



# **National Action Plan (NAP)** to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance



REPUBLIC OF SOUTH AFRICA



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**FOREWORD BY THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

South Africa's peaceful and negotiated transition from apartheid to democracy a quarter of a century ago was an inspiration to the world. It brought Black and White South Africans together after centuries of conflict to establish a new, united nation based on principles of equality and dignity.

In his inauguration speech in May 1994, President Nelson Mandela invoked images of each of us, like the jacaranda trees of Pretoria and the mimosa trees of the bushveld, being intimately attached to the soil of this beautiful country and he spoke of a rainbow nation at peace with itself and the world.

As our nation marks 25 years of freedom and democracy, we are called upon, however, to acknowledge that this vision is undermined by recurrent manifestations of racism and racial discrimination.

We are not alone in this, because racism and xenophobia, often cloaked in nationalism, is on the rise. However, to the extent that these challenges manifest in our own society, we bear responsibility for eliminating behaviour that violates the letter and spirit of the Preamble to our Constitution which says:

*"We, the people of South Africa,*

*Recognise the injustices of our past;*

*Honour those who suffered for justice and freedom in our land;*

*Respect those who have worked to build and develop our country; and*

*Believe that South Africa belongs to all who live in it, united in our diversity."*


Racism and racial discrimination continue to be felt in our society alongside other forms of prejudice, sexism, xenophobia, homophobia, hate crimes and hate speech.

The time has come for us to shed all shackles of prejudice and discrimination so that we can fulfil the promise of building a united, non-racial, non-sexist and prosperous country in which all who live in it are not just entitled to equality, but experience equality in their daily lives.

South Africa's commitment to the eradication of discrimination and intolerance in various forms is informed by the Declaration and Programme of Action adopted by the United Nations (UN) World Conference against Racism of 2001, which urged 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."





The South African flag is shown in the background, partially obscured by a semi-transparent box containing text. The flag features horizontal stripes of red, white, green, and blue, with a black triangle at the top and a yellow triangle at the bottom.

*“This Plan calls for commitment by all South Africans to values and behaviour that will break with our hurtful and damaging past and that will keep our moral compass trained on our path of renewal and growth.”*

In answering this call, Cabinet has adopted this ***National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance***. The Plan is based on the collective conviction of South Africans that, given that the ills of unfair discrimination and inequality are human-made; we have the means to completely eradicate these ills from our country.

The Plan has been developed through a comprehensive consultation process involving government, the Chapter Nine institutions and civil society, and is informed by general principles of universality, interdependence and indivisibility of human rights, participation and inclusion, progressive realisation, accountability, equality and non-discrimination.

The Plan commits all sectors of our society to the promotion and protection of human rights, and to raising awareness of anti-racism, equality and anti-discrimination issues. It calls for a partnership between government departments and Chapter Nine institutions in implementing anti-racist and anti-discrimination education.

Further actions include the collection of data regarding racism and discrimination in order that we may combat these problems and improve such interventions as the prosecution of offenders and psychosocial support for victims.

The National Action Plan (NAP) also makes provision for the identification of legislation that needs to be amended or adopted with a view to improving the protection of victims, the building of a more equal society, and strengthening of the rule of law and democracy.

This Plan calls for commitment by all South Africans to values and behaviour that will break with our hurtful and damaging past and that will keep our moral compass trained on our path of renewal and growth.

This is an effort that must have its root in every heart and every home, from where our values must radiate into our classrooms, workplaces, supermarket queues, restaurants and stadiums.

Let us make our next 25 years of freedom a period where we will indeed be free of the divisions, discrimination and intolerance of our past.

## PREAMBLE

The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), as presented in the Durban Declaration and Programme of Action (DDPA, 2001) states that:

*“We recognise that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status.”*

The Declaration and Programme of Action adopted by the UN World Conference against Racism 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.”

Given South Africa's history of colonialism and apartheid, the call by the Durban Conference is more than relevant. In 1994, the country emerged from three and a half centuries of racial oppression, perpetrated by successive White, colonial and apartheid governments. During this long period, the Black majority were treated like hewers of wood and drawers of water. They were marginalised politically, dispossessed economically and suppressed culturally.

The scars of colonialism and apartheid are indeed still visible on the collective face of South African society today. Poverty and underdevelopment are racially based – affecting mostly Black persons – while wealth ownership and a better life largely remain the preserve of White persons.

Colonialism and apartheid further worsened already existing traditional practices that undermined the dignity and wellbeing of women in society. The patriarchal practices that characterised traditional African communities were used politically to serve the interests of successive minority governments. It is an incontrovertible truth that, compared to their male counterparts, women generally occupied a weaker position in society.

The many years of a racist and isolationist policy of apartheid have planted seeds of xenophobia, particularly towards Africans, undoing centuries of brotherhood and sisterhood among Africans in South Africa and those from other parts of the continent. This is how Africans have come to be the worst victims of xenophobia in contemporary South Africa. This NAP is a response to the call made by the Durban Conference and is meant principally to serve as the guiding document behind national efforts to eradicate racism, racial discrimination, xenophobia and related intolerance.

The NAP does not belong to government only – it belongs to the country. As the UN Guidelines<sup>1</sup> state, a national action plan against racial discrimination is a mechanism for the effective pursuit of national goals. Thus, it should be regarded as a truly national undertaking, involving all elements of government and society. The State plays a key role in the initiation, launching and implementation of the national action plan against racial discrimination. At the same time, to make a real difference, the plan needs to be “owned” by the entire population. In seeking to achieve their objectives, States must establish meaningful partnerships among all relevant stakeholders.

The NAP's scope is national and is applicable to all branches and spheres of government, including the executive, Parliament and the Judiciary at all levels.

<sup>1</sup> *Developing National Action Plans against Racial Discrimination*, A Practical Guide, UNHR, 2014, p. 10.

The NAP has been developed through a comprehensive consultative process involving government, the Chapter Nine institutions and civil society and is informed by general principles of universality, interdependence and indivisibility of human rights, participation and inclusion, progressive realisation, accountability, equality and non-discrimination.

- **Universality:** The NAP should recognise that fundamental human rights norms enjoy universal protection by customary international law across all borders and civilisations. It should be consistent with the State's duty to respect, protect, promote and fulfil human rights and fundamental freedoms, regardless of its political, economic or cultural system.
- **Interdependence and indivisibility:** The NAP should give equal attention to all categories of rights, including civil and political rights, as well as economic, social and cultural rights, especially bearing in mind that the denial of one right invariably impedes the enjoyment of the others.
- **Participation and inclusion:** The NAP should guarantee full, effective and equal participation. It should empower individuals and groups that have faced or face racial discrimination to identify their human rights needs and to ensure that they are met.
- **Progressive realisation:** The NAP should develop targeted, legally consistent and sufficiently progressive policies to secure the rights of individuals and groups facing racial and other discrimination.
- **Accountability:** To be effective, the NAP requires the development of a system of accountability based on specific, ascertainable goals. It should develop mechanisms to hold the institutions in charge of its implementation accountable to those groups and individuals whose rights it is intended to promote and protect.
- **Equality and non-discrimination:** The principle of non-discrimination is the cornerstone of human rights law and a principle included in all human rights treaties. The NAP should be guided by the principle of the enjoyment of human rights on an equal footing as an integral part of the prohibition of racial discrimination. It must strive to guarantee that human rights are applied on a basis of equality of access, opportunity and results, in fact and in law, for all persons. It should give due priority to those who are most vulnerable to racial discrimination. Non-discrimination and equality are essential to the exercise and enjoyment of human rights. The right to equality and non-discrimination requires States to guarantee non-discrimination in the exercise of each human right.
- **Intersectionality:** The NAP is based on the collective conviction of South Africans that, given that the ills of unfair discrimination and inequality are human-made; they can be reversed and be made to disappear completely from our country.

## DEFINITIONS

**Explanatory note:** The WCAR, which met in Durban from 31 August to 8 September 2001, acknowledges the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as the principal international instrument to eliminate racism, racial discrimination, xenophobia and related intolerance.

The NAP therefore uses the definitions as contained in the ICERD and, where applicable, other international treaties. Where our domestic legislation or the Constitutional Court has further amplified certain definitions, these are indicated accordingly.

**Discrimination:** Means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly--

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from,

any person on one or more of the prohibited grounds.<sup>2</sup>

**Gender-based discrimination:** Means any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>3</sup>

**Hate crimes:** A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following 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:

- (a) Age;
- (b) albinism;
- (c) birth;
- (d) colour;
- (e) culture;
- (f) disability;
- (g) ethnic or social origin;
- (h) gender or gender identity;
- (i) HIV status;
- (j) language;
- (k) nationality, migrant or refugee status;
- (l) occupation or trade;
- (m) political affiliation or conviction;

<sup>2</sup> Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No.4 of 2000).

<sup>3</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

- (n) race;
- (o) religion;
- (p) sex, which includes intersex; or
- (q) sexual orientation.<sup>4</sup>

**Hate speech:** The intentional publishing, propagating, advocating or communicating to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—

- (i) be harmful or to incite harm; or
- (ii) promote or propagate hatred,

based on one or more of the following grounds:

- 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.<sup>5</sup>

**Indirect discrimination:** Laws, policies or conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination.<sup>6</sup>

**Listed grounds:** Means those grounds as set out in section 9 of the Constitution.

**Prohibited grounds** are--

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground--

<sup>4</sup> The Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018.

<sup>5</sup> Ibid.

<sup>6</sup> *City Council of Pretoria v Walker* 1998 (2) SA 363.



- (i) causes or perpetuates systemic disadvantage;
- (ii) undermines human dignity; or
- (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).<sup>7</sup>

**Racial discrimination:** 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 of public life.<sup>8</sup>

**Racism:** Means prejudice, discrimination, or antagonism directed against someone of a different race based on the belief that one's own race is superior.<sup>9</sup>

**Xenophobia:** Means an attitudinal orientation of hostility against non-nationals in a given population.<sup>10</sup>

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<sup>7</sup> Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No.4 of 2000).


<sup>8</sup> ICERD, article 1.

<sup>9</sup> Oxford Living Dictionary.

<sup>10</sup> UNESCO <http://www.unesco.org/new/en/social-and-human-sciences/themes/internationalmigration/glossary/xenophobia/>.

## ACRONYMS

<b>CA</b>	Constitutional Assembly
<b>CEDAW</b>	Convention on the Elimination of all Forms of Discrimination against Women
<b>CODESA</b>	Convention for a Democratic South Africa
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>DAC</b>	Department of Arts and Culture
<b>DDPA</b>	Durban Declaration and Programme of Action
<b>DOJCD</b>	Department of Justice and Constitutional Development
<b>DPME</b>	Department of Planning, Monitoring and Evaluation
<b>EAP</b>	Economically Active Population
<b>FHR</b>	Foundation for Human Rights
<b>GBV</b>	Gender-based violence
<b>GHS</b>	General Household Survey
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>IES</b>	Income and Expenditure Survey
<b>IMC</b>	Inter-Ministerial Committee
<b>LGBTI</b>	Lesbian, Gay, Bisexual, Transgender and Intersex
<b>MTSF</b>	Medium-Term Strategic Framework
<b>NAP</b>	National Action Plan
<b>NDP</b>	National Development Plan
<b>NKC</b>	National Khoisan Council
<b>NPA</b>	National Prosecuting Authority
<b>NTT</b>	National Task Team
<b>PAJA</b>	Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)
<b>PEPUDA</b>	Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No.4 of 2000)
<b>POAIA</b>	Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)
<b>SAHRC</b>	South African Human Rights Commission
<b>SARB</b>	SA Reconciliation Barometer Survey
<b>SEJA</b>	Socio-Economic Justice for All
<b>TRC</b>	Truth and Reconciliation Commission
<b>UBPL</b>	Upper Boundary Poverty Line
<b>UN</b>	United Nations
<b>WCAR</b>	World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance
<b>WPRPD</b>	White Paper on the Rights of Persons with Disabilities



*"No one is born hating another person because of the colour of his skin, or his background, or his religion. People learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite."*

Nelson Mandela

## CHAPTER 1: INTRODUCTION AND PURPOSE OF THE NAP

1. South Africa was invited by the UN to host the third WCAR, held in 2001. The invitation was extended in recognition of the struggle waged by the people of South Africa against the system of apartheid and the country's transition to democracy, founded on constitutional values. The WCAR was attended by representatives of 160 countries. The conference adopted the historic DDPA which 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."<sup>11</sup>
2. The DDPA 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.

The DDPA makes the point that addressing these issues successfully requires governments and all people to work together to change attitudes, to intensify awareness about the scourge of racism and racial discrimination, and to establish and strengthen specialised bodies to combat it.

3. A NAP provides the basis for the development of a comprehensive public policy against racial discrimination and assists States in giving effect to their international human rights obligations related to the elimination of racism, racial discrimination, xenophobia and related intolerance. It provides for specific outcomes and is also a process of bringing stakeholders together to discuss the challenge of combating racism, racial discrimination, xenophobia and related intolerance.<sup>12</sup>
4. The NAP is not intended to replace existing laws and policies, but rather to be **complementary** to existing legislation, policies and programmes which address equality, equity and discrimination. The NAP will provide mechanisms for documenting and monitoring on-going incidents of racism, racial discrimination, xenophobia and related intolerance including establishing a rapid response team, reporting directly to government and broader society, serving as a barometer measuring the extent of the incidents, the circumstances which allow for their continuation and the provision of tools to address them.
5. Furthermore, the NAP is intended to assist South Africa to meet its international treaty and regional obligations i.e. the ICERD, as well as its commitments arising from the third UN WCAR.

### Special emphasis on priority groups

6. The right of vulnerable and marginalised groups to live in a non-racist, non-sexist and non-discriminatory society based on race, colour, gender, sexual orientation and gender identity and expression, descent, national and ethnic origin is often challenged. They constitute a priority group for the NAP given the constitutional goals of equality and non-discrimination and the need for protection against racism, racial discrimination, xenophobia and related intolerance.
7. The DDPA identified the following priority groups:<sup>13</sup> Indigenous peoples; Africans and people of African descent; Asians and people of Asian descent; migrants; refugees and asylum seekers;

<sup>11</sup> Par 66 of the DDPA.

<sup>12</sup> As required by the DDPA, par 66.

<sup>13</sup> Developing National Action Plans against Racial Discrimination, A Practical Guide, UNHR, Office of the High Commissioner (2014) p81.

victims of trafficking in persons; internally displaced persons; Roma/Gypsy/Sinti/traveller communities; Jewish communities; Muslim and Arab communities; national and ethnic, religious and linguistic minorities.

8. The NAP also prioritises groups of individuals who, besides being victims of racial discrimination, face multiple forms of discrimination, such as:
  - Rural and urban poor;
  - Farm workers and farm dwellers;
  - Persons in extreme poverty;
  - Women and girls;
  - Children and youth;
  - Stateless persons;
  - Domestic workers;
  - People living with HIV/AIDS;
  - Persons with disabilities;
  - Older persons;
  - Persons deprived of their liberty;
  - Lesbian, gay, bisexual, transgender and intersex persons, and
  - Persons affected by armed conflict or natural disasters.
9. The NAP is applicable to all persons within a national jurisdiction who are rights holders to equality and non-discrimination. Both State and non-State actors are duty bearers of the obligations that arise from the right to equality and non-discrimination. The NAP, in keeping with the belief that human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing seeks to ensure the equal enjoyment of all human rights, including civil, cultural, economic, political and social rights. The NAP also takes account that the right to equality and non-discrimination are rights in and of themselves and may be violated even without being associated with the denial of other rights – something which is highlighted in our Constitution.
10. States have a duty to promote and protect human rights and prevent the violation of such rights. States are obliged to refrain from interfering with the enjoyment of the rights of victims of racial discrimination. States are also obliged to prevent violations of the rights of victims of racism and racial discrimination by State and non-State actors. States are required to adopt measures to remove any obstacles that may impinge upon the enjoyment of the right to non-discrimination based on race, colour, descent, or national or ethnic origin. This includes the duty to prohibit discrimination in the private sphere.
11. The development and establishment of the NAP constitutes the technical framework for the State's policies, programmes, strategies and measures to combat racism, racial discrimination, xenophobia and related intolerance and constitutes compliance with the state's obligation to protect all individuals and groups from racism, racial discrimination, xenophobia and related intolerance.



### The main focus of the NAP

12. The **main focus** of the NAP is to specifically address the issue of racism in our country. In addition to existing measures, the NAP is also intended to combat xenophobia and related intolerance and to address the following:
- Promote human dignity through the promotion and protection of human rights.
  - Raise awareness of anti-racism, equality and anti-discrimination issues among public officials, civil society and the general public, mobilising support from a wide range of people and addressing the need to prevent, combat and address racism.
  - Encourage the collection of data regarding racism, racial discrimination, xenophobia and related intolerance and allow for a more comprehensive assessment of the 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.
  - Increase the effectiveness and coherence of measures against racism, racial discrimination, xenophobia and related intolerance including financial and human resources.
  - 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 groups encountering racism, racial discrimination, xenophobia and related intolerance in education, health, employment, housing, food security, social services and access to justice including where necessary through appropriate remedies.
  - Facilitate the identification of legislation that needs to be amended and or adopted with a view to improving the protection of victims.
  - Build a more equal society and strengthen the rule of law and democracy.

## CHAPTER 2: HISTORICAL CONTEXT

13. The South African nation reflects a confluence of history, identity and culture, representing the origins, dispersal and re-integration of humanity over hundreds of thousands of years, characterised by violent conflicts, material dispossession and political oppression. Instead of joining in to build upon the already existing foundations of the diverse human occupants of Africa's southernmost part, settlers from Europe worked hard to construct a stage on which to fight bitter wars among themselves in the quest for conquest, material preponderance and political subjugation of the vast majority of the indigenous peoples of the territory. Having waged numerous wars, the defeat of Africans in 1906, in the Bambatha Rebellion, represented the last attempt by indigenous peoples to wage an organised resistance against colonial subjugation.
14. Colonialism led to the subjugation of the African population, the Khoi and the San, who were victims of genocidal campaigns, as well as the Malay and Indian communities who were used in constructing the economic foundations of White minority domination. The advanced industrial base of the colonial powers, which made such subjugation possible, introduced into the South African geographic space the application of advanced forms of economic production and trade that relied on indigenous and slave labour from Asia. It is this difficult past that continues to define the socio-cultural mosaic of contemporary South Africa.
15. Under colonialism and apartheid, Black people<sup>14</sup> were oppressed, dispossessed of their land and other means of livelihoods and systematically stripped of their basic human rights including the right to vote and freedom of movement and association. Racial discrimination rested on the political exclusion of Black persons, resulting in their economic disempowerment and most were also excluded from representative government and from many of the rights and privileges enjoyed by the country's White inhabitants. Race-based legislation passed in the 1920s and 1930s extended racial discrimination further. The adoption of apartheid in 1948 was purportedly a model for the 'separate development' of races, but in reality served to preserve White privilege. Apartheid literally affected each and every part of a person's life – where they were allowed to live, whom they could marry, who they could associate with, which government services, if any, they could access. We are a multi-lingual society, yet under apartheid the suppression of African languages was inextricably linked to racial domination.
16. Racial discrimination gave rise to protest and resistance politics in South Africa from the late 1940s and more intensely, after 1976. South Africa's oppressed majority organised themselves into sustained resistance, involving political organisations, labour movements, traditional authorities and various organs of civil society. The struggle against apartheid was intensified abroad by the actions of international solidarity. From the mid-to-late 1980s the apartheid State faced increased economic and diplomatic isolation, leading to economic stagnation, high public-sector debt and increasingly futile attempts by the police and justice system to defend apartheid. By the late 1980s the country, its social fabric torn apart by apartheid and a failing economy, had become ungovernable.
17. The advent of democracy in 1994 ushered in a new social order. The Convention for a Democratic South Africa (CODESA) led to the first democratic elections in 1994 and the enactment of an Interim Constitution.

<sup>14</sup> Black, Coloured and Indian persons.

18. The drafting of a new Constitution for a democratic South Africa was to be the most momentous part of the transformation of our country. The Interim Constitution of 1993 and the Constitution of the Republic of South Africa of 1996 heralded a new constitutional order in which the Constitution became the supreme law of the country. The transition from apartheid to a democratic South Africa was a negotiated settlement rooted in compromises which meant there was no winner or loser. Consequently, there were no prosecutions of the leaders or agents of the apartheid regime for crimes of apartheid. Instead a Truth and Reconciliation Commission was established with the tasks of achieving reconciliation and supervising the granting of amnesty to those who had committed serious violations of human rights during the apartheid years.
19. The first democratic elections which took place on 27 April 1994 saw the election of 400 public representatives to the National Assembly and 90 to the Senate. A joint sitting of these two bodies constituted the newly-formed Constitutional Assembly (CA) mandated under section 68(1) of the Interim Constitution. The CA was required under the Interim Constitution to draft and adopt a final constitution within two years of the first sitting of the National Assembly. The final Constitution had to comply with 34 Constitutional Principles that were negotiated and agreed to by parties during the Multi-party Negotiating Process at Kempton Park. The newly-formed Constitutional Court was required to certify whether these principles were adhered to, or not.<sup>15</sup>
20. The drafting of the final Constitution took a massive effort. Apart from representations made by political parties, two million submissions were received from members of the public and civil society groups. Scores of public hearings and workshops were held.
21. In September 1994, the CA established 6 Theme Committees that focused on the 34 Constitutional Principles and ensured that submissions incorporated into the final Constitution complied with them. Each Theme Committee was assisted by experts on a Technical Committee.<sup>16</sup> While public participation in the process was going relatively smoothly, political disagreements were mounting.
22. A crucial aspect in the drafting of the final Constitution was the establishment of an independent panel of constitutional experts in terms of section 72 of the interim Constitution, with the mandate to advise the CA and chairpersons of Theme Committees, and resolve disagreements.
23. In October 1995, the first working draft of the final Constitution was produced for consideration by the CA. It was approved by the CA and published on 22 November 1995. Over four million copies of the draft constitution were printed and distributed in tabloid form. The public was given three months to comment.
24. By February 1996, it emerged that there were at least 65 unresolved issues pertaining to the draft and a political deadlock on a few key issues. The fourth working draft of the final Constitution was published in March.
25. Negotiators met in Arniston in the Western Cape in April 1996 and a fifth draft of the final Constitution was produced. Parties had about a week to agree on the text before the deadline on which it had to be tabled in the CA. This resulted in bilateral talks, multi-lateral talks and sub-committee meetings.

<sup>15</sup> [https://www.concourtrust.org.za/uploads/files/Background\\_to\\_the\\_Constitutional\\_Assembly.pdf](https://www.concourtrust.org.za/uploads/files/Background_to_the_Constitutional_Assembly.pdf)

<sup>16</sup> Theme Committee 1 was tasked with examining the character of the democratic State. Theme Committee 2 looked at the structure of government. Theme Committee 3 focused on the relationship between the different levels of government. Theme Committee 4 examined fundamental rights, while Theme Committee 5 focused on the judiciary and the legal system. Theme Committee 6 examined the specialised structures of government and was divided into a further 4 sub-theme committees: public administration, financial institutions and public enterprises, transformation and monitoring, and security services.

In a marathon 22-hour meeting that began on 18 April, agreement was reached on the basic text and preamble to the Constitution.

26. The Constitutional Committee had to consider 298 proposals for amendments to the Bill, tabled by various parties. With just a week to go before the deadline for the final Constitution to be adopted, there was still no agreement on certain clauses. On 6 and 7 May, the Constitutional Assembly met for a final debate on the Bill, even as bilateral talks continued. On the night of 7 May, agreement was finally reached.
27. On 8 May 1996, the final Constitution was adopted by the CA. In the end, 421 votes were recorded in favour of the Constitution. The Bill was referred to the Constitutional Court for certification. The Constitutional Court held nine days of hearings commencing on 1 July. Written representations and oral argument was presented by five political parties, while 84 private parties lodged objections. 27 parties were allowed to present oral arguments to the Court.
28. On 6 September the Constitutional Court handed down its judgment which found that the Constitutional Principles were not adhered to in some of the provisions. Some of the provisions that did not pass muster were those relating to: the right of individual employers to engage in collective bargaining; adequate protection of fundamental rights; the independence and impartiality of the Public Protector and Attorney General; the Public Service Commission; the framework and powers of local government and the powers and functions of the provinces. On 11 October, the CA passed the amended text. After a three-day hearing commencing on 18 November, the Constitutional Court certified the amended text on 4 December. On 10 December 1996, President Nelson Mandela signed the first Constitution of a democratic South Africa into law at Sharpeville. The Constitution came into effect on 4 February 1997.<sup>17</sup>
29. With a new constitutional, policy and legislative framework in place the apartheid system was dismantled and the foundation laid for a democratic and inclusive State founded on the values of human dignity, human rights, freedom, non-racialism, non-sexism and the rule of law. To achieve this, the democratic State had to work towards reconciliation and social cohesion and ensure that mechanisms were put in place to deal with the legacy of apartheid and redress past imbalances.
30. In President Nelson Mandela's address to the Constitutional Assembly on the occasion of the adoption of the new Constitution in 1996, he described the kind of society South Africa was trying to build. He said that the Constitution was –

*“...our own humble contribution to democracy and the culture of human rights world-wide; and it is our pledge to humanity that nothing will steer us from this cause. Everybody will understand that we have a commitment and a mandate from the overwhelming majority of our people in this country to transform South Africa from an apartheid State to a non-racial State, to address the question of joblessness and homelessness, to build all the facilities that have been enjoyed for centuries by a tiny minority. We want men and women who are committed to our mandate, but who can rise above their ethnic groups and think in terms of South Africa as a whole.”<sup>18</sup>*

<sup>17</sup> [https://www.concourtrust.org.za/uploads/files/Background\\_to\\_the\\_Constitutional\\_Assembly.pdf](https://www.concourtrust.org.za/uploads/files/Background_to_the_Constitutional_Assembly.pdf)

<sup>18</sup> Address to the Constitutional Assembly on the occasion of the adoption of the new Constitution, May 1996.

### CHAPTER 3: DEMOCRACY – THE END OF ALL FORMS OF DISCRIMINATION?

31. The advent of democracy in South Africa in 1994 ushered in a human rights culture as the cornerstone of the new constitutional dispensation and a wide-ranging set of human rights, including socio-economic rights, was inscribed in a Bill of Rights and incorporated in the Interim Constitution of 1993 and repeated in the final Constitution of 1996. The Bill of Rights applies both vertically and horizontally and is the cornerstone of democracy in South Africa. For this reason, it is afforded special protection and bills amending the Constitution require a two-thirds majority in the National Assembly as well as a supporting vote of six of the nine provinces represented in the National Council of Provinces. Today our courts ensure the nurturing of South Africa's founding values such as human dignity, equality and supremacy of the Constitution. Today we seek to infuse everything we do with the ideals and values of our Constitution – using the Bill of Rights as a benchmark to measure the attainment of human rights.
32. The adoption of the Constitution in 1996 was a major turning point in this country's history. It has been called the “birth certificate” of a new South Africa - a country that is profoundly different to the one that existed before. The constitutionally guaranteed right to equality and equal protection and benefit of the law must be understood against the country's history of inequality, racism, and sexism. Our goal of building a non-racial, non-sexist and democratic society flows from our tragic past. Of course, the Constitution did not arrive suddenly or magically; it is the product of protracted negotiations - and a long and troubled history before that. Many of the ideas it contains are the realisation of years of struggle. In the words of the late former Chief Justice Mahomed -
 

*“In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.”<sup>19</sup>*
33. The equality clause (section 9) underpins the other rights in Chapter 2 of the Constitution, providing as it does for the “full and equal enjoyment of all rights and freedoms.” Section 9 prohibits unfair discrimination on certain listed grounds.
34. **Discrimination** is a particular form of differentiation - it is differentiation on illegitimate grounds. This means that discrimination on the basis of one of the grounds listed in section 9(3) is presumed to be unfair discrimination, until the contrary is proved. There is accordingly a presumption that differentiation on the listed grounds will impose burdens on those who have been victims of past patterns of discrimination or will impair the fundamental dignity of those affected. The listed grounds are race, colour, ethnic origin, gender, sex, pregnancy, sexual orientation, marital status, age, disability, religion, conscience and belief, culture and language, birth and social origin.

<sup>19</sup> *S v Makwanyane*, 1995 (6) BCLR 665, par 262.



35. **Intersectionality** plays a significant role in addressing past patterns of discrimination. In its simplest form, intersectionality relates to the various attributes that play a role in the discrimination that an individual experiences. It refers to the “overlapping” of social attributes such as gender, race, class, ability, religion, nationality, sexual orientation. This “structure” can be used to appreciate how systemic injustices and social inequalities occur on multi-faceted levels. Intersectionality contends that the traditional notions of oppression such as racism, sexism and homophobia are not independent. Rather these interrelate and generate a system of oppression that generates the “intersection” of multiple forms of discrimination.<sup>20</sup>
36. The Bill of Rights is arguably the part of the Constitution that has had the greatest impact on life in this country. As the first words of this chapter say: *“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”*
37. South Africa has passed a number of laws to give effect to its constitutional goals of achieving equality, human dignity and the advancement of human rights and freedoms. During the first 20 years of democracy more than 1200 laws and amendments aimed at dismantling apartheid and eradicating all forms of discrimination were approved by Parliament. New and amended legislation was put in place to enforce equality and prevent discrimination, such as, for example, the Employment Equity Act, 1998,<sup>21</sup> the Promotion of Access to Information Act, (POAIA) 2000,<sup>22</sup> the Promotion of Administrative Justice Act (PAJA), 2000<sup>23</sup> and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), 2000.<sup>24</sup> In addition, the new government passed legislation dealing with land restitution, the upgrading of land tenure, the facilitation of access to housing and the provision of social assistance to those in need. These laws addressed systemic inequalities and unfair discrimination that manifested in the institutions of society and the practices and attitudes of South Africans insofar as these undermine the aspirations of our constitutional democracy.
38. Yet it would be naive to expect even the best-drafted laws to eradicate decades and centuries of oppression and institutionalised racism and discrimination. The legacy of apartheid and colonisation remains. As former President Thabo Mbeki remarked in 1998 -

*“South Africa is a country of two nations. One of these nations is White, relatively prosperous, regardless of gender or geographic dispersal. It has ready access to a developed economic, physical, educational, communication and other infrastructure. This enables it to argue that, except for the persistence of gender discrimination against women, all members of this nation have the possibility to exercise their right to equal opportunity, the development opportunities to which the Constitution of ‘93 committed our country.*

*The second and larger nation of South Africa is Black and poor, with the worst affected being women in the rural areas, the Black rural population in general and the disabled. This nation lives under conditions of a grossly underdeveloped economic, physical, educational,*

20 Puleg Segalo, “Gender, social cohesion and everyday struggles in South Africa”, *Psychology in Society* On-line version ISSN 2309-8708, Psychol. Soc. n.49 (2015).

([http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1015-60462015000200006](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1015-60462015000200006)).

21 Employment Equity Act, 1998 (Act No. 55 of 1998).

22 Promotion of Access to Information Act, 2000 (POAIA, Act No. 2 of 2000).

23 Promotion of Administrative Justice Act, 2000 (PAJA, Act No.3 of 2000).

24 Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA, Act No. 4 of 2000).

*communication and other infrastructure. It has virtually no possibility to exercise what in reality amounts to a theoretical right to equal opportunity, with that right being equal within this Black nation only to the extent that it is equally incapable of realisation.*

*This reality of two nations, underwritten by the perpetuation of the racial, gender and spatial disparities born of a very long period of colonial and apartheid White persons minority domination, constitutes the material base which reinforces the notion that, indeed, we are not one nation, but two nations."*

39. Significant progress has been made over two decades of freedom – yet there is still much more to be done. There are still, currently, challenges that we need to face. South African society remains divided. Many schools, suburbs and places of worship are integrated, but many are not. South Africa remains one of the most unequal economies in the world. The privilege attached to race, class and gender has not been fully reversed. Some examples, discussed hereunder, provide a glimpse of the remaining legacy of apartheid.

## CHAPTER 4: WHAT TEARS US APART? GRAPPLING WITH THE FAULT LINES

40. Poverty and inequality which entrench racial disparities constitute fault lines which South Africa will have to grapple with if it is to overcome the apartheid legacy. People experience not only poverty and inequality which are structural and systemic in nature, but also, in many instances, discrimination on a variety of grounds.
41. South Africa is struggling not only with structural racism, but also with individualised or “personal” intolerances. The NAP therefore does not aim to address structural inequalities as government has other mechanisms, such as the Bill of Rights, domestic legislation, and various international conventions and international treaties which aim to address such.
42. In terms of racial exclusion and discrimination, we have very specific legislation such as PEPUA (2000)<sup>25</sup> and the Employment Equity Act (1998).<sup>26</sup> Many of the “fault line issues” - such as poverty, land and housing - go hand in hand with racism, racial discrimination, xenophobia and other intolerances and therefore there is a need to further strengthen such existing policies and programmes.
43. The NAP therefore exists in a contextual framework, where it focuses on racism, within a bigger government program of action, which also includes PEPUA (2000) and the envisaged Hate Crimes legislation.

### Land

44. Land is an extremely emotive issue in South Africa and one that “requires that we descend into the repository of history to confront some uncomfortable truths about ourselves”.<sup>27</sup>
45. Land dispossession is the root of economic inequality and the dispossession of the African majority in South Africa. Land ownership patterns still reflect historical colonial and apartheid economic injustices. Despite land restitution programmes implemented by the democratic government, a vast majority of Black persons still live in rural areas and crowded informal settlements, with no access to productive land. They remain excluded from ownership of bank-valued property and land for commercial farming and meaningful enterprise. This places severe limits on the productive capacities of Black persons and their ability to create wealth and escape the poverty trap.
46. Following centuries of colonial rule and decades of apartheid rule, democratic South Africa sets out to redistribute rights in land as a way to remedy past racial injustice and lay the basis for more equitable development. In pursuit of social justice, land reform would seek to undo more than racial discrimination: it would be pro-poor and would promote gender equality and, by changing production and investment patterns, start to transform dualism in agriculture by blurring the lines between the commercial and communal areas of the country.<sup>28</sup>
47. Land redistribution is central to South Africa’s anti-poverty strategy. This is part of our national imperative to redress the historical injustice of land dispossession, which continues to inform wealth creation today in South Africa.

<sup>25</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUA, Act No.4 of 2000).

<sup>26</sup> The Employment Equity Act, 1998 (Act No.55 of 1998).

<sup>27</sup> Nzimande, “Land Question: It’s about identity”, *Mail & Guardian*, 28 Feb 2018 (<https://mg.co.za/article/2018-02-28-land-identity-white-guilt>).

<sup>28</sup> **Land Redistribution in South Africa**, Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa, Kepe & Hall, September 2016.

48. The current debate around section 25 of our Constitution relates to the land question and the equitable redistribution of land. This is needed to address the historical injustices and the legacy of land dispossession which started in 1652 through colonialism and was further cemented by apartheid. Land inequity and its adverse impacts are a risk to future political stability and needs to be addressed.
49. The 2017 Land Audit reported that out of 76% of national agricultural land, 72% thereof is owned by White South Africans, 15% by Coloured persons, 5% by persons of Indian descent, 4% by Black South Africans and 3% by others. Women own only 13% of farmland. Today, land ownership in South Africa is still skewed along racial and patriarchal lines.<sup>29</sup>
50. The challenge of land reform is that the pace has been too slow. In 1994, government had set itself a target to transfer 30% of the total productive land by 2014. This was not achieved. The use of the “market value” and “willing buyer, willing seller” principles over “just and equitable” in the compensation of land owners are major contributing factors.
51. To date, 8.4 million hectares of land have been acquired for land reform purposes; 4.9 million hectares through the land redistribution and tenure programme; and 3.5 million hectares through the land restitution programme. This equates to 10% of total agricultural land.
52. Parliament’s motion on Land Expropriation without Compensation called for an investigation by Parliament’s Constitutional Review Committee into, amongst others, the necessity to amend section 25 of the Constitution to enable the State to expropriate land without compensation.
53. Efforts to address equitable land redistribution have been elevated to the highest level of government, with an inter-ministerial committee (IMC) on land reform – chaired by the Deputy President - having been established to coordinate and implement measures to accelerate the redistribution of land. In addition, a 10-person Presidential advisory panel, representing all sectors, has been appointed to suggest models for government to implement a fair and equitable land reform process that redresses the injustices of the past, increases agricultural output, promotes economic growth and protects food security.

### **Poverty, unemployment and inequality**

54. While the debate continues as to the best instrument to measure poverty, there is no disagreement that poverty and unemployment remain the twin challenges that threaten the social stability of South Africa. There are those who argue that democratic South Africa could and should have done more to tackle these challenges. Correct as such suggestions may be, the truth is that the poverty in which millions of South Africans live in today is a direct result of our long history of colonialism and apartheid.
55. While post-apartheid South Africa has enjoyed several successive years of economic growth, and despite various social interventions made by government, the poverty trap remains stubborn. Further complicating this is the widening gap between the *haves* and the *have-nots*, making South Africa one of the most unequal societies in the world. What this economic growth has meant is that the rich have become richer and the poor poorer, with the attendant levels of poverty being disproportionately experienced by Black persons.

<sup>29</sup> <http://www.ruraldevelopment.gov.za/publications/land-audit-report/file/6126>

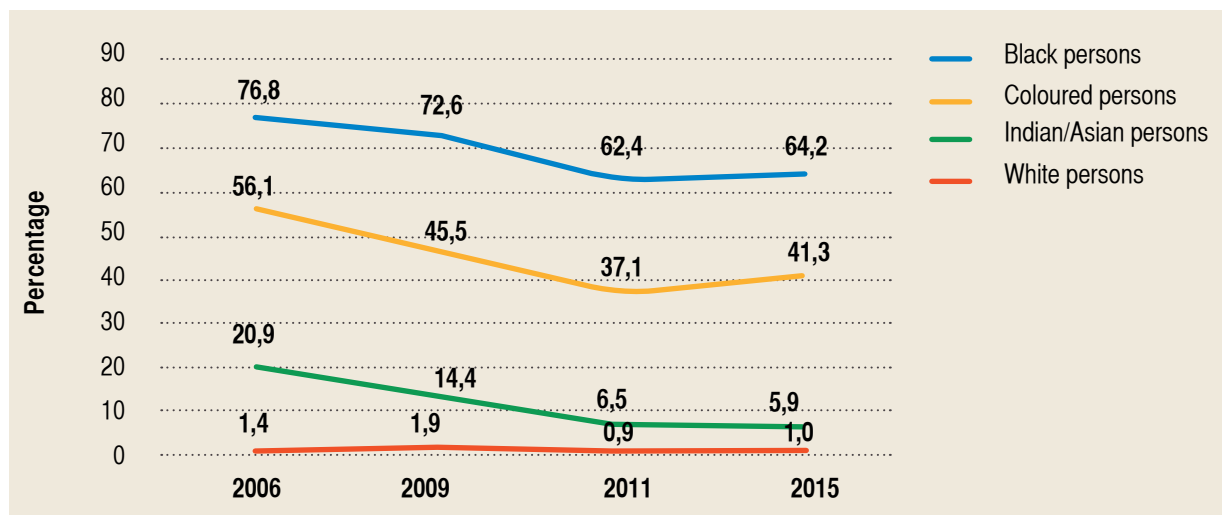
56. Government is committed to eliminating poverty, and fiscal policy is one critical lever that expresses this commitment. The equitable share formula used to determine transfers to provincial and local spheres of government contains a poverty component as a redistributive measure. The 'social wage' has been used as a redistributive mechanism of the government budget deliberately aimed at improving the lives of the poor and reducing their cost of living. This has been achieved through, among others, free primary health care; no-fee paying schools; old age and child support grants; housing; and free basic services (water, electricity and sanitation) to poor households. Although these policies and interventions have resulted in notable gains in poverty reduction since 1994, the country continues to face the challenge of high poverty, high inequality and high unemployment.
57. While there is a proportionately small but palpable stratum of Black persons who have benefited from the dividends of democracy, the racial makeup of wealth ownership still reflect a society that is yet to free itself from apartheid's socio-economic engineering. Essentially, apartheid has bequeathed democratic South Africa with a strange legacy where race and class are intertwined.
58. The fundamental understanding of poverty as a human construct and, therefore, as something that can be eradicated, underlines the perspective of this NAP to fight racism, racial discrimination, xenophobia and related intolerance. The NAP maintains as its starting point that racist dispossession and exclusion of the vast majority of Black people remain the central reason why the majority of the population in our country are still impoverished.
59. Poverty plays an important role in the sustenance of racism. Therefore, the equitable distribution of economic power lies at the heart of the much-needed transformation of race relations and social stability in South Africa.
60. Poverty is also linked to participation. As the United Special Rapporteur on Extreme Poverty and Human Rights correctly argues, poverty is an urgent human rights concern. For those living in extreme poverty, many human rights are out of reach. Among many other deprivations, the poor often lack access to education, health services or safe drinking water and basic sanitation. They are often excluded from participating meaningfully in the political process and seeking justice for violations of their human rights. Extreme poverty can be a *cause* of specific human rights violations, for instance because the poor are forced to work in environments that are unsafe and unhealthy. At the same time, poverty can also be a *consequence* of human rights violations, for instance when children are unable to escape poverty because a State may not provide adequate access to education. The elimination of extreme poverty should thus not be seen as a question of charity, but as a pressing human rights issue. Its persistence in countries that can afford to eliminate it amounts to a clear violation of fundamental human rights.<sup>30</sup>
61. Black South Africans consistently exhibit the highest poverty rates. In 2015, 47% of the households headed by Black South Africans were poor. This was very high compared to 23% for those in households headed by Coloured persons, a little more than 1% for the population in households headed by an Indian/Asian South African, and less than 1% among those in households headed by White South Africans.<sup>31</sup> Black persons carry the overwhelming share of poverty by representing more than nine out of every ten individuals living below the UBPL (upper boundary poverty line).

<sup>30</sup> <https://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyindex.aspx>.

<sup>31</sup> *Overcoming Poverty and Inequality in South Africa, An Assessment of Drivers, Constraints and Opportunities*, (undertaken by The World Bank, the National Planning Commission Secretariat at the Department of Planning, Monitoring and Evaluation, and Statistics South Africa) March 2018.



**Table 1**<sup>32</sup> below shows the poverty headcount per population group in 2006, 2009 and 2011 and 2015:



62. **Table 2**<sup>33</sup> below shows the poverty headcount and poverty gap per population group in 2006, 2009, 2011 and 2015.

	Headcount ( $P_0$ )				Poverty gap ( $P_1$ )				Severity ( $P_2$ )			
	2006	2009	2011	2015	2006	2009	2011	2015	2006	2009	2011	2015
<b>Total</b>	66,6	62,1	53,2	55,5	35,6	33,5	25,5	27,7	22,5	21,3	15,0	17,0
<b>Black persons</b>	76,8	72,6	62,4	64,2	41,8	39,8	30,3	32,5	26,6	25,5	18,1	20,1
<b>Coloured persons</b>	56,1	45,5	37,1	41,3	24,9	20,4	14,3	16,9	14,3	11,3	7,3	9,1
<b>Indian/Asian persons</b>	20,9	14,4	6,5	5,9	6,9	4,0	1,9	1,5	3,2	1,4	0,8	0,5
<b>White persons</b>	1,4	1,9	0,9	1,0	0,4	0,8	0,4	0,4	0,2	0,5	0,2	0,2

63. The percentage of individuals that benefited from social grants consistently increased from 12,8% in 2003 to 30,8% in 2017. Simultaneously, the percentage of households that received at least one grant increased from 30,8% to 43,8% in 2017. More than one-third of Black individuals (33,8%) received a social grant, compared to 29,3% of Coloured individuals, and 14,5% of Indian/Asian individuals. By comparison, only 6,1% of the White population received grants.<sup>34</sup>

64. A recent comprehensive report<sup>35</sup> undertaken by the World Bank in collaboration with the National Planning Commission Secretariat at the Department of Planning, Monitoring and Evaluation, and Statistics South Africa shows that, overall, poverty levels are lower today compared to 1994. Relatively high and consistent economic growth following the end of apartheid in 1994 up to around 2011 supported poverty reduction in South Africa, although economic growth prospects

<sup>32</sup> *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015*, Statistics SA, Report No. 03-10-06 (2017)

<sup>33</sup> Ibid.

<sup>34</sup> General Household Survey (GHS) 2017, Statistics SA

<sup>35</sup> *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities*, (undertaken by The World Bank, the National Planning Commission Secretariat at the Department of Planning, Monitoring and Evaluation, and Statistics South Africa) March 2018

have been slowing in recent years. The economy is currently not generating sufficient jobs, and the unemployment rate was 27.7% in the third quarter of 2017. Youth and unskilled workers bear the brunt of the problem as employers seek skilled workers, and the youth unemployment rate was 38,6%. As a result, poverty rates increased between 2011 and 2015. This experience is a reminder of the reality that the country's socio-economic challenges are deep, structural and long-term.

### **Transformation of public and key private institutions**

65. Under colonialism and apartheid, public and strategic private sector institutions were used as instruments of racial discrimination and for the oppression of Black persons. The legacy of job reservation still haunts democratic South Africa today. While progress has been made in the public service, transformation in many areas remains unsatisfactory. The private sector has also not moved as fast as it should regarding transformation, including in respect of the creation of an inclusive culture in workplaces.

### **Education**

66. Historically, education was used as a tool of oppression in South Africa. Denial of quality and racism-free education to the majority of the population was one of the principal strategies of colonialism and apartheid to guarantee the underdevelopment of, and deny, Black persons access to knowledge. It is the subjection of the Black majority to inferior and racist Bantu education that led to the historic student protests and resistance of 1976 and others. The legacy of this inferior education system continues to haunt our country. The #RhodesMustFall movement which started at the University of Cape Town in 2015 was originally directed against a statue that commemorated Cecil John Rhodes, yet the campaign marked the beginning of the largest wave of student protests. Across the country, students called for the "decolonisation" of universities and free higher education, among other things.
67. Structural obstacles to the achievement of the right to education do exist. Research has consistently shown that the strongest determinant of educational outcomes in South Africa is socio-economic status. Given the history of South Africa, there is an overlap of poverty, race and historical disadvantage. Although education and economic policies are designed to be pro-poor the negative effect of home background factors cannot be completely eradicated. The pace of social and economic development in the country is therefore a long-term obstacle to full realisation of the right to education.
68. South Africa still faces enormous challenges of racism and inequality at schools and institutions of higher learning. Despite a number of advances and the enactment of progressive legislation to hasten integration, our nation is from time to time visited by incidents that prove that the demon of racism in schools and institutions of higher learning refuses to be exorcised, and that many of our institutions of learning continue to grapple with racial integration.
69. Chapter 9 of the National Development Plan envisages a country where all children can access and benefit from a high quality education. There are still challenges facing education. Out-of-school factors, such as poverty and socio-economic conditions, play a role. Family commitments, having to work at home, and pregnancy account for those not receiving instruction. In addition, many learners in South African schools face a language barrier in the classroom.

70. Other factors include the fact that many South African children do not live in the same household as their biological parents. Poverty and adult illiteracy often prevent parents who are present from getting more involved in their children's education. Many young people are missing out on the chance of getting a higher education, because they cannot afford it.
71. South Africa has public and independent schools. As at the end of 2015, there were 23 905 public schools and 1786 independent schools.<sup>36</sup>Public schools include those entirely funded by government and others partially funded by the school governing body. Often there is a great variance in terms of teacher-learner ratios, facilities, resources and affordability between the different types of schools.
72. One of the biggest challenges is that schools and institutions of higher learning are not fully integrated. We need to address the legacy of segregated education and to address attitudes and prejudices responsible for the persistence and continued existence of racism. We also need to address distortions and biases in the way in which history has been presented and promote tolerance and respect for racial, cultural and religious diversity.
73. It is imperative to integrate anti-racism training and education into the curriculum, particularly the values and democracy components and to develop curricula that deal honestly, objectively and truthfully with our painful past and to promote greater integration of schools. We need to ensure that schools are not only desegregated but also integrated. Schools must reflect the demography, diversity and richness of our country's cultural heritage. Government has embarked on a number of measures to enhance human rights and constitutional awareness in schools. Initiatives such as the National Schools Moot Court Competition, the Albert Luthuli Oral History Competition and establishing History as a compulsory subject in schools are invaluable in fostering human rights awareness. In addition, schools that do not offer any indigenous languages are now being compelled to do so.

### Knowledge production

74. The oppression and discrimination of Black persons in South Africa was justified through pseudo-scientific explanations, churned out by White-owned publishing houses meant to distort truth about Africa and to project White people as an intellectually superior nation in relation to others. Black persons were thus systematically excluded from the knowledge production sphere, and were often only written about from the standpoint of the subjective lenses of White writers. This exclusion was then used politically to reproduce racial stereotypes. These stereotypes persist in many subtle ways in democratic South Africa.

### Decolonising the mind

75. Given its systematic enforcement over more than three centuries, racialised thought has become a reality among individuals and within communities. The persistence of wealth disparities and varying degrees of access to resources by different racial groups, as well as the influence of race in social conditions, serve further to sustain racial worldviews and attitudes. Although not openly acknowledged, notions and beliefs of White supremacy still exist equally among some White

<sup>36</sup> <https://www.education.gov.za/EducationinSA/tabid/327/Default.aspx>.

and Black South Africans. Black inferiority has historically been engrained in the psyche of those who were declared inferior. The Truth and Reconciliation (TRC) process has taught us that truly acknowledging the past is not akin to being obsessed with it, but rather to ensure that the past does not become a ghost that haunts the future.

76. South Africa is a society that has been deeply traumatised and continues to live with the anguish caused by colonialism and apartheid. It is with this in mind that this NAP acknowledges those who were and continue to be victims of racism, racial discrimination, xenophobia and related intolerance. We believe that by acknowledging the brutality of our history, we will marshal national efforts to save the future from the racial burdens of the past.
77. It should also be recognised that true liberation from racism begins with the mind. Deconstructing and exposing the hollowness of racist beliefs must form part of deliberate strategies for combating racism, racial discrimination, xenophobia and related intolerance – in the context of the Constitution.

### **Social cohesion**

78. South Africa's heritage of racial discrimination continues to define race relations and integration in our society today. For this reason, social cohesion must be at the center of social transformation. Social cohesion represents the antithesis of exclusion and separateness, and encapsulates the spirit of inclusion that must guide national efforts aimed at building a new society. Core to this process is the promotion of a sense of common belonging and a celebration of diversity among all who live in South Africa. This includes the reaffirmation of the diminished heritage of African peoples. Building a unified, non-sexist and democratic South Africa remains an urgent national priority.

### **Public discourse**

79. Public discourse in South Africa is mainly conducted through a vibrant and sophisticated mass media. The media is an important vehicle for conveying ideas and messages about racism, racial discrimination, xenophobia and related intolerance. The media can be used in both positive and negative ways to promote non-racialism and counter racial intolerance as opposed to fueling racist views. Historically, colonialism and apartheid did make use of some media to entrench racism. In contemporary South Africa, a national discourse on the media's role and the coverage of issues relating to racism and xenophobia should always be kept alive in order for our nation to constantly be aware of how we deal with such issues and specific attention needs to be given to the role of social media.

### **Xenophobia**

80. Xenophobia is an unreasonable fear, distrust, or hatred of strangers, foreigners, or anything perceived as foreign or different and is often based on unfounded reasons and stereotypes. It can manifest itself in several ways in a country. For example, it can be through victimisation on the basis of one's nationality or appearance, brutal assaults, murders, ethnic cleansing in an area, and mass expulsion from the country.

81. South Africa has, in the past and more recently, experienced widespread and violent forms of xenophobia resulting in the deaths and injuries to people as well as looting and destruction of property. Xenophobia presents a serious challenge towards the protection of human rights. It is important for governments, civil society, both the migrant and local communities and community leaders including traditional leaders to fight against this phenomenon. A few methods which can be used in the fight against xenophobia include acknowledging and condemning acts of bias-motivated violence whenever they occur, enacting hate crime laws, strengthening law enforcement, and prosecuting offenders.
82. It is imperative to monitor and report on attacks and to reach out to communities affected by violence to reduce fear, assist victims, and improve reporting of incidents. It is equally important to promote a spirit of integration through engaging communities where xenophobia is most rampant. Government should send out clear messages that violence against foreign nationals and xenophobic attacks will not be tolerated and that those involved in such activities will be prosecuted.

#### **Discrimination-based on ethnic origin**

83. Through a policy of divide and rule, and through apartheid, Black persons were corralled into homelands and townships, which were essentially enclaves meant to maintain artificially created gulfs among Black persons based on their membership of certain ethnic groups. In time, ethnic identities were deepened in some sections of African communities. While apartheid was defeated, South Africa will constantly be vigilant against the legacy of discrimination based on the grounds of ethnic origin. The Constitution lays the basis for the creation of a society in which the celebration of cultural diversity contributes to the creation of a unifying South African identity.
84. Yet “tribalism” still remains – there are many examples.<sup>37</sup> Former President Mbeki described “tribalism” as a challenge to South Africa and something that perpetuates corruption, as it was “a tool used by politicians to manipulate some and to reward others”.<sup>38</sup>

#### **Gender-based discrimination and violence**

85. Historically, there has been an intersection between racial and gender discrimination. This intersection was based on patriarchal practices that characterised all cultures in our country. These cultural practices promoted a conception of masculinity constructed deliberately around the diminution of femininity. It is equally true that the weaker position of women in our society also owes a great deal to our colonial and apartheid past. Under apartheid, a majority of women in South Africa faced the triple-oppression of gender, class and race.
86. Both women and children are still a vulnerable group in society. Their rights often get violated through, among others, domestic violence, trafficking, child pornography and labour exploitation. All of these impact negatively on the freedom of women and the welfare of children. It is true that in South Africa racism, racial discrimination, xenophobia and related intolerance manifest themselves in a differentiated manner and more severe forms for women and children. These include deterioration in their living conditions, poverty, violence and many other forms of discrimination.

<sup>37</sup> For example, an unnamed man was quoted as referring to protests in Tshwane following the ANC's decision to name Thoko Didiza as its mayoral candidate for the then upcoming municipal elections. He was quoted as saying: “*The ANC cannot bring a Zulu person from KwaZulu-Natal to rule Pedis, Xitsongas and TshiVendas. If you are saying that she [Didiza] is from Pretoria, then tell us where in Pretoria she is from.*” (<https://www.thesouthafrican.com/racism-and-tribalism-still-engraved-in-most-south-africans/>).

<sup>38</sup> Keynote address on the opening of UNISA's College of Human Science (CHS), January 2014.



87. Under apartheid, Black women in South Africa were the subject of triple oppression, i.e. on the basis of gender, class and race. The structural nature of apartheid had an enormous impact on the lives of Black women. Gender oppression is often expressed in socio-cultural traditions and attitudes, all of which are supported and perpetuated by an ideology which subordinates women.
88. For most poor Black women this entrenched patriarchy meant living on the periphery: economically, politically and also in relation to employment. Many Black women were pushed into unskilled, low-paying work as domestic workers or in factories.
89. The CEDAW Committee noted that the legacy of apartheid for women included *“widespread discrimination and underdevelopment, and is visible in areas such as women’s high levels of unemployment, illiteracy and poverty and in the area of violence against women”*. It is, therefore, crucial that the needs and interests of women are given priority both at the national level and within the context of the community and home, in order to attain equality.
90. In 2015, a resolution was passed by the UN General Assembly adopting the 2030 Agenda for Sustainable Development.<sup>39</sup> The 17 Sustainable Development Goals and 169 targets represent an intention to stimulate action over the next 15 years in areas of critical importance for humanity and the planet. Specifically, goal number 5 is to ‘achieve gender equality and empower all women and girls’, with the following concomitant targets: (a) end all forms of discrimination against all women and girls everywhere; (b) eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation; (c) eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation.<sup>40</sup>
91. South Africa’s commitment to eliminate racism, oppression and exploitation from our society cannot fail to address also the question of gender equality. The experience of other societies has shown that gender equality is not a by-product of a struggle for democracy or national liberation. It has to be addressed in its own right. To achieve genuine equality, policies must be based on a real understanding of inherited entrenched patriarchy and the way it manifests itself in our society.
92. Gender equality is a constitutional imperative in South Africa. The Constitution strives to achieve equality between women and men by prohibiting racial, gender and all other forms of discrimination. This recognition is firmly grounded in the Constitution and reflected in a wide range of laws, policies, programmes and practices. The constitutional mandate on gender equality is clear and the legislative process is to provide the building blocks for a gender-equitable society.
93. It is worrying that less than 50% of women know about the Constitution. Research shows that with regards to general knowledge about the Constitution, levels of knowledge were similar across male and female respondents. While 37% of male respondents displayed low levels of knowledge, this was true for 40% of female respondents. At the other end of the scale, 36% of male respondents had high levels of constitutional knowledge as did 32% of female respondents.<sup>41</sup>
94. South Africa has one of the highest rates of violence against women in the world, with gender and sexual based violence based on sexual orientation and gender orientation or expression being widespread and something which is increasingly normalised and underreported. In August 2018, the #TheTotalShutdown movement – a movement of women (both cisgender and transgender women) and gender non-conforming people- delivered a memorandum to the government stating that gender

39 UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

40 National Strategic Plan on Gender-based Violence Shadow Framework (Stop Gender Violence Campaign), 2017, page 22.

41 The Foundation for Human Rights’ Socio-Economic Justice for All (SEJA) Baseline Survey, 2017.

based violence against women, non-conforming women and intersectional women has reached levels that are unacceptable and cause untold harm, and that without a total integrated action by all relevant segments of society as well as political will, nothing will change to eliminate this scourge. The memorandum sets out an initial set of twenty four demands to enable women and gender non-conforming people to realise their right to be free from violence. Subsequent to and as an outcome of the #TheTotalShutdown march, a Presidential Summit was convened on 1- 2 November 2018, which summit adopted a Declaration against Gender-Based Violence and Femicide.

### **Preventing discrimination and prejudice against LGBTI persons**

95. There is no doubt that violence and discrimination on the grounds of sexual orientation and gender orientation or expression still exists. The challenge lies in changing societal attitudes, to ensure that persons are not victims of violence or discrimination in their daily lives on the grounds of their sexual orientation, gender identity and gender expression.
96. A survey of attitudes towards homosexuality and gender non-conformity in South Africa, produced by The Other Foundation and the Human Sciences Research Council<sup>42</sup> found that 55% of South Africans indicated that they will accept a gay family member, but only 27% have a friend or family member whom they know is homosexual; 51% believe that gay people should have the same human rights as other people, even though 72% hold the view that same-sex activity is “morally wrong”. It also finds that between 2012 and 2015, there has been a tenfold increase in the number of South Africans who “strongly agree” with allowing same-sex marriage. Eight out of ten people said they have not – nor would they ever consider – verbally or physically abusing someone who was gender non-conforming.
97. A more recent study undertaken by the Foundation for Human Rights (FHR) indicates that two-thirds (68%) of all respondents agreed or strongly agreed that people in South Africa are free to choose and express their sexual orientation without fear or judgement. Almost three quarters (74%) of respondents disagreed or strongly disagreed that being gay or lesbian was against the values of their community. This finding was consistent across Indian/Asian respondents (72%), Black respondents (73%), White respondents (77%) and Coloured respondents (77%) as well as both male (73%) and female (74%) respondents.<sup>43</sup>

### **Memory of victims and national healing and reconciliation**

98. Colonialism and apartheid were discriminatory policies involving perpetrators and victims. This incontrovertible truth had to be acknowledged in order for our nation to heal and make progress. The TRC recommended that the government should support a series of symbolic reparations in order to restore human and civil dignity and allow survivors to come to terms with the past. The TRC further recommended that society should commemorate victims of colonialism and apartheid through commemorative days, the construction of public memorials at national, regional and municipal levels, and the renaming of public facilities in the names of victims. There is a need to ensure that victims of apartheid are affirmed in public life.

<sup>42</sup> “Progressive Prudes: A survey of attitudes towards homosexuality & gender non-conformity in South Africa”, 2016

<sup>43</sup> Socio-Economic Justice for All (SEJA) Baseline Survey, FHR, 2017.

99. The TRC at the end of its mandate handed a list of cases to the National Prosecutorial Authority (NPA) for the purpose of pursuing further investigations and prosecutions. The Promotion of National Unity and Reconciliation Act, 1995<sup>44</sup> provided that if amnesty had been denied or not applied for or granted, the law should follow its course with perpetrators responsible for violations being prosecuted.
100. Truth recovery, particularly around institutional and systemic questions, is acknowledged and recognised today in the field of transitional justice as being a critical element to address the injustices of apartheid so as to ensure not only that history correctly reflects the reign of terror unleashed by the Security Branch police by exposing the inhumane conditions of detention and the torture and death of detainees whilst in police custody, but also to ensure that those responsible are held accountable, thus sending a message in the new South Africa that torture and police brutality will not be tolerated.
101. In an open and democratic society such as ours, perpetrators cannot be allowed to suppress the truth and in so doing litter our history with half-truths that will not allow society to heal.
102. Each individual and every society has the inalienable right to know the truth about the past. As a result of deliberate fabrication and withholding of information from the TRC, many perpetrators of human rights violations have escaped scrutiny and responsibility for their actions. The survivors and the families of those who died in detention need to know the truth about how their loved ones were tortured and killed so that they can get closure. The truth has to be recorded - not by the perpetrators but by their victims.
103. It is incumbent on South Africans from all walks of life to embark on programmes dedicated at eradicating all the lingering negative legacies of apartheid and discrimination from our past. It is therefore imperative for government, the corporate sector, organised labour, and faith based organisations to develop their own progressive barometers (indicators) measuring their achievements in eradicating all the scourges of racism and attaining the ideals of nation building and social cohesion.
104. Systemic and inherited racism must be confronted by society as otherwise it will be reproduced and reinforce itself across generations. It is this inherited psyche of racial prejudice, breakdown in values, inequality of opportunity and massive poverty, as well as competition for scarce resources, which helps fuel racism and, more recently, xenophobia. Discrimination on the grounds of sexual orientation and gender orientation or expression and homophobic violence are also a major problem. More needs to be done to protect the constitutional and legal rights of sexual minorities. Inequality and discrimination still exist. It is against this reality that the NAP is necessary.

## Employment

105. The Commission for Employment Equity in its latest report<sup>45</sup> indicates that representation of the White population group is more than six times their Economically Active People (EAP) and the Indian population group is more than three times their EAP at the top management level. It also shows the representation of the African population group to be approximately one-fifth and the Coloured population group approximately half of their EAP at this occupational level.

<sup>44</sup> Promotion of National Unity and Reconciliation Act, 1995 (Act No. 34 of 1995).

<sup>45</sup> 2017/18.

106. **Table 3** shows the representation of designated groups<sup>46</sup> at different occupational levels between 2001 and 2017.

OCCUPATIONAL LEVEL	PERIOD	WHITE PERSONS	BLACK PERSONS	COLOURED PERSONS	INDIAN PERSONS	MALE	FEMALE
Top Management	2001	87%	6%	3%	4%	87%	13%
	2017	67%	14,3%	5,1%	9,4%	77,1%	22,9%
Senior Management	2001	81%	9%	5%	5%	80%	20%
	2017	56,1%	22,1%	7,7%	10,9%	66,2%	38,8%
Professionally Qualified	2001	56%	33%	6%	5%	62%	38%
	2017	36,5%	42,2%	9,6%	8,8%	53,4%	46,6%
Technical Skilled	2001	18%	58%	18%	6%	60%	40%
	2017	19,6%	61,7%	11,3%	5,6%	52,9%	47,1%

107. In view of the above, it is evident that employment equity requires ongoing attention. There is still a great need for employment equity measures in South Africa.

### Income distribution

108. The latest Income and Expenditure Survey (IES)<sup>47</sup> examines the increases to income according to population group. We see the largest increases happening in non-White households. Indian/Asian-headed households showed a 36,8% increase (an increase of R68 013), closely followed by Black-headed households at 34,5% (an increase of R17 859). Households headed by Coloured persons saw a 27,7% increase in income (an increase of R30 152), while White-headed households saw only a 0,4% real increase or roughly R1 412 more.
109. However, despite this significant growth in income in non-White person households, there is still a tremendous gap between the population groups. White-headed households on average earn more than 5.5 times the income of the average Black-headed household. So, while the income growth trend shows very positive signs, inequality remains a serious challenge for the country. Although marginal, male-headed households are still seeing greater income growth than households headed by women. However, in most male-headed households, the income reported commonly includes a working spouse/partner, so it is possible that gains made by their spouses / partners give extra weight to the household's overall income. Even though South Africans are getting richer, overall there are still very high levels of inequality across and within population groups.

46 "Designated groups" mean Black persons, women and people with disabilities who:  
 (a) Are citizens of the Republic of South Africa by birth or descent; or  
 (b) became citizens of the Republic of South Africa by naturalisation—  
 (i) Before 27 April 1994; or  
 (ii) After 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.

47 Income and Expenditure Survey 2010/11, Statistics SA.

Table 4

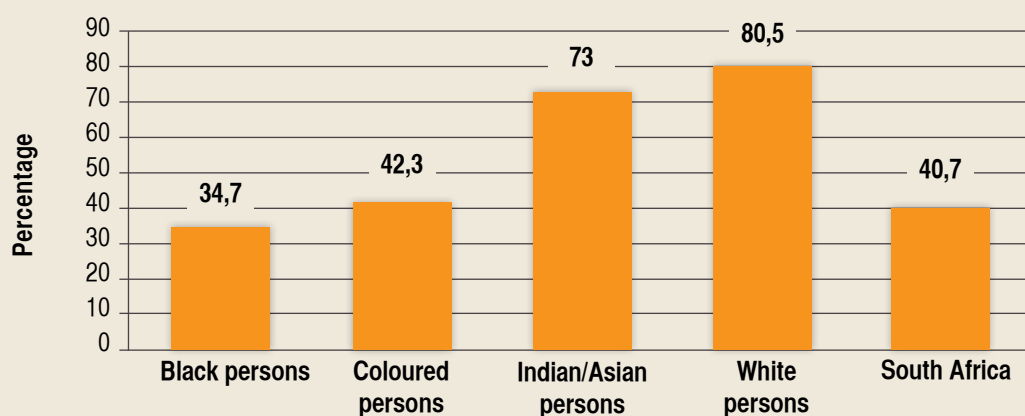
	IES 2010/11 (R)	IES 2005/06 (R)	Real Growth	Increase in Rand terms
<b>South Africa</b>	119 542	102 401	16,7%	17 141
<b>Sex of household head</b>				
<b>Male</b>	151 185	127 914	18,2%	23 272
<b>Female</b>	70 830	62 397	13,5%	8 433
<b>Population group of household head</b>				
<b>Black persons</b>	69 632	51 773	34,5%	17 859
<b>Coloured persons</b>	139 190	109 038	27,7%	30 152
<b>Indian/Asian persons</b>	252 724	184 711	36,8%	68 013
<b>White persons</b>	387 011	385 599	0,4%	1412

110. Table 4 shows a prominent relationship between race and class, especially in terms of material exclusion. Black South Africans comprise the vast majority of the materially excluded in South Africa, a dire reality which is not experienced by most White South Africans. This is part of the legacy passed down from centuries of colonialism that culminated in the apartheid system, which fostered a mutually reinforcing relationship between racial discrimination and class inequality. This inheritance continues to be alive to this day.<sup>48</sup>

### Housing

111. Findings from the General Household Survey, 2017<sup>49</sup> on the percentage of dwelling units with six rooms or more per population group is depicted in **Table 5** below. The number of rooms includes all rooms in the dwelling (including toilets and bathrooms). This question reflects the standard of living of the household and can be tied to other characteristics such as education or perceived wealth status. White-headed (80,5%) and Indian/Asian-headed (73,0%) households were much more likely to live in dwellings with six or more rooms than Coloured-headed (42,3%) or Black-headed (34,7%) households.

Table 5



<sup>48</sup> Reconciliation Barometer, IJR, 2013.

<sup>49</sup> Undertaken annually by Statistics SA.

## Disability

112. Globally, persons with disabilities are marginalised and excluded from full participation in society. According to research by the South African Human Rights Commission (SAHRC), in South Africa, persons with disabilities face multiple forms of discrimination in various social spheres, including in respect of access to health care services, employment and education.<sup>50</sup> Without a commitment to social inclusion and the accommodation of persons with disabilities, substantive equality cannot be achieved.
113. The 2011 census findings show a national disability prevalence rate of 7,5%. Provincial variations show that the Free State and Northern Cape provinces had the highest proportion of persons with disabilities (11%), followed by North West and Eastern Cape (10% and 9,6% respectively). Western Cape and Gauteng provinces showed the lowest percentage of persons with disabilities (5%). The population group profile shows that Black people had the highest proportion of persons with disabilities (7,8%), followed by the White population group (6,5%).
114. South Africa signed and ratified the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol in 2007, and is obligated under this convention to fulfil its commitments in terms of implementation and reporting.

## Albinism

115. Discrimination based on albinism has received scant attention in the South African legal context. Because persons living with albinism are a small and marginalised group in society, discrimination against them is simply overlooked and unreported.<sup>51</sup> Diverse sociological and psychological factors give skin colour its present connotations. In the history of Africa, discrimination on the basis of skin colour is not new – the system of privilege and prejudice founded on the extent of lightness or darkness of a person's skin colour has been addressed with such phrases as 'colourism', 'shadism', 'skin tone bias', 'pigmentocracy' and 'colour complex'. Any label used to describe a person's skin colour is fraught with problems, and may point to discrimination, stereotyping and perceptions of beauty, even between those of the same race. For persons living with albinism, their skin colour leads to negative social constructions amongst Africans, including beliefs that they are cursed.<sup>52</sup> It is important to note that in November 2014, the UN General Assembly adopted a resolution establishing June 13th as International Albinism Awareness Day. This historic resolution confirmed the global focus on albinism advocacy. The Department of Arts and Culture launched its #AlbinismActivismCampaign on 4 May 2018.

<sup>50</sup> South African Human Rights Commission, Research Brief on Disability and Equality in South Africa 2013 - 2017.

<sup>51</sup> *Colour discrimination against persons with albinism in South Africa*, M Mswela & M Nöthling-Slabbert, Department of Jurisprudence, School of Law, University of South Africa, Pretoria, June 2013, SAJBL, Vol 6.

<sup>52</sup> M Mswela & M Nöthling-Slabbert.

## CHAPTER 5: SOUTH AFRICA TODAY

116. We cannot be blind to racial tension that still exists in South Africa today. As Mondli Makhanya writes:<sup>53</sup>

*"We are not the syrupy rainbow nation that the diminutive archbishop and the first president of "free" South Africa wished us to be. These two great men wished us to be a human representation of the flag.*

*They so wished us to be, they even believed we had arrived there.*

*Regretfully not enough practical work had gone into building that nonracial society, which in any case was always going to take decades of effort to perfect.*

*We celebrated the achievement of a nonracial society without confronting the lingering reality of our past and dealing with the healing process.*

*Now we are paying the price. We are regressing."*

117. The Constitutional Court has recognised that:

*"South African society is diverse and has for many centuries been sorely divided, not least through laws and practices which encouraged hatred and fear. Expression that advocates hatred and stereotyping of people on the basis of immutable characteristics is particularly harmful to the achievement of these values as it reinforces and perpetuates patterns of discrimination and inequality."<sup>54</sup>*

118. Yet, instances of hate speech have surged in recent years, while other recent examples of racism, racist incidents, xenophobia and/or other hate crimes abound:

- For example, a Black student was turned away from attending hockey trials in North West. She persuaded her parents to drive her to Hoërskool Grenswag for Bokkie Week trials after being given approval by her coach. All seemed well when she was allowed to register after producing her birth certificate and paying R30 fee, but was then allegedly told that Bokkie Week was for White children only.
- Complaints against a teacher at the Parkdene Primary School who has been accused of harassing a grade three pupil for wearing the sacred Hindu red string (Kavla) around his wrist. The teacher was suspended pending investigations by the Department of Basic Education.
- A Mozambican national was killed in 2015 when he demanded payment for cigarettes young boys had taken from his stall during an outbreak of violence against foreign nationals.
- In January 2017, the iconic Cape Town mosque, Nurul Islam, was defaced with blood and the snout of a pig. The caretaker allegedly said he called the police who sent out a police vehicle, but he was told they could not open a case, but only record the incident.

<sup>53</sup> "Of cakes and race wars", News24, 21 January 2018, <https://www.news24.com/Columnists/Mondli-Makhanya/mondli-makhanya-of-cakes-and-race-wars-20180121-3>.

<sup>54</sup> *Islamic Unity v Independent Broadcasting Authority and Others*, 2002 (4) SA 294 (CC) para 43.



- Persons have been found guilty of *crimen injuria* for posting racist comments on social media.
  - The coffin assault case of 2017 sparked much controversy, when a Black man was put in a coffin by two White men who were heard on a video threatening to put a snake inside the coffin and set it alight.
  - In the “Coligny Sunflower case” two White North West farm workers have been found guilty of killing a 16-year-old Black teenager by pushing him out of a moving van after they allegedly caught him stealing from their employer’s field.
  - There have been numerous attacks on LGBTI persons, with so-called “corrective rapes” becoming more prevalent.
119. The SA Reconciliation Barometer Survey (SARB): 2017 Report, undertaken by the Institute for Justice and Reconciliation, provides very useful information on race relations and reconciliation in our country. According to the SARB, respondents who participated in the 2017 SARB survey perceived limited change in key spheres of society.
120. In the SEJA Baseline Survey<sup>55</sup> respondents were asked to consider whether they thought circumstances in South Africa were getting better, staying the same or getting worse. Almost half (47%) of respondents thought that things were getting worse, while a quarter of respondents either thought things were staying the same (27%) or getting better (26%). While there were no significant differences across male and female respondents, the differences across the races were interesting. Three out of every ten (29%) Black persons thought that things were getting better, as did two out of every ten (22%) White respondents. Indian/Asian and Coloured respondents were less enthusiastic about the direction of the country. Almost two-thirds (65%) of Coloured respondents and three fifths (62%) of Indian/Asian respondents thought that things were getting worse – this was in contrast to only half (53%) of White persons and two-fifths (43%) of Black persons.
121. In the same survey, a significant proportion (44%) agreed that foreigners should not be allowed to live in South Africa. Almost half of all White respondents (48%) and Coloured respondents (48%) agreed with foreigners not being allowed in the country as did 43% of Black respondents and 36% of Indians/Asians respondents. The highest levels of distrust were in people from other countries – both African and non-African countries – reinforcing the attitudes to foreigners reported above. Approximately two-fifths of all adults in South Africa had no trust at all in people from other African countries (38%) or those from other non-African countries (39%).
122. With regard to knowledge of the Constitution, male respondents were more likely (55%) than their female counterparts (47%) to have heard of either the Constitution or the Bill of Rights. With regards to the race of respondents, White persons were the most likely (68%) to have heard of either, followed by Indian/Asian respondents (61%).
123. While the majority (56%) of Coloured persons had heard of either the Constitution or the Bill of Rights, less than half (48%) of Black respondents had heard of either. Female Black respondents were least likely (44%) to have heard of the Constitution or the Bill of Rights.

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<sup>55</sup> 2017.

## CHAPTER 6: ADDRESSING RACISM AND DISCRIMINATION AND PROMOTING EQUALITY – WHAT WE HAVE DONE SO FAR

124. The various measures taken by South Africa to meet its range of constitutional and human rights obligations have been set out in detail as part of South Africa's international treaty reporting obligations. South Africa has a strong equality and anti-discrimination legal framework. The Constitution requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights with the State having the primary responsibility to guarantee that every individual can exercise their rights. In this regard, the government of South Africa has passed a number of laws to give effect to its constitutional goals of achieving equality, human dignity and the advancement of human rights and freedoms.

### Equality and anti-discrimination

125. The right to equality and to be protected from discrimination features prominently in our Constitution.<sup>56</sup> South Africa has enacted various pieces of legislation to rule out discrimination and ensure equality across a variety of areas, e.g. with regards to combating employment discrimination, there is the Employment Equity Act, 1998.
126. Government also passed the PEPUA (2000) which prohibits unfair discrimination on the grounds of race, gender and disability. The Act defines hate speech as words 'that could reasonably be construed to demonstrate a clear intention to be hurtful, cause harm or promote hatred on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth'. This definition is broader than the definition provided for in the Constitution in that it includes both hurtful and harmful speech, as well as speech that could have this intention, introducing a speculative element to the definition.<sup>57</sup>
127. The PEPUA, 2000<sup>58</sup> provides for the framework for the implementation of section 9 of the Constitution. In this regard, the Act provides for the designation of Equality Courts. The purpose of Equality Courts is to adjudicate matters specifically relating to infringements of the right to equality, unfair discrimination and hate speech, with a view toward eradicating the ever present post-apartheid spectre which essentially divided the country along racial, gender and monetary related lines. The Act stipulates that all High Courts are automatically designated as Equality Courts, but more importantly it affords the bulk of adjudicative powers relating to equality matters to the Magistrates' Courts. The Department of Justice designates Magistrates' Courts as having jurisdiction to entertain equality matters, once presiding officers and staff of such Courts receive the appropriate training. Regulations for Equality Courts were promulgated<sup>59</sup> and, in 2009, all Magistrates' Courts were designated as Equality Courts. This has improved access to justice as the public can now lodge complaints of unfair discrimination at the Magistrates' Court nearest to their community.

<sup>56</sup> S 9

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

<sup>57</sup> Promotion of Equality and Prevention of Unfair Discrimination Act (2000).

<sup>58</sup> Ibid.

<sup>59</sup> Government Notice No R764 of 13 June 2003 (Government Gazette 25065).

128. The extensive range of remedies available to these courts is designed to encourage a creative, informal judicial approach that is sensitive to the circumstances of each case and the needs and interests of the parties. There are wide standing provisions allowing proceedings to be instituted by individuals, those acting on their behalf, in the interests of a group or class, in the public interest, or an association acting in the interest of its members.
129. Persons needing assistance when approaching the Equality Court are usually assisted by the clerk of the Equality Court or the SAHRC or the Commission for Gender Equality, as the case may be. Although the Equality Court is a formal court sitting, the rules and procedures are more relaxed than in normal courts. In order to institute proceedings in the Equality Court it is not a requirement that one must have legal representation. The Equality Courts are free of charge, so the complainant does not have to pay any court fees. There was a 14% decrease of Equality Court matters reported between 2015/16 and 2016/17. The latest figures for Equality Court matters reported during 2017/18 indicate a further 51% decrease in the total number of reported cases.<sup>60</sup>
130. Our courts have also handed down cases which focus on equality and clamp down on discriminatory laws and practices. For example, in *Prinsloo v Van der Linde*<sup>61</sup> the Court acknowledged that -

*“Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order. It is the majority, and not the minority, which has suffered from this legal separateness and disadvantage.”*<sup>62</sup>

131. In *Minister of Finance v Van Heerden*<sup>63</sup> the Court held that the Constitution recognises the fact that all are not equal in our country. If legal rules and policies deny this reality, it will simply lead to an entrenchment of existing inequalities:

*“The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution.”*<sup>64</sup> *As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights.*<sup>65</sup> *From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.”*<sup>66</sup>

132. In *Minister of Home Affairs v Fourie* Sachs J held that -

*“A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. **Equality means equal concern and respect across difference. It does not***

<sup>60</sup> Department of Justice and Constitutional Development, *Annual Report*, 2017/2018, page 34.

<sup>61</sup> 1997 (6) BCLR 759.

<sup>62</sup> Par 20.

<sup>63</sup> 2004 (11) BCLR 1125 (CC).

<sup>64</sup> *Brink v Kitshoff* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 40; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 31; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 26.

<sup>65</sup> See, for example, sections 1(a), 7(1) and 39(1)(a).

<sup>66</sup> Par 26.

*presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society".<sup>67</sup>*

133. In *Minister of Home Affairs and Others v Watchenuka* the court acknowledged that dignity is inherent in all persons regardless of nationality –

*"Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by section 10 of the Bill of Rights." <sup>68</sup>*

134. In essence, the judgments of our courts are continuously being factored into the policies of government to ensure the strengthening of a human rights culture in the country.

### Hate crimes and hate speech

135. Hate crimes are identity crimes, directed not only at the identity of the victim but also of the group to which they belong. A victim is thus often a symbol of a broader group of people. Although hate crimes can be perpetrated against anyone, it is often the more marginalised groups that are targeted. We are increasingly living in a world that focuses more and more on difference, a world that is becoming increasingly intolerant. There is no shortage of hate crimes or hate speech in our society. In the case of *SAHRC v Qwelane*, the Equality Court recognised that freedom of expression cannot protect speech which is harmful to constitutional values and human rights, and which threatens democratic pluralism.<sup>69</sup>
136. South Africa has a number of laws that deal with discrimination, such as the PEPUA (2000) as well as section 9 of the Constitution, yet none of these is specifically tailored to address the issue of hate crimes. PEPUA (2000) deals with hate speech, unfair discrimination and harassment. The term "hate crime" does not feature anywhere in the Act.
137. It is important to note that PEPUA (2000) recognises that unfair discrimination and hate speech **may** constitute crimes and must be regarded as an aggravating factor for the purposes of sentencing. But this does not address hate crimes individually and specifically, as it does harassment, discrimination and hate speech. PEPUA (2000) has a further weakness in the sense that it focuses specifically (in section 28(1)) on discrimination based on race, disability and gender but does not include nationality or sexual orientation. In this way, PEPUA (2000) creates a 'hierarchy of hate' by prioritising some forms of discrimination over others. A further weakness of PEPUA (2000) is that not enough emphasis is placed on the finding of motive.
138. There is currently a Prevention and Combating of Hate Crimes and Hate Speech Bill, which has been tabled in Parliament. The Bill is based on the recommendations contained in the policy framework which was developed. Developing specific legislation on hate crimes will have a number

<sup>67</sup> Par 60.

<sup>68</sup> *Minister of Home Affairs and Others v Watchenuka and Others* 2004 (4) SA 326 (SCA).

<sup>69</sup> *SAHRC v Qwelane* case no EQ44/2009 (EQ13/2012) EQC (18 August 2017).

of advantages. It will help create a shared definition of hate crime amongst all those involved in the criminal justice system;<sup>70</sup> will send a clear public message that hate crimes will not be tolerated in South Africa; will provide additional tools to investigators and prosecutors to hold hate crimes perpetrators accountable; will provide a means to monitor efforts and trends in addressing hate crimes, and will allow for effective coordination between government service providers to reduce the impact of secondary victimisation on hate crimes victims. Secondary victimisation takes place where victims are subjected to further insensitive or inappropriate behaviour or comments by police, health care officials or justice officials.

### Xenophobia

139. Following the 2015 incidents of violence against foreign nationals, government's strategy, in partnership with various organs of civil society in proactively curbing and averting these threats, was outlined in a multi-faceted and integrated plan. Government's efforts are coordinated at the highest level through, amongst others, three main IMCs. These IMCs are – The IMC on Migration, the IMC on Social Cohesion and the IMC on Population Policy. The IMC on Migration's mandate was broadened to also deal with all the underlying causes of the tensions between communities and foreign nationals.
140. Some of the areas that are being addressed in this regard, is the review of the implementation of Labour Relations policies as they affect foreign nationals; the implementation of the laws that govern business licenses; the country's border management and generally the country's migration policies. This is work in progress and the IMC has initiated consultations with the affected parties so as to seek a lasting solution to the issues raised by communities and foreign nationals. In terms of the operational functioning of the IMC, the National Joint Operational and Intelligence Structure (NATJOINTS) which is the structure for coordinating government's response to emergencies of this nature, has been activated. In addition, a Technical Committee comprising of the Directors-General of all the affected departments, provides the critical support on the intensive work that needs to be done in dealing with the root causes of these tensions. These two structures provide the necessary support to the IMC.
141. It should be noted that as part of the work of the IMC, the former President has convened meetings of stakeholders in South Africa to discuss the country's migration policy and discuss how various sectors can work with government to promote orderly migration and good relations between citizens and foreign nationals. The meetings have been attended by business, sports, trade union movements, arts and sports bodies, religious leaders, community formations, youth formations, children, persons with disabilities and traditional authorities. The participants were unanimous in condemning and rejecting the attacks against foreign nationals. They further pledged their commitment to work within their constituencies to build social cohesion. In addition, the former President also invited the representatives of the foreign nationals residing in South Africa. All the participants were unanimous in acknowledging and commending government's efforts to stop the attacks. They committed to work together with South African authorities to address the challenges. It is also noteworthy that government has initiated anti-xenophobia programmes and social cohesion campaigns in schools.

<sup>70</sup> For example, the National Policy Guidelines for Victim Empowerment list 'Victims of Hate Victimisation' as a priority group for assistance but there is no recognition of 'victims of hate victimisation' in any domestic current legislation.

142. Some of the actions flowing from the Justice, Crime Preventions and Security Cluster (JCPS) interventions include the following:

- The police have prioritised the investigation of these matters and liaise closely with the NPA and courts in dealing with such matters – especially where large numbers of persons are arrested. The NPA has developed contingency plans to manage and deal with the cases efficiently and speedily. In addition, dedicated Deputy Director of Public Prosecutions, Chief Prosecutors, Senior Prosecutors and Control Prosecutors were assigned to monitor, prosecute and give guidance to police investigations. Prosecutors were sensitised and provided with guidelines on how best to deal with such cases. Where required, dedicated court sessions are instituted to help prioritise these matters once they are trial ready.
- Monitoring of the cases arising from such violence and prioritising their investigations and trials continues. In addition, the DOJCD, the SAPS and the NPA are in the process of reviewing cases that were withdrawn, closed as undetected or where people were acquitted due to technicalities, in order to deal with all shortcomings and to close identified gaps. The NPA has also developed guidelines for prosecutors for use in such matters and this is being shared with other role players, especially the SAPS. Community-based campaigns were launched to promote the justice system and educate persons about human rights for all. In particular, the DOJCD held various key community events to highlight government's commitment towards the protection of human rights. The DOJCD's community events focused on, amongst others, the Bill of Rights, anti-xenophobia and equality.
- NPA officials in the provinces were encouraged to participate in the community dialogues arranged by SAHRC with the view to educate the people on issues that lead to foreign nationals leaving their respective countries and their contribution to the economy of this country. In opposing bail, where required, prosecutors draw the attention of the court to the potential for intimidation of witnesses or complainants, and its wider ramifications for justice and the rule of law.
- The Branch: Court Services in the DOJCD has identified and placed on a database foreign language interpreters that can assist in dealing with interpretation services where required in terms of matters relating to foreign nationals.

143. Recommendations were also made by the Parliamentary Ad Hoc Joint Committee on Probing Violence against Foreign Nationals Report and the Special Reference Group on Migration and Community Integration in KwaZulu-Natal, chaired by Judge Navi Pillay. The SAHRC convened a National Investigative Hearing on Migration, Xenophobia and Social Cohesion in February 2018. The purpose of the investigative hearing was to interrogate the plight of migrants in South Africa with a focus on investigating:

- the underlying causes and contributing factors to xenophobia and related intolerance;
- the extent of the prevalence of xenophobia and related intolerance in the country;
- the broader issues relating to the treatment of foreign nationals in the country, including the challenges faced by migrants in integrating into local communities;

- the extent of institutional xenophobia focusing on an investigation on the barriers faced by migrants in obtaining the necessary documentation;
- accessing support and basic services;
- the precarious and often harmful labour practices to which vulnerable groups such as migrants are subjected to and widespread stigmatisation of foreign nationals;
- the extent to which previous recommendations have been implemented, particularly the recommendations in the Commission's 2010 report, and an examination of measures taken post-2015 xenophobic violence to promote the social integration of migrants into local communities;
- the coherency of the legislative and policy environment from a rights-based perspective, and its impact on the rights of migrants;
- how the conception and implementation of law and policy proposed regulatory amendments and their contribution to the perpetuation of stigma and discrimination against migrants;
- the conceptualisation and role of the hate crimes legislation and the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, including the manner in which it may impact and/or contribute to current counter-xenophobia initiatives;
- the role of the media and public figures in perpetuating or combatting stereotypes relating to migration; and
- the challenges faced by migrants in integrating in South African society and the measures that could be adopted to encourage social cohesion.

### **LGBTI persons**

144. The establishment of a National Task Team (NTT) by the DOJCD in 2011 was intended to counter the continued discrimination based on sexual orientation and gender identity against members of the LGBTI community. The DOJCD launched the National LGBTI Programme endorsing government's commitment and issued terms of reference for a National Intervention Strategy to address gender and sexual orientation based violence as well as the terms of reference for the rapid response team to fast track cases in the criminal justice system.
145. In 2012, in submitting its National Report to the Universal Periodic Mechanism of the United Nations Human Rights Council, South Africa was commended by UN member States for its commitment to human rights and improving the lives of its citizens, the delivery of basic services such as housing, health and education as well as South Africa's leading role in the United Nations Human Rights Council, especially regarding the rights of LGBTI persons. Equally, South Africa was also urged to develop urgent measures to deal with violence against LGBTI persons.
146. When the NTT was re-established in May 2013, the DOJCD together with representatives from Chapter Nine institutions and civil society organisations, such as the FHR as the secretariat, set out to achieve a number of formidable tasks. These included, amongst others, to develop a National Intervention Strategy to respond to, and prevent, gender and sexual orientation-based violent crimes perpetrated against LGBTI persons and to develop an Intersectoral Implementation Plan which would link parallel and complementary initiatives. The NTT undertook to strengthen



government's ability to respond to LGBTI needs and to strengthen the capacity of CSOs to deliver related services.

147. It set out to improve linkages with other government departments, to undertake programmes within the DOJCD, such as the Access to Justice and the Promotion of Constitutional Rights, the current SEJA Programme as well as working closely with relevant Chapter Nine institutions - such as the South African Human Rights Commission and the Commission for Gender Equality – to combat racism, xenophobia and related intolerance and in that manner address the impact of different forms of discrimination targeting LGBTI persons. It sought to improve the management of cases by relevant role-players in the criminal justice system, including the South African Police Service, the National Prosecuting Authority, the Department of Social Development, the Department of Health and the Department of Correctional Services. Lastly, it aimed to implement, coordinate, monitor and evaluate the National Intervention Strategy and other related objectives.
148. Significant progress has been made to meet these objectives. To this end, the National Intervention Strategy, aimed at preventing and responding to gender and sexual orientation-based violence, was finalised and launched. The Inter-sectoral Implementation Plan for the Strategy was finalised. The Rapid Response Team meets to review progress on new and pending cases in the criminal justice system, while multi-sectoral provincial task teams have been established in all provinces, thereby improving and strengthening the issue of representation and participation in the NTT and public education initiatives embarked upon. Ensuring equality for all means that we must respond decisively to incidents of discrimination and crimes that are being committed against LGBTI persons, by using the mechanisms set up under the NTT. In addition, we must collaboratively support public education and training programmes set up under the NTT.

### Indigenous people

149. South Africa's approximately 320,000 indigenous citizens include the San peoples—!Xun, Khwe, and Khomani—the Nama Communities, the Griqua associations and Koranna descendants, and the “revivalist Khoisan,” which are referred to collectively as the Khoisan. In 1996, the newly-democratic elected government took steps toward recognising Khoisan rights in Article 6 of the Constitution, requiring the Pan South African Language Board (PanSALB) to promote not only the eleven official languages, but also ‘the Khoi, Nama and San languages’. PanSALB created a Khoi and San National Language Board.
150. Following the first democratic elections in 1994, and as part of a comprehensive strategy to recognise Khoisan identity, a National Griqua Forum was established. This body then proposed that a national body be established to represent the Khoisan communities in South Africa that would serve as a single body with which government would consult on all issues relating to the Khoisan. On 27 May 1999, a national non-statutory body that became known as the National Khoisan Council (NKC) was established.
151. Government continues to work with and support the National Khoisan Council (NKC) that serves as a single body with which government consult on all issues relating to the Khoisan. The NKC consists of 30 members representing the five main groupings of the Khoisan society (Griqua, San, Cape Khoi, Koranna and Nama). They have been involved in the development of the Traditional and Khoisan Leadership Bill which was recently passed by the National Assembly and by the National Council of Provinces. The legislation will provide for the statutory recognition of the Khoisan leaders and communities.

The Constitution places significant value on the principles of “unity” and “diversity”. It contains specific features that recognise the right of communities<sup>71</sup> (or indigenous peoples) to engage in cultural, linguistic and religious forms of expression.

152. South Africa has implemented and funded practical steps and significant educational, economic and scientific programmes for the protection and promotion of indigenous people. Known as the Indigenous Knowledge System, this ambitious programme brings together indigenous communities, universities, research centres and economic partners and enjoys the support of the government. The Department of Science and Technology’s National Indigenous Knowledge Systems Office has received international recognition for its innovation in enhancing indigenous knowledge systems in the country.
153. The SAHRC has stated that recognition must be given to the fact that South Africa has taken progressive measures in respect of the protection of the rights of indigenous peoples, including the establishment of numerous specific bodies and institutions and the enactment of multiple laws and policies aimed at preventing unfair discrimination and protecting the rights of indigenous peoples. These include, *inter alia*, an abundance of laws aimed at protecting the rights of indigenous peoples’ indigenous knowledge systems as well as plans with respect to the restitution of land.

#### **Racism and prejudice in mainstream and social media**

154. Racism continues to play out in the traditional media in South Africa, which is itself under the pressure of the increase of social media outlets. Social media has, in some cases, become an outlet for untrammelled racism. In addition, racial conflicts erupt in wars of words among media practitioners themselves. The media and other means of public communication, such as the Internet and social media, play a crucial role in enabling free expression and the realisation of equality. Freedom of expression must not impinge on the right to dignity. Conversely, the unprecedented, rapid development of new communication and information technologies, such as the Internet and social media, has enabled wider dissemination of racist and xenophobic content that has the potential to incite racial hatred and violence.
155. In response to the increasing vulnerability of victims to cybercrime, South Africa has implemented a number of strategic and tactical interventions including the approval of a National Cyber Security Policy Framework in 2012. Issues of racism and racial hatred on the worldwide web and social media platforms are further addressed through legislation to combat cybercrime.<sup>72</sup> The country is in the process of finalising legislation on cybercrime and related matters. This is in accordance with the African Union Draft Convention on the establishment of a credible legal framework for cyber security in Africa. It requires States who ratified the Convention to adopt legislation to criminalise the dissemination of racist and xenophobic material. The legislation includes the prohibition and dissemination of racist and xenophobic material through a computer or electronic communications network as well as the incitement of violence against a person or groups of persons.

<sup>71</sup> The objectives of the bill are: to make provision for the recognition of the Khoisan, to consolidate (subsequently to repeal) the National House of Traditional Leaders Act, 2009, and the Traditional Leadership and Governance Framework Act, 2003, to ensure an integrated and uniform approach in dealing with all matters relating to traditional leadership, to address the limitations of the two laws that are to be repealed, and to effect consequential amendments to other laws.

<sup>72</sup> Specific legislation on cybercrime has been enacted through the following instruments: - Electronic communication and Transactions Act (Act No. 25 of 2002)- The National Cyber security Policy Framework 2012 - Regulation of Interception of Communications and Provision of communication-related Information Act of 2002 - Protection of Personal Information Act 2013.

156. The Cybercrimes Bill<sup>73</sup> does not contain any provisions relating to racism, racial discrimination, xenophobia and related intolerance, as the Prevention and Combating of Hate Crimes and Hate Speech Bill (2018) now deals with this category of offences. The latest version of the Hate Crimes and Hate Speech Bill contains definitions relating to the publication, propagation or advocating or communication of hate speech material in cyberspace.
157. Furthermore vis-à-vis social media, the current wording of clause 4(1)(a) sets out the elements of and creates an offence of hate speech. In terms of clause 4(1)(b) of the Bill, it is an offence to intentionally distribute or make available hate speech material via an electronic communication, viz. in cyberspace. Clause 4(1)(c) provides that any person who intentionally, in any manner whatsoever, displays any material or makes available any material which constitutes hate speech, which is accessible by, or directed at, a specific person who can be considered to be a victim of hate speech, is guilty of an offence.
158. The Protection from Harassment Act (Act No. 17 of 2011)<sup>74</sup> provides victims of harassment with effective remedies against such behaviour and introduces measures which seek to enable the relevant organs of State to give full effect to the provisions of this Act. In terms of the Act, the definition of “harassment” provided in section 1 includes engaging directly or indirectly in conduct that the respondent knows or ought to know (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or (iii) sending, delivering or causing the delivery of *inter alia* electronic mail. Online “trolling”,<sup>75</sup> online abuse and cyber bullying brings with it its own challenges.

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73 Bill 6 of 2017.

74 Protection from Harassment Act (Act No. 17 of 2011).

75 “Trolling” refers to offensive online postings and social media abuse.

## CHAPTER 7: SOUTH AFRICA'S NATIONAL ACTION PLAN TO COMBAT RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

### National scope: The role of key actors in combating and eliminating racism, racial discrimination, xenophobia and related intolerance

#### Government

159. Government is responsible for creating a legal and policy framework for the prevention of racism, racial discrimination, xenophobia and related intolerance as well as for the effective implementation of the prevention measures and practices. To complement enforcement measures, government should increase its efforts towards prevention of racism, racial discrimination, xenophobia and related intolerance in areas such as immigration policy, policing and administration of justice and the promotion of multiculturalism and cultural diversity. Human rights training for government officials are also central in this regard.
160. Moreover, as stated by the Committee on Economic, Social and Cultural Rights in its general comment no. 21 (2009) these rights impose three types or levels of obligations on government: (a) the obligation to respect; (b) the obligation to protect; and (c) the obligation to fulfill. The obligation to respect includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group to freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected. This includes the right not to be subjected to any form of discrimination based on cultural identity, exclusion or forced assimilation. Lastly, the obligation to fulfill requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realisation of the right enshrined in article 15, paragraph 1 (a), of the Covenant.<sup>76</sup>
161. Article 2 of ICERD states that all State parties should condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.<sup>77</sup>

#### The consultation process

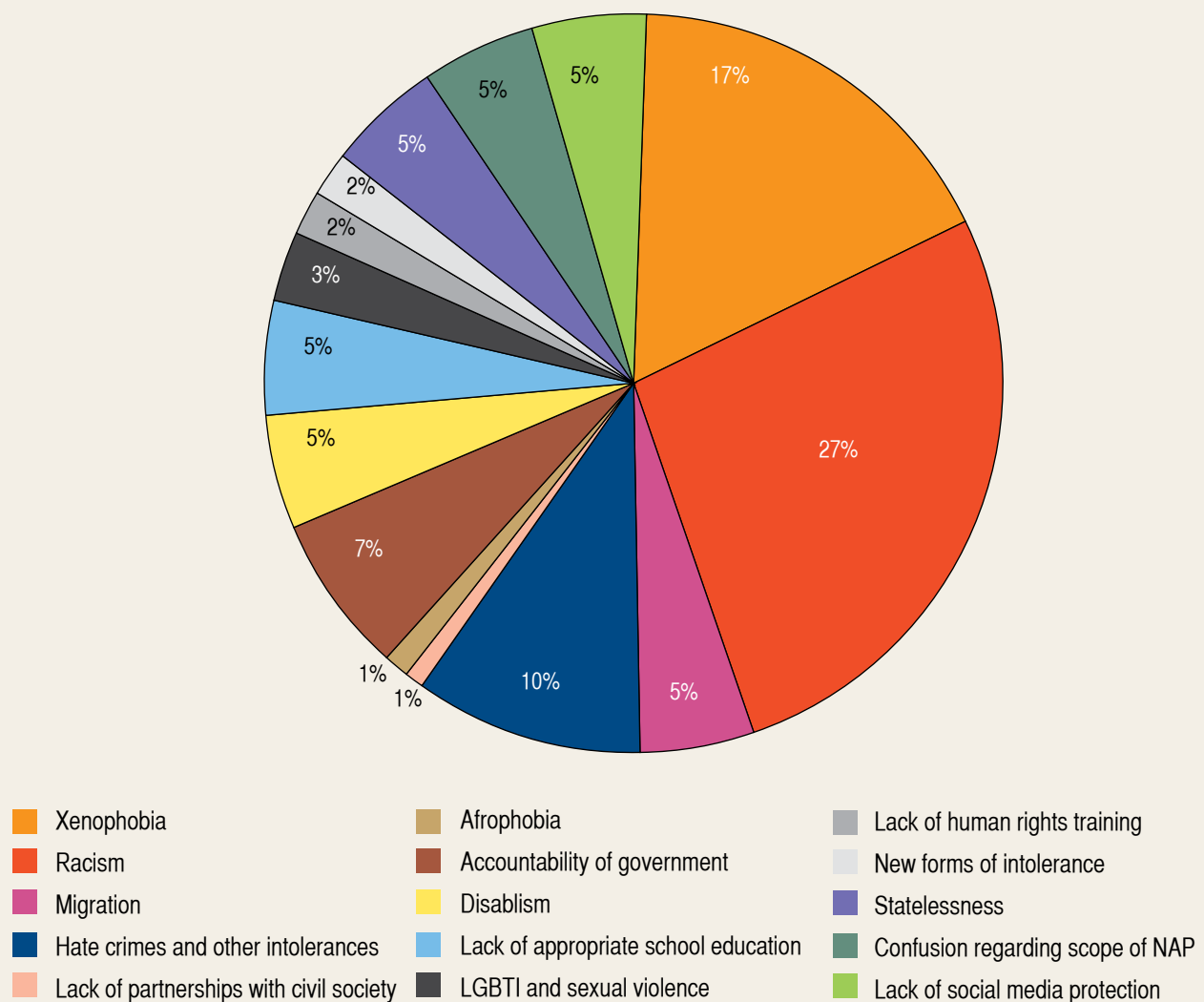
162. Flowing from the WCAR and the DDPA, various initiatives were undertaken to facilitate the development of the NAP. A draft was approved by Cabinet and made available on the departmental website for public comment. Public consultations were held in 2016 and inputs were received from the judiciary, Chapter Nine institutions, civil society, sports, media, youth, labour, community, other interest groups, the public and private sector. The DOJCD has also, in collaboration with various partners and stakeholders, conducted numerous awareness sessions, briefings and dialogues on the draft NAP across the country, including with communities at a grassroots level. All inputs received have been taken into account in the final draft of the NAP.

<sup>76</sup> E/C.12/GC/21, paras. 48-49. Committee on Economic, Social and Cultural Rights Forty-third session. Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) 2–20 November 2009.

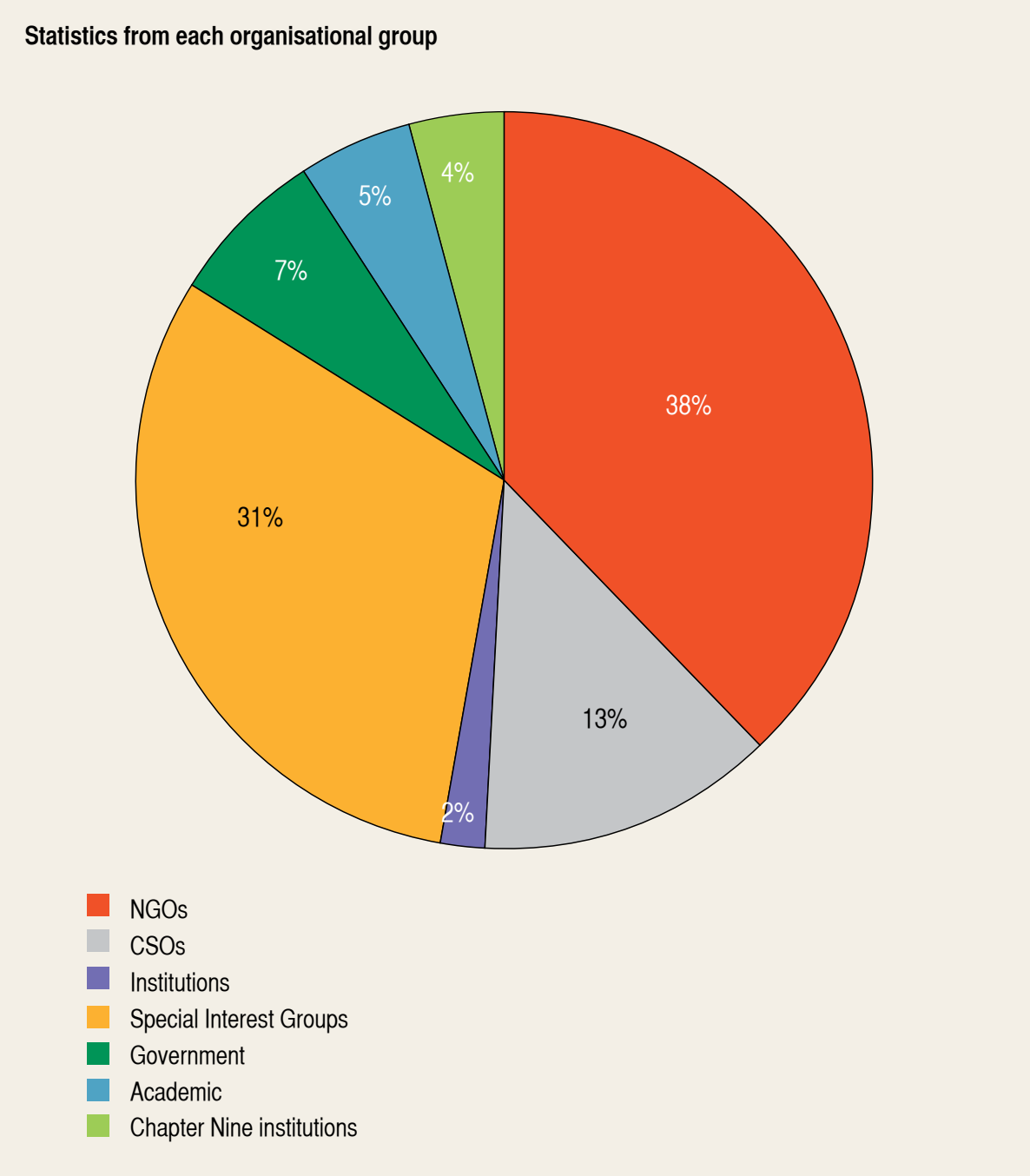
<sup>77</sup> UNOHCHR (1965). International Convention on the Elimination of All Forms of Racial Discrimination.

163. The DOJCD held provincial consultations in Kwazulu-Natal, Gauteng, North West, Mpumalanga, Northern Cape, Free State, Eastern Cape, Western Cape and Limpopo in 2016. The draft NAP was also available at all Thusong Service Centres and Regional Offices of the DOJCD and all stakeholders and the public were invited to submit their inputs to: [nap@justice.gov.za](mailto:nap@justice.gov.za).
164. A total of 159 submissions were received from 104 individuals and 55 from organisations, various interest groups and Chapter Nine institutions. An analysis of the submissions received, together with the comments and inputs received at the provincial consultations, were done and formed the basis of a diagnostic report.
165. **Figure 1** shows a breakdown of the various issues raised by different organisations:

**Statistics of issues raised by organisations**

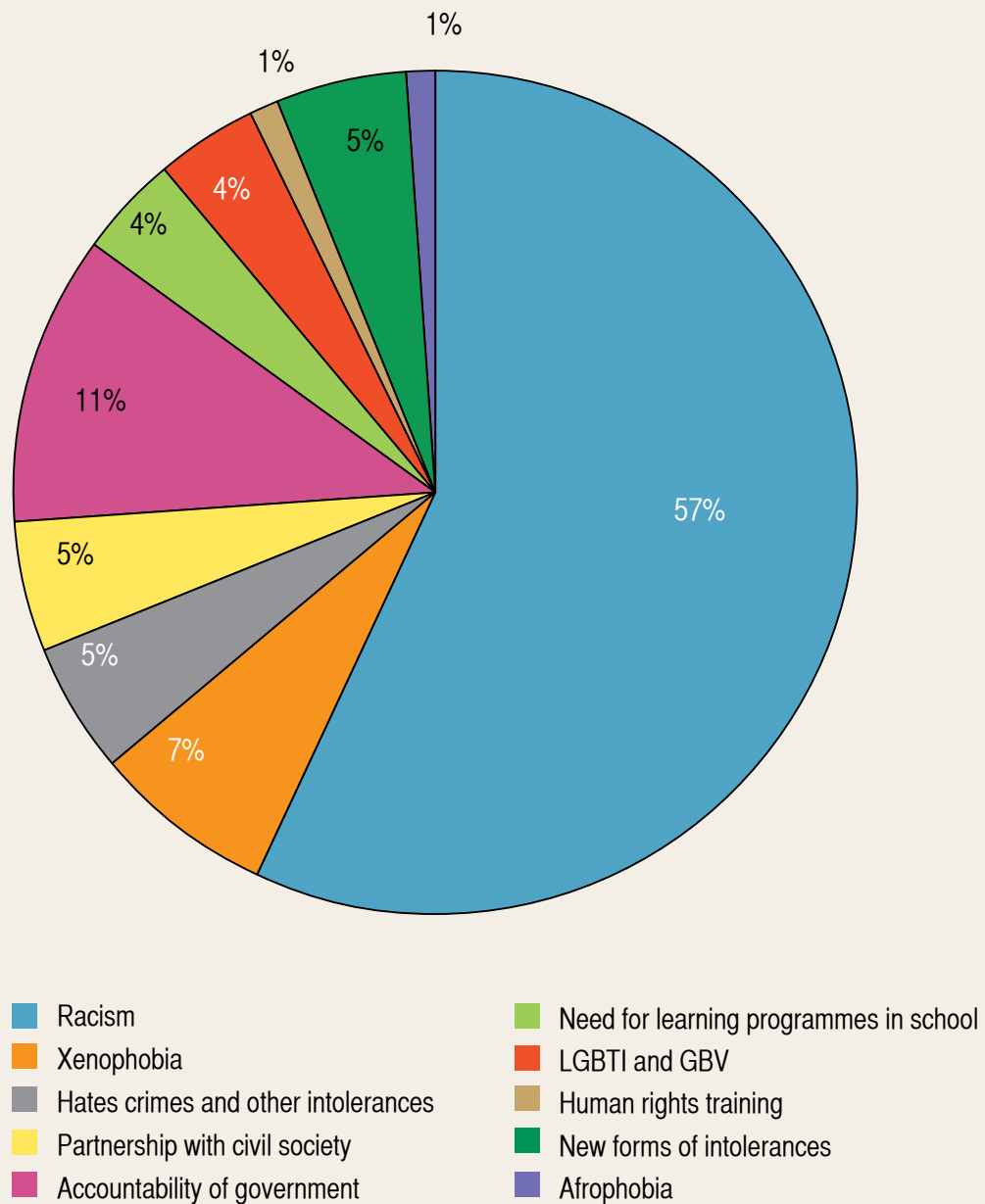


166. **Figure 2** sets out the statistics from each organisational group:



167. **Figure 3** sets out a breakdown of the percentages of issues as raised by individuals:

**Percentage of issues raised by individuals**





## What our people told us...

**//** I am quite saddened that in 2016, the word sotho and possibly others use to describe Indian people in SA is makula. I asked a few people who used this word, and was told it is a "normal everyday" word. It comes from the word coolie, which was and is a derogatory term just like the k word is a derogatory word from an arab word"

**//** I want to add that Racism is not only at schools and from whites. Also blacks... I am an adult wont state my age black Zulu from KZN. But now live in JoBurg. My manager black african from eastern cape. Told me not to wear a dook at work. And first i thought he was joking.. Secondly he said pointing at my head quote ... I am not going to talk to you wearing this dook. I have 3 kids am above 44 yr"

**//** ...went to high school back in the day ..and long before hairstraightener. Yet we were all neat and tidy and well dressed.. We looked like school girls, we dressed like school girls. We acted like school girls and our behaviour was impeccable. We respected our teachers and we studied and studied hard. We went to teachers colleges in 76 and we did what needed to be done. We turned out mighty fine. The kids in Pretoria wont comb hair and the hair really looks like a birds nest. Yet they call it racism"

**//** Interventions such as workshops, learning indigenous languages, etc. will never eradicate racism. BUT imagine if it became a punishable offense, people will suddenly start to think BEFORE they act or speak in a racial manner. Fixing a persons flawed state of mind with courses on diversity will only go so far. Make it a PUNISHABLE offense. Guarantee, it will discourage racists."

**//** The idea of calculating whether or not South Africans have made progress in transferring "wealth" from whites to blacks in this way is somewhat odious, but it is more than that - it is inaccurate to use this standard to make a determination that the legacy of apartheid lingers on, as you would have the action plan say."

**//** ... punishing white people by not employing them, not letting them play for the national team, refusing them shares in a blacks-only share scheme, hiring blacks ahead of whites merely to fulfil a quota when a white person may well be more qualified than a black person is itself inherently racist and discriminatory. This will not and cannot as a matter of fact fix the economy. This will not rebalance the social and economic inequality"

**//** The Khoi and San Indigenous People's are not constitutionally recognised yet therefore still referred to as the so called "coloured" people as defined by previous colonialist\apartheid classification of race and ethnicity. We, the NKC, has had extensive input regarding Traditional and Khoi and San Leadership Bill, currently tabled at parliament, although process has been delayed for over 17 years. This results as racial exclusion of a people group defined as "vulnerable". The exclusion of the Khoi and San, our heritage, history, language, and culture added tremendously toward intolerance, racism and racial discrimination against a people's group, classified by a legislative system to be oppressed and stripped of African dignity in such an inhumane way that today racism among the Khoi and San is deeply embedded simply because of the system still defining us as something other than who and what we truly are."

**//** I think racism is more than this. The "assertion of superiority based on intrinsic differences" is not the essence of racism. This is to misconstrue Kant's means with his ends. A person is not defined by his intellect, body or culture but by the fact that he/she is a living human being, or in Christian theology, that he/she is made in the image of God. Either is sufficient. The denial of a person's essential humanity is the core of racism."

**//** Start with the officials and train them to: Answer their telephones immediately. When you arrive at your office, start working and continue to work during office hours and not lounge around and stop eating in front of your stakeholders, asylum seekers and refugees. Don't speak to stakeholders, asylum seekers or refugees with your mouth full of food."

## Chapter Nine institutions

168. Chapter Nine of the Constitution establishes a number of independent institutions the purpose of which is to strengthen constitutional democracy in South Africa by the active promotion of a culture of human rights and the protection, development and attainment of those rights, including monitoring and assessing their implementation. Chapter Nine institutions in conformity with the principles<sup>78</sup> relating to the status of national institutions for the promotion and protection of human rights have an important mandate in respect of the prevention and protection of human rights including racism, racial discrimination, xenophobia and related intolerance. In particular, they can play a role in addressing the following:
- Assisting victims of differential treatment with their complaints.
  - Investigating differential treatment.
  - Publishing reports on differential treatment.
  - Making recommendations on the fight against differential treatment.
  - Promoting the protection, development and attainment of human rights and monitoring and assessing the observance of human rights in the country.
169. It is envisaged that Chapter Nine bodies will, in particular, play a fundamental role in the monitoring and evaluation of the NAP.

## Civil society

170. Civil society plays a key role in the progressive realisation of human rights and the democratisation of our society. The Durban Declaration recognised the importance of the role and involvement of civil society in combating racism, racial discrimination, xenophobia and related intolerance. Civil society has an essential role to play by holding government accountable. Furthermore, civil society groups have built up vast experience and expertise in working with victims of racism, racial discrimination, xenophobia and related intolerance.
171. The South African government has reaffirmed its relationship with civil society in ensuring development and good governance.
172. The complex and multi-faceted nature of racism, racial discrimination, xenophobia and related intolerance requires a diversity of expertise that civil society is able to provide. Civil society actors can contribute to research and policy analysis by collecting relevant data and identifying trends on racism, racial discrimination, xenophobia and related intolerance. They can also provide training for law enforcement officials, legal aid and capacity building to groups or individual victims of racism, racial discrimination, xenophobia and related intolerance, and undertake awareness-raising activities. Civil society actors are key in preventing and combating racism and should partner with government in so doing.

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<sup>78</sup> UN General Assembly Resolution 48/134 of 20 December 1993.

**Private sector**

173. The NAP has both horizontal and vertical application thus targeting the private sector as well. Business opportunities continue to be defined by race, gender, geographic location, class and linguistic background. The private sector should reflect a commitment to observe basic human rights and demonstrate a non-racist approach to employment issues. This should demonstrate responsible transformation and raise issues that may be genuinely inhibiting them from actually creating a workforce that is more representative of our country given that the private sector has made too little progress in this regard. The sector has to identify how different industries can play a role in addressing underlying issues that give rise to problems like poverty and a lack of education. Very often business is the one sector that is overlooked when dialogues around human rights take place.

**Labour sector**

174. The labour sector should be proactively involved in a number of campaigns on human development which includes, amongst others, raising awareness against racism and racial discrimination, xenophobia and related intolerance in the workplace, raising awareness and monitoring child labour, promoting gender equity, providing education and training for trade union members and promoting government's accountability in fighting corruption. The labour sector, through NEDLAC as the requisite structure for formal engagement between government and organised labour, was consulted and will be further engaged in policy dialogues around racism, xenophobia and related intolerances.

**Media**

175. Section 16 (1) of the Constitution guarantees that everyone has the right to freedom of expression, including, inter alia, the rights to freedom of the press and other media as well as academic freedom. However, section 16(2) states that the above rights do not extend to "propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm". In short, hate speech is not free speech.
176. The media plays a critical role in nation building and building non-racialism and non-sexism. They also play a role in building an informed, educated and opinionated society and in holding government to account. As stated in the Durban Declaration, the exercise of the right to freedom of expression, particularly by the media, can make a positive contribution to the fight against racism, racial discrimination, xenophobia and related intolerance.<sup>79</sup> This is critical for democracy to function.
177. The NAP acknowledges that access to information via print, broadcasting and the internet are vital for building an informed and active citizenry. It also contributes to education and economic development. The Press Council oversees the websites of their members and their code outlaws hate speech and racism. The World Editor's Forum recommends an approach based as much on promoting useful discussion as preventing abuse.

<sup>79</sup> Report of Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Rutere. Human Rights Council 20<sup>th</sup> session Agenda Item 9, 15 May 2012  
[http://www.ohchr.org/Documents/Issues/Racism/A.HRC.20.33\\_en.pdf](http://www.ohchr.org/Documents/Issues/Racism/A.HRC.20.33_en.pdf).

178. The independence and autonomy of media institutions and regulatory bodies including the South African Broadcasting Corporation, the Independent Communications Authority of South Africa, the Press Council of South Africa and the Advertising Standards Authority should be protected.<sup>80</sup> The diversity of the content of media coverage reflects the extent of diversity in newsrooms and media houses. In this context self-regulatory media bodies can also play a positive role including in helping to rebuild the racially and ethnically divided media landscape, through the adoption of measures such as enforceable or voluntary media codes of conduct. Self-regulation of internet service providers is to be encouraged.
179. The media is encouraged to play a role in the fight against racism, racial discrimination, xenophobia and related intolerance through reporting on racist, xenophobic and gender discriminatory related incidents and developing awareness-raising initiatives to sensitise the population.
180. The media will be further engaged and consulted through dialogues with different structures and bodies representing the different types of media and media houses in the country. This will include, amongst others, the South African Broadcasting Corporation, the Independent Communications Authority of South Africa, the Press Council of South Africa and the South African National Editors Forum. The media, like other interest groups, were provided the opportunity to comment on the draft NAP during the public consultation process.

#### **Academia**

181. Institutions of higher learning and tertiary education institutions are usually at the forefront of social change. These institutions will be requested to annually report to the NAP governance structure on incidents of racism, racial discrimination and related intolerances and steps taken to address such.

#### **Sporting bodies**

182. Sport has the power to unite people – or divide them. Racism in sport exists, not only in South Africa, but the world over. Sports and Recreation South Africa will be responsible for obtaining information from various domestic sporting federations on incidents of racism, racial discrimination and related intolerances, as well as initiatives taken to root out racism on the sports field.

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<sup>80</sup> National Development Plan: Vision for 2030. "Transforming Society and Uniting the Country." Chapter 15. P8 <http://www.gov.za/documents/national-development-plan-vision-2030>.

## CHAPTER 8: MEASURES

183. The role of government in respect of human rights is three-fold: **promotion** and **protection** of human rights and the **prevention** of human rights violations – or differently phrased, prosecution, protection, and prevention, better known as the so-called “3Ps”. Section 7(2) of the Constitution expressly commits the State to “respect, protect, promote and fulfil the rights in the Bill of Rights.”
184. States assume obligations and duties under international law to respect, protect and fulfil human rights for all persons within their territory or jurisdiction, without discrimination of any kind.<sup>81</sup> Further, “States, including all branches thereof, have the primary responsibility for the promotion and protection of all human rights, including the prevention of human rights violations”.<sup>82</sup> The obligations of States include the duty to protect against human rights abuse by third parties, including private actors.<sup>83</sup> States may breach their international human rights law obligations where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse.<sup>84</sup>
185. The UN NAP Guidelines propose a structure based on the need to set specific goals, objectives and actions, as well as on the importance of determining the responsible State bodies, target dates and performance indicators for each objective. The NAP gives a clear indication of the State’s intentions in its struggle against racial discrimination. It sets out measures and indicators over time which will need to be achieved. The measures and indicators stated in the plan constitute a useful orientation for those working on the plan and provide guidance to the general public.
186. In order to meet these requirements, the proposed measures and indicators are set out hereunder. It must be stressed that these measures do not exist in isolation, but must be viewed against existing policies, programmes and interventions.
187. The DOJCD will conduct a **baseline study** which will serve as the basis to measure improvement in the country following the implementation of the NAP. It moves beyond issues of perception. It will be used to make recommendations on the protection needed for vulnerable and marginalised groups. The baseline study will take account of current laws, policies, programmes, activities, needs and human and institutional resources for the elimination of racism, racial discrimination, xenophobia and related intolerance.
188. Disaggregated statistical data will be collected to identify -
  - patterns of racism;
  - the obstacles to the elimination of racism and discrimination that should be overcome, paying special attention to contemporary and emerging forms of racial discrimination;

<sup>81</sup> Art. 2, International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment 31 (2004); art. 2, Convention on the Rights of the Child and the Convention on the Rights of the Child’s General Comment 5 (2003).

<sup>82</sup> A/HRC/RES/24/16, para. 2. The Inter-American Court of Human Rights has held that States have “a legal duty to take reasonable steps to prevent human rights violations” (*Velasquez Rodriguez v. Honduras*, 29 July 1988). E. Decaux and S. Touzé, *La Prévention des Violations des Droits de l’Homme* (Paris, Editions A. Pedone, 2015).

<sup>83</sup> See Human Rights Committee General Comment 31, para. 8 and Communication No. 195/1985, *Delgado Paez v. Colombia*, Views adopted on 12 July 1990; Convention on the Elimination of All Forms of Discrimination against Women General Recommendations 19 and 28. The European Court of Human Rights has established that claims may arise against the State when the police fail to protect individuals from violations of their rights by other individuals (*Osman v. United Kingdom* (Appl. No. 87/1997/871/1083), judgment of 28 October 1998).

<sup>84</sup> Guiding Principles on Business and Human Rights: Implementing the UN “Protect, Respect and Remedy” Framework (annex of A/HRC/17/31), endorsed by Human Rights Council resolution 17/4.

- access to justice for victims of racial discrimination;
  - programmes to combat racial discrimination;
  - knowledge about the prohibition of racial discrimination among the general population and among potential victims;
  - perpetuation of racial discrimination by the mass media (including television, radio, Internet, newspapers and magazines);
  - how the curricula reinforce the principles of equality and non-discrimination at all levels of education, and
  - the availability and accessibility of key human rights documents and other materials safeguarding equality and non-discrimination in national and local languages as well as in simplified form.
189. The DOJCD will under the leadership of the national coordinating structure develop an Early Warning system linked to a **Rapid Response Mechanism** initiated by the DOJCD. The DOJCD will also ensure that accurate data and statistics are collected and published on the number of racist and xenophobic offences that are reported to the police, on the number of cases that are prosecuted, as well as on the reasons for not prosecuting and on the outcome of prosecuted cases.
190. The DOJCD will in collaboration with government departments, Chapter Nine institutions the Foundation for Human Rights and civil society working with these issues, develop a **database with the names of service providers** who provide assistance on these matters which will be linked to the Rapid Response Mechanism.
191. The DOJCD will promote **research strategies** which include the investigation of the nature, causes and manifestations of racism and discrimination in both public and private spheres as well as efficient ways of ensuring that accurate data and statistics are collected.
192. The promotion of **anti-racist and anti-discrimination education** is a shared responsibility between government departments and the Chapter Nine institutions. The DOJCD will, under the auspices of the NAP, promote the multi-faceted educational strategies of government departments as well as the measures adopted by them to combat racism, racial discrimination, xenophobia and related intolerance.
193. The DOJCD will develop and design education and **training programmes** in partnership with other government departments, Chapter Nine institutions as well as civil society to increase awareness of anti- racism, equality and anti-discrimination issues among public officials, civil society and the general public, mobilising support from a wide range of experts.
194. These measures can include programmes combining national efforts and cooperation with other stakeholders, to promote the use of private investment in consultation with the affected communities in order to eradicate poverty, particularly in those areas in which victims of racial discrimination predominantly live. The private sector should also consider contributing to research to investigate the nature, causes and manifestations of racial discrimination, xenophobia and related intolerance.

195. The actions have been formulated using the format used in the Medium-Term Strategic Framework (MTSF) and should therefore help to seamlessly dovetail with both the MTSF and the NDP.

Actions	Responsibility to lead <i>(* refer to Implementation Plan - subject to change w.r.t new mandates post-2019 national elections)</i>	Activities and outputs	Timeframes: 2019-2024  <i>(as per Implementation Plan)</i>
1. Baseline study	DOJCD	<ol style="list-style-type: none"> <li>1. Establish a baseline study to determine levels of racism, xenophobia, discrimination based on sexual orientation, gender identity and expression, racial incidents, inter-racial relations and perceptions of national identity.</li> <li>2. Consolidation of reports on current laws, policies, programmes, needs and human and institutional resources necessary for the elimination of racism, racial discrimination, xenophobia, homophobia and related intolerances.</li> </ol>	
2. Data collection	DOJCD	<ol style="list-style-type: none"> <li>1. Develop a virtual data repository from various sources with disaggregated statistical data to identify: <ul style="list-style-type: none"> <li>• patterns of racism;</li> <li>• obstacles to the elimination of racism and discrimination that should be overcome, paying special attention to contemporary and emerging forms of racial discrimination;</li> <li>• access to justice for victims of racial discrimination;</li> <li>• knowledge about the prohibition of racial discrimination among the general population and among potential victims;</li> <li>• perpetuation of racial discrimination by the mass media (including television, radio, Internet, newspapers and magazines);</li> <li>• the availability and accessibility of key human rights documents and other materials safeguarding equality and non-discrimination in national and local languages as well as in simplified form.</li> </ul> </li> <li>2. Establish a National Focal Point to lead the implementation of the NAP.</li> </ol>	



Actions	Responsibility to lead <i>(* refer to Implementation Plan - subject to change w.r.t new mandates post-2019 national elections)</i>	Activities and outputs	Timeframes: 2019-2024  <i>(as per Implementation Plan)</i>
<b>3. Rapid Response Mechanism for data collection</b>	DOJCD	<ol style="list-style-type: none"> <li>1. Establish a Rapid Response Mechanism to collate incidents of racist and xenophobic offences/hate crimes that are reported to the SAPS and the SAHRC on the number of cases prosecuted, as well as on the reasons for non-prosecution and the outcome of cases prosecuted by the NPA.</li> <li>2. This will include awareness campaigns that encourage and inform the public of reporting incidents of racism, racial discrimination, xenophobia, and related intolerances to the relevant authorities.</li> </ol>	
<b>4. Database</b>	DOJCD	<ol style="list-style-type: none"> <li>1. Compile a database/directory of service providers to provide assistance to victims of racism, racial discrimination, xenophobia, homophobia and related intolerances.</li> <li>2. The DOJCD will host a link to the directory of service providers on its website, and make the information accessible at all its offices.</li> <li>3. Conduct awareness campaigns to popularise and inform the public of the directory of services on a regular basis and in partnership with civil society organisations.</li> </ol>	
<b>5. Research</b>	DOJCD	<ol style="list-style-type: none"> <li>1. Undertake an investigation into the nature, causes and manifestations of racism and discrimination in both public and private spheres.</li> <li>2. Undertake specific research on restorative justice.</li> <li>3. Undertake a qualitative description of the ethnic composition of our population, in particular indigenous people and non-citizens.<sup>79</sup></li> <li>4. Review all specific measures adopted to address the situation of <i>de facto</i> segregation that persists in South Africa and evaluate the impact of these measures.<sup>80</sup></li> <li>5. Encourage research opportunities in the areas of the prevention of racism and discrimination.</li> </ol>	

79 Recommendation by the Committee on the Elimination of Racial Discrimination after consideration of South Africa's Country Report on the ICERD, 2006, CERD/C/ZAF/CO/3.

80 Ibid.

Actions	Responsibility to lead <i>(* refer to Implementation Plan - subject to change w.r.t new mandates post-2019 national elections)</i>	Activities and outputs	Timeframes: 2019-2024  <i>(as per Implementation Plan)</i>
<b>6. Education and training</b>	DOJCD	<ol style="list-style-type: none"> <li>1. Education and training is a shared responsibility between government departments and the Chapter Nine institutions. The DOJCD will, under the auspices of the NAP, promote the multi-faceted educational strategies of government departments as well as the measures adopted by them to combat racism, racial discrimination, xenophobia and related intolerance.</li> <li>2. Work with South African Judicial Education Institute to ensure appropriate training of judicial officers.</li> </ol>	
<b>7. Address land-related issues</b>		<ol style="list-style-type: none"> <li>1. Engage in national dialogues on land.</li> <li>2. Government to develop a policy document which prioritises the redistribution of vacant, unused and under-utilised State land.</li> <li>3. Ensure effective programmes to increase training and support measures that will ensure the success of beneficiaries of land reform.</li> <li>4. Increasing security of tenure and enhancing security for farm dwellers.</li> <li>5. All land related issues will be guided by legislative frameworks and parliamentary processes.</li> </ol>	
<b>8. Poverty alleviation</b>		<ol style="list-style-type: none"> <li>1. Implement the national minimum wage and ensure its monitoring and enforcement by the Department of Labour.</li> <li>2. Multiplying skills development programmes and improving communication about their accessibility.</li> <li>3. Improving job creations mechanisms to provide sustainable livelihoods for the poor.</li> <li>4. Intensifying food security efforts.</li> </ol>	
<b>9. Accelerate transformation</b>		<ol style="list-style-type: none"> <li>1. The State must develop a more effective programme to ensure access to, and ownership of, financial institutions by Black persons, youth and women. This should include new approaches to regulation and licensing that fosters competition and enables diversified ownership.</li> <li>2. Advancing transformation in the tourism sector.</li> <li>3. Monitoring progress in the implementation of employment equity policies.</li> </ol>	

Actions	Responsibility to lead <i>(* refer to Implementation Plan - subject to change w.r.t new mandates post-2019 national elections)</i>	Activities and outputs	Timeframes: 2019-2024 <i>(as per Implementation Plan)</i>
<b>10. Reverse the legacy of apartheid education</b>		<ol style="list-style-type: none"> <li>1. Measures to deal decisively with challenges of inequity between rural and urban education by ensuring that there is adequate resourcing of village and township early childhood development centres and schools through the provision of quality, efficient, innovative, and inclusive education and training programmes and solutions.</li> <li>2. Ensuring the development and infusion of anti-racism and equality promotion lessons in the early childhood development and school curriculum.</li> <li>3. Roll-out and monitor anti-racism programmes in early childhood development centres, schools and institutions of higher learning.</li> <li>4. Create a new, inclusive culture of learning, including programmes aimed at combating racism, racial discrimination, homophobia, xenophobia and other related intolerances.</li> </ol>	
<b>11. Increase knowledge production</b>		<ol style="list-style-type: none"> <li>1. Providing material support to Black writers and artists.</li> <li>2. Rolling out campaigns to encourage Black intellectuals to publish.</li> <li>3. Encourage the transformation of publishing houses to create more space for the promotion of African perspectives.</li> </ol>	
<b>12. Decolonise the mind</b>		<ol style="list-style-type: none"> <li>1. Using the education system to instill it in the minds of children that every person is entitled to their human rights and no person has superiority over another.</li> <li>2. Design programmes within all institutions of learning that engender and promote values of racial, cultural and religious tolerance for all people regardless of difference.</li> <li>3. Using the media to highlight and celebrate the excellence of all South Africans in all areas of human endeavour.</li> <li>4. Work with SANEF/media houses/related bodies to ensure social context and diversity training for media sector to strengthen ethical, sensitive and responsible reporting.</li> </ol>	

Actions	Responsibility to lead <i>(* refer to Implementation Plan - subject to change w.r.t new mandates post-2019 national elections)</i>	Activities and outputs	Timeframes: 2019-2024  <i>(as per Implementation Plan)</i>
<b>13. Promote social cohesion</b>		<ol style="list-style-type: none"> <li>1. Undertake community mapping in targeted areas.</li> <li>2. Mobilise communities through community conversations and dialogues to sensitise people around the divisive nature of our history and the effects thereof.</li> <li>3. Rolling our social mobilisation campaigns to address racism, racial discrimination, xenophobia, homophobia and other intolerances.</li> <li>4. Developing and using arts and culture to engender a greater appreciation of cultural diversity as a critical aspect of a unifying national identity.</li> <li>5. Popularising and encouraging visits to national heritage sites.</li> <li>6. Monitor incidents of racism, racial discrimination and related intolerances in sport.</li> <li>7. Make use of DBE to design and revise policies to be inclusive of all stakeholders in implementing anti-discrimination initiatives to combat racism, racial discrimination, xenophobia and related intolerances.</li> <li>8. Coordination of a participatory process to develop an Integrated National Strategy to Protect, Promote and Uphold the Rights of Persons with Albinism.</li> </ol>	
<b>14. Inform public discourse on racism</b>		<ol style="list-style-type: none"> <li>1. Using national days of celebration and commemoration to combat racism, racial discrimination, xenophobia and related intolerances.</li> <li>2. Working with the media/media houses/ SANEF/civil society organisations and Chapter Nine institutions to strengthen campaigns such as Anti-Racism Week.</li> </ol>	
<b>15. Combat discrimination based on ethnic origin</b>		<ol style="list-style-type: none"> <li>1. Whilst respecting different cultures, also teaching our learners in school about the dangers of discrimination based on grounds of ethnic origin.</li> <li>2. Inculcating a sense of national pride through symbols that promote a national identity.</li> <li>3. Using government communication campaigns to mobilise society against discrimination based on grounds of ethnic origin.</li> </ol>	

Actions	Responsibility to lead <i>(* refer to Implementation Plan - subject to change w.r.t new mandates post-2019 national elections)</i>	Activities and outputs	Timeframes: 2019-2024  <i>(as per Implementation Plan)</i>
<b>16. Combat xenophobia</b>		<ol style="list-style-type: none"> <li>1. Ensure implementation of the recommendations made by the Parliamentary Ad Hoc Joint Committee on Probing Violence Against Foreign Nationals Report and the Special Reference Group on Migration and Community Integration in KZN, chaired by Judge Navi Pillay.</li> <li>2. Put mechanisms in place to ensure that non-nationals receive the services to which they are constitutionally entitled.</li> <li>3. Foster a human culture in the management of migrants, refugees and asylum seekers.</li> <li>4. Facilitate the integration of migrants into communities where they stay.</li> <li>5. Government to consider drafting a policy framework related to stateless persons and the eradication of statelessness.</li> </ol>	
<b>17. Eradicate gender-based violence, femicide and gender based discrimination</b>		<ol style="list-style-type: none"> <li>1. Address the concerns raised in the #TotalShutdown memorandum addressed in the Declaration of the Presidential Summit against Gender-Based Violence and Femicide viz. the establishment of a multi-sectoral, coordinating structure to respond to gender-based violence and femicide including the allocation of the necessary and adequate resources required and to develop a national gender-based violence and femicide strategy.</li> <li>2. Establishing a Femicide Watch.</li> <li>3. Encouraging community dialogues to combat violence against women and children.</li> <li>4. Adequate resourcing and strengthening of Thuthuzela Care Centres, Sexual Offences Courts and shelters.</li> <li>5. Strengthen the implementation of the Domestic Violence, 1998 (Act No.116 of 1998).</li> <li>6. Address violence in schools and providing a safe environment for all learners.</li> </ol>	

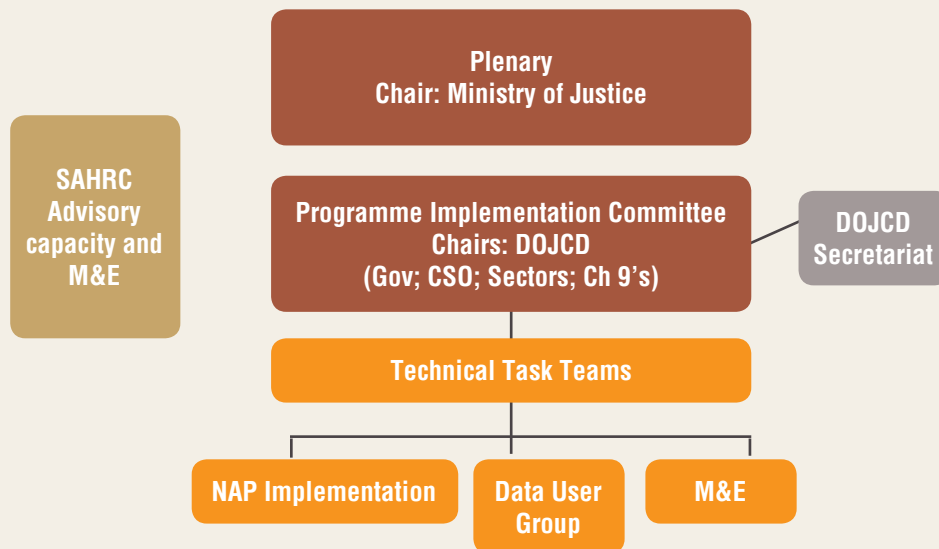
Actions	Responsibility to lead <i>(* refer to Implementation Plan - subject to change w.r.t new mandates post-2019 national elections)</i>	Activities and outputs	Timeframes: 2019-2024  <i>(as per Implementation Plan)</i>
<b>18. Affirm victims of colonialism and apartheid</b>		<ol style="list-style-type: none"> <li>1. Teaching learners about our history of colonialism and apartheid.</li> <li>2. Attending to any outstanding/unfinished work of the Truth and Reconciliation Commission, including the implementation of its recommendations.</li> <li>3. Promote the signing of the Convention on Apartheid and the Convention Against Enforced Disappearances.</li> <li>4. Popularising our national symbols and struggle icons.</li> </ol>	
<b>19. Promote constitutional and human rights awareness</b>		<ol style="list-style-type: none"> <li>1. Implement programmes such as <i>Amarightza</i> to foster human rights and constitutional awareness.</li> <li>2. Educating communities on how to enforce their rights via channels such as their public representatives, Chapter Nine bodies and the courts.</li> <li>3. Popularise the use of Equality Courts and strengthen Equality Courts.</li> <li>4. Make the National Schools Moot Court Competition part of the curriculum.</li> <li>5. Develop municipal model toolkits to combat racism, racial discrimination and prejudice (e.g. as eThekweni Metro has done.)</li> <li>6. Fully incorporate the CRPD into South African domestic law.</li> </ol>	

## CHAPTER 9: GOVERNANCE MODEL

196. The NAP requires a multi-sectoral approach premised on the active involvement of different government departments and sectors. The NAP needs an integrated structure under a dedicated Ministry involving several role-players, reporting to the highest political structure within the country. The effective and accountable implementation of the NAP hinges on an effective governance structure and the monitoring and evaluation of the programmes implemented. This underscores the importance of a clearly defined structure with a proper understanding of the different roles and responsibilities of all role-players involved.
197. The following elements are to be considered in guiding us towards the establishment of an effective governance model:
  - (i) The importance of the cross-cutting nature of the NAP;
  - (ii) Accountability to the highest authority in the country, reporting to Cabinet/Parliament;
  - (iii) Political support at the highest level, such as the presidency;
  - (iv) Implementation of the NAP across all spheres of government horizontally and vertically with political support on all levels (national, provincial and local government);
  - (v) Implementation of the NAP requires a multi-sectoral approach by both the public and private sectors;
  - (vi) Members to be selected for their expertise and skills (e.g. research; data analysis; policy development and analysis; equality; racism; information/knowledge management etc.);
  - (vii) Consideration to be given to the composition, mandate, authority, roles and responsibilities and governance matters of the structure (framework/terms of reference);
  - (viii) Identify key/lead and supporting government departments to represent and participate in the governance structure;
  - (ix) Government departments to identify representatives and oversee participation in the governance structure;
  - (x) Clearly defined roles and responsibilities for all participating role-players (Government departments; Chapter Nine institutions; civil society organisations, legislature, judiciary and different sectors);
  - (xi) Government departments to participate in this structure as per their approved APP and MTSF plans to implement anti-discrimination programmes;
  - (xii) All government departments be obliged to ensure that their respective APP's reflect anti-discrimination measures as per the final NAP;
  - (xiii) Government as a service delivery agent: separate adequately capacitated and funded secretariat to support the governance structure as well as various technical task teams' mandates and functions;
  - (xiv) Costing of the governance structure, and
  - (xv) Consideration to be given to the potential duplication of responsibilities of current structures within government.

198. The critical roles of Parliament, as the legislature and Cabinet, as the executive branch of government, at the uppermost level of the proposed NAP governance structure will ensure implementation of the NAP and ensure political support at the highest level.
199. The oversight role of Parliament in the NAP governance structure is important for the following reasons:
  - Parliament has a central role to play as the legislative branch of government;
  - The Minister of Justice reports to Parliament through the relevant Portfolio Committee;
  - Portfolio Committees are important structures for ensuring efficient government and public participation;
  - Parliamentary Committees provide a platform to members of the public to express their views on matters discussed;
  - To ensure increased participation by its members in discussions on the cross cutting issues of the NAP;
  - To provide the high-level political support needed for the NAP implementation;
  - To hold all government departments accountable on the implementation of the NAP, and
  - To oversee the monitoring and evaluation of the NAP implementation.
200. The role of Cabinet in the NAP governance structure is also important. The transversal nature of the NAP requires it to be administered within and across the different clusters of government and relevant Cabinet Committees, and not only within the JCPS Cabinet Committee. Furthermore, consideration should be given to the imperative of instilling social issues and aspects to the work of the JCPS as well as all other Clusters, in line with the principle that human rights are universal and inalienable; indivisible, interdependent and interrelated.
201. Cabinet as the supreme policy making body in the country, would have the following responsibilities in respect of the NAP governance structure:
  - To oversee coordination of implementation and monitoring of the NAP;
  - Oversee an inclusive implementation strategy of the NAP;
  - Oversee review of progress of the implementation of the NAP through which the country can meet its international obligations;
  - Oversee reporting on the implementation of the NAP to the highest political level;
  - Oversee commitment on the NAP implementation from all government departments; private sector; Chapter Nine institutions, civil society and different sectors, and
  - Approval of funding for the NAP governance structure.
202. The proposed governance structure will be chaired at the highest political level by the Minister of Justice. The proposed governance structure will comprise of a Plenary, chaired by a Minister, a Programme Implementation Committee and Technical Task Teams. The secretariat of the structure will be housed in the DOJCD.



**Proposed NAP governance structure**

203. The proposed responsibilities of the proposed Programme Implementation Committee would be as follows:

- Meet quarterly throughout the year.
- Assess the performance of role-players on the implementation of the NAP;
- Report to Cabinet on the progress made on the overall implementation of the NAP;
- Direct oversight of the NAP monitoring and evaluation process;
- Respond to queries in respect of the NAP;
- Provide guidance on the implementation of the NAP;
- Establish technical task teams to ensure implementation and monitoring of the NAP, and
- Ensure coordination and coherence of the work of technical task teams.

204. There will be Technical Task Teams on the following thematic areas such as:

- Implementation of the NAP;
- Data User Group on the methods of data collection on incidents of racism, racial discrimination, xenophobia and related intolerance, and
- Monitoring and evaluation (international and national reporting).

205. The Technical Task Teams will report to the Programme Implementation Committee on their respective areas of responsibility. The recommendations of the Technical Assistance project on the analysis of methods of data collection on incidents of racism, racial discrimination, xenophobia and related intolerance speaks to and sets out recommendations supporting the proposed governance structure.

206. The proposed NAP governance structure will function as a government component as it does not require legislation. The advantage of a government component is that it will be possible for the National Treasury to ring-fence funding from sector departments and transfer this to the governance structure. The government component will be located within a host ministry, but operates autonomously from the department as the chairperson of the Programme Implementation Committee would report to a Minister. Oversight rests with the Executive Authority. A government component will also be able to receive funds from international donors.
207. The different role-players represented on the NAP Governance Structure will include:
- Key government departments;
  - Civil society sectors (non-governmental organisations and community-based organisations; advocacy groups; faith-based organisations; higher education; labour; law and human rights; sport; women and youth; migrants/refugee/ asylum seeker organisations);
  - Sectors (media; labour; business);
  - Chapter Nine institutions, and
  - Academia/research institutions.
208. The DOJCD's Constitutional Development Branch, and specifically located within the Chief Directorate: Social Justice and Participatory Democracy, the Directorate: Social Justice will continue to provide administrative and logistical support to the new governance structure as the secretariat. As the proposed secretariat, the Directorate's current structure and resourcing must be reviewed to ensure an adequately capacitated and funded secretariat to support the governance structure's mandate and functions, in addition to its other work. The Directorate will during the implementation phase, play an important role in amongst others -
- setting up, supporting and coordinating the establishment of a governance structure to ensure the implementation of the NAP;
  - promoting and mainstreaming the NAP;
  - promoting, protecting and advocating for the eradication of all forms of racism, racial discrimination, xenophobia and related intolerance;
  - conducting research on factors inhibiting the attainment of racial harmony;
  - in partnership with relevant stakeholders, developing and implementing various programmes in support of the NAP;
  - collecting/analysing data, creating a database and generating reports on trends and patterns relating to incidents falling within the scope of NAP (through Technical Assistance under SEJA);
  - promoting research strategies and commission studies/surveys in support of the NAP;
  - conducting a baseline survey (under SEJA);
  - monitoring trends and incidents of racism, racial discrimination, xenophobia and related intolerance;

- providing adequate responses thereto, through effective co-ordination and facilitation with government departments and stakeholders;
- facilitating and promoting programmes relating to tolerance and understanding of diversity amongst the people of South Africa, and
- ensuring the establishment of an M&E mechanism.

209. Benefits to the proposed governance structure are that a single plenary provides oversight to all the functions; there is a single decision-making structure; multi-sectoral representation is ensured and administrative functions are grouped together in a single unit.

### **Reporting obligations**

210. Accountability and transparency are vital to make the NAP work. As the NAP is built around partnerships involving different sectors of society, the results depend on how well government and civil society work together. Monitoring progress and reporting back are key elements to the success of the NAP. Consequently, the focal agency will establish an accountability framework. To evaluate its long-term impact, the national governance structure in conjunction with the SAHRC and other Chapter Nine bodies will collaborate to identify indicators to monitor progress in the fight against racism. Various role-players will continue to address racism and multi-culturalism issues where there is joint responsibility, and assist in coordinating information sharing. Serious consideration should be given to an annual report on the NAP being debated in the National Assembly.

### **Building complementarity with other government programmes**

211. The DOJCD will, under the guidance of the proposed governance structure, be responsible for building complementarity between the NAP and other action plans developed by government departments, Chapter Nine institutions, civil society and other sectors. It should build complementarity between laws and policies implemented by government impacting on racism, discrimination and affirmative measures taken to address the legacy of apartheid.

## **CONCLUSION**

212. South Africa has been a guiding light in the world in conquering racism. The NAP is the blue print for building on what we have achieved thus far. The NAP is the ideal opportunity for our country and its peoples to renew our commitment to the fight against racism, racial discrimination, xenophobia and all other forms of prejudice and intolerance. South Africa belongs to all who live in it – united in our diversity.