SA NAP Racism, Racial Discrimination, Xenophobia & Related Intolerance

In 2001, the Durban Declaration urged states, including SA, "to establish & implement without delay national policies & action plans to combat racism, racial discrimination, xenophobia & related intolerance, including their gender-based manifestations." The SA Department of Justice and Constitutional Development (DOJCD) has developed the plan and is now taking feedback until 30 June 2016. In this meeting AAI hopes to offer a space for SA activists to quickly and efficiently engage and develop feedback on this vital doc for submission to DOJCD. The call for comment from the SA Department of Justice and Constitutional Development can be seen here: [http://www.ngopulse.org/opportunity/2016/02/18/call-comment-national-action-plan-combat-racism-racial-discrimination](http://www.ngopulse.org/opportunity/2016/02/18/call-comment-national-action-plan-combat-racism-racial-discrimination)

Civil Society Response to National Action Plan to combat Racism, Racial Discrimination, Xenophobia & Related Intolerance (NAP XR3)

FINAL

1. Background

This report is the result of an initial meeting of civil society organisations (CSOs) convened by Aids Accountability International (AAI) at the Ford Foundation offices in Johannesburg on 23 May 2016 to draft a civil society response to the Department of Justice & Constitutional Development (DOJCD)’s National Action Plan to combat Racism, Racial Discrimination, Xenophobia & Related Intolerance 2016–2021 Draft for Public Consultation, dated October 2015 (see Annexure A). For ease of use, the National Action Plan will hereafter be termed the NAP XR3. The NAP was developed in fulfilment of South Africa’s commitment to give effect to their signing on to the Durban Declaration of the World Conference Against Racism (2001), WCAR.

Contributions at the meeting were made by AAI, Lawyers for Human Rights (LHR)/Triangle Project/Hate Crimes Working Group (HCWG), Kwanele, Legal Resources Centre (LRC), Ibis Reproductive Health (IRH), LGBTI Botswana, Professional Journalists’ Association of South Africa (ProJourn), and Gay and Lesbian Memory in Action (GALA).

This Draft was compiled by ProJourn based on the minutes of the meeting, in particular the agreement on what the contents of this Draft should embrace, and the three key principles on which it should be based. It will be adopted or amended by AAI.
The AAI Draft will then be submitted to all the CSOs invited to the 23 May meeting – including those who tendered apologies: Section 27, African Humanitarian Institute (AHI), Brothers for Life, Tshwaranang Care Centre, Sonke Gender Justice, United Nations Population Fund (UNFPA), GenderDynamix, Pan-African Business Coalition on HIV and Health (PABC), Network of African People Living with HIV, Southern African Region (NAPSAR+), Association for Responsible Alcohol Use (ARAU), David Ross Patient, and the Higher Education HIV/AIDS Programme (HEAIDS).

All these organisations will be encouraged to send this Draft to their networks for input. Those CSOs who wish to sign on to the AAI Draft are welcome to do so – **before the close of business on 22 June 2016** – and it will then be submitted by AAI both to the NAP XR3 National Steering Committee (NSC) and to the DOJCD itself. Those who do not wish to sign on to it are welcome to use it as food for thought in devising their own submission and may use or adapt any component as they see fit.

### 2. Foundational Principles and Goals

**a) Principles.**

The convened CSOs largely agree with the NAP XR3’s guiding principles: Universality; Interdependence and Indivisibility; Participation and Inclusion; Progressive realisation; Accountability; and Equality and Non-discrimination. But it was noted that Accountability was the weakest part of the NAP and that this created confusion in terms of oversight, lines of authority, process, reporting, and monitoring and evaluation (M&E). It was also decided that a key Principle that urgently needed to be added was Intersectionality (more on this below in 3.b.6).

**b) Goals.**

Noting that the NAP’s stated Goals are to promote broad public awareness of racial discrimination and non-discrimination, to enhance legislative, policy and administrative measures to combat discrimination, and to assist victims and groups vulnerable to racism and related forms of discrimination, the convened CSOs felt that these Goals would be attainable if the NAP’s interventions were squarely based on:

- an implementation matrix of budgeted and time-bound objectives; and
- the strengthening of existing institutions and mechanisms.

### 3. Addressing Issues in the NAP XR3

**a) Definitions.**

1. **Errors.** Errors of definition need to be corrected, for example the use of the word “transvestite” where “transgender” is intended.

2. **Constitutional alignment.** All definitions in the NAP XR3 need to be aligned, ultimately, with similar definitions in the **Constitution (1996)** and in the **Promotion of Equality and Prevention of**
Unfair Discrimination Act (2000), PEPUDA, and the proposed draft Prevention and Combating of Hate Crimes and Hate Speech Bill, so for example, the NAP definitions of hate speech and incitement to imminent violence need to be identical to those in Chapter 2 Section 16 of the Constitution. It is already problematic that the definitions in the Hate Crimes Bill differ from those in PEPUDA. It is noted that the constitutionality of the hate speech provisions in PEDUDA is a matter of current legal debate.

3. Gender. The NAP’s gender, sex, sexuality, and identity definitions are outdated and tend to be based purely on the biological binary of heterosexual male and female, which totally ignores LGBTI, especially transgender, experiences.

4. Problematic Definitions. Some definitions such as “nation-building,” while intended to be positive principles, may have unfortunate interpretations if they are taken to mean a jingoistic and xenophobic patriotism, while “social cohesion” might be disputed in that it pretends that class-based exclusion and marginalisation does not exist, so we urge caution in the terms used.

b) Gaps in the NAP.

1. The State. Nowhere in the NAP is there an admission that the state itself is potentially racist or discriminatory, which is especially important when the state is intended as a point of access to redress. Examples of this is the SAPS being in breach of the anti-profiling clause of the Durban Declaration of the WCAR, by its Operation Fiela which has witnessed the ethnic and colour profiling of people resident in South Africa in order to deport undocumented migrants. Furthermore, various government departments such as the Police, Home Affairs, Health and other social institutions have been in breach of the Durban Declaration by, for example, gender profiling for instance discriminating against single mothers whereas the Durban Declaration stands against all forms of discrimination “including their gender manifestations” – which is meant to include men, women, trans diverse, and intersex people.

2. The Private Sector. While the private sector is mentioned in the NAP, it is not given full responsibility as a transformative, anti-discriminatory agency, beyond its obligations under BBBEE and equality legislation, and is not seen as a potential co-funder of the NAP XR3.

3. The Media. The NAP imposes obligations on the media both in their promotion of equality and social cohesion, as well as interrogating their own production of discriminatory material. But because the NAP was developed so long after the Durban Declaration when the internet was young, we feel there is an overemphasis on ephemeral social media.

4. Historicity. The NAP XR3 has a shallow historical understanding of the roots of discrimination as it only mentions those originating in the Apartheid Era and “new forms of discrimination” (such as xenophobia) in the Democratic Era, but ignores currently obtaining discrimination rooted in the Colonial and Dominion Eras such as prejudice originating in the First Nations Genocide, in slavery, and in indentured labour. In other words, the NAP’s view of the roots of today’s discrimination needs to be rehistoricised. The historical context is lacking in other respects in its focus on racism and and
racial discrimination without exploring the complicated roots of homophobia, transphobia and other forms of intolerance.

5. Migrant Rights. Although the NAP commits to “Gender equality, Anti-LGBTI discrimination, Economic opportunities for all, and Eradicating the legacy of apartheid,” there are no NAP obligations on the Department of Home Affairs (DHA) regarding migrant’s rights. This is vital if xenophobia is to be adequately combated. We note that the state is currently weak in this regard in that it shut down many Refugee Reception Centres, making access to asylum-seeking and other forms of migrancy documentation more difficult, and that the Hate Crimes Working Group is not represented in many of the border provinces that are the first ports of call for incoming migrants.

6. Intersectionality. It was very strongly agreed that the current draft NAP unfortunately compartmentalised experiences of discrimination, whereas most experiences occur across a diverse field that might include in a single individual case experiences of class, race, disability, sexuality, gender and other determinants of marginality and vulnerability. So we urge the NAP to be solidly grounded in an intersectional analysis of the nuances and complexities of cross-cutting marginalities. We recognise, however, that some marginal groups or individuals are not currently at risk and suggest that the NAP’s priorities for priority interventions pay close attention to groups more at risk and actually threatened or under attack, noting that these objective conditions will change with time and so require regular monitoring. Prioritisation should not, however, exclude less at-risk marginalisations that will still require interventions including public education.

7. Public Education. The NAP merely states that the public should be aware of the NAP itself, but there is no proper public education campaign including in via the schools and universities and via social media on why combating discrimination is so important.

8. Excluded Marginal Groups: The NAP identifies four especially vulnerable groups: Foreign nationals especially from the rest of Africa, LGBTI people, Women and girls, and Indigenous people. We welcome these and the inclusion of occupation as a listed ground for protection from discrimination as a positive development, so that sex-workers can be protected on that basis. However, we note that the NAP makes no mention of certain marginal groups such as the disabled. Even though 10% of South Africans suffer from disability, there is no proper tracking of the experience, and the disabled are the most vulnerable in terms of violence, especially sexual violence. There also needs to be an emphasis on discrimination directed at HIV+ people and at people living with TB.

9. Sanctions. There is nothing in the NAP about the actual legal, criminal, social or other consequences of discrimination. In fact a debate needs to take place on what criminal sanctions (if any) should be applied to those individuals, groups and institutions found to be in breach of the NAP XR3 beyond those found guilty of criminal acts under existing legislation. We would prefer the principle of restorative justice to apply. Lesser offences might have some sort of social sanction applied such as a required public apology, while more serious offences might be in additional to the current criminal code, be criminalised under legislation such as the Protection of Constitutional Democracy Against Terrorist and Related Activities Act (2004), which outlaws the instigation or use of violence to create feelings of fear, terror or uncertainty within a segment of the public, or the...
United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948), to which South Africa acceded in 1998, which outlaws certain xenophobic statements and acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” as genocide.

10. Race Classification. This is one of the most difficult issues to deal with, but it is clear that the continued use of both official and casual race classification by the state, private sector, and social institutions and groupings is a directly contributing factor to the longevity and entrenched nature of racism in our society. Unavoidably, assigning racial classifications is remnant of apartheid logic. However, it is recognized that the material and emotional impact of racism is very real, very damaging, and lies at the core of much of the inequality, exclusion, and prejudice in South Africa today – and is thus what necessitates the NAP and similar initiatives.

We recognise that the reason given by state and societal authorities for continuing to apply race categorisation to persons in the country is to track the progress of transformation and democratisation. However, this presents a democratic society with a conundrum because the concept of separate human “races” in the plural is both scientifically discredited and politically dubious, and in itself sows the seeds from which racism may flower. Wide, deep, and detailed consultation needs to take place within our society to determine how best to resolve this conundrum so that apartheid racialisations are challenged and racial inequalities are simultaneously addressed.

c) Governance & Process.

1. Oversight. The proposed governance models include either putting the NAP under the South African Human Rights Commission (SAHRC), or under a Chapter 9 institution, or under a single Ministry, or to create a new national co-ordinating structure. That governance body would then oversee the NAP National Steering Committee (NSC) – consisting of relevant government departments, Chapter 9 institutions, and CSOs – which would then convene a Rapid Response Mechanism (RRM). Given the existing instruments like the Equality Courts and that the result of its interventions may result in court actions, it may be best that the Department of Justice and Constitutional Development is best in order to centralise ongoing cases and provide a direct line of information to decision-makers to use political / bureaucratic clout to deliver speedy results.

2. The National Steering Committee. The NSC should be structure to ensure cordial and functional intersectional partnerships between the relevant government departments, Chapter 9s, and CSOs, and that CSOs that do not sit on the NSC have easy access to the NSC to provide input on the NAP as it rolls out. We are currently concerned that the NSC is insufficiently representative of civil society as many CSOs were not made aware of the process or invited to sit on the NSC.

3. The Rapid Response Mechanism. It is not clear from the governance model whether the RRM envisaged is a rapid-response task team like the LGBTI rapid-response task team which is supposed to track anti-LGBTI hate crimes – which we would prefer – or some other mechanism. We would like to see an RRM that is indeed very mobile, responsive and fast-acting, regardless of where serious discrimination is occurring.
4. **Intersectionality.** The principle of intersectionality demands that there be a single oversight body and a single RRM rather than a set of several differentiated instruments; this should ensure that no marginalised group or individual falls through the cracks, though the most at-risk will receive priority.

5. **Reporting and Investigations** The NAP requires a mechanism for reporting to its governance body, NSC, and RRM that will require reporting on the status of risks and imminent threats, not merely on the past performance of the NAP – but the governance model does not make this clear. The NAP needs to have capacity for intelligence-gathering on looming threats, legal case-building, empirical statistics, data and evidence-collection, police investigating, monitoring and evaluation (M&E), and media monitoring, in order for the RRM to adequately intervene in emergencies, and for the NAP to devise broader structural interventions.

d) **Legislation & Policy.**

1. **Alignment.** There is concern from the legal community about the alignment of NAP XR3 with the Constitution, PEPUDA, and other relevant legislation and policies. If it is not constitutionally aligned it will inevitably wind up being challenged in the Constitutional Court.

2. **Duplication.** There is concern that the NAP does not sufficiently focus on existing anti-discriminatory mechanisms such as the Equality Courts – which deserve to be adequately strengthened under NAP XR3 – and that it will lay the groundwork for a Hate Crimes Bill that will wind up being an unnecessary duplication of PEPUDA and other relevant legislation and policies.

3. **Best Practice.** It is suggested that the drafters look at best practices regarding NAPs both at home and abroad, so for instance, the Department of Social Development’s excellent NAP on Adolescent Sexual and Reproductive Health Rights, or at examples of similar NAPs from Brazil which is a socially comparable country.

g) **Timeline & Budget.**

1. **Timeline.** Although the NAP is supposed to be implemented over 2016-2021, we are already deep into 2016, so it is likely to only kick off in 2017, and yet other than the National Steering Committee (NSC), no mechanisms are yet in place. There has been inadequate public consultation about CSO and civil society’s role on the NSC. The NAP also lacks a detailed implementation and outcomes timeline.

2. **Budget.** The funding of the NAP XR3 is not discussed, whether government departments will be asked to find the implementation within their existing budgets or whether they will be given an additional budget line. Is there a possibility of asking the private sector to contribute towards the funding? Vitally, there is nothing in the NAP that mentions how existing institutions such as the Equality Courts will be funded; they have in fact been underfunded, as have the Rape Courts which are similarly important as NAP implementing agencies. Ultimately, whether or not Treasury allocates a ring-fenced line-item funding the NAP XR3 will determine whether it succeeds or fails.
4. Conclusion

The undersigned CSOs are convinced that the NAP XR3 could be a vital instrument for dealing with one of South African society’s most damaging and intractable problems, so long as:

● it be based squarely on the operational principle of intersectionality and devises an intersectional threat-and-marginalisation matrix on which to base the actions of its RRM and other interventions;

● it reinforce existing instruments and institutions such as the Constitution, PEPUDA, and the Equality Courts; and

● it produces a logical set of objectives to address inequalities and prejudice on a clearly goal-and-activity-directed timeline, with measureable outcomes, constant M&E, and a ring-fenced budget allocation.

[ENDS]