

## *Criminalising racism in tumultuous times*

### Summary

The purpose of this policy brief is to evaluate whether existing laws governing discrimination, hate speech, crimen injuria and defamation are adequate to deal with the recent rise in racist hate speech in South Africa. The introduction of a new bill criminalising hate crimes and hate speech is discussed in the context of existing legislation in South Africa and elsewhere which is designed to deal with these harmful acts. The bill provides for the criminalisation of conduct that amounts to incitement, instigation and conspiracy to commit hate crimes.

We make three recommendations, namely: (1) Retain the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (known as PEPUDA or the Equality Act) as it serves as an alternative legal route for those seeking civil remedies to address hate speech, (2) Improve the functionality of the Equality Courts and (3) Introduce new legislation that criminalises racist conduct and hate speech. Most importantly, we underline that none of these recommendations will be effective for achieving the overall objective of eliminating racist hate speech if we do not also deal with the root causes of racism.

### Background

The draft Prevention and Combating of Hate Crimes and Hate Speech Bill has been introduced in Parliament in early 2017. This is despite existing laws governing discrimination, hate speech, crimen injuria and defamation under which acts of racism can be prosecuted. The Bill has been drafted in response to the surge in racist incidents in South Africa. The South African Human Rights Commission has reported receiving an average of 30 complaints of 'unfair discrimination based on race'<sup>1</sup> each month for nearly a year (Savides 2016).

### Importance of the issue of racism and the legislation reviewed

The South African National Planning Commission (NPC) noted in its Diagnostic Report of 2010: 'Without a high degree of social cohesion, without unity of purpose, it is difficult to envisage South Africa overcoming the significant obstacles that stand in the way of prosperity and equity' (NPC 2010: 1). The Commission recognised that one of the obstacles to achieving social cohesion was the fact that in the democratic era, 'South Africa is a deeply divided society where opportunity continues to be defined by race, gender, geographic location, class and linguistic

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<sup>1</sup> The large number of complaints to the Human Rights Commission suggests that South Africa is becoming more racist.

background' (NPC 2010: 1). Race remains one of the most salient lines of division, largely because of the country's history of white minority rule.

The increasing number of racist incidents over the last few years is indicative of the challenges the country still faces. It also makes apparent the deep-seated feelings of interracial dislike and mistrust (refer to Figure 1 below) which are expressed privately and publicly in the form of harmful stereotypes. Besides the impact of these stereotypes on race relations, racist speech is harmful to individuals and groups.

Trust between individuals is central to the individual's ability to form social relationships and reject damaging

stereotypes. Since 2003, the Human Sciences Research Council (HSRC) has conducted the South African Social Attitudes Survey (SASAS) annually with a nationally representative sample of South African adults aged 16 and older, including a question asking respondents about their level of agreement with the statement 'People of different racial groups do not really trust each other.' In 2003, nearly three-quarters (72%) agreed with this statement. This figure remained relatively stable until 2008, when levels of agreement began to decline gradually. In 2011, it fell to below two-thirds (64%) of the general public. After 2011, public agreement with the statement began to rise again, reaching 69% of the adult public in late 2015.

Legislation is one way in which governments around the world try to minimise incidents of racist speech and hate crime. The impact of such incidents on individual members of target groups is exacerbated when governments fail to respond. 'The government's denial of personhood by denying legal recourse may be even more painful than the initial act of hatred' (Matsuda 1989: 2338). The key question is: Does existing South African legislation that deals with racist hate speech and hate crime (in the Constitution and the Equality Act as well as available common law remedies) provide adequate recourse or should new legislation be introduced to address these problems that undermine the project of nation building?

## Key research findings

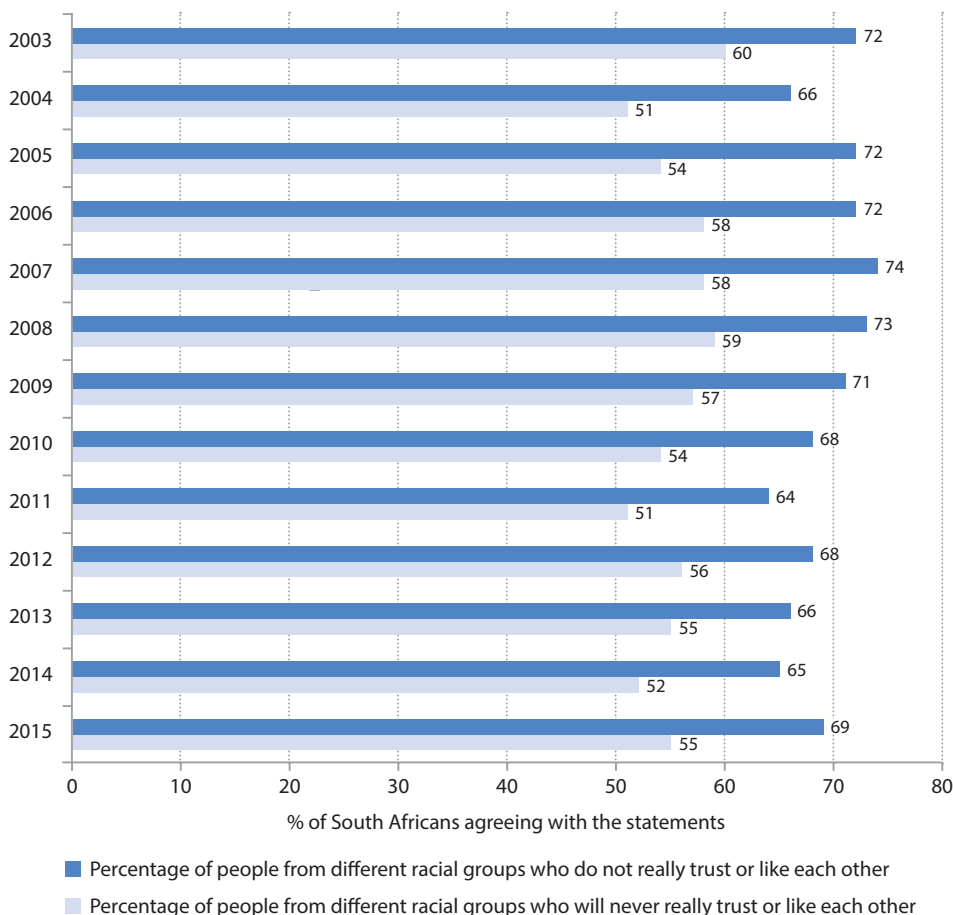
### Existing laws dealing with racism and hate crimes

- Section 9 of the Constitution prohibits unfair discrimination on a number of grounds, including race.
- Section 10 protects the right to dignity for all.
- It is a crime under South African common law to impair someone's dignity through speech (an offence called *crimen injuria*).
- Similarly, under common law, defamation is the unlawful and intentional publication of matter that impairs another person's reputation.

There is a gap in our common law in respect of speech and publications that impair the dignity of groups of people or individuals on the basis of their race.

The Equality Act was promulgated to give effect to the requirements of section 9(4) of the Constitution to deal with unfair discrimination. The Act is also aimed at protecting human dignity as contemplated in section 10 of the Constitution. The Equality Act prohibits unfair discrimination in the

**Figure 1:** Trust between race groups, 2003–2015



public and private sectors (including systemic discrimination), as well as by individuals. Sections 10 and 11 forbid hate speech and harassment. Hate speech is defined in section 10(1) of the Act as the publication, propagation or communication of words that are based on one or more of the prohibited grounds, which include race. To constitute hate speech, these words must demonstrate a clear intention to be hurtful, harmful, or incite harm and promote or propagate hatred.

It is important to note that the Equality Act already envisages criminal prosecution for hate speech. It provides (in s 10(2)) for the Equality Court to refer a civil case involving hate speech for additional criminal prosecution by the National Prosecuting Authority. The question is whether we need more than referral to address racist actions in South Africa. Is it necessary to amend the Equality Act to provide for criminal sanctions for serious incidents of race crimes and to provide directly for criminal sanctions for hate speech? This option appears to be highly unlikely as the Act was promulgated for a particular purpose (to prevent unfair discrimination and to promote equality) and serves this purpose through the civil – and not criminal – courts.

### ***Hate crimes and criminalising racist speech?***

The Draft National Action Plan (NAP) does not envisage a new crime of racism (DoJ&CD 2015). It envisages that its Policy Framework will be the basis for legislation dealing specifically with hate crimes, as well as additional measures focused on the criminal prosecution of hate speech.

Will the criminalisation of race crimes be more effective than the current civil and criminal remedies for racist hate speech? Sexual offences are on the increase despite strong criminal legislation.

But will explicitly criminalising racist speech and conduct (hate crimes) send a welcome zero tolerance message by identifying criminal prosecution as the primary remedy, and because the record stays with the perpetrator and therefore has long-lasting consequences?

A concern with all criminal prosecutions is that the standard of proof required (beyond reasonable doubt) is higher than the standard of proof in civil proceedings (a balance of probabilities). This, and the measures described above, makes it easier for complainants to prove their case in the Equality Courts, where the balance is weighted in favour of victims of hate speech – albeit that the sanctions may not be perceived to be harsh enough. As indicated above, where this perception arises, the option exists to refer the matter for further criminal investigation and prosecution if the court agrees with the complainant that available civil sanctions are inadequate in the particular case.

The Equality Act already prohibits hate speech and unfair discrimination on the basis of race. Section 4(2)(a) of the Act acknowledges the reality of systemic discrimination and inequalities, and section 7 prohibits discrimination against any group or class of persons based on race. Moreover, section 14(3)(c) requires the Equality Court to take cognisance of the power relationships underpinning systemic manifestations of racism.

Section 20(1) of the Act provides for class actions in the public interest. The Equality Courts were established to implement the Equality Act and to provide a forum where civil remedies are available for many forms of institutionalised and systemic racism, as well as for other acts of unfair discrimination such as homophobia and xenophobia. However, these courts have not been utilised well and available remedies have not been

tested. Certain regulations for the courts have not been passed, placing on hold the implementation of aspects of the Equality Act. Research conducted by Karthy Govender indicates that there is a lack of awareness of the Equality Act and the Equality Courts among not only the general public but also court officials. Other problems include lack of personnel and insufficient court infrastructure (DoJ&CD & FHR 2011). Considerable effort has been made to address these deficiencies through the recent Access to Justice and Promotion of Constitutional Rights Programme undertaken jointly by the Foundation for Human Rights and the Department of Justice and Constitutional Development (FHR 2015).<sup>2</sup>

### ***Anti-racism legislation in other countries***

South Africa is not the first country to seek solutions to the problem of racism. Internationally, such efforts have given rise to international conventions, legislation and a host of global anti-racism institutions. Racism was identified as an international problem with the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination by the United Nations General Assembly in 1965. The Convention is indicative of the recognition that racism is a political problem and that governments should play a central role in eliminating all forms of racial discrimination, outlawing hate speech and criminalising membership of racist organisations.

<sup>2</sup> The HSRC's Democracy, Governance and Service Delivery Programme recently undertook the final evaluation of the Foundation for Human Rights' Access to Justice and Promotion of Constitutional Rights Programme, during which we learned of the range of initiatives undertaken to enhance public awareness of the Equality Courts and increase their efficiency and effectiveness.

Anti-racism legislation is found in many countries around the world. Several countries also have hate speech laws that criminalise such utterances and provide for severe penalties.

- The Public Order Act (1986) applicable in England and Wales provides for a maximum sentence of seven years' imprisonment or a fine (or both) for a person found guilty of intentionally using threatening, abusive or insulting words or behaviour, or displaying any written material that is threatening, abusive or insulting in order to stir up racial hatred (Bleich 2003).
- French anti-racism legislation prohibits hate speech 'towards a person or a group of people because of their origin or because they belong or do not belong to a certain ethnic group, nation, race, or religion' (Bleich: 166). The penalty for violating this prohibition is up to a year of imprisonment and a fine, or either one of these (Bleich 2003).
- The Belgian Anti-Racism Law (1981) criminalises incitement to discrimination, segregation, hatred or violence against a person or group on account of race, colour, descent, origin or nationality. The legislation also criminalises advocacy of any form of discrimination, hatred, violence or segregation (Brehms 2006). Penalties for violation include a fine, imprisonment and/or suspension of civil and political rights.

However, there is wide disagreement about the effectiveness of anti-racism laws. Some argue that, at the very least, the existence of such legislation signals to society that racism is an intolerable evil. Others argue that more severe penalties may discourage perpetrators from carrying out acts of racism or at least may punish more severely those who commit them. However, critics of existing anti-racism legislation in countries such as France describe them

as weak, lacking sufficient enforcement, ineffective and symbolic. They also point to the difficulty of proving discriminatory behaviour, especially the *intention* to 'provoke discrimination, hate or violence.' Criminal laws may also drive the expression of racist sentiments underground, where it cannot be regulated.

## Conclusion and recommendations

South African public sentiment (evident from a scan of traditional and social media) appears to be in favour of new legislation, wanting to see dignity upheld and racist conduct effectively punished. The three largest political parties (the African National Congress, the Democratic Alliance and the Economic Freedom Fighters) have thrown their collective weight behind this initiative. This broad support is also demonstrated by the formation in 2009 of the Hate Crimes Working Group, a multisectoral network of civil society organisations set up to spearhead advocacy and reform initiatives pertaining to hate crimes in South Africa, and the launch of the Anti-Racism Network of South Africa by more than 80 civil society organisations in November 2015.

Given the widespread concern, there seems to be clear political and public support for legislation with a focus on criminalising racist hate speech and hate crimes. As a result, attention should focus on two issues: identifying the most appropriate legal avenue or instrument, and ensuring that the law is effectively enforced.

## Recommendations

- *Retain the current Equality Act as is.* This Act serves an important purpose, as it provides for civil remedies and makes the process easier for

complainants to claim for damages or an apology (or both).<sup>3</sup>

- *Work within the existing legislation and improve the functionality of the Equality Courts to facilitate more effective civil sanctions as well as referral for criminal prosecution.* Included here would be the provision of training on the Equality Act to members of the South African Police Service, court managers, clerks of the Equality Court and Legal Aid South Africa – and providing sufficient personnel (including magistrates and clerks), as well as court infrastructure, to make the courts functional. This would of course not address the issue of criminalisation.
- *Introduce new legislation criminalising racist acts and hate speech as proposed by government.* Such legislation would allow for the enhancement of penalties for hate speech and for hate crimes, for example, murder and violent attacks motivated by bias against the victim's actual or perceived ethnicity, nation, race, religion or sexual orientation. The onus of proof would be to prove the infraction beyond reasonable doubt and the sanctions could be spelled out specifically in the legislation, providing for imprisonment or a fine (or both).

People can then *choose* which legal route to take. It should be noted, however, that the legal and policy changes recommended still do not enable us to *deal with the root causes of racism*. The law, while helping to establish new norms and sanctions, cannot on its own address the underlying causes of racism. Research and interventions that address these causes are essential to ultimately reduce the need for the regulation and punishment of hate crimes and speech

3 In terms of section 21(2) of the Equality Act.

through concerted efforts to change the underlying beliefs and acceptance of structural injustices that led to these actions.

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