

31 August, 2016

Attention: Ms Danaline Franzman

Chief Director: Social Justice and Participatory Democracy
Department of Justice and Constitutional Development
Private Bag X81
Pretoria, 0001
nap@justice.gov.za

Dear Madam

**SUBMISSION BY FREEDOM OF EXPRESSION INSTITUTE: NATIONAL ACTION PLAN
TO COMBAT RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED
INTOLERANCE**

1. INTRODUCTION

- 1.1 The FXI is a not for profit non-governmental organisation which was established in 1994 to promote and advance freedom of expression and related rights. The FXI objectives are to fight for and defend freedom of expression, to oppose censorship, to fight for the right of equal access to information and knowledge, and to promote access to media and a free press.
- 1.2 The FXI welcomes this opportunity availed by the Department of Justice and Constitutional Development to make written submissions on the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP).
- 1.3 These submissions are aimed at ensuring that the right to freedom of expression as given by section 16 of the South African Constitution is recognized, protected and advanced within the process of developing the NAP.
- 1.4 The primary submission of the FXI is aimed at ensuring that the definition of hate speech in the NAP is aligned to the Constitution so as not to adversely impact on the guaranteed right to free expression. Secondary submissions are aimed at ensuring that access to information, particularly through the media and new platforms of social interaction is not arbitrarily restricted in the singular interest of promoting a non-discriminatory society and social cohesion.

2. BACKGROUND AND RATIONALE

- 2.1 Section 7 of the South African Constitution (Bill of Rights) enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. Establishing and maintaining an appropriate balance between these rights are essential in sustaining democracy.
- 2.2 However, the limitation of free expression under the guise of protecting the rights to dignity and equality of vulnerable and marginalized groups has often been used to illegitimately limit forms of protected speech. There is need to guard against the perception of free speech as something opposite to the prevention of intolerance or other threats to social cohesion. On the contrary, free expression, dignity and equality are complementary and self-reinforcing instruments for social cohesion and sustained democracy.

- 2.3 In a democratic society there is need for all to accept being shocked, disturbed or even offended. Discussion and public exposure reinforce pluralism and allows even the most vulnerable, marginalized and excluded to be heard. Freedom of expression amplifies all voices and allows for debate and engagement that fosters understanding of opposing views. It is therefore important that all possible measures are taken to oppose efforts aimed at preventing opinions and ideas from being expressed and disseminated.¹

Free expression and free media are important instruments in order to facilitate the dissemination and discussion of all kinds of beliefs, thoughts and creeds. Therefore, the justification for FXI's submissions is that free expression is a necessary condition for social cohesion. Free expression ensures the protection of marginalized and excluded voices in society; and mutual respect for minority views.

3. PRIMARY SUBMISSION: HATE SPEECH

- 3.1 The definition of hate speech given in the NAP (p. 5) is as follows –

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

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

- 3.2 The FXI acknowledges the attempts made in the draft NAP to narrow the definition of hate speech given in the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). The FXI agrees that the definition of hate speech in section 10(1) of PEPUDA is overly broad and introduces speculative elements to the interpretation of hate speech in South African law (p. 28).

- 3.3 The FXI has noted concerns with the definition in South African law and submitted to the Parliamentary High Level Panel on the Assessment of key Legislation (Committee on Social Cohesion) that s10(1) of PEPUDA² –

- i. Expands the nature of prohibited action from one that “*constitutes incitement*” to one that “*could reasonably be construed to demonstrate a clear intention*”.
- ii. Expands the consequence that the prohibited action from “*incitement to cause harm*” to an intention to “*be hurtful*”, “*be harmful or to incite harm*”, or to “*promote or propagate hatred*”.

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

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

² FXI submission to the High Level Panel on the Assessment of key Legislation (Committee on Social Cohesion)

- 3.5 Although the NAP definition is significantly improved from the PEPUDA definition, it is still broad and inconsistent with s16(2) of the Constitution in that it introduces additional ambiguous terms that –
expands the form of hate speech from “incitement of imminent violence”, as in Section 16(2)(a) of the Constitution, to include “*incitement to discrimination and hostility*”,
- 3.6 The FXI acknowledges that the term “*hostility*” is derived from international law. We recommend that this term is further defined in the NAP to clarify its practical interpretation in Equality Courts.³
- 3.7 FXI submits that the definition of hate speech given in the NAP be amended, in line with the s16(2) of the Constitution.
- 3.8 The FXI further submits that all definitions of hate speech in South African legislation be aligned to a Constitutional interpretation of hate speech.
- 3.9 Regarding par. 98 of NAP, the FXI is concerned that hate speech may constitute a crime. We maintain that the hate speech should remain simply a prohibited conduct, punishable by measures currently stated in PEPUDA. We agree that it should be an aggravating factor but submit that criminalising it would deter the right to freedom of expression.

4. SECONDARY SUBMISSIONS: ACCESS TO INFORMATION AND THE MEDIA

- 4.1 Part of the FXI’s objectives include promoting access to media and a free press. As acknowledged in the draft NAP (p. 50), the media plays a critical role in nation building and building non-racialism and non-sexism. The FXI concurs that the media furthers plays a role in building an informed, educated and opinionated society and in holding government to account. The media should play all these roles while at the same time, breaking down racial and gender stereotypes. The media must promote the Constitution and also promote the non-racial, non-sexist and democratic ethos of the Constitution.
- 4.2 It is critical to acknowledge the existing mechanisms that are in place as controls within traditional media. The Press Council has recently reviewed its regulations to ensure that it is capable of dealing with new developments in the print media sector. The Broadcasting Complaints Commission of South Africa ensures compliance with standards aligned to the Constitution and law in the broadcasting sector.
- 4.3 The FXI agrees that new means of public communication, such as the Internet and social media, play a crucial role in enabling free expression and the realization of equality. The FXI further notes concerns of increased racism on new platforms of engagement such as social media. However, the FXI disagrees with the assertion that social media has become an outlet for “untrammelled” racism (p. 40).
- 4.4 The FXI submits that any attempt to regulate the internet and social media should be aligned to the Constitution in protecting guaranteed rights, national and international law. It is further important to note that already there are both internal and legislative mechanisms to ensure that the internet and social media is not abused. Most social media platforms include internal usage policies that ensure the protection of free expression and guard against abuses. External controls include the Film and Publications Board, which has also been involved in the

³ International Convention on Civil and Political Rights, Article 20(2)

process of reviewing Online Regulations policies. Government should ensure that such internal and external policies are compliant with the Constitution and the law.

- 4.5 The unique features of anonymity and privacy that seemingly poses a threat in the hands of abusers are at the same time, what enables the rights of minorities in the broader discourse on social cohesion. Therefore, it is critical to balance assertions that the Internet and social media has enabled wider dissemination of racist and xenophobic content that has the potential to incite racial hatred and violence, with the benefits of a free and open internet. The internet has allowed a greater number of marginalized groups to access information and amplified the voices of vulnerable groups regardless of these being in the minority. The FXI supports proposals to increase efforts at counter speech as a tool for social cohesion through online platforms.

5. SUBMISSIONS REGARDING DEFINITIONS

- 3.1 On page 5, the definition for Gender based discrimination mentions 'sex' specifically as a ground for discrimination as opposed to 'gender'. It is recommended that the 'gender' is used so that it is all encompassing of all individuals in their various forms of gender expression.
- 3.2 On page 6, regarding the definition of '*Institutional racism*', it is recommended that the definition is extended to include 'dominant discourse', such that the sentence reads as follows;

"It (institutional racism) refers to rules, norms, routines, patterns of attitudes and behaviour in institutions and other societal structures that represent obstacles to groups or individuals in achieving the same rights and opportunities that are available to the dominant group and those who ascribe to a dominant discourse"

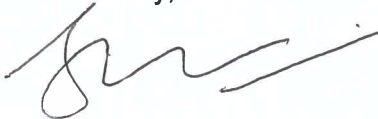
Such an improvement to the definition would incorporate structural suppression, unconventional views and opinions about race as an academic or artistic subject.

- 3.3 On page 6, regarding the definition of '*racial discrimination*', it is recommended that the definition refers to 'Unfair' "distinction, exclusion ...", so that the definition aligns with the South African construction that discrimination is either fair or unfair.

6. CONCLUSION

- 6.1 The Freedom of Expression Institute requests the opportunity to make full oral submissions to the department. Any such invitation should be addressed to Mr Zororo Mavindidze, Senior Researcher, Freedom of Expression Institute, zororom@fxi.org.za, 011 482 1913 (Office) or alternatively 073 554 8310 (Mobile).

Yours faithfully,



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