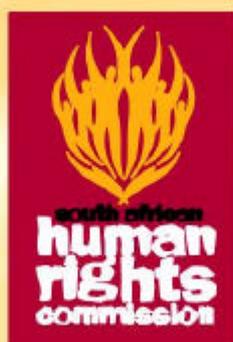


# South African Human Rights Commission

**DISCUSSION DOCUMENT**

**Freedom of Expression**



21 November 2002

## INTRODUCTION

1. The SAHRC has received a number of similar complaints regarding forms of expression, which have become the subject of some debate. By way of example, the SAHRC has recently received complaints regarding the expression “kill the boer, kill the farmer”<sup>1</sup> as well the lyrics of a song by Mbongeni Ngema, which appears to deride Indian people.<sup>2</sup> Previously articles in the newspaper and the distribution of a music CD, with questionable lyrical content, were brought to the attention of the SAHRC.<sup>3</sup>
2. For the purpose of this memorandum it is not necessary to set out the details of each complaint other than to say that all the complaints have the following common features:
  - They were published either in the newspaper or broadcast on the radio
  - They contain some form of criticism of people or persons based solely on race
3. On many occasions the SAHRC has had to contend with the question whether particular forms of expression are Constitutionally protected, or whether they fall foul of the Constitution and should be classified as hate speech. This memorandum attempts to contextualise issues of freedom of expression in South Africa, both in an historical and contemporary context.
4. The Constitutional dispensation in South Africa heralded the importance of the values of human dignity, equality and freedom as the cornerstones of our new found democracy. It is from this perspective, that we will approach these complaints, in the context of the freedom of expression clause.

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<sup>1</sup> Malherbe 21/2002/0273; Mulder 21/2002/0272; Aucamp 21/2002/0341

<sup>2</sup> Mbongeni Ngema 21/2002/0262, the song called Amandiya was the subject of a complaint brought by the SAHRC to the Broadcast Complaints Commission on 13 June 2002. the BCCSA’s judgment will be traversed in this paper

<sup>3</sup> R Munusamy *Let’s face it: A large portion of us Indians are deeply racist* Sunday Times 14 January 2001. The Press Ombudsman, in a fax to the HRC on 5 March 2001 stated that he was of the view that the article reported a factual situation based on election results and expressed the author’s personal opinion. The newspaper involved published a letter of objection to the article. Under those circumstances, the Press Ombudsman was of the view that the newspaper, in publishing the article and the letter of objection was doing its duty by exposing racism and furthered the cause of freedom of expression; N Bruce *Hain should examine his past* Business Day Newspaper report.; H Giliomee *Reuk van Mislukking is in die Lug* Rapport 28 January 2001; CD Shane McCallaghan 21/2001/0178.

## FREEDOM OF EXPRESSION IN THE SOUTH AFRICAN CONTEXT

5. In terms of s 16 of the Bill of Rights:

- (1) Everyone has the right of freedom of expression, which includes -
  - (a) freedom of the press and other media;
  - (b) freedom to receive or impart information or ideas;
  - (c) freedom of artistic creativity; and
  - (d) academic freedom and freedom of scientific research.

This right does not extend to propaganda for war, incitement of imminent violence or advocacy of hatred based on race, ethnicity, gender or religion, and that which constitutes incitement to cause harm. The right to freedom of expression in South African law is not absolute and the right must overcome either the internal limitation or the test laid down in the limitation clause, s 36 of the Constitution.

6. The Constitution has created two rights under the freedom of expression right in respect of the media and the environment in which it operates. Section 16(1)(a) contains the right of the press and media to free expression and s 16(1)(b) contains an audience's right to receive information. Section 16(1)(b) also recognises that 'everyone' has the right to impart information and ideas.
7. The internal limitation to freedom of expression found in s 16(2) removes the entire realm of hate speech beyond the ambit of Constitutional scrutiny and makes it the subject of parliamentary sovereignty. Parliament now has the option to pass legislation regarding s 16(2). This has occurred in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>4</sup>, which is discussed at a later stage in this paper. There is concern that the Equality Act, although on our statute books, is yet to be put into operation. This raises questions regarding whether the state has indeed discharged its obligations in terms of the Constitution<sup>5</sup>
8. Historically, South Africa had anti 'hate speech' legislation as promulgated by the *apartheid* government. Although these appeared to be race-neutral, they were used exclusively to restrict anti *apartheid* views and expressions.<sup>6</sup>

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<sup>4</sup> Act No 4 of 2000

<sup>5</sup> Section 9(4) requires the state to pass national legislation within three years of the date on which the new Constitution took effect (Schedule 6 Transitional Arrangements s 23). This date was deemed to be February 2000.

<sup>6</sup> Lena Johannessen *A critical view of the Hate Speech Provision* 1997 SAJHR (13) 135 at 137

## THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT NO 4 OF 2000

9. It is intended that the Promotion of Equality and Prevention of Unfair Discrimination Act (The Equality Act) will come into force soon. That Act seeks to both prevent discrimination and promote equality. To that end, it has included a section devoted to hate speech, which reads:

10 (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

10. Section 12 of the Equality Act prohibits the dissemination or broadcast of any information, or the publication or display of any advertisement or notice, which demonstrates a clear intention to unfairly discriminate against any person. By importing the notion of intention, the Act envisages that there may be reasonable foreseeable consequences of the speech, which may in itself elevate it to hate speech. It also recognises that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.<sup>7</sup>

11. Section 21(2)(n) makes provision for an Equality Court to refer a hate speech complaint to the Director of Public Prosecutions, for the possible institution of criminal proceedings.

12. There are clear conflicts between the freedom of expression clause in the Constitution and the sections prohibiting hate speech in the Equality Act. The most noticeable difference is that the Equality Act imports the subjective notion of hurtfulness. It also extends the prohibition of hate speech to all of the prohibited grounds and does not confine it to race, ethnicity, gender or religion, as does the Constitution. The hate speech provision in the Equality Act lowers the threshold. It widens the net to extend the notion of hate speech beyond the confines of the Constitution, which requires an advocacy of hatred as well as the incitement to cause harm.

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<sup>7</sup> Concern has been expressed about these exclusions as it may be open to abuse.

13. The Equality Act requires a test that hate speech must ‘reasonably be construed to demonstrate a clear intention’. These are fairly onerous burdens for a complainant to discharge and may make the use of the Equality Act a less attractive option. The Constitution, however, removes all forms of hate speech beyond the realm of judicial review. It is not clear how a court will deal with the conflicts between these acts, other than to note that the Constitution has precedence over the Equality Act, and insofar as the Equality Act is in conflict with it, the Constitution will prevail.

## OTHER AREAS OF SOUTH AFRICAN LAW WHICH IMPACT ON FREEDOM OF EXPRESSION

14. South African law has a well-developed criminal and civil jurisprudence which caters for inappropriate forms of expression. In particular, our criminal law has the crimes of *crimen iniuria*, which consists of the unlawful and intentional violation of the dignity or privacy of another. Criminal defamation consists of the unlawful and intentional publication of matter concerning another which tends to injure her/his reputation.

A person's good name or reputation can be harmed only if the conduct or words complained of come to the notice of someone other than the complainant, in other words, if publication takes place. If the conduct comes to the notice of the complainant only, it can at most amount to *crimen iniuria* if the complainant's *dignitas* has been impaired.

15. Our courts have tended to restrict the prosecution of these crimes to more serious cases of impairment of another's reputation. Whether defamation is of a sufficiently serious character depends (as in *crimen iniuria*) upon a variety of factors such as the position or status of the person defamed, the defamer's motive, the character of the allegations, the degree of publication, and also the interests of the community.<sup>8</sup>
16. The civil law of defamation protects reputation by means of the *actio iniuriarum*. It is that part of the law which is concerned with the reconciliation of the citizen's right to enjoy the reputation which s/he deserves with the right of freedom of expression. It is part of the law of delict and that branch of *iniuriae*, which consists of the publication of defamatory statements. The delict of defamation is the unlawful publication of a statement concerning another person, which has the effect of injuring that person's reputation. A person's reputation is injured if the statement tends to lower her/him in the estimation of right-thinking members of society generally, or if it tends to diminish the esteem with which s/he is held by others.<sup>9</sup>
17. The delict of defamation is influenced by the core values of the Constitution, which values have informed the development of this area of our common law.

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<sup>8</sup> The Law of South Africa: *Criminal Law* A St Q Skeen at para. 275 ff Butterworths Publications on CDROM

<sup>9</sup> The Law of South Africa *Defamation* by C Kinghorn at para. 242 ff Butterworths Publications on CDROM

## LIMITING THE RIGHT TO FREEDOM OF EXPRESSION

18. Constitutional rights the world over are never absolutely protected. Rights may clash with each other for primacy of protection. Other societal interests may be more compelling than a right in the Bill of Rights, which interest may trump the right. Rights contained in the Bill of Rights may be limited in a general manner as is evident in the Constitution, by reference to the limitation clause or in a specific internal manner as is evidenced by s 16(2), which removes an entire category of speech into the realm of non-speech, which is never afforded Constitutional protection.
19. Rights contained in the Bill of Rights may be limited by Section 36 of the Constitution, provided that such limitation is embodied in a law of general application and provided further that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Such a limitation of rights must also take into account the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose. The content and scope of each right is dynamically dependant upon how the limitation clause is interpreted in relation to each right. The limitation clause is thus at the hub of Constitutional interpretation.
20. Limitations analysis is a two-stage process.<sup>10</sup> The first stage requires the claimant to establish that a fundamental right has been infringed. The claimant must show that the particular activity falls within the ambit of the particular right. Once this has been achieved, it is incumbent on the claimant to show that there has indeed been an infringement of the right. Once the first stage has been overcome, the inquiry shifts to the second stage. The second stage requires the competing party to show that the restriction is reasonable and justifiable in conformity with the broader societal interests. The real limitation enquiry therefore only falls to be considered in the second stage. The limitation inquiry is a value laden one as is evidenced by reference to the underlying values in s36(1).

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<sup>10</sup> Woolman *S Out of Order? Out of Balance? The Limitation Clause of the Final Constitution* SAJHR 13 (1997) 102 at 108

## THE RIGHT TO DIGNITY

21. Section 10 of the Constitution reads; “everyone has inherent dignity and the right to have their dignity respected and protected”.

The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs Constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights... Human dignity is also a Constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary Constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.<sup>11</sup>

22. The respect for human dignity is crucial to accommodate conflicting interests; so too is respect for the other foundational values such as democracy, equality and freedom. There are, however, potential tensions between these values, which courts have to resolve.<sup>12</sup> For this reason the Courts are obliged to balance competing rights. Dignity underpins the rights in the Bill of Rights and is essential to the balancing process. Individualised justice may have to give way here to the general interests of the community.<sup>13</sup>
23. On this basis, although the right to human dignity underpins the right to freedom of expression, we would submit that in the interests of society as a whole, the right to freedom of expression should be measured against the right to dignity in each case, and neither should be presumed to have supremacy.

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<sup>11</sup> *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para. 35

<sup>12</sup> A Chaskalson *Human Dignity as a Foundational Value of our Constitutional Order* SAJHR (2000) 193 at 201

<sup>13</sup> *Ibid* at 204

## RECENT CONSTITUTIONAL COURT DECISIONS

24. In *S v Mamabolo*<sup>14</sup> the Constitutional Court stated in regard to the status of the right to freedom of expression in society, stated:

[T]he Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.

25. In *South African National Defence Union v Minister of Defence and Another*<sup>15</sup> O'Regan J stated that:

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental functions as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters . . .

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<sup>14</sup> 2001 (3) SA 409(CC) per Kriegler J

<sup>15</sup> 1999 (4) SA 469 (CC) par 7

26. In *The Islamic Unity Convention v The Independent Broadcasting Authority and Others*<sup>16</sup> the Court held that:

Notwithstanding the fact that the right to freedom of expression and speech has always been recognized in the South African common law,<sup>17</sup> we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a 'Constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours'.

27. It is clear that the Constitutional Court is taking a narrow view regarding those forms of speech which constitute hate speech, and therefore do not attract Constitutional protection. Placing the restrictions of freedom of expression in an historical context, tends to alert us to the dangers of banning or disallowing speech, unless there are compelling reasons to do so. It should also be noted that freedom of expression has no pre-eminence in our Bill of Rights. It is within these parameters that the SAHRC should be assessing its policy.

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<sup>16</sup> (Case CCT 36/01) at par 27

<sup>17</sup> See *Publications Control Board v William Heinemann, Ltd. and Others* 1965 (4) SA 137(A) at 160E-G; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 585 B-E; *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) at 400 H-J; *S v Turrell and Others* 1973 (1) SA 248 (C) at 256 G; *United Democratic Front and Another v Acting Chief Magistrate, Johannesburg* 1987 (1) SA 413 (W) at 416 C-G.

## DECISIONS AND FINDINGS OF THE SAHRC

### 28. National Party v Maharaj, Kasrils and Mokaba (1997)

Certain statements, attributable to the three respondents, were reported in the national media. The statements related to Mr FW De Klerk, and cast him in a bad political light. In particular, it was reported that Mr De Klerk was running death farms, Mr De Klerk had knowledge of *apartheid* atrocities and he was described as “’n kaalkop-misdadiger wat drup van die bloed van onskuldige mense’<sup>18</sup>. The respondents admitted they had made the statements attributed to them.

The SAHRC took note that all parties to this complaint were members of political parties, and the statements had been made in the context of the Truth and Reconciliation Commission and other public forums. The SAHRC concluded that Mr De Klerk’s right to dignity had been infringed, but took the opportunity to assess the right to dignity in the context of the right to freedom of expression. Taking into account the manner and forums in which these statements were uttered and the political atmosphere at the time, the SAHRC did not find the utterances to be hate speech.

The SAHRC cautioned that certain speech which is abusive and insulting should be uttered, with circumspection, particularly in the context of speech uttered by public figures.

### 29. Viljoen v Makhaye (September 1999)

It was alleged that Mr Makhaye made utterances regarding his allegations of the ‘brutality of white farmers’ which may result in the ‘killing [of] the farmers’. Some five months after these utterances, in the context of the murder of a farmer, General Viljoen complained to the SAHRC citing Mr Makhaye’s statements as inflammatory and hate speech.

The SAHRC had recourse to international instruments and international jurisdictions in concluding that South Africa’s proscription against hate speech was in line with international trends. The SAHRC further concluded that there was no clear incitement of imminent violence in Mr Makhaye’s utterances. The SAHRC, however, did not stop there, and again cautioned that irresponsible utterances by public figures, although Constitutionally protected, were not in the interests of nation building and human dignity.

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<sup>18</sup> Loosely translated ‘a bald criminal with the blood of innocent victims dripping from his bald scalp’.

### 30. SAHRC v SABC (June 2002)<sup>19</sup>

The SAHRC initiated a complaint to the Broadcast Complaints Commission (BCCSA) against the SABC, which had broadcast a song by Mbongeni Ngema called *Amandiya*. The song expressed a view that Indian's were a threat to Black South Africans and the song appealed to 'virulent and courageous men' to take note of the threat of Indians to Black South African culture and lifestyles.<sup>20</sup>

The BCCSA had recourse to the right to freedom of expression in the Constitution, in particular s 16(2). It looked at the accusations against Indian's as oppressors, conveyed in the manner of a song, which it deemed to be a particularly powerful medium of communication. It noted that the song pitted African South Africans against Indian's and in so doing, amounted to 'hate' based on race. It further noted that the words of the song were inflammatory, not least of all in its assertion that life was better under *apartheid* than it is with the current perception of oppression of Black people by Indian's. The combination of the above and the songs call to all to rise up against this 'movement' led the BCCSA to conclude that the utterances were sufficient to incite harm and therefore amounted to hate speech.

The SAHRC is obliged to refer complaints, which may be more effectively dealt with by another forum, to that forum. The SAHRC has done this on many occasions, and the referral of the *Ngema* complaint was in the ordinary course. It is noteworthy that, prior to referring this complaint to the BCCSA, the BCCSA's code on freedom of expression had been rendered unconstitutional as it did not accord with the right to freedom of expression in the Bill of Rights.<sup>21</sup> It was on this basis that the BCCSA made its determination. The *Ngema* complaint has been the subject of other litigation, the outcome of which, at the time of writing, is yet to be determined. Under the circumstances it is not possible to state whether the BCCSA decision will pass constitutional muster.

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<sup>19</sup> This was not a finding of the SAHRC, yet the complaint was of such a nature that the SAHRC felt compelled to lay it before the BCCSA.

<sup>20</sup> I am relying on the translation of the song as presented in the BCCSA finding in case number 31/2002

<sup>21</sup> *The Islamic Unity Convention v The Independent Broadcasting Authority and Others* (Case CCT 36/01)

## CURRENT COMPLAINTS BEFORE THE SAHRC

31. As indicated in the opening paragraphs, the SAHRC is seized with a number of similar complaints relating to freedom of expression. It may be incumbent on the SAHRC to follow the lead set by the Constitutional Court and take a narrow view on what constitutes hate speech.
32. As has been indicated above, the SAHRC has determined matters to fall within the Constitutional provisions, yet has pronounced them to be offensive, in bad taste or not conducive to promoting the values underlying the Constitution. In this way, the SAHRC has had recourse to the limitation clause and determined that, the speech, although not hate speech, when balanced against the other rights in the Bill of Rights, it is rendered unconstitutional. The SAHRC has had particular recourse to the rights of dignity and equality, which are also core values of the Constitution. Values, it must be noted, tend to amount to overarching aspirations, as opposed to rights, which tend to be more clear and defined. In this way, the values of equality and dignity differ from the rights of equality and dignity. The Constitution enjoins us to interpret the Bill of Rights within the context of these core values, which inform our democracy.
33. In a recent response to the utterances “kill the farmer, kill the Boer” President Thabo Mbeki confirmed that “nobody, whoever they are, has the right to call for the killing of farmers or Boers, nor the right to threaten violence to advance their particular goals.”<sup>22</sup> His condemnation of these utterances did not amount to a call for the banning of such statements, nor the prosecution of the persons making these utterances. President Mbeki resorted to a public shaming of those who indulge in this form of speech, and in this way set the moral tone in response to such amoral remarks.
34. It is respectfully submitted that, in the context of our current circumstances, and our need to encourage free debate and expression, the President’s response is the correct one. The strong condemnation and public shaming attendant on these forms of speech, ensures that we do not resort to a knee-jerk response of demanding that free expression be curtailed, but rather we encourage a constructive debate around these issues, and allow the values of our Constitutional democracy to shine through. We can express our confidence in our growing Constitutional democracy, and trust that society’s moral outrage will be correctly placed, as was evident in the public debates around all of these complaints before the SAHRC. The SAHRC may set the tone of these debates by issuing press statements condemning them and placing them firmly within the context of inappropriate speech for a democratic society.

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<sup>22</sup> Response by the President of South Africa, the Honourable Thabo Mbeki, on occasion of the budget vote of the Presidency, 19 June 2002.

## CONCLUSION

35. The Bill of Rights must be interpreted within the context of the values set out in the Constitution. The limitation clause also relies on the values. Therefore in limiting a right, it must occur within the context of the values. If a form of expression is to be denied Constitutional protection, it will have to be justified on the grounds that the activity in question plays no role in furthering any of the values, which underlie the guarantee.
36. There are clearly two paths available to a complainant when complaining about the content of expression; firstly, to allege that the expression falls with s 16(2) of the Constitution and therefore falls outside of the realm of Constitutional protection, or secondly, to allege that the expression falls within s 16(1), but should be limited as a result of an enquiry held in terms of the limitation clause. In order to show that expression falls within the purview of s 16(2) the following enquiry must be satisfied; the form of expression under scrutiny:
  37. advocates hatred and
  38. that hatred is based on race, ethnicity, gender or religion and
  39. that expression constitutes an incitement to cause harm.
40. It is therefore contended that if free expression does not expressly advocate hatred based on race, ethnicity, gender or religion, *and* it does not constitute incitement to cause harm, it should not be hit with the absolute exclusion of s 16(2).
41. In the manner suggested above (and the historical practice of the SAHRC), each complaint should be a-judged according to its own facts. In this way, if the speech is not expressly hate speech, yet it offends the rights to dignity and equality, the SAHRC may pronounce that speech to be a violation of the values which underlie the Bill of Rights based on the balancing exercise undertaken in each case.
42. There is a view that holds that the test for admissible freedom of expression should be that of 'hurt' or 'hurtfulness' in line with the proposal found in the Equality Act. It holds that if a person feels hurt as a result of utterances, those utterances should be disallowed. It is submitted that a test based on hurt, besides not according with the Constitutional provisions, may be far too subjective to make it justiciable. It would, however, have application and could be taken into account as an aspect to be weighed up during the limitation process in the Bill of Rights.
43. The *Handyside v The United Kingdom*<sup>23</sup> decision upholds the view that each democratic society is different and that each must be a-judged in accordance with the notion of a 'margin of appreciation'. The idea behind a margin of appreciation is that the circumstances surrounding each country, its time and place in its history and the issues pertinent to its past and present must be taken into account when determining whether expression amounts to hate speech.<sup>24</sup> In this way, the

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<sup>23</sup>(1976) 1 EHRR 737

<sup>24</sup> For an in depth look at South Africa's international obligations to proscribe racism and to safeguard freedom of expression, see *Faultlines: Inquiry into Racism in the Media* SAHRC Report August 2000

European Court of Human Rights acknowledged that there is no uniform conception of morals.<sup>25</sup> The notion of a margin of appreciation would have relevance in the limitation enquiry, were it established that the speech or expression complained of, is subject to such an enquiry.

44. Therefore, in the context of the current complaints before the SAHRC, although they may be distasteful and they may be hurtful, they do not explicitly fall into the category envisaged by s 16(2). The ideas may, however, offend the rights to dignity and equality. It is on this basis that the SAHRC may determine that particular speech offends the Constitution and should be subject to public debate and criticism within the public realm. In this way the integrity of the notion of freedom of expression is upheld, and the protagonists views can be subject to a public debate, which, if we as a society uphold the values of our Constitution, should result in an exercise of public shaming.<sup>26</sup>
45. The SAHRC should firmly state its views that such utterances are offensive and undesirable by reference to the founding values, which inform our Constitutional discourse.

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at pp 63-77. It must be noted that at page 70 of that inquiry, the inquiry confirms that it expressly saw itself primarily as an enquiry into racism in the media, and did not wish to turn itself into an inquiry into freedom of expression.

<sup>25</sup> Handyside para. 48

<sup>26</sup> On 16 February 2001 I attended a hearing at the Broadcast Complaints Commission of South Africa, where Radio 702 had been called to account for playing excerpts from the CD referred to at footnote 4 above. Dan Moyane, on behalf of Radio 702, was at pains to explain that the public debate, which was generated by their choice to air the CD, exonerated their decision. He explained that the CD and its author were subject to a process of public shaming, which in itself strengthened our notion of nation building and unity and reinforced the feeling amongst listeners and commentators that this form of racism was unacceptable in South Africa today. Radio 702 was exonerated for broadcasting excerpts from the CD by the BCCSA in *AJB Myburgh and S Ingelby v Radio 702 BCCSA Case number 14/2001*