



south african
**human
rights**
commission

Investigative Reports

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COMPLAINT NO: Gauteng/2012/0134

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Complaint No: GP/2012/0134

MÉDECINS SANS FRONTIÈRES	1 st Complainant
SECTION27	2 nd Complainant
LAWYERS FOR HUMAN RIGHTS	3 rd Complainant
PEOPLE AGAINST SUFFERING, OPPRESSION AND POVERTY	4 th Complainant
and	
THE DEPARTMENT OF HOME AFFAIRS	1 st Respondent
THE NATIONAL DEPARTMENT OF HEALTH	2 nd Respondent
BOSASA OPERATIONS (PTY) LTD	3 rd Respondent
THE SOUTH AFRICAN POLICE SERVICE	4 th Respondent
THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION	5 th Respondent

BASELINE INVESTIGATION REPORT

1. INTRODUCTION

- 1.1. The South African Human Rights Commission (the Commission) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
- 1.2. The Commission is specifically required to:
 - 1.2.1. Promote respect for human rights;
 - 1.2.2. Promote the protection, development and attainment of human rights;and
 - 1.2.3. Monitor and assess the observance of human rights in the South Africa.
- 1.3. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country and to take steps to secure appropriate redress where human rights have been violated. The Human Rights Commission Act, 54 of 1994 (the HRCA)¹, provides the enabling framework for the exercise of the Commission's powers and imposes a mandatory duty of cooperation on both public bodies and private individuals.
- 1.4. Section 9(6) of the HRCA determines the procedure to be followed in conducting an investigation regarding an alleged violation of/or threat to a fundamental right.
- 1.5. Chapter 3 of the South African Human Rights Commission's Complaints Handling Procedures (CHP), provides that the Commission has the jurisdiction, after assessing the complaint for this purpose, to conduct or cause to be conducted, on its own accord

¹ The statutory powers, applicable to this investigation, conferred by the HRCA have not in any material way been altered by the provisions of the South African Human Rights Commission Act No. 40 of 2013.

or upon receipt of a complainant, an investigation into any alleged violation of or threat to a fundamental right.

2. THE PARTIES

- 2.1. The First Complainant is Médecins Sans Frontières (MSF) an independent, international, medical humanitarian organisation registered in South Africa as a non-profit organisation (NGO) with its principal place of business at 3rd Floor, Orion Building, 49 Jorissen Street, Braamfontein, Johannesburg.
- 2.2. The Second Complainant is SECTION27, a public interest litigation centre registered as a NGO with its principal place of business at 23 Jorissen Street, 5th floor Braamfontein Centre, Braamfontein, Johannesburg.
- 2.3. The Third Complainant is Lawyers for Human Rights (LHR), an independent human rights organisation registered as a NGO with its principal place of business at Kutlwanong Democracy Centre, 357 Visagie Street, Pretoria.
- 2.4. The Fourth Complainant is People against Suffering, Oppression and Poverty (PASSOP), a community-based NGO working to protect the rights of refugees, asylum-seekers and immigrants in South Africa with its principal place of business at 37 Church Street, Wynberg, Cape Town.
- 2.5. First Respondent is the Department of Home Affairs (DHA), a public body which is accountable to the National Parliament of South Africa. The DHA is mandated *inter alia* to act as the custodian, protector and verifier of the identity and status of persons resident in South Africa; to control, regulate and facilitate immigration and the movement of persons through ports of entry and to determine the status of asylum-seekers and refugees in accordance with international obligations. The DHA is ultimately “legally and administratively responsible for all matters pertaining to the apprehension, holding, processing, repatriation and release”² of detainees at Lindela. The DHA’s head office is at 909 Arcadia Street, Pretoria.
- 2.6. The Second Respondent is the National Department of Health (DoH), a public body which is accountable to the National Parliament of South Africa and which has overall responsibility for healthcare in South Africa, with a specific responsibility for public-sector healthcare. The DoH’s head office is at the Civitas Building, Corner Thabo Sehume and Struben Streets, Pretoria.
- 2.7. The Third Respondent is Bosasa Operations (Pty) Ltd (Bosasa), a registered private company with its principal place of business at 1 Windsor Road, Luipaardsvlei, Mogale City, Johannesburg. Bosasa is contracted by the first Respondent to run the facilities at the Lindela Repatriation Centre (Lindela).
- 2.8. The Fourth Respondent is the South African Police Service (SAPS), a public body which is accountable to the National Parliament of South Africa and responsible *inter alia* for the upholding and enforcing of the laws of South Africa. The SAPS head office is at the Koedoe Building, 236 Pretorius Street, Pretoria. The SAPS has been included as a Respondent, by virtue of its role in the apprehension, administration of and detention of non-nationals presumed to be unlawfully in South Africa.

² <http://www.bosasagroup.com/content/1361/1275/lindela-repatriation-centre>.

- 2.9. The Fifth Respondent is the Department of International Relations and Cooperation (DIRCO), a public body which is accountable to the National Parliament of South Africa and responsible for the foreign policy and international relations of South Africa. The DIRCO's head office is at 460 Soutpansberg Road, Pretoria.
- 2.10. The Second, Fourth and Fifth Respondents, although not parties to the investigation, are cited as such on the basis of the respective recommendations directed to them resulting from this investigation.

3. BACKGROUND TO THE COMPLAINT

- 3.1. On 28 May 2012, the Commission received a written complaint from the first to fourth Complainants.
- 3.2. The complaint was premised on various grounds for concern that led to the Complainants' call for an investigation into the state of health and provision of health care services at Lindela. These grounds are as follows:
 - 3.2.1. The first Complainant, on 30 November 2011, requested access to Lindela for the purposes of conducting an independent medical assessment of the state of health care provision at that facility. In denying this request, the Chief Director of the Immigration Directorate for the Department of Home Affairs, Mr Modiri Matthews, indicated that the second Respondent and the Commission were the relevant bodies tasked with oversight over operations at Lindela in relation to medical standards and human rights respectively;
 - 3.2.2. An alleged lack of oversight at Lindela generally, in light of the lack of access accorded to independent human rights organisations despite reports of human rights violations;
 - 3.2.3. That officials of the third Respondent allegedly indicated to the third Complainant that it is no longer responsible for health care services at Lindela;
 - 3.2.4. Findings reported by various studies relating to conditions at Lindela that could impact on the state of health of detainees held there. These included:
 - 3.2.4.1 A finding in 2000 by the Commission that many detainees had complained of limited access to medical care at Lindela as well as further findings in the same study indicating that there had been non-compliance by the then service provider at Lindela (Dyambu Holdings), with regard to menu recommendations and that periods between the serving of meals were too lengthy;³
 - 3.2.4.2 A 2010 report by the Forced Migration Studies Programme reporting that detainees on chronic medication, including anti-retroviral (ARV) treatment, reported not being given access to such medication.⁴ This report further found that a large number of detainees who had

³ "Lindela at a Crossroads for Detention and Repatriation: An assessment of the conditions of detention by the South African Human Rights Commission" (December 2000) available at <http://www.queensu.ca/samp/migrationresources/xenophobia/reports/sahrc1.pdf>.

⁴ Amit, R. "Lost in the Vortex" Irregularities in the Detention and Deportation of Non-National in South Africa" (2010) Forced Migration Studies Programme available at http://www.migration.org.za/sites/default/files/reports/2010/Lost_in_the_Vortex-_Irregularities_in_the_Detention_and_Deportation_of_Non-Nationals_in_South_Africa_0.pdf.

sought medical care were not satisfied that their condition had been adequately treated and that a large percentage of reported incidences of violence involved officials of the first and / or third Respondents;⁵

- 3.2.4.3. A 2012 submission by the third Complainant to the Special Rapporteur on the Human Rights of Migrants in which it reported on common complaints by detainees who were consulted at Lindela. Such complaints included allegations of inadequate medical care and a neglect of the psychological well-being of detainees;⁶ and
- 3.2.4.4. In a report by Solidarity Peace Trust and the fourth Complainant, based on the results of a 2012 survey, respondents indicated a lack of access to medical services at Lindela (this included ARVs).⁷ This report further indicated that a large number of respondents alleged that they had been held in detention for more than 120 (one hundred and twenty) days⁸.
- 3.2.5. Reports received about a male whose meningitis infection had allegedly been mistreated by the first Respondent and whose family was reportedly only informed of his hospitalisation approximately two months after his admission to hospital.

4. PRELIMINARY ASSESSMENT

- 4.1. The Commission confirmed acceptance of the complaint in terms of its CHP on the basis of *prima facie* violations of human rights. On that basis, the Commission instituted an investigation of the compliant.

5. RIGHTS ALLEGEDLY VIOLATED

From its preliminary assessment of the compliant, the Commission identified *prima facie* violations of the following human rights, as enshrined in the Bill of Rights of the Constitution:

- 5.1. Section 10 (the right to human dignity);
- 5.2. Section 12 (the right to freedom and security of the person);
- 5.3. Section 27 (the right to health care, food, water and social security);
- 5.4. Section 33 (the right to just administrative action); and
- 5.5. Section 35 (the rights of arrested, detained and accused persons)

6. METHODOLOGY

- 6.1. In evaluating this matter, the Commission accessed and considered:
 - 6.1.1. Applicable Constitutional and statutory prescripts;
 - 6.1.2. The particular facts of the complaint;

⁵ Ibid.

⁶ "LHR Submission to the Special Rapporteur on the Human Rights of Migrants" LHR (2012) available at <http://www.lhr.org.za/publications/lhr-submission-special-rapporteur-human-rights-migrants>.

⁷ Solidarity Peace Trust and Passop, "Perils and Pitfalls – Migrants and Deportation in South Africa" (2012), Durban: Solidarity Peace Trust available at [http://www.solidaritypeacetrust.org/1192/perils-nd-pitfalls/for this report](http://www.solidaritypeacetrust.org/1192/perils-nd-pitfalls/for%20this%20report).

⁸ Ibid

- 6.1.3. Information obtained through the conduct of an inspection *in loco* and through interviews with officials of the first Respondent, the doctor and nurses on site;
- 6.1.4. Information gleaned from the results of a survey in which 109 (one hundred and nine) detainees participated;
 - 6.1.4.1. The survey contained a series of quantitative questions about detainees' experiences both in police detention and at Lindela, as well as a small number of qualitative questions.
 - 6.1.4.2. Aside from questions related to access to and quality of health care, a number of questions covered the related issues of basic conditions of detention and issues of procedural and administrative justice insofar as these aspects impact access to and quality of health care.
 - 6.1.4.3. In order to ensure anonymity, the participants were randomly selected from weekly detainee lists provided by the third Respondent. As the research manager randomly selected participants from the detainee lists, there was no way of avoiding knowledge of the participants' names. However, this knowledge was limited to the selection process alone as detainees were not requested to identify themselves during interviews and no names were used in the survey itself. The data collected therefore remains anonymous and no information can be linked to any particular individual.
 - 6.1.4.4. Participation was voluntary and based on informed consent.
 - 6.1.4.5. Not all respondents answered every question.
 - 6.1.4.6. The research design set out to interview approximately 10% (ten percent) of the Lindela population in order to obtain a representative sample. The 109 (one hundred and nine) respondents in the study make up approximately 8% (eight percent) of the detainee population at the time of the study, but many questions had fewer respondents. Accordingly, the study did not obtain a representative sample. However, the responses do provide a window into Lindela and suggest issues of concern while pointing to the need for rapid intervention as well as more regular monitoring of detention conditions in order to provide a broader picture of detainee rights, specifically with regard to access to and quality of health care.
 - 6.1.4.7. Ethics clearance for the study was received from the University of the Witwatersrand Research Ethics Committee (non-medical) on 7 March 2013 (protocol number: H130222)
- 6.1.5. Information gleaned from six detainee lists provided to the Commission by the third Respondent and covering the period at Lindela between April and May 2013.
- 6.1.6. Information obtained through desktop research.

- 6.2. The Commission notes that Justice Edwin Cameron⁹ in July 2012 conducted an inspection at Lindela¹⁰. The Honourable Justice issued a report on his findings entitled “Visit to Lindela Repatriation Centre, Krugersdorp: Justice Edwin Cameron, Constitutional Court of South Africa”¹¹ (Justice Cameron’s Lindela Report)¹². An unannounced visit was later also undertaken by Justice Moseneke in April 2014. The report by Justice Moseneke is hereinafter referred to as the Moseneke report.
- 6.3. This investigation was not intended to be a comprehensive assessment of all health issues and is limited to specific areas of focus. It should therefore be viewed as a baseline study for further investigation and research into access to and quality of health care at Lindela.

7. STEPS TAKEN BY THE COMMISSION

- 7.1. The Commission received and reviewed the abovementioned complaint.¹³
- 7.2. In a meeting chaired by the Commission’s Chairperson Advocate M.L. Mushwana, on 27 June 2012, the Commission met with representatives of the Complainants to further discuss the particular facts of the complaint and the Commission’s intended approach in investigating the complaint. It was agreed at this meeting that the Commission would be supported in this investigation by the Complainants as experts in their relevant fields. In this respect, it was agreed that the Commission would seek permission from the relevant authorities to be accompanied by the first Complainant on its inspection of the health care and related facilities at Lindela.
- 7.3. The Commission proceeded with an investigation consisting of an inspection *in loco* and interviews with management of and employees at Lindela as well as the administration of a research questionnaire with respondents. In respect of the later part of the investigation, the African Centre for Migration and Society (ACMS) was included in the group of experts supporting the Commission in the conduct of this research. The ACMS was instrumental in the design and management of the research process. The ACMS also collated and interpreted data from the questionnaires and provided a report on the research findings to the Commission.
- 7.4. On 4 September 2012, a delegation consisting of representatives of the Gauteng Provincial Office of the Commission together with two representatives from the first Complainant and one representative from the fourth Complainant, conducted an inspection *in loco* of the health care and related facilities at Lindela. The delegation was escorted on its inspection of the facilities by Lindela administrators (officials of the first Respondent) and the third Respondent’s senior managers. The inspection revealed the following:
 - 7.4.1. Lindela appeared overall to be clean and ordered.
 - 7.4.2. Officials appeared cooperative and approachable.

⁹ Justice of the Constitutional Court since 1 January 2009

¹⁰ Justice Cameron was accompanied by his law clerks Nurina Ally and Michael Mbikiwa, and his former law clerk Claire Avidon.

¹¹ Cameron, E. “Visit to Lindela Repatriation Centre, Krugersdorp: Justice Edwin Cameron, Constitutional Court of South Africa” (2012). Online available at <http://www.constitutionalcourt.org.za/site/PrisonVisits/Cameron/Prisons-Lindela-Report-Monday-29-October-2012-FINAL.pdf>.

¹² A similar visit was conducted by Judge Brian Spilg of the South Gauteng High Court; however, his office was, as at the time of issuing of this report, unable to provide the Commission with a copy of the report on his visit.

¹³ See paragraph 3 above.

- 7.4.3. Inspection of the clinic revealed the following:
- 7.4.3.1. The waiting area outside the clinic is a small, open-air area which allows for fresh air and sunlight.
 - 7.4.3.2. The delegation was introduced to Doctor Khota and 4 (four) female nurses, all employed by the third Respondent. Interviews with medical staff revealed the following:
 - 7.4.3.2.1. Dr Khota has been employed to provide medical care to detainees at Lindela for the past 15 (fifteen) years; he visits Lindela daily in the mornings and is on call for emergencies.
 - 7.4.3.2.2. Nursing staff are based at Lindela full-time and work on a shift basis.
 - 7.4.3.2.3. The clinic undertakes approximately 300 (three hundred) to 400 (four hundred) primary health consultations (PHC) per day (this number includes attendance by detainees on chronic medication who attend for the purpose of receiving their medication on a “directly observed treatment” (DOT) basis).
 - 7.4.3.2.4. Dr Khota was very positive about the medical services provided at Lindela.
 - 7.4.3.2.5. Dr Khota indicated that pregnant women and women that test positive for pregnancy at the clinic, as well as minors, are not detained at Lindela.
 - 7.4.3.2.6. Once in Lindela, detainees are allowed to visit the clinic during the day, for medical attention.
 - 7.4.3.2.7. The clinic is stocked with standard essential drug list (EDL) medication and the clinic is therefore able to treat detainees at a primary health care level¹⁴. Detainees requiring hospital admission are referred to Leratong Hospital.
 - 7.4.3.2.8. Patients who are discharged from the hospital are admitted to the recovery ward at Lindela where they are kept until they are well enough to return to the shared rooms in the detention courtyard.
 - 7.4.3.2.9. The clinic staff alleged that tuberculosis (TB) medication and ARVs are provided to patients once they have been initiated through second Respondent’s local clinic; and further, that they had, at that time, only 4 (four) patients under their care that were on TB medication and over 40 (forty) on ARVs.
 - 7.4.3.2.10. Nurses indicated that tetanus vaccines were available at the clinic.

¹⁴ The Declaration of Alma-Ata. International Conference on Primary Health Care, Alma-Ata, USSR, 6-12. September 1978 [online available at http://www.who.int/publications/almaata_declaration-en.pdf] defines “primary health care” as “essential health care... the first level of contact... and... the first element of a continuing health care process.”

- 7.4.3.2.11. With regard to voluntary counseling and testing (VCT), clinic staff indicated that only one test is conducted per week and that no protocols and considerations for counseling are in place.
- 7.4.3.2.12. Dr Khota indicated that the most common diagnoses at the clinic are flue and sexually transmitted infections (STIs).
- 7.4.3.2.13. With regards to emergency treatment, Dr Khota indicated that there is access to a resuscitation trolley in the clinic and an emergency kit / suitcase is available with very basic resuscitation equipment. In the event of an emergency, Dr Khota is notified and he then, depending on the nature of the ailment, either consults with the patient or refers them to Leratong Hospital. An ambulance is available at the premises to transport patients to hospital.
- 7.4.3.2.14. With regard to psychological care, the delegation was informed that in instances where detainees are diagnosed as needing possible psychiatric care, such patients are referred for care outside Lindela. There is no counselor or psychologist available on the premises¹⁵.
- 7.4.3.2.15. With regard to the management of trauma, Dr Khota indicated that usually only minor injuries (such as cuts and lacerations) are treated at the clinic. Dr Khota alleged that no serious injuries or trauma had been treated at the clinic in the preceding three months at least.
- 7.4.3.2.16. With regard to medication and translation, the delegation was informed that this is done with the assistance of another detainee from the same country as the person inquiring such mediation / translation services.
- 7.4.3.2.17. Dr Khota indicated that his main concern is with regard to the management of patients transferred to Lindela from prisons, as they allegedly often do not receive chronic medication (including ARVs) at prison and therefore, on arrival at Lindela, have not taken ARV medication for periods of up to two weeks. He further raised concerns about the admission of patients with advanced acquired immune deficiency syndrome (AIDS) but indicated that he had raised this with Lindela management and that they were dealing with these concerns.
- 7.4.3.3. Promotional health material was displayed on the walls and detainees appeared to be treated with dignity and a decent measure of privacy.
- 7.4.3.4. The clinic has two small wards, one for female patients and one for male patients. The female ward has two beds. The male ward has eight beds.

¹⁵ Similar allegations are noted in Justice Cameron's Lindela Report, see footnote 6.2 above, at page 17.

- 7.4.3.5. Upon inspection, the female ward was empty.
 - 7.4.3.6. Upon inspection, the male ward had two patients. One patient was in a bed and the other sitting in a chair watching television.
 - 7.4.3.7. The rooms were clean and tidy and the barred windows and curtains were open.
 - 7.4.3.8. There are two dressing rooms with basic equipment, in a clean environment.
 - 7.4.3.9. Single use dressing kits were available.
 - 7.4.3.10. Inspection of the fridge revealed that there were no tetanus vaccines inside.
 - 7.4.3.11. The investigation raised concern about whether, upon deportation, deportees are provided with a buffer stock of chronic medication to ensure adherence to medical treatment plans during deportation and in the time immediately thereafter.
 - 7.4.3.12. There is an isolation unit next to the clinic that was under construction at the time of inspection. The indication was that these rooms would be used for TB patients, separate from other detainees. There were very few windows and no natural ventilation was present in the room.
- 7.4.4. Inspection of the female detention section revealed the following:
- 7.4.4.1. The section is located in an open courtyard with a clean shower, a toilet block and a room with a television on one side.
 - 7.4.4.2. The courtyard is spacious and clean.
 - 7.4.4.3. The delegation observed women lying on the floor in the sun and some women drying their clothes on the trees.
 - 7.4.4.4. Women spend their daytime sitting outside in this area and return to the rooms at bedtime.
 - 7.4.4.5. Each room has 28 (twenty eight) bunk beds, a toilet and a sink. Not all the beds were occupied and there appeared to be an adequate amount of blankets. There were only two windows on one side of the wall. However, all rooms have rooftop ventilation¹⁶.
 - 7.4.4.6. The delegation observed representatives from a private company arriving to pick up a load of blankets for washing.
- 7.4.5. Inspection of the male detention section revealed the following:
- 7.4.5.1. There are two male sections, "Section A" and "Section B".
 - 7.4.5.2. Section A is the main section and held approximately 1 200 (one thousand two hundred) men on the day the investigation was conducted.
 - 7.4.5.3. The rooms were similar in size to those in the female section, approximately ten by eight meters, however some rooms held slightly more than 28 (twenty eight) bunk beds. Section A has at least 50 (fifty) such rooms.

¹⁶ Ventilation is provided through the use of whirlybirds.

- 7.4.5.4. Each room has a television, shower and one toilet.
- 7.4.5.5. Detainees have unhindered access to the courtyard during the day, but are confined to the rooms from early evening and through the night.
- 7.4.5.6. Detainees in the male section usually congregate in terms of nationality, but rooms are not allocated in line with nationality. The congregation appeared to take place purely on the initiative of the detainees themselves.
- 7.4.6. Inspection of the food preparation areas revealed the following:
 - 7.4.6.1. The delegation was given an extensive tour of the kitchen and food storage areas.
 - 7.4.6.2. The third Respondent appears to provide a well-run service in this regard¹⁷.
 - 7.4.6.3. There were two big walk-in freezers for vegetables, bread and meat, with meat stored separately.
 - 7.4.6.4. Food is pre-packed to minimise the use of utensils and delivered in three (3) day cycles.
 - 7.4.6.5. Food is moved from general storage areas to day storage areas in preparation for the day's meals.
 - 7.4.6.6. There are thawing and washing rooms in the kitchen and the delegation was informed that these are used daily.
 - 7.4.6.7. The delegation was further informed that the menu is constant for two weeks. The menu in use at the time of the Inspection was prominently displayed on the walls and included information in relation to approximate nutritional value.
 - 7.4.6.8. There was visible attention to the need for special medical diets.
 - 7.4.6.9. With regard to infection control:
 - 7.4.6.9.1. Delegation members were all given hair nets prior to entering the kitchen area;
 - 7.4.6.9.2. Kitchen staff were wearing personal protective equipment (PPE);
 - 7.4.6.9.3. The storage, preparation and dining area were all clean; and
 - 7.4.6.9.4. There was active cleaning taking place by appropriately dressed staff members.
- 7.4.7. There did not appear to be any condom dispensers at Lindela.
- 7.4.8. After the inspection, during interviews with officials of the first Respondent, Ms Nolwandle Qaba, Director of Deportations, and Mr Job Jackson, the Manager of Lindela, the following was indicated:

¹⁷ Ibid footnote 6.2 at page 6

- 7.4.8.1. In response to questions raised about reasons for detainees being detained for periods in excess of 30 (thirty) days, officials indicated that the delays in the deportation process are sometimes caused by the fact that some detainees are brought to Lindela without their status having been checked prior thereto and the responsibility therefore falls on Lindela to do so, even though it is not within Lindela's mandate. Further, delays are sometimes caused in instances where foreign embassies are required to interview detainees to verify nationality prior to deportation and such embassies do not / are not able to attend at Lindela within a reasonable time period.
- 7.4.8.2. Mr Jackson and Ms Qaba indicated that there were 1 900 (one thousand nine hundred) detainees in total on the day. The figure had decreased by 500 (five hundred) in the preceding 24 (twenty four) hours as a number of Zimbabwean nationals had been deported the day before.
- 7.4.8.3. Ms Qaba indicated that the lack of formalised screening procedures for the health screening of detainees upon arrival was being revised as part of a general revision of the standard operating procedures at Lindela.

7.5. Over a period of time spanning April, May and September 2013, questionnaires were administered to detainees at Lindela. The following reported survey results are based on quantitative survey data gathered from 109 (one hundred and nine) respondents¹⁸:

7.5.1. With regards to demographics:

7.5.1.1. The respondents were predominantly male – constituting 92 (ninety two) of the total sample, whereas only 17 (seventeen) were female.

7.5.1.2. The table below shows the most highly represented nationalities in the survey and the proportion of the overall population in Lindela they represented at the time of the investigation, based on the nationality totals in the sample of detainee lists provided by the third Respondent¹⁹:

Country of origin²⁰	Number of Respondents	Percentage of Lindela population
DRC	21	3%
Nigeria	13	5%
Zimbabwe	9	20%
Zambia	6	Less than 1%
Malawi	5	44%
Tanzania	4	4%
Mozambique	4	11%
Bangladesh	4	1%

¹⁸ See paragraph 6.1.3. above.

¹⁹ See paragraph 6.1.5. above.

²⁰ Researchers interviewed one respondent who alleged that he was a South African national being detained as an illegal non-national.

- 7.5.1.3. Although detainees from Malawi, Mozambique and Zimbabwe were the most highly represented populations in Lindela during the investigation, the frequency of transport to these countries means that they are generally detained for shorter periods than nationals from countries such as the DRC and Nigeria. As health concerns increase with the length of detention, respondents from the latter countries may therefore have heightened health care needs.
- 7.5.1.4. The respondents ranged in age from 19 (nineteen) to 59 (fifty nine), averaging 32 (thirty two) years.
- 7.5.1.5. The most common languages spoken were Swahili, English, French, Lingala, Igbo and Ndebele.
- 7.5.1.6. Eighteen respondents indicated that they did not speak English comfortably and fluently, but answered the survey questions where possible.
- 7.5.1.7. Four surveys were conducted in French.
- 7.5.2. With regard to procedures around arrest and detention:
 - 7.5.2.1. Twenty six respondents alleged that they were arrested with valid Immigration status. This figure includes 16 (sixteen) respondents who alleged they had valid asylum-seeker permits.
 - 7.5.2.2. An additional 27 (twenty seven) respondents alleged that they were arrested with expired asylum permits.
 - 7.5.2.3. Four individuals alleged to be recognised refugees with expired refugee documents.
- 7.5.3. With regard to the duty to inform detainees of their right to appeal the deportation decision and to request that their detention be confirmed by a warrant of court:
 - 7.5.3.1. Almost three-quarters (78 (seventy eight) respondents) alleged not to have received notification of their legal rights upon being detained as illegal non-nationals.
 - 7.5.3.2. Only 9 (nine) out of 104 (hundred and four) respondents reported receiving a notice of deportation.
 - 7.5.3.3. Roughly three-quarters (73 (seventy three) respondents) were not informed of their right to appeal the decision classifying them as an illegal non-national.
 - 7.5.3.4. More than half (63 (sixty three) respondents) indicated that they did not know that they could ask a court to review their detention.
- 7.5.4. With regard to detention of detainees, for the purpose of verification of status (at police stations):
 - 7.5.4.1. Ninety eight respondents indicated that they were held at a police station prior to arriving at Lindela.
 - 7.5.4.2. Seventy one respondents alleged that they were held for over 48 (forty eight) hours.

- 7.5.4.3. The results indicate that the average time detained in a police station was 26 (twenty six) days.
- 7.5.4.4. Fifty seven respondents alleged that they were not informed within 48 (forty eight) hours that they were being held as illegal non-nationals.
- 7.5.4.5. Only 15 (fifteen) respondents reported having seen a warrant confirming their detentions, while 89 (eighty nine) had not.
- 7.5.5. With regard to periods of detention at Lindela:
 - 7.5.5.1. Forty three respondents alleged that they had been in Lindela for over 30 (thirty) days.
 - 7.5.5.2. Nine respondents alleged to have been held in Lindela longer than 120 (one hundred and twenty) days.
 - 7.5.5.3. The overall indicated average detention period of detainees detained in Lindela was 46 (forty six) days.
 - 7.5.5.4. Twenty six respondents alleged that they had been released from Lindela and immediately re-arrested.
 - 7.5.5.5. The longest alleged period of detention at Lindela was 377 (three hundred and seventy seven) days.
- 7.5.6. Taking into account period of detention, including time spent by detainees both in police custody and in Lindela:
 - 7.5.6.1. Sixty one respondents alleged to have been detained for over 30 (thirty) days.
 - 7.5.6.2. Overall, indicated average detention period was 62 (sixty two) days.
 - 7.5.6.3. The longest alleged overall period of detention was 524 (five hundred and twenty four) days.
- 7.5.7. With regard to experience of conditions of detention in the custody of the fourth Respondent:
 - 7.5.7.1. Seventeen respondents alleged that they suffered physical injuries during the arrest process; this in many cases involved the use of pepper spray.
 - 7.5.7.2. One respondent alleged that he was beaten in his cell by other detainees.
 - 7.5.7.3. Among respondents who alleged having been held in police custody or over 48 (forty eight) hours, one alleged that he had to buy food while detained at the police station.
 - 7.5.7.4. Of the 13 (thirteen) respondents who indicated that they were on medication prior to their arrest, 7 (seven) indicated that they were unable to access this medication while being held by the police.
- 7.5.8. With regard to experience of conditions of detention in Lindela:

- 7.5.8.1. Nineteen respondents reported experiencing violence at Lindela. Most of the violence described was alleged to have been committed by security guards at the facility.
- 7.5.9. With regard to diet and meal periods:
- 7.5.9.1. Respondents provided conflicting information on the number of meals received per day at Lindela. Eight six respondents reported getting two meals a day: breakfast and lunch. Those respondents who did report receiving dinner indicated that this meal consisted of bread, tea and coffee.²¹
- 7.5.9.2. The reported gap between lunch and breakfast ranged from 15 (fifteen) to 21 (twenty one) hours, with an average of 17.8 (seventeen point eight) hours.
- 7.5.9.3. Twelve respondents alleged that the food at Lindela did not meet their dietary requirements.
- 7.5.10. With regard to personal hygiene:
- 7.5.10.1. Respondents were asked with regard to each of the items below to select among the following choices: (1) given item for free, (2) had to buy item, (3) given some for free but ran out / had to buy more what I received was insufficient, or (4) no access to item. The results are as follows:
- 7.5.10.2. *Wash basin*: 21 (twenty one) respondents reported no access.
- 7.5.10.3. *Soap for washing clothes*: 11 (eleven) respondents reported having to buy soap, 24 (twenty four) reported insufficient access, and 6 (six) reported no access.
- 7.5.10.4. *Soap for bathing*: 37 (thirty seven) respondents had to buy soap, 19 (nineteen) reported insufficient access, and 22 (twenty two) reported no access.
- 7.5.10.5. *Towels*: 48 (forty eight) respondents had to buy a towel, 47 (forty seven) had no access.
- 7.5.10.6. *Clean clothes*: 33 (thirty three) respondents had to buy clean clothes, 16 (sixteen) had insufficient clean clothes, 35 (thirty five) had no clean clothes.
- 7.5.10.7. *Tooth brush*: 1 (one) respondent alleged he had been unable to brush his teeth for 3 (three) months.
- 7.5.11. With regard to access to health care services:
- 7.5.11.1. Respondents reported seeking medical care for a variety of issues, including *inter alia* headaches, flu, chest pains, TB, psychological issues, asthma and bloody stools. The 79 (seventy nine) respondents who reported seeking medical care at Lindela alleged as follows:

²¹ Justice Cameron's Lindela Report notes similarly that food is served twice a day with lunch and supper being served simultaneously. See footnote 6.2 above, at page 6.

- 7.5.11.2. Fifteen reported receiving medication from non-medical staff.
 - 7.5.11.3. Twenty five reported receiving standard painkillers without any attempt to assess their medical condition.²²
 - 7.5.11.4. Forty indicated that they did not feel that the medical staff had provided adequate care for their medical condition.²³
 - 7.5.11.5. Thirteen respondents reported being on chronic medication prior to their arrest; 10 (ten) of these respondents reported that they were unable to access their prescribed medication while held in Lindela.²⁴
 - 7.5.11.6. Only 5 (five) respondents indicated that they had been tested for TB.
 - 7.5.11.7. Fifty respondents reported being unaware of the HIV status.
- 7.6. Detainees lists provided by the third Respondent revealed the following:²⁵
- 7.6.1. Fifty two detainees had been held in Lindela for over 120 (one hundred and twenty) days, of those:
 - 7.6.1.1. Twenty three had been held for over 150 (one hundred and fifty) days;
 - 7.6.1.2. Fourteen had been held for over 200 (two hundred) days; and
 - 7.6.1.3. Four had been held for over 300 (three hundred) days.
 - 7.6.2. The longest period of detention was 402 (four hundred and two) days.
 - 7.6.3. On any given day, there was an average of 24 (twenty four) detainees at the facility who had been there for over 120 (one hundred and twenty) days, about 2% (two percent) of the population.
 - 7.6.4. Nationals of the DRC made up the highest proportion of those held for over 120 (one hundred and twenty) days.
- 7.7. Post field investigation meeting with Lindela Manager:
- 7.7.1. On 06 May 2014 the Commission met with the Manager of Lindela, Mr Job Jackson. The purpose of the meeting was to:
 - 7.7.1.1. Establish whether civil society organisations are permitted access to Lindela;
 - 7.7.1.2. Establish the criteria governing such access;
 - 7.7.1.3. Obtain records of such criteria and / or policies governing access by civil society organisations;²⁶ and
 - 7.7.1.4. Obtain information regarding the process through which detainees are, at the various administrative levels of the deportation process, including instances where non-nationals are arrested or detained by the fourth Respondent, made aware of their rights.

²² Ibid at page 17.

²³ Ibid at page 17.

²⁴ Ibid at page 17.

²⁵ See paragraph 6.1.5 above.

²⁶ No such criteria / policies or guidelines are available on either the first or third Respondent's websites.

- 7.7.2. Mr Jackson responded as follows:
- 7.7.2.1. Civil society organisations that act as legal counsel for detainees are given “walk-in access” in order to allow for consultation between attorneys and their clients;
 - 7.7.2.2. All other civil society organisations desiring access to Lindela must direct their request, in writing, to the Chief Director of the Immigration Directorate for the Department of Home Affairs (the Chief Director) for approval by either the Chief Director’s Office or, in certain instances, by the Minister of Home Affairs (the Minister);²⁷
 - 7.7.2.3. Mr Jackson was unable to provide information about and copies of any other criteria and / or policies governing access by civil society organisations and advised that such request should be directed to the Chief Director. The Commission on 08 May 2014 directed such a request to the Chief Director in formal correspondence. As at the date of this report no response has been received in this regard from the first Respondent.
 - 7.7.2.4. When arrested and / or on arrival at a police station, police inform detainees of their rights as detained / accused persons and this is recorded on an “SAPS 14A” form;²⁸
 - 7.7.2.5. Detainees are informed, prior to being taken to Lindela, by an Immigration Officer (official of the first Respondent) of their rights in terms of the Immigration Act²⁹ (IA) and Regulations thereto, this is recorded on the “DHA 1724 Notice of Deportation” and the “Notice of Decision Adversely Affecting Rights of a Person” forms;³⁰
 - 7.7.2.6. The “DHA 1724 Notice of Deportation” Form makes provision for detainees to indicate whether they elect to:
 - 7.7.2.6.1. Await the first reasonable opportunity to be deported;
 - 7.7.2.6.2. Appeal the decision to deport; or
 - 7.7.2.6.3. Have their detention for the purposes of deportation confirmed by a warrant of court.
 - 7.7.2.7. Officials at Lindela make use of a checklist³¹ to ensure all appropriate forms, including those mentioned in paragraphs 7.7.2.4. and 7.7.2.5., are provided by the relevant authorities. Detainees for whom such forms are not provided are not admitted to be detained at Lindela;³²

²⁷ The Commission notes in this regard that it has not requested that the first Respondent provide statistical data indicating the number and type of civil society organisation which has been granted access over any specific period of time.

²⁸ The Commission was given sight of, but not provided with a copy of the “SAPS 14A” form.

²⁹ Act no. 13 of 2002.

³⁰ The Commission was given sight of, but not provided with copies of the “DHA 1724 Notice of Deportation” and “Notice of Decision Adversely Affecting rights of a Person” forms.

³¹ A copy of which was provided to and accepted by the Commission.

³² The Commission is mindful that it has not tested the veracity of the Respondents responses in this regard by verifying, through the records, that the various notifications had been provided to the detainees participating in the survey (see paragraph 7.5 above). The limitation on the investigative team in this regard was attributable largely to the fact that the interviews were conducted on the basis of guarantees of anonymity provided to respondents (see paragraph 6.1.4.2 above).

- 7.7.2.8. With regard to detainees' right not to be detained for a period exceeding 30 (thirty) calendar days, without a warrant of a Court extending such period,³³ Mr Jackson indicated that, as detainees are made aware of their rights at the arrest stage,³⁴ they are simply informed, should such an extension become necessary, that an application will be made to Court.
- 7.7.3. The Commission noted that the forms described in paragraphs 7.7.2.4 and 7.7.2.5 above recognise the language needs of detained persons and make provision for a translator to be used to communicate its contents and for such interpreter to certify the interpretation and communication.
- 7.8. Post field investigation comments provided by Complainants:
- 7.8.1. The third Complainant provided the following response to comments made by Mr Jackson in the post field interview above.³⁵
- 7.8.1.1. That the third Complainant does sometimes act as legal counsel for detainees but is not provided with "walk-in access"; and
- 7.8.1.2. That the third Complainant is required by Lindela officials, prior to access being granted to it, to:
- 7.8.1.2.1. Give 48 (forty eight) hours advance notice of its intention to consult with specific detainees;
- 7.8.1.2.2. Provide the names of detainees it wishes to consult with; and
- 7.8.1.2.3. Take proof of submission of prior notice along on the day of consultation.³⁶

8. LEGAL FRAMEWORK

International Legal Framework

- 8.1. The **Charter of the United Nations**³⁷ addresses political and civil rights and Calls for international economic and social cooperation. **Article 55** declares that all human beings are entitled to enjoy human rights without discrimination.
- 8.2. The international principle of *non-refoulement* in terms of which a victim of persecution may not be turned over to his or her persecutor is recognised in **Article 14** of the **Universal Declaration of Human Rights**³⁸ (UDHR) which provides as follows:

³³ Section 34(1)(d) of the IA.

³⁴ See paragraphs 7.7.2.4 and 7.7.2.5 above.

³⁵ See paragraphs 7.8.1.2.1 above.

³⁶ The Third Complainant further alleges the Lindela officials do not allow its representatives to take cell phones into consultations with detainees and that this limits access to translators that could otherwise be accessed telephonically. It is further alleged that Lindela officials prohibit the practice of letting one detainee act as a translator for another and that this has forced the third Complainant to take along an interpreter when necessary. It is alleged moreover that, even with prior notice given, translators accompanying the third Complainant have on occasion not been allowed access to Lindela.

³⁷ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, online available at: <http://www.refworld.org/docid/3ae6b3930.html>.

³⁸ Adopted 10 December 1948 UNGA Res 217 A (III).

"1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

Article 25(1) of the **UDHR** provides that:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

8.3. The **International Covenant on Civil and Political Rights**³⁹ (**ICCPR**) obliges South Africa as a signatory to provide an effective legal remedy to any violation of the rights it recognises, which include the right to physical integrity, liberty and security of person, procedural fairness, individual liberties and non-discrimination (including on the basis of race or national origin).

8.4. The **International Covenant on Economic, Social and Cultural Rights**⁴⁰ (**ICESCR**) includes a commitment to guarantee non-discrimination, including discrimination on the basis of race or national origin. **Article 12** of the **ICESCR** provides that:

"1. The State Parties to the [ICESCR] recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness." (own emphasis)

8.5. The **Constitution of the World Health Organisation**⁴¹ provides that:

"[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition..."

8.6. The United Nations **Declaration of Commitment on HIV/AIDS**⁴² provides as follows:

"Realization of human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS

³⁹ Adopted 16 December 1966 (entered into force 23 March 1976) 999 UNTS 171.

⁴⁰ Adopted 16 December 1966 (entered into force 3 January 1976) 999 UNTS 3.

⁴¹ As adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 states (Official Records of the World Health Organisation, no. 2, p. 100) and entered into force on 7 April 1948.

⁴² UN General Assembly, *Declaration of Commitment on HIV/AIDS*, 2 August 2001, A/RES/S-26/2, online available at: <http://www.refworld.org/docid/3dda1a037.html>.

Respect for the rights of people living with HIV/AIDS drives an effective response

58. By 2003, enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups, in particular to ensure their access to, inter alia, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic;

59. By 2005, bearing in mind the context and character of the epidemic and that, globally, women and girls are disproportionately affected by HIV/AIDS, develop and accelerate the implementation of national strategies that promote the advancement of women and women's full enjoyment of all human rights; promote shared responsibility of men and women to ensure safe sex; and empower women to have control over and decide freely and responsibly on matters related to their sexuality to increase their ability to protect themselves from HIV infection..." (own emphasis)

8.7. **Principle 1 of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care**⁴³ provides that “[a]ll persons have the right to the best available mental health care, which shall be part of the health and social care system.”

8.8. The **Basic Principles for the Treatment of Prisoners**⁴⁴ provides that “[p]risoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.” Whereas **Principle 1 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**⁴⁵ provides that:

“Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained.” (own emphasis)

8.9. The **Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment**⁴⁶ (CAT) holds states responsible for preventing within their territory, acts of cruel, inhuman, or degrading treatment, especially those committed with the consent or acquiescence of public officials.⁴⁷ **Article 1 of the Optional protocol to the Convention**

⁴³ UN General Assembly, *The Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, 17 December 1991, A/RES/46/119, online available at: <http://www.un.org/documents/ga/res/a46r119.htm>.

⁴⁴ UN General Assembly, *Basic Principles for the Treatment of Prisoners*: resolution / adopted by the General Assembly, 28 March 1991, A/RES/45/111, online available at: <http://www.refworld.org/docid/48abd5740.html>.

⁴⁵ UN General Assembly, *Principles of Medical Ethics*: resolution / adopted by the General Assembly, 18 December 1982, Resolution 37/194, online available at: <http://www.un.org/documents/ga/res/37/a37r194.html>.

⁴⁶ UN Commission on Human Rights, *Torture and other cruel, inhuman or degrading treatment or punishment*, 10 March 1987, E/CN.4/RES/1987/29, online available at: <http://www.refworld.org/docid/3b00f03e4c.html>.

⁴⁷ The Committee against Torture has specified that this responsibility is not mitigated when detention centers are privately owned or run. See Committee against Torture (2007) General Comment No. 2 on the implementation of Article 2, CAT/C/GC//2/CRP.1/Rev.4 23 November 2007, 39th Session, Paragraph 17.

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁸ (OPCAT) provides that:

“[t]he objective of [OPCAT] is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”⁴⁹ (own emphasis)

Article 3 of **OPCAT** places a duty on State Parties to “...set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment...”⁵⁰ (own emphasis)

- 8.10. **The Declaration on Human Rights Defender⁵¹**, adopted by consensus by the United Nations General Assembly, on the fiftieth anniversary of the UDHR, is an indication of the commitment of states to guaranteeing not just protection for human rights defenders, but the creation of an enabling environment for work done by human rights defenders. **Article 1** indicates that human rights defenders are any persons who, individually or in association with others, promote and strive for the protection and realisation of human rights and fundamental freedoms. The Declaration therefore provides for conditions that will ensure human rights defenders are able to determine the state of and advance and protect human rights. Although not a legally binding instrument, the rights, standards and precepts contained in the Declaration on Human Rights Defenders are based on rights, standards and precepts contained in a number of other, legally binding international instruments such as the ICCPR.
- 8.11. The **Convention Relating to the Status of Refugees⁵²** and the **Protocol Relating to the Status of Refugees⁵³**, both acceded to by the South Africa, affirm the rights of refugees to status, property, association, access to the courts, employment, and education (among other freedoms). The Convention also protects against refoulement. South Africa’s pledges under these instruments are particularly relevant given the substantial number of refugees resident in the country.
- 8.12. The **United Nations High Commissioner for Refugees’ (UNHCR) Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention⁵⁴** provides as follows:

⁴⁸ UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199, online available at: <http://www.refworld.org/docid/3de6490b9.html>

⁴⁹ When South Africa was evaluated by the UN Committee on Torture in 2006, the lack of an effective monitoring system at Lindela was specifically cited as a concern. UN Committee against Torture (2006) Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture – South Africa CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006.

⁵⁰ The Commission notes in this regard that there is an inter-departmental process underway considering an implementation plan for a National Preventative mechanism (NMP) as required by the OPCAT.

⁵¹ The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) adopted 8 March 1999 by General Assembly Resolution A/RES/53/144. Online available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement>.

⁵² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p.137, online available at: <http://www.refworld.org/docid/3be01b964.html>.

⁵³ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p.267, online available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

⁵⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, online available at: <http://www.refworld.org/docid/503489533b8.html>.

“Guideline 6. Indefinite detention is arbitrary and maximum limits on detention should be established in law

Guideline 7. Decisions to detain or to extend detention must be subject to minimum procedural safeguards

Guideline 8. Conditions of detention must be humane and dignified

Guideline 9. The special circumstances and needs of particular asylum-seekers must be taken into account

Guideline 10. Detention should be subject to independent monitoring and inspection”⁵⁵

- 8.13. Also relevant to broader considerations around persons who are vulnerable to detention at Lindela are the large numbers of migrant persons in South Africa. The **International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families**, which has been neither signed nor ratified by South Africa, built upon previous human rights law to apply pre-existing principles directly to migrant workers and their families.⁵⁶ **Article 28** provides that:

“Migrant workers and member of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned.” (own emphasis)

Article 33 further endows migrant workers with “the right to be informed” and obligates states to make migrants aware of “their rights and obligations under the law and practice of the State concerned.”

Regional Legal Framework

- 8.14 **Article 16** of the **African Charter on Human and Peoples’ Rights**⁵⁷ (**African Charter**) provides that:

“1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

- 8.15 The **Additional Guidelines for TB and Population Mobility**⁵⁸ to the **Southern African Development Community (SADC) Policy Framework for Population Mobility and Communicable Diseases in the Region** provide *inter alia* for the following:

“iv. Regional harmonization of treatment policies and clinical management guidelines of patients with TB, including MDR / XDR and TB and HIV co-infection

⁵⁵ Ibid at page 11.

⁵⁶ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* 18 December 1990, A/RES/45/1158, available online at www.ohchr.org/Documents/ProfessionalInterests/cmw.pdf

⁵⁷ Adopted 27 June 1981, entered into force 21 October 1986 (1982) 21 ILM 58.

⁵⁸ Policy Framework for Population Mobility and Communicable Diseases in the SADC Region (2009); online available from http://www.arasa.info/files/6613/7574/3254/SADC_Policy_Framework_FINAL.pdf at pages 17 - 18.

v. *Region-wide adoption and implementation of the three I's (Intensive case finding, IPT and Infection control) initiative for People Living with HIV and AIDS*

...

x. *Establishment of SADC regulated cross border notification and referral systems for drug resistant TB cases; and regional TB surveillance system."*

8.16. The **Additional Guidelines for HIV and AIDS and Population Mobility⁵⁹ to the SADC Policy Framework for Population Mobility and Communicable Diseases in the Region** provide *inter alia* for the following:

"i. Universal implementation of the three I's (Intensive TB case finding, IPT and Infection control) initiative for People Living with HIV and AIDS as part of broader collaborative TB / HIV activities.

ii. Strengthening and capacity building of networks of PLWHA⁶⁰ for cross-border collaboration.

...

iv. Resource mobilisation for IEC⁶¹ material production and ensuring dissemination to targeted populations.

v. Involvement of all key partners at Borders in programming including people living with HIV and AIDS.

vi. Mechanism for effective logistic management for health supplies. E.g. drugs

vii. Review of regulations and laws that discriminate against PLHIV⁶² on entry."

Domestic Legal Framework

The Constitution⁶³ is the benchmark for all legislation in South Africa. Its provisions are **applicable to all persons**, including juristic persons.⁶⁴ The values of equality, human dignity and freedom form the basis of any constitutional analysis of the human rights protected in the Bill of Rights.⁶⁵ South African domestic laws and interpretation of rights therefore find form through the primary principles as contained in the Constitution of the country. These principles are however not interpreted in isolation but, as per the provision of section 39 of the Constitution, international law is considered when interpreting the Bill of Rights.⁶⁶

⁵⁹ Ibid at page 18.

⁶⁰ People Living With HIV / AIDS (PLWHA) / (PLHIV).

⁶¹ Information Education Communication (IEC)

⁶² See footnote 60 above.

⁶³ The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

⁶⁴ Section 8 of the Constitution.

⁶⁵ Section 7 of the Constitution.

⁶⁶ Section 39 of the Constitution (Interpretation of the Bill of Rights) provides that:

⁽¹⁾ *When interpreting the Bill of Rights, a court, tribunal or forum-*

^(a) *must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*

^(b) *must consider international law, and*

8.17. The Constitution

The following provisions of the Constitution are relevant to the matter under consideration:

8.17.1. Section 10 (The right to human dignity):

“(1) Everyone has inherent dignity and the right to have their dignity respected and protected”

8.17.2. Section 12 (The right to freedom and security of the person):

“(1) Everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way...”

8.17.3. Section 27 (The rights to health care, food, water and social security)

“(1) Everyone has the right to have access to -

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The State must take reasonable and other legislative measures, within its available resources, to achieve the progressive realization of these rights.

(3) No one may be refused emergency medical treatment.”

8.17.4. Section 32 (The right of access to information)

“(1) Everyone has the right of access to-

...

(b) any information that is held by another person and that is required for the exercise or protection of any rights.”

8.17.5. Section 33 (The right to just administrative action)

“(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

^(c) may consider foreign law.”

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
- (c) promote an efficient administration.”*

8.17.6. Section 35(2) (The rights of detained persons)

“(2) everyone who is detained, including every sentenced prisoner, has the right-

- (a) to be informed promptly of the reason for being detained;*
- (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;*
- (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
- (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;*
- (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and*
- (f) to communicate with, and be visited by, that person’s-*
 - (i) spouse or partner;*
 - (ii) next of kin;*
 - (iii) chosen religious counselor; and*
 - (iv) chosen medical practitioner.”*

8.17.7. Section 36(1) (The Limitation Clause)

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.”*

Fundamental rights provided for in the Bill of Rights⁶⁷ may be limited either in terms of the provisions of section 36 of the Constitution or where a limitation is created internally by the wording of the right itself.

⁶⁷ Chapter 2 of the Constitution

The rights contained in section 27 of the Constitution have such internal limitations as is evidenced by the use of the word “progressive”.

8.17.8. Section 41 (The principles of co-operative government and intergovernmental relations)

“(1) All spheres of government and all organs of state within each sphere must-

...

(h) co-operate with one another in mutual trust and good faith by-

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) coordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.”

8.18. The **National Health Act⁶⁸ (NHA)** provides a framework for a structured uniform health system within South Africa and for matters connected therewith. **Section 5** of the **NHA** provides that **no person may be denied emergency medical treatment**. This means that irrespective of nationality, all persons are entitled to emergency medical treatment.

8.19. The **Immigration Act⁶⁹ (IA)** provides for the regulation of admission of persons to, the residence of persons in, and the departure of persons from South Africa; and for matters connected therewith. **Section 32** of the **IA** provides for the deportation of any “illegal foreigner.” “**Illegal foreigner**” is defined in **section 1** as “**a foreigner who is in the Republic in contravention of**” the **IA**.

8.19.1. The decision to arrest, detain or deport an “illegal foreigner,” as defined, is an administrative one and as such, means that there is no requirement for the issuance of a warrant.⁷⁰ The **IA** does however provide procedural and substantive protections to the detainee in **section 34(1)**, including that the detainee:

“(a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;

(b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

(c) shall be informed upon arrest or immediately thereafter of the rights

.....
⁶⁸ Act No, 61 of 2003.

⁶⁹ Act No, 13 of 2002.

⁷⁰ See section 34 of the **IA**.

set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(d) may not be held in detention for longer than 30 calendar days without a warrant of a court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days,⁷¹ and

(e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.”
(own emphasis)

8.19.2. **Section 34(2)** of the **IA** further provides that:

“(2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than is or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four p.m. of the first following court day.” (own emphasis)

8.19.3. The Minister of Home Affairs, in terms of the provisions of **section 7** of the **IA** and after consultation with the Immigration Advisory Board, developed the **Immigration Regulations, 2005. Regulation 32** provides as follows:

“An immigration officer or police officer shall take the following steps in order to verify the identity and status of the person contemplated in section 41(1) of the Act:

(a) Access relevant documents that may be readily available in this regard; or

(b) Contact relatives or other persons who could prove such identity and status; and

(c) Access departmental records in this regard.” (own emphasis)

8.19.4. **Annexure B** of the **Regulations to this IA** sets out the **Minimum Standards of Detention**. These include that:

8.19.4.1. Every detainee:

8.19.4.1.1. Shall be provided accommodation with adequate space, lighting, ventilation, sanitary installations and **general health conditions and access to basic health facilities** (Section 1(a));

8.19.4.1.2. Shall be provided with a bed, mattress and at least one blanket (Section 1(b));

8.19.4.1.3. Shall be provided with an adequate balanced diet (Section 2(a)).

8.19.4.2. Special provision is to be made for detainees with special dietary

⁷¹ The court in *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA) held that “the maximum period of detention permitted under s 34(1)(d) is 120 days, i.e. an initial period of 30 days, followed by an extended period or periods not exceeding 90 days.”

requirements related to a physical condition (Section 2(b)).

8.19.4.3. Food should be **served at intervals of not less than four and a half hours**, barring the period between the evening meal and breakfast, which shall not exceed 14 (fourteen) hours (Section 2(d)).

8.19.4.4. The Department shall **provide the means** for every detainee to **keep his or her person, clothing, bedding and room clean and tidy** (Section 3).

The above standards regulate immigration detentions and places boundaries on the actions of the detaining officials beyond which such action becomes impermissible. Thus, while decisions relating to the detention and deportation of “illegal foreigners,” as defined, are administrative in nature, the abovementioned legal provisions accord detainees a range of rights meant to protect their liberty and dignity.

8.20. The **Refugee Act**⁷² is the domestic legislation giving effect, within South Africa, to the relevant international legal instruments, principles and standards relating to refugees and asylum-seekers and providing for matters connected therewith. **Section 2** of the **Refugees Act** gives effect to the international principle of non-refoulement, and provides as follows:

“(2) Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited to or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

(a) He or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) His or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part of the whole of that country.” (own emphasis)

8.21. The **Promotion of Access to Information Act (PAIA)** is a legislative measure enacted to enable **full protection of all rights, through the protection of the right of access to information**. Although the Act specifically makes provision for the process of requesting information, the preamble of the Act provides more generally for the **fostering of a culture among public and private bodies of automatic information sharing to give effect to this right**.

National Jurisprudence

8.22. In *Lee v Minister of Correctional Services*,⁷³ the Constitutional Court considered the conditions of detention that led to Mr Lee, a detainee, contracting TB. The Court quoted the Supreme Court of Appeal (SCA) in *Minister of Correctional Services v Lee*.⁷⁴

⁷² Act No. 30 of 1998.

⁷³ 2013 (2) SA 144 (CC).

⁷⁴ 2012 (3) SA 617 (SCA).

*"...a civilized and human society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation... inherent in the right ... to **conditions of detention that are consistent with human dignity**.*⁷⁵

The Court in that decision described "poorly ventilated and overcrowded environments" as the "ideal conditions for transmission" of TB, indicating that detention even in terms of the Correctional Services Act must meet certain basic standards in so far as health is concerned.⁷⁶

8.23. The SCA in **Arse v Minister of Home Affairs**⁷⁷ held as follows:

"An 'illegal foreigner' may in terms of this paragraph [section 34(1)(d) of the IA] not be detained for a period longer than 30 calendar days 'without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days'. The respondents were not able to produce such a warrant justifying the appellant's continued detention. It seems to me that the maximum period of detention permitted under s 34(1)(d) is 120 days, ie an initial period of 30 days, followed by an extended period or periods not exceeding 90 days." (own emphasis)

Key National Policies

8.24. The **National Strategic Plan on HIV, STIs and TB, 2012-2016 (NSP)**,⁷⁸ sets out the country's comprehensive strategy in relation to HIV and TB. The following key provisions in the NSP are of particular importance in the matter under consideration:

8.24.1. **Paragraph 2.5.** defines "key populations" as:

*"...those most likely to be exposed to, or to transmit, HIV and/or TB. As a result, their engagement is critical to a successful HIV and TB response. Key populations include those who lack access to services, and for whom the risk of HIV infection and TB infection is also driven by inadequate protection of human rights, and by prejudice."*⁷⁹ (own emphasis)

It goes on to specifically identify "migrant populations" as a key population for the purposes of the strategy.⁸⁰

8.24.2. The NSP provided further, with regard to "actions that will mitigate the impact of the epidemic,"⁸¹ as follows:

"RECOMMENDED ACTION ON BEHAVIOURAL AND SOCIAL DETERMINANTS

...

*Condom use - Increase consistent use, especially among key populations, including those involved in sex work.*⁸²

⁷⁵ Ibid at paragraph 65.

⁷⁶ Ibid at paragraph 8.

⁷⁷ 2012 (4) SA 544 (SCA).

⁷⁸ Online available at <http://aylacassim.co.za/pdf/National%20Strategic%20Plan%20on%20HIV,%20STIs%20and%20TB.pdf>.

⁷⁹ Ibid at page 25.

⁸⁰ Ibid at page 26.

⁸¹ Ibid at page 22.

⁸² Ibid at page 23.

8.24.3. **Sub-Objective 2.1** with regard to voluntary counseling and testing provides as follows:

“Maximising opportunities to ensure everyone in South Africa tests voluntarily for HIV and is screened for TB at least annually, and is subsequently enrolled in relevant wellness and treatment, care and support programmes.

Universal access to HIV counseling and testing and TB screening, as an entry point for diagnosis and HIV and TB treatment, care and support is a key intervention required to achieve the goals of the NSP. Special attention will be required to ensure that people from key populations know their HIV and TB status. This is to ensure early access to treatment and to reduce transmission...

The full package of screening, to be available in all clinical settings, will include: HCT,⁸³ TB symptomatic screening, linked to TB testing for those with symptoms; as well as screening for diabetes, blood pressure, anaemia, mental illness and alcohol abuse, with referral to psychological and social support. STI management is an important entry point for HCT. Screening for acute STIs in certain situations (e.g. unretrothral discharge in men) and enhancing the uptake of HIV testing will improve case detection.⁸⁴ (own emphasis)

8.24.4. **Intervention 3.1.2** specifically makes provision for implementing targeted programmes of HIV, STI and TB screening and support for key populations and provides as follows:

“The KEY⁸⁵ report provides good evidence for special attention to be given to populations at risk of HIV infection that require specific efforts to screen, diagnose and provide treatment services. This includes:

...

Correctional and detention facilities: These facilities have high rates of TB and high rates of HIV. The Department of Correctional Services must ensure the provision of appropriate prevention and treatment services, including HIV, STI and TB screening, prompt treatment of all inmates and correctional services staff, ensuring a continuum of care through proper referrals, and the enforcement of laws and policies to prevent sexual violence in prison settings, including the use of newly developed screening guidelines to identify inmates who are vulnerable to sexual violence.⁸⁶ (own emphasis)

8.25. South Africa has not implemented any standardised treatment protocols around deportation. However, the Southern African HIV Clinicians Society, in association with other organisations, has developed guidelines on HIV / AIDS and TB services in prisons that are relevant for immigration detention setting.⁸⁷ The guidelines include **health screening upon admission** to the facility (assessing medication requirements, checking

⁸³ HCT is the abbreviation for the term HIV Counseling and Testing.

⁸⁴ Ibid at page 40.

⁸⁵ The *Know Your Epidemic* (KYE) Report is a situation analysis of TB in the country.

⁸⁶ NSP above at pages 47 – 48.

⁸⁷ Bulbulia et al. (2008). Guidelines for the Prevention and Treatment of HIV in Arrested, Detained and Sentenced Persons. Southern African Journal of HIV Medicine.

for medication or medical records, and determining future medication needs), and taking the necessary steps to ensure **continuity of treatment with respect to chronic medication**, particularly HIV and TB treatment, further, detention facilities should regularly provide TB and HIV tests and those infected with TB should be held in a separate area with adequate ventilation and sunlight or **ultraviolet germicidal light**.

9. ANALYSIS AND FINDINGS

- 9.1. The Commission is guided in its consideration of the measures which must be put in place to protect the rights of persons detained as illegal non-nationals by the existing broad international framework and the Constitutional principles. In addition the Commission is mindful of the need to ensure that in strengthening protections for detained persons, negative impact on the administration of such facilities are not unfair and unduly burdensome on the state. However, negative administrative impacts are not always automatically permissible justifications for violations of basic rights.
- 9.2. The Commission notes that international best practice provides a valuable point of reference but is not a conclusive means through which to determine best practice in the South African context. Comparative practice remains an exercise which **in its broadest, most positive sense, is informed by international legal instruments and the obligations of states in terms of these instruments, regional obligations, domestic statutory frameworks, and indeed the political and socio-economic considerations prevalent in that particular state**. In the circumstances, comparative models with best practice that is consonant with the South African Constitution are perhaps more readily adapted and adopted for integration in South Africa. There remains however a duty on the state to be vigilant and to take special precautions to avoid a duplication of certain manifest deficiencies into the South African context. **The South African model must first and foremost always be benchmarked against the spirit and letter of the South African Constitution**. In this regard, our model must, at a minimum, place a premium on dignity, recognition of the humanity of people, fair administrative practice and the **strongest possible commitment to the realisation of basic rights**, such as access to quality health care.
- 9.3. Lindela is a temporary holding facility for illegal non-national pending deportation. The Commission notes in this regard the unique difficulties in monitoring deportation detentions, as a succinctly captured by Justice Cameron. Specifically, the fact that **the short term nature of such detentions “make[s] detainees vulnerable to abuse (since they will soon leave and will not be able to testify)” but also because this means that there are “no long-term institutional or social disincentive[s] against fabricating complaints.”**⁸⁸ These challenges have been noted elsewhere, internationally.⁸⁹ The

⁸⁸ Justice Cameron’s Lindela Report, page 3.

⁸⁹ Justice Cameron quoting Mary Bosworth, “Subjectivity and identity in detention: Punishment and society in a global age”, *Theoretical Criminology* 16(2) 123-140 (2010) at 124 notes that “Because of their population and their institutional make-up, removal centres defy simple taxonomy”. Referring to the United Kingdom, she says – “Ostensibly a destination for people en route to an airport, they increasingly house women and men for upwards of six months. Though deportation and the detention that precedes it are matters of administrative law, foreign offenders are now routinely given deportation orders by judges and magistrates as part of their criminal sentence. Detention centres likewise pose multiple methodological demands. Most fundamentally, it is extremely difficult to gain research access to such places as governments have refused to allow rigorous academic study of these institutions or those who stay or work in them. Many detainees speak only limited English. They hail from countries with an array of cultural, religious and traditional norms and practices that may be difficult for researchers to understand. Some are held overnight, others

Commission further notes the limitations of this investigation in that not all possible health related issues were canvassed.⁹⁰

9.4. Since 1996, Lindela has served as the country's only designated facility for the detention of illegal non-nationals for the purposes of deportation. Located approximately 40 (forty) kilometers outside of Johannesburg, the facility falls under the first Respondent's mandate to enforce the IA. It has the capacity to hold 4000 (four thousand) detainees.⁹¹

9.5. The third Respondent's website states that the first Respondent remains '*legally and administratively responsible for all matters pertaining to the apprehension, holding, processing, repatriation and release of illegal aliens at the Lindela repatriation centre.*'⁹² Although it has contracted out specific duties to the third Respondent, the first Respondent retains ultimate responsibility for Lindela and remains accountable together with the second Respondent, for the conditions at Lindela, including the legislated provision of basic healthcare.

9.5.1. In terms of the provisions of the IA, Lindela is only authorised to detain "illegal foreigners" as defined. The IA specifically provides for the identification of someone as an "illegal foreigner." Two elements of this process are central:

9.5.1.1. The categorization must be done by an immigration officer; and

9.5.1.2. The categorization must take place within 48 (forty eight) hours of the initial detention.

9.5.2. Lindela's legal status as a holding facility for illegal non-nationals means that this process must take place prior to the detention at Lindela.

9.5.3. The Chief Director of the Immigration Inspectorate has confirmed that only those individuals whose status as "illegal foreigners" has been confirmed are detained at Lindela.⁹³ He explained that immigration status is confirmed at the screening section of the facility upon arrival; individuals with a legal status that authorises their entry into and presence in South Africa are not admitted to Lindela for detention.⁹⁴ However, the third Respondent on its website characterizes detainees held at Lindela as individuals "*awaiting determination of their legal status in South Africa.*"⁹⁵ The status of detainees inside Lindela thus remains unclear.

9.6. WITH REGARD TO ALLEGATIONS RELATED TO **MONITORING AND OVERSIGHT**

9.6.1. An important basis of the complaint by the first Complainant was that civil society organisations are refused access to Lindela for the purposes of monitoring health related issues at Lindela.⁹⁶

for several years; it is not always clear how to capture the range of experiences under these circumstances."

⁹⁰ For example the allegations, disputed by officials of the first Respondent, that female detainees were physically "inspected" prior being provided with sanitary towels and further that only two sanitary towels were provided per detainee per month, were not tested by the Commission in this investigation. Similarly issues relating to special needs of persons with disabilities, and issues relating to dental health, etcetera were not tested in this study.

⁹¹ Justice Cameron's Lindela Report, page 4.

⁹² <http://www.bosasagroup.com/content/1361/1275/lindela-repatriation-centre>.

⁹³ Chief Director: Inspectorate, Mr Modiri Matthews, cited in Justice Cameron's Lindela Report, footnote 16 on page 5.

⁹⁴ Ibid.

⁹⁵ <http://www.bosasagroup.com/content/1361/1275/lindela-repatriation-centre>.

⁹⁶ Granting access to civil society to relevant government facilities is an integral requirements in adhering to internation-

- 9.6.2. There **do not appear to be widely accessible written policies which state criteria for access to Lindela and, when requested, the manager for Lindela was unable to provide records** to this effect. It does appear however, from discussion with the Manager as well as information provided by certain civil society organisations that **access is permitted in the instances where the civil society organisation provides legal services** to detainees, or where requests for access have been approved in writing.
- 9.6.3. Access by any civil society organisation not directly involved in assisting detainees with legal representation therefore appears to rest largely on the exercise of the Chief Director and / or the Minister's discretion.
- 9.6.4. Allegations by the first Respondent that civil society organisations directly involved in assisting detainees with legal representation are given "walk-in access," is also inconsistent with information provided by the third Complainant regarding its experience in this regard.⁹⁷ The Commission records that despite requests for information from the first Respondent, same has not been provided.
- 9.6.5. In contrast, **Justice Cameron's Lindela Report noted Lindela officials indicated that civil society organisations' applications for access to Lindela would be assessed and would be approved where this was appropriate.**⁹⁸
- 9.6.6. It was noted earlier in this report that insofar as access by civil society organisations which provide legal representation are concerned, **access is subject to a 48 hour prior notification** to third Respondent before contact based engagement with the respective detainee can be made. **Justice Moseneke expressed concern over this condition effectively limiting access.** He stated that, "*the need to arrange a visit 48 hours in advance seems completely unnecessary especially considering the constraints in such cases. Nothing in the IA allows for such a denial of access to legal representation and it is essential that persons deprived of liberty be given access to legal assistance without unnecessary hindrance.*"⁹⁹
- 9.6.7. The approach by first and third Respondents with regard to civil society organisations' access to Lindela is therefore inconsistent in respect of those civil society organisations providing legal assistance and those providing other forms of assistance or undertaking monitoring activities.
- 9.6.8. While the Commission notes that, when assisting the Commission in its investigation, civil society organisations were not denied access, this may be attributed to the fact that the delegation was being led by the Commission. Access to Lindela by the Commission has however been endorsed by the Courts and indeed has been respected by the first Respondent.¹⁰⁰

9.7. WITH REGARD TO THE ALLEGATIONS RELATED TO **INFORMING DETAINEES OF**

al human rights imperatives, see paragraph 8.10. above.

⁹⁷ See paragraphs 7.7.2.1. and 7.8.1. above.

⁹⁸ Justice Cameron's Lindela Report at page 14.

⁹⁹ The Moseneke report, Page 9.

¹⁰⁰ This oversight and right of access to Lindela was expressly agreed to between the Respondent and the Commission in the unreported matter of the South African Human Rights Commission and Forty Others / Minister of Home Affairs and Dyambu (Pty) Limited T/A The Lindela Repatriation Centre in the WLD, Case Number 1999/28367.

THEIR RIGHTS AND THE DETENTION OF DETAINEES FOR PERIODS IN ACCESS OF LEGISLATED DETENTION TIME-PERIODS:

9.7.1. Survey results indicated that respondents to the questionnaires were generally unaware of their rights.¹⁰¹ These results are inconsistent with the explanation provided by Mr Job Jackson.¹⁰² The Commission finds it fair to infer, on the basis of the overwhelming responses from respondents indicating uncorroborated and similar responses with respect to notification of rights, that the respondents may have not adequately provided such information to detainees. In this respect the right of access to information and right to just administrative action as well as the specific rights of detainees, as contained in section 35(2) of the Constitution are potentially being adversely impacted.

9.7.2. Insofar as the survey results indicate that detainees have been held for periods in excess of 120 (one hundred and twenty) days, and insofar as this is supported by objective data contained in the lists provided by the third Respondent,¹⁰³ **the Commission finds that such detentions are extra-legal and amount to a violation of the right to freedom and security of such persons. The interpretation is supported by jurisprudential authority to this effect and the much publicised impact of the court ruling of which officials must be deemed to be aware.**¹⁰⁴ **The findings of the Commission in respect of delays in deportation were also noted by the learned Justice Moseneke who states in his inspection report that “a situation where only detainees who can afford their own transport to their home countries are deported without delay is unacceptable. Government budgeting processes must seriously be reviewed in order to elimination the undue deprivation of liberty.”**¹⁰⁵

9.8. WITH REGARD TO THE ALLEGATIONS RELATED TO **HEALTH CARE:**

9.8.1. The law regarding the content of the state obligation to provide health care is not exhaustive. Legislative provisions guarantees immigration detainees access to basic health facilities¹⁰⁶ and to medical treatment,¹⁰⁷ but there are no official definitions of the terms ‘basic health care,’ ‘primary health care services,’ or ‘basic health facilities.’ This complicates efforts to determine precisely what levels of care should be provided in detention facilities. The Commission is therefore guided in its analysis of these allegations by the Constitutional principle, the existing broad international framework and the second Respondent’s NSP.¹⁰⁸

9.8.2. The NSP sets out the country’s comprehensive strategy in relation to HIV and TB and identifies migrant populations as a “key population for the HIV and TB response,” **urgently in need of a “comprehensive package of services.”**

.....
¹⁰¹ See paragraphs 7.5.3. and 7.5.4. above.

¹⁰² See paragraph 7.7.2.5. above.

¹⁰³ See paragraph 6.1.5. above.

¹⁰⁴ See paragraph 8.23. above.

¹⁰⁵ Ibid footnote 80, Page 10.

¹⁰⁶ Regulation 1(a) of the IA.

¹⁰⁷ Section 35(2) of the Constitution.

¹⁰⁸ See paragraph 8.24. above.

- 9.8.3. With respect to detention, the NSP states that detention facilities must **target specific efforts to screen, diagnose and provide treatment services to detainees**. It also highlights the need for “*a continuum of care for migrant populations, both between rural and urban areas and provinces within South Africa, and between countries in the region.*”
- 9.8.4. The NSP further specifically provides for the “full package of screening” to include referral for psychological care.
- 9.8.5. The NSP’s recommended action with regard to the mitigation of the HIV epidemic includes *inter alia* “**increased and consistent**” condom use among key populations.
- 9.8.6. Insofar the Commission’s inspection indicated that there is:
- 9.8.6.1. a lack of condom dispensers at Lindela;
 - 9.8.6.2. a lack of psychological care;
 - 9.8.6.3. a lack of proactive VCT;
 - 9.8.6.4. a lack of ventilation and natural light in the clinic’s isolation unit;
 - 9.8.6.5. no tetanus vaccine in the clinic’s fridge;
 - 9.8.6.6. prolonged period of detention; and
- 9.8.7. Insofar as the survey results indicate that:
- 9.8.7.1. A lack of **measures to ensure continuity of treatment with respect to chronic medication**, particularly with regard to TB and HIV treatment; and
 - 9.8.7.2. That the **time-interval between the serving** of the evening meal and breakfast does not comply with the time-periods prescribed in the Regulations to the IA.

The Commission finds on this basis that there has been an infringement of detainees’ right to health care.¹⁰⁹

10. RECOMMENDATIONS

Based on the findings set out above, the Commission recommends:

10.1. WITH REGARD TO THE FINDINGS RELATED TO **MONITORING AND OVERSIGHT:**

Noting the need for monitoring and oversight, the Commission considered whether this responsibility should reside with it, as an institution specifically established by Chapter 9 of the Constitution to support constitutional democracy, and the monitoring of human rights. It is clear from the provisions of sections 184(1)(c) and (3) that the Commission has a constitutional duty to monitor the observance and implementation of human rights in South Africa. Section 184(3) specifically provides that the Commission must require relevant state organs to provide it annually with information on measures taken towards the realisation of *inter alia*, the right to health care. It is thus clear, from the

¹⁰⁹ As contained in both sections 27 and 35(2)(e) of the Constitution.

provisions of the Constitution as well as the provisions of section 7(2) of the HRCA, that **state organs have a constitutional and statutory obligation to support the Commission in the performance of its duties and specifically, its monitoring duty.** The Constitution however, does not specify what the Commission's constitutional duty to monitor entails.

The relevant provisions of the Constitution read together with the HRCA confer a **broad monitoring function on the Commission**, encompassing a monitoring duty in relation to practically all the rights in the Bill of Rights. The Commission's monitoring function is therefore a function aimed at assessing compliance at a **broader systemic level** rather than at assessing matters on a case-by-case or on an interventionist basis. The Commission therefore, in the formulation of specific monitoring interventions, bearing in mind this broad-level function as well the capacity constraints of the Commission, formulates interventions that will target broader systemic issues rather than monitoring the everyday functions of Respondents. The monitoring mandate of the Commission depends on the accuracy of reports obtained from the government departments. This **monitoring function however, particularly in the context of places of detention such as Lindela, requires independent monitoring, to be undertaken with closer and frequent scrutiny.**

While the Commission's broad oversight remains unfettered,¹¹⁰ as described above, it is submitted that **the first Respondent has the legislative mandate to monitor the performance of officials responsible for the day to day running of Lindela. Such oversight at this level has a number of benefits for the operations of the facility and the state commitment to the upholding of human rights. More significantly such monitoring will result in enhanced outcomes when coupled with independent oversight.** The first Respondent also bears the duty as an organ of the state to comply with the Constitution, and statutory framework which dictate the exercise of its power and delivery of its service. In this respect the duty to routinely monitor compliance with regard to statutory and constitutional duties imposed on officials therefore falls more appropriately and necessarily on the first Respondent. Such monitoring by the Respondent however, will significantly be enhanced with independent monitoring in place.

In the circumstances, and recognising the need for close monitoring and oversight flowing from its investigation, the Commission recommends that:

10.1.1. The first Respondent implement measures to ensure the human rights defenders are able to advance the protection of human rights.¹¹¹ In this respect the first Respondent is to, **within two (2) months of the date of receipt of the Commission's report**, in consultation with civil society organisations and other relevant stakeholders, review existing protocols for access to Lindela by civil society organisations and develop objective criteria and protocols to regulate access to Lindela by civil society organisations. Such criteria and protocols are to be provided to the Commission **within three (3) weeks of finalisation.** The criteria and protocols referred to above shall:

¹¹⁰ The South African Human Rights Commission and Forth Others/ the Minister of Home Affairs and Dyambu (Pty) Limited T/A The Lindela Repatriation Centre in the WLD, Case Number 1999/28367.

¹¹¹ See paragraph 8.10 above.

- 10.1.1.1. Make specific provisions for a “good cause” requirement, requiring civil society organisations to provide substantive grounds for the need for access in applications therefore;
 - 10.1.1.2. Provide clear timelines for response to access requests which should not be in excess of 24 (twenty four) hours;
 - 10.1.1.3. Permit for delays in approval on the basis of agreed extensions in time for consideration and approval between the parties; and
 - 10.1.1.4. Should include processes for requests for urgent access including requests by nongovernmental medical specialists;
 - 10.1.1.5. Be made publically available and accessible, specifically at Lindela;
 - 10.1.1.6. Be communicated clearly to detainees and visibly displayed within Lindela.
- 10.1.2. Detainees be provided the means through which to access such civil society organisations from within Lindela.
- 10.1.3. The first Respondent implement and maintain a record system for accurate record keeping of the number and type of civil society organisations provided access to Lindela.
- 10.1.4. The first Respondent consider options for an independent monitoring mechanism¹¹² in consultation with a broad and inclusive range of stakeholders. In this regards, the first Respondent is to provide the Commission, **within 3 (three) months** of the date of receipt of the Commission’s report, with a report on the viability, process for and recommendations to relevant authorities, for the implementation of such a mechanism to address this need. Such report shall:
- 10.1.4.1. Outline the steps to be taken as well as timelines for implementation of such a system;
 - 10.1.4.2. Make provision for an accessible and safe manner for detainees and staff to use the complaints mechanism;
 - 10.1.4.3. Make further provision for strict compliance with admission procedures and with legislated requirements for the extension of periods of detention. The first Respondent is to consider whether this should take the form of a duty on the relevant independent body to automatically monitor periods of detention every 30 (thirty) days;
 - 10.1.4.4. Make provision for the submission of:
 - 10.1.4.4.1. Annual reports to the Commission for the purposes of its monitoring function in terms of section 184(3) of the Constitution; and
 - 10.1.4.4.2. Quarterly reports to the Commission providing the names and details of persons in detention, whose term of detention has reached 20 (twenty) days and 100 (one hundred) days

¹¹² See footnote 50 above.

respectively.

10.1.5. In this regard, the first Respondent is to engage with the Commission **within three (3) months** of the date of receipt of this report to develop a protocol around the Commission's monitoring of the facility and in respect of the first Respondent's reporting as referred to in paragraphs 10.1.4.4.1. and 10.1.4.4.2. above.

10.1.6. The Commission has previously strongly recommended ratification of the Optional Protocol to the Convention against Torture (OPCAT), without reservations in respect of the National Preventative Mechanism (NPM).¹¹³ **The Commission again repeats this recommendation to the fifth Respondent.** The OPCAT specifically allows for independent monitoring of places of detention, a measure which is strongly advocated by the Commission in this report and elsewhere.

10.1.7. The Commission further recommends that the fifth Respondent consider signing and ratifying the **International Convention on the Protection of the Rights of All Migrant Workers and their Families**, to strengthen South Africa's commitment to insuring adequate protection of the rights of citizens and non-nationals alike.

10.2. WITH REGARD TO THE FINDINGS RELATED TO **INFORMING DETAINEES OF THEIR RIGHTS**

In accordance with the provisions of section 34 of the IA, the first Respondent must ensure that existing legal requirements relating to informing detainees of their rights are complied with.

Given the inconsistency in the information before the Commission in this respect, the Commission recommends:

10.2.1. That the first Respondent, in the manner and form prescribed by the IA and the Regulations thereto, **within one (1) month** of receipt of this report, provide all detainees with written information, to be made available in languages commonly used in Lindela as well as in English, relating to their rights.

10.2.2. In line with the constitutional mandate in relation to intergovernmental co-operation, that the first Respondent engage with the fourth Respondent to consider options for the implementation of a system that will ensure:

10.2.2.1. Detainees are from the time of apprehension and detention by the fourth Respondent and at every important juncture of the deportation process informed, in the manner and form prescribed by the IA and the Regulations thereto, of their relevant rights as provided for in the IA and that such a system is to specifically make **provision for written notification** of the following:

10.2.2.1.1. The decision to deport and the right to appeal such decision;

10.2.2.1.2. The right to have legal representation and to have the detention for the purpose of deportation confirmed by a Court; and

¹¹³ See Online available at <http://www.sahrc.org.za/home/index.php?ipkMenuID=16&ipkArticleID=34>.

- 10.2.2.1.3. The right not to be held in detention for longer than 30 (thirty) calendar days without a warrant issued by a Court.
- 10.2.1.2. The first and fourth Respondents are to issue a joint report to the Commission **within three (3) months** from date of receipt of this report regarding the steps to be taken by the departments to implement such a system, and the timelines for implementation of the system;
- 10.2.1.3. A special report tabling details of detainees in detention in excess of 120 (one hundred and twenty) days at Lindela and the date of their expected release is to be provided to the Commission **within 48 (forty eight) hours** of receipt hereof.

10.3. WITH REGARD TO THE FINDINGS RELATED TO **HEALTH CARE:**

The Commission recommends as follows:

- 10.3.1. That the first Respondent undertake a full independent audit of the existing conditions and practice impacting on the right of detainees to access health care.
- 10.3.2. That the first Respondent, **within 3 (three) months** from date of receipt of this report, provide the Commission with a comprehensive report outlining:
 - 10.3.2.1. The challenges it has identified;
 - 10.3.2.2. The steps it will take to remedy such barriers to the realisation of the right to health care;
 - 10.3.2.3. The timelines within which it will do so;
 - 10.3.2.4. Timelines within which the needs of persons already in detention at the time of this report will be addressed; and
 - 10.3.2.5. Steps that will be taken to ensure that the rules and guidelines are also made applicable to the fourth Respondent and any other authority responsible for the arrest or detention of foreign nationals for the purposes of deportation.
- 10.3.3. In this regards, the Commission requests that the following areas of concern be specifically addressed:
 - 10.3.3.1. **The lack of availability of condoms;**
 - 10.3.3.2. **The lack of guidelines for health screening at the point of entry;**
 - 10.3.3.3. **The lack of guidelines to ensure continuity of treatment with respect to chronic medication, particularly with regard to TB and HIV treatment;**
 - 10.3.3.4. **The lack of VCT; and**
 - 10.3.3.5. **The lack of measures to ensure a continuum of care after deportation.**
- 10.3.4. In this regard, the first and second Respondents are to:
 - 10.3.4.1. Take into account the guidelines developed by the second Respondent and by the Southern African HIV Clinicians Society;
 - 10.3.4.2. Consider the development of a cross-border referral system;

- 10.3.4.3. Consider a system for the provision of referral letters and buffer or trial stocks of medication for detainees on chronic medication;
- 10.3.4.4. Consider partnering with civil society organisations to ensure provision of information at detention centres and at cross-border reception centres about where health facilities in the destination country can be accessed.
- 10.3.4.5. Steps to ensure special provision for TB testing and for transfer of infected persons to isolation areas, which receive adequate ventilation and sunlight or ultraviolet germicidal light;
- 10.3.4.6. The lack of psychological care;
- 10.3.4.7. The unavailability of tetanus vaccines;
- 10.3.4.8. Overcrowding in rooms;
- 10.3.4.9. The time interval between the serving of the evening meal and breakfast not complying with the time-periods prescribed in the Regulations to the IA; and
- 10.3.4.10. A possible lack of appropriate and comprehensive training for all relevant staff.

11. APPEAL

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of receipt of this finding, by writing to:

**Private Bag X2700
Houghton
2041**

South African Human Rights Commission



COMPLAINT NO: Limpopo/2012/0159

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Complaint No: LP/2012/0159

Democratic Alliance, Limpopo

Complainant

(Represented by Ms. Desiree Van Der Walt, Member of Provincial legislature)

and

Department of Education, Limpopo Province

Respondent

INVESTIGATIVE REPORT

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as “the Commission”) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”),
- 1.2. In terms of section 184 (1) of the Constitution, the Commission is specifically mandated to:
 - 1.2.1. Promote respect for human rights and a culture of human rights;
 - 1.2.2. Promote the protection, development and attainment of human rights; and
 - 1.2.3. Monitor and assess the observance of human rights in the Republic.
- 1.3. Furthermore, section 184(2) affords the Commission authority to undertake research and education activities together with the duty to investigate and report on the observance of human rights. These duties contribute and enhance the exercise of its authority in terms of section 184(2)(b) to take appropriate steps to secure redress where human rights have been violated.
- 1.4. The Human Rights Commission Act, 40 of 2013 (hereinafter referred to as “the HRC Act”), further supplements the powers of the Commission to fulfil its constitutional mandate.

2. Nature of Complaint

- 2.1. On the 13th of September 2012, the Commission received a complaint from the Complainant alleging that the Respondent had violated the Complainant’s Constitutional right to access information, as set out in section 32 of the Constitution.
- 2.2. The Complainant alleged that by failing to provide it with a policy/directive applicable on the shredding of learning materials, the Respondent was in contravention of the Promotion of Access to information Act 2 of 2000.¹
- 2.3. The Complainant approached the Commission for assistance after an unsuccessful attempt to obtain the aforesaid information through the processes included in section 18(1) of PAIA.

¹ Hereafter referred to as PAIA.

3. The Parties

- 3.1. The Complainant is the Democratic Alliance,² represented by its member of the Limpopo Legislature, Ms. Desiree Van der Walt.
- 3.2. The Respondent is the Provincial Department of Education,³ appointed in terms of section 132 (2) of the Constitution.

4. Preliminary Assessment

- 4.1. A preliminary assessment on receipt of this matter was informed by a consideration of the legal framework detailed below. A consideration of the rights which are alleged to have been violated in terms of the framework governed largely by the Constitution and PAIA, indicated a *prima facie* violation of the access to information rights of the Complainant.
- 4.2. Section 32(1) of the Constitution determines that everyone has the right of access to any information held by the State.
- 4.3. In addition, section 11 of PAIA, in giving effect to the abovementioned Constitutional principles, states the following:

A requester must be given access to a record of a public body if-

 - (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
 - (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
- 4.4. As a result of the aforesaid, the Commission proceeded with the investigation as the information assessed constituted a *prima facie* violation of the section 32 of the Constitution.

5. Steps taken by the Commission

- 5.1. An assessment of the relevant legislative frameworks informed the allegations arising from the alleged conduct of the Respondent, described more fully below.
- 5.2. On the 31st October 2012, the Commission dispatched an allegation letter to the Respondent, setting out the allegations provided to it as received from the Complainant. The Commission requested that the Respondent respond to the allegations within 21 days of receipt of the allegations letter.
- 5.3. After failing to receive the timeous response from the Respondent, the Commission contacted the Respondent telephonically, on the 14th and 28th of January 2013. The purpose of the telephonic communications were to remind the Respondent of its duty to cooperate with the Commission, as well as a final request for the Respondent to issue it with a response to the allegations put to it.⁴

.....
² Hereafter referred to as the Complainant.

³ Hereafter referred to as the Respondent.

⁴ In this regard, it is also prudent to note that the Respondent did not adhere to its duty under Section 18 of the HRC Act, to cooperate with the Commission.

- 5.4. On the 29th January 2013, the Commission received the required response from the Respondent.
- 5.5. In its response, the Respondent addressed the request for information by the Complainant by providing the Commission with its policies on loss, and the disposal of assets.

6. Legal Framework

6.1. International Law

6.1.1. The Universal Declaration on Human Rights⁵

Article 19 of the UDHR states that everyone has the right to freedom of opinion and expression and that part of that right includes the right 'to seek, receive and impart information and ideas through any media and regardless of frontiers The UN Special Rapporteur on Freedom of Opinion and Expression, elaborated on this in his 1995 Report to the UN Commission on Human Rights, stating:

*Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.*⁶

The declaration further establishes that information held by governments is in principle public, and may only be withheld if there are legitimate reasons for not disclosing it.

6.1.2. International Covenant on Civil and Political Rights⁷

The ICCPR also reiterates the importance of the right to information in article 19 thereof:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, **receive and impart information** and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

To exercise the right of access to information, it is therefore neither necessary to justify any legal interest, nor to explain the reasons for requesting the information from government. All requests should be treated without discrimination as to the nature or profession of the requestor.

⁵ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

⁶ UN Doc. E/CNA.1995j32, para. 35.

⁷ 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23/6 ILM 368 (1967). Hereafter referred to as the ICCPR.

6.2. The Constitution⁸

Article 32(1) of the Constitution explicitly provides for everyone's right to have access to any information held by the State. This constitutional provision reflects the highest standards of the right to information, recognizing that it is not only a right of the citizen vis-a-vis government, but a broader human right to information necessary for the full enjoyment of other human rights. Additional to section 32, openness and transparency is continually protected and promoted by the Constitution. Section 1 (d) stipulates that the Republic of South Africa is founded on the value of "openness".

6.3. Domestic Legislation

6.3.1. PAIA

The purpose of PAIA is to give effect to the constitutional right of access to any information held by the state, as well as information held by another person that is required for the exercise or protection of any right. The motivation for giving effect of the right to access to information is to foster a culture of transparency and accountability both in public and private bodies and to promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all their rights.

6.4. Case Law

6.4.1. Treatment Action campaign (TAC) v Minister of Correctional Services and another⁹

In this matter, the Court held that the conduct of the Respondent in failing to provide the applicant with a copy of the requested report was inconsistent with PAIA, and therefore unlawful. The Court also held that as a result, the Respondent's actions were not in line with the Constitution.

6.4.2. Brümmer v Minister for Social Development and Others¹⁰

The Court explained the importance of the constitutional right of access to information held by the State as follows:

"The importance of this right...in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely; accessible and accurate information'."

7. Legal Analysis

7.1. Access to information is not only a human right in itself, but also crucial for the exercise of a variety of other fundamental rights as contained within the Constitution.

⁸ Act 108 of 1996.

⁹ Treatment Action Campaign v the Minister of Correctional Services and the Office of the Inspecting Judge of Prisons, (18379/2008) (2009] ZAGPHC 10 (30 January 2009). Hereafter referred to as the TAC case.

¹⁰ Brümmer v Minister of Social Development and Others, (10013/07) [2009] ZAWCHC 22 (16 March 2009).

- 7.2. PAIA, in responding to the commitment of transparency of South Africa's democratic society, establishes the right to request information and a concomitant duty to provide information that has been requested.
- 7.3. This information must be provided:
 - 7.3.1. unless there is a ground for refusing access to the information; and
 - 7.3.2. provided the requester complies with all the Act's procedural requirements.
- 7.4. In terms of section 25 of PAIA, the Information Officer or Deputy Information Officer must respond to a requester's request within 30 days. The Information Officer or Deputy Information Officer may extend the period of 30 days once e.g. where the request is for a large number of records or where the requested information is at an office elsewhere from the office of the Information Officer or Deputy Information Officer.
- 7.5. From the facts of the matter it is clear that the Information Officer of the Respondent was not forthcoming with the requested information, despite having been provided with all relevant documents from the Complainant.
- 7.6. The information requested from the Complainant is also perceived to be records easily accessible to the Respondent, as it formed part of its policies and governance procedures.
- 7.7. As mentioned above, PAIA requires access to a record to be granted on request unless refusal is mandated by one or more of the grounds of refusal listed in PAIA. Unless reasons for substantiated refusal prevail, there is a reliance on the cooperation of public bodies' to abide by their duty as set out in PAIA.
- 7.8. There is no indication before the Commission that the Respondent complied with its obligations under PAIA at any stage. The Information Officer allowed the request to default and did not consider it necessary to provide the Complainant or Commission with any reasons for doing so.
- 7.9. In the TAC matter, the Court referred to such actions as:

*"not only inconsistent with the Constitution and PAIA but ... reprehensible"*¹¹
- 7.10. Should the intervention of the Commission have been unsuccessful, the Respondent would have necessitated that the Complainant consider other, more onerous options to access the information such as litigation.
- 7.11. Without the cooperation and assistance from public bodies such as the Respondent, a culture of transparency and accountability cannot be fostered.
- 7.12. By giving effect to the right of access to information, public bodies such as the Respondent contribute to actively promoting a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.

8. Findings

- 8.1. Against the background of the above, as well as a full review of current jurisprudence on the right to information, the Commission makes the following findings:

¹¹ See par 36 of the TAC case.

- 8.1.1. That the Respondent neglected to adhere to its legislative duty to timeously respond to the Complainant's request for information;
- 8.1.2. That the Respondent neglected to furnish the Complainant with grounds for refusal;
- 8.1.3. That the nature of the information requested by the Complainant was easily accessible to the Respondent and could have been furnished through following the appropriate procedures contained in PAIA; and
- 8.1.4. That by neglecting to avail itself of its duty under national legislation, the Respondent violated the right of the Complainant to have access to information held by the State, as stipulated in section 32 of the Bill of Rights.

9. Recommendations

- 9.1. In terms of the HRC Act, the Commission is entitled to:

"...make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution."

- 9.2. The Commission recommends accordingly that:

- 9.2.1. The Respondent provides the Complainant with the information requested;
- 9.2.2. The Respondent to ensure proper compliance with its duty as determined by PAIA;
- 9.2.3. The Respondent to be cautious of the timeframes applicable in relation to PAIA, and keep proper record of applications received from requester's in terms of section 18 of PAIA; and
- 9.2.4. The Respondent to provide the Commission with a record of all training endeavours undertaken by the Respondent to capacitate itself on its duties in terms of PAIA, within 3 months of receipt hereof.

10. Appeal

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

**Private Bag X2700
Houghton
2041**

South African Human Rights Commission



COMPLAINT NO: Western Cape/2012/0494

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Complaint No: WC/2012/0494

In the matter between:

MRS. X

First Complainant

MR. X

Second Complainant

and

GLENWOOD HOUSE SCHOOL

Respondent

REPORT

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as the “Commission”) is an institution established in terms of section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the “Constitution”).
- 1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as “state institutions supporting constitutional democracy”.
- 1.3. The Commission is specifically required to:
 - 1.3.1. Promote respect for human rights;
 - 1.3.2. Promote the protection, development and attainment of human rights; and
 - 1.3.3. Monitor and assess the observance of human rights in the Republic.
- 1.4. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 1.5. The Human Rights Commission Act, 54 of 1994, (hereinafter referred to as “the Act”) provides the enabling framework for the powers of the Commission. The Complaints Handling Procedures promulgated in terms of section 9(6) of the Human Rights Commission Act determines the procedures to be followed in conducting an investigation regarding an alleged violation of/ or threat to a fundamental right.

2. The Parties

- 2.1. The First Complainant is an adult female and the Second Complainant is an adult male (hereinafter referred to as “the Complainants”). The Complainants lodged the complaint on behalf of their 14 year old son (hereinafter referred to as “Child X”), in respect of a dispute which arose with Glenwood House School while he was a learner there. The parties are resident in George, Western Cape Province, Republic of South Africa.
- 2.2. The Respondent is Mr D Symes, who acts in his representative capacity as the Headmaster of Glenwood House School, an independent private school, (hereinafter referred to as “the Respondent”) based in George, Western Cape Province, Republic of South Africa.

3. The Complaint

The First Complainant submitted a complaint to the Commission on 19 March 2012, in which she alleged the following:

- 3.1. *Background to complaint*
 - 3.1.1. That on 6 August 2011, during a private party, a group of boys, who are learners at the Respondent's school smoked marijuana and drank alcohol. When the Respondent became aware of the events, it conducted an investigation into the matter.
- 3.2. *Respondent's investigation of Child X's conduct*
 - 3.2.1. That on 17 August 2011, Child X was 'interrogated' by two teachers for three and a half hours,
 - 3.2.2. Child X was never cautioned or informed of his rights, he was interrogated without any adult representation, and his parents were never informed. He was accused of smoking, possessing and selling drugs (marijuana). These charges implicated him as a 'drug dealer',
 - 3.2.3. During the interrogation, Child X's cell phone was taken, accessed and searched. It was only returned to him at the end of the day.
 - 3.2.4. The two teachers were joined by another teacher, Mr Kushner who informed Child X that they have evidence against him and the charges against him were very serious.
 - 3.2.5. Child X was bullied, terrified, confused, harassed and coerced into confessing to having smoked marijuana two and half months earlier.
 - 3.2.6. He was informed by the teacher that this would stay in his system for three months.
 - 3.2.7. According to the Complainants, Child X maintained that at this stage he would have said anything to get out of the office, as he was threatened by the School that they would call in the police and dogs. Child X then admitting to smoking marijuana and shortly thereafter the interrogation was brought to an end.
 - 3.2.8. At this point there was still no communication by the Respondent with the Complainants in regard to the allegations and investigation against their child.
 - 3.2.9. When collecting Child X that day from school, it took the First Complainant half an hour to calm him down and get the story from him. The First Complainant immediately phoned the Respondent and requested a meeting for the next day.
- 3.3. *Meeting Between Respondent and Complainants on 18 August 2011*
 - 3.3.1. A meeting between the Respondent and Complainants took place on 18 August 2011.
 - 3.3.2. The same accusations were put to the Complainants and the Respondent gave them the option to remove Child X from the school in exchange for removing the charges from Child X's school record.

- 3.3.3. If the child was not removed from the school, then the Complainants were advised that the matter would become a formal disciplinary matter and that Child X could face expulsion.
- 3.3.4. According to the Complainants, the teachers accused Child X of being “cocky” and “arrogant” during their questioning of him.
- 3.3.5. The next day Child X apologised to the teachers.
- 3.4. *Disciplinary action taken against Child X*
 - 3.4.1. On 23 August 2011, Child X was handed a letter by the Respondent and was informed that he was suspended pending a formal disciplinary hearing. The Complainants were given two days to prepare for the hearing.
 - 3.4.2. On 24 August 2011, the First Complainant approached the local office of the Western Cape Education Department (hereinafter known as “the WCED”) seeking assistance in the matter. She advised the Commission that the WCED was very supportive and advised her to seek legal advice as several of Child X’s constitutional rights ‘seemed’ to have been violated, but advised that they could unfortunately not assist further as the school is a private school.
 - 3.4.3. The Complainants instructed an attorney. Mr Nico Smit, who sent the Respondent a letter on 25 August 2011 requesting information required by him to prepare for the Hearing and requesting further that he be allowed to be present at the Hearing. Neither the Complainants nor their attorney received a response from the Respondent.
 - 3.4.4. On Friday 26 August 2011, the Complainants and their attorney appeared at the Respondent’s School for the scheduled disciplinary hearing (First Hearing). The Hearing was chaired by Mr Johan Marais, Shareholder and CEO of the School Board.
 - 3.4.5. Mr Marias, on behalf of the Respondent, advised that he was not aware that the Complainants had legal representation and felt that before they proceeded with the Hearing the Respondent should be granted the opportunity to do the same. This First Hearing was discontinued.
 - 3.4.6. It was agreed between all parties that the Hearing would be postponed until the following Thursday, 1 September 2011 (Second Hearing). Later that day, the Complainants’ attorney was advised that the Respondent’s legal representative would be Advocate Lucas Du Preez.
- 3.5. *Failure of the Respondent to provide information to the Complainants*
 - 3.5.1. The Complainants’ attorney sent a further letter to the Respondent on 30 August 2011 advising that they had not received any response for their request for information, and again requesting the information needed to prepare for the Second Disciplinary Hearing set down for 01 September 2011.
 - 3.5.2. The information requested was not provided in time for the second hearing or at all.

3.6. Second Disciplinary Hearing 1 September 2011

Impartiality of the Chairperson

- 3.6.1. Advocate Lucas Du Preez informed the Complainants' attorney that he was in fact not the Respondent's legal representative, but had been asked by the School to chair the Second Hearing as set down for 01 September 2011.
- 3.6.2. While attending the formal disciplinary hearing (Second Disciplinary Hearing) on 01 September 2011, the Complainants and their attorney were informed by Advocate Du Preez that he was retained by the Respondent to handle certain legal matters, but assured them that he would not be biased in any way and would keep the proceedings informal.

Differential treatment of Child X

- 3.6.3. The Complainants questioned how Child X's name came up in the list of allegations, as according to the Respondent, seven other boys were also involved and had been questioned. However, those seven boys were not suspended and no further disciplinary steps were taken against them.
- 3.6.4. The Respondent advised that the investigation against Child X was initiated based on the fact that the mother of one of the boys that attended the function had informed the Respondent that her son used marijuana at the party and when questioned, that learner informed her he got it from Child X.

Further failure of the Respondent to provide information to Complainants

- 3.6.5. The Respondent further advised that it had signed statements from three or four boys regarding these charges against Child X.
- 3.6.6. The Respondent refused to provide the Complainants with copies of these statements and advised them that the School had to protect the other learners.
- 3.6.7. The Complainants alleged that the Respondent did not demonstrate the same regard to protect the rights of Child X.
- 3.6.8. The Complainants raised their concern that these statements were obtained from minor boys without their parents' consent or presence.
- 3.6.9. The Respondent's concern to protect the other learners seemed to be 'odd' as these boys had been in contact with Child X over the weekend.
- 3.6.10. One of the boys, (hereinafter referred to as "Child L") had admitted to Child X on a social network, namely "mixit" that he had lied to clear himself.
- 3.6.11. As a message on "mixit" cannot be saved, the Complainants gave their attorney permission, with the consent of Child X, to retrieve all his messages from "mixit".
- 3.6.12. Child L also mentioned in his statement given to the Respondent, that Child X had smoked marijuana at the party a week before.
- 3.6.13. This statement, according to the Complainants, was clearly false as Child X's drug test was negative.
- 3.6.14. At this stage, the Complainants alleged that it was clear that the Respondent had proceeded to take action against Child X, based on unreliable evidence.

Failure to consider information submitted by Complainants

- 3.6.15. Two of the other boys who were also involved in the matter (hereinafter referred to as “Child D” and “Child T”), had allegedly both said on a social networking site, namely “Facebook”, that Child X’s name had been brought up by the Respondent prior to them giving his name as the person providing them with drugs.
- 3.6.16. The Complainants had copies of these postings on record and advised Advocate Du Preez of this.
- 3.6.17. The Complainants allege that these documents were not even considered as evidence (copies of these transcripts were provided to the Commission).
- 3.6.18. The Respondent failed to test the evidence in the statements obtained from the boys, which was used as the basis for their charges against Child X.

Disputed settlement

- 3.6.19. The Hearing was adjourned and the Respondent offered the Complainants a ‘deal’ in that if they removed Child X from the School he could walk away with a clear record.
- 3.6.20. According to the Complainants, it was clear at this stage that the Respondent was biased and had already found Child X guilty even though the disciplinary hearing had not been concluded.
- 3.6.21. They argued that the Respondent clearly did not wish to have Child X as a learner at the School.
- 3.6.22. After consulting with Child X, the Complainants instructed their attorney to reject the offer.
- 3.6.23. Child X opted to proceed with the disciplinary hearing as he wished to clear his name.
- 3.6.24. The Complainants’ attorney advised Advocate Du Preez that they rejected his offer to settle.
- 3.6.25. Advocate Du Preez then cautioned them to bear in mind the “Van der Vyver” case which had almost bankrupted that family.
- 3.6.26. He advised them that instead of proceeding with a formal disciplinary hearing process, they should consider coming to a joint understanding, which would be to remove Child X from the School.
- 3.6.27. At this stage, the Hearing discontinued because the Complainants refused to accept the Respondent’s proposed settlement offer.
- 3.6.28. The following week the Respondent sent the ‘settlement agreement’ in writing to the Complainants.
- 3.6.29. The Complainants’ attorney once again rejected the agreement and drafted a counter settlement agreement.
- 3.6.30. The Respondent rejected this counter settlement agreement.

Bias/conduct of Chairperson

- 3.6.31. The disciplinary hearing was then postponed to the next day.
- 3.6.32. Even before the Hearing started, Advocate Du Preez, as the Chairperson, informed the Complainants that after considering all of the information, the evidence was in the Respondent's favour.
- 3.6.33. Advocate Du Preez further advised the Complainants that the information supplied so far had been sufficient and he wanted Child X to understand that he was not going to get off on a technicality.

3.7. Treatment of Child X

- 3.7.1. This incident was not the first time the school harassed and "targeted" Child X.
- 3.7.2. On a previous occasion, in and during October 2010, he was also accused of using marijuana at the school.
- 3.7.3. No formal disciplinary steps were taken against him to find him guilty.
- 3.7.4. Not wanting to go only on Child X's word, who was still maintaining his innocence, the Complainants took him to Path Care Laboratory on 4 October 2010 for a drug test.
- 3.7.5. The drug test came back negative. (A copy was provided to the School and the Commission). According to the Complainants, this indicated that the Respondent's accusations against Child X were false.
- 3.7.6. Nevertheless, in this instance, the School suspended him for 10 school days and 'sentenced' him to do community service at the school.

3.8. Impact on Child X

- 3.8.1. During his suspension and absence from school, Child X experienced emotional trauma and was given a zero for all the tests and assignments that he missed.
- 3.8.2. He returned to school after an absence of approximately two weeks and his report at the end of the term was, according to the Complainants, "shocking", and in no way a true reflection of his capabilities, which was also acknowledged by several of Child X's teachers,
- 3.8.3. Due to this investigation, Child X has suffered immensely and his reputation had been irreparably damaged by being labelled a "drug dealer",
- 3.8.4. The Complainants' family and the Respondent are part of a very small close knit community and Child X's alleged transgression had become commonly known within the community in which he lives.
- 3.8.5. According to the Complainants, it seems that the Respondent has made the information regarding the investigation public because Child X's friends' parents instructed them to break all ties with him.
- 3.8.6. The Complainants were recently advised in public by the Respondent's prayer group that the Respondent asked them to pray for the Complainants and their family in order to get closure on the matter.

- 3.8.7. The repercussions of the aforesaid “forced” the Complainants to remove Child X from the school at the end of the school term and enrol him at a school in a neighbouring town where people do not know about the incident.
- 3.8.8. The Complainants are now forced to pay much higher school fees and drive Child X to another town in the morning and home in the afternoon.
- 3.8.9. Although Child X moved schools, he is still being branded as a drug dealer and is ridiculed when he goes to town.
- 3.8.10. According to the Complainants, adults made statements such as ‘how are your herbal hollic studies going now’, implying that his studies are drug related.
- 3.8.11. Child X has not had any closure regarding this matter and is extremely angry.
- 3.8.12. The Complainant took Child X to see a psychologist on 12 September 2011 because he was suffering from severe emotional distress.
- 3.8.13. At that stage Child X had stopped eating, talking and interacting with the family as he normally did, and was constantly vomiting.
- 3.8.14. He lost five kilograms over the next two weeks.
- 3.8.15. Reports from two psychologists were submitted regarding the feelings of anger and trauma that Child X experienced due to the accusations levelled against him and the need for him to get closure in this matter (copies of these reports have been provided to the Commission).
- 3.8.16. The Complainants were at that stage not in a financial position to instruct an attorney to pursue this matter further.
- 3.9. Response from WCED
 - 3.9.1. The Complainant lodged a formal complaint with the WCED.
 - 3.9.2. The response from the WCED was that the School had been informed that they would have to review and re-write their Code of Conduct for learners regarding constitutional and human rights. (The Complainants are of the opinion that this is a mere slap on the wrist for the Respondent.)

4. Human Rights Under Investigation

- 4.1. Human Dignity.
- 4.2. Privacy.
- 4.3. Children: The right of the child to be protected from maltreatment, neglect, abuse or degradation; and failure to act in the best interests of the child.
- 4.4. Basic Education.
- 4.5. Just Administrative Action.

5. Investigation Undertaken by the Commission

5.1. Correspondence

- 5.1.1. On 24 July 2012, the Commission sent the Complainants a letter of request for further information.
- 5.1.2. On 19 October 2012, the Commission sent an allegations letter to: the Respondent and UMALUSI, (the School Governing Body of the School). The Commission requested all the above parties to respond to the allegations contained in the letter and provide it with a report by 05 November 2012.
- 5.1.3. On 22 October 2012, the Commission received a response from the WCED, advising that, due to the fact that the School is an Independent School, the WCED would not be able to assist with the matter.
- 5.1.4. On 25 October 2012, UMALUSI copied the Commission in on their request to the Respondent to respond to the allegations. On 15 March 2013, UMALUSI redirected the Commission to the WCED. No further response to the allegations was received from UMALUSI.
- 5.1.5. On 05 November 2012, the Commission received a response from the Respondent. The Respondent failed to respond to all the allegations put to it. The Respondent essentially denied the allegations and argued that it had acted fairly in terms of School's Code of Conduct, as accepted and signed by the Complainants, as parents of the learner.
- 5.1.6. On 20 December 2012, the Commission sent the Respondent's response to the Complainants and requested their comments thereon.
- 5.1.7. On 15 January 2013, the Commission received the Complainants' detailed comments with supporting documents. The Complainants did not agree with the Respondent's response.
- 5.1.8. On 22 February 2013, the Commission, considering the above information, proposed, in writing, to all the affected parties, that a meeting be conducted at the School on 19 March 2013. All the parties, except UMALUSI, agreed to the proposed meeting. (UMALUSI referred the Commission to the WCED.)

5.2. Meeting with Child X 18 March 2013

On 18 March 2013, the Commission, represented by the file handler, Legal Officer Bahia Sterris, and Senior Legal Officer Zena Nair, interviewed Child X in the presence of the Complainants to take further statements and to obtain clarity on outstanding issues.

5.3. Meeting with parties 19 March 2013

On 19 March 2013, the Commission conducted a meeting between the Complainants and the Respondent. The Respondent was represented by the Headmaster Mr Symes and the CEO, Mr Marais.

5.4. Response received from the Respondent

The written response received from Respondent on 05 November 2012 advised that

5.4.1. School's Code of Conduct

- i. As stated and required in its admission contract (Code of Conduct and Ethics) which was signed by the second Complainant as the parent of Child X, it requires of its pupils that:
 - Pupils will not be party to behaviour that is anti-social.
 - Pupils will abstain from using and having in their possession any alcoholic beverage and /or addictive substance.
 - Pupils will strive to uphold the honour and good name of the school and will obey all school rules and regulations, both at school and any place or situation where the school is formally or informally present. This will include any context where the school uniform is worn and any context where a pupil or pupils are known to be pupils of the School.

5.4.2. Investigation by Respondent

- i. The Respondent was made aware of events that had taken place at the party referred to.
- ii. It noted that a number of pupils from the school attended this party and subsequently alleged that Child X was involved in the handling of illegal substances.
- iii. This caused a clear association with the school with extremely serious consequences.
- iv. As such, these were allegations that the Respondent, as the Headmaster, could not ignore and he had to act accordingly to ensure the safety and well-being of all his learners, the role with which he is mandated.

5.4.3. Respondent's interview with Child X

- i. The Respondent, with the assistance of the Deputy Headmaster, proceeded to investigate the allegations.
- ii. The Respondent reiterated that it had no alternative but to investigate.
- iii. It is in accordance with normal practice that a preliminary investigation is initially conducted internally in order to establish whether or not there is any substance to the allegations.
- iv. If the allegations appeared to be correct or probable, the next step would be to involve parents and/or representatives.
- v. This is the only way that the best interests of the pupil involved could be protected.
- vi. The Respondent strongly and categorically denied that either him or any member of his staff intimidated bullied or coerced Child X into any form of confession.

vii. As the preliminary investigation unfolded, certain information came to light which necessitated the Respondent to speak to Child X to get answers.

viii. This discussion was certainly not an “interrogation”, but a regular and essential communication process as part of the preliminary investigation in respect of the allegations made, in order to determine the way forward.

5.4.4. Notification of parents - suspension of Child X

i. When it appeared that there was substance to the allegations, the parents and their legal representative were immediately informed and involved, the Respondent set up a disciplinary hearing in order to allow Child X and his parents the right to respond to the allegations.

ii. In view of the severity of the allegations, the Respondent decided it to be in the best interests of Child X to temporarily suspend him, pending the outcome of the disciplinary hearing.

5.4.5. Second disciplinary hearing 1 September 2011

i. The Complainants and Child X had full legal representation at the hearing which was subsequently scheduled for 01 September 2011.

ii. The School employed the services of an impartial advocate to chair this hearing.

iii. At the outset of the proceedings, the parents and the legal representative accepted and agreed that this impartial chairperson should firstly endeavour to informally facilitate the matter, with the assistance of the parents’ legal representative, without embarking on a formal disciplinary hearing. Again, this was deemed to be in the best interests of Child X.

iv. The facilitation process was conducted professionally and in a sensitive manner, extending over several days.

v. After lengthy discussions, the parties agreed in principle, to an agreement which would allow Child X to remain at the school until the end of the term. He would receive his report and he would then enrol at a school of his choice.

vi. No disciplinary hearing took place - let alone it being unjust and unfair.

vii. No ‘verdict’ was reached.

viii. The parties specifically agreed that a formal disciplinary hearing would not be in the best interests of Child X.

ix. At the same time, it was also agreed that with everything that had happened, it would also be in the best interests of all involved, if an amicable agreement was reached in terms of which Child X could continue with his studies at another school in the area, which is what then happened.

5.4.6. Learning materials support provided by the School

i. The educators of the school were also instructed to provide Child X with any learning material notes that he may have missed at any point in time as a result of this incident and his absences.

- ii. The School and its staff throughout this sensitive incident, made themselves fully available to assist and support Child X.

5.4.7. Best interests of the Child

- i. The Respondent concluded by stating that neither he, nor any of the staff members, had any reason to victimize Child X at any point in time.
- ii. His mandate from the School Board and the parents is to provide and care for, his pupils by creating a safe and secure environment in which effective learning can take place.
- iii. It is respectfully suggested that the constitutional rights referred to in the “Allegations Letter” of the Commission, extend to all pupils in their School; these rights may be infringed upon if allegations of such nature are not properly investigated and dealt with.
- iv. The Respondent stated that he wanted to give his reassurance that this matter was dealt with appropriately and in a sensitive manner, drawing a balance between the rights of all parties involved.
- v. The Respondent raised his concern that they have not been able to receive closure on this matter despite it being more than a year after the incident took place.
- vi. The Respondent questioned if it is in the best interests of either party for to continue with this process.

5.5. Complainants’ comments to the response received from Respondent

5.5.1. Nature of Disciplinary Hearing

- i. The Complainants disagree with the Respondent’s response that “*no disciplinary hearing took place*”, The Complainants attached in evidence the following documents that they received from the Respondent:
 - Notification of formal disciplinary hearing; Record of disciplinary proceedings; Email from Respondent confirming hearing; Record of notice that on the second day of the proceedings marked “*Formal Disciplinary Hearing*, it was decided that the format of these proceedings would be changed to informal.”
 - In an e-mail dated 26 August 2011 the Respondent informed the Complainants that the School’s legal representative would be Advocate Lucas Du Preez (proof hereof provided to the Commission).
 - The Complainant questioned why, halfway through proceedings, did the structure of the hearing change, Reference is made to the email dated 22 September 2011 from the Complainants’ legal representative to the Respondent confirming that (“*dissiplinêre verrigtinge hervat sal word, aangesien dit bloot opgeskort was hangende die aangaan van die ooreenkoms*”)- translated in English means “*disciplinary proceedings will resume, since it was merely suspended pending the conclusion of the Agreement.*”

- 5.5.2. The Complainants dispute the independence of the Chairperson
- i. When Advocate Lucas Du Preez was contacted by the Complainants' legal representative requesting relevant information, he was informed that Advocate Du Preez would actually be presiding over the hearing.
 - ii. The details of the school's correct legal representative were requested but never given (proof of correspondence thereof provided to the Commission).
 - iii. As a Chairperson who should be unbiased in the disciplinary proceedings, in this instance he had been privy to events prior to the Hearing.
 - iv. Furthermore, during the Hearing when the parties had discussions in separate offices, Advocate Du Preez as the Chairperson remained in the room with the School representatives.

- 5.5.3. The Complainants dispute that information was provided to prepare for the Hearing.

No information was provided to the Complainants to prepare for the Hearing despite requests made by their legal representative (proof of correspondence thereof provided to the Commission).

- 5.5.4. The Complainants dispute that a settlement was reached to remove the child from the school.
- i. The Complainants disagreed with the Respondent's response (above) indicating that the parties agreed that a formal disciplinary hearing would not be in the best interest of the child and that an amicable agreement was reached that Child X could continue with his studies at another school. The Complainants contend that:
 - No agreement was reached that they will remove their child from the school as they never signed the "settlement agreement" (proof of correspondence thereof provided to the Commission).
 - The Complainants had no choice but to remove the Child from the school after what had transpired.
 - As parents, they knew that the interests of the child would never come before the interests of the school.

- 5.5.5. The Complainants disagree with the Respondent's response (above) that Child X received educational support:

- i. No learning materials, notes or assistance were ever provided or offered to Child X;
- ii. The Complainants requested the Respondent to show any documentation to the contrary;
- iii. Child X's school report for the end of that term was shocking and they had to apply to a new school with that as a reflection of his work.

- 5.5.6. The Complainants disagree with the Respondent's response that Child X was not victimised (above) in that:

- i. The staff members failed to prove that Child X was not victimised.
- ii. A year before the Respondent insisted that Child X go for a drug test which came back negative. In this incident Child X again tested negative for drugs but the Respondent nevertheless imposed a disciplinary sanction without affording the child the benefit of a hearing in which to present his case.
- iii. Respondent's argument that its mandate was to provide a safe and secure environment so the Complainants question why their 14 year old son was held in 'isolation' for more than three hours; interrogated by three adult men; had his cell phone removed from him; asked the same question up to eight times with the same response from the child; and only when they got the response they wanted did they stop. This was all done without the parents being notified or giving consent, having any form of representation or Child X being cautioned or advised of his legal rights.
- iv. The Respondent states that it is concerned that "*we have not been able to receive closure on this matter despite it being more than a year after the incident took place*". The Complainants argue that the emotional trauma that Child X experienced at the hands of the School will be with him for the rest of his life, not to mention the damage to his reputation. Child X has had to see two different psychologists and was put on anti-depressants to try and help him to overcome this experience (copies thereof provided to the Commission).

5.6. Further investigations by the Commission

5.6.1. Interview with Child X

- i. On 18 March 2013 the Commission held an interview with Child X duly accompanied by his parents, the Complainants. Child X corroborated the allegations contained in the Complaint as submitted by the Complainants on his behalf.
 - Child X maintained that he was coerced into signing an admission that he used marijuana in that he was interrogated and intimidated by the teacher for four hours without any food and water. He was scared and just wanted to be released.
 - Child X advised that the Respondent victimised him in that he was very aggressive and told him: "I will do anything in my powers to take you out of the school." Child X advised that the Respondent was prejudiced against him from the start of the investigation. Child X referred to a previous incident a year ago when the Respondent suspended him and sentenced him to community service without following due disciplinary process.
 - Child X advised that the Respondent is aggressive and rude with learners in general. The Complainants played a tape which revealed the Respondent shouting at learners at an assembly (a copy provided to the Commission).

- Child X was still traumatised a year after the incident. He advised that initially he opted to go back to the School but conditions became unbearable and he requested that his parents remove him. His name was tarnished and he was branded as a “drug dealer”. He lives in a very small community and lost all his friends as their parents refuse to allow their children to associate with him. He wants his name to be cleared.
- Child X and the Complainants advised that apart from the extra cost in fees and travelling which they cannot afford, they regret that Child X was “forced” to leave the School. They are of the opinion that it is a very good school but that the Respondent tarnished the good name of the School and should be removed as Headmaster.

5.6.2. Conciliation meeting at School on 19 March 2013

- i. On 19 March 2013 a meeting was conducted between the Commission, the Complainants, and the Respondent and the CEO of the School Governing Board at the School in George, Western Cape.
- ii. The purpose of the meeting was initially two-fold. Firstly, to attempt to reach a conciliation between the parties and secondly, to obtain clarity on certain issues. It however became clear as the meeting proceeded that any attempt for conciliation would be unsuccessful given the anger and resentment between the parties.
- iii. The Commission requested the Respondent to clarify issues such as:
 - The alleged interrogation, victimisation and harassment of Child X;
 - The alleged failure to provide the Complainants with access to information:
 - The alleged seizure and search of Child X’s cell phone;
 - What were the charges against Child X;
 - The basis for proceeding with disciplinary action only against Child X;
 - The initial alleged failure to inform the Complainants of the investigation against Child X;
 - Response to the allegation as to why the Code of Conduct was applied inconsistently against Child X as against the other learners who had admitted to smoking marijuana;
 - The basis for the differential treatment between Child X and the other boys in the investigation of the matter;
 - Why the Respondent regarded the proposed Settlement Agreement to be in the best interests of Child X.

- iv. In reply to the Complainants' responses, the Respondent clarified the issues specified by the Commission:
- The Respondent denied that it interrogated, victimised and harassed Child X.
 - The Respondent advised that it provided the Complainants' attorney with the relevant information as requested. (The Complainants advised that this is untrue). The Respondent failed to respond further.
 - The Respondent admitted that it confiscated the cell phone of Child X and noted that the other boys were questioned. The Respondent submitted that it did not want Child X or his parents to contact the other boys that were implicated. No admission was made as to the search of the cell phone.
- v. At this meeting the Respondent called in one of its educators, Mr Smith, as he initially questioned Child X. Mr Smith contended that the whole matter was wrong. He voiced his opinion that there is too much anger between the Complainants and the Respondent as adults and that Child X suffered because of it. In his opinion, the Respondent should have proceeded with the formal disciplinary hearing and Child X would have been found 'not guilty' due to a lack of evidence, but the Respondent opted against that.

5.6.3. Additional information received from the Respondent

On 19 March 2013, the Respondent, without prejudice, submitted a pro forma answer sheet to the Commission in response to the Complainants' comments wherein it essentially confirmed its previous responses of 5 November 2012, and further stated that:

- i. Referring to Advocate Du Preez as a legal representative was a *bona fide* mistake. Advocate Du Preez was to chair the disciplinary hearing should the disciplinary hearing have continued on the set date.
- ii. It is conceded that should the disciplinary hearing have continued, after the mediation proceedings failed, that all the necessary information and evidence regarding the charge against the learner would have been disclosed to the learner's legal representative.
- iii. In light of the mediation and the fact that there was a prospect of reaching a settlement in terms whereof the learner chose to leave the school and that it would not be necessary to proceed with a disciplinary action, there was no need to disclose the identity and information with regard to the evidentiary affidavits in possession of the school. The school was also of the opinion that in light of the fact that there would be no disciplinary hearing the accused learner was not entitled to this information.
- iv. The Complainant is correct that a settlement agreement was never signed. The school is of the opinion that although no settlement agreement was signed, the crux of the proposed settlement was:

- That the learner would leave the school out of his own will;
- That there would be no disciplinary hearing;
 - That there would be no judgment against the learner.
- v. The details of the settlement agreement could not be agreed to and in the interim the parents of the learner, out of their own free will, chose to remove the learner from the School.
- vi. There was no further responsibility on the school to take this matter any further by either proceeding with a disciplinary hearing or pursuing the issue of getting a signed settlement agreement.
- vii. In regard to not initially notifying the learner's parents of the charges and of the investigation against the minor, the Respondent advised that it would be absurd to expect that the school or Headmaster should notify a learner's parents with regards to each and every enquiry or correspondence with a learner.
- viii. That it was clear that the Complainants had misread the case against the learner. That the learner was not charged with using an illegal substance but that the learner had an illegal substance on him on school grounds and that he either sold or tried to sell illegal substances to other learners.
- ix. The question of whether the evidence obtained during these questionings was irregular and an infringement of the learner's human and constitutional rights, would according to Respondent only require an answer if the disciplinary hearing continued.
- x. Should the disciplinary hearing have continued, and it appeared that the investigation was irregular and that there had been an infringement on the learner's human and constitutional rights, then that evidence would have been inadmissible in the disciplinary hearing. Should the disciplinary hearing have come to a decision on this evidence, then that decision could have been set aside.
- xi. In this matter, the parties did not come to a written settlement agreement but they did agree that it would be in the best interests of Child X that he would leave the school and that the school would not proceed with a disciplinary hearing and as such, would not make a finding.
- xii. Due to the fact that the disciplinary hearing did not proceed, the information obtained during the investigation which might have been tainted, was irrelevant. As such, there could be no argument that during the 'perceived' disciplinary hearing the learner's human and constitutional rights had been infringed.

6. Issues to be Determined by the Commission

- 6.1. The Commission after consideration of the information placed before it and obtained during the investigation is called upon to make a determination of whether the following rights of Child X were infringed by the Respondent.

- 6.1.1. Just Administrative Action - whether the alleged procedural irregularities constitute a violation of the right to Just Administrative Action and principles of natural justice.
- 6.1.2. Children - whether the Respondent failed to act in the best interest of the child, both in the manner it conducted its investigation and in its response to the entire incident. Further whether the Respondent's handling of the matter resulted in the humiliation and degradation of Child X, thereby Violating Child X's right to human dignity and to be protected from abuse or degradation.
- 6.1.3. Privacy - The alleged search of the cell phone is subject of a factual dispute as the Complainant cannot provide substantiating evidence that it was indeed searched, the Commission accordingly is not able to make a finding in regard to this allegation.
- 6.1.4. Basic Education - Whether the failure to provide the learner with support during the period of his suspension violated his right to basic education.

7. Legal Framework

7.1. International legal instruments

The UN Convention on the Rights of the Child (1989)¹

Article 37(a) provides that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...

7.2. Regional legal instruments

The African Charter on the Rights and Welfare of the Child (1990)²

Article 21 states:

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child...

Article 4 states that:

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

7.3. Constitution of the Republic of South Africa, 1996

Human Dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3, available at <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 5 February 2014].

² Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*. 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.refworld/docid/3ae6b38c18.html> (accessed 5 February 2014)

Children

28. (1) Every child has the right - ...
- (d) to be protected from maltreatment, neglect, abuse or degradation; ...
- (2) A child's best interests are of paramount importance in every matter concerning the child.

Education

29. (1) Everyone has the right -
- (a) to a basic education, ...
- (3) Everyone has the right to establish and maintain, at their own expense independent educational institutions that - ...
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.

Just Administrative Action

33. (1) Everyone has the right to administrative action that is lawful reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

7.4. Domestic legislation

7.4.1. National Education Policy Act No. 27 of 1996

Section 1 (viii) defines that:

"education institution" means any school contemplated in the South African Schools Act, 1996 (Act No. 84 of 1996);

Section 3 provides:

3. Determination of national education policy by Minister.-(1) *The Minister shall determine national education policy in accordance with the provisions of the Constitution and this Act. ...*

- (4) Subject to the provisions of subsections (1) to (3), the Minister shall determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system and, without derogating from the generality of this section, may determine national policy for:- ...

(n) *control and discipline of learners at education institutions: Provided that no person shall administer corporal punishment, or subject a student to psychological or physical abuse at any education institution;...*

7.4.2. South African Schools Act, 84 of 1996

Section 1 (1) defines that:

“school” means a public school or an independent school which enrolls learners in one or more grades from grade R (Reception) to grade twelve;

“principal” means an educator appointed or acting as the head of a school;

Section 2 (1) provides for the application of the Act:

(1) This Act applies to school education in the Republic of South Africa.

Section 8A (10) (a) provides that:

(10) The principal or his or her delegate must-

(a) within one working day, if practicable, inform the parent that a random test or search and seizure was done in respect of his or her child.

Section 9 (1) provides that:

(1) The governing body may, on reasonable grounds and as a precautionary measure, suspend a learner who is suspected of serious misconduct from attending school, ...

7.4.3. Western Cape Provincial School Education Act, 12 of 1997

Section 27 provides that:

(1) No person may establish, conduct or maintain an independent school unless it is registered by the Head of Department.

(2) Subject to this Act and any applicable legislation, any person may, at his or her own cost, establish and maintain an independent school.

Section 37(1) provides that:

(1) The Member of the Executive Council may make regulations as to- ...

(e) any matter relating to independent schools which shall or may be prescribed by him or her.

7.4.4. Promotion of Administrative Justice Act, 3 of 2000

The Promotion of Administrative Justice Act, 3 of 2000 (hereinafter referred to as “PAJA”) provides a legislative basis for the review of administrative action and sets out procedures to be followed by administrators before certain decisions or rules are made. PAJA ‘gives effect’ to the constitutional rights enshrined in section 33 of the Constitution.

1. Definitions-*In this Act, unless the context indicates otherwise-“administrative action” means any decision taken, or any failure to take a decision, by-*

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

...

which adversely **affects** the rights of any person and which has a direct, external legal effect,

...

“decision” means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to- ...

(d) imposing a condition or restriction;

...

“organ of state” bears the meaning assigned to it in section 239 of the Constitution;

Section 3 of PAJA states that:

3. Procedurally fair administrative action affecting any person.-(1)

Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

Section 8 of PAJA sets out the available remedies for an administrative action determined to be not procedurally fair. They include directing an administrator to give reasons³, directing an administrator to act in a particular manner⁴, prohibiting an administrator from acting in a specified manner⁵, and setting aside of the action under scrutiny.⁶

7.4.5. South African Council of Educators Act, 31 of 2000

The South African Council of Educators Act applies to all educators in public and independent schools.

³ Promotion of Administrative Justice Act No 3 of 2000 (PAJA). Section 8(a) (i).

⁴ PAJA. Section 8(a) (ii).

⁵ PAJA. Section 8(b).

⁶ PAJA. Section 8(c).

Section 3 provides that:

3. *This Act applies to all educators ... appointed-*

(a) *in terms of the Employment of Educators Act, 1998 (Act No. 76 of 1998);*

(b) *in terms of the South African Schools Act, 1996 (Act No. 84 of 1996);*

...

(e) *at an independent school; ...*

Section 5 provides:

5. *Powers and duties of council.-Subject to this Act and the National Education Policy Act, 1996 (Act No. 27 of 1996), the council-*

(c) *with regard to professional ethics-*

(i) *must compile, maintain and from time to time review a code of professional ethics for educators who are registered or provisionally registered with the council;*

In terms of this Act, Article 3.5 of the South African Council for Educators Code of Professional Ethics provides that:

An educator avoids any form of humiliation, and refrains from any form of abuse, physical or psychological.

7.4.6. The Children's Act, 38 of 2005

Section 1 provides that:

(1) In this Act, unless the context indicates otherwise -

...

"abuse", *in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes -*

...

(e) *exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally;*

Section 6 provides that:

6. (1) ...

(2) *All proceedings, actions or decisions in a matter concerning a child must-*

(a) *respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interest of the child standard set out in section 7, ... subject to any lawful limitation;*

(b) *respect the child's inherent dignity;*

(c) *treat the child fairly and equitably;*

(d) *protect the child from unfair discrimination on any ground ...;*

(e) *recognise a child's need for development ...*

...

(4) *In any matter concerning a child –*

(a) *an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and*

(b) *a delay in any action or decision to be taken must be avoided as far as possible.*

7.5. Policy Documents and Guidelines

7.5.1. Western Cape Education Department (WCED) Guidelines: Guidelines for random search and seizure and alcoholic liquor and illegal drug testing at public schools-circular: 0024/2011

Section 2.2.3 provides that:

Given that section 45A limits certain rights conferred in the Bill of Rights, it must be implemented with due regard to human dignity, privacy and the right to property of the learner concerned.

Section 8.1 Notice to Parents, provides that:

Section 45A (11) of the Act stipulates that the principal or his or her delegate shall-

(a) *Within one working day, if practicable, inform the parent of the learner concerned that a test or search and seizure was done in respect of his or her child...*

7.5.2. WCED Learner Discipline and School Management Guideline, 2007

Section 5 (1) makes provisions that:

A School's Code of Conduct is not a set of rules and measures for punishment, but is the school's framework for the creation of a culture of positive behaviour within which learners should conduct themselves.

Section 6.1 makes provision that:

Steps should be followed in the execution of the prescribed procedure for a disciplinary hearing: In regard to the investigation into alleged serious misconduct and includes-

- The principle that a person is innocent until proven guilty must be maintained throughout by the investigator.
- Caution should be used where young children are involved.
- Aggressive confrontation or pressuring for a confession must be avoided.
- The alleged offender must be given the opportunity to request the support of his/her parents when it is expected of him/her to make a statement which could be incriminating.

7.5.3. Regulations Relating to Disciplining, Suspension and Expulsion of Learners at Public Schools in the Western Cape.⁷

⁷ Province of the Western Cape: Provincial Gazette Extraordinary 6939, 15 December 2011

Section 4(3) provides that:

4. Suspension of Learner

...

(3) The governing body must report all the decisions to suspend and the nature of the suspension of the learners to the District Director, who shall keep a register of such suspensions.

Section 6 provides that:

6. Appointment and composition of disciplinary committee

(1) The governing body must preside over the disciplinary proceedings or must appoint a disciplinary committee to do so.

(2) The disciplinary committee must comprise at least five persons, at least three whom must be governing body members.

(3) The disciplinary committee must be chaired by a member of the governing body, ...

(4) The disciplinary committee must be impartial, fair and act without favour or prejudice.

7.5.4 Rights and Responsibilities of Independent Schools Circular⁸

Chapter One provides that:

Independent schools have to operate within the confines of the Constitution and all relevant National and Provincial legislation. However, critical to their independence is the freedom of a school to use its professional judgement to make decisions...

The Circular quotes Chapter Two section 46(3) (a) of the South African Schools Act, 1996 as amended as providing that:

The standards to be maintained by such school will not be inferior to the standards in comparable public schools.

Chapter Six provides that the Provincial Education Departments (hereinafter referred to as "PED") have the responsibility to monitor independent schools that are registered with them.

Chapter Eight makes provision for the exclusion of learners on grounds of contravention of the rules contained in the school's Code of Conduct and grievance procedure, drafted in line with relevant legislation and good practice provided that fair procedure has been followed. The provision further stipulates that the best interest of the child should always be adhered to.

Chapter 10 provides that:

Good practice dictates that decisions taken about the promotion or retention of a learner should be based on good records of progress,

⁸ Rights and Responsibilities of Independent School, Department of Basic Education Circular: (034s445Appendix(i)-Final Approved NAISA27/10/10)

or lack of progress, and evidence of considerable care being taken to ensure that the decisions are made in the best interests of the child.

7.5.5. Respondent's Disciplinary Procedures and Code Guidelines for Learners⁹

In terms of its Code of Conduct, the School amongst others provides that:

Section 1- Introduction and Objectives:

The school fully supports the principles of Fair Discipline and the consistent application of appropriate and corrective disciplinary measures where necessary.

Section 6 - Collective Disciplinary Action provides that:

Alleged misconduct by a group of learners, usually acting in concert with one another, or where the infringement are of a similar nature or objective, is considered as being collective misconduct

Generally, collective misconduct is more effectively dealt with on a collective basis. ... A single disciplinary hearing can be conducted with all the learners concerned.

In certain cases it might be considered appropriate by the School to conduct separate investigations or hearings with individual learners The School reserves its right to exercise its option to conduct individual or collective procedures. Any differences in verdict or penalties imposed between different learners involved in the same incident/infringement will obviously also have to be justified if the School is called upon to do so.

In terms of its Disciplinary Procedures the School amongst other provides that:¹⁰

In terms of the process that leads to expulsion/suspension:

Opportunity will be given to the child to respond to charges or accusations and to call witnesses in defence.

The conducting of the formal Disciplinary Hearing is of great importance and must be chaired by an objective Senior School official or suitably qualified or experienced third party.

Section Four - Disciplinary Process provides that:

To ensure that this crucial procedure is properly and fairly conducted all disciplinary hearings should be conducted in such a way as to ensure that the rules of natural justice are complied with i.e. the learner and parent-

Must properly understand the allegations being made before commencing with the hearing. Should be presented with all the relevant facts and information relating to the allegations.

⁹ Glenwood House School Discipline Policy: Revised January 2010 As provided to the Commission

¹⁰ Glenwood House School: Discipline Policy: Policy and Procedure with regard to Expulsion/Suspension. Revised January 2010

- *Must be given the opportunity to question information provided and evidence led.*
- *Must be advised of the outcome (verdict) of the hearing, the decision made regarding penalty and the reasons for such decisions.*

7.6. Case Law

7.6.1. Human Dignity

In ***S v Makwanyane and Another 1995 (3) SA391 (CC)***, O'Regan J explained the right to dignity:

Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.¹¹

In ***S v Williams 1995 (3) SA 632 (CC)*** in reference to punishment in general, the Court held that that the Constitution required that:

...measures that assail the dignity and self esteem of an individual will have to be justified; there is no place for brutal and de-humanising treatment and punishment.¹²

7.6.2. Maltreatment, Neglect, Abuse and Degradation of Children

In ***Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11***, Sachs J referred to the fact that the State has an obligation to protect all people and especially children from maltreatment, abuse or degradation.¹³ Sachs J stated that one of the reasons for the provisions in the (Schools Act 84 of 1996) banning corporal punishment was *to protect the learner from physical and emotional abuse.*¹⁴

7.6.3. Best Interests of the Child

In ***S v M 2008 (3) SA 232 (CC)*** Sachs J pointed out that the best interest concept is indeterminate, resulting in various interpretations. Sachs J went on to say that:

A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.¹⁵

7.6.4. Education

In case of ***Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others (CCT 29/10) [2011] ZACC 13 and Section 27 and Others v Minister of Education and Others (24565/2012) [2012] ZAGPPHC 114*** the courts confirmed the principle that the right to basic education is immediately realisable. It is not subject to progressive realisation within available resources.

¹¹ At paragraph 328.

¹² At paragraph 77.

¹³ At paragraph 50.

¹⁴ At paragraph 50.

¹⁵ At paragraph 24.

7.6.5. Just Administrative Action

All administrative action should be procedurally fair.

In **De Lange v Smuts NO 1998 (3) SA 785 (CC)** Justice Mokgoro stated that:

...everyone has the right to state his or her case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter ... must be informed of both views of parties. In order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance.¹⁶

8. Legal Analysis

The Commission has assessed the allegations of the Complainants against the version of the Respondent in the light of relevant Constitutional and legislative and policy provisions. In its assessment of applicable legislation the Commission has noted that whilst legislation makes provision for both the National Minister and Provincial Member of the Executive Council (hereinafter referred to as “the **MEC**”) responsible for education to issue Regulations for independent schools (Section 3(4)(n) of the National Education Policy Act 1996 and section 37 the Western Cape Provincial School Education Act 1997 respectively) to date this has not been done in respect of disciplinary processes/procedures in independent schools. In the absence of relevant regulations applicable to Independent Schools, the policies and regulations provided for public schools are of persuasive value and provide interpretation to responsibilities of schools/principals and governing bodies in terms of the National and Western Cape Provincial School Acts.

8.1. Just Administrative Action - Procedural Fairness

The Commission is satisfied that the actions taken by the Respondent constitute administrative action and that the PAJA is applicable to the evaluation of this enquiry because the decision to subject the learner to a disciplinary process constituted an administrative decision (as defined in the PAJA and set out hereinabove) and furthermore the conduct of the Respondent falls within the scope of PAJA in that the Respondent is a school and performs a public function.

8.1.1. Procedural irregularities

The Respondent failed to refute the allegations that the disciplinary process was procedurally unfair.

- i Child X was ‘interrogated’ for three and a half hours. The result of this extended ‘interrogation’ was that the child then made a self-incriminating statement. His parents were not notified of the serious charges or investigation into same at all during the period of the ‘interrogation’. This is contrary to protections provided for in the Children’s Act and WCED Learner Discipline and School Management Guideline (Section 6.1). It is not contested that the Complainants were notified about the incident by the learner and at their own initiative requested a meeting with the Respondent.
- ii. The disciplinary proceedings were irregular in that the parties were not *ad idem* on either the procedural or substantive aspects of the proceedings.

¹⁶ At paragraph 131.

The Nature of the Proceedings

- The Complainants are of the view that a Disciplinary Hearing was conducted. However, the Respondent is of the view that the proceedings took the form of a mediation. The Respondent denies that it scheduled any Disciplinary Hearing or that such hearing took place on 1 and 2 September 2011 and contends it was a 'mediation' meeting. However it is on record that format notification was sent to the Complainants and their attorney advising them of the date and time of such 'Disciplinary Hearing'.
- Further a record of the 'Disciplinary Proceeding' held on 1 and 2 September 2011 is on record. At no stage was prior notice given to Complainants that they were attending a mediation process and not a disciplinary hearing.
- The Complainants contend that it was only when they refused to sign the Settlement Agreement that the Disciplinary Hearing discontinued. The Complainants and their attorney were of the assumption that such hearing would continue at a later date as no closure was reached in this matter and it was unresolved. Mr Smith, a teacher at the school, at the meeting of 19 March 2013 admitted that should the disciplinary hearing have proceeded against Child X he would have been found not guilty due to lack of evidence.
- In the record the only mention of deviation from proceedings is the statement by the Chairperson explaining the nature of the proceedings and that it need not be formal but that the principle of natural justice needed to be complied with.

The Charges against the Learner

- The charge against Child X as formulated in the notification of a "formal disciplinary hearing" in which it was alleged that he had brought drugs onto school premises in contravention of the Respondents Code of Conduct. The statements which formed the basis of the enquiry and the report from the mother of the child which gave rise to the enquiry related to the use of marijuana at a party attended by learners from the school which did not take place at the school premises.
- On the available evidence there is no clear indication of what charge the learner ultimately faced.
- The Notification of a Disciplinary Hearing provided to the Complainants appears to charge the learner with possession of illegal substances on school premises.
- The record of the interrogation of the learner indicates that the investigation related to a party which had taken place on a weekend not on school premises and made mention of use of marijuana, selling of marijuana to other learners, possessing marijuana on

school premises.

- In its response to specific questioning by the Commission the Respondent claimed that the Complainants had misunderstood the charges and that the child had never been charged with using but rather that the charge had been 'possession of an illegal substance on school premises and the sale or attempted sale of said illegal substances to other learners'. Even this response is inconsistent with the charge since the charge makes no mention of the sale or attempted sale of illegal substances.
 - The Commission notes that in the event that regard is had to the notification of a Disciplinary Hearing, the only charge against the learner is for possession of marijuana on school premises. There is no mention made of distribution or sale of marijuana.
 - The Commission notes further that the evidence which apparently formed the basis of the charges against the learner and the initial complaint to the Respondent regarding the party don't seem to support the charge which was ultimately formulated. In the absence of the statements which allegedly formed the basis of the charge against Child X, what remains is that it appears that both the Complainants and the Respondent equally suffered a measure of confusion in this regard.
- iii. The Complaints stress that they did not reach an agreement regarding the removal of the learner from the school voluntarily. The Respondent was however of the view that the parties mutually agreed that the child would be removed.
- The Complainants stress that no agreement was finalised. The Complainants have confirmed that they instructed their attorney to reject the offer which was made. The Respondent appears to ground its assumption of an agreement on the fact that the child was removed from the school at the end of the semester. The contention by the Respondent that there was no need to resume the disciplinary hearing cannot be accepted since it is clear that no agreement was reached.
 - The learner attended the school for another semester before leaving the school as conditions had become unbearable to him. There was ample time to resume the disciplinary meeting during this further semester. The learner was therefore also denied the right to clear his name and get closure in this matter.

The failure to follow process and the clear failure to give effect to the principles of natural justice as set out above support the conclusion hereunder that the process was fatally flawed.

8.1.2. Failure to provide information to Complainants.

- i. The Respondent advised the Complainants and the Commission that it initiated its investigation against Child X based on signed statements from

three or four boys. The Complainants allege that they were never provided with these statements despite the requests of their attorney for copies of same to be given to them in order that they could adequately prepare their defence.

- ii. It was alleged that one of the learners, Child L also mentioned in his statement given to the Respondent, that Child X had smoked marijuana at the party a week before. Child X underwent a drug test which returned a negative result. There was therefore proof that the statement in question was false but yet even this statement was never made available to the Complainants.
- iii. The Complainants attorney of record made a request to be provided with all of the further particulars in the matter in order to enable him to prepare the Complainants to present their defence. The Respondent initially verbally advised the Complainants and their attorney that it did provide the information but thereafter the Respondent refused to provide the Complainants or their attorney with copies of these statements and advised them that the school had to protect the other learners. The Complainants alleged that the Respondent did not demonstrate the same regard to protect the rights of Child X.
- iv. The Respondent then in writing justified this refusal by conceding that had the disciplinary hearing continued after the mediation proceeding failed, all the necessary information and evidence regarding the charge against the learner would have to have been disclosed to the learner's legal representative. This information was not relayed to the Complainants at the time of their request. Their request was merely ignored and based on what is stated above regarding the nature of the proceedings the Disciplinary Hearing commenced without the Complainants ever having insight into the alleged statements of the witnesses.
- v. The Respondent denied the Complainant and their attorney access to information, which was vital to adequately prepare for the Disciplinary Hearing and to protect the rights of Child X.

The ultimate response of the Respondent, that even if the statements had been obtained erroneously (and possibly unlawfully since it is unknown whether the parents of the children concerned consented to the taking of potentially self-incriminating evidence) it had not used the evidence against Child X as the disciplinary hearing did not take place, is nonsensical, as the Respondent required the removal of Child X from the school in exchange for the withdrawal of the disciplinary charges. The Respondent accordingly made use of the allegations against Child X as a bargaining tool.

8.1.3. Failure to evaluate information obtained during its investigation.

- i. The Respondent failed to take the evidence of a negative drug test which Child X submitted to on 19 August 2011 and which was provided to the Respondent on 19 September 2011, into account. Following the receipt of the drug test Respondent nonetheless opted to proceed with its disciplinary enquiry.

- ii. Documentary proof that the Complainants provided to the Respondent that the other boys who had given statements against Child X admitted that they had lied was not considered. These statements, by the Respondent's own admission, were foundational to the allegations and motivated the investigation against Child X.

8.1.4. Bias of the Chairperson

- i. The Respondent denied that the Chairperson of the disciplinary hearing, Advocate Lucas Du Preez, was its legal representative. However in an email dated 26 August 2011 the Respondent advised the Complainants that its legal representative on record is Advocate Lucas Du Preez. The principle of natural justice that no (man) person should be a judge in his (or her) own cause (*nemo iudex in suam causam*) was violated by the appointment of the Respondent's legal representative as the chairperson of the disciplinary committee. Respondent's subsequent denial of this fact cannot be accepted in view of statements attributed to Advocate Du Preez regarding his prior relationship with the Respondent (that he was on retainer) and in light of the fact that the first hearing was adjourned for the very purpose of allowing the Respondent the opportunity of obtaining representation.
- ii. The subsequent conduct of the Chairperson and statements attributed to him by the Complainants substantiates the allegation of bias.
 - Even before the Hearing started, Advocate Du Preez, as the Chairperson, informed the Complainants that after considering all of the information, the evidence was in the Respondent's favour. Advocate Du Preez further advised the Complainants that the information supplied so far had been sufficient and he wanted Child X to understand that he was not going to get off on a technicality.
 - The Chairperson, Advocate Du Preez then cautioned them to bear in mind the "Van der Vyver" case which had almost bankrupted that family. He advised them that instead of proceeding with a formal disciplinary hearing process, they should consider coming to a joint understanding, which would be to remove Child X from the School. At this stage, the Hearing discontinued because the Complainants refused to accept the Respondent's proposed settlement offer.
 - The Chairperson failed to reconvene the proceedings following rejection of the offer which was tabled.

8.1.5. Differential treatment of Child X

- i. The Respondent advised that the investigation against Child X was initiated based on the fact that the mother of one of the boys that attended the function had informed the Respondent that her son used marijuana at the party and when questioned, that learner informed her he got it from Child X. It is clear from this allegation that at least one other child was involved in the alleged smoking of marijuana.

- ii. The Respondent admitted that seven other boys smoked marijuana. The Respondent admitted that those seven boys were not suspended and no further disciplinary proceedings were taken against any of the other boys. The Respondent failed to clarify as per the Commission's request why no further steps were taken against any of the other boys who smoked marijuana. The failure to take action against the seven other learners involved without any rational basis for the distinction drawn between Child X and these other learners not only violated the Code of Conduct of the School but amounted to an irrational decision of the part of the Respondent.
- iii. The Respondent further failed to clarify as per the Commission's request why it applied its policy of interviewing children differentially. Child X was questioned without his parent's presence, whilst the one boy who admitted to smoking marijuana was questioned in the presence of his mother. The Respondent again provided no reason for this differentiation and no further action was taken against this boy.
- iv. As required by its own Discipline Policy (Section 6) the Respondent when called upon to do so, failed to justify the differences in verdict on penalties imposed between different learners involved in the same incident/ infringement. In the case of Child X the Respondent convened a Disciplinary Hearing with expulsion being the penalty in the event of a guilty verdict whereas in the case of the other seven boys no disciplinary hearing was convened and it does not appear that the children concerned were even charged with misconduct.

The Commission concludes that the right to just administrative action was violated by the Respondent in that the defects in the process relating to the alleged transgression of Child X, as detailed above. The Respondent failed to adhere to and give effect to the most fundamental of the rules of natural justice and even deviated from its own procedures to the detriment of Child X.

8.2. Children- best interest of the child/maltreatment/human dignity

- 8.2.1. Both the Constitution (Section 28) and the Children's Act (Section 6) provide that in all matters relating to children, the best interests of the child shall be of paramount importance. Specific provision is also made in the Children's Act (Section 6 (4) (a) for proceedings relating to children to have a problem solving and conciliatory approach.
- 8.2.2. It is clear from the discussion on the procedural defects which the Commission has identified that the proceedings were neither problem solving nor conciliatory but took the form of an adversarial process which the child experienced as being intimidating, scary and accusatory.
- 8.2.3. The election of the Respondent to institute the disciplinary process against Child X in the first instance violates the general principles applicable to matters relating to children and this is especially the case where the option not to follow this route is provided for in Respondent's own Code of Conduct.
- 8.2.4. Child X was treated differently from other learners alleged to have been involved in the incident giving rise to the charges. No rational explanation for this

differential treatment was ever offered by the Respondent. Child X was singled out and treated in an inquisitorial manner from the inception of the process while another learner was questioned in the presence of his mother and no disciplinary steps were taken against him. The resultant psychological harm suffered by the child speaks to the trauma which the process caused him.

- 8.2.5. It does not appear from the versions of the parties that there was ever any attempt to reconcile the opposing positions of the parties. In this regard the Commission has considered the allegation that a mediation took place but has been compelled to conclude that no mediation took place since there was no clear advice to the Complainants that the hearing was being converted to a mediation and the Complainants at no stage understood themselves to be participating in a mediation.
- 8.2.6. The Respondent appeared to make every effort to get Child X to leave the school short of following proper disciplinary processes. The best interest of Child X was not of paramount importance in Respondent's conduct of the investigation into either the allegations or the disciplinary hearing itself. The Respondent, while paying lip service to the concept of the best interests of the child failed to demonstrate an appreciation for the content and meaning of this concept and failed to act in terms of such an appreciation.
- 8.2.7. The Respondent failed to justify the basis upon which it interrogated Child X for three and a half hours without informing his parents. The Respondent merely denied that the process concerned had amounted to an interrogation but had not denied that the questioning of Child X went on for three and a half hours. During the period of his interrogation he was obliged to sit in one office and the interrogators came and went. The child was in the words of the First Complainant "bullied, terrified, confused, harassed and coerced into confessing". Apart from the fact that this conflicts with the above quoted Section 6.1 of the WCED Regulations relating to School Management and Learner Discipline, the wilful infliction of psychological harm on the child by means of a protracted interrogation wherein he is denied access to his parents and ultimately coerced into making a self incriminating statement clearly falls foul of the standard of the best interests of the child being of paramount importance.
- 8.2.8. The Respondent failed to provide a rational explanation for the basis upon which it considered the removal of Child X from the school to be in his best interests rather than rehabilitating him as provided for in its Code of Conduct. In the matter of S v M as quoted above, the court held: "*to apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child*";¹⁷ The approach of the Respondent in removing the 'problem child' from the school rather than considering an approach more conducive to his rehabilitation was not in his best interests.
- 8.2.9. Child X has not had any closure regarding this matter and is extremely angry. The Complainant took Child X to see a psychologist on 12 September 2011 because he was suffering from severe emotional distress. At this stage Child X had stopped

¹⁷ Supra At paragraph 24

eating, had stopped talking and interacting with the family as he normally did, and was constantly vomiting. He lost five kilograms over the next two weeks. Reports from two psychologists were submitted regarding the feelings of anger and trauma that Child X experienced due to the accusations levelled against him and the need for him to get closure in this matter (copies of these reports have been provided to the Commission).

8.2.10. Due to this investigation, Child X has been degraded and has suffered immensely as his reputation has been irreparably damaged by being labelled a 'drug dealer'. The Complainants' family and the Respondent are part of a very small close knit community. Child X's alleged disciplinary infraction became known to members of the community who were not directly involved in the disciplinary process. Child X's friends' parents instructed them to break all ties with him. The Complainants were recently advised in public by the Respondent's prayer group that the Respondent asked them to pray for the Complainants and their family in order to get closure on the matter, The repercussions of the aforesaid 'forced' the Complainants to remove Child X from the school at the end of the school term and enrol him at a school in a neighbouring town where people do not know about the incident in order to spare him the trauma and humiliation of having to confront the damage to his reputation on a daily basis.

8.3. Education

The failure of Respondent to provide the learner with educational support during the period of suspension interfered with the learner's right to education.

- The Respondent failed to clarify as per the Commission's request at the meeting of 19 March 2013 why Child X obtained zero for all tests and assignments during his suspension and being off sick, and its failure to provide him with any learning material, notes or assistance. The Respondent argued that it instructed its teachers to provide Child X with the necessary assistance but to date failed to provide proof of such an instruction. In any event the Respondent is liable for the omissions of its staff and the Respondent if further liable for its failure to exercise due diligence in ensuring that that such support was provided.

9. Findings

In light of the above the Commission makes the following findings:

- 9.1. The Respondent has infringed the right of the Complainants to just administrative action that is fair and reasonable in that the procedure it purported to follow was riddled with irregularities. Its refusal to treat Child X in the same way it treated the other learners involved in the incident; its refusal to consider relevant and cogent exculpatory evidence; its failure to bring the matter to finality; its failure to have regard to the best interests of the child and act in a manner consistent with an appreciation of this standard; its failure to follow the procedure laid down in its own Code of Conduct and various other irregularities cumulatively amount to a failure to respect and promote the right to just administrative action.
- 9.2. The Respondent infringed Child X's right to be protected from maltreatment, abuse or degradation (Section 28(1) (d)) by its treatment of him during the investigation of the

allegations, its failure to complete the disciplinary process and its failure to treat the matter as highly confidential. The actions of the Respondent are in compliance with the very definition of abuse as contained in section 1 of the Children's Act. The evidence of emotional and psychological trauma which the child has suffered and continues to suffer as a result of the treatment he endured further substantiates the finding that the child's right not to be subjected to maltreatment, abuse or degradation has been violated.

- 9.3. The Respondent has infringed the right of Child X to Human Dignity in that the child experienced the entire disciplinary process as humiliating and demeaning of him as a human being in that he was not accorded the most basic of rights (such as the right to be presumed innocent until proven guilty or the right to present his version of events and have it be properly considered). The embarrassment and social ostracism which Child X experienced forced him to leave the school as he was unable to cope with the emotional and psychological pressure of the position he found himself in.
- 9.4. The Respondent violated the right of Child X to basic education by its failure to exercise due diligence in ensuring that he received educational support during the period of his suspension and while he was ill. During the period of the learner's suspension the Respondent remained under both a Constitutional and a contractual duty to render educational support to the learner. It failed to do so in violation of his right to receive such support.

10. Recommendations

- 10.1. WCED and the National Alliance of Independent School Associations (hereinafter referred to as "NAISA") are provided with a copy of this report.
- 10.2. That the MEC for education as a matter of urgency draft regulations and/or guidelines for independent schools in regard to learner discipline; conducting of disciplinary procedures and executing searches and seizures at independent schools as provided for in section 37(1) of the Western Cape Provincial School Education Act, 12 of 1997.
- 10.3. That the Respondent issues a written apology to the Complainants and Child X.
- 10.4. That Respondent with immediate effect redraft its policies regarding disciplinary proceedings taking into consideration the findings of this Report and provide the Commission with a copy of such within three months of receipt of this Report.

11. Appeals Clause

Should you not be satisfied with this decision, you may lodge an appeal, in writing within 45 days of receipt of this letter. A copy of the appeal form is available at any office of the Commission. The appeal should be lodged with the Head Office of the Commission - contact details are as follows:

**Private Bag X2700
Houghton
2041**

South African Human Rights Commission



COMPLAINT NO: Eastern Cape/1213/0387

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

EC/1213/0387

In the matter between

SA Human Rights Commission (acting in the
interests of Bulugha Farm School)

Complainant

and

Eastern Cape Department of Education

Respondent

REPORT

(In terms of Procedure 21 of the Complaints Handling Procedures of the South African Human Rights Commission - promulgated in terms of the Human Rights Commission Act, 1994)

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as the “Commission”) is a state institution established in terms of Chapter 9 of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereinafter referred to as (“The Constitution”), to support constitutional democracy.
- 1.2. The Commission is mandated in terms of section 184 (1) (a-c) of the Constitution to:
“...promote respect, monitor and assess the observance of human rights in South Africa”.
- 1.3. The Human Rights Commission Act, 54 of 1994, provides the enabling framework for the powers of the Commission.
- 1.4. Section 9(6) of the Human Rights Commission, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.
- 1.5. Article 3(b) of the South African Human Rights Commission’s Complaints Handling Procedures, provides that *the Commission has the jurisdiction to conduct or cause to be conducted any investigation on its own accord*, into any alleged violation of or a threat to a fundamental right.

2. The Parties

- 2.1. The complainant is the South African Human Rights Commission (hereinafter referred as the “SAHRC”)
- 2.2. The Respondent is the Eastern Cape Department of Education (hereinafter referred as the “Respondent”)

3. Background

- 3.1. On or about 13 March 2013 the print media (Daily Dispatch) published an article titled “toilet proposal infuriates DA”.
- 3.2. According to the article the DA has criticized the Provincial Department of Education after it allegedly told a school with no toilet facilities to shorten teaching hours to make toilets unnecessary.

3.3. The article further reports that pupils are forced to relieve themselves in the bush.

4. Preliminary Assessment

4.1. Based on the newspaper article, the SAHRC determined that there may have been *prima facie* violations of the following Constitutional rights:

- a) Section 29 of the Constitution - The right to basic education
(1)(a) Everyone has the right to basic education including adult basic
- b) Section 24 - the right to clean environment
1)(a) Everyone has a right to an environment that is not harmful to their health or wellbeing;
- c) Section 28 - Children's rights
- d) Section 10 - Human Dignity
"Everyone has inherent dignity and the right to have their dignity respected and protected"

5. Investigation steps taken by the SAHRC

5.1. On 24th April 2013, the SAHRC investigators visited Bulugha Farm School with the sole purpose to:

- a) verify the accuracy of the said newspaper article;
- b) to ascertain whether there was any intervention by the Department in relation to this matter.

5.2. On the day of the inspection in loco the SAHRC found the following human rights violations:

5.2.1. Section 24 - Healthy Environment

The school had three pit toilets which were full and not being serviced due to the alleged contractual issues between the service provider and the Department of Education.

That said structures were not in working condition and were not adequate nor were they suitable for use due to the fact that such toilets posed a health risk on both the learners and educators.

5.2.2. Section 10 - Human Dignity

That the 250 learners (including boys and girls) were indeed relieving themselves in the surrounding bush within the school premises and in full view of others close by.

That the educators, especially the female educators are utilizing one bucket between them when relieving themselves.

5.2.3. Section 29 - Education and Section 28 (2) - Best interests of the child

That due to the lack of proper and adequate ablution facilities it was confirmed and witnessed by the investigators that the schooling hours were shortened and ended at 12H30pm.

- 5.3. An allegation letter dated 25 April 2013 was dispatched to the Respondent, outlining the SAHRC observations during its visit to the school and requested a plan of action from the Respondent.
- 5.4. On 14 May 2013, a reminder letter was sent to the Respondent.
- 5.5. On the 27 May 2013 SAHRC received a response from Respondent advising that the Department has installed seven (7) toilets.
- 5.6. Subsequent to the above response, SAHRC visited the school to confirm and ensure that the said toilets were proper and adequate.

Photographs taken during the inspection in loco

Existing toilets prior to SAHRC intervention. The pit toilets were full and not being serviced

The base of the tree which was utilized by the pupils to relieve themselves.

The bucket utilized by female educators

Photograph taken after our intervention

7 toilets built by the Department

5 toilets built by a sponsor from Johannesburg

The toilet interior

6. Findings

- 6.1. Taking into consideration that school is situated in an area that has a scarcity of running water, the Commission finds the type of toilets built by the Respondent and the sponsor to be proper and adequate.
- 6.2. Notwithstanding the above, the Commission noted that there is no toilet(s) that caters for the disabled.
- 6.3. The Commission finds that the distance between the school and the toilets is approximately between 15-20 meters.
- 6.4. The Commission further finds the number of toilets built to be appropriate to cater for the number of learners enrolled at the school.
- 6.5. Although the school is equipped with water tanks, there are no water taps or tank situated nearby the toilets to enable the learners to wash their hands.
- 6.6. The school has resumed the official school hours of 8H00am to 15H00pm.

7. Recommendations

- 7.1. The Commission is satisfied that the Respondent has complied with Commission's request to address the issue of sanitation at Bulugha Farm School, near East London.
- 7.2. Nevertheless, the Respondent should look into addressing the lack of toilets that caters for disabled people within **three (3) months** of this report.
- 7.3. Moreover the Commission recommends that the Respondent must provide the school with water tanks/taps in close proximity to the toilets, within **three (3) months** of this report.

8. Appeal

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

**Private Bag X2700
Houghton
2041**

**Signed at Johannesburg on the 18th Day of September 2013
South African Human Rights Commission**



COMPLAINT NO: Free State/1213/0338

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/1213/0338

In the matter between:

**Deputy Minister of Justice
And Constitutional Development**

Complainant

and

Creare Training Centre

Respondent

REPORT

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as the “**Commission**”) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996 (hereinafter referred to as the “**Constitution**”).
- 1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as “*state institutions supporting constitutional democracy*”.
- 1.3. The Commission is specifically required to:
 - 1.3.1. Promote respect for human rights;
 - 1.3.2. Promote the protection, development and attainment of human rights; and
 - 1.3.3. Monitor and assess the observance of human rights in the Republic.
- 1.4. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 1.5. Further, section 184(2)(c) and (d) affords the Commission authority to carry out research and to educate the community on human rights related matters.
- 1.6. The Human Rights Commission Act, 54 of 1994 (Human Rights Commission Act), further provides for additional powers and functioning of the Commission.
- 1.7. Section 9(6) of the Human Rights Commission Act determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

2. Parties

- 2.1. The Complainant is the Deputy Minister of Justice and Constitutional Development, an administrative functionary in terms of section 239 of the Constitution, who together with the Minister of Justice and Constitutional Development bears the constitutional and statutory responsibility for the administration of justice in the Republic of South Africa.
- 2.2. The Respondent is Creare Training Centre, a voluntary association established under the leadership of Our Father’s Home Church that specializes in Christian based studies, Christian Arts and Missions with its Head Office situated at 7 Gerhard Beukes Street, Bloemfontein.

3. Nature of the Complaint

- 3.1. On Friday, 18 January 2013, the Free State Provincial Office of the Commission received a complaint from the Deputy Minister of Justice and Constitutional Development, Honourable Andries Nel, MP (hereinafter referred to as the **'Complainant'**).
- 3.2. The Complainant requested the Commission to investigate whether Creare Training Centre (hereinafter referred to as **'Respondent'**) violated section 9 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) and the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000), by unfairly discriminating against people on the basis of sexual orientation.
- 3.3. The Complainant alleged that he was in possession of a document which he alleged had been published by the Respondent. The document is titled, "Relational Etiquette" that
"any existing relationships or planned relationships between male & female Creare students will be submitted to Creare leadership. According to the Statement of Faith in the Constitution of Creare Training Centre, we believe in the principle of relationship fundamental to personal sexual orientation being founded on that of heterosexuality. Therefore any person wanting to pursue a lifestyle contrary and is not willing to be disciplined (sic) in this regard, will not be permitted to continue further studies or lecture. We offer ministry to help people that want to change their sexual orientation A.E Homosexuality & Lesbianism to heterosexuality."
- 3.4. The Complainant asserts that the notion that a person's sexual orientation can be changed at will, or by compulsion, feeds the very same homophobic attitudes that encourage the criminal and abhorrent practice of so-called, "corrective rape."

4. Preliminary Assessment

- 4.1. The Provincial Office of the Free State made a preliminary assessment of the complaint.
- 4.2. The preliminary assessment of the Office was that the alleged publication constituted a *prima facie violation* of the following rights:
 - a) The Right to Equality in terms of section 9 of the Constitution;
 - b) The Right to Human Dignity in terms of section 10 of the Constitution;
 - c) Freedom and security of the person in terms of section 12 of the Constitution; and
 - d) The Right to Privacy in terms of section 14 of the Constitution; and
 - e) The Right to Education - because the policy directs that homosexuals will not be permitted to continue further studies.
- 4.3. That the assessed violations *fell within the mandate and jurisdiction* of the South African Human Rights Commission;
- 4.4. That there was no other organisation that could more effectively and expeditiously deal with the complaint.

5. Steps Taken by the Commission

The FS Provincial Office of the SAHRC took the following steps:

- 5.1. Dispatched a letter together with an investigation questionnaire to the Respondent.¹
- 5.2. The FS Office further dispatched a letter to the Free State Provincial Manager of South African Gay & Lesbian Against Defamation (SA GLAAD FS), an equal civil rights advocacy group that documents and responds to homophobia and heterosexism in the South African popular media and society to garner their views about this complaint.
- 5.3. On Wednesday, 23 January 2013, the FS Office received a response from both the Respondent and the SA GLAAD FS.
- 5.4. Pursuant to 5.3. above, the FS Office reviewed the correspondence from both the Respondent and SA GLAAD FS.
- 5.5. After perusal of the Respondent's formal response to the allegation letter, the FS Office arranged a meeting with the Headmaster of the Respondent.
- 5.6. On Thursday, 24 January 2013, the FS Office held a meeting with the Respondent Headmaster and Management at its premises in Bloemfontein.
- 5.7. The meeting discussed the Respondent's response to the investigation questionnaire and the proposal contained in their formal response letter.
- 5.8. On Monday, 28 January 2013, the FS Office sent a further letter to the Respondent requesting their formal response within a period of seven (7) working days to the questionnaire in order to complete the assessment of the complaint.
- 5.9. On Monday, 11 February 2013, the Respondent furnished the Commission with a comprehensive response to allegations together with additional documentation.²

6. Issues for Determination

The Provincial Office determined that the following five (5) aspects of the complaint constituted the salient issues for determination:

- 6.1. Whether the relational etiquette contained in the Prospectus, constituted a violation of the right to equality and an act of unfair discrimination against homosexual people on grounds of sexual orientation in terms of Section 9(3) of the Constitution;
- 6.2. Whether the Respondent's constitution and statement of faith, constitutes a violation of the right to privacy in terms of Section 14.
- 6.3. Whether the Respondent's constitution and statement of faith, constitutes a violation of the right to education in terms of Section 29.
- 6.4. Whether the publication by Respondent, constituted a violation of homosexual people's right to human dignity in terms of Section 10 of the Constitution;

¹ 21 January 2013

² The Constitution of Creare Training Centre 2013; Full-Time Application Form; Creare Training Centre Prospectus (revised)

- 6.5. Whether the publication (Prospectus) by implication reinforces already existing societal prejudices on homosexuality and severely increases the vulnerability of homosexuals and therefore constitutes an infraction of their right in terms of Sections 12(1)(c) and (e) of the Constitution;
- 6.6. Whether the right to religious freedom as perceived and practiced by the Respondent outweighs the constitutional imperative that there must not be unfair discrimination on the basis of sexual orientation.

7. Applicable Legal Framework

a) *International Instruments*

7.1. Universal Declaration of Human Rights 1948

Article 7 of the Universal Declaration of Human Rights provides that:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

7.2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights provides in Article 17 that:

“(1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.”

Article 26(1)³ of the ICCPR provides that:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

7.3. Convention on the Elimination of All Forms of Discrimination Against Women⁴

“For the purposes of the present Convention, the term “discrimination against women” shall mean 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”.

7.4. African Charter on Human & People’s Rights

Article 2 of the African Charter underlines that the rights in the charter may be invoked without discrimination. It provides that individuals are entitled to the rights under the

³ In the case of *Toonen vs. Australia*, the Human Rights Committee held that references to “sex” in Article 26 (equality before the law) of the ICCPR should be taken to include sexual orientation. With this case the Human Rights Committee created a precedent within the UN Human Rights system in addressing discrimination against lesbian, gays and bisexuals.

⁴ This treaty is relevant in cases of discrimination against lesbian, bisexual and transgender women.

African Charter 'without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status'.⁵

b) Constitutional Rights

The complaint before the Commission is an alleged violation of various rights enshrined in the Constitution.

7.5. Foundational Values

Section 1 of the Constitution determines that South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality, the advancement of human rights and freedoms, supremacy of the Constitution and the rule of law and a system of democratic government that is accountable, responsive and open.⁶

7.6. The Right to Equality

Section 9 (3) of the Constitution provides that the State may not unfairly discriminate directly or indirectly against anyone on the basis of sexual orientation.

Subsection 4 provides that, 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.

7.7. The Right to Human Dignity

Section 10 is the right to have the inherent dignity of everyone respected and protected. Given the facts of this matter and the intrinsic nature of the right, it has central significance.

7.8. Freedom and Security of the Person

Section 12 (1) (c) & (e) provides that everyone has the right to freedom and security of the person, which includes to be free from all forms of violence from either public or private sources; and not to be treated or punished in a cruel, inhuman or degrading way.

7.9. The Right to Privacy

Section 14 of the Constitution entrenches the right to privacy.

7.10. Freedom of religion, belief and opinion

Section 15 (1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion.

7.11. The Right to Education

Section 29 (1) provides that everyone has the right to a basic education, including adult basic education.

7.12. Freedom of Association

Section 18 provides that everyone has the right to freedom of association.

⁵ However, the right to equality on the basis of sexual orientation has remained largely outside the consideration of the African Commission.

⁶ Constitutional values in Section 1 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

c) *Domestic Legislation***7.13. Promotion of Equality & Prevention of Unfair Discrimination Act⁷**

Section 1 of the Equality Act defines “**discrimination**” as:

“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”.*

Section 6 of the Equality Act reiterates the Constitution’s prohibition of unfair discrimination by both the State and private parties on listed grounds including, of course, sexual orientation.

The prohibited grounds provided in the definitions section are *“race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”*

The Act also provides guidance for the determination of unfairness.

Section 14 of the Act provides that –

“(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(1) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

- a) The context;*
- b) the factors referred to in subsection (3);*
- c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.*

(3) The factors referred to in subsection (2)(b) include the following:

- a) Whether the discrimination impairs or is likely to impair human dignity;*
- b) the impact or likely impact of the discrimination on the complainant;*
- c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;*
- d) the nature and extent of the discrimination;*
- e) whether the discrimination is systemic in nature;*
- f) whether the discrimination has a legitimate purpose;*
- g) whether and to what extent the discrimination achieves its purpose;*
- h) whether there are less restrictive and less disadvantageous means to achieve the purpose;*

⁷ 4 of 2000

- i) *whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to –*
 - i. *address the disadvantage which arises from or is related to one or more of the prohibited grounds; or*
 - ii. *accommodate diversity.”*
- e) *Case Law*

The Constitution entreats the Commission to consider relevant case law in determining the nature and scope of a human right:

7.14. The Right to equality:

- 7.14.1. The key issue for consideration is whether in the crafting of a policy document by an educational institution whose content expressly excludes participation of certain groups of people on the basis of a listed ground, amounts to a violation of the right to equality.
- 7.14.2. Speaking against the marginalization of gay people and the resultant consequences thereof. Sachs J in **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others**⁸ states that “the effect is that all homosexual desire is tainted, and the whole gay and lesbian community is marked with deviance and perversity. When everything associated with homosexuality is treated as bent, queer, repugnant or comical, the equality interest is directly engaged. People are subject to extensive prejudice because of that they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual nonconformity, persecuted, marginalized and turned in on itself.”
- 7.14.3. In **Hoffman v South African Airways**⁹ Ngcobo J was of the opinion that equality can only be achieved in the absence of stereotyping and narrow-mindedness. The learned judge stated that “*our constitutional democracy has ushered in a new era-it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly*”
- 7.14.4. The Constitutional Court (citing *The Sodomy case* judgement)¹⁰, in **Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others**, (The Fourie Case)¹¹ further highlighted the fact that once a group of people has been marginalized, that group of people can no longer enjoy their right to equality. The court held that;
- “A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalize people for*

⁸ [1998] ZACC 15; 1999 (1) SA 6 (CC); 198 (12) BCLR 1517 (CC)

⁹ [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC)

¹⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC). (The Sodomy case.)

¹¹ (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005)

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 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 behavior 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. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognizing and accepting people with all their differences, as they are.”

The court went further to state that “the Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.”

7.15. The Right to Dignity

- 7.15.1. The importance of the right to dignity in South Africa cannot be overemphasized. South Africa has emerged from a dark past where the right to dignity was denied to the majority “*We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.*”¹²
- 7.15.2. O’Regan in her judgment in **S v Makwanuane**¹³ gave a synopsis of what the right to dignity entails. The learned judge stated that “*the importance of human dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human being: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in Chapter 3.*”
- 7.15.3. In order for us as human beings to enjoy the right to dignity, freedom must prevail, as one cannot exist without the other. The Constitutional court highlights

¹² Prinsloo v Van der Linde and Another 1997 (6) BCLR 759 (CC) at paragraph 31

¹³ 1995 (3) SA 391 at paragraph 328

this link between freedom and dignity in **Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others**¹⁴ where Ackermann J stated that: *“Human dignity has little value without freedom; for without freedom personal development and fulfillment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.”*

- 7.15.4. The Constitutional Court confirmed the importance of the right to dignity in *Dawood and Another v Minister of Home Affairs and Others*¹⁵ when the court said that *“The value of dignity in our Constitutional framework cannot...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 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.”*
- 7.15.5. Denying a person dignity could be equated to denying the person his/her humanity. Ackermann J in **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs**¹⁶, observed as follows: *“The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and lead to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.”*
- 7.15.6. The Constitutional court in **NM v Smith (Freedom of Expression Institute as Amicus Curiae)**¹⁷ reiterated the importance of the right to dignity in our constitutional dispensation and the reason why this right must be jealously guarded. The Court held that: *“a constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom.”*

7.16. The Right to Privacy

- 7.16.1. Commentators on the right to privacy have stated that this right is a component of the broader, inherent right to dignity, contributes to our humanity. The Constitutional Court in **NM v Smith (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC); 2007 (7) BCLR 751** defined privacy as the *“right of a person to live his or her life as he or she pleases”*¹⁸ This definition of privacy seems to be in line with what O'Regan J observed in **Khumalo & Others**

¹⁴ 1996 (1) SA 984 (CC)

¹⁵ [2000] ZACC 8; 2000 (3) SA 936 (CC) at paragraph 35

¹⁶ 2000 (2) SA 1 (CC)

¹⁷ 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 at paras [49]-[51]

¹⁸ At Paragraph 33

v Holomisa¹⁹. The learned judge stated that *“the right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution.”*

- 7.16.2. The *Fourie* case seems to agree with the reasoning of O’Regan J in *Khumalo v Holomisa* with regards to the fact that the right to privacy should be protected from invasion. Ackermann J in his judgment in the *Fourie* case stated that *“Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy”*

7.17. The Right to religious freedom

- 7.17.1. In **S v Lawrence**,²⁰ the Constitutional Court has accepted that the right to freedom of religion at least comprehends: *“The right to entertain such religious beliefs as person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”*
- 7.17.2. In **Prince v President of the Law Society of the Cape of Good Hope**²¹, Ngcobo J stated the following in his dissenting judgment: *“The right to religious freedom is especially important for our constitutional democracy... Our society is diverse. It is comprised of men and women of different cultural, social, religious and linguistic backgrounds. Our Constitution recognizes this diversity... The protection of diversity is the hallmark of a free and open society.”*
- 7.17.3. In **Christian Education**,²² in the context of accommodating religious belief in society, a unanimous Court identified the underlying motivation of the concept as follows: *“The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which laws they will not obey. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.”*

¹⁹ [2002] ZACC 12

²⁰ 1997 (4) SA 1176 (CC). See also Currie I and De Waal J. *The Bill of Rights Handbook* (Juta, Cape Town 2005) 338

²¹ 2002 (2) SA 794

²² *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC)

- 7.17.4. This Court further held that: *“It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them would not be unfair to anyone else who did not hold those views.”*
- 7.17.5. The court further stated that *“there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the “right to be different”*

7.18. Discrimination and Unfair discrimination

- 7.18.1. Speaking against the effects and/or consequences of discrimination and the importance of section 8 of the Interim Constitution, O’Regan J in **Brink v Kitshoff NO**²³ states that *“Section 8 [interim Constitution] was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realized that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of section 8 and, in particular, subsections (2), (3) and (4).”*
- 7.18.2. In a trilogy of cases²⁴, the Constitutional Court seems to be of the opinion that a mere allegation of discrimination is on its own not sufficient as the affected person(s) should further demonstrate that he or she has been unfairly discriminated against. The court also points out that once the right that has been violated is identified as listed under prohibited grounds in section 9 of the Constitution of the Republic then the presumption is that the discrimination is unfair.
- 7.18.3. The court in the **Harksen case** tabulates the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 [**section 9 1996 Constitution**] of the interim Constitution.(own emphasis) They are:
- 7.18.3.1. Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

²³ [1996] ZACC 9; 1996 (6) BCLR 752 (CC)

²⁴ President of the Republic of South Africa v Hugo 1997 (6) BCLR 708 (CC) Prinsloo v Van der Linde and Another 1997 (6) BCLR 759 (CC) and Harksen v Lane NO and Others 1997 (11) BCLR 1489 (CC)

- 7.18.4. Once it has been established that there is differentiation, then one has to ask whether the differentiation amounts to unfair discrimination? This according to the *Harksen* case, requires a two stage analysis:
- 7.18.4.1. *“Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner;*
- 7.18.4.2. *If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.*
- 7.18.5. *If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).*
- 7.18.6. *If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)[**section 36 of the 1996 Constitution**] (own emphasis).”*
- 7.18.7. **Goldstone J in Harksen** further goes on to say that *“in order to determine whether the discriminatory provision has impacted on the complainants unfairly, various factors must be considered. These would include:*
- 7.18.7.1. *the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;*
- 7.18.7.2. *the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question;*
- 7.18.7.3. *with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.”*

7.18.8. The right that has been allegedly violated in this matter is sexual orientation which is listed under prohibited grounds in the Constitution and according to the **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** case_“sexual orientation is a ground expressly listed in s 9(3) of the Constitution and under s 9(5) discrimination on it is unfair unless the contrary is established;”

7.18.9. The Constitutional court is of the view that under the new constitutional dispensation discrimination should not be tolerated at all. This is evident in the case of **President of the Republic of South Africa and Another v Hugo**²⁵, wherein the Court stated that: “at the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of the Constitution which should not be forgotten or overlooked.”

7.18.10. In **Prinsloo v Van der Linde and Another**²⁶, the court reasoned that ‘discrimination’ should be understood in the context of the history of this country. The court stated as follows; “Given the history of this country we are of the view that ‘discrimination’ has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them.”

7.19. Discrimination against gays and lesbians

7.19.1. Several Constitutional cases point out the apparent fact that gay people are a minority group in our country and that they have in the past suffered prejudice as a result of their sexual orientation. And to that end they require the protection of our Constitution.

7.19.2. In the **Fourie case** Cameron JA pointed out that “our equality jurisprudence had taken great strides in respect of gays and lesbians in the last decade. The cases articulate far-reaching doctrines of dignity, equality and inclusive moral citizenship. They establish that: gays and lesbians are a permanent minority in society who have suffered patterns of disadvantage and are consequently exclusively reliant on the Bill of Rights for their protection; the impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels;”

7.19.3. The court in the **Fourie case** went on to state that “the sting of the past and continuing discrimination against both gays and lesbians’ lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they ‘do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity namely that ‘all persons have the same inherent worth and dignity, whatever their other differences may be.”

²⁵ 1997 (6) BCLR 708 (CC) at para 41 (as per Goldstone J)

²⁶ 1997 (6) BCLR 759 (CC) at para 31

- 7.19.4. The court went on to further state that *“discrimination against gays and lesbians serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians. There is an existence of an imperative constitutional need to acknowledge the long history in our country and abroad of marginalisation and persecution of gays and lesbians, that is, of persons who had the same general characteristics as the rest of the population, save for the fact that their sexual orientation was such that they expressed erotic desire and affinity for individuals of their own sex, and were socially defined as homosexual”*
- 7.19.5. Another fact that the **Fourie case** pointed out which made the case in my opinion a *locus classicus* on gay and lesbian rights in the point that, *“in an open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.”*
- 7.19.6. Instances whereby any of the parties in a dispute quotes religious scriptures and/or verses was also dealt with in the abovementioned *locus classicus* of **Fourie**, wherein Mr. John Jackson Smyth, the second *amicus curiae* in the matter sincerely cited passages in the Old and New Testaments in support of his argument that what he referred to as a change in the definition of marriage would discriminate against persons who believed that marriage was a heterosexual institution ordained of God, and who regarded their marriage vows as sacred.
- 7.19.6.1. The court acknowledging his sincerity however stated that *“for the purpose of legal analysis, such appreciation would not imply accepting that those sources may appropriately be relied upon by a court. Whether or not the Biblical texts support his beliefs would certainly not be a question which this Court could entertain. From a constitutional point of view, what matters is for the Court to ensure that he be protected in his right to regard his marriage as sacramental, to belong to a religious community that celebrates its marriages according to its own doctrinal tenets, and to be free to express his views in an appropriate manner both in public and in Court. Further that that the Court could not be expected to go.”* The court seems in my opinion to distance itself from supporting the view that one can use quotations from a religious text as an excuse to impose certain beliefs on other people’s lives, the court rather chooses to look at what is constitutional and what is not.

7.19.7. The **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** case in its judgment summed up what it calls the facts concerning gays and lesbians as follows;

- i. *Gays and lesbians have a constitutionally entrenched right to dignity and equality;*
- ii. *Sexual orientation is a ground expressly listed in section 9(3) of the Constitution and under section 9(5) and discrimination on it is unfair unless the contrary is established;*
- iii. *Prior criminal proscription of private and consensual sexual expression between gays, arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional;*
- iv. *Gays and lesbians in same sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, eos and charity;*
- v. *They are likewise as capable of forming intimate, permanent, committed. Monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support; and assistance in running the common household;*
- vi. *They are individually able to adopt children and in the cases of lesbians to bear them;*
- vii. *In short, they have the same ability to establish a consortium omni vitae;*
- viii. *Finally...they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses."*

7.19.7.1. The court in my view seems to be alluding to the fact that gays and lesbians are no different to any other person as such differentiation is rather unnecessary

7.20. Weighing up of competing rights and limitation thereof

7.20.1. The Constitutional court in **S v Makwanyane and Another** stated that *"even though the 1996 Constitution differs from the 1993 Interim Constitution its application still involves a process of "...weighing up of competing values, and ultimately an assessment based on proportionality... which calls for the balancing of different interests."*

7.20.2. The court went further to state that *"the relevant considerations in the balancing process include, the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."*²⁷

²⁷ Section 36 1996 Constitution

8. Analytical Framework

In analyzing this complaint, the Commission considered the following constitutional tests and guidelines for the interpretation of the rights:

a) The Justification analysis

Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- a) The nature of the right;
- b) The importance of the purpose of the limitation;
- c) The nature and extent of the limitation;
- d) The relation between the limitation and its purpose; and
- e) Less restrictive means to achieve the purpose.

b) Interpretation of the Bill of Rights

Section 39 of the Constitution provides that, when interpreting the Bill of Rights, a court, tribunal or forum –

- a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b) Must consider international law; and
- c) May consider foreign law.

Section 39(2) of the Constitution makes it clear that the Act must be interpreted in light of the *“spirit, purport and objects of the Bill of Rights.”*

9. Analysis

- 9.1. In determining whether the provision in the Respondent’s prospectus amounted to unfair discrimination, the Commission considered various factors, including these:
 - 9.1.1. The position of LGBTI people in society and whether they have suffered in the past from patterns of disadvantage;
 - 9.1.2. The nature of the provision in the prospectus and the purpose sought to be achieved by it;
 - 9.1.3. The extent to which the provision in the prospectus has affected the rights or interests of the Complainant and deeply impaired the fundamental dignity of the LGBTI community;
- 9.2. One of the major challenges for LGBTI people in South Africa is the deeply entrenched homophobic sentiment among certain sectors of the population notwithstanding the fact that South Africa was the first country in the world to entrench LGBTI rights in its Constitution.
- 9.3. A study conducted by the Human Sciences Research Council confirmed these deeply embedded homophobic attitudes and concluded that, in spite of Constitutional protection and legal reform, cultural prejudices against gays and lesbians remains strong,

that attitudinal changes do not necessarily correlate with rights, and that rights do not necessarily result in justice.²⁸

- 9.4. LGBTI people are also targets and victims of hate crime and violence. The most common form of hate crime perpetrated against gays and lesbians in South Africa is what is referred to as “corrective rape”.²⁹ This is a practice whereby men rape lesbian women in an effort to “cure them” or to “turn them straight.”
- 9.5. This homophobic violence is underpinned by “hetero-normativity” – the idea that heterosexuality is the only “normal” and “acceptable” sexual orientation.
- 9.6. ‘Sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.’³⁰
- 9.7. With regard to sexual orientation, the silent background norm is often, the assumption that all of society is heterosexual. This heterosexual norm leads to an acceptance that homosexuals are fundamentally and unalterably different from heterosexuals.

Biblical Justification

- 9.8. Religion is one of the most important aspects of today’s society and is particularly relevant to the present complaint.
- 9.9. The Respondent is a development centre and ministry under the leadership of a Christian church called “Our Father’s Home”.
- 9.10. The Respondent states in its ‘statement of faith’ that it espouses Christian based principles and teachings. It further states that the Centre believes in the principle of heterosexual relationships between a natural man and a natural woman within the confines of lawful matrimony.³¹
- 9.11. The Bible states the following in respect to homosexuality:

“Do not lie with a man as one lies with a woman; that is detestable.” (Leviticus 18:22)

“If a man lies with a male as with a woman, both of them have committed abomination; they shall be put to death, their blood is upon them” (Leviticus 20:13)

Apostle Paul also makes a statement against homosexuality in the New Testament stating that:

“Neither the sexually immoral nor idolators...nor homosexual offenders...will inherit the Kingdom of God.” (1 Corinthians 6: 9-10)

Two other passages of Scripture from the New Testament also warrant consideration, namely Romans and Timothy, with the following being highlighted:

²⁸ See B Roberts & V Reddy “Pride and Prejudice: Public Attitudes towards Homosexuality” (2008) 6 HSRC Review The results of a study consisting of a series of surveys conducted by the Human Sciences Research Council (HSRC) between 2003 and 2008 found that more than 80% of the population aged sixteen years and above expressed the view that sex between two men or two women could be considered “always wrong”.

²⁹ A 2008 South African Human Rights Commission Report expressed alarm at the “growing phenomenon of ‘corrective rape’ in schools across the country, with young boys believing that raping lesbian girls would ‘correct’ their sexual orientation. See SAHRC *Report of the Public Hearings on School-based Violence* (2008)

³⁰ See E Cameron “Sexual Orientation and the Constitution: A Test for Human Rights” (1993) 110 SALJ 452-472

³¹ Para 5 of Create Training Centre Constitution under subheading ‘Statement of Faith’

“For this reason God gave them up to degrading passions. Their women exchanged natural intercourse for unnatural.” (Romans 1:26)

“And women were consumed with passion for one another. Men committed shameless acts with men and received in their own persons the due penalty for their error.” (Romans 1:27)

“Fornicators, Sodomites, slave traders, liars, perjurers, and whatever else is contrary to the sound teaching... (1 Timothy 1:10)

- 9.12. In the present matter it is common cause that the Respondent’s relational etiquette in the prospectus explicitly states that *‘any person wanting to pursue a lifestyle contrary and is not willing to be disciple (sic) in this regard, will not be permitted to continue further studies or lecture. We offer ministry to help people that want to change their sexual orientation A.E Homosexuality & Lesbianism to heterosexuality’*.
- 9.13. It is clear from the above provision that the Respondent’s relational etiquette is rooted in the use and interpretation of biblical scripture. The Respondent’s statement of faith also purports to conform to the doctrine contained in the Bible.
- 9.14. The issue in the present complaint is that the Respondent expresses a religious view that the practice of homosexuality is deemed to be contrary to the divine will. In the case of **National Coalition for Gay and Lesbian Equality v Minister of Justice**, which dealt with discrimination based on sexual orientation, the following was stated at para [38]:

“As far as religious views and influences are concerned I would repeat what was stated in S v H:

‘There is still a substantial body of theological thought which holds that the basic purpose of the sexual relationship is procreation and for that reason also proscribes contraception. There is an equally strong body of theological thought that no longer holds this view. Societal attitudes to contraception and marriages which are deliberately childless are also changing. These changing attitudes must inevitably cause a change in attitudes to homosexuality.’

It would not be judicially proper to go further than that in the absence of properly admitted expert evidence. I think it necessary to point out, in the context of the present case, that apart from freedom of expression, freedom of conscience, religion, thought, belief and opinion are also constitutionally protected values under the 1996 Constitution. The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view that holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would wish not to have the physical expression of sexual orientation differing from their own proscribed by the law. It is nevertheless equally important to point out that such views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to the grounds of sexual orientation.”

9.15. Application of legal principles to the facts (Case law)

9.15.1. The right to equality

- 9.15.1.1. The Respondent's relational etiquette clause differentiates between gays and lesbians and heterosexuals and as a result of that differentiation gays and lesbians no longer enjoy the same equal opportunity as heterosexuals with regards to entry to the school and treatment per se. This differentiation leads to gays and lesbians being thought of as suffering from some sort of "homosexual" disease which the Respondent can "heal" by way of religious ritual.
- 9.15.1.2. The result therefore is that the right to equality for gays and lesbians is infringed. This view is evident from the case of **National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others** where the court held that *"when everything associated with homosexuality is treated as bent, queer, repugnant or comical, the equality interest is directly engaged."* If the Respondent views persons with a sexual orientation other than heterosexual as being "unnatural" based on a religious value-judgement, then the right of homosexual's to equality has been infringed.
- 9.15.1.3. The Respondent, by requiring homosexuals to "convert" to heterosexuality, acts against the spirit and purport of the constitutional dispensation and violates the right to equality. This is clearly evident from the **Fourie case** where the court states that *"democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalize people for being who and what they are is profoundly disrespectful of the human personality and violation of equality."*
- 9.15.1.4. By refusing to acknowledge homosexuals the Respondent fails and/or refuses to accept that people are different from each other and by so doing, the Respondent further violates the right to equality as enshrined in the Constitution. The fact that the refusal to accept that people are different is a violation of the principle of equality was expounded by the Constitutional court in the **Fourie case** when the court stated that *"equality means equal concern and respect across difference. It does not 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 behavior or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. 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."* From the explanation given by the court in **Fourie** it therefore becomes clear and apparent that the Respondent infringes the right to equality by elevating heterosexual couples above same sex couples. The Respondent treats gays and lesbians as inferior as they consider them to be suffering from an ailment that could be cured by ministry.

9.15.2. The Right to Dignity

- 9.15.2.1. The relational etiquette clause undermines the dignity of gays and lesbians by suggesting that their sexual orientation is an illness or disease that is capable of being “cured” by means of religious ritual. The court in **S v Makwanyane** points out the link between dignity and humanity when it states that *“recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.”*
- 9.15.2.2. The close relation between dignity and humanity was also pointed out in **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs**³², where the court observed as follows; that, *“The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and lead to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.”*

The court in this matter clearly points out that once a person’s dignity is undermined, that person loses his/her identity and the estimation of this individual in the eyes of right thinking members of society is lowered. Within the context of South Africa, reported evidence reflects that such persons become targets of homophobic, violence justified by perpetrators as “corrective rape”.

- 9.15.2.3. The right to dignity according to the **NM v Smith (Freedom of Expression Institute as Amicus Curiae)** case must be jealously guarded as *“the whole aim of the struggle against apartheid was for the restoration of dignity, equality and freedom.”* This case seems to highlight the important role that dignity enjoys in post-apartheid, democratic South Africa. The essence of the struggle against apartheid was a struggle for restoration of dignity. Consequently, any act undermining the dignity of any sector of the South African community is one that will be met with scrutiny and sanction by the Constitution.

9.15.3. The Right to Privacy

- 9.15.3.1. Does the **Respondent’s action towards gays and lesbians amount to invasion of privacy?** According to the facts the *Respondent requires all students to disclose any existing relationships to the leadership.* The prescribed compulsion by the Respondent for students to disclose their sexual orientation **amounts to invasion of privacy and is contrary to what** the Constitutional court held in the **Fourie case** that *“privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows interference from the outside **community.** The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually*

³² 2000 (2) SA 1 (CC)

and without harming one another, invasion of that precinct will be a breach of our privacy” Thus the Respondent infringes the students’ right to privacy the moment the students’ sexual orientation is made a criteria of admission into the school and the moment disclosure of any existing relationships is required.

9.15.4. The Right to Religious Freedom

- 9.15.4.1. The Respondent is a religious based institution as such the Respondent has as the Constitutional Court stated in **S v Lawrence** *“the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”*
- 9.15.4.2. However in enjoying this right the Respondent must realise as Ncgobo J stated in his dissenting judgment in the **Prince v President of the Law Society of the Cape of Good Hope** case that *“our society is diverse. It is comprised of men and women of different cultural, social, religious and linguistic backgrounds. Our Constitution recognizes this diversity... The protection of diversity is the hallmark of a free and open society.”*
- 9.15.4.3. The Respondent in exercising its right to religious freedom fails and/or refuses to acknowledge that the South African society is not a mono-theological society; it comprises of diverse communities of people with a wide range of different sexual orientations and that hold a myriad of competing religious views on this subject. All these variants of sexual orientations and religious views should find space to co-exist in harmony in this society.
- 9.15.4.4. Whilst, the Respondent is free to practice its religion, within the bounds of the law, as the Constitutional Court said in the **Christian Education**,³³ case that *“..believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land.”* The Respondent cannot therefore use its religious freedom to discriminate against gays and lesbians on the basis of sexual orientation as this is against the supreme law of the land, the Constitution, which prohibits anyone from discriminating against any other person on the basis of their sexual orientation.

9.15.5. Does the Respondent’s action amount to unfair discrimination against gays and lesbians?

- 9.15.5.1. In order to establish whether the Respondent discriminates against gays and lesbians we have to apply the test in the **Harksen case** whether the provision under attack *“differentiates between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might*

³³ 2000 (4) SA 757 (CC)

nevertheless amount to discrimination.” It is apparent that the provision in the Respondent’s relational etiquette clause differentiates between on the one hand gays and lesbians and on the other heterosexuals.

- 9.15.5.2. The **Harksen case** goes on to state that *“once it has been established that there is differentiation, then one has to ask whether the differentiation amounts to unfair discrimination?. This requires a two stage analysis. Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner;”*
- 9.15.5.3. In applying the **Harksen case** two stage analysis above one can see that the differentiation between gays and lesbians and straight people does amount to discrimination because the differentiation is made based on the students’ sexual orientation which is a prohibited ground under section 9 (3) of the Constitution. The differentiation also infringes gays and lesbians’ dignity as their identity as gay and lesbians is considered to be something temporary that requires healing.
- 9.15.5.4. Once discrimination has been established the **Harksen case** further stated that *“one has to consider whether the discrimination amounts to ‘unfair discrimination.’ If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.”* The Respondent therefore unfairly discriminates against gays and lesbians as discrimination on the basis of sexual orientation is specifically prohibited under section 9(3) of the Constitution, and to that end we have to presume it is unfair.
- 9.15.5.5. **Goldstone J in Harksen** further goes on to state that *“in order to determine whether the discriminatory provision has impacted on the complainants unfairly, various factors must be considered. These would include:*
- 9.15.5.5.1. *the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;*
 - 9.15.5.5.2. *whether the discrimination in the case under consideration is on a specified ground or not;*
 - 9.15.5.5.3. *the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending*

on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question;”

9.15.5.6. Applying Goldstone’s reasoning to the facts of this matter one could argue that the Respondent unfairly discriminates against gays and lesbians as they have in the past suffered from patterns of disadvantage as a result of being considered to be different from everyone else. A clear example of this is to be found in Section 20A of the Sexual Offences Act No. 32 of 1957 where sodomy was criminalized and police were entitled to shoot and kill any person who attempted to resist arrest by fleeing from enforcement agents after having been caught in the act of sodomy or suspected of committing the crime of sodomy. Any one caught engaging in sodomy could face up to two years imprisonment and R400 fine.

9.15.5.7. The Respondent’s actions are not, as Goldstone stated in *Harksen above*, “..Aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all” but rather it seems the prospectus rather promotes inequality by considering gays and lesbians to be inferior and heterosexuals to be superior.

The Constitution

9.16. In terms of section 1, South Africa is founded on the values of “human dignity, the attainment of equality and the advancement of human rights and freedoms.”

9.17. Section 7(1) describes the Bill of Rights as an instrument which enshrines the rights of all people in the country and affirms the values which underlie the Constitution, human dignity, equality and freedom.

9.18. Section 9(1) guarantees “everyone” the right to equality before the law and “equal protection and benefit of the law.” Section 9(2) expresses the principle of equality as including the equal enjoyment of all rights and freedoms, and promotes the principle of substantive equality by providing for the adequate protection and advancement of persons disadvantaged by unfair discrimination.

9.19. The South African Constitution prohibits all unfair discrimination, including discrimination on the enumerated grounds³⁴. The right to be free from sexual orientation discrimination is recognised as a fundamental right in section 9(3) of the Constitution.³⁵ The Constitutional protection of the right to freedom of sexual orientation in South Africa has to be seen in the context of the country’s history of inequality and injustice.

9.20. The Constitutional right to equality is foundational to the open and democratic society envisaged by the Constitution. As a general principle therefore, the Constitution will counteract rather than reinforce unfair discrimination on the ground of sexual orientation. Equality is not merely a fundamental right; it is a core value of the Constitution.

³⁴ Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

³⁵ Section 9(3) provides that “the State may not discriminate directly or indirectly against anyone on one or more grounds, including sexual orientation.....”

- 9.21. The centrality of equality in the Constitutional value system has also repeatedly been emphasized by the Constitutional Court. As Moseneke J put it in **Minister of Finance and Another v Van Heerden** *'the achievement of equality goes to the bedrock of our Constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights, but also a core and fundamental value; a standard that must inform all law and against which all law must be tested for constitutional consonance'*.
- 9.22. In the present matter, the Respondent's provision in the prospectus had an enormous impact on the LGBTI people's right to equality, protected as one of the foundations of our new Constitutional order. This was demonstrated by widespread condemnation the Respondent's prospectus elicited in the media and from concerned LGBTI organisations.
- 9.23. The Constitutional Court, in recognising the importance of dealing with disadvantage in society, chose to define equality with reference to dignity.
- 9.24. The onus rested on the Respondent to demonstrate that the relational etiquette in the prospectus served a legitimate purpose and was not unfairly discriminating against LGBTI people. Instead, the Respondent was evasive in its response and chose a less strenuous option of asserting that at the time they received the complaint, they were in the process of reviewing their policies, constitution and other relevant documents.
- 9.25. The assertion by the Respondent that nonconformists will be excluded from further tuition clearly impairs or is likely to impair the dignity of homosexuals failed to consider the impact of their relational etiquette on the self-worth and dignity of homosexuals.
- 9.26. The right to freedom of religion is especially important for our constitutional democracy which is based on human dignity, equality and freedom. It was stated as follows in Woolmer et al **Constitutional Law of South Africa** at p 41-46:
"Rights to religious freedom can potentially be outweighed by other constitutionally protected rights...Religious freedom is apt to run up most often against demands for equality. These demands will be most compelling with regard to discrimination on the basis of race, sex and sexual orientation".
- 9.27. The right to freedom of religion incorporates the interest of the Respondent in conducting its internal affairs. The Commission, however, has to consider whether the right to religious freedom and association of the Respondent outweighs the constitutional imperative that there must not be unfair discrimination on the basis of sexual orientation.
- 9.28. The Constitutional Court in the *Lesbian and Gay Equality* matter implicitly endorsed a view that while one's sexual orientation might not always be a fixed immutable attribute, it should still be constitutionally protected because it relates to choices that are fundamental to a person's self-definition – like a person's religion or cultural identity.
- 9.29. The blatant disregard for the fundamental dignity of LGBTI community and misconceptions perpetuated by this relational etiquette of the Respondent should be rejected.
- 9.30. Further and importantly, the Respondent asserts that it is a voluntary association and students enroll by choice. It does to a certain extent refer to the associational right to

freedom of religion enshrined in sections 31 and 18 of the Constitution. This does not, however, justify the contents of its relational etiquette.

- 9.31. The dicta of the Constitutional Court in the **Lesbian and Gay Equality Project** case³⁶ is instructive with regard to the levels of tolerance for diversity required in a democratic South Africa: “...the acknowledgment and acceptance of difference is particularly important in our country... South Africans come in all shapes and sizes. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.”
- 9.32. The Constitutional Court, in **S v Lawrence**³⁷, addressing itself to tolerance of diversity of religions in the new South Africa, also affirms “The right to entertain such religious beliefs as a person chooses ... and the right to manifest religious belief by worship and practice.....”.

10. Findings

On the basis of the analysis in the preceding section, the Commission makes the following findings:

- 10.1. The Respondent’s provision in the prospectus relating to relational etiquette constitutes a violation of the LGBTI community’s right to equality, dignity, religion, freedom of association, freedom and security of the person and education.
- 10.2. The Commission finds that, to the extent that sexual minorities have been victims of past patterns of discrimination that led to systemic disadvantage, the relational etiquette of the Respondent has the potential effect of perpetuating discrimination against the LGBTI people.
- 10.3. The Commission rejects the exclusionary provision in the relational etiquette and the justification offered by the Respondent.
- 10.4. The Respondent provision in the relational etiquette constitutes a violation of rights that has the potential of resulting in psychological and physical harm to members of the LGBTI community

11. Recommendations

In terms of the Human Rights Commission Act, the Commission is entitled to “make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution.”

- 11.1. The Commission recommends accordingly that:
- 11.1.1. The Respondent to review and amend the Training Centre Constitution and Prospectus within a period of three (3) months from date of this finding. Such amended Constitution should demonstrate the following:
- a) *reasonable accommodation for diversity;*
 - b) *Affirmation that difference should not be the basis of exclusion.*

³⁶ Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Home Affairs and Others 2000 (2) SA 1 (CC)

³⁷ 1997 (4) SA 1176.

- 11.1.2. The Institute for Social Justice and Reconciliation Studies at the University of the Free State, in collaboration with the South African Council of Churches, engage the Respondent (including its leadership and associated institutions) in a series of *Sensitisation Workshops*, and report in writing to the Commission on the progress achieved thereby no later than six (6) months from the date of this finding.
- 11.1.3. The Commission makes this finding **without prejudice** to the entitlement of the Complainant or any other party, including the Commission, to institute legal proceedings against the Respondent in the Equality Court for any additional competent or alternative relief provided for in Section 21 of the Equality Act.

12. APPEAL

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days of the date of receipt of this finding**, by writing to:

Private Bag X2700
Houghton
2041

Signed in Braamfontein on the 4th day of April 2013
South African Human Rights Commission



COMPLAINT NO: Free State/1213/0350

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Complaint Ref. No.: FS/1213/0350

In the matter between:

SAHRC Own Initiative (Groenpunt Riots)

Complainant

and

Regional Commissioner of Correctional Services,
Free State and Northern Cape

First Respondent

Head of Prison, Groenpunt Correctional Centre

Second Respondent

REPORT

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as the “**Commission**”) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 1996 (hereinafter referred to as the “**Constitution**”).
- 1.2. The Commission and other institutions created under Chapter 9 of the Constitution are described as “state institutions supporting constitutional democracy”.
- 1.3. The Commission is specifically required to:
 - 1.3.1. Promote respect for human rights;
 - 1.3.2. Promote the protection, development and attainment of human rights; and
 - 1.3.3. Monitor and assess the observance of human rights in the Republic.
- 1.4. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 1.5. Further, section 184(2)(c) and (d) affords the Commission authority to carry out research and to educate on human rights related matters.
- 1.6. The Human Rights Commission Act, 54 of 1994 further supplements the powers of the Commission and provides the enabling framework for the powers of the Commission.
- 1.7. Section 9(6) of the Human Rights Commission Act determines the procedure to be followed in conducting an investigation regarding the alleged violation of or a threat to a fundamental right.

2. Parties

- 2.1. The Complainant in this matter is the South African Human Rights Commission an institution supporting constitutional democracy established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996.
- 2.2. The First Respondent is the Regional Commissioner of Correctional Services, Free State and Northern Cape Region (hereinafter referred to as the “**1st Respondent**”).

- 2.3. The Second Respondent is the Head of the Correctional Centre at Groenpunt Correctional Centre, Free State Province designated by the Commissioner to manage and control this Correctional Centre (hereinafter referred to as the **2nd Respondent**”).

3. Nature of Investigation

- 3.1. The investigation into this matter seeks to determine whether any one or more of the human rights listed in Chapter II of the Constitution (Bill of Rights), were violated during a mass riot of inmates incarcerated at the Groenpunt Correctional Centre in Deneysville, Free State Province. The riots took place between the 7th and the 10th January 2013 respectively.

4. Background to the Complaint

- 4.1. On Wednesday, 9th January 2013, the attention of the Commission was drawn to media reports¹ that hundreds of inmates at the Groenpunt Maximum Security Correctional Centre in Deneysville, Free State Province had staged a riot.
- 4.2. According to media reports, more than seven hundred (700) prisoners participated in the riot, smashing walls with home-made weapons and setting cells and offices alight. It was reported that nine (9) warders and fifty (50) prisoners were injured.
- 4.3. Media reports further highlighted that the prisoners staged the riot following complaints they had lodged concerning the quality of the food that they were being provided with. The prisoners were further reported to have demanded that one of the unit heads at the centre be fired.

5. Preliminary Assessment

- 5.1. The Free State Provincial Office of the Commission made a preliminary assessment of the complaint.
- 5.2. The Commission found the Respondents’ alleged conduct to amount to a *prima facie* violation of the following rights: **Human dignity (s10) and the Rights of arrested, detained and accused persons (s35)**.
- 5.3. The Commission further determined that the alleged violations fell within the mandate and jurisdiction of the Commission.
- 5.4. The Commission further determined that a full investigation be conducted by the Commission in terms of the Complaints Handling Procedures of the Commission.

6. Institutions with mandate to provide redress

In the assessment of the Commission, three institutions have a complementary and not exclusive jurisdiction to investigate this incident:

6.1. The Office of the Inspecting Judge (JICS)

The Judicial Inspectorate of Prisons is an independent office under the control of the Inspecting Judge. The object of the Judicial Inspectorate is to facilitate the inspection of

¹ The Times Newspaper, 07 January 2013.

correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on conditions in correctional centres.

Section 90(1) of the Correctional Services Act of 1998² provides that: *“The Inspecting Judge inspects or arranges for the inspection of correctional centres and remand detention facilities in order to report on the treatment of inmates in correctional centres and remand detention facilities and on conditions and any corrupt or dishonest practices in correctional centres and remand detention facilities”*.

6.2. The South African Police Services (SAPS)

Section 205(3) of the Constitution provides the following in terms of the mandate of SAPS: *“The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic of their property, and to uphold and enforce the law”*.

The Preamble to the South African Services Act³ provides that there is a need to provide a police service throughout the national territory to –

- a) ensure the safety and security of all persons and property in the national territory;
- b) uphold and safeguard the fundamental rights of every citizen as guaranteed by the Constitution;
- c) ensure co-operation between the service and the communities it serves in the combating of crime;
- d) reflect respect for victims of crime and an understanding of their needs, and
- e) ensure effective civilian supervision over the service.

6.3. The South African Human Rights Commission

The Commission is mandated in terms of section 184 of the Constitution *to make steps to secure appropriate redress where human rights have been violated and to investigate and report on the observance of human rights in the country*.

In terms of section 3(b) of the Human Rights Commission Act⁴ the Commission has jurisdiction *“to conduct or cause to be conducted any investigation on its own accord, into any alleged violation of or a threat to a fundamental right”*.

7. Steps taken by the Commission

7.1. Request for written response to allegations

7.1.1. On the 9th January 2013, the Free State Provincial Office of the Commission made a written request to the Respondents for further particulars relating to the reported riots. Attached to this letter was an Investigation Questionnaire which sought to gather information on whether, in the view of the Respondents, there had been any human rights violations and if so, how the violations could be remedied.

7.1.2. On 18th March 2013, the Commission sent a letter to the Office of the Inspecting

² Section 85, Correctional Services Act, 111 of 1998.

³ 68 of 1995.

⁴ No. 54 of 1994.

Judge advising them of the Commission's mandate and the Commission's preliminary assessment and seeking a detailed report on the Groenpunt Correctional Centre riots, events leading thereto and subsequent events thereto.

- 7.1.3. On 18th March 2013, the Commission sent letter to the Regional Commissioner of Correctional Services for Free State and Northern Cape Region, advising of the Commission's mandate and the Commission's preliminary assessment and seeking a detailed report on Groenpunt Correctional Centre riots, events leading thereto and subsequent events thereto.
- 7.1.4. Similarly, on 25th March 2013, the Commission sent the same request to the Deneysville Police Station and in addition to seeking information on the riots, the Commission also sought a detailed report on whether a case regarding the death of the inmate at Groenpunt Correctional Centre had been opened. Attached to this letter was an Investigation Questionnaire which sought to gather information on the above.
- 7.1.5. On Friday, 5th April 2013, the Commission sent a further letter to Deneysville Police Station urging its response to the letter of 25th March 2013.

7.2. Inspection In Loco

- 7.2.1. On the 10th January 2013, the Free State Provincial Office of the Commission dispatched an investigator to the Groenpunt Correctional Centre Maximum Security Centre in Deneysville for an inspection *in loco*.

The objectives of the inspection *in loco* were three-fold:

- a) To verify the accuracy of the media reports;
- b) To identify the causes of the riots;
- c) To determine whether the Commission can play a role in restoring the situation to normal and remedying any human rights violations.

The methodology employed in conducting investigations during the inspection *in loco* was interviews. The intention of the Commission was to conduct interviews with officials of the Correctional Centre, warders, inmates and their representatives.

8. Evidence collected during investigation

8.1. Response submitted by the Regional Commissioner of Correctional Services: Free State and Northern Cape Region to the letter and Investigation Questionnaire of the Commission dated 9th January 2013.

The Office of the Regional Commissioner forwarded its response to the Commission on 10th January 2013. The report highlighted the following in relation to the riots:

- 8.1.1. the inmates are all male and they are predominantly Africans;
- 8.1.2. that the underlying cause of the riots was due to the fact that inmates had submitted their complaints but that they had not been addressed by any staff of the Correctional Centre authority and they became impatient and aggressive;
- 8.1.3. the inmates' complaints were in relation to the following:

- a) inadequate medical care;
 - b) inadequate nutritional services;
 - c) lack of rehabilitation programmes;
 - d) the fact that the Case Management Committee sittings and their decisions are not communicated to the inmates;
 - e) the fact that reclassification of inmates is not done regularly;
 - f) the fact that there is no maintenance or repairs of the Centre;
 - g) the conduct of the Emergency Support Team (EST) during searches;
 - h) the fact that the administration of appeals is slow;
 - i) the establishment of a Prisoner's Management Committees.
- 8.1.4. about three hundred (300) inmates participated in the riots, they broke open the grill locks of the cells and instigated other inmates to join in the riots;
- 8.1.5. the inmates displayed aggressive and violent behavior, they assaulted and injured officials and pelted them with stones, they also set the administration office alight, broke open the Unit A tuck shop, looted it and set it alight and also barricaded the two entrances to the Unit with beds and cabinets, placed mattresses on them and set them alight;
- 8.1.6. the Centre immediately reported the matter to higher authority in the Department of Correctional Services and the Department's Emergency Support Teams, Sasolburg Fire Brigade, Deneysville SAPS, Sasolburg Ambulance Services and the Welkom Public Order Police were called in and they managed to bring the situation under control at about 02:00 in the morning;
- 8.1.7. the Administration brought in extra reinforcement to maintain stability, the instigators were identified, removed from the Unit and transferred to other Correctional Centre;
- 8.1.8. there is no organised body representing the inmates and there are no negotiations between the Correctional Centre and the inmates, but an investigation is underway to assist in the determination of a way forward;
- 8.1.9. the Correctional Centre would like the Commission to educate offenders on their rights and their corresponding responsibilities and to assist the Department to identify where there were any human rights violations and the violations identified to be remedied;
- 8.1.10. the Correctional Centre further indicated that they would like the Office of the Inspecting Judge to continue to investigate inmates complaints and provide proper feedback at all times;
- 8.1.11. the Correctional Centre also identified SAPS as another stakeholder that is providing assistance in terms of providing security and investigating any criminal acts that might have been committed during the riots;
- 8.1.12. the Provincial Department of Correctional Services also responded promptly and provided leadership support in efforts to restore order and maintain peace, the National Department did the same;

- 8.1.13. the inmates committed criminal acts of arson, assault and public violence and investigations will determine whether the Correctional Centre infringed any laws, policies or regulations;
- 8.1.14. in future, inmates grievances are to be attended to urgently and the grievance procedure is to be followed by both inmates and officials.

8.2. Report submitted by the Department of Correctional Services on 15th April 2013 after the completion of the Department's preliminary investigations. In the report received by the Commission on 15th April 2013, the Department noted the following:

- 8.2.1. Mr Motloun, the Unit A Manager from the Maximum Correctional Centre reported to the Head of Groenpunt Correctional Centre, Mr Sekele, that the inmates did not want to enter their cells and to be locked up by the Unit Case Officers because they had grievances that they wanted to be addressed by the Head of the Correctional Centre, Mr Mokhosi, a Case Officer from Unit A confirmed this;
- 8.2.2. A representative of the inmates, Mr Andrew Letshele communicated the grievances of the inmates to the Head of the Correctional Centre and provided a memorandum detailing complaints registered by the Prisoner's Management Committee date 15th November 2012, the memorandum highlighted the following complaints:
 - a) a lack of medical staff and the distribution of expired medication, negligence by staff, a lack of medication for a variety of illnesses and the fact that inmates with eye problems do not receive spectacles;
 - b) the Case Management Committee fails to apply the re-classification tool;
 - c) the Emergency Support Team (EST) conduct themselves inappropriately;
 - d) maladministration in the handling of appeals and other administrative matters;
 - e) a new Prisoner's Management Committee needs to be elected in all sections;
 - f) the kitchen does not comply with hygiene and health standards, there is shortage of food, non-compliance with the dress code and there is non-compliance with nutritional standards;
 - g) an absence of social worker programmes, the unavailability of developmental programmes and a lack of rehabilitative programmes;
 - h) corruption of officials and the fact that they do not intervene when there are gang fights, the inmates have to stop the fights themselves;
 - i) inmates allege that Mr. Motloun, the Unit Manager and the Case Officers do not serve them properly and they command no respect;
 - j) inmates further complained about the fact that their cells are opened late and that they do not receive any exercise as per the policies;
 - k) inmates further allege that the Acting Divisional Head: Security harasses them, he was also recently caught with a cell phone during the riot on 7th January 2013;
 - l) inmates allege that their grievances were not handled properly or timeously as they were handed over to Management on 19th April 2012 but had not been addressed by 7th January 2013;

- m) lack of repairs when there are damages;
 - n) inmates also indicated the people whom they allege are helpful and people whom they would like to be led by;
 - o) inmates further indicated that officials from Unit A should be reshuffled as some of them are corrupt;
- 8.2.3. the inmates became aggressive, looted the tuck shop and burned down cells, the SAPS Public Order Section brought the situation under control at around 23h00;
- 8.2.4. about nine (9) officials and fifty (50) inmates sustained injuries during the riot, they all received medical attention and there were no fatalities;
- 8.2.5. twenty five (25) inmates were identified as the instigators and were removed, to date four hundred and seven (407) inmates were transferred successfully to other Correctional facilities and ninety three (93) inmates are due for transfer to other facilities soon;
- 8.2.6. due to the fear that other Correctional Centres would embark on riots as well, search operations were conducted at other Correctional Centres, including the Heilbron Correctional Centre, the Groenpunt Medium Correctional Centre and the Vereeniging Correctional Centre, during these searches, mobile phones and unauthorised items, including weapons were confiscated from officials and inmates;
- 8.2.7. in resolving the matter and ensuring that the riot never happens again, the Correctional Centre did the following:
- a) Vacant posts were filled;
 - b) Security at the Correctional Centre has been enhanced and the locks were repaired;
 - c) The Unit was prioritised for renovations in the new financial year 2013/2014;
 - d) The Memorandum of Grievances from offenders from Groenpunt Medium and Maximum Correctional Centres has been addressed by the Area Commissioner, Area Coordinator Corrections and Area Coordinator Development and Care with different stakeholders;
 - e) Management of the Correctional Centre has been reviewed by the suspension of both the Area Commissioner and the Head of the Centre and other senior officials have been appointed pending the finalisation of the investigation and disciplinary enquiries.
 - f) The Head of the Correctional Centre alleges to have addressed and handled the inmates complaints adequately.

(the report is annexed hereto as “Annexure A”)

8.3. Report submitted by the Office of the Inspecting Judge on 4th April 2013.

The Office of the Inspecting Judge indicated that the report had been tabled in Parliament. The report highlighted the following:

- 8.3.1. In so far as how the riots came about, the report of the Office of the Inspecting Judge is similar to reports noted above.

- 8.3.2. Inmates were assaulted by the Department's officials and EST members after the situation had been brought under control, the JICS inspector noted that even inmates that did not pose any threat and were cooperating were being assaulted.
- 8.3.3. There is a serious staff shortage and the Inspecting Judge highlighted this shortage as a "ticking time bomb" in discussions between the Deputy Regional Commissioner and JICS, which discussions took place in February 2013;
- 8.3.4. The JICS maintains that had the Head of the Correctional Centre and the Area Commissioner done more to contain the inmate's agitation before the EST was deployed, it may have been possible to prevent the riot;
- 8.3.5. The JICS inspector highlighted that the Correctional Centre was unprepared for the crisis, the generator was faulty and could not be used immediately after the flow of electricity was disrupted and some of the fire fighting equipment had not been serviced since 2008, hence the Centre could not contain the fire and the fire brigade had to be called in;
- 8.3.6. The transfer process was poorly managed and inmates who had not even been involved in the riots were transferred, inmates who were perceived to be troublesome were also transferred to other Correctional Centres;
- 8.3.7. The Department indicated in its report that fifty (50) inmates had been injured but during its investigation, JICS found that seventy four (74) inmates had been injured and by the time the JICS final report was compiled a hundred and four (104) offenders had been injured although it is not clear whether the injuries were sustained during the riot and not immediately reported;
- 8.3.8. Officials of the Department had low staff morale as a result of staff shortage and the inappropriate shift system;
- 8.3.9. There is a breakdown in the relationship between personnel and management of the Correctional Centre and this contributed to the riot and the Correctional Centre's inability to manage the situation;

8.4. Report submitted by Deneysville SAPS on 19th April 2013

The report from Deneysville SAPS highlighted the following:

- 8.4.1. The SAPS and Officials from the Department of Correctional Services used minimum force in handling the violent Correctional Centre riots in that implements like tear gas and rubber bullets were used;
- 8.4.2. The police seized weapons from the inmates, these weapons included bricks, homemade knives and sharp objects, sixty eight (68) inmates were injured and there were no fatalities;
- 8.4.3. Twenty five (25) inmates were identified as the instigators in the riots and they were charged with arson, assault and malicious damage to property;
- 8.4.4. The cause of the riots were that inmates were not satisfied with the treatment they were receiving from the Department of Correctional Services, problems like corruption were highlighted by the inmates;
- 8.4.5. The matter is still under investigation and some of the inmates have been transferred to other Correctional Centres.

8.5. Evidence collected during Inspection in Loco

- 8.5.1. Not much information was gathered during the inspection in loco as officials of the Department and Management of the Correctional Centre were convening a meeting to address the situation with the rioters; this meant that there was no one available to address the Commission;
- 8.5.2. The investigator did however, manage to speak to Mrs Molatedi, the Deputy Regional Correctional Services Commissioner and she highlighted the following:
- a) The Correctional Centre was in a process of reconstructing files that had been damaged in the fire;
 - b) The area that had been burnt down could not be accessed as it had been declared a crime scene as the SAPS was still busy with their investigations and could not allow any contamination of the crime scene;
 - c) The Commission could not, at that stage have access to any inmates or their representatives as hundreds of inmates had been transferred to other Correctional Centres because during the riots, the inmates burnt down office and inmate cells, hence those areas had become uninhabitable and the Correctional Centre was trying to sort out the logistics of making the Correctional Centre habitable for inmates who had not yet been transferred;
 - d) The Department of Public works was on site to evaluate the extent of the damage to that they could ascertain how much money would be needed in repairs and renovations.

9. Applicable Legal Framework

9.1. International Instruments

a) United Nations Declaration of Human Rights (UDHR)⁵

The UDHR, in its preamble recognizes the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.

Article 3 of the UDHR provides that *“everyone has a right to life, liberty and security of the person”*.

Article 5 provides that *“no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”*.

b) United Nations Standard Minimum Rules for the Treatment of Prisoners⁶

These rules seek to set out what is generally accepted as being good principles and practice in the treatment of prisoners and the management of institutions.

Some notable provisions in the Rules are as follows:

Article 20(1) provides that *“every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served”*.

⁵ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.

⁶ Adopted in Geneva in 1955.

Article 21 (1) provides that *“every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits”*.

Article 22(2) provides that *“sick prisoners who require specialist treatment shall be transferred to specialized or to civil hospital facilities. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceuticals supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitably trained officers”*.

c) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁷

The Convention seeks to *“make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”*.

To this end, Article 16(1) of the Convention mandates that *“each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 of the Convention”*.

d) Basic Principles for the Treatment of Prisoners⁸

Article 1 of the Principles provides that *“all prisoners shall be treated with the respect due to their inherent dignity and value as human beings”*.

Article 5 provides that *“except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights as well as such other rights as are set out in other United Nations covenants”*.

e) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁹

Principle 1 provides that *“all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person”*.

Principle 6 provides that *“no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment”*.

9.2. Constitutional Framework

a) Section 1(a) of the Constitution Act, 108 of 1996

Section 1(a) of the Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms. These are the foundational values of the Constitution and therefore form the bedrock upon which the Constitution is based.

⁷ Adopted by the General Assembly, resolution 39/46 of 10 December 1984.

⁸ Adopted by the General Assembly, resolution 45/111 of 14 December 1990.

⁹ Adopted by the General Assembly, resolution 43/173 of 9 December 1988.

b) Section 7(2) of the Constitution

This section requires the State, in this instance, the Respondents, to respect, protect, promote and fulfil all fundamental rights.

c) Section 10: The Right to Human Dignity

Section 10 of the Constitution provides that:

“Everyone has inherent dignity and the right to have their dignity respected and protected”.

d) Section 35: Arrested, detained and accused persons

Section 35 of the Constitution provides that:

*“(2) Everyone who is detained, including every sentenced prisoner, has the right –
(e) to conditions of detention that are consistent with human dignity, including at least exercises and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment”.*

9.3. Applicable Domestic Legislation

a) Correctional Services Act¹⁰

The Correctional Services Act seeks to give effect to the Bill of Rights as enshrined in the Constitution and in particular, provisions relating to offenders.

The Act also seeks to recognize and give effect to international principles on correctional matters and to regulate the release of offenders and the system of community corrections and to provide for independent mechanisms to investigate and scrutinize the activities of the Department of Correctional Services.

9.4. Applicable Regulatory Framework

a) Correctional Services Regulations¹¹

The Regulations highlight the fact that custody of all inmates must be under conditions of human dignity.

The Regulations provide for the admission of inmates, their appropriate accommodation, nutrition and healthcare.

Chapter 2(4)(1) provides that sentenced inmates must be provided with a nutritious balanced diet.

Chapter 7(1)(a) states that primary healthcare must be available in a correctional centre at least in the same level as that rendered by the State to members to the community.

9.5. Applicable Policy Framework

a) White Paper on Corrections (2005)

Chapter 29 of the Department’s White Paper provides that the Department commits itself to full compliance with the provisions of the Constitution and international instruments in relation to the honouring of the basic rights of offenders.

¹⁰ Act 111 of 1998.

¹¹ Regulations in terms of section 134 of the Correctional Services Act 111 of 1998, Regulation Gazette, No. 35277.

In its White Paper, the Department also highlights that it has a needs-based framework for implementation of their function of safety and security within a human rights context. According to the Department, the needs-based approach will ensure that there is *“a perfect balance between secure and safe custody on the one hand and correction, promotion of social responsibility and human development on the other hand”*.

9.6. Strategic Frameworks

a) Department of Correctional Services Strategic Plan¹²

In its strategic plan, the Department of Correctional Services highlights its strategic objectives as amongst others to ensure that:

- i. remand detainees and offenders are held in secure, safe and humane conditions;
- ii. effective case management processes are in place;
- iii. effective incarceration and rehabilitation programmes of offenders are in place;
- iv. offender behavior is corrected through access to correctional programmes and psychological, social and spiritual services;
- v. offenders human development is improved through literacy, education and skills competency programmes;
- vi. inmates are provided with appropriate nutritional services;
- vii. inmates are provided with appropriate access to health care services;
- viii. inmates are provided with appropriate hygiene services.

9.7. Relevant Case Law

a) **Goldberg v Minister of Prisons**¹³

In the **Goldberg** case, Corbett JA highlighted the following:

“It seems to me that fundamentally, a convicted and sentenced prisoner retains all the basic rights and liberties of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he as a prisoner, is placed. Of course, the inroads which incarceration necessarily makes upon a prisoner’s personal rights and liberties are very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial residuum of basic rights which he cannot be denied, and if he is denied them, then he is entitled to legal redress”.

¹² Strategic Plan 2013/2014 – 2016/2017.

¹³ 1979 (1) SA 14 (A),39.

b) S v Williams¹⁴

In referring to punishment in general, the Constitutional Court, in *S v Williams*, held that the Constitution required that *“measures that assail the dignity and self-esteem of an individual will have to be justified; there is no place for brutal and dehumanizing treatment and punishment. The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding lights of civilized societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that even the vilest criminal remains a human being possessed of common human dignity”*.¹⁵

c) NM v Smith

In **NM v Smith (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC)** the court held that *“a constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom*.¹⁶

The Court further held that if human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. The Court referred to judgements made in the matter of Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others:

“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 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. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it clear that dignity is not only a value that is fundamental to our constitution, it is a justiciable and enforceable right that must be respected and protected”.¹⁷

¹⁴ 1995 (3) SA 632 (CC).

¹⁵ Ibid para 58.

¹⁶ NM v Smith at para 49.

¹⁷ NM v Smith at para 50-51.

d) S v Makwanyane and Another¹⁸

In **S v Makwanyane and Another**, the Court observed as follows:

“Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution”.

Chaskalson P further stated that although imprisonment impairs a person’s dignity, the State has the power to impose this form of punishment as part of the criminal justice system. Prisoners, however, do not lose their rights on entering prison. On the contrary prisoners *“retain all the rights to which every person is entitled under the Bill of Rights subject only to limitations imposed by the prison regime that are justifiable under the limitations clause”*.¹⁹

10. Analysis**10.1. Right to Human Dignity**

- a) The Commission's preliminary assessment is that the inmate's rights to human dignity had been violated. The state has obligations to respect, protect, promote and fulfil the rights in the Bill of Rights, including the right to human dignity.
- b) Prisoners generally need to tolerate a greater limitation of their rights, including their right to dignity, than other persons, but an infringement of inmates rights must be justifiable with reference to the objectives of their incarceration, which are the prevention of crime and the rehabilitation of the offender.
- c) There was nothing gleaned during the course of Investigations that suggested that the Respondents responded to the complaints of the inmates adequately and timeously.
- d) The Respondents did not comply with the minimum standards of detention in light of domestic law and international instruments and the inmates were not treated with the necessary respect towards their human dignity.
- e) The Respondents did not respond to calls by personnel to employ more staff as there is a shortage of staff, this affects the security of the Centre and inmates cannot be taken care of properly.

10.2. Rights of Arrested and Detained Persons

- a) The Commission's preliminary assessment is that the Respondents did not provide inmates with conditions of detention that are consistent with human dignity, which obligation rests on them in terms of section 35(2)(e) of the Constitution.
- b) In its White Paper on Corrections, the Department highlight that it has a needs-based framework for implementation of their function of safety and security within a human rights context. According to the Department, the needs-based approach will ensure that there is *“a perfect balance between secure and safe custody on the*

¹⁸ 1995 (3) Sa 391 (CC).

¹⁹ S v Makwanyane at paras 142-143.

one hand and correction, promotion of social responsibility and human development on the other hand". The Department however has not reached this goal in that they did not provide inmates with this balance within a human rights context and thus violated inmates right to conditions of detention that are consistent with human dignity.

- c) Nothing gleaned from the various reports obtained by the Commission shows that both Respondents took reasonable measures to ensure that they provide the inmates with exercise, adequate accommodation, reading material, medical treatment and with generally excepted standards of accommodation in line with their obligations.

10.3. Obligations and Responsibilities of the National and Provincial Department of Correctional Services

- a) National and provincial government departments have a clear responsibility to ensure compliance with standard procedures and they also have a monitoring role.
- b) It is incumbent upon both provincial and national departments to monitor and intervene if necessary in the work of correctional centres. National and provincial departments should have exercised closer monitoring of the Correctional Centre. Such monitoring would have ensured compliance with the Department Strategic Plan Objectives, the Department's Regulations and compliance with International instruments.

11. Findings

Based on the investigation conducted by the Commission and the analysis of the Constitutional rights, court judgments and applicable legislation, the Commission finds that:

- 11.1. The First and Second Respondents failed to adequately and timeously address inmates' complaints and grievances and this ultimately led to the riots that took place;
- 11.2. The Complaint of violations to the right to human dignity, and the rights of arrested and detained persons is upheld.

12. Recommendations

In terms of the human Rights Commission Act, the Commission is entitled to:

"make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution".

The Commission recommends accordingly that:

- 12.1. The Department of Correctional Services and Management of the Correctional Centre must ensure that inmates have access to rapid health treatment and to social and psychological services, within twelve (12) months from date of this finding;
- 12.2. The Department of Correctional Services and Management of the Correctional Centre must, with immediate effect, monitor how food and supplies are distributed, to this end, they must ensure that all inmates get basic necessities; rations and that these are not intercepted by other inmates and/or staff.
- 12.3. The Department and Management of the Correctional Centre must improve patrols by having systems where inmates can raise the alarm about corruption and irresponsible

behavior of officials, regular patrols to the cells and unannounced visits to cells, rapid access to the cells in the event of incidents and during lock-up must be ensured within three (3) months from date of this finding;

- 12.4. Proper developmental and rehabilitative programmes must be developed and implemented in line with the Departmental policies and regulations within six (6) months from date of this finding;
- 12.5. Inmates complaints/grievances must be responded to timeously and handled appropriately with immediate effect.
- 12.6. The Commission shall regularly monitor the implementation of the recommendation made herein and this end the Head of the Correctional Centre must submit written progress report at least every six (6) months until all recommendations shall have been implemented.

13. APPEAL

You have the **right to lodge and appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days of the date of receipt of this finding**, by writing to:

Private Bag X2700
Houghton
2041

South African Human Rights Commission



COMPLAINT NO: Free State/1213/0324

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref. No.: FS/1213/0324

In the matter between:

South African Human Rights Commission
(On behalf of Henneman Residents)

Complainant

and

Matjhabeng Local Municipality

Respondent

REPORT

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as the “Commission”) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the “Constitution”).
- 1.2. The Commission is specifically required to:
 - 1.2.1. Promote respect for human rights;
 - 1.2.2. Promote the protection, development and attainment of human rights; and
 - 1.2.3. Monitor and assess the observance of human rights in the Republic.
- 1.3. Section 184(2) of the Constitution empowers the Commission to *investigate and report on the observance of human rights* in the country.
- 1.4. The Human Rights Commission Act, 54 of 1994, provides the enabling framework for the powers of the Commission.
- 1.5. Section 9(6) of the Human Rights Commission, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

2. Parties

- 2.1. The Complainant in this matter is the South African Human Rights Commission (hereinafter referred to as “Complainant”).
- 2.2. The Respondent is Matjhabeng Local Municipality, a municipality established in terms of the provisions of the Local Government Municipal Structures Act 117 of 1998 with its Head Office situated at One Reinet Street, Welkom (hereinafter referred to as “Respondent”).
- 2.3. The Respondent is cited as the local government authority with jurisdiction over Henneman responsible for the delivery of basic municipal services to its residents.

3. Background to the Complaint

- 3.1. On Monday, 21 January 2013, the attention of the Commission was drawn to a news broadcast by the South African Broadcasting Corporation (hereinafter referred to as the “SABC”) which highlighted violent service delivery protests in Phomolong, Henneman, in the Free State Province.

- 3.2. The SABC news broadcast highlighted the plight of the residents of Phomolong and finally, their desperation in relation to service delivery in Phomolong.

4. Preliminary Assessment

The Provincial Office of the Free State made a preliminary assessment of the complaint.

- 4.1. The Commission found that the Respondent's conduct amounted to a *prima facie* violation of the rights to dignity, a clean environment, the right to housing, access to health care services and access to information, contained in sections 10, 24 and 26, 27 and 32 of the Constitution.
- 4.2. The Commission further determined that the alleged violations fell within the mandate and jurisdiction of the Commission.
- 4.3. The Commission further determined that a full investigation be conducted by the Commission in terms of the Complaints Handling Procedures of the Commission.

5. Steps taken by the Commission

5.1. Request for written response to allegations

- 5.1.1. On Monday, 11 March 2013, the Commission sent an allegation letter to the Respondent setting out the observations of the Commission in regard to the media reports, the preliminary assessment of the Commission and an invitation for the Respondent to respond in writing to the allegations within 21 (twenty-one) days from date of same letter.
- 5.1.2. The Commission has to date not received any response from the Respondent.

5.2. Interviews conducted during the inspection *in loco*

- 5.2.1. On 20 February 2013, the Commission dispatched an investigator to conduct an inspection-in-loco of the municipality under review.
- 5.2.2. The Commission conducted interviews with members of the local police station in Henneman, the organisers of the protests and a random sample of residents of the Municipality to verify the accuracy of media reports.

5.2.3. Interview with residents

The residents of Henneman confirmed that they raised the following issues in the memorandum to the Mayor of Matjhabeng Local Municipality:

- a) **Poor state of roads – the roads in the area are in a very bad state and become inaccessible when it rains;**
- b) **Lack of decent sanitation & functioning sewer network** – residents alleged that pipes burst constantly and that the sewers have faeces in them which badly affect the health of the community. A senior citizen allegedly fell into the sewer and died. There are still over **1500** (one thousand five hundred) **bucket toilets** in Henneman. They further indicated that there is a very high level of tuberculosis in Phomolong which they attribute to the sewer and its unbearable smell.

- c) Lack of access to healthcare services** – There is no hospital in Henneman and this is a grave infringement on the community’s right to access health care services. Residents have to use one clinic which is only operational until four o’clock in the afternoon.
- d) Lack of access to adequate housing** – Residents indicated that the Municipality had not allocated sites since around 1997 and there was congestion. To this end, people had placed themselves in an informal settlement to ease up the congestion that was in Phomolong. They also indicated that there was land that could be developed but that the Municipality had indicated that the land is used by a certain individual as a gliding site for his aeroplanes.
- e) Vulnerable groups (Children)** – One of the residents who runs a Day Care Centre (crèche) of about 60 (sixty) children in Extension One in Phomolong, stated that the lack of decent sanitation in the area has resulted in the children at the crèche having to use only two bucket toilets. These toilets have no privacy and are not conducive for use by children. They are also not safe as a child can easily fall into the bucket, hence a teacher always has to accompany and supervise a child who visits the toilet.

The crèche has a big hole into which the buckets are emptied because they cannot wait for the Municipality to empty them as they become full very quickly. They have employed a care taker who assists in emptying the buckets and ensuring that they are clean. There are toilets that have been built for the crèche but the Municipality never finished the project. Further, there is no water connection and so the toilets cannot be used.

They have complained to the Municipality about the problems they encounter with the bucket toilets and the Municipality has made promises on several occasions to come and try to fix the problem.

- f) Vulnerable groups (Older persons & Women)** – An elderly woman born in 1938 and who has resided in Phomolong all her life alleged that she has never had a flushing toilet; she uses a bucket toilet with a makeshift enclosure of dilapidated corrugated iron sheets. In around 2007, she had hopes that this unsanitary form of sanitation would end when the Municipality began a project of installing flushing toilets.

However, the project was never completed. The enclosures and the toilet were built and installed but the toilet was not connected to any pipes or sewer network, hence it cannot be used and she cannot afford to complete the project herself. The toilet enclosure can now only be used as a store room. She indicated that their roads are also very bad and when it rains they become completely inaccessible. For this reason, when it rains the Municipality does not collect the buckets and the residents have to dig holes in their yards in order to empty the buckets.

She further indicated that they also have a problem with sewerage and that the streets are always full of sewerage from burst pipes and it smells horrible. When it rains and the buckets are full, the smell from both is unbearable.

- g) Ill-health** – Residents stated that they are constantly ill because of the smell

of the sewerage and some have been diagnosed with tuberculosis due to the spillage and the stench from the sewer network.

- h) Informal settlement dwellers (Indigent)** – Residents stated that the municipality has failed to provide their informal settlement with basic municipal services since they occupied the area in 2005. To date, the area has not been formalized and they do not have any basic municipal services like refuse removal or sanitation notwithstanding their indigent status.

5.2.4. Interview with Healthcare workers at Phomolong Clinic

A professional nurse who works at Phomolong Clinic, stated that since her tenure in June 2012, she has witnessed a high prevalence of tuberculosis and HIV infections despite awareness campaigns conducted by the Clinic. She attributes this to a high level of substance abuse in the community and socio-economic conditions in the area particularly those relating to lack of decent sanitation and clean environment.

She also highlighted the fact that the Clinic is extremely busy as there is no hospital in the area and stated that nurses are overworked as even people from the neighbouring farms use that clinic, which closes at four in the afternoon.

5.3. Physical Inspection

- 5.3.1. On 20 February 2013, the Free State Office dispatched an investigator to conduct an inspection *in loco* in Phomolong, Henneman.

5.4. Evidence collected during investigation

Response of the Municipality's Unit Manager, Mr Atolo, during an interview conducted during the inspection *in loco*

During the Inspection *in loco*, the Commission's investigator managed to interview the Unit Manager of the Municipality, Mr Atolo, and he addressed some of the allegations as follows:

- 5.4.1. Sites & Housing allocation-** The municipality allocated sites to residents of Phomolong in 2005 when the Municipality bought the land called 'Bokamoso' for residential sites. The Municipality is waiting for the Provincial Office to allocate funds for a survey to be conducted and to establish the area as a township, which establishment is the prerogative of the Department of Cooperative Government and Traditional Affairs (COGTA). The Municipality still awaits funding so that they can engage service providers to begin work.

- 5.4.2. Roads** – Mr Atolo conceded that the roads are not in good condition because the soil is clay soil, and therefore whenever it rains the roads become inaccessible. He also agrees that the Municipality is unable to collect buckets when it rains due to the inaccessibility of the roads.

He stated that the challenge is that all six (6) towns falling under the Matjhabeng Municipality share resources, hence when there is a problem in Henneman, they have to wait for the town that has the resources to complete what they are doing.

He indicated however, that the Municipality has completed 75% of its work on roads and that they are embarking on a project of paving roads in Phomolong.

5.4.3. Sanitation - In around 2005/6, the bucket eradication programme began in Henneman, but it encountered problems at various levels because contractors did not do a proper job. The enclosures were completed and some toilets were connected but the problem is that whenever someone flushes the sewerage within the township and there is no proper outflow, hence the pipes constantly burst. This is the primary reason why there is a sewerage problem in Phomolong.

5.4.4. The Programme Management Unit (PMU) was responsible for this project and they indicated that the problem was due to lack of an outfall sewer that goes to the pump station, when people flush their toilets it goes through the township and has no way of reaching the pump station.

5.4.5. The Municipality has employed an interim solution to this problem in that they use a honey sucker which sucks the spillage in the township. This is, however, only a provisional measure.

5.4.6. The PMU has indicated that they applied for additional funding in 2010 which application was only approved in early 2013. A contractor has already been chosen, and once funds have been allocated and approved the contractor will begin work. The PMU also endeavours to eradicate the bucket toilets.

5.4.7. Healthcare services - Mr Atolo confirmed that there is no hospital in Henneman, with the nearest hospitals being in Virginia and Welkom, and yet the Clinic in Henneman closes at four in the afternoon, hence the residents request that the Clinic at the very least be a twenty four hour clinic. Mr. Atolo however, indicated that this was the prerogative of the Department of Health.

5.4.8. Schools - Mr. Atolo indicated that he could not respond to this as schools are the prerogative of the Department of Education.

5.4.9. Public Participation - Mr. Atolo indicated that there are ward councillors who call monthly community meetings. He also indicated that they had recommended the establishment of the Henneman Community Development Forum which would comprise of various government departments, other stakeholders and non-governmental organizations. The purpose of this forum will be to have structured interaction to ensure a relationship with various government departments, non-governmental organizations, the municipality and the community in an effort to foster good communication practices, and find amicable solutions to the challenges facing Henneman.

5.5. Evidence collected during the Inspection in Loco

5.5.1. There are patent levels of unemployment in the area, with many residents living off social grants.

5.5.2. Many residents are infected with tuberculosis.

5.5.3. The roads are in a very bad state and it is clear that they are not being properly maintained.

5.5.4. People who have settled themselves in the informal settlement do not have any basic municipal services.

5.5.5. There are times when the buckets are not collected on time and this consequently

leads to the residents having to dig holes in their yards to dispose of the faeces, this is demeaning, an insult to their dignity and unsanitary and unhealthy.

(Photographs taken from the Inspection in Loco are attached below)

IMAGE 1: Photographed at Phomolong on 20 February 2013.

Residents of Phomolong are still subjected to the indignity of using bucket system toilets which is very unsanitary and unhealthy.

IMAGE 2: Photographed at Phomolong on 20 February 2013.

This project was never completed; toilet enclosures were built, the toilet fixtures were installed but the toilets were never connected to water pipes, hence these enclosures are just used as storage rooms.

IMAGE 3: Photographed at Phomolong on 20 February 2013.

Residents are forced to dig holes in their own yards to dispose of the contents of the buckets when the Municipality is unable to collect the buckets.

IMAGE 4: Photographed at Phomolong on 20 February 2013.

The sewer smells horrible and it keeps on getting worse, people fall into the filth and a member of the community has died from falling into one such sewer.

6. Applicable Legal Framework

International instruments

International Covenant on Economic, Social and Cultural Rights¹

Article 2(1) explains the nature of the obligation resting on states parties with regard to the provision of socio-economic rights, highlighting that minimum core and progressive realisation are hallmarks of this obligation, while provision of the rights is subject to the state's available resources.

Article 11 enshrines the right of everyone to an adequate standard of living, which includes accessibility and availability of adequate housing, food and clothing. The rights to water and sanitation – being vital aspects of an 'adequate standard of living' – are clearly governed by this Article.

Article 12 recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. For such a right to be achieved, it is apparent that access to health care services is of primary importance.

While South Africa has not ratified the Covenant it is a signatory State, and the Government of South Africa can therefore not act in a manner that is contrary to spirit of this Covenant.

United Nations Committee on Economic, Social and Cultural Rights: General Comment No. 4 – The right to adequate housing (1991)

The right to housing applies to everyone, incorporating both an individual right and that of the family. The right must be interpreted broadly so as to cover a form of shelter which provides for security, peace and dignity rather than a simple cover over one's head. This is consistent with both

¹ 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 18 June 2013].

the general principles of the Covenant – including the right to dignity – and the centrality of the attainment of the right to housing for the provision of other rights.

The requirement that the housing be *adequate* gives content to the right to housing, in providing for a minimum standard which includes legal security of tenure over one's shelter which protects against forced eviction, harassment and other threats; availability of services, materials, facilities and infrastructure; affordability of the housing so as not to compromise the satisfaction of other basic needs and rights; habitability; and accessibility (including adequate access for disabled persons).

The States parties' duty to provide for this right includes ensuring that housing policies and resources are directed towards disadvantaged and impoverished, and thus vulnerable, communities.

United Nations Declaration on Human Settlements²

The United Nations Declaration on Human Settlements entreats signatories thereto to commit themselves to:

- a) Ensuring adequate shelter for all and making sustainable human settlements safer, healthier and more liveable, equitable, sustainable and productive;
- b) Recognising the particular needs of women, children and youth for safe, healthy and secure living conditions;
- c) Intensifying efforts to eradicate poverty and discrimination, promoting and protecting human rights and fundamental freedoms for all, and providing for basic needs, such as education, nutrition and life-span health care services and adequate shelter for all;
- d) Improving the living conditions in human settlements in ways that are consonant with local needs and realities, and ensuring full and equal participation of all women and men and the effective participation of youth in political, economic and social life; and
- e) Promoting full accessibility for people with disabilities, as well as gender equality in policies, programmes and projects for shelter and sustainable human settlement development.

United Nations Committee on Economic, Social and Cultural Rights: General Comment No. 15 – The right to water (2003)

The Committee gave content to the right to water in the following manner:

“The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.”³

Moreover, it was held that the right “contains both freedoms and entitlements”. The freedoms include “the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference”, while the entitlements refer to “the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.”⁴

² Istanbul Declaration on Human Settlements, available online at www.unhabitat.org [accessed 18 June 2013].

³ Para 2.

⁴ Para 10.

The Committee recommended that before any action that interferes with the right of access to water is carried out by the State or any third party, the relevant authority must ensure that such actions are performed in a manner warranted by law.

The Committee highlighted the fact that this right is enjoyed without discrimination,⁵ and that States parties must specifically ensure that traditionally disadvantaged and marginalised persons are empowered to exercise their right to water.⁶

United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation⁷

The General Assembly adopted a resolution calling on all states to provide safe, clean, accessible and affordable drinking water and sanitation for all.

Convention on the Rights of the Child⁸

Article 24(1) of the Convention recognises “the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health”, and compels States parties to ensure access to such services and facilities.

Article 24(2) obliges States parties to “combat disease and malnutrition...through the provision of adequate nutritious foods and clean drinking-water.”

More generally, Article 27 enshrines “the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.” This encompasses the necessary living conditions for the child’s development, as well as State support programmes with regard, inter alia, to housing.

The Rio Declaration on Environment and Development⁹

The Rio Declaration states that in order to protect the environment, states must first fulfil the basic needs of their people and improve living standards.

The World Summit on Sustainable Development: Plan of Implementation¹⁰

This Plan directs States to prevent and minimise waste and maximise re-use, recycling and use of environmentally friendly alternative materials, with the participation of all stakeholders. This must be done to minimise adverse effects on the environment and improve resource efficiency.

The Plan also states that in order for States to reverse the current trend in natural resource degradation, states must implement strategies, including targets, to protect ecosystems and to achieve integrated management of natural resources. To achieve this:

- a) States must launch a programme of action to achieve the Millennium Development Goals on safe drinking water, with a view to halving, by 2015, the proportion of people who are unable to reach or to afford safe drinking water and the proportion of people without access to basic sanitation; and
- b) States must facilitate access to public information and participation – including women –

⁵ At para 13.

⁶ At para 16.

⁷ Resolution 64/292.

⁸ 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 18 June 2013].

⁹ UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

¹⁰ 2002

at all levels, in support of policy and decision-making related to water resource management and project implementation.

Regional instruments

The African Charter on Human and People's Rights¹¹

Article 16 enshrines the right of every individual to the best attainable state of physical and mental health, which compels States parties to ensure both the protection of one's health as well as access to medical attention when sick.

Constitution s 1(a) - Foundational values

Section 1(a) of the Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, being the foundational values of the Constitution and thereby forming the bedrock upon which the Constitution is based.

Constitution s 7(2) - Obligation on the State

This section requires the State, in this matter the Respondent, to respect, protect, promote and fulfill all fundamental rights enshrined in the Bill of Rights.

Constitution s 10 - The right to human dignity

Section 10 recognises the right of everyone to have their inherent dignity respected and protected. A lack of access to decent sanitation is inherently degrading, and undermines one's human dignity.

Constitution s 24 - Environmental rights

Section 24(a) provides that '[e]veryone has the right to an environment that is not harmful to their health or well-being', while s 24(b) recognises the right to have one's environment protected through reasonable legislative and other measures, including those that prevent pollution and ecological degradation.

Article 24 recognises the right of all peoples to a general satisfactory environment favourable to their development.

African Children's Charter (1990)

Article 14 comprehensively sets out the right of all children to the enjoyment of the best attainable state of physical, mental and spiritual health, which includes the provision of necessary medical assistance and health care; adequate nutrition; safe drinking water; and the integration of basic health service programmes into national development plans.

South African Development Community Protocol on Health (1999)

A particularly relevant provision of this Protocol is Article 23, which states as follows:

"State parties shall collaborate, co-operate and assist each other in a cross-sectoral approach in addressing regional environmental health issues and other concerns, including toxic waste, waste management, port health services, pollution of air, land and water, and the degradation of natural resources."

¹¹ 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 18 June 2013].

Constitutional framework

The preliminary assessment of the Free State Provincial Office of the Commission indicated that the rights alleged to have been violated are **section 10 (right to dignity), 24 (right to an environment that is not harmful), 26 (right to housing), 27 (right to access to health care services) and 32 (right of access to information) of the Constitution of the Republic of South Africa**. Each of these rights is discussed hereunder, in turn.

Constitution s 26 – The right to housing

Section 26(1) enshrines the right of all individuals to have access to adequate housing, with s 26(2) compelling the State to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

Constitution s 27 – The right to health care

This provision recognises the right of everyone to have access to, inter alia, health care services, with the State required to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation thereof.

Constitution s 32 – The right of access to information

Section 32 provides that everyone has the right of access to information, both that which is held by the State and that held by another person which is required for the exercise or protection of any rights.

Constitution s 139 – Duties of the municipality

Section 139(1) provides that “[w]hen a municipality cannot or does not fulfill an executive obligation in terms of legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation, including –

- a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfill its obligations and stating any steps required to meet its obligations; and
- b) assuming responsibility for the relevant obligation in that municipality to the extent necessary –
 - i. to maintain essential national standards or meet established minimum standards for the rendering of a service;
 - ii. to prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
 - iii. maintain economic unity...”

Part B Schedule 4 of the Constitution – Local government responsibilities

This provision mandates that local government is responsible for “water and sanitation services limited to portable water supply systems and domestic waste-water and sewerage disposal.”

Legislative framework

Housing Act 107 of 1997

The definition of ‘housing development’ as included in Section 1 of the Act refers to access of the following two key elements on a progressive basis:

- a) “[P]ermanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and

- b) portable water, adequate sanitary facilities and domestic energy supply.”

Section 2 of the Act sets out the general principles applicable to housing development. They provide that national, provincial and local spheres of government must *inter alia*:

- c) give priority to the needs of the poor in respect of housing development; and
- d) promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions.

Section 9 of the Act requires that every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy *inter alia* to:

- e) ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
- f) ensure that conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are removed;
- g) ensure that services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner that is economically efficient;
- h) set housing delivery goals in respect of its area of jurisdiction;
- i) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.

The Development Facilitation Act 67 of 1995

This Act was introduced to fast track low-income housing developments. It is one of a few routes available for land use planning and development in South Africa. The Act creates two separate bodies responsible for land use planning in the same area.

The Less Formal Township Establishment Act 113 of 1991

This Act provides for shortened procedures for land development and township establishment. In terms of the Act, the decision-making authority lies with the Provincial government.

Water Services Act 108 of 1997

The Act defines *basic sanitation* as “[t]he prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewerage from households, including informal households.”

Basic water supply is defined as the “prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.”

Section 3 of the Act provides that everyone has a right of access to basic water supply and basic sanitation. The provision establishes, *inter alia*, the following rights and obligations in respect of access to basic water supply and basic sanitation:

- a) everyone has a right of access to basic water supply and basic sanitation.
- b) Every water services institution must take reasonable measures to realise these rights.

This is, however, qualified by Regulation 2 of the Regulations relating to Compulsory National Standards and Measures to Conserve Water.¹²

Section 5 of the Act states that:

“If the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them.”

The National Health Act 61 of 2003

The Act came into force in May 2005 and is the most important piece of legislation that helps to implement the constitutional right to health, giving clear and overall direction on such rights. Some of the aims of the National Health Act are to:

- a) make effective health services available to the population, equitable and efficiently;
- b) protect, respect and fulfill the rights of the people of South Africa to progressively realize their constitutional right to health;
- c) establish a national health system that will provide people with the best possible health services that available resources can afford.

The National Environmental Act 107 of 1998

The Act states that the interpretation of any law concerned with protecting and managing the environment must be guided by its principles, at the heart of which is the principle of sustainable development. Consequently, organs of state must evaluate the social, economic and environmental impact of activities that may significantly affect the environment.

The Act also seeks to protect the environment by:

- a) Creating a set of environmental principles that show the Government how it should act; and
- b) Making the Government consider all the effects that a development can have before it is allowed to go ahead.

Local Government: Municipal Systems Act 32 of 2000

The Act defines *basic municipal services* as:

“A municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.”

Section 73(1) of the Act states that a municipality must give effect to the provisions of the Constitution and:

- a) give priority to the basic needs of the local community;
- b) promote the development of the local community; and
- c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.

Sections 106 and 107 are relevant to the extent that they deal with provincial and national monitoring.

¹² Published under GN R509 in GG 22355 of 8 June 2001.

Section 106 provides that if an MEC has reason to believe that a municipality in the province cannot or does not perform a statutory obligation binding on that municipality, or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must:

- d) “by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or
- e) if the MEC considers it necessary, designate a person or persons to investigate the matter.”

Section 107 states that “[t]he Minister, by notice in the Gazette, may require municipalities of any category or type specified in the notice, or of any other kind described in the notice, to submit to a specified national organ of state such information concerning their affairs as may be required in the notice, either at regular intervals or within a period as may be specified.”

Local Government: Municipal Finance Management Act 56 of 2003 (MFMA)

Section 28(1) of the Act directs that municipalities may revise and approve their annual budget through an adjustments budget.

Section 27(5) is also relevant to the extent that it permits provincial executives to intervene in terms of Section 139 of the Constitution if a municipality cannot or does not comply with the provisions of Chapter Four of the Act.

Promotion of Access to Information Act 2 of 2000

This Act protects and upholds the rights of people to access information, and seeks to enhance the transparency, accountability and effectiveness of government. Public bodies are obliged to give information needed to the public in order to facilitate the process of enabling people to exercise the rights that are enshrined in the Constitution.

Regulatory framework

Regulations Relating to Compulsory National Standards and Measures to Conserve Water¹³

These Regulations provide that the minimum standard of basic sanitation service is:

- a) the provision of appropriate health and hygiene education; and
- b) a toilet that “is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, is well ventilated, keeps smell to a minimum and prevents the entry and exit of flies and other disease-carrying pests.”

In terms of Regulation 3, a municipality is obliged to provide each resident with access to at least 25 litres per day at a water user connection within 200 metres of each of the residents’ households.

Policy framework

White Paper on Water

Government’s white paper entitled “Water is Life, Sanitation is Dignity”¹⁴ articulates government’s commitment to the provision of at least a basic water and sanitation service to all people living in South Africa. It states further that the provision of water and sanitation remains an important

.....
¹³ Supra.

¹⁴ Department of Water Affairs and Forestry, October 2002.

policy concern. The government is also committed to reducing the backlog in services by 2008 in the case of water and 2010 in the case of sanitation. The policy of free basic water and sanitation services means that everybody in South Africa has a right to a basic amount of water and a basic sanitation service that is affordable.

National Sanitation Policy¹⁵

The National Sanitation Policy defines sanitation as “the principles and practices relating to the collection, removal or disposal of human excreta, refuse and waste water, as they impact on users, operators and the environment.”

The policy lists the main types of sanitation systems used in South Africa, namely:

- a) Traditional unimproved pits;
- b) Bucket toilets;
- c) Portable chemical toilets;
- d) Ventilated Improved Pit toilets;
- e) Low flow on-site sanitation (LOFLOS);
- f) Septic tanks and soakaways;
- g) Septic tanks effluent drainage (solids-free sewerage) systems; and
- h) Full water-borne sewerage.

White Paper on Basic Household Sanitation¹⁶

According to the 2001 White Paper on Basic Household Sanitation, the Department of Water Affairs and Forestry had the following responsibilities, together with other national role-players:

- a) Developing norms and standards for the provision of sanitation;
- b) Providing support to the provinces and municipalities in the planning and implementation of sanitation improvement programmes;
- c) Coordinating the development by the municipalities of their Water Services Development Plans as a component of their Integrated Development Plan;
- d) Monitoring the outcome of such programmes and maintaining a database of sanitation requirements and interventions;
- e) Providing capacity building support to provinces and municipalities in matters relating to sanitation;
- f) Providing financial support to sanitation programmes until such time as these are consolidated into a single programme; and
- g) Undertaking pilot projects in programmes of low cost sanitation.

White Paper on Health¹⁷

The White Paper on the Transformation of the Health System sets out key policy issues. It aims to:

- a) Unify the national health system to address the effects of apartheid on health;
- b) Re-organise the health service to give priority to primary health care through the district health care system, where certain aspects of health service delivery takes place at district

¹⁵ Department of Water affairs and Forestry, 1996.

¹⁶ Department of Water Affairs and Forestry, 2001.

¹⁷ White Paper on the Transformation of the Health System, 1997.

(instead of national or provincial) level. A clear advantage of the district health model is that it seeks to bring health care services closer to people on the ground;

- c) Promote health;
- d) Strengthen disease prevention;
- e) Ensure that there are safe, good quality essential medication available in all health facilities;
- f) Recognise the need to increase access to services by making primary health care services available to all people;
- g) Give special attention to health services reaching people most in need of these services - the poor, the elderly, women and children;
- h) Promote the participation of community structures in health care delivery.

Strategic framework

The Strategic Framework for Water Services¹⁸

This Framework defines a basic sanitation facility as:

“The infrastructure necessary to provide a sanitation facility which is safe, reliable, private, protected from the weather and ventilated, keeps smells to the minimum, is easy to keep clean, minimises the risk of the spread of sanitation related diseases by facilitating the appropriate control of disease carrying flies and pests, and enables safe and appropriate treatment and/or removal of human waste and waste water in an environmentally sound manner.”

It further defines a basic sanitation service as:

“The provision of a basic sanitation service facility which is easily accessible to a household, the sustainable operation of the facility, including the safe removal of human waste and wastewater from the premises where this is appropriate and necessary, and the communication of good sanitation, hygiene and related practices.”

Free Basic Sanitation Implementation Strategy¹⁹

According to this Strategy, municipalities are required to ensure that every household has access to basic sanitation, as per the Constitution, Water Services Act and the Municipal Systems Act. It acknowledges that there is a “right of access to a basic level of sanitation service” enshrined in the Constitution.

Applicable sector codes

The National Housing Code²⁰

The National Housing Code was adopted in terms of s 4(6) of the Housing Act. The provisions of the Code are binding on all three spheres of government.

The central objective of the National Housing Code is to encourage the development of social capital by supporting the active participation of communities in the design, implementation and evaluation of projects. In this regard, the Code places certain injunctions on service delivery agents, stating that:

¹⁸ Department of Water Affairs and Forestry, 2003.

¹⁹ Department of Water Affairs and Forestry, April 2009.

²⁰ The National Housing Code, Technical and General Guidelines (Vol 2) 2009.

“To ensure that fragile community survival networks are not compromised and to empower communities to take charge of their own settlements, one of the basic tenets of the programme is that beneficiary communities must be involved throughout the project cycle. All members of the community, even those who do not qualify for subsidies, should be included.”

Programmatic framework

The Upgrading of Informal Settlements Programme (UISP)²¹

The Programme is published in terms of section 3(4)(g) of the Housing Act and contained in the National Housing Code, and was established by the Department of Housing in 2004 as part of its Breaking New Ground Policy Document. The broad objectives of the programme are to facilitate access to basic services, transform communities through upgrading and to engender local economic development through the improvements in infrastructure.

The Programme is the mechanism whereby municipalities and provinces can implement upgrading projects in informal settlements. The Programme provides that informal settlements are to be upgraded *in situ* in partnership with the residents thereof, in order to establish sustainable human settlements.

The Programme identifies the following characteristics of an ‘informal settlement’:

- a) Illegality and informality;
- b) Inappropriate locations;
- c) Restricted public and private sector investment;
- d) Poverty and vulnerability; and
- e) Social stress.

The Programme is therefore applicable to all settlements that demonstrate one or more of the above characteristics.

The upgrading of informal settlements must be effected in collaboration with the residents thereof. Thus the Programme provides as follows:

“In order to ensure that community members assume ownership of their own development and project, the involvement of the community from the onset is key. Hence community participation should be undertaken within the context of a structured agreement between the municipality and the community.”

The Programme recognises that many informal settlements are situated on privately owned land and that often the first step in an upgrading project will be the acquisition of such land. Thus the Programme provides that funding is available and may be obtained for “the acquisition of land, where the land to be developed is in private ownership, through negotiation or expropriation.”

The Programme makes provision for a comprehensive, fully costed, four-phase process for the upgrading of informal settlements.

The Programme makes provision for the installation of both interim services and permanent municipal engineering services. The Programme states that “where interim services are to be provided it must always be undertaken on the basis that such interim services constitute the first phase of the provision of permanent services.”

²¹ Breaking New Ground Policy Document, Department of Housing, 2004.

Relevant case law

Regional case law

Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) - The rights to health and an environment

In dealing with an alleged violation of the rights to health and environment contained in the African Charter, the African Commission on Human and Peoples Rights held that:

“These rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual...”

“The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure and ecologically sustainable development and use of natural resources. Article 12 of the ICESCR... requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in article 16(1) of the African Charter and the right to a generally satisfactory environment favourable to development (article [24]) already noted, obligate governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect these rights and this largely entails non-interventionist conduct from the state; for example, to desist from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.”²²

Purohit and Another v The Gambia (2003) AHRLR 96 (ACHPR 2003) - The right to health and health care

In this decision, the Commission gave content to the right to health (in the context of access to health care service for mentally ill patients) in the following manner:

“Enjoyment of the human right to health as it is widely known is vital to all aspects of a person’s life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.”²³

The Commission nevertheless applied this right in the greater context of African states, and accordingly made the following qualification:

“The African Commission would however like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into article 16 [of the African Charter] the obligation on part of states party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.”²⁴

²² Paras 51-52.

²³ Para 80.

²⁴ Para 84.

Domestic case law***S v Makwanyane and Another* 1995 (3) SA 391 (CC) – The right to human dignity**

In this seminal case the Constitutional Court, when dealing with the constitutionality of the death penalty, observed as follows:

“Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.”²⁵

***NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) – The right to human dignity**

In this matter, dealing with an alleged violation of the claimants’ dignity, the Constitutional Court held that “[a] constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom.”²⁶

The Court held further that if human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. In this regard, reference was made to the following dictum from the matter of *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 35:

“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 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. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it clear that dignity is not only a value that is fundamental to our constitution, it is a justiciable and enforceable right that must be respected and protected.”

***Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) – The right to housing**

This matter was the first in which the Constitutional Court thoroughly addressed, interpreted and applied the constitutional right to housing.

The Court highlighted the differences between Constitution s 26 and the relevant international law provisions, particularly Articles 2(1) and 11(1) of the ICESCR, noting that:

.....
²⁵ Para 329.

²⁶ Para 49.

- The Constitution provides for the right of access to adequate housing, while the ICESCR provides for a right to adequate housing
- While the Constitution obliges the State to take ‘reasonable legislative and other measures’, the ICESCR requires states parties to take ‘appropriate steps’ which must include legislation.²⁷

The Court held that the determination of a minimum core which constitutes the State’s obligation in respect of a particular right cannot be done without assessing the needs and opportunities for the enjoyment of that right, which will vary in different areas due to the prevalence or absence of relevant factors.²⁸ As the Court does not have access to sufficient information upon which to make the determination as to what constitutes a minimum core, it is held that it will be unable to do so. Rather, the appropriate question in the South African context is “whether the measures taken by the State to realise the right afforded by s 26 are *reasonable*.”²⁹

In interpreting Constitution s 26, the Court held that subsections 1 and 2 (identifying the existence and scope of the right and the State’s obligations in that regard) must be read together, with s 26(1) imposing a negative obligation which must also be read with subsection 3 (protection from eviction, demolition etc). Moreover, the expansion of the ICESCR right to adequate housing to encompass access to adequate housing recognises the broader context in which the right must be realised (i.e. the right does not just require the provision of shelter). State policy in terms of access to adequate housing must ensure the provision of the right for both those who can afford housing and those who cannot, and are thus most vulnerable, and must take the particular context of the community into account when providing for the right and determining what appropriate (and thus reasonable) provision would constitute.³⁰

The Court held that s 26(2) imposes a positive – but not unqualified – obligation on the State, namely:

1. To take reasonable legislative and other measures³¹

This incorporates the need to clearly allocate responsibilities to all relevant spheres of government in accordance with their general duties in the provision of services and amenities, and provide adequate financial support to each sphere. In particular, the national sphere must determine the national housing policy, with each sphere implementing that policy accordingly.

The primary determinant of the lawfulness of the State’s conduct in this regard is the reasonableness of the content of the measure imposed by and adopted in accordance with the policy; “a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable”. Moreover, the Court held that mere legislation is insufficient as the requirement provides for ‘other’ measures as well, which includes “appropriate, well-directed policies and programmes” to support the legislative

²⁷ Para 28.

²⁸ Para 32.

²⁹ Para 33.

³⁰ Paras 34-38.

³¹ Paras 39-44.

measures adopted, which must also be reasonable both in their conception and their implementation.

In assessing reasonableness, the particular context of the housing policy must be considered in order to determine the capacity of the implementing entities. Furthermore, the context of the Bill of Rights as a whole is relevant, in particular the interconnectedness of the rights to housing and other rights therein in light of the foundational principles (including human dignity).

2. To achieve the progressive realisation of the right³²

This requirement stipulates the extent and content of the State's obligation. In particular, the interpretation of the phrase 'progressive realisation' is appropriate and relevant to South Africa's constitutional framework.

3. Within available resources³³

Both the content of the obligation and the reasonableness of the measures undertaken by the State are determined with the regard to the State's available resources.

Consequently, s 26 of the Constitution requires that the Government "establish a coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State's available means."³⁴

Beja and Others v Premier of the Western Cape and Others Case No. 21332/2010 (CPD)
- Content of the rights to housing, dignity and privacy

In this matter the Western Cape High Court held that:

"Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with Section 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity."³⁵

Erasmus J held further that s 73(1)(c) of the Municipal Systems Act requires a municipality to provide the "minimum level of basic services", which includes the provision of sanitation and toilet services. He found that there was a violation of rights in terms of sections 10 (human dignity), 12 (freedom and security of the person), 14 (privacy), 24 (environment), 26 (housing) and 27 (healthcare) of the Constitution.³⁶

The High Court then undertook a thorough analysis of both the rights to dignity and privacy in the context of the provision of unenclosed toilets to the poor, concluding that:

"The City's decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights. The legal obligation to reasonably engage the community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents with respect and care for their dignity was not taken into account when the City decided to install the unenclosed toilets."³⁷

³² Para 45.

³³ Para 46.

³⁴ Para 41.

³⁵ Para 147.

³⁶ Paras 142-143.

³⁷ Para 146.

Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) – ‘Public law right’ to basic municipal services

In this matter the Constitutional Court read sections 152 and 152 of the Constitution alongside the provisions of the Municipal Systems Act and the Housing Act to find that a “public law right to basic municipal services” existed, which imposed a duty on local government to provide such services.

Mazibuko and Others v The City of Johannesburg and Others 2010 (4) SA 1 CC – The right to water

In this case the Constitutional Court assessed, interpreted and applied the right of access to sufficient water contained in s 27(1)(b) of the Constitution.

The Court first outlined the content of the right of access to sufficient water (s 27(1)(b)), holding that the constitutional provision in which it is enshrined must be read alongside the qualification of the state’s obligation in that regard (s 27(2)).³⁸ Consequently, “it is clear that the right does not require the State upon demand to provide every person with sufficient water without more; rather it requires the State to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.”³⁹

However, the Court itself is not well-placed to determine the actual quantity of water required to meet the State’s obligations in this regard; in any event, any such quantification would be too static to constitute sufficient protection of the right. The appellant’s argument for a quantification of the right to water therefore failed.⁴⁰ Rather, the test for whether the State has met its obligations is focused on the reasonableness of its conduct.⁴¹

Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others 2007 (6) SA 4 (CC) – Environmental rights and the principle of sustainable development

In this matter, the Constitutional Court gave content to Constitution s 24, and particularly the principle of sustainable development, in the following manner:

“The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ‘ecologically sustainable development and use of natural resources while promoting justifiable economic and social development’. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.”⁴²

³⁸ Para 49.

³⁹ Para 50.

⁴⁰ Paras 51-60.

⁴¹ Para 66.

⁴² Para 45.

7. Analysis

7.1. Access to Information

- 7.1.1. With regard to the Respondent's duty of service provision, the Commission observes that the principles of active participation, social cohesion and community empowerment are vital to the Respondent's work. In particular, active communication and proactive information sharing lie at the heart of such engagement and participation. A municipality must demonstrate that effective and interactive community participation has taken place in the planning, implementation and evaluation of a project. It is therefore incumbent upon the Respondent to demonstrate that effective and interactive community participation took place.
- 7.1.2. There was nothing gleaned during the course of investigations that suggested that the Respondent had included active community participation in the project, the project was, for all intents and purposes, not a transparent one.
- 7.1.3. Adequate consultation at the point of conceptualization would have provided the Respondent with clear insight of the community's needs and its own capacity to respond accordingly.
- 7.1.4. In terms of the MFMA, a municipality must consult communities and present the budget available to undertake specific projects. The budget must be presented through the Medium Term Expenditure Framework (MTEF) process, where there is an agreement as to how many toilets can be built to completion over a period of time. The fact that toilets remained inadequate and dysfunctional for a lengthy period is an indication that the Respondent neither consulted nor used the multiyear planning framework on service delivery.
- 7.1.5. Access to information is a fundamental right entitling people to information that public bodies hold, and facilitating informed participation in decisions which affect their daily lives. The Commission has considered the Respondent's compliance or lack thereof with the Promotion of Access to Information Act (PAIA), a law of national application which facilitates information sharing and seeks to promote public participation.
- 7.1.6. PAIA compels the Respondent to make available information on its decisions relating to all aspects of the process, including tenders, as well as informing the community of how they can access such information. In this sense, residents are not only able to participate meaningfully in the Respondent's project, but are also able to hold the Respondent accountable.
- 7.1.7. In this instance, the residents of Phomolong advised the Commission's investigators that they do not know anything about the project, including having no information on the project's budget.
- 7.1.8. Based on the Respondent's failure to share information and consult with the community, the Commission finds no justification for the Respondent's actions.
- 7.1.9. It is therefore the finding of the Commission that the right of the residents to access information has been violated.

7.2. Health & Environmental rights

- 7.2.1. The health risks posed by the above situation, particularly to vulnerable groups with weak immune systems, are extremely serious. This situation is exacerbated by the fact that most people experiencing these conditions have very little means of combating diseases such as diarrhea which result from the unhygienic bucket toilets system.
- 7.2.2. The fact that the residents of Phomolong constantly have to dig holes in their yards to dispose of human waste constitutes a failure by the State to fulfill its obligation to progressively realise the right of citizens to adequate sanitation. Moreover, this poses a serious threat to the residents' health.
- 7.2.3. Residents of Phomolong are forced to live in an area where the smell is unbearable due to a leaking sewer in the streets. They are also constantly ill because the environment is not clean.
- 7.2.4. The Water Services Act is explicit that the prescribed minimum standard of basic sanitation services is for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewerage from households, including informal settlements.
- 7.2.5. The Respondent has clearly not complied with the Water Services Act in that their actions or lack thereof fall short of the provisions of the Water Service act in that they have failed to provide the minimum standard of basic sanitation.
- 7.2.6. Residents of the Informal Settlement try to keep the area clean by themselves, there are no roads and the services are very limited, hence it is difficult to keep their area clean. Further, the fact that the residents have to dig holes in their yards to dispose of waste material, including human waste, violates their right to a clean environment.

7.3. Consultation and Community Participation

- 7.3.1. It is clear that active participation, social cohesion and community empowerment are key principles to the UISP and it was incumbent upon the Respondent to demonstrate that effective and interactive community participation took place. Active communication and proactive information sharing lie at the heart of such engagement and participation.
- 7.3.2. Such community participation must therefore be initiated at the time of inception of project plans, and sustained through both implementation and evaluation of such projects. A municipality must demonstrate that effective and interactive community participation has taken place in the planning, implementation and evaluation of a project.
- 7.3.3. Legislation and judgments of our courts have required not only consultation but the active participation of communities in such undertakings. There is absolutely nothing in this matter that would suggest that the Respondent provided for active community participation in the project; the project was, for all intents and purposes, not a transparent one.

- 7.3.4. Adequate consultation at the point of conceptualisation would have provided the Respondent with a clear insight of the community's needs and its own capacity to respond accordingly.
- 7.3.5. In terms of the MFMA, a municipality must consult communities and present the budget available to undertake specific projects. The budget must be presented through the MTEF process, where there is an agreement as to the process for the proclamation of the area as a township, the period it will take to complete this and the manner and time-frame of installing municipal services and developing infrastructure and housing.
- 7.3.6. The Municipal Systems Act states that municipalities must encourage and create conditions for the local community to participate in the affairs of municipalities, including:
- a) preparing, implementing and reviewing its integrated development plan;
 - b) establishing, implementing and reviewing its performance management system;
 - c) monitoring and reviewing of its performance, including the outcomes and impact; preparing its budget; and
 - d) strategic decisions relating to the provision of municipal services.
- 7.3.7. The Commission has serious reservations about whether any of the obligations listed above have been met.
- 7.3.8. Access to information is a fundamental right entitling people to information that public bodies hold, and facilitating informed participation in decisions which affect their daily lives. The Commission has considered the Respondent's compliance or lack thereof with the Promotion of Access to Information Act (PAIA), a law of national application which facilitates information sharing in the country and is meant to promote public participation.
- 7.3.9. PAIA obliges the Respondent to make information about its decisions relating to all aspects of the process, including tenders and the means through which the community can access the information the Respondent holds. In this sense, residents are not only able to participate meaningfully in the project of the Respondent, but they are also able to hold it accountable.

7.4. Dignity

- a) The Western Cape High Court, in the *Beja* judgment, undertook a thorough analysis of both the rights to dignity and privacy in the context of the provision of unenclosed toilets to the poor. At paragraph 146, the court held that:
- "The City's decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights. The legal obligation to reasonably engage the community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents **with respect and care for their dignity** was not taken into account when the City decided to install the unenclosed toilets."*
- b) The former Constitutional Court judge, Albie Sachs, in arguing that the right to dignity is of central significance, states:

“Respect for human dignity is the unifying constitutional principle that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not to simply ensure that the ‘haves’ continue to have but to help create conditions in which the basic dignity of the ‘have nots’ can be secured.”⁴³

- c) When observed along a continuum, the state’s obligation to progressively realize socio-economic rights starts with the minimum socio-economic provision necessary to meet a person’s basic needs, being the minimum obligation. The full realisation of this obligation – and thereby of the rights concerned – culminates in the capabilities of people in society to meaningfully participate and shape society. This implies that persons are not only passive recipients but active participants in society and it is through this process that true empowerment, active participation and social cohesion will occur. The manner in which the Respondent rendered a basic service to the affected community is contrary to the Commission’s understanding of such progressive realisation.

7.5. Housing

7.5.1. The Complainant further alleges a violation of the right to housing, on the basis that the area has not been developed, residents still live in shacks with no proper housing and the Municipality has not provided sites since about 1997.

7.5.2. In the *Grootboom* case, the Constitutional Court stated at paragraph 82 that:

“All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirement of Section 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.”

7.5.3. Section 152 (1)(b) and Section 152 (1)(d) of the Constitution further states that the role of local government is, among other things, “to ensure the provision of services to communities in a sustainable manner and to promote a safe and healthy environment.”

7.5.4. In terms of the national and provincial housing policy, legislation and programmes, the Municipality is expected to perform the following housing functions, amongst others:

- a) Conduct socio-economic surveys to determine population growth, the housing needs and the housing backlog including compilation of a housing waiting list;
- b) Submit housing needs to the Province;
- c) Help applicants in filling housing subsidy application forms;
- d) Inspect buildings, including the laying out of foundations, installation of infrastructural services and the construction of houses;
- e) Manage the implementation of the housing sector plan;
- f) Establish and manage a complaint system; and to
- g) Promote, where feasible, on-site housing redevelopment of informal settlements.

⁴³ Sachs, A, *The Strange Alchemy of Life and Law* (2009) Oxford University Press.

7.6. Obligations and Responsibilities of National and Provincial Government

- a) National and provincial government departments have a clear responsibility to ensure that municipalities meet their obligations. A number of steps could have been taken at the early stages of planning and implementation of the project as a whole, which steps would necessarily have included the obligation of provincial government to monitor reports of the local municipality.
- b) It is incumbent upon both provincial and national departments to monitor and intervene, where necessary, in the work of local government structures. This is also true of the planning and budgeting undertaken by municipalities. National and provincial departments should have exercised closer monitoring of the Respondent. Such monitoring and scrutiny of the work of the Respondent would have permitted timeous intervention by the MEC and relevant national ministers.

8. Findings

Based on the investigation conducted by the Commission and the analysis of the constitutional rights, case law, applicable legislation and general legal framework, the Commission finds that:

- 8.1. The Respondent failed to adequately conceptualize, plan and implement its project, which resulted in the residents being forced live in an undeveloped area with no municipal services and infrastructure;
- 8.2. The Complaint of violations of the rights to human dignity, privacy, a clean environment, housing, health children, and access to information are upheld; and
- 8.3. The provincial and national government departments have not adequately monitored the work of the Respondent or intervened in respect of their legislative and Constitutional obligations.

9. Recommendations

In terms of the Human Rights Commission Act, the Commission is entitled to:

“make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution”.

Accordingly, the Commission recommends that:

- 9.1. The Respondent is required to complete the installation of toilets in Phomolong to allow for proper usage and enable the residents to have their rights to dignity protected and their basic sanitation needs met.
- 9.2. The Respondent is required to provide a proper system of waste removal that has a proper outfall sewer thus ensuring that people are able to flush their toilets without the waste running into the streets.
- 9.3. To this end the Respondent is required to:
 - 9.3.1. Furnish the Commission with a progress report at least every six (6) months from the date of this finding; and further to,
 - 9.3.2. Furnish the Commission with a progress report at least every three (3) months in respect of the progressive realisation of the right to water and sanitation services in Henneman, Phomolong.

- 9.4. The report to the Commission must demonstrate the following:
 - 9.4.1. The Respondent's implementation and budgetary plans;
 - 9.4.2. Interim measures for the provision of sanitation to the residents;
 - 9.4.3. The manner in which it has identified and responded to the rights of vulnerable groups such as women, children and people with disabilities.
- 9.5. The Respondent is required to provide the Commission with the framework stipulating the manner in which meaningful and ongoing consultation with the community will be undertaken. To this end, the Respondent is directed to furnish the Commission with the minutes of every community meeting held at least every three (3) months in respect of development in the municipality relating to access to water and decent sanitation services.
- 9.6. The Free State Provincial Department of Cooperative Governance and Traditional Affairs together with the Department of Human Settlements are directed to provide the Commission with a report and a detailed plan on strategies intended to deal with challenges, as well as a report outlining clear time-frames for the resolution of the municipality's operational and capacity shortcomings. The report should be furnished to the Commission within three (3) months from date of this finding.

11. APPEAL

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days of the date of receipt of this finding**, by writing to:

Private Bag X2700
Houghton
2041

Signed at Johannesburg on this on the 18th Day of December 2013
South African Human Rights Commission



South African Human Rights Commission
Private Bag X2700
Houghton
2041