may be critical of a government. While hate speech should not be tolerated, for Facebook, limits should be thoughtfully considered within the context of economic advancement.⁴⁵

The Freedom of Expression Institute (FXI) expressed similar concerns regarding the limiting of freedom of expression on social media platforms, particularly in light of the role such platforms play in sustaining robust democracies. As expressed during the Hearing, FXI's primary concern is that limiting the right to free expression under the guise of protecting the rights to dignity and equality of vulnerable and marginalised groups can also be used to illegitimately limit forms of protected free speech. Instead, freedom of expression, dignity, and equality should be viewed as complementary rights, which can aid the advancement of democracy and social cohesion. It is important in an open democracy that all views, even those that are shocking, offensive, or disturbing, must be considered to promote open discussion and debate to contest these views.⁴⁶

While the Panel noted the danger of reverting to an apartheid-era society of formal censorship and self-censorship, it also raised concern about expression that contributes toward further entrenching racial division and inhibiting progress toward social cohesion.⁴⁷ In addition challenges faced by vulnerable groups in accessing justice and in dealing with hate crimes were concerns expressed by the Panel. Facebook acknowledged that at times, it has made "mistakes". These were mostly attributed to the large amount of content that its moderators review daily and to the fact that its moderators may not be aware of the nuances and subtleties that inform the contexts of the various countries Facebook operates in. In South Africa, Facebook cited the *Penny Sparrow* incident as an example of a reported case of hate speech by its users that was initially overlooked by its moderators. However, Facebook also submitted that its platform is constantly evolving and that in making mistakes, its management also

⁴⁴ Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017, p97.

⁴⁵ Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017, p126.

⁴⁶ Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017, p82-83.

⁴⁷ Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017, p91.

learns how to navigate the complexity of hate speech regulation in any given context while simultaneously remaining true to its commitment of promoting free speech.⁴⁸

The positive contribution that social media has made toward the advancement of substantive democracy, expanding the right to freedom of expression, and providing a platform to claim other civil, political, economic, social, and cultural rights cannot be underestimated. However, at the same time, social media platforms have been met with criticism, including allegations of hindering democratic progress and reinforcing existing social fissures.

Research conducted by ROi Africa of statements posted by social media users suggests a global prevalence of 'cyber racism' or posts by users that reveal a range of homophobic, Islamophobic, xenophobic, racist, sexist, and other thought patterns. In South Africa, there has been a more public re-emergence of overt forms of racist speech, including usage of the 'k-word', and incitement of violence. The *Penny Sparrow* case, which constituted one of the Top 10 reported stories in South African media in 2016, was a prominent example of one of the many racial outbursts that have occurred on social media. Notwithstanding the sanctions levelled against Ms. Sparrow, these outbursts continue. Moreover, the ability of key social media users to influence online discussions and shape public debate is influential in either facilitating social cohesion or amplifying social divisions.⁴⁹

⁴⁸ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p118-120.

⁴⁹ Ahmed Kathrada Foundation (2017) "Cyber racism: SAHRC submission prepared by the Ahmed Kathrada Foundation and ROi Africa", National Hearing on Racism and Social Media, 15- 16 February 2017.

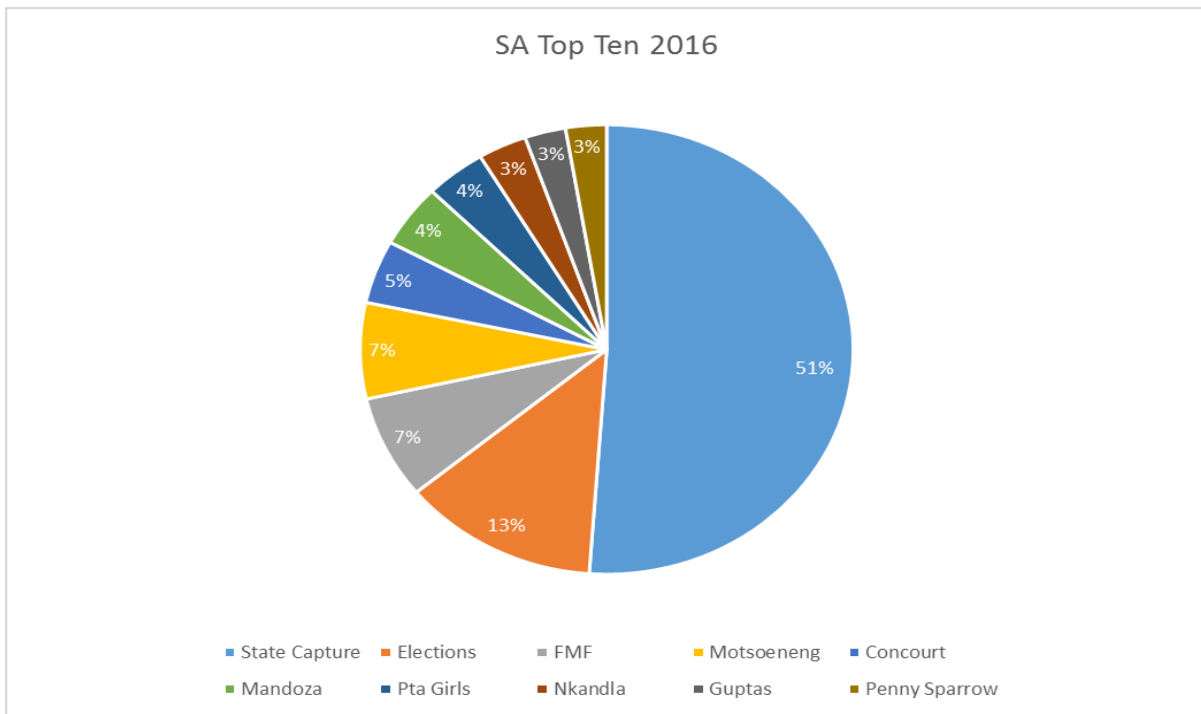


Figure 3: Top ten reported stories in South African media, 2016 (Source: RoiAfrica)

During the Hearing, the Panel heard from various participants who alleged that racist outbursts reflected a deeper systemic issue that South Africans need to confront more robustly. However, the Panel raised concern that such a generalised approach to conduct that is caused by individuals, who have the ability to influence and manipulate the outcomes of what is posted on social media platforms such as Facebook, justifies passivity and absolves social media platforms from taking the necessary action in holding individuals accountable. Therefore, while social media may not always be a mirror of society at large, it does mirror specific aspects of particular societies which has the potential to reinforce social divisions in such societies. Racist outbursts on social media platforms in South Africa and elsewhere in the world have highlighted how racism adapts and reappears in a multiplicity of guises.

As noted by Judge Sachs during the Hearing, ‘the very power of the social media is, they are literally from the ground up, and they are in the hands of the people. It is a hugely democratic participatory form of activity, that gives it immediacy, it gives it warmth, it empowers each individual who has access to the internet....but it is also capable of diffusing poison, of destroying the values that we want to achieve in our society, because of its very openness and potency.’⁵⁰

⁵⁰ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p9-10.

The next chapter unpacks the remedies available to individuals seeking recourse regarding allegations of alleged racist hate speech on social media platforms.

CHAPTER 5: Access to Remedies

During the Hearing, Professor Cathi Albertyn highlighted that combating systemic racism in South Africa requires an intervention that extends beyond the law. While individual complaints must indeed be addressed and the individuals responsible for the allegation must be held to account, law and policy must also be used in a manner that addresses the root causes leading to racist conduct. To effectively address racism, a creative, remedial intervention is necessary to redefine the norms and standards that govern our society.⁵¹

In terms of section 16 of the Constitution, which speaks to the right to freedom of expression:

'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;
....
(2) The right in subsection (1) does not extend to –
(a) propaganda of 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.'

In terms of section 10 of PEPUDA:

'10. (1)....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;
(c) promote or propagate hatred.'

The primary objective of PEPUDA is to give effect to the spirit of the Constitution by ensuring the equal enjoyment of all rights and freedoms by every person, to promote equality, to prevent and prohibit unfair discrimination, and to prohibit hate speech and harassment. PEPUDA also aims to provide remedies for victims of unfair discrimination, hate speech and harassment;

⁵¹ Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017, p212.

educate the public by raising awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech, and harassment; and facilitate compliance with international law obligations.⁵²

While the South African Courts have found that the particular use of certain words can constitute hate speech in terms of PEPUDA, jurisprudence has not adequately addressed more systemic conduct that results in feelings of exclusion and perceived racism. For example, in the case of *Prinsloo v The State*, the Court explained that '[t]he word *kaffir* is racially abusive and offensive and was used in its injurious sense.... In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. The appellant cannot claim that he did not know that the use of such word is offensive and injurious to the dignity of the complainants. I agree with the trial court's finding that such conduct seeks to negate the valiant efforts made to break from the past and has no place in a country like ours which is founded upon the democratic values of human dignity, and the advancement of human rights and freedoms.'⁵³

Similarly, in the case of *Herselman v Geleba*⁵⁴, the Court found that use of the word "*baboon*" in reference to black people amounted to hate speech as defined in section 10 of PEPUDA. As explained in *Mangope v Asmal and Another*⁵⁵, the Court held that '[i]t is, in my view clear, that when the epithet '*baboon*' is attributed to a person when he is severely criticised, as in this case, the purpose is to indicate that he is base and of extremely low intelligence.'

In *ANC v Sparrow*,⁵⁶ which dealt with Ms Sparrow referring to black people as 'monkeys' on Facebook, the Court stated, *inter alia*, that '[h]er words convey the message both explicitly and implicitly to the reader that...reference to black people as monkeys conveys the explicit message that black people are not worthy of being described as human beings. Implicit is that they have subhuman or low intelligence.' Consequently, the words posted by the respondent constituted hate speech as defined in PEPUDA.

Despite the prohibition of hate speech in both the Constitution and PEPUDA and the various judgements issued by the Equality Courts that aim to reinforce dignity as the foundation of

⁵² Department of Justice and Constitutional Development, Republic of South Africa "Stand and defend your right to equality".

⁵³ (534/13) [2014] ZASCA 96 (15 July 2014), at para 20.

⁵⁴ (ECG) (unreported case no 231/2009, 1-9-2011).

⁵⁵ 1997 (4) SA 277 (T) at 286J – 287A.

⁵⁶ (01/16) [2016] ZAEQC 1 (10 June 2016).

South Africa's democracy, the SAHRC continues to receive numerous complaints alleging racist hate speech on social media platforms. This demonstrates that PEPUDA is yet to meet its objectives. A number of mechanisms for redress are available to people alleging racist hate speech on social media platforms, including through the SAHRC and the Equality Courts.

5.1. Complaints to the SAHRC

In addition to the constitutional mandate to promote respect for human rights and a culture of human rights,⁵⁷ PEPUDA also requires the SAHRC to release an annual report on the extent to which unfair discrimination on the basis of race, gender, and disability persists in South Africa, the effects thereof, and recommendations on how best to address the problem.⁵⁸ In order to achieve these objectives, the SAHRC receives and resolves complaints alleging discrimination and litigates matters in the Equality Courts.⁵⁹

Since its inception, the SAHRC has played a significant role in promoting human rights, providing redress, and ensuring access to justice for victims of violations of the right to equality. Some of the most widely publicised race-related matters have been resolved through the intervention of the SAHRC, including the 2008 *Reitz 4* incident where four white students were videotaped abusing black workers at the University of the Free State and the alleged racially motivated death of Thabang Mokgoang, a student at North West University. The SAHRC resolved the *Reitz 4* matter through alternative dispute resolution (ADR) mechanisms and also assisted in establishing a human rights help desk at the University of the Free State. The North West University matter resulted in a national hearing on the transformation of South Africa's public universities.⁶⁰

At a provincial level, the SAHRC has resolved race-related matters through both ADR mechanisms (primarily mediation between the parties) and the Equality Courts. However, the SAHRC is cognisant of the challenges presented by the time and other resources required to prosecute such matters. In many instances, when race-related complaints are resolved through mediation, the perpetrator of the violation offers an apology for their conduct, recognises the hurtful and harmful nature of their conduct, and agrees to participate in race-related sensitisation training.⁶¹ In this manner, the SAHRC provides access to redress and promotes social cohesion simultaneously.

With respect to complaints alleging hate speech on social media platforms, which are largely picked up by the SAHRC through mainstream media outlets and where it has been able to locate the perpetrator, the SAHRC is frequently able to secure an apology or commitment to

⁵⁷ Section 184(1)(a) of the Constitution.

⁵⁸ Section 28(2) of PEPUDA, which has not yet been brought into operation by proclamation.

⁵⁹ SAHRC (2014) "Equality roundtable dialogue report", 27 March 2014.

⁶⁰ SAHRC (2014) "Equality roundtable dialogue report", 27 March 2014.

⁶¹ See, for example, the SAHRC matter of *Makhuva v Coin* (LP/1617/0092).

attend anti-racism workshops and generally encourages the apology to be posted on social media platforms.⁶² Thus, social media platforms have been utilised as tools to advance social cohesion and hold the individual accountable for their conduct.

5.2. Equality Courts

In addition to resolving complaints through ADR mechanisms, the SAHRC frequently takes matters to the Equality Courts for resolution. This often occurs in cases where the complaint extends beyond a single individual and where the statements made are directed at an entire group of South Africans. Due to the nature of matters referred to the Equality Courts, the rules and procedures are more relaxed, which enables issues to be ventilated without fear or intimidation.⁶³ As explained in the judgment of *George and Others v Minister of Environmental Affairs and Tourism*:⁶⁴

‘An integral part of the Equality Act ... is the focus on the creation of a user-friendly Court environment where proceedings are conducted along inquisitorial lines, with an emphasis on informality, participation and the speedy processing of matters. This objective itself goes to the essence of what equality is about because it emphasises the need to make the judicial processes available to all, including the poor and oppressed who are usually the victims of unfair discrimination and inequality. The formal, adversarial, often expensive and potentially intimidating proceedings that prevail in an ordinary Magistrate’s Court or High Court and which may act as a barrier to those seeking justice, have no place in an Equality Court.’

The Equality Courts may order that the perpetrator of the violation makes an unconditional apology, pay damages, or any other form of redress as provided for in PEPUDA.⁶⁵

The SAHRC regularly institutes proceedings at the Equality Courts to hold individuals accountable for discriminatory statements made against South Africa’s various population groups, including on the basis of their race. These cases are either identified by the SAHRC through mainstream media or social media platforms or referred to the SAHRC by complainants who feel aggrieved by such statements. Complaints of this nature include the *Mfeka* matter where derogatory statements were made towards the Indian community, the *Vicki Momberg* matter where a police officer was continuously referred to by the ‘*k-word*’, and the matter of *Velaphi Khumalo* where references were made to cleansing the country of white

⁶² See, for example, the SAHRC matter of *SAHRC v Tlou Molele* (LP/1617/220).

⁶³ Department of Justice and Constitutional Development, Republic of South Africa “Stand and defend your right to equality”.

⁶⁴ 2005 (6) SA 297 (EqC).

⁶⁵ Department of Justice and Constitutional Development, Republic of South Africa “Stand and defend your right to equality”.

people in addition to glorifying Adolf Hitler.

The Equality Courts were established with a view of providing uncomplicated and inexpensive access to justice for individuals alleging a violation of the right to equality. However, they remain severely underutilised and the SAHRC has found that many South Africans are unaware of their existence. Data provided by the Department of Justice and Constitutional Development (DOJCD) demonstrated that in 2015/16, South Africa's 382 Equality Courts registered a total of 558 complaints. This was a significant drop from the 844 complaints lodged during 2014/2015. In 2015/2016, 277 complaints alleging hate speech were registered, which was a decrease from the 328 complaints registered during the previous financial year.⁶⁶ This situation has been attributed to poor public awareness and inadequate promotion of the courts. Through site visits by Commissioners and support staff, the SAHRC has established that similar challenges exist in all provinces.

Data from the DOJCD further illustrates that during 2015/2016, 40 cases were dismissed, 20 cases were withdrawn, 15 cases received judgements, and 11 cases received orders. Although there was a significant increase in the number of judgements and orders granted during 2015/2016, they only constituted 4.7% of the total number of cases registered.⁶⁷ Furthermore, not only are case numbers in the Equality Courts low, but case finalisation is also slow, exemplified by the *Mfeka* matter, which was registered at the Durban Magistrates Court in 2014 but has yet to be finalised.

The SAHRC has also found that in several Equality Courts, designated clerks and presiding officers have not been allocated, with the result that, although these forums contribute to the official number of Equality Courts in the country, they are not operating as such. Several respondents interviewed by the SAHRC also noted that the quality of the training provided to Equality Court clerks and presiding officers was not sufficient to meet their needs, meaning that they could only partially fulfil their mandates.

However, these shortcomings in implementing PEPUDA should not be viewed as deficiencies in the legislation itself, particularly as it expansively provides for intervention in respect of alleged violations beyond or outside of the Equality Courts. Chapter 5 of PEPUDA, which is not yet in effect, places a responsibility on the State, and *all* persons, to promote equality. The State has a duty to, amongst others, develop awareness of fundamental rights in order to promote a climate of understanding, mutual respect, and equality; develop and implement programmes to promote equality; develop action plans to address unfair discrimination, hate speech, and harassment; and conduct information campaigns to popularise PEPUDA.

⁶⁶ Department of Justice and Constitutional Development "Annual Report: 2015/2016".

⁶⁷ Department of Justice and Constitutional Development "Annual Report: 2015/2016".

Importantly, all persons, non-governmental organisations, community-based organisations, and traditional institutions must promote equality in their relationships with other bodies and in their public activities.⁶⁸ A proclamation of the commencement of Chapter 5 of PEPUDA is thus urgently required.

Chapter 5 of PEPUDA also calls for the adoption of positive measures to promote and advance substantive equality. It requires both the State and the private sector to engage in self-reflection and to come up with ideas, programmes, and plans as to how to deal with inequality in our society. It also provides a more efficient means to address systemic discrimination, particularly when compared with a complaints-driven process, which requires the formal initiation of a complaint.⁶⁹ Therefore, active promotion of PEPUDA's values and objectives by the State, the SAHRC, and private entities is urgently needed to address the systemic levels of racism that are entrenched in South Africa.

5.3. Social Media Platforms

In addition to utilising the avenues of redress provided by the law, individuals aggrieved by racist hate speech online can also refer these matters to respective social media platforms. In recognising that some forms of expression risk silencing others, making people unsafe, or inciting real-world violence, Facebook has a universal set of [Community Standards](#) to address complaints reported by its 1.8 billion users. These Community Standards prohibit content deemed to be directly harmful, but allows content that is offensive or controversial. Facebook defines harmful content as anything that points to organising real-world violence, theft, or property destruction or that directly inflicts emotional distress on a specific private individual (e.g. bullying). Facebook believes that these restrictions are necessary to encourage open speech and expression by protecting the safety of people who use the platform, thus ensuring that it is able to achieve its mission in giving people the power to share and make the world more open and connected.⁷⁰

From as early as 2013, Facebook's [content policy](#) has received attention by groups representing marginalised women, the LGBTQI community, and various religious communities. Some of the concerns expressed by critics of the Facebook Community Standards are around the issue of consultation in the development of regulations. Facebook defines hate speech as 'direct and serious attack on any category of people based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or disease'.

⁶⁸ See PEPUDA Sections 24-27.

⁶⁹ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p212.

⁷⁰ Facebook (2017) "Written submission for the National Hearing on Racism and Social Media in South Africa", National Hearing on Racism and Social Media, 15-16 February 2017.

Reported content is reviewed by a large team of multi-disciplinary moderators located across the globe, consisting of specialists in hate speech, counter-terrorism, child safety, and harassment. Software engineers have also been employed to develop review systems, in addition to quality control managers, policy specialists, legal specialists, and general reviewers.

Facebook has previously committed to improving its systems to enable it to respond more effectively to reports of violations. It has also acknowledged that in the past, its systems have failed to capture all content that violates its standards. In response, Facebook has committed to reviewing the guidelines used by its team to evaluate reports of violations of the Community Standards around hate speech, soliciting feedback from legal experts and representatives from groups that have historically faced discrimination; evaluate the training for teams that review and evaluate reports of hateful speech or harmful content on Facebook, and highlight areas of particular concerns. The Community Standards are alleged to increase the accountability of the creators of the content that does not qualify as 'actionable hate speech but is cruel or insensitive speech, by insisting that the authors take ownership of the content they create'. To this end, Facebook insists that if an individual decides to publicly share cruel and insensitive content, users can hold the individual author accountable, and may itself directly object to such content. In addition, Facebook has committed to establishing more formal and direct lines of communication with representatives working with marginalised groups to assure expedited treatment of content they believe violate the Community Standards. It has also committed to undertaking further research to identify how to effectively balance free expression and to examine the effect of hate speech on the online experiences of groups that have historically faced discrimination in society.⁷¹

However, despite these initiatives, Facebook continues to face criticism for the manner in which it develops its content policies 'behind closed doors', and for the lack of transparency in these policies. A report by the British Parliament's Home Affairs Committee has argued for Facebook to pay fines for failing to remove alleged extremist and hate-crime material.⁷² While Facebook has recently increased the number of moderators it employs to review content, many have called for a review of Facebook's review policies, particularly in light of the vast amount of content to be reviewed. Additionally, while moderators are encouraged to take into

⁷¹ Facebook (2013) "Controversial, Harmful and Hateful Speech on Facebook", available at <https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054/>.

⁷² Grierson, J. (2017) "No grey areas': experts urge Facebook to change moderation policies", *The Guardian*, 22 May 2017, available at <https://www.theguardian.com/news/2017/may/22/no-grey-areas-experts-urge-facebook-to-change-moderation-policies>.

account linguistic, cultural nuance, and local laws pertaining to freedom of expression, Facebook has stated that it will not censor content unless a country has demonstrated the political will to enforce its censorship laws.⁷³

Facebook has cautioned against ‘intermediary liability’, claiming that part of the Internet’s success has been the ability of operators of various online platforms to share information without fear that the platforms will be held liable for content created and shared by a third party. According to Facebook, Internet platforms should not have the same degree of responsibility as the publisher or speaker of the objectionable content, as not only does this pose the risk of harming the freedom and openness of the Internet, it also does not hold individuals to account for their actions. Facebook argues further that the threat of intermediary liability will have a negative impact on the digital economy with consequences of deterring information technology companies from investing in countries with such laws and potentially turn websites into gatekeepers incentivising them to block user content, thus making the Internet less innovative, collaborative and productive.⁷⁴

With respect to regulating electronic media, the Independent Communications Authority of South Africa (ICASA) is responsible for regulating broadcasting in the public interest and ensuring stability in the information and communication technology (ICT) sector. Importantly, ICASA must ensure that it promotes the interests of consumers with regard to the price, quality, and availability of electronic communication services. Thus, in terms of its empowering legislation, the primary role of ICASA is to promote economic growth within – and as a result of – the ICT sector. However, Internet services are self-regulating, and ICASA does not regulate the content of what gets published online.⁷⁵

Noting Facebook’s challenges in removing content that may constitute hate speech in a local context and its failure to meet the standards of hate speech set in its own policies, as well as the legislative restrictions on ICASA to regulate online content, it is essential that users not only report such content to site administrators but also make use of the public institutions available to them, such as the SAHRC and the Equality Courts. Combating systemic racism and redefining the norms and standards by which all South Africans ought to live by requires the active participation of citizens obtaining redress through the courts and public institutions

⁷³ Salon, O. (2017) “To censor or sanction extreme content? Either way, Facebook can’t win”, *The Guardian*, 23 May 2017, available at <https://www.theguardian.com/news/2017/may/22/facebook-moderator-guidelines-extreme-content-analysis>.

⁷⁴ Facebook (2017) “Written submission for the National Hearing on Racism and Social Media in South Africa”, National Hearing on Racism and Social Media, 15- 16 February 2017.

⁷⁵ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p254-271.

such as the SAHRC, in addition to the public condemnation of the conduct through social media.

The next chapter considers further interventions by both state and civil society actors to combat systemic racism and advance social cohesion.

CHAPTER 6: Interventions to combat racism and build social cohesion

'...South Africa has got millions of walking wounded people, and a wounded person will always look for an opportunity to wound others...We need to put our heads together and see what programmes we can come about for healing.... We need to continue this dialogue around healing of the wounded people, of all races, in this country' – Commissioner Makwetla (extracts from Hearing record)

In 2001, at the conclusion of the Third World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance hosted in South Africa, representatives adopted the historic Durban Declaration and Programme of Action. The Declaration urges 'states to establish and implement without delay national policies and action plans to combat racism, racial discrimination, xenophobia and related intolerance, including their gender-based manifestations'. It also recognises that racial discrimination exists in all societies; no country is free of racism, racial discrimination, xenophobia, and related intolerance, and all countries face challenges to eliminate racial discrimination.⁷⁶

To give effect to the Durban Declaration, the South African government subsequently drafted the NAP as a basis for the development of a comprehensive public policy against racial discrimination. The NAP, seeks to ensure that South Africa upholds its international human rights obligations and promotes the elimination of racism, racial discrimination, xenophobia, and related intolerance in public and public spheres. The NAP was not intended to replace existing laws and policies, but rather to complement existing legislation, policies, and programmes that address equality, equity, and discrimination. Ultimately, the 'NAP envisions uniting South Africans in building a non-racial and tolerant society, that recognises its plurality and diversity based on the values of equality and human dignity through the promotion of anti-racism education, constitutional values and the advancement of human rights, through dialogue and action'.⁷⁷

The NAP is designed to:

- Raise awareness of anti-racism, anti-discrimination, and equality among public officials, civil society and the general public;

⁷⁶ DOJCD "National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2016 – 2021".

⁷⁷ Ibid, para 4

- Encourage the collection of data regarding racism, racial discrimination, xenophobia, and related intolerance and follow a more comprehensive assessment of their needs to effectively combat it;
- Ensure that the concerns of individuals and groups encountering racism, racial discrimination, xenophobia, and related intolerance are more effectively addressed;
- Engender a commitment to eliminating racism, racial discrimination, xenophobia, and related intolerance through appropriate programmes aimed at reaching achievable targets;
- Strengthen programmes for individuals and racism encountering racism, racial discrimination, xenophobia, and related intolerance in education, health, employment, housing, food security, social services, and access to justice;
- Facilitate the identification of legislation that needs to be amended or adopted with a view to improving the protection of victims; and
- Generate a more equal society and strengthen the rule of law and democracy.

During the hearing the DOJCD acknowledged earlier delays in the finalisation of the NAP which was at the time still in draft form.⁷⁸ However, the continued battle against racism in our society, both real and perceived, demonstrates the urgent need for the NAP's implementation in South Africa. The DOJCD has developed programmes that seek to combat systemic racism, including Anti-Racism Week and the Freedom Month Campaign, which specifically targets DOJCD officials, members of the judiciary, magistracy, prosecuting authority, and other key role players within the criminal justice system.

Outcome 14 of the NDP, which speaks to nation building and social cohesion, prioritising knowledge of the Constitution and the values contained therein; equalising opportunities; promoting inclusion and redress; promoting social cohesion across society through increased interaction across race and class; promoting active and responsible citizenry and broad-based leadership; and achieving a social compact that will lay the foundation for equity, inclusion and prosperity for all.⁷⁹ Various government departments have been identified as key role players and implementing authorities of both the NAP and Outcome 14 of the NDP. These include the DOJCD, Department of Arts and Culture (DAC), the Department of Basic Education (DBE), and the Department of Higher Education and Training (DHET).

⁷⁸ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p16. The NAP has since been approved by Parliament.

⁷⁹ National Planning Commission "Outcome 14: Nation building and social cohesion", *National Development Plan 2030*.

The DOJCD is also implementing programmes to raise awareness around constitutional rights, including one that focuses specifically on vulnerable and marginalised groups. The DAC has also prioritised the promotion of national symbols, noting that ‘it is in its symbols and objects that a nation’s collective sense of self, its histories, trials and tribulations, as well as victories can be best captured’.⁸⁰ However, while the symbolism of the heritage of the South African landscape can be a source of patriotism and national pride, it can also serve as a polarising effect and deepen existing socio-historical divisions.⁸¹ The recent student protests at the University of Cape Town calling for the removal of the statue of Cecil Rhodes and the controversies that erupt with proposed street or town name changes, are examples of how these divisions continue to disrupt the country’s nation-building project. The DAC has also embarked on a series of community cohesion projects with the purpose of offering platforms for people of diverse backgrounds to converse in a manner that bridges socio-historical divides premised primarily on race and to assist the DAC in ascertaining the efficacy of its programmatic initiatives to advance social cohesion. Lastly, the DAC advised that it has embarked on a project of ‘moral regeneration’ aimed at citizens and civil society actors to further understand what citizens view as ‘my ideal South Africa.’⁸²

The NDP further recognises that the quality of education and school experience learners receive is intrinsically linked to combating systemic racism and advancing social cohesion. The DBE has emphasised the need for learners to build confidence and to develop into adults with discerning judgment, good communication skills, and an ability to think independently and critically. The DBE also encourages learners to become active global citizens with a strong sense of civic responsibility and a vested interest in contributing towards the progress of the country. To achieve this, teachers and principals must have strong leadership values and recognise their responsibility to promote harmony, creativity, and sound work ethic within schools and the broader society. These values should be embodied in all public schools’ Codes of Conduct.⁸³

Higher Education White Paper 3, released in 1997, provides a programme for the transformation of the higher education sector. Its aim was to ensure a democratic, non-racial and non-sexist system of higher education, promote equity of access, and ensure that all

⁸⁰ Department of Arts and Culture (2017) “Submission to the South African Human Rights Commission”, National Hearing on Racism and Social Media, 15- 16 February 2017.

⁸¹ Ibid.

⁸² Ibid.

⁸³ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p272-276.

students would have the ability to succeed in the education system.⁸⁴ These committees found that racism and sexism are pervasive in the sector and the pace of redress is unacceptably slow.⁸⁵ In 2016, the DHET released a new policy framework for the realisation of social inclusion in the post-school education and training system, based on the values of non-racism, non-sexism, and social justice. The policy intends to assist sectoral institutions to implement and report on elements of social inclusion in line with the DHET's transformation priorities.⁸⁶ While these initiatives are notable, the Hearing Panel highlighted the need for the DHET to continue to engage constructively with student bodies who are calling for more dynamic and urgent transformation of the higher education sector.⁸⁷ It is perhaps, significant in the context of the Hearing for sector authorities such as the DHET, and the DBE to consider how social media may be used to catalyse transformation and respect for rights with a view that students are able to engage even more robustly on these important issues.

Cyber-bullying has indeed presented a new set of challenges for the education sector's social cohesion project. Access to the internet and mobile phone communication has significantly changed the way in which young people communicate and altered the type and content of information they share.⁸⁸ Due to the perceived anonymity and distance presented by online communication, social media is increasingly being used as a platform for bullying with at least one in five South African teenagers reporting that they have experienced some form of cyber-bullying first-hand. A survey of almost 5 000 teenagers aged 13 to 18 in 11 countries found that roughly 24% of South Africa's teenagers had experienced online bullying, ranking South Africa the fourth highest country after New Zealand, the United States, and Ireland. While online bullying may not be limited to race, social media has presented an opportunity for anyone to become a bully, with psychological impacts that could potentially last for years.⁸⁹

In an effort to combat cyber-bullying and improve awareness around the issue, the DBE has developed learning materials targeted at both children and parents. The materials provide information on available forms of appropriate intervention and also use social media to

⁸⁴ Department of Education (1997) "Programme for the Transformation of Higher Education", *General Notice 1196 of 1997 Education White Paper 3*, 24 July 1997.

⁸⁵ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p292.

⁸⁶ Department of Higher Education and Training (2016) "Policy Framework for the Realisation of Social Inclusion in the Post-School Education and Training System", *Government Gazette*, 15 December 2016.

⁸⁷ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p303.

⁸⁸ Badenforst, C. (2011) "Legal responses to cyber bullying and sexting in South Africa", *Centre for Justice and Crime Prevention*.

⁸⁹ Naik, S. (2017) "The devastating consequences of cyberbullying", *IOL*, 25 February 2017.

educate young people about the dangers associated with cyber-bullying.⁹⁰ It is noted however, that for many learners for whom access to social media is still beyond their reach, the DBE has opportunities to create an enabling environment through which all learners are able to engage with and respond through social media in an informed way. These macro level changes do not however, detract from the fact that in certain instances victims may seek stronger forms of intervention.

The Harassment Act, which also applies to cyber-bullying, prohibits the unreasonable following, watching, pursuing, or accosting of a person in addition to the prohibition of unreasonable verbal, electronic, or other communication. A victim of harassment may approach the magistrates' court for the granting of a protection order, which prohibits the perpetrator from engaging in various forms of harassment and carries criminal or civil penalties if the perpetrator contravenes the conditions of the order. Any person who is the victim of harassment may approach the court for a protection order and children can apply without the consent of parents or a guardian. In the event that the victim is uncertain of the identity of the person committing the harassment, a protection order may still be sought from the courts who may direct the SAPS to investigate the matter and identify the perpetrator. In the event that the person is engaging in harassment via electronic media communications, the court may direct the electronic communications service provider to provide the details of the perpetrator.

A person does not have to have experienced harm (mental, psychological, physical, or economic) in the past to apply for a protection order; if the fear of future harm is reasonable, it is sufficient for the court to grant an order. Importantly, one does not need a lawyer to assist in applications for the granting of a protection order. Similar to that of the Equality Courts, the process for applying for a protection order is intended to be uncomplicated and inexpensive, and the clerks of the court are obliged to explain and guide applicants through all procedural processes.⁹¹

Throughout the Hearing, the question of addressing 'harm to the soul' arose. Whereas online racist conduct may not necessarily lead to violence or the destruction of property, it is indubitably destructive to the psyche of the society. Seeking protection orders to hold individuals accountable for allegations of online racist conduct, outside of the remedies provided in PEPUDA, was explored during the Hearing as a form of censure with the ability to

⁹⁰ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p277.

⁹¹ Rice, K (2013) "A guide to the Protection from Harassment Act", *Centre for Justice and Crime Prevention* and published on polity.org.za.

curb future acts. While online racist conduct may be hurtful and harmful, it can also cause emotional and psychological distress, which can be construed as harassment under the Harassment Act. Noting that the processes of obtaining a protection order is similar to that of the Equality Courts, the granting of a protection order to censure online racist conduct may suffice as a remedy where civil damages or criminal prosecution may not be suitable.⁹²

The next chapter further examines approaches to freedom of expression and legislative interventions proposed by the South African government. It also examines legislative interventions in select foreign jurisdictions, particularly around combating online hate speech.

⁹² *Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017*, p221.

CHAPTER 7: Domestic, Regional and International Approaches to Freedom of Expression and Combating Online Hate

'We would hate to see the NPA devoting a huge amount of resources to complaints on social media that are expanding exponentially all the time, and the criminal law in a sense is a very blunt instrument with your prosecutions, long and drawn-out trials, appeals... for dealing with issues that are very much questions of the human mind, human relationships. On the other hand, we cannot allow impunity, simply because it is difficult to deal with it. These things are extremely hurtful, and not just hurtful, they are dangerous to the basic tranquillity in society.' – Judge Albie Sachs (extracts from Hearing record)

Article 19 of the Universal Declaration of Human Rights (UDHR) states:

'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.'

Freedom of opinion and expression is universally recognised as indispensable for the full development of the person and essential to the foundation of a free and democratic society. The right is necessary for advancing transparency and accountability and essential for promoting and protecting other fundamental rights.⁹³ A crucial component of the right to freedom of opinion and expression is a free and uncensored media, which allows for the free communication of information and ideas about public and political issues between citizens. The advent of internet and mobile-based electronic information systems has substantially changed the manner in which people communicate and allows for the free flow of information without reliance on traditional media intermediaries. Consequently, it is important for States to take the necessary steps to foster the independence of new media and facilitate access to individuals.⁹⁴

However, the right to freedom of expression and opinion is not absolute, and the exercise of the right carries both duties and responsibilities. Legitimate limitation of the right is provided for in law, and is necessary for the respect of the rights and reputations of others, and for the

⁹³ UN HRC, General Comment 34, *Article 19: Freedom of opinion and expression*, CCPR/C/GC/34, para. 2-3.

⁹⁴ *Ibid*, para 13 and 15.

protection of national security, public order, public health, and public morals, is acceptable in terms of the international legal framework.⁹⁵

In 2012, the United Nations (UN) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression released a report focusing on hate speech and incitement to hatred.⁹⁶ Whilst noting the significance of laws that conform to international norms and principles to combat hate speech, the Special Rapporteur emphasised the importance and need for non-legal measures to tackle the root causes of hatred and intolerance as supplementing legal responses to hate speech.⁹⁷ To this end, the Special Rapporteur recommended a number of mechanisms to address ensure the right to expression is protected and to address violations arising from the exercise of the right, including:

- i. That only serious and extreme instances of incitement to hatred be prohibited as criminal offences.⁹⁸ Furthermore, that States establish high and robust thresholds in this regard which includes the following elements: severity, intent, content, extent, likelihood or probability of harm occurring, imminence and context. Such examination must be performed on an ad hoc basis, taking context into consideration;⁹⁹
- ii. For other types of hate speech that do not meet the threshold of advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence, the Special Rapporteur recommends that States adopt civil laws, with the application of diverse procedural and substantive remedies, such as restoring reputation, preventing recurrence and providing financial compensation;¹⁰⁰ and
- iii. Training should be offered to the judiciary to ensure a clear and consistent understanding of the forms and thresholds of hate speech under international law. In addition, continuing education opportunities for legal professionals and law enforcement officials in relation to relevant national and international provisions, including thresholds for incitement, should be made widely available.¹⁰¹

With respect to internet-based information, restrictions to the right of freedom of expression and opinion should be content-specific, rather than generic.¹⁰² In 2016, the Special Rapporteur

⁹⁵ Article 19(3), International Covenant on Civil and Political Rights, 1966.

⁹⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/67/357, 7 September 2012.

⁹⁷ *Ibid.*, p.2.

⁹⁸ *Ibid.*, para 79.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, para 80.

¹⁰¹ *Ibid.*, para 82.

¹⁰² UN HRC, General Comment 34, *Article 19: Freedom of opinion and expression*, CCPR/C/GC/34, para 43.

issued two further reports focusing on the intersection of State regulation, the private sector, and freedom of expression in a digital age¹⁰³ and contemporary challenges confronting freedom of expression.¹⁰⁴ In these reports, the UN Special Rapporteur recognised the role of the private sector in expanding freedom of expression and access to information, including social media.¹⁰⁵

The reports examine whether private entities should have the same responsibilities as public authorities, whether these responsibilities should be derived from human rights law, and how the relationships between corporate actors and the State should be structured. The Special Rapporteur acknowledged that the information and communication sector is under constant and rapid development and that consequently, legal and policy interventions may fail to address trends that are only now emerging or have yet to emerge.¹⁰⁶ The Special Rapporteur further outlined content restrictions by governments and individuals around extremism or hatred and hostility or harassment as areas that require further reporting.¹⁰⁷ However, the Special Rapporteur concluded that the digital environment will encounter persistent threats to freedom of opinion and expression, including 'government dominance of, or attempts to dominate sources of information, using tools of censorship against online services and infrastructure; the failures of many business enterprises to ensure the promotion and protection of rights in pursuit of commercial interests; and the often contradictory demands of individuals that business entities provide them not only with security, but also convenience, connectivity, and community'.¹⁰⁸ The Special Rapporteur concluded further that while States must not require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, private entities must ensure the greatest possible transparency in their policies, standards, and actions that implicate freedom of expression and other fundamental rights.¹⁰⁹

Importantly, the Special Rapporteur emphasised that although non-State actors can present serious threats to many people exercising their right to expression, State policies aimed at restricting freedom of expression can risk undermining the media, critical voices, and activists.¹¹⁰ Freedom of expression remains vital to public participation and debate, accountability, sustainable development and human development; the exercise of all other

¹⁰³ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/32/38, 11 May 2016.

¹⁰⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/71/373, 6 September 2016.

¹⁰⁵ A/HRC/32/38, para 2.

¹⁰⁶ Ibid, para 82.

¹⁰⁷ Ibid, para 75.

¹⁰⁸ Ibid, para 82.

¹⁰⁹ Ibid, para 85; see also para 89.

¹¹⁰ A/71/373, para 2.

rights. In addition, as noted by the Special Rapporteur, 'expression should provoke controversy, reaction and discourse, the development of opinion, critical thinking, even joy, anger or sadness – but not punishment, fear and silence'.¹¹¹

The Declaration of Principles on Freedom of Expression in Africa expands on Article 9 of the African Charter, which provides for the rights to receive information and freely disseminate opinions within the confines of the law. It echoes Article 19 of the UDHR, reaffirming that 'freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy'.¹¹² Further, 'any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society'.¹¹³

The African Declaration on Internet Rights and Freedoms, which is a Pan-African initiative led by civil society groups, further emphasises that the 'Internet is an enabling space and resource for the realisation of all human rights, including the right to hold opinions without interference, the right to freedom of expression and information, the right to freedom of assembly and association, the right to freedom of thought, conscience and religion, the right to be free from discrimination in all forms, the right of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language...'. Importantly, the Internet is 'particularly relevant to social, economic and human development in Africa'.¹¹⁴ Noting the crucial role that the Internet plays in modern African society, the civil society-developed Declaration advises that the Internet should be open, accessible, and affordable; promote freedom of expression and the right to information; protect the privacy and personal data of individuals; and be a secure, stable, resilient, reliable, and trustworthy network.

The ACHPR has called on African Member States to take the necessary steps to guarantee, respect, and protect all citizens' rights to freedom of information and expression through access to internet services.¹¹⁵

As a member of the regional and international legal system, South Africa is required to ensure that international legal principles are adequately translated into the domestic legal framework.

¹¹¹ Ibid, para 3.

¹¹² African Commission on Human and People's Rights, *Declaration of Principles on Freedom of Expression in Africa*, Article 1(1).

¹¹³ Ibid, Article 2(2).

¹¹⁴ Available at < <http://africaninternetrights.org/articles/>>.

¹¹⁵ African Commission on Human and People's Rights, *Resolution on the Right to Freedom of Information and Expression on the Internet in Africa*, ACHPR/Res. 362(LIX) 2016.

As a party to the ICCPR and ICERD, South Africa is regularly subject to review by respective treaty body committees to ensure that it complies with its international human rights obligations. In 2016, the Human Rights Committee (HRC) expressed concern about the inability of the South African government to prevent and address racist and xenophobic attacks and hold perpetrators accountable.¹¹⁶ The HRC specifically recommended that the government should,

*'...redouble its efforts to prevent and eradicate all manifestations of racism and xenophobia, protect all communities in South Africa against racist and xenophobic attacks, and improve policing responses to violence against non-nationals. Effective investigations into alleged racist and xenophobic attacks and other hate crimes should be conducted systematically, perpetrators should be prosecuted and, if convicted, punished with appropriate sanctions, and victims should be provided with adequate remedies. The State party should also pass appropriate legislation explicitly prohibiting hate crimes and hate speech as soon as possible.'*¹¹⁷

Similarly, the Committee on the Elimination of Racial Discrimination (CERD) expressed concern at the rise of hate crimes and hate speech in South Africa, including 'physical attacks against certain ethnic groups and non-citizens, discriminatory statements by State officials and politicians, and the increase in the use of media and the internet to propagate racist hate speech.'¹¹⁸

The South African government has subsequently released the Draft Prevention and Combating of Hate Crimes and Hate Speech Bill (the Bill), which has generated much debate, particularly regarding the extent to which freedom of expression is regulated and the implications of further regulation on new media users. The DOJCD has stated that the purpose of the Bill is to address the increasing number of racially-motivated hate crimes and hate speech and to assist victims of such violations. In addition to penalties and sanctions, the Bill also aims to place a responsibility on the State to develop programmes that will assist in the prevention and combating of hate crimes and hate speech.¹¹⁹

¹¹⁶ UN Human Rights Committee (HRC), *Concluding observations on the initial report of South Africa*, 27 April 2016, CCPR/C/ZAF/CO/1 See para 14

¹¹⁷ *Ibid*, para 15

¹¹⁸ UN Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations on the combined fourth to eighth periodic reports of South Africa*, 5 October 2016, CERD/C/ZAF/CO/4-8 para 12

¹¹⁹ *Record of the SAHRC National Hearing on Racism and Social Media in South Africa*, 15-17 February 2017, p25.

The SAPS has expressed support for the criminalisation of hate speech, stating that the meaning of words should not be underestimated. Hate speech has the potential to threaten the stability of the state and criminalisation can have a positive impact in promoting the maintenance of public order and public peace. Moreover, people who are victims of hate speech can also retaliate by becoming perpetrators, thereby providing ground for future threats to the stability of society.¹²⁰

The Bill presents an opportunity to collate statistics reflecting incidents of crime motivated by racism. While South Africa's National Prosecuting Authority (NPA) maintains performance data and statistics regarding various types of crimes, this does not extend to race-related offences. This is to a large degree a result of South Africa's criminal law, which allows for racism to be considered as a motivation to commit a common law offence, such as *crimen injuria*, assault, intimidation, sexual assault, and malicious damage to property, amongst others.¹²¹ The Bill therefore presents an opportunity to maintain statistical records of race-related hate crimes or hate speech and for these to be reported to Parliament.¹²²

However, critics of the Bill highlight the potential threat posed by the regulation of free speech on South Africa's democracy, particularly with regard to the inclusion of grounds for criminalisation. Furthermore, concern has been raised over the potential limitations the Bill poses on those who may be critical of government, or the ability of members of the public to engage freely in open debate where the subject matter may be controversial but necessary to highlight challenges that impede the advancement of South Africa's social cohesion project.

With respect to social media complaints, prosecuting an individual for racist hate speech as envisioned in the Bill, will require cooperation between the investigating authorities and administrators to identify and locate the perpetrator. However, noting that in some instances users of social media platforms may create fake accounts to maintain their anonymity, attempts to locate the perpetrator may strain the already limited State resources, particularly considering the country's alarming violent crime rate.¹²³

During the Hearing, Facebook highlighted the challenges regarding allegations of online hate and the impact it has on exacerbating social tensions, noting that it is a global phenomenon. Therefore, the practical challenges of combating online hate is not unique to South Africa.

¹²⁰ Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017, p173.

¹²¹ Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017, p39.

¹²² Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017, p40.

¹²³ Record of the SAHRC National Hearing on Racism and Social Media in South Africa, 15-17 February 2017, p42 – 49.

Hate speech that advocates hate crimes and ethnic cleansing of certain population groups continues to pose challenges for politicians across the world and often manifests in blame being attributed to vulnerable groups for social milieus that governments have failed to address. In recent years, these sentiments have been expressed on social media platforms, which enable them to rapidly spread through society. Therefore, speech becomes dangerous, especially where the speaker has power and/or influence over an audience and that audience is vulnerable to incitement. Therefore, the call for the incitement of collective violence has a reasonable chance of succeeding.¹²⁴

In 2007 in Kenya, post-election violence led to the promulgation of the National Cohesion and Integration Commission Act of 2008, where 'hate speech' is defined as 'speech that advocates or encourages violent acts against a specific group, and creates a climate of hate or prejudice, which may, in turn, foster the commission of hate crimes'. The provision can be used to monitor, remove or block content, including online content. Hate speech can include words or behaviour, the display, publishing or distribution of written material, and public performances of plays or recordings. During the run-up to the Kenya's 2013 elections, the provision was used to address hate speech espoused via SMS and on the internet.¹²⁵

In an attempt to monitor the role that new media plays in an election, research conducted in Kenya found Facebook to be the preferred online media platform for promoting dangerous speech. New media platforms were monitored for dangerous speech over a ten month period between September 2012 and June 2013, which saw 792 statements collected in November 2012 alone, with 78% of these reportedly constituting dangerous speech.¹²⁶ Furthermore, fake accounts are also being created in the names of popular political and community leaders, with target audiences often unaware of the accounts' inauthenticity. Consequently, online hate can incite deadly violence, with the responsible individuals often evading the justice system.¹²⁷

However, despite the clear need for more stringent measures to address hate speech in Kenya, investigating authorities continue to struggle to identify perpetrators and collect sufficient evidence required for prosecution due to concealed web identities. Investigating officers also lack the requisite knowledge of the dynamics of social media platforms.

In Germany, rather than targeting the individual responsible for spreading online hate, Germany's Justice Minister Heiko Maas recently proposed legislation to fight hate speech, which, if implemented, could result in social media companies being fined up to approximately

¹²⁴ Umati (2012) "Monitoring Online Dangerous Speech", Nairobi: Kenya, November 2012.

¹²⁵ Muendo, M. (2017) "The options for Kenya as an impending election fuels fear of hate speech", *The Conversation*, 14 February 2017.

¹²⁶ Umati (2012) "Monitoring Online Dangerous Speech", Nairobi: Kenya, November 2012.

¹²⁷ Koech, B. (2013) "Tackling online hate speech in Kenya", *Institute for War and Peace Reporting*.

USD 53 million in cases of non-compliance with the legislation. In terms of the rules that have been proposed, Internet companies will be required to clearly explain compliance procedures to their users and follow up on each complaint received. Companies will have 24 hours to delete illegal content while offensive content that may not be illegal will be required to be blocked or removed within seven days.¹²⁸

The proposed legislation is in response to the increase of ‘fake news’ that is alleged to have influenced the outcomes of the United States 2016 elections. Germany’s Chancellor, Angela Merkel, has received immense criticism for her approach to the Syrian refugee crisis and fears are that online media sites may be used to influence the country’s elections.¹²⁹ Germany’s Justice Minister has also raised concern that too little criminal content is being deleted from online platforms or not being deleted quickly enough and that it appears that these platforms do not take the complaints of their users seriously.¹³⁰ Further, German officials have cited the surge of hate speech across the Internet as a major factor behind the rise of violence committed against refugees and police officers in Germany.¹³¹

The United Nations Educational, Scientific, and Cultural Organisation (UNESCO) notes that online hate speech is located at the intersection of multiple tensions, demonstrating that new technologies with transformative potential such as the Internet present both opportunities and challenges in balancing the fundamental right of freedom of expression and defending human dignity. Part of the challenge in combating online hate speech is that the term ‘hate speech’ is contested. Internet intermediaries have advanced their own definitions of the term and limit certain forms of expression, while national and regional bodies are rooted in local contexts. Consequently, a universally shared definition of ‘hate speech’ seems unlikely. However, the increase in violence caused by hate speech has resulted in various stakeholders coming together to find a solution.¹³²

The speed at which information travels through the internet also presents jurisdictional challenges, making it difficult for governments to enforce national legislation in the virtual world. The nature of online hate speech and its relation to offline speech is also poorly understood. Much of the focus in curbing online hate speech has been on the content of the speech rather than attempting to understand the impetus for the phenomenon – such as increased experiences poverty and inequality – which are likely factors influencing objectionable content, leading to actual discrimination, hostility, or violence. Various initiatives

¹²⁸ “WJC welcomes draft legislation in Germany to combat online hate”, *World Jewish Congress*, 14 March 2017.

¹²⁹ Fiola, A. (2017) “How do you stop fake news? In Germany, with a law.” *Washington Post*, 5 April 2017.

¹³⁰ “WJC welcomes draft legislation in Germany to combat online hate”, *World Jewish Congress*, 14 March 2017.

¹³¹Fiola, A. (2017) “How do you stop fake news? In Germany, with a law.” *Washington Post*, 5 April 2017.

¹³² Gagliardone, I *et al.* (2015) “Countering Online Hate Speech”, *UNESCO*.

have been undertaken globally to address the phenomenon of online hate, including: dialogue surrounding definitions and contextual considerations that give rise to online hate, programmes of counter-speech where the same platforms used to promote online hate are also used to diffuse it, and educational initiatives to educate users on what is online hate speech and how to report.¹³³

A multi-sectoral approach and understanding, not limited to legal solutions, and which recognises what is essentially a problem of human interaction, is a necessary first step to combat the increasing phenomenon of unlawful hate speech.

¹³³ Ibid.

CHAPTER 8: Recommendations

'...the reason we have chosen to look particularly at racism and the social media is because of the challenges that we are coming across in doing our work as the Commission, especially with regard to hate speech, racism...The social media seems to present a particularly difficult challenge, because we often run into a wall when we do our investigations, to try and identify the sources of such violations of human rights, in order to try and identify the perpetrators, in order to assist our complainants, to get some form of redress. But also in general to try and deal with the problem of hate and racism.' – Commissioner Majola (extracts from the Hearing record).

8.1. Initiatives to Advance Social Cohesion

All Hearing submissions recognised that despite South Africa's significant gains advancing the ideals of a non-racist democracy, pervasive social divides necessitate further constructive dialogue between the country's various constituent groups. Such dialogue must be constructive with the concrete objective to address the wounds of the past. It is likely that dialogue of this nature could generate anger, but it is also likely to result in South Africans reaching a common understanding about why certain conduct is perceived as racist, and how such conduct undermines human dignity. Indeed, as highlighted by Facebook during the Hearing:

'Sometimes that dialogue is going to be difficult. Sometimes that dialogue is going to awaken hurt that people thought were gone. But I think that the type of constructive dialogue is critical in building a society that actually works....' – Facebook (extracts from Hearing record)

The CERD has previously called on the South African government to 'conduct educational campaigns to address the root causes of prejudice; promote tolerance; and respect for diversity, with a focus on the role and responsibilities of journalists and public officials in such efforts.'¹³⁴ In addition, Chapter 5 of PEPUDA requires the state and all persons to promote the advancement of equality.

¹³⁴ UN Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations on the combined fourth to eighth periodic reports of South Africa*, 5 October 2016, CERD/C/ZAF/CO/4-8, para 13.

To this end, it is recommended that:

1. The SAHRC must work together with Internet service providers and social media platforms, and regional and international bodies, to advance an understanding of the importance of promoting freedom of expression, while limiting forms of expression that undermine human dignity recognised in human rights instruments subscribed to globally and in the South African Constitution.
2. Engagement between stakeholders such as the DOJCD and the Law Reform Commission, other regulatory bodies such as the Information Regulator and ICASA, civil society organisations, internet and social media providers and hosts; chapter 9 bodies and the public to establish roles, responsibilities and consequences where administrators and hosts fail to adequately regulate content which is hate speech in a reasonable and timely manner is strongly recommended.
3. The DOJCD should actively promote efforts to implement the NAP as a matter of priority and; take further steps to ensure the review and operationalisation of Chapter 5 of PEPUDA.
4. Government departments continue to support the important work undertaken by various civil-society organisations on issues pertaining to social cohesion and the advancement of substantive equality, including the SAHRC.

8.2. Self-Regulation and Education

‘One does not want over-correction, and in a sense it destroys that very fun, if you like, of Facebook...the spontaneity and openness and if you are worried all the time about controls and frontiers and boundaries, it somehow gets into the core, even if you do not desist. But I do not feel that the danger of over-correction means no correction...’ – Judge Albie Sachs (extracts from Hearing record).

The role that the Internet has played in advancing participatory democratic processes and the significant contributions toward economic growth in a globalised market economy cannot be underestimated. However, South Africa’s journey to democracy has been a long and painful one, the ramifications of which still permeate society. The implications of hate crimes and in particular, its untold impact on society, requires that all role players closely and urgently engage on the matter. The conversation is therefore no longer about the ills of social media as its positive value is incontrovertible. However, given this very significance of technology

and the 4th industrial revolution, in countries like South Africa, the role social media can play in eradicating such crimes remain an area that requires urgent and considered investigation by all role-players. Role-players including individuals and Internet service providers, must consciously seek to place basic respect for human rights at the forefront of their consideration to avoid developments in protection frameworks which unduly limit one basic right over the other. In countries like South Africa the need for such engagements are even more compelling given our history, and transformation project. While reforms and practical responses are navigated it is also important for both Internet service providers and users to educate themselves on the nature of Internet freedoms and the role the Internet can play in strengthening democracies, particularly in Africa. At the same time, there is also a responsibility on both Internet service providers and users to ensure that they respect the dignity of others in order to realise a society based on the ideals enshrined in the Constitution.

The SAHRC recommends:

- As a National Human Rights Institution, the SAHRC must continue to promote the adherence and implementation of ‘best practice’ guidelines, such as those issued by UNESCO.
- The SAHRC must work with regulatory bodies, such as ICASA, DOJCD, the Information Regulator, and private intermediaries such as Google to determine how best online hate speech may be combatted, and to consider the roles and responsibilities of active parties in the process of information communication, and how collective efforts may be brought to bear to assist in combating online hate speech, promoting self-regulation, and promoting the values of the NAP, whilst still remaining within the confines of its enabling legislation.
- The SAHRC must work together with Internet service providers and social media platforms, and regional and international bodies, to advance an understanding of the importance of promoting freedom of expression, while limiting forms of expression that undermine human dignity recognised in charters subscribed to globally and in the South African Constitution.

8.3. Strengthening Mechanisms of Accountability

While a nuanced approach that utilises both legal and non-legal forms of intervention is required to combat all forms of discrimination and manifestations of online hate in South Africa, the law can be used creatively to achieve systemic change.

The SAHRC recommends that:

- The DOJCD should consider the potential remedies provided in the Harassment Act to complement those provided in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA), particularly in light of the limited resources available for conducting investigations arising from violations conducted through social media. The protection orders provided for in the Harassment Act may result in achieving both individual redress for harm suffered through online racist expression, while at the same time generating the requisite public censure required to change social behaviour and combat systemic discrimination.
- The DOJCD should actively promote and strengthen the Equality Courts and provide the necessary resources required for their effective functioning.
- The SAHRC must work with regulatory bodies, such as ICASA, DOJCD, the Information Regulator of South Africa, and private intermediaries such as Google to determine how best online hate speech may be combatted, what the roles and responsibilities of active parties in the process of information communication are, and how collective efforts may be brought to bear to assist in combating online hate speech and promoting the values of the NAP, whilst still remaining within the confines of its enabling legislation.
- The active and public promotion, together with monitoring of progressive achievement of the objectives of the NDP and NAP, particularly those objectives which relate to social cohesion promotion by Government departments, including the DOJCD, DAC, DBE and DHET, is strongly advocated. Such initiatives should endeavour to advance the awareness of the South African public on the political, economic, and social dimensions of racism and the manner in which it inhibits the advancement of the country's democratic processes.

8.4. Monitoring and Data Collection

While it was noted that proposed legislation to combat hate crimes and hate speech will establish a framework to collate data on crimes motivated by hate, data is still required to monitor the prevalence of all forms of hate in South Africa and the effectiveness of the NAP. Such data is also required to understand the extent to which marginalised groups endure violations of the right to equality as provided for in PEPUDA.

The SAHRC recommends that:

- The NPA, together with the SAPS, strengthen data collection mechanisms in respect of the number of individuals within South Africa exposed to human rights violations on the grounds listed in PEPUA, including race, ethnicity, gender, or religion.

It is disappointing that after 24 years since the introduction of democracy in South Africa, racial discrimination remains one of the most pervasive human rights violations in the country. It is necessary for the government to strengthen the capacity of the NPA and SAPS to collect and disaggregate statistical evidence to support effective planning and appropriate responses to the problem of racism in this country.

Conclusion

Incidents of racism and racial discrimination in South Africa have increased, intensified and spread rapidly by virtue of the power of social media and technology to reach millions of people in seconds. In a country where socio-economic and structural inequality prevails, and where the legacy of race based superiority remains a slow healing wound, the potential for prohibited race based hate speech expressed through social media to deepen hate, rupture fragile gains made toward social cohesion are vastly amplified.

The SAHRC as South Africa's national human rights institution, is the champion of all basic human rights, not least the right to freedom of expression and the rights to dignity and equality. It is apparent that as contemporary societies grapple with the impact of technology on information and communication in the context of rights, South Africa too must engage on this matter. To initiate such a conversation and stimulate diverse inputs, the SAHRC hosted a National Hearing on Racism and Social Media on 15 and 16 February 2017. The key objectives of the hearing were to assist the SAHRC in convening diverse stakeholders in conversation, regarding the critical rights of dignity, expression, and equality in light of global developments, and on account of its own observations arising from complaints to the SAHRC. In addition, the SAHRC sought to begin to document research, views and inputs that would inform, support and influence, policy development, legislative reforms, and social change for the protection of basic rights. The Hearing was further intended to inform and shape the roles and responsibilities key stakeholders need to play to prevent 'on-line' hate speech and to promote social cohesion.

In an effort to achieve these objectives, the National Hearing convened policy-makers, regulatory bodies, civil society organisations, researchers, academics, and social commentators, together with a former justice of South Africa's Constitutional Court to contribute to the Hearing. The participants detailed the complexities of addressing racism and racial discrimination in the context of social media, highlighting contemporary trends and challenges in combatting racism and hate speech. It was significant however, that despite unequal access to technology in South Africa, a clear recognition was afforded the significance of technology in the future of the country, and as a platform through which social cohesion could be promoted as opposed to thwarted. The Hearing served as an opportunity for the SAHRC to further enhance its own understanding, and that of the general public about the evolution of internet rights. In the course of the hearing, important flags requiring closer attention regarding the role and responsibilities of private entities – such as social media platforms also arose. Additionally, the Hearing provided an opportunity for the SAHRC to build on its approach to issues of racism, racial discrimination, and social cohesion.

The Hearing additionally provided a platform through which a number of public bodies were able to provide information in respect of the measures being implemented to promote social cohesion and to investigate complaints pertaining to racially motivated hate crimes or hate speech.

As a National Human Rights Institution, it is incumbent upon the SAHRC to continue to promote the adherence and implementation of 'best practice' guidelines, such as those issued by UNESCO. Further, the SAHRC must work with regulatory bodies, such as ICASA and the Information Regulator, persons in positions of leadership and other stakeholders to sustain research, influence change, encourage thinking and responses to efforts to combating online hate speech and promoting the values of the NAP, without compromising fundamental rights to access information and freedom of expression. The hearing process emphasised the need for the SAHRC to work together with Internet service providers and social media intermediaries as stakeholders to discuss and carve roles and responsibilities in the interests of human rights, guided by the Constitution.

It is clear from the Hearing that no clear solution or quick-fix will resolve the challenge posed by social media which although a neutral medium, provides a means through which crimes such as hate speech are initiated, advocated, and spread to millions of people instantaneously. Collective efforts are required by all stakeholders to become more technologically astute, enhance the legislative and enforcement environment, demonstrate through leadership a will to shrink the space for race based hate speech; clarify roles and responsibilities, contribute to global and regional best practises, and encourage self-regulation as mechanisms to support expression and democracy. South Africa must continue to work toward achieving the goals envisaged when it first became a democracy more than 20 years ago. The sacrifices endured by so many to realise the dream of democracy must not be forgotten, nor should we allow the social ills that continue to plague our society to define our destiny. Panellist Commissioner Makwetla, aptly captures this sentiment in the transcript extract below:

'Racism is a scourge. It is one that keeps coming up in our lives on a regular basis. We dare not allow ourselves and the millions of disadvantaged people in our country to get used to this scourge. It is thus important that we thank and acknowledge everyone that is here, because it confirms our belief that racism shall not be tolerated in our country. We have lived through years of institutionalised discrimination and racist policies and it has taken many, many

years to achieve our hard-won democracy and the birth of the South African Constitution.' (Extract from the Hearing record)

Annexure 'A' - Methodology and Hearing Procedure

Building on the work undertaken by the SAHRC to address racism and racial discrimination, the purpose of the National Hearing was to convene policy-makers, regulatory bodies, civil society organisations, researchers, academics, and social commentators to inform both the SAHRC and the general public on the complexities of addressing racism and racial discrimination in the context of social media. However, the intention was not to address the root causes that lead to outbursts of alleged racial discrimination on social media platforms, or to pronounce on the legitimacy of current legislation or policies that aim to give effect to the right to equality, but rather to gain further insight and understanding as to why challenges in advancing substantive equality continue to occur notwithstanding the laws and policies currently in place.

The following recommendations arose from engagements with the submissions to the Hearing:

1. The DOJCD should consider the potential remedies provided in the Harassment Act to complement those provided in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA), particularly in light of the limited resources available for conducting investigations arising from violations conducted through social media. The protection orders provided for in the Harassment Act may result in achieving both individual redress for harm suffered through online racist expression, while at the same time generating the requisite public censure required to change social behaviour and combat systemic discrimination.
2. The DOJCD should actively promote and strengthen the Equality Courts and provide the necessary resources required for their effective functioning.
3. The NPA, together with the SAPS, needs to strengthen data collection mechanisms to account for the number of individuals within South Africa exposed to human rights violations on the grounds listed in PEPUDA, including race, ethnicity, gender or religion.
4. The SAHRC must work with regulatory bodies, such as ICASA, DOJCD, the Information Regulator of South Africa, and private intermediaries such as Google to determine how best online hate speech may be combatted, what the roles and responsibilities of active parties in the process of information communication are, and how collective efforts may be brought to bear to assist in combating online hate speech and promoting the values of the NAP, whilst still remaining within the confines of its enabling legislation.

5. The SAHRC must work together with Internet service providers and social media platforms, and regional and international bodies, to advance an understanding of the importance of promoting freedom of expression, while limiting forms of expression that undermine human dignity recognised in human rights instruments subscribed to globally and in the South African Constitution.
6. Engagement between stakeholders such as the DOJCD and the Law Reform Commission, other regulatory bodies such as the Information Regulator and ICASA, civil society organisations, internet and social media providers and hosts; chapter 9 bodies and the public to establish roles, responsibilities and consequences where administrators and hosts fail to adequately regulate content which is hate speech in a reasonable and timely manner is strongly recommended.
7. The active and public promotion, together with monitoring of progressive achievement of the objectives of the NDP and NAP, particularly those objectives which relate to social cohesion promotion by Government departments, including the DOJCD, DAC, DBE and DHET, is strongly advocated. Such initiatives should endeavour to advance the awareness of the South African public on the political, economic, and social dimensions of racism and the manner in which it inhibits the advancement of the country's democratic processes.
8. The DOJCD should actively promote efforts to implement the NAP as a matter of priority and; take further steps to ensure the review and operationalisation of Chapter 5 of PEPUDA.
9. Government departments should continue to support the important work undertaken by various civil-society organisations on issues pertaining to social cohesion and the advancement of substantive equality, including the SAHRC.

As per the requirements of Article 21 of the SAHRC CHP, the Hearing Panel comprised of the following members:

- Commissioner Bongani Majola – Chairperson of the SAHRC;
- Commissioner Angie Makwetla – responsible for the strategic direction of the Children's Rights portfolio; and
- Judge Albie Sachs – former Constitutional Court Justice who continues to play an active role in matters pertaining to social cohesion in South Africa.

The National Hearing was hosted over a period of two days to ensure that while sufficient time was allocated to ventilating the necessary issues, the process was also confined to achieving its specific objectives. Due to the social complexities associated with racism and that

complaints received by the SAHRC are predominantly between private parties rather than against particular government departments, certain formalities associated with the National Hearing process, such as providing testimony under oath, were relaxed. This notwithstanding, the National Hearing was still formally constituted by inviting respondent stakeholders to participate on specific terms. It was hoped that such an engagement would contribute to developing a more comprehensive understanding of the manner in which racism manifests in South Africa and provide structured guidelines on how to respond to these varied issues toward the advancement of substantive equality.

Respondent stakeholders were formally invited to make written submissions and appear before the Hearing Panel. Stakeholders were identified based on the role that they play as implementing authorities of legislation or the NAP aimed to strengthen social cohesion or pertinent roles that they have played in the context of social cohesion, freedom of expression, and/or social media.¹³⁵

¹³⁵ The list of respondent stakeholders invited to the National Hearing is attached to this Report as 'Annexure B'.

Annexure 'B' – List of Respondent Stakeholders

(in order of appearance, as per the Hearing Programme)

Respondent	Presenter(s)
Department of Justice and Constitutional Development	Ms D Franzman (Chief Director: Social Justice and Cohesion) Ms T Ross
National Prosecuting Authority	Adv. S Mzinyathi (Director of Public Prosecutions)
FW De Klerk Foundation	Ms P Dube (Director: Centre for Constitutional Rights) Ms Z Dawood (Director: Centre for Unity and Diversity)
Freedom of Expression Institute	Ms T Fokane (Executive Director) Ms S Linderboom (Head: FXI Law Clinic)
Facebook	Ms E Okobi (Public Policy Director, Africa)
Ahmed Kathrada Foundation	Mr N Balton (Executive Director) Ms Z Vadi (Communications Officer)
Nelson Mandela Foundation	Mr V Harris (Director: Archive and Dialogue) Ms V Collis-Buthelezi (Director: Racial Equity Fellowship Programme) Mr K Goga (Dialogue Analyst)
Helen Suzman Foundation	Mr F Antonie (Director) Ms C Ramsden (Legal Researcher) Ms K Chetty (Legal Researcher) Mr R Griffin (Researcher)

South African Police Service	Brigadier Margda van Rooyen
Department of Arts and Culture	Mr Vusithemba Ndima (Acting Director General) Dr Abraham Serote (Director: Social Cohesion)
Expert	Prof. Cathi Albertyn (University of the Witwatersrand Law School)
CRL Commission	Mr B Makeketa (Senior Manager: Researcher and Policy Development)
Afriforum	Mr E Roets (Deputy Chief Operations Officer)
Independent Communications Authority of South Africa	Mr B Makola (Acting Head: Legal) Ms V Letsiri (Senior Manager: Policy Research - Regulating and Monitoring)
Department of Basic Education	Mr J Ndlebe (Director: Education Management and Governance) Ms D Hlatshaneni (Social Cohesion Development and Equity in Education)
Department of Higher Education and Training	Ms S Mahlobongoane (Director: Social Inclusion and Equity) Mr C Mabizela (Chief Director: University Education Policy)

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First, the SAHRC Commissioners who constituted part of the investigative Panel, chaired by the Chairperson, Advocate Bongani Majola, alongside Commissioner Angie Makwetla. The SAHRC is indebted to former Constitutional Court Justice, Judge Albie Sachs, who assisted the SAHRC as an external Panellist.

The SAHRC's Chief Operations Officer, Chantal Kisoona, and its Legal Services Unit, namely Mr Pandelis Gregoriou and Ms Thandiwe Matthews who designed and managed the Hearing process, supported by Mr Kwanele Pakati, Ms Yonela Diko, and Mr Sandile Mdunusana.

The SAHRC further expresses its gratitude and appreciation to all government departments and officials who submitted information or responded to questions on request, as well as the various interested stakeholders, including representatives of social media entities, NGOs, research institutes, and academics.