THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

South African Human Rights Commission
Attention: Commissioner MS Ameermia
Private Bag X2700
Houghton
2041

Email: tmatthews@sahrc.org.za

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SUBMISSION BY THE FW DE KLERK FOUNDATION TO THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION - REF 11/2/2/2/2

NATIONAL HEARING ON RACISM AND SOCIAL MEDIA IN SOUTH AFRICA - FEBRUARY 2017

The FW de Klerk Foundation is honoured to have been requested by the SAHRC to make a submission on Racism and Social Media in South Africa. This written submission could be expanded upon at the national hearings scheduled for 15 and 16 February 2017.

1. Introduction

The National Hearing on Racism and Social Media in South Africa is an important forum for discussion in contemporary South Africa and accords with the Foundation's own mission to support and promote the Constitution and the Bill of Rights as foundational and sacred elements of our democracy. The constitutional imperative enshrined in the Preamble and captured in the Bill of Rights promoting unity in diversity is richly captured in the mission of the Foundation and forms the rationale for the establishment of the Foundation's new Centre for Unity in Diversity.

In addition, the Foundation's Centre for Constitutional Rights (CFCR), established in 2006, is dedicated to the promotion and protection of the Constitution and the values, rights and principles enshrined therein. The CFCR also serves a vital monitoring and public information function in respect of developments that may impinge on the enjoyment of constitutional rights by all South Africans.

The Foundation's positive contribution to the promotion and protection of our constitutional democracy is prefaced on the achievement of real and substantive equality; equitable access to land and other resources, with manifest regard for rights and protections concerning property and administrative action that is lawful, reasonable and procedurally fair.

In the light of the above, the Foundation is imminently qualified to contribute to a robust discourse as envisaged in the upcoming national hearings.

The issue of race in South Africa rarely, if ever, elicits a neutral response. This is of course as a result of the country's apartheid history and its legacies. The task of nation-building, social cohesion, redress and economic equality, is work in progress. The task is a mammoth one and requires visionary

leadership and a continued commitment to the values of the Constitution. The Foundation prides itself on its demonstrable commitment to both. Examples and evidence of this commitment are too many to outline in this submission, suffice to refer to the recent Penny Sparrow matter, where the Foundation condemned in the strongest terms the bigoted utterances of Ms Sparrow. On the other hand, we were also perturbed by the many cases of racist speech in reaction to the Sparrow and other cases. The Foundation's unequivocal condemnation of the "coffin matter" and the despicable attacks on religious freedom through the attacks on two mosques in the Western Cape, are patent examples of the kind of society we decry.

In many of the examples noted above, the use of social media was prevalent in recording and publicising these incidents. The Foundation, like most 21st century institutions, is patently aware of the good and bad that these various platforms are capable of. Facebook, Twitter, WhatsApp, Instagram, LinkedIn, Google+, YouTube, Pinterest, Snapchat and more have captured millions of users globally and the cost of bandwidth notwithstanding, South Africans, of all hues and classes, have followed this global trend.

The benefits of social media are certainly not to be frowned on and we applaud its benefit in connecting people, making new forms of education and information so easily available and potentially turning each of us into citizen journalists and distributors of information.

The downside of social media has also received vast amounts of attention with cautions expressed about its reliability, questions about the veracity of information distributed, its user's ability to engage in faceless bullying and hacking of information.

The purpose of this submission is not to analyse the use of social media but to acknowledge that its use has the potential to highlight, publicise and escalate inflammatory situations, particularly in relation to a hugely sensitive and painful issue that is race in South Africa.

The visionary leadership of the SAHRC in engaging and not avoiding the issue of Race and Social Media gives succour to the Foundation that dialogue, respectful engagement and exchange accords with the views of the majority of South Africans in addressing a most important issue in South Africa.

The Foundation reiterates its position that the Constitution of the land serves as our touchstone for the deliberations in this regard.

2. Defining Racism in South Africa

South Africa's racial past has laid a deep imprint on the minds and hearts of South Africans across race, ethnic, religion and gender lines. While more nuanced and textured analysis is available about race, class and power, it seems that the dominant narrative of white superiority vs black inferiority remains prevalent. This narrative is, however, far too reductionist in a post-apartheid South Africa where both political and economic power are in both new and old hands.

While 1994 ushered in a new dispensation and the TRC process went some way to acknowledge and assuage the pain of the past, the country continues to grapple with the meanings of race, racism, prejudice and belonging. The complexity of defining a South African(ness) remains a vexing one but it must be acknowledged that huge strides have been made to achieve peaceful, harmonious and respectful relations between the peoples of South Africa, who are in the eyes of the law equal and full citizens of the country. Significant too, is the real aspiration of the majority of South Africans to acknowledge the impact of the past and work hard to build a shared future.

These largely positive relations between people are disrupted by jarring and painful incidents that have the prospect, through the ease of use of social media, to go viral and stir up deep emotions. The use of social media is not in question, it is the use of racist and abusive terminology to describe other people that is at the core of the argument. Such incidents clearly set the agenda back significantly and have the effect of polarising people. Use of abusive language and racist descriptors for people has not been limited to one race group, and as paragraph 5 of the letter from the SAHRC, dated 7 December 2016, highlights, these traverse different racial, religious and ethnic groups.

The Foundation strongly asserts that any and all racist references must be treated equally and uncompromisingly and racism is not limited to one race group but has its invidious presence amongst black and white. Disdain, disrespect and disregard for any race group deserves in equal measure, condemnation and the response of both the law and education (including remedial education). The *Durban Declaration*, emanating from the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001), is a key reminder that South Africa, in concert with the global community, committed itself to, "Reaffirming the principles of equality and non-discrimination in the *Universal Declaration of Human Rights* and encouraging respect for human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

The task of defining racism and its impacts is a gargantuan one, but unless there is some measure of understanding of 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.

3. **Hate Speech Bill**

The Foundation is in full agreement that the timing of the hearings by the SAHRC is opportune, especially as the recent publication of the *Prevention and Combating of Hate Crimes and Hate Speech Bill* (Hate Speech Bill) is on the table for public comment. The drafting of this Bill is clearly a response to recent incidences where vile, indecent and inhumane references have been made to describe black people in particular. The Foundation has used the opportunity to submit a very detailed critique of the proposed Hate Speech Bill and asserts that while hate speech has no place in our constitutional democracy, it is calling for a fundamental reconsideration of this Bill, particularly in relation to the possible criminalisation of free speech. A legal commentary is attached (Annexure A) that elucidates our reasons for extreme wariness of curbing freedoms that were so valiantly fought for and which require defending in a robust democracy, while the Foundation supports the imperative to ensure that those found guilty of hate crimes incur the full weight of the law.

The collective effect is that while hate speech is abhorrent, freedom of speech and expression should not be sacrificed at the altar of opportunism or populism. The inclusion of provisions to curb free speech and expression is an authoritarian measure that will increase censorship, and in particular self-censorship, in order to "cause no harm" or perceived harm. Free speech, we assert, is the lubricant of our constitutional democracy and attempts to curb and criminalise these freedoms must be strenuously defended.

Additional serious concerns with the Bill are its very broad scope, in particular its provision of wide latitude to the state to define the nature of motive and intent in addition to proving incitement to harm and the imposition of punitive custodial sentences. The Foundation, together with other advocates of our constitutional democracy, strongly assert that the Constitution, the Bill of Rights and legislation (in particular the *Promotion of Equality and Prevention of Unfair Discrimination* Act 4 of 2000 - PEPUDA) provides adequate cover for what the Bill proposes and that existing law and institutions, including Chapter 9 institutions, are strong enough to serve as arbitrators for the strengthening of our constitutional democracy.

4. **The Constitutional and Legal Basis for the Fight against Racism**

South Africa ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* (the ICERD), which was adopted by the United Nation's General Assembly in 1965.

The ICERD specifically states in its preamble that member states will promote and encourage "universal respect and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion".

Furthermore, the ICERD specifically states in article 1 that "racial discrimination" shall mean "any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field in public life".

The Preamble of the Constitution specifically emphasises that the Constitution is to be adopted to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". Furthermore, the Preamble of the Constitution also states that as a country, South Africa aims to "build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations".

The founding provisions of the Constitution in chapter 1 of the Constitution reiterate that South Africa is founded on the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms" and furthermore there is an emphasis on the value of "non-racialism and non-sexism" in section 1(b) of the Constitution.

Section 9 of the Constitution echoes South Africa's international obligation in terms of the ICERD and our founding values in the Constitution and specifically states that legislative and other measures must be designed to protect or advance people to ensure that everyone is "equal before the law and has the right to equal protection and benefit of the law."

Section 10 of the Constitution states that "everyone has inherent dignity and the right to have their dignity respected and protected".

Furthermore, section 16(2)(c) of the Constitution, as discussed above in relation to the Bill, specifically states that the right to freedom of expression is not protected in the instance where it relates to "advocacy of hatred based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm". This clause is known as the hate speech provision in the Constitution.

PEPUDA was specifically enacted to give effect to section 9, section 10, and section 16(2)(c)of the Constitution. PEPUDA's preamble states that the Act aims "…to facilitate the transition to a democratic

society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom".

It is interesting to note that neither the Constitution nor PEPUDA defines "racism". PEPUDA only provides for "prohibited grounds" which include "race" and "ethnic or social origin". No specific definition is provided for these three terms and it does raise the question whether racism can also relate to ethnic-distinction that underlines xenophobia.

Section 7 of PEPUDA specifically prohibits unfair discrimination on the ground of race and prohibits "any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation, in any form of racial violence". Furthermore, section 10 of PEPUDA specifically prohibits hate speech on one or more of the grounds that as previously stated, include race. PEPUDA provides for various civil remedies in the instance of hate speech and it is also possible for the Equality Court to refer the matter to the Director of Public Prosecutions to institute criminal proceedings in terms of common law or any other legislation. This was done in the Sparrow matter, where the Equality Court not only ordered Ms Sparrow to pay an amount of damages to a civil society organisation, but the matter was also referred to the Director of Public Prosecutions in KwaZulu-Natal. According to news reports, Ms Sparrow pleaded guilty to the *crimen injuria* charge and received a two-year suspended sentence.

It is evident that in our Constitutional dispensation there is no place for racism. In the recent Constitutional Court matter of *South African Revenue Services v Commission for Conciliation, Mediation, and Arbitration*, the Court sets an unwavering precedent on judicial officers to uphold the foundational values of our Constitution when considering racial discrimination litigation. In this matter the Constitutional Court emphasised that "South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly and outwards manifestations".

5. The work of the Foundation's Centre for Unity in Diversity

Considerable work is envisaged by the Foundation's newly established Centre for Unity in Diversity to undertake several initiatives to address issues of racism, diversity, respect, identity politics and constitutionalism.

These issues directly inform and impact the process envisaged by the SAHRC. It is hoped that the slate of themes identified by the Centre for Unity in Diversity, and importantly the process for discussion and dissemination of views, will assist South Africans, across real and imagined borders and boundaries, to talk about racism and crucially for the parameters of racism to begin to be identified.

As the submission of the Foundation on the Hate Crimes Bill attests, the punitive actions envisaged for transgressions are firm and unremitting by criminalising these acts. The Foundation is also of the view that racism and its roots cannot only be legislated away. The use of coercion and control have their limits in how the human mind and spirit engage and need to unravel and re-learn attitudes, behaviours and actions. Education, building of trust, interaction and placing a premium on diversity as strength needs focus and commitment and resources for action.

6. Conclusion

The opportunity afforded to a large swathe of civil society, business and government to make submissions to the SAHRC during its national hearings on Racism and Social Media in South Africa is

bound to be robust. It is this tenacity and commitment to peace through respectful dialogue that got South Africa and South Africans talking and debating about the nature of the society we wanted from the early 1990s. An acknowledgement of the richness of our diversity, as opposed to divisive identity politics that leads to mistrust and hate, clearly formed the basis of negotiations and the birth of the Constitution. The Foundation is of the view that this spirit must continue to guide us as we discuss how to cross new challenges and frontiers in the task of nation-building.

As the institution vested with these core tasks, the SAHRC is well-placed to continue to build on its Midrand Declaration against Racism and be the lead agency to take forward the draft *National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances* (NAP). However, these worthy efforts must be matched by actions that prod South Africans to engage and re-engage each other on meanings of racism and its deeply damaging impact on the lives and psyches of all, irrespective of race, class, gender etc.

The dehumanising effects of racist behaviours and utterances pose a real setback to South Africa if left unchecked. The ease through which racist rants are circulated on social media make it impossible to ignore. These platforms allow for unchecked additions, commentary and abuse to pile up and this has the circular effect of keeping these matters in the public eye. However, the use of social media around the time of xenophobic attacks on foreign nationals in South Africa, for example, was crucial in providing information, advocacy and assistance and was a force for positive change.

It is the hope of the FW de Klerk Foundation that our submission will aid the SAHRC to assert its mandate in a more robust manner and that the work of the Foundation, through its Centre for Constitutional Rights and its Centre for Unity in Diversity, will offer scope for partnerships with the Commission to assert the supremacy of the Constitution and pay crucial heed to the Preamble of the Constitution that “South Africa belongs to all who live in it, united in our diversity”.

The inclusion of the reference in the Preamble to healing the divisions of the Past and to establish a society based on democratic values, social justice and fundamental human rights is directly relevant to the envisaged discussions and outcomes of the National Hearing on Racism and Social Media in South Africa. The Foundation looks forward to engaging both the Commission and other stakeholders on the important issues to be raised during these proceedings.

Dr Theuns Eloff

Ms Phephelaphi Dube

Ms Zohra Dawood

ANNEXURE A

Executive Summary of the Foundation's Legal analysis and Submission on the *Prevention and Combating of Hate Crimes and Hate Speech Bill* (Hate Speech Bill)

The Foundation's submission focused on the constitutionality of the offence of hate speech created in clause 4(1)(a) of the Bill and we followed a two-stage approach in this regard. We first considered whether the expression of hate speech prohibited falls within the constitutional definition of hate speech in section 16(2) of the Constitution. Secondly, we considered whether, despite falling outside these constitutional parameters, the offence can still be justified as a reasonable limitation on the right to freedom of expression in terms of section 36 of the Constitution. We also point out that the creation of an offence of hate speech could be open to abuse and unintended consequences. The submission only briefly considered the offence of hate crimes and did not provide an in-depth analysis of this offence and for the sake of brevity, the offence of hate crimes will not be discussed herein.

We found that the various forms hate speech created in the sub-clauses of clause 4(1)(a) are much wider than the scope of section 16(2) of the Constitution. To qualify as hate speech under section 16(2)(c) of the Constitution, the expressions prohibited must relate to the narrow category of "advocacy of hatred" based on limited prohibited grounds of "race, ethnicity, gender or religion" which also "constitutes incitement to harm". Not only is there a list of 20 undefined prohibited grounds, but there is also a clear break from the need to show that there is a reasonable likelihood of harm occurring, be it either physical or emotional, which is a clear disregard of the interpretation of "constitutes incitement to harm" as required in section 16(2)(c) of the Constitution.

We furthermore considered whether the undefined terminology such as "threatening" read with to "stir up violence" referred to in the clause could qualify under section 16(2)(b) of the Constitution which relates to "incitement to imminent violence". In our opinion the words "threatening" and "to stir up violence" are not in line with constitutionally accepted terminology and do not necessarily confer a real risk of lawless action if one considers the origin of the wording. Therefore, we found that the hate speech offence falls outside the limits of hate speech as defined in the Constitution and can only be justified as a reasonable limitation on the right to freedom of expression if it can be shown to be a reasonable limitation in terms of the limitation inquiry set out in section 36 of the Constitution.

The limitation enquiry weighed the rights to dignity and equality against freedom of expression, and we analysed whether the nature and extent of the limitation can be justified considering lesser restrictive means to achieve the purpose. On analysis of this clause, we also considered foreign law approaches to the curbing of hate speech by means of criminal law and we generally found a very a cautious approach and a narrow tailoring of the criminal offences.

In our analysis of the offence of hate speech in terms of the said limitation inquiry we found the clause loses sight that the focus of curbing hate speech is not on the mere expression, but on the potential of this extreme public manifestation of emotion to expose a vulnerable group of people to further discriminatory attacks.

We furthermore found that the extensive list of undefined forms of communication referred to in this clause do not necessarily relate to public forms of expressions and

if read with certain undefined words such as “abusive or insulting” which “bring into contempt or ridicule” to “a person or group of persons”, it provides too low a threshold. These aforementioned words cannot reasonably be associated with extreme contempt, which could objectively expose a vulnerable group of people to further attacks. We were also concerned that there might be conflict between terminology used in other proposed and existing legislation, which also prohibits hate speech.

We also found that the reference to “occupation or trade” as characteristics on which the expression is based cannot be reasonably be justified as inherent markers associated with the dignity of a natural person that ought to be protected and is an unreasonable limit to the right to freedom of expression. We were also concerned about the reference to a juristic person under the definition of a “victim”, as it should only be inherent characteristics of a natural person associated with the dignity of a person that ought to be protected. A juristic person cannot reasonably be a carrier of such a characteristic.

Lastly, we found that the offence of hate speech is open to unintended consequences and might greatly be abused, and that our law already provides civil remedies in terms of the *Promotion of Equality and the Prevention of Unfair Discrimination Act* of 2000 (PEPUDA) to victims of hate speech. There is also the possibility of instituting criminal actions under the common-law remedy of *crimen injuria*. Therefore, the offence of hate speech as created in this Bill will not muster the limitation inquiry of section 36 of the Constitution and in our opinion is unconstitutional.

We made the following recommendations to the Department of Justice and Constitutional Developments (the Department) in this regard.

1. We submitted that on a practical ground the offence of hate speech in the Bill should be excluded to ensure that the need to address hate crimes are not delayed.
2. We also suggested that before the Department considers drafting proposed criminal measures to deal with hate speech, proper legislative reform of PEPUDA must be undertaken and a proper census has to be taken to determine whether there is a pressing societal need to address hate speech within criminal law over and above PEPUDA.
3. We also suggested that if there is in fact a dire need to address hate speech by means of criminal law, as narrowly defined in terms of section 16(2) of the Constitution, then foreign law approaches in this regard should be considered in line with section 39 of the Constitution. In this regard, we submit that the Canadian approach to clear statutory defences regarding the narrowly defined criminal offence of hate speech should be considered and applied.
4. Lastly we recommended that the parameters of what racism is, should be added to the definition section, considering international and South African factors, but not limiting racism to any one race group.