

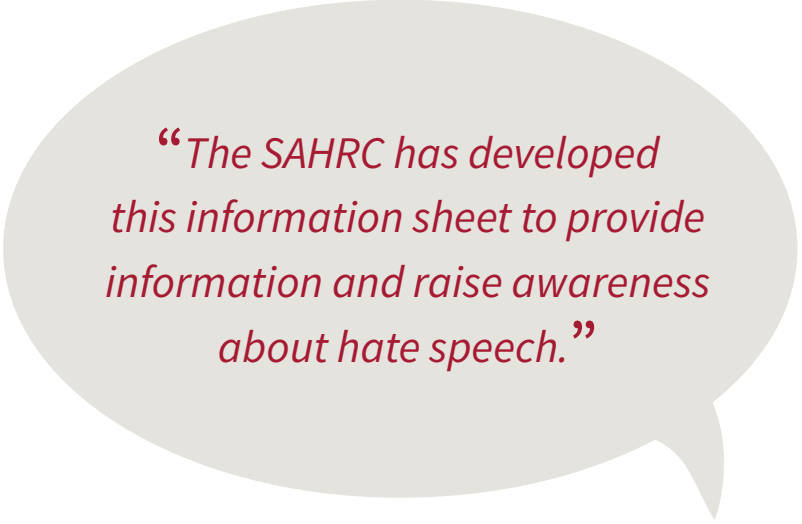


# HATE SPEECH

INFORMATION SHEET



south african  
**human  
rights**  
commission



*“The SAHRC has developed this information sheet to provide information and raise awareness about hate speech.”*

# HATE SPEECH

## INFORMATION SHEET

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# Introduction

The South African Human Rights Commission (SAHRC/ Commission) is an independent institution established in terms of the Constitution of the Republic of South Africa, to support constitutional democracy. The SAHRC is the national human rights institution, mandated to promote, protect and monitor the observance of human rights in the Republic.



In line with its promotional mandate, the SAHRC must educate and raise awareness to promote respect for human rights and a culture of human rights. The SAHRC has developed this information sheet to provide information and raise awareness about hate speech. Given the nature and the prevalence of unlawful hate speech, increased awareness is intended to assist in the identification, prevention and eradication of hate speech; thereby strengthening respect for the rule of law, social cohesion and promoting equality in South Africa.



Race-based discrimination presents one of the greatest challenges to the country and features as an important area in the work of the SAHRC.

The SAHRC's *Annual Complaints Trends Analysis Report* reveals that race related complaints accounted for 69% of all complaints to the SAHRC during the 2016-2017 period. In the category of race based complaints, those relating to hate speech are highest in number. This is not surprising, given South Africa's deeply entrenched historical racial divisions which the country continues to grapple with.

*“Race-based discrimination presents one of the greatest challenges to the country and ... is an important area of work for the SAHRC”*

# What is Hate Speech?

**H**ate speech may be defined as expression which goes beyond mere insults or offensive language, and which may infringe the dignity of certain persons or groups.

DEROGATORY LANGUAGE  
OR EXPRESSION INTENDED  
TO BELITTLE THE:

**intelligence**  
**humanity**  
**appearance**  
**beliefs**

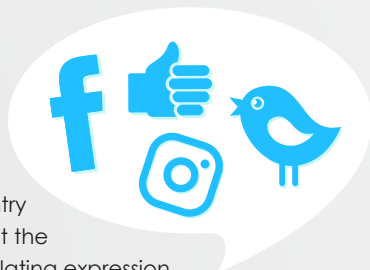
OF A PARTICULAR  
GROUP OF PEOPLE

HATE SPEECH:

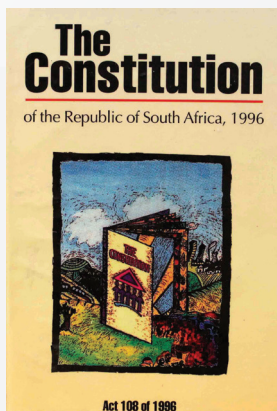
- impacts negatively on victims in terms of their self-worth
- causes significant hurt, harm, pain, distress, sorrow and humiliation
- is degrading and dehumanising
- has the effect of depriving victims of their fundamental rights
- in particular; it impugns the right to human dignity and equality

The increase in social media usage in the country has brought about the challenge of regulating expression that is hateful and harmful. The anonymity and broadcasting ability provided by social media has created a platform for people who wish to propagate hate speech. There is an urgent need for collective action between national governments, providers of global social media platforms and the general public in order to end the scourge of hate speech propagated on social media.

In South Africa common comments or words historically used during colonial and apartheid periods such as "baboon", "monkey", "aap" "hotnot", and "coolie" to describe people in a demeaning way have been declared by the courts to be hate speech. Such speech has no place in a constitutional democracy founded on the values of dignity and equality.



*“Hate speech... goes beyond insults or offensive language and may infringe the dignity of certain persons or groups”*



*“Section 16 of the Constitution and Section 10 of the Equality Act both prohibit hate speech”*



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#### SECTION 16 OF THE CONSTITUTION

provides that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. However this freedom is limited and does not extend to propaganda for war or incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.



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#### THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, 4 OF 2000 (PEPUDA OR EQUALITY ACT)

is also meant to prevent and prohibit hate speech. Section 10 of the Act provides that 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 be hurtful; be harmful or to incite harm; and/or to promote or propagate hatred. Publication of such expression is allowed if the expression is genuinely for purposes of artistic creativity, academic and scientific inquiry, fair and accurate reporting or such publication of any information, advertisement or notice is in the public interest.

**Accordingly, while the Constitution protects both the rights to expression, expression which is hurtful, harmful or incites harm, and promotes or propagates hatred is unlawful and is not protected.**

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# What is being done to address Hate Speech?

South Africa has undertaken various measures through legal reforms, social actions and research in efforts to eradicate hate speech. These include:

- observance and implementation of international instruments, international and national legislation in domestic law;
- advocacy reform in the development and implementation of the *National Action Plan against Racism, Xenophobia and Related Intolerances*;
- regulatory policies and codes of conduct in electronic communication systems and broadcasting services; and
- the monitoring of racism and hate speech by a number of entities.



The Universal Declaration on Human Rights

The International Covenant on Civil and Political Rights

PEPUDA/  
the Equality Act

South Africa is party to international laws and agreements, which means that the country accepts all the legal obligations that are imposed through these instruments. *The Universal Declaration on Human Rights*, adopted on 10 December 1948, provides for protection against discrimination and also regulates hate speech recognises the need to eliminate unfair discrimination. *The International Covenant on Civil and Political Rights*, adopted on 16 December 1966, provides for the right to freedom of expression, but restricts the right if it is hate speech.

South Africa demonstrated its commitment to promote equality and regulate speech by enacting domestic laws such as *PEPUDA/the Equality Act*. The Act provides for penalties for being found guilty of hate speech, which includes amongst others, offering an apology, a prohibitive interdict, or the payment of compensation.

Some of the widely reported cases involving hate speech for contravention of our laws that dominated the public discourse are discussed on the following pages.

*“South Africa is party to international laws and agreements and has demonstrated its commitment to promoting equality and regulating speech.”*



### **01 PENNY SPARROW**

*The **Penny Sparrow** matter involved a controversial Facebook post likening black beach-goers to monkeys. The court found that the “words convey the message both explicitly and implicitly to the reader that black people are not worthy of being described as human beings - implicit in this is that they have lowered or sub-human intelligence.” Sparrow was fined R5 000, 00 and a two year imprisonment term, suspended for five years and ordered to pay R150 000 fine to a not for profit organisation.*

### **02 VICKI MOMBERG**

*The **Vicki Momberg** matter provided clear authority that use of the racial epithet “kaffir” is regarded as hate speech. In this matter the offender’s repeated reference to South African Police Service officials who attended to her following a “smash and grab” incident was recorded. The recording bears repeat reference to use of the racial epithet, as the offender rails against the calibre of blacks in Johannesburg and repeatedly declares her hatred of all black people. The court sentenced her to an effective three year imprisonment term, a year of which was suspended. The Equality Court ordered Momberg to pay a R100, 000 fine, make a public apology and commit to sensitivity training and community service.*

### **03 ADAM CATZAVELOS**

*The **Adam Catzavelos** matter involved a video clip of a person on a Greek beach revelling in the fact there were no black people on the beach. As part of a settlement, he agreed to pay a fine of R150 000 and publicly apologised for his comments.*





**04  
VELAPHI  
KHUMALO**

*In the **Velaphi Khumalo** matter, Mr Khumalo posted two social media posts exhorting “that the country be cleansed of all white people and act as Hitler did to the Jews”. The Equality Court deemed the inflammatory posts to be hate speech in terms of the Equality Act; ordered that he writes a letter of apology directed to all South Africans; interdicted him from repeating similar utterances and that the National Prosecuting Authority investigate whether he should be criminally charged.*

**05  
JULIUS  
MALEMA  
& EFF**

*In March 2019 the SAHRC found that certain statements made by **Mr Julius Malema and another member of the Economic Freedom Fighters (EFF)**, were offensive but did not constitute hate speech. Mr Malema made various comments about white people and land redistribution, following with further comments in relation to Indians in KwaZulu-Natal in a separate incident. Shortly thereafter he sang the song ‘Kiss the Boer’ at the end of a public speech during an EFF Human Rights Day rally. A court had previously declared a similar song “Shoot the Boer” as hate speech. Comments in relation to the Indian and Coloured population groups following on the comments at the rally were also subject of complaints to the SAHRC. An EFF Member of Parliament, was the subject of complaints in relation to twitter statement referring to the Democratic Alliance’s then Member of Parliament, Mr Mmusi Maimane, as a “garden boy” during a parliamentary debate.*

*The comments formed the basis of a number of complaints to the SAHRC, alleging violations to the rights to equality, freedom of expression and dignity. As part of its determination, the Commission looked at the factual, social and historical context informing the comments. In addition, the SAHRC considered judgements of the courts and the impact and effect of the comments. The SAHRC found that while the acts forming the subjects of these complaints may have been offensive, they did not meet the legal threshold to qualify as hate speech.*

The reactions and vitriolic comments from certain sectors of the public that followed the release of the SAHRC findings indicate that expression invoking historically denigrating language continues to be sensitive in South Africa. Such speech remains difficult and contentious. Dealing with alleged violations of the right to expression therefore requires careful consideration of the context in which utterances are made and the impact of those utterances to ensure basic rights such as expression, dignity and equality are not violated.

Our courts and other enforcement agencies have grappled with the difficulties in establishing clear tests to determine whether certain expression constitutes hate speech over a period of time. These difficulties were highlighted in the case of *Jon Qwelane* which dealt with the limits of freedom of speech after a public figure made comments against the gay, lesbian, bisexual, transgender and intersex community. The Supreme Court of Appeal found that the provisions on hate speech were vague and overly broad, and therefore unduly limited the right to freedom of expression. The Court declared Section 10 of the Constitution invalid, and the matter will now proceed to the Constitutional Court to confirm or not confirm the Supreme Court of Appeal's order of invalidity.

**Given the difficulties in dealing with hate speech matters, there remains a need for clarification on the law, its interpretation and application in respect of hate speech. It is anticipated that a ruling by the Constitutional Court will provide much needed clarity on the legal challenges in the interpretation of the law.**

# What to do if you are a victim of hate speech

## Equality Court

**E**quality Courts are central to the protection of the right to equality. An Equality Court will determine whether the right to equality has been violated, sanction offenders and provide relief to persons whose rights have been violated. The courts have the power to include actions which offenders must perform to promote respect for and observance of the law and to deter further violations. Equality courts determine matters involving unfair discrimination, hate speech or harassment.

In South Africa all Magistrate District and High Courts have been designated as Equality courts with a view to increasing accessibility to courts in matters involving violations to the right to equality. In addition these court follow simplified processes to strengthen access to justice. The simplified processes mean that attorneys are not necessary, and to allow cases to be resolved easily and quickly. Court officials are trained to provide assistance to members of the public who wish to use the services of the Equality Court at no cost.



The courts can make orders that include payment of damages in respect of impairment of dignity, pain and suffering, and emotional and psychological suffering. Orders may include a referral of the matter to the Director of Public Prosecution for the institution of criminal proceedings against the perpetrator of hate speech. The courts may also issue take down notices, which are notices instructing internet and broadcasting service providers to remove content following the publication of unlawful content.



## South African Human Rights Commission

The SAHRC engages directly with members of the public to raise awareness of rights such as equality, dignity and freedom of expression through outreach interventions, the production and dissemination of educational material and research to enable the public to assert and enforce their rights. In addition, the SAHRC supports the protection of rights through investigations, litigation, hearings, dispute resolution and advancing law reform.

Services by the SAHRC are provided at no cost to any applicant or complainant. Members of the public, including children, whistle-blowers and civil society organisations may submit complaints of alleged violations of their human rights to the SAHRC.

**In terms of the law, the SAHRC has the power bring proceedings in any court in its own name, or on behalf of a person or a group or class of persons; and to investigate potential violations on its own initiative.**

The SAHRC may also be requested by Equality Courts to mediate equality related matters. This also comes from the SAHRC Act as well as Section 14 of our Act.

A complaint may be lodged at any of the provincial offices of the SAHRC where the alleged violation of a fundamental right took place.

A complaint may be lodged:



→ in person



→ in writing



→ telephonically



→ by completing the online complaint form.

If after preliminary consideration, the SAHRC is of the opinion that there is substance in any complaint, it will in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress.

The SAHRC has produced and publicised its Complaints Handling Procedures, which detail the procedure to be followed in conducting an investigation of any alleged violation of human rights. The Complaints Handling Procedures is available on the SAHRC website and complaints may be lodged through the website as well.

# What other protection is there for victims of Hate Speech or Hate Crime?

In 2016 the State introduced the *Prevention and Combating of Hate Crimes and Hate Speech Bill*; aimed at reducing offensive speech and curbing hate crimes. The Bill is not yet law but will become law, should the President sign it.

The Bill proposes the criminalisation of hate speech and hate crime, and broadens the prohibited grounds to a larger number of seventeen grounds, as constituting hate speech. The Bill provides that any person who purposely circulates, spreads anything to one or more persons in a manner that could reasonably be interpreted to show a clear intention to:

- (i) be harmful or to provoke harm; or
- (ii) promote or spread hatred, based on one or more of the following grounds of age; albinism; birth; colour; culture; disability; ethnic or social origin; gender or gender identity; HIV status; language; nationality, migrant or refugee status; race; religion; sex, which includes intersex; or sexual orientation, is guilty of an offence of hate speech.

**The Bill defines hate crime as an offence which is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the stated characteristics or perceived characteristics of the victim or his or her family member or the victim's association with, or support for, a group of persons who share the said characteristics.**

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## Collective, conscious action to eradicate hate speech and hate crimes

Words matter and have consequences on others. Expression is often subjective and the result of complex triggers. We therefore must all be mindful of what we say without curbing spontaneity and expression to ensure violations to basic rights are avoided. To protect the right to information, expression of ideas and thought as widely as is possible, it is important to recognise that certain expression, although offensive or insensitive or shocking, may not always amount to hate speech or an offence.

**The appreciation of all our rights are extremely important to the well-being of all in our communities and requires both individual and collective efforts to be enjoyed.**

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## How to contact the SAHRC

Forum 3, Braampark, Braamfontein, Johannesburg



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@SAHRCCommission



SA Human Rights  
Commission

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