



**SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

**National Human Rights Institution Report on the South African Government's combined  
Fourth to Eight Periodic Country Report under the International Convention on the  
Elimination of Racial Discrimination**

**Submitted to the United Nations Committee on the Elimination of Racial Discrimination  
for consideration at the 90<sup>th</sup> session in August 2016**

*July 2016*



**South African Human Rights Commission**

Forum 3 Braampark Office Park,  
33 Hoofd Street,  
Braamfontein,  
2017

Private Bag X2700  
Houghton  
2041

Website: [www.sahrc.org.za](http://www.sahrc.org.za)

Email: [info@sahrc.org.za](mailto:info@sahrc.org.za)

## **Table of Contents**

ACRONYMS .....	5
Section 1: Introduction .....	8
1.1 South Africa's national human rights institution.....	9
Recommendation to the Committee .....	11
Section 2: Article 1: Concept of and special measures to combat racial discrimination ...	11
2.1 General observations regarding Article 1 .....	11
2.2 Protection of non-nationals in line with the Convention.....	12
2.2.1 Immigration Act 13 of 2002 .....	12
2.2.2 Zimbabwean Special Dispensation Permit of 2014 .....	14
2.2.1 Constitutional Rights Relevant to Migrants' Right to Health.....	14
Recommendations to the Committee .....	15
Section 3: Article 2: Policies and legislation to combat racial discrimination and special measures to develop and protect certain racial groups or individual.....	16
3.1 The role of traditional leadership.....	16
3.1.1 Traditional Courts Bill.....	16
3.1.2 Rights of indigenous people .....	17
Recommendations to the Committee .....	18
3.2 The promotion of gender equality .....	19
3.3 Legislation, policies and other measures in place to eliminate discrimination .....	19
Recommendations to the Committee .....	21
3.4 Criminalisation of racism .....	21
Section 4: Article 3: Condemnation, prohibition and eradication of racial segregation, apartheid and practices of this nature .....	22
4.1 Measures to address de facto segregation .....	22
4.1.1 Equality Courts .....	22
Recommendations to the Committee .....	24
4.2 Progress with respect to the Durban Declaration and Programme of Action.....	24
Recommendations to the Committee .....	26

Section 5: Article 4: Condemnation and criminalisation of all propaganda based on ideas or theories of racial discrimination .....	27
5.1 Examples of South Africa response to racial propaganda.....	27
5.1.1 Hate Speech .....	27
Recommendations to the Committee .....	29
Section 6: Article 5: Guarantee to everyone the right to equality before the law in the enjoyment of their rights.....	30
6.1 Equality and access to justice.....	30
Recommendations to the Committee .....	31
6.2 Liberty and freedom of movement .....	32
6.2.1 Places of Detention.....	32
Recommendations to the Committee .....	32
6.2.2 Freedom of movement and residence within the border of the State.....	33
Recommendations to the Committee .....	34
6.3 Marriage and family life .....	34
6.3.1 Forced and servile marriage .....	34
Recommendations to the Committee .....	35
6.3.2 Discrimination against LGBTI persons .....	35
Recommendations to the Committee .....	37
6.4 Socio-economic and cultural rights.....	37
6.4.1 Land .....	37
Recommendations to the Committee .....	38
6.4.2 Housing .....	39
Recommendations to the Committee .....	39
6.4.3 Healthcare .....	40
Recommendations to the Committee .....	41
6.4.4 Poverty reduction and special services .....	41
6.4.4.1 Persons with disabilities .....	41
Recommendations to the Committee .....	42
6.4.4.2 Water and sanitation .....	42

Recommendation to the Committee .....	43
6.4.5 Education.....	43
Recommendation to the Committee .....	44
Section 7: Article 6: Effective protection and remedies against any acts of racial discrimination .....	45
7.1 The protection of non-nationals against racially motivated violence .....	45
Recommendations to the Committee .....	49
7.1.2 Position with regard to Article 14 declaration.....	50
Section 8: Article 7: Measures in the fields of teaching, education, culture and information to combat racial discrimination.....	50
8.1 Racial Discrimination at Institutions of Higher Education .....	51
Recommendations to the Committee .....	52
Section 9: Concluding remarks .....	53
Annex: SAHRC's 2015/16 Complaints Breakdown.....	54

## **ACRONYMS**

ACERW	African Committee of Experts on the Rights and Welfare of the Child
ANC	African National Congress
CEDAW	Convention on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
CRL	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL)
CRPD	Convention on the Rights of Persons with Disabilities
DBE	Department of Basic Education
DOH	Department of Health
DHA	Department of Home Affairs
DHS	Department of Human Settlements
DHET	Department of Higher Education and Training
DOJCS	Department of Health Department of Justice and Correctional Services
DWCPD	Department of Women, Children and People with Disabilities
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICERD	International Convention on the Elimination of All forms of Racial Discrimination
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ILO	International Labour Organisation
LBGTI	Lesbian, Bisexual, Gay, Transsexual and Intersex
NAP	National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerance
NFAR	National Forum Against Racism
NHRI	National Human Rights Institution
NCC	National Coordinating Committee
NHI	National Health Insurance
OPSC	Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography
OPCAT	Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
PanSALB	Pan South African Language Board
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act, Act No. 4 of 2000
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission



SAMP	South African Migration Programme
SAPS	South African Police Service
TCB	Traditional Courts Bill
TKLB	Traditional and Khoisan Leadership Bill
UN	United Nations
UNCAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCRC	United Nations Convention on the Rights of the Child
ZSP	Zimbabwean Special Dispensation Permit

## Section 1: Introduction

1. The South African Human Rights Commission (SAHRC), welcomes the South African government's State report (State report) to the Committee on the Elimination of Racial Discrimination (Committee). Although the State report was overdue by several cycles, the SAHRC commends the government for submitting a detailed report which sets out the advances made in the implementation of the International Convention on the Elimination of Racial Discrimination (ICERD / Convention) and the responses to the Committee's 2006 concluding observations. In its assessment of the State report, the SAHRC notes that, in some instances, limited information is provided to the Committee. The SAHRC therefore appreciates the opportunity to submit a national human rights institution (NHRI) report setting out the shortfalls of the State report and proffers recommendations that the Committee may wish to consider during its the review of the South African government.
2. For ease of reference, the SAHRC has categorised its report in accordance with the Committee's reporting guidelines and the thematic clusters in the State report. Noting the dated time period which the State report addresses, as well as the Committee's 2016 List of Themes to South Africa,<sup>1</sup> the SAHRC highlights specific recent developments so as to provide the Committee with a comprehensive insight on the application of the ICERD in the country. In this regard, the SAHRC also points out activities, complaints, investigations and research it has undertaken in matters relating to the rights espoused under the Convention.
3. It should be noted that in addition to submitting its periodic report under the ICERD in November 2014, the South African government also submitted several reports to the other UN treaty bodies. These included the periodic reports under the following treaties: i) the International Covenant on Civil and Political Rights (ICCPR); ii) the United Nations Convention on the Rights of the Child (UNCRC) and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC); and, iii) the Convention on the Rights of Persons with Disabilities (CRPD). In March 2016, the South African government appeared for its review before the Human Rights Committee in respect of its obligations under the ICCPR. In September 2016, the South African government is due to appear before the Committee on the Rights of the

---

<sup>1</sup> As released in June 2016, available at, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/121/21/PDF/G1612121.pdf?OpenElement>

Child in respect of the UNCRC. In both these instances, the SAHRC has accordingly submitted NHRI reports.

## **1.1 South Africa's national human rights institution**

4. The Committee may recall that in June 2006, the SAHRC submitted a comprehensive NHRI report in relation to the South African government's initial, second and third State report under the Convention. Whilst detailed information was provided on the mandate of the SAHRC in both the institution's NHRI report as well as the previous State report, it should be noted that the powers and mandate of the SAHRC has been further strengthened through the enactment of new enabling legislation. A brief overview of the SAHRC's mandate is reflected hereunder.
5. The SAHRC is mandated by Section 184 of the Constitution of the Republic of South Africa,<sup>2</sup> which states that:
  184. (1) The South African Human Rights Commission must –
    - (a) promote, respect for human rights and a culture of human rights;
    - (b) promote the protection, development and attainment of human rights; and
    - (c) monitor and assess the observance of human rights in the Republic.
6. In September 2014, the new South African Human Rights Commission Act 40 of 2013 (Human Rights Commission Act) came into force, repealing its predecessor, the Human Rights Commission Act 54 of 1994. With regard to the promotion of international human rights law standards, section 13(1)(b)(vi) of the Act specifically mandates the SAHRC to monitor the implementation of, and compliance with, international and regional human rights instruments.<sup>3</sup>
7. As a NHRI, the SAHRC is additionally guided by the Paris Principles adopted by the United Nations General Assembly in 1993.<sup>4</sup> In 2012, the SAHRC was reaccredited as

---

<sup>2</sup> The Constitution of the Republic of South Africa of 1996, referred to as the "Constitution".

<sup>3</sup> See section 13(1)(b)(vi) of the Human Rights Commission Act, 50 of 2013

<sup>4</sup> UN General Assembly Resolution 48/134 on National Institutions for the promotion and protection of human rights (1993).

an 'A status' NHRI by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). The SAHRC was elected as Chair of the ICC from 2013 to 2016.

8. In 2015, the SAHRC celebrated 20 years of its establishment. Over the past two decades, the SAHRC has provided relief to individuals and groups through its robust complaints mechanisms. Specifically between 2009 and 2013 the institution received over 35 000 complaints and resolved 33 000 of those.<sup>5</sup> In addition, the SAHRC has conducted over 30 investigations into structural systemic challenges to service delivery across the country.<sup>6</sup> The outcomes of these investigations have culminated reports containing recommendations to government. These reports were also tabled at Parliament for consideration and as a resource to exercise due oversight over government departments.
  
9. In March 2016, a commemorative conference was held to recognise the SAHRC's 20 year milestone. The SAHRC dedicated the theme of the conference to the fight against racism following an increase in the number of complaints lodged with the institution relating to allegations of racism perpetrated on social media.<sup>7</sup> During the conference, the SAHRC's Chairperson, Lourence Mushwana, revealed that 20 years after the country committed itself to becoming a non-racial, non-sexist society, deep economic divisions continue to be based on social characteristics including race and gender.<sup>8</sup> This was further expanded on by former South African President, Thabo Mbeki, who succinctly pointed out that the SAHRC's decision to focus the conference on racism 'constitutes a justifiable acknowledgement that South Africa has still not accomplished its objective as stated in the Constitution to build a new South Africa based on non-racialism and non-sexism'.<sup>9</sup> It was further opined that South Africa's 'perpetuation of the racial, gender and spatial disparities born of a very long period of colonial and apartheid white minority domination, constitutes the material base which reinforces the notion that, indeed, we are not one nation, but two nations'.<sup>10</sup> In this context it was remarked that, 'one of these nations is white, relatively prosperous, regardless of gender or geographic dispersal' whereas the, 'second and larger nation of South Africa

---

<sup>5</sup> See address by SAHRC Chairperson, Adv. Lourence Mushwana at the SAHRC 20 year Commemorative Conference, at <http://www.sahrc.org.za/home/21/files/Pfanelo%20April%202016.pdf> p.5

<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid*

<sup>8</sup> *Ibid*

<sup>9</sup> A copy of the speech is available at, <http://www.politicsweb.co.za/opinion/material-racism-the-obstacle-to-creating-a-nonraci>

<sup>10</sup> *Ibid*

is black and poor, with the worst affected being women in the rural areas, the black rural population in general and the disabled'.<sup>11</sup>

10. To further contextualise the dynamic related to racial discrimination in South Africa, the SAHRC attaches an annex to this report which reflects the complaints lodged with the institution from 1 April 2015 to 29 February 2016. During this period, 716 complaints were lodged with the SAHRC alleging a violation of the right to equality, the single largest proportion of complaints received overall. Further disaggregation of the data reveals that 68% of all equality-based complaints related to allegations of racial discrimination.

### **Recommendation to the Committee**

11. The Committee should recommend that the South African government allocate appropriate financial resources to enable the SAHRC to execute its mandate effectively.

## **Section 2: Article 1: Concept of and special measures to combat racial discrimination**

### **2.1 General observations regarding Article 1**

12. The SAHRC acknowledges the great strides made by the South African government to dismantle the apartheid structures which institutionalised and legalised racial discrimination. The SAHRC concurs with the State report in *para* 8, that the main challenge in South Africa remains the residual forms of discrimination which often occur in covert and subtle manners.<sup>12</sup> Despite the fact that the prohibition of discrimination in law results in formal equality, the actual attainment of substantive equality remains a challenge. Section 9(2) of the Constitution provides clarity in this instance and states that, 'equality includes the full and equal enjoyment of all rights and freedoms'. The term 'all rights' therefore extends to the socio-economic rights which are also reflected in the Constitution.

---

<sup>11</sup> *Ibid*

<sup>12</sup> State report, *para* 8, p. 7

13. As expanded upon in both the initial State report and the SAHRC's 2006 NHRI report to the Committee, the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 (PEPUDA), remains one of the most significant pieces of legislation in post-apartheid South Africa. The preamble to PEPUDA to specifically calls for the, 'eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people'.<sup>13</sup> Challenges remain, however, in respect of the full implementation of PEPUDA, whereby the promotional aspects of the Act continue to be held in abeyance.

## **2.2 Protection of non-nationals in line with the Convention**

14. Notwithstanding South Africa's legislative frameworks and commitment to combat racial discrimination, the country has witnessed high levels of xenophobia and hate speech against non-nationals. The SAHRC notes that additional matters related to the treatment of non-nationals is captured under section VII(A) of the State report and in keeping with the report consistency, the institution provides further information on non-nationals under section 8 hereunder.

### **2.2.1 Immigration Act 13 of 2002**

15. Under para 21 of the State report, reference is made to the Immigration Act 13 of 2002, which aims to put in place, 'a system of immigration control, which would ensure that permanent residence permits are issued expeditiously, and on the basis of... reasonable requirements and criteria, and without consuming excessive administrative capacity.'<sup>14</sup> The State report further indicates that amendments to the Immigration Act have sought to clarify the powers of immigration officers and police officers with regard to interviewing a person when they are not satisfied that such person is entitled to be in the country. In this regard, the SAHRC highlights the fact that Section 41 of the Immigration Act specifically requires that every person who is approached on reasonable grounds by a police or immigration officer must be able to identify him or herself as a citizen, temporary or permanent resident. In the event that the officer is not satisfied that the person is lawfully within the country, the person in question may

---

<sup>13</sup> Preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000

<sup>14</sup> State report, para 21, p. 10

be detained for up to 48 hours for an investigation into their status.<sup>15</sup> In terms of the Act, if a person does not have authorisation to remain in the country or is not an asylum seeker, such person may be detained for an initial period of 30 days without a warrant pending deportation. Further, if the person is not removed from the country within the initial 30 days, a court may authorise an additional 90 day detention period.<sup>16</sup>

16. In this regard, the SAHRC draws the Committee's attention to a judgement in favour of the institution in the case of *South African Human Rights Commission and Others v Minister of Home Affairs*.<sup>17</sup> The SAHRC challenged the detention of 39 non-nationals at South Africa's 'Lindela Repatriation Centre', who were held beyond the requisite time frame of 30 days as stipulated under section 34 of the Immigration Act. In this instance, the individuals were detained for over 120 days without a warrant. The Court accordingly found that the extended detention period was unlawful and unconstitutional<sup>18</sup> and ordered the respondents to, *inter alia*, take all reasonable steps to terminate such unlawful detention practices.<sup>19</sup> The Court further held that the respondents should provide the SAHRC with a written report on a, 'regular or at least a quarterly basis', setting out, i) the steps taken to comply with the judgement to ensure that no person is detained in contravention of the order;<sup>20</sup> and, ii) full and reasonable particulars in relation to any person detained at the Lindela Repatriation Centre for a period in excess of 30 days from the date of that person's initial arrest and detention.<sup>21</sup> In addition, the respondents were directed to provide the SAHRC with regular access to the Lindela Repatriation Centre and its detainees.<sup>22</sup>

---

<sup>15</sup> See section 34 of the Immigration Act 13 of 2002 which relates to the 'deportation and detention of illegal foreigners.'

<sup>16</sup> *Ibid.*

<sup>17</sup> *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others* (41571/12) [2014] ZAGPJHC 198, available at <http://www.saflii.org/za/cases/ZAGPJHC/2014/198.html>

<sup>18</sup> *Ibid.*, para 52.2. Also see, <http://ewn.co.za/2014/08/29/SAHRC-immigration-case-and-outright-victory>

<sup>19</sup> *Ibid.*, para 52.3

<sup>20</sup> *Ibid.*, para 52.4.1

<sup>21</sup> *Ibid.* These particulars include: The person's full names; person's country of origin; The reason for the person's detention; The date on which that person was arrested; The basis on which the respondents seek to justify that person's continued detention beyond the 30 day period and whether a warrant for extension of the detention beyond 30 days has been authorised in terms of section 34(1)(d) of the Immigration Act (with a copy of such warrants to be provided).

<sup>22</sup> *Ibid.*, para 52.5

## 2.2.2 Zimbabwean Special Dispensation Permit of 2014

17. Whilst not mentioned in the State report, the SAHRC points out that in August 2014, the Department of Home Affairs announced the creation of the new Zimbabwean Special Dispensation Permit of 2014 (ZSP), to replace the 2009 Dispensation of Zimbabweans Project.<sup>23</sup> In a move that grants further protection to Zimbabwean nationals who received permits under the previous dispensation, the ZSP will allow permit-holders to live, work, conduct business and study in South Africa, for the duration of the permit, which is valid until 31 December 2017.<sup>24</sup>

## 2.2.1 Constitutional Rights Relevant to Migrants' Right to Health

18. Although *paras* 23 to 26 of the State report sets out measures that have been taken to guarantee the right to health for migrants in South Africa, it remains a challenge for many non-nationals to exercise these rights. The SAHRC brings to the Committee's attention the findings of a study conducted in 2011 by the South African Migration Programme (SAMP) where the extent of access to healthcare for migrants in South Africa, as well as xenophobia in the health sector were investigated.<sup>25</sup> The study accordingly found that 'medical xenophobia' existed and manifested itself through the following ways, i) the requirement that refugee patients produce identification documentation and proof of residence status before receiving treatment; ii) health professionals refusing to communicate with patients in English or allow the use of translators; iii) treatment is often accompanied with xenophobic statements, insults and other verbal abuse; (iv) non-South African patients are required to wait until all South African patients have received medical attention, even if they have been waiting longer for treatment; and, (v) refugees and asylum seekers experience difficulty accessing anti-retroviral treatment for HIV in public hospitals and many are subsequently forced to rely on NGO treatment programmes.<sup>26</sup> These factors are concerning and demonstrate the need for a robust national approach to root out xenophobia in the health sector.

---

<sup>23</sup> <http://www.refworld.org/docid/54cf838015.html>

<sup>24</sup> *Ibid*

<sup>25</sup> Jonathan Crush and Godfrey Tawodzera, *Medical Xenophobia: Zimbabwean Access to Health Services in South Africa*, SAMP, Migration Policy Series No. 54, available at <http://www.queensu.ca/samp/sampresources/samppublications/policyseries/Acrobat54.pdf>

<sup>26</sup> Ganzamungu Zihindula, Anna Meyer-Weitz and Olagoke Akintola, *Access to Health Care Services by refugees in Southern Africa: A Review of Literature*, Southern African Journal of Demography Volume 16 (1), June 2015, p. 27



19. The SAHRC further brings to the Committee's attention that in 2014, the institution conducted an investigation into the right to healthcare for detainees at the Lindela Repatriation Centre.<sup>27</sup> The investigation revealed numerous shortcomings, including, *inter alia*, i) the lack of provision for TB testing and isolation of infected persons; ii) poor psychological care; iii) unavailability of condoms; iv) the lack of voluntary counselling and testing for HIV/AIDS; and, v) the unavailability of tetanus vaccines.<sup>28</sup> It was further found that there were overcrowding in rooms and that the time intervals between the serving of the evening meal and breakfast did not comply with the prescribed time periods in the Regulations to the Immigration Act.<sup>29</sup> Whilst the SAHRC continues to monitor Lindela closely, these findings further demonstrate the need for the establishment of an independent monitoring mechanism as contained in the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

#### **Recommendations to the Committee**

20. The Committee should encourage the South African government to ratify the OPCAT and establish a national preventive mechanism to enhance the monitoring places where persons are deprived of their liberty (such as the Lindela Repatriation Centre).
21. The Committee should recommend that government should embark on a nationwide human rights training initiative to educate persons working in the healthcare industry (doctors, nurses, administrative staff etc.) about xenophobia and the rights of non-nationals. These training initiatives ought to include measures on how best to communicate with persons who are unable to fully speak or comprehend one of the official South African languages. Advocacy materials and campaigns should also be introduced to encourage patients to lodge complaints if they have experienced 'medical xenophobia' or associated discrimination and health care workers who perpetuate this phenomenon should face disciplinary action.

---

<sup>27</sup> Report of the South African Human Rights Commission in the matter between *Medecins sans Frontiers* and 3 others and The Department of Home Affairs and 4 others, GP/2012/0134.

<sup>28</sup> <http://www.sahrc.org.za/home/index.php?ipkArticleID=296>

<sup>29</sup> *Ibid*

**Section 3: Article 2: Policies and legislation to combat racial discrimination and special measures to develop and protect certain racial groups or individual**

**3.1 The role of traditional leadership**

22. Whilst the State report notes the role of traditional leadership in South Africa, the SAHRC specifically shares with the Committee the following recent developments which are not captured in the State report.

**3.1.1 Traditional Courts Bill**

23. The Traditional Courts Bill (TCB) was first introduced in Parliament in 2008<sup>30</sup> and provided for the establishment and regulation of courts to hear traditional and customary law disputes. At the time, various concerns were raised about the lack of public consultation on the provisions in the Bill and as a result, the Bill was subsequently withdrawn. In December 2011 however, the Bill was re-introduced in Parliament<sup>31</sup> and was once again met with widespread opposition. It was argued that instead of affirming traditional justice systems, the Bill fundamentally altered customary law by centralising power in the hands of senior traditional leaders and adding powers that they did not traditionally hold under custom.<sup>32</sup> The Bill also created new challenges and inequalities, as there were no provisions to permit the right to appeal to state courts nor the appointment of female presiding officers. Furthermore, that presiding officers under the TCB were vested with the power to impose penalties including the deprivation of land and imposition of forced labour.<sup>33</sup> In 2012, the SAHRC presented its views to Parliament on the TCB, wherein it challenged the constitutionality of the Bill and pointed out concerns relating to gender equality, fair trial rights and the rights of the child.<sup>34</sup> The SAHRC argued that the TCB defined the jurisdiction of the traditional courts based on the apartheid era geographic boundaries rather than the membership of a particular customary group.<sup>35</sup> As a result, the Bill entrenched a separate legal system for black people living in South Africa's former *Bantustans* and created a

---

<sup>30</sup> Traditional Courts Bill, [B15-2008]

<sup>31</sup> Traditional Courts Bill, [B1-2012]

<sup>32</sup> <http://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/>

<sup>33</sup> *ibid*

<sup>34</sup> See SAHRC TCB submission at, <http://www.sahrc.org.za/home/21/files/SAHRC%20Submission%20Traditional%20Courts%20Bill%20NCOP%2015%202012.pdf>.

<sup>35</sup> This would effectively result in some communities being subject to a court system they may not recognise without recourse to an opt-out option. See, <http://www.saflii.org/za/journals/DEREBUS/2012/55.html>

distinction between the level of fair trial rights enjoyed between rural black people and those in urban areas.<sup>36</sup> Although the TCB lapsed, there were indications from government that the Bill shall be re-introduced in Parliament for a third time during 2016.<sup>37</sup>

### 3.1.2 Rights of indigenous people

24. Notwithstanding the comments made in *paras* 54 and 55 of the State report, there have been several developments regarding the legislative framework on traditional leadership in South Africa. In response to the Committee's concluding observation no. 19, the SAHRC points out that the National House of Traditional Leaders Act 22 of 2009 and the Traditional Leadership and Governance Framework Act 41 of 2003, as discussed in the State report, may be repealed by new legislation through the Traditional and Khoi-San Leadership Bill, 2015 (TKLB).<sup>38</sup> Unlike its predecessors, the TKLB affords recognition to both the traditional and the Khoi-San communities in South Africa and provides, *inter alia*, for, i) the recognition of traditional and Khoi-San communities, leadership positions and for the withdrawal of such recognition; ii) the establishment, composition and functioning of both the National and Provincial Houses of Traditional and Khoi-San Leaders; and, iii) a uniform approach in dealing with all matters relating to traditional leadership.<sup>39</sup> Whilst the Bill has not been formally released at the provincial level for public consultation, it should be noted that during a parliamentary workshop held in February 2016, stakeholders criticised the current version of the Bill and argued that it would not pass constitutional muster. Among the strong criticisms of the Bill was that it, i) reinforces *Bantustan* boundaries; ii) recognises traditional leaders without taking into consideration individual communities' approaches to traditional leadership; and iii) envisaged two different systems for traditional leaders i.e. one for African communities and the other for Khoisan communities.<sup>40</sup>

---

<sup>36</sup> *Ibid*

<sup>37</sup> It was initially stated that the Bill would be re-introduced in 2015. See, <http://www.bdlive.co.za/national/law/2015/03/24/masutha-to-return-traditional-courts-bill-to-parliament>. Also see PMG Monitor, Mar-April 2015 at, [http://www.pa.org.za/media\\_root/file\\_archive/MONITOR\\_Mar-Apr\\_2015.pdf](http://www.pa.org.za/media_root/file_archive/MONITOR_Mar-Apr_2015.pdf). In April 2016, it was further announced that the Bill would be tabled by June 2016. See, <http://www.news24.com/SouthAfrica/News/redrafted-traditional-courts-bill-to-be-finalised-soon-20160419> and [http://www.parliament.gov.za/live/content.php?Item\\_ID=8886](http://www.parliament.gov.za/live/content.php?Item_ID=8886)

<sup>38</sup> Available at, [https://jutralaw.co.za/media/filestore/2015/09/Draft\\_Traditional\\_and\\_Khoi-San\\_Leadership\\_Bill\\_2015.pdf](https://jutralaw.co.za/media/filestore/2015/09/Draft_Traditional_and_Khoi-San_Leadership_Bill_2015.pdf)

<sup>39</sup> *Ibid*, preamble

<sup>40</sup> <http://city-press.news24.com/News/traditional-leadership-bill-fails-to-pass-muster-20160206>

25. In 2009, the International Labour Organisation together with the African Commission on Human and Peoples' Rights produced a country report on the, 'Constitutional and Legislative Protection of the Rights of Indigenous Peoples in South Africa'.<sup>41</sup> The report notes that South Africa is one of the few countries on the continent that has embarked on ambitious efforts aimed at redressing the problems of its indigenous peoples through the provision of legislative, policy and judicial interventions.<sup>42</sup> However, the report also highlights that indigenous persons in South Africa continue to suffer from exclusion and marginalisation, and "continue to lack capacity, partly due to extreme levels of poverty, and a lack of awareness to enforce these rights and provisions."<sup>43</sup>
26. As noted in the SAHRC's 2006 NHRI report to the Committee,<sup>44</sup> the institution has actively been monitoring the rights of indigenous people. In 2004, hosted investigate hearings into the rights of the *Khomani-San* community and issued recommendations to government in this regard.<sup>45</sup> However, the SAHRC continues to receive complaints regarding the alleged human rights violations of indigenous communities which relate to, *inter alia*, equality, language, education, land redistribution, and the lack of recognition of the indigenous communities and their respective leadership.<sup>46</sup> Based on the frequency of these complaints, the SAHRC hosted a, 'National Hearing on the Human Rights Situation of Indigenous people' during 2015/2016. The official report on the outcome and findings of the hearing shall be released during the course of 2016 and will accordingly proffer recommendations to government on strengthening the recognition and protection of the rights of indigenous people.

### Recommendations to the Committee

27. The Committee should encourage the South African government to ratify the International Labour Organisation (ILO) Convention on indigenous and Tribal Peoples

---

<sup>41</sup> Country Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples: South Africa, available at [http://www.chr.up.ac.za/chr\\_old/indigenous/country\\_reports/Country\\_reports\\_SouthAfrica.pdf](http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_SouthAfrica.pdf).

<sup>42</sup> *Ibid* p. 11

<sup>43</sup> *Ibid*, p. 64

<sup>44</sup> *Ibid*, p. 19

<sup>45</sup> Report on the Inquiry into Human Rights Violations in the *Khomani San* Community, SAHRC, November 2004, available at, [http://www.sahrc.org.za/home/21/files/Reports/KHOMANI\\_SAN\\_ENGLISH\\_FINAL.pdf](http://www.sahrc.org.za/home/21/files/Reports/KHOMANI_SAN_ENGLISH_FINAL.pdf)

<sup>46</sup> SAHRC Draft Report on the National Hearing Relating to the Human Rights Situation of Indigenous Peoples in South Africa, November 2015 to January 2016, p.24 (The final report will be publicly available on the SAHRC's website in due course)

(No.169) which outlines the international standards for the recognition and protection of the rights of indigenous persons.

28. The South African government ought to provide feedback to the Committee and the SAHRC, on the course of action government intends to take in respect of the recommendations issued by the SAHRC in its 2004 and 2016 investigative hearings into the rights of indigenous people.
29. The Committee may wish to recommend that the South African government introduce a public awareness campaign on the heritage, cultures and traditions of Khoi and San peoples.
30. In relation to section D of the State report, the Committee may wish to recommend that the South African government should allocate sufficient financial resources to the Pan South African Language Board (PanSALB) and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL), so as to ensure that it is able to fully exercise its mandates and further promote and protect indigenous languages, including the Khoi and San languages.

### **3.2 The promotion of gender equality<sup>47</sup>**

31. It is noted that under *para* 62 of the State report, reference is made to the role of the Department of Women, Children and People with Disabilities (DWCPD). The SAHRC brings to the Committee's attention that although the DWCPD was established in 2009, the Department was subsequently disbanded after the 2014 general elections. The women's portfolio was accordingly shifted to a new ministry within the Presidency.<sup>48</sup>

### **3.3 Legislation, policies and other measures in place to eliminate discrimination**

32. The SAHRC notes the legislative measures taken by South Africa to eliminate discrimination in the employment sector, as reflected in *paras* 30 to 35 and *paras* 78

---

<sup>47</sup> The SAHRC is aware that issues related to the promotion of gender equality will be further analysed when South Africa appears before the Committee on the Elimination of all forms of Discrimination Against Women (CEDAW)

<sup>48</sup> Accordingly, its mandate is to, 'lead, coordinate and oversee the transformation agenda on women's socio-economic empowerment, rights and equality', see, <http://www.women.gov.za/>

to 79. Whilst there are indeed a plethora of policies and laws to prevent unfair discrimination and promote the achievement of equality, discrimination in the workplace remains prevalent in South Africa. Despite legislation to foster employment equity, transformation in South Africa's workplace remains a challenge as statistics indicate that white persons represent over 60% of senior management whereas black African persons are estimated at 23%.<sup>49</sup>

33. Allegations of unfair discrimination also continue to constitute one of the most common complaints received by the SAHRC,<sup>50</sup> particularly with regard to unfair labour practices and discrimination within the workplace.<sup>51</sup> These complaints highlight the systemic challenges relating to the achievement of equality and as a result, in March and April 2016, the SAHRC conducted investigative hearings to ascertain the overall equality trends and prevalence of discrimination within the workplace. The hearings sought to, *inter alia*, identify the different grounds of discrimination, (including but not limited to, race, gender, disability, HIV/AIDS status, sexual orientation, age and language), and to understand the inter-related nature of the different grounds of discrimination.<sup>52</sup> The hearing also aimed to, i) promote awareness of the issues and challenges faced by different groups, and, ii) to encourage a human rights based approach to employment practices.<sup>53</sup>
34. Whilst the outcome report is pending finalisation, the SAHRC's preliminary findings indicate that the historical divisions of the past are still exhibited through socio-economic inequalities and workplace relations.<sup>54</sup> The SAHRC further noted that despite the laws and policies put in place by the government, transformation in the workplace is occurring at a slow pace. The SAHRC further found that discriminatory trends in the workplace are likely to reflect greater inequalities and prejudices entrenched within society more broadly, and that one biggest factors driving unfair discrimination is a lack of awareness and information.<sup>55</sup>

---

<sup>49</sup> Statistics South Africa. (2015). Quarterly Labour Force Survey 1 2015, available at, <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2015.pdf>

<sup>50</sup> See annex to the report in this regard.

<sup>51</sup> Other labour relations related complaints relate to non-payment of Unemployment Insurance Fund benefits by the Department of Labour. See SAHRC Equality Report, 2015, p. 20.

<sup>52</sup> Draft report of SAHRC Public Hearing on Discrimination in the Workplace, p.11 (The final report will be publicly available on the SAHRC's website in due course).

<sup>53</sup> *Ibid*

<sup>54</sup> *Ibid*, p.108.

<sup>55</sup> *Ibid*

## Recommendations to the Committee

35. The Committee may wish to recommend that the South African government engage at a multi-sectoral level with businesses, trade unions, labour organisations and employment sector to introduce initiatives aimed at developing a culture of human rights within the workplace.
36. The Committee should recommend that the South African government consider and provide feedback on the recommendations which will be issued by the SAHRC in respect of its hearings into discrimination in the workplace.

### 3.4 Criminalisation of racism

37. The criminalisation of racism is addressed in detail under section 5 herein in respect of article 4 of the Convention. However, the SAHRC alerts the Committee to a brief synopsis of the recent and concerning rhetoric which have garnered widespread media attention and ignited interest regarding the criminalisation of racism in South Africa.
38. During the course of the year, racial tensions broke out during a rugby match at a South African university, when a group of black students and workers peacefully protested by standing on the rugby field, singing struggle songs. White spectators subsequently attacked the protestors resulting in violent clashes and the suspension of academic activities in the interest of safety.<sup>56</sup> In another example, a white person posted derogatory and racist remarks on social media by comparing black persons to monkeys.<sup>57</sup> Similarly, a renowned post-graduate black student took to social media to share that he had racially insulted a white waitress,<sup>58</sup> whereas a white student used profanity directed at black persons to express his dissatisfaction at government's decision to withhold international sporting events.<sup>59</sup> High-level state officials have also taken to social media to express their views. In one instance, a member of parliament re-posted a comment which praised former apartheid prime minister and called for his return.<sup>60</sup> In a further example, a High Court judge posted comments implying that rape of young women is a part of 'black culture',<sup>61</sup> whereas another government official

<sup>56</sup> <http://www.news24.com/SouthAfrica/News/ufs-suspends-academic-activities-violence-on-campus-20160222>

<sup>57</sup> See, <http://mg.co.za/article/2016-01-04-twitter-erupts-after-kzn-estate-agent-calls-black-people-monkeys>

<sup>58</sup> See, <https://www.thedailyvox.co.za/ntokozo-qwabe-black-people-whiteness-rhodes-scholar/>. I

<sup>59</sup> See, <http://mg.co.za/article/2016-05-03-twitter-erupts-after-matthew-theunissen-racist-rant-goes-viral>

<sup>60</sup> See, <http://ewn.co.za/2015/10/01/DA-MP-slammed-over-social-media-post-calls-for-PW-Bothas-return>

<sup>61</sup> See, <http://www.bbc.com/news/world-africa-36246081>

called on black South Africans to do to white people what 'Hitler did to the Jews'<sup>62</sup> These recent examples demonstrate incidents which have caused national and international opprobrium, and is reflective of the racist dynamics which continue to plague sectors of South African society despite 22 years of democracy.

39. In January 2016, the office of the ruling party's chief whip in Parliament announced that the current legislative provisions were not sufficient to punish and dissuade racists and that as the majority party in Parliament, the African National Congress (ANC), 'would soon investigate creating a specific law or amending the existing legislation to ensure that acts of racism and promotion of apartheid are criminalised and punishable by imprisonment'.<sup>63</sup> The chief whip further stated that the party shall persuade and work with relevant stakeholders to ensure that Parliament enacts such law.<sup>64</sup>

#### **Section 4: Article 3: Condemnation, prohibition and eradication of racial segregation, apartheid and practices of this nature**

##### **4.1 Measures to address de facto segregation**

###### **4.1.1 Equality Courts**

40. In *paras* 91 and 92 of the State report, reference is made to the establishment of Equality Courts and the initiatives undertaken by the government to strengthen and ensure the effective functioning of these courts. However, despite these efforts, the SAHRC points out that these courts remain underutilised as there has not been a sustained effort at the national level to promote the Equality Courts.
41. Statistics published by the Department of Justice and Correctional Services (DOJCS) in its 2014/15 Annual Report further illustrate that the number of cases registered at the Equality Courts, as well as the number of cases resolved during the financial year period, were only 844 nationwide. Based on 382 Equality Courts across the country,<sup>65</sup> this translates to an average of two cases registered in each Equality Court for the

---

<sup>62</sup> <http://www.news24.com/SouthAfrica/News/khumalo-in-hot-water-over-racist-facebook-post-20160107>

<sup>63</sup> Statement issued by the Office of the ANC Chief Whip, 5 January 2016, available at, <http://www.politicsweb.co.za/news-and-analysis/specific-law-needed-to-criminalise-racism-and-prom>

<sup>64</sup> *Ibid*

<sup>65</sup> It is noted that the State report makes reference to 386 equality courts. However, official information accessed in July 2016 on the DOJCS website indicate that there are 382 equality courts. See, [http://www.justice.gov.za/EQCact/eqc\\_courts.html#sthash.gHLd0i2W.dpbs](http://www.justice.gov.za/EQCact/eqc_courts.html#sthash.gHLd0i2W.dpbs). Notwithstanding the difference in the number of equality courts between 382 and 386, the average case per court remains 2 cases.



entire period. It should also be noted that the DOJCS Annual Reports does not provide disaggregated data on the nature of complaints at the national level. Instead, general information is provided based on the number of complaints received. As such, the Annual Report indicates that there was a 38% increase in the number of new matters registered during 2014/15. According to the DOJCS's statistics, complaints related to hate speech increased by 36% and accounted for 328 of the overall complaints received. Complaints of unfair discrimination represented the second largest proportion of Equality Court matters and accordingly increased by 46% to 291 complaints for the year.<sup>66</sup>

42. The SAHRC has raised concern over the challenges in the access and operations of these courts. Through regular visits and investigations conducted by the SAHRC's provincial offices and Commissioners,<sup>67</sup> it was found that the under-utilisation of the Equality Courts appear systemic and across all the provinces.<sup>68</sup> The SAHRC found that several Equality Courts did not have a single case open at the time of the visit, whilst a number of courts had never opened a case.<sup>69</sup> The SAHRC further found instances where, i) the Equality Courts were not functional; ii) court officials were not suitably trained; iii) the lack of dedicated staff (e.g. clerks) to process Equality Court complaints; and, iv) a general lack of awareness by both the public and the court officials on the role of the Equality Courts.<sup>70</sup>
  
43. Through its monitoring, the SAHRC has also picked up on challenges related to the physical accessibility of the Equality Courts. In this regard, the SAHRC acknowledges the steps taken by the DOJCS to ensure equal access for persons with disabilities to court facilities.<sup>71</sup> All of the courts visited by the SAHRC were found to be wheelchair accessible. However, the provision of Braille facilities, sign language interpreters and other accessibility features ought to be strengthened to further enhance the accessibility of the courts for persons with disabilities.<sup>72</sup>

---

<sup>66</sup> DOJCS, Annual Report, 2014/15, p. 35, available at, [www.justice.gov.za/reportfiles/anr2014-15.pdf](http://www.justice.gov.za/reportfiles/anr2014-15.pdf)

<sup>67</sup> This was done in collaboration with the Commission for Gender Equality and the Commission for Promotion and Protection of the Rights of Cultural Religious and Linguistic Communities.

<sup>68</sup> SAHRC 2015 Equality Report, p. 79

<sup>69</sup> *Ibid*

<sup>70</sup> *Ibid*, also refer to tables on pp. 79 to 82

<sup>71</sup> In this regard, also see *Esthe Muller v Department of Justice and Constitutional Development and Another*, 01/03 (Germiston Magistrate Equality Court).

<sup>72</sup> SAHRC Equality Report 2015, p.84

## **Recommendations to the Committee**

44. The Committee may wish to recommend that the South African government introduce a robust public education and awareness campaign which on the role and function of Equality Courts. These education initiatives ought to be disseminated in all the official languages and through various media platforms so as to reach a large audience, particularly at the rural level. Existing public education initiatives that have already been undertaken or are already being planned ought to be reviewed and assessed to establish their strengths and shortcomings.
45. The Committee may wish to further advise that the South African government to provide refresher training courses to existing court official who administer Equality Court matters. It is recommended that attendance at these courses be factored in as part of the performance agreements of the officials or that attendance be on a mandatory basis. This form of regular training will capacitate court officials with the requisite skills and increase public confidence in the justice system.
46. The Committee should recommend that the DOJCS provide disaggregated national data on both the nature of the complaint as well as the prohibited ground on which it was lodged at the Equality Court.

## **4.2 Progress with respect to the Durban Declaration and Programme of Action**

47. In line with the Committee's concluding observation no. 28, *para* 102 of the State report makes reference to the progress with respect to the Durban Declaration and Programme of Action. Reference is also made to the establishment of a National Forum for Racism (NFAR) in 2003, to develop and monitor the implementation of the National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP). Within the NFAR, a further Steering Committee (or National Coordinating Committee (NCC)) was established for the purpose of drafting the new NAP.
48. It should be pointed out that the NCC was co-chaired by the SAHRC, (along with the then Department of Justice). However in 2009, the SAHRC relinquished its position

as co-chair to ensure that its role as an independent body would be preserved and to monitor the drafting and implementation of the NAP with the necessary autonomy and impartiality. However, the SAHRC continues to play a consultative role in the process of advancing South Africa's NAP.

49. The SAHRC updates the Committee that the draft NAP was launched by the DOJCS and released for public consultation on 30 March 2016.<sup>73</sup> The deadline for public engagement is 31 August 2016, following which the NAP is set to be finalised.
50. In order to strengthen the existing interventions to combat racism, unfair discrimination, xenophobia and related intolerances, the draft National Action Plan, *inter alia*, provides for the following:
  - a. The establishment of a rapid response team to monitor the on-going incidences of racism, racial discrimination, xenophobia and related intolerances and to report its findings directly to government. The monitoring work of the rapid response team includes measuring the extent of the incidents of racism, unfair discrimination and xenophobia and the circumstances or conditions which allow for their continuation, in order to develop measures and tools to address those incidences;
  - b. The taking of legislative and policy initiatives specifically targeted at the prevention of racism (as opposed to unfair discrimination generally);
  - c. Dovetailing the NAP with other instruments that have similar objectives in order to pool resources, including:
    - i. The Promotion of Equality and Prevention of Unfair Discrimination Act;
    - ii. Proposed hate crimes legislation (See 'k' below);
    - iii. The National Development Plan (specifically Outcome 14 which relates to social cohesion);
    - iv. The National Intervention Strategy to Address Gender and Sexual Orientation-Based Violence; and,
    - v. The National Social Cohesion Framework.

---

<sup>73</sup> A copy of the draft NAP is available at, <http://www.justice.gov.za/docs/other-docs/nap.html>

- d. The intensification of efforts towards prevention of racism, racial discrimination, xenophobia and related intolerance in areas such as immigration policy, policing and administration of justice;
- e. The promotion of multiculturalism and cultural diversity;
- f. The provision of human rights training for government officials;
- g. A framework for both government and civil society to develop programmes and measures designed to combat racism, racial discrimination, xenophobia and related intolerances on the internet, social media platforms and the media;
- h. The prioritisation of vulnerable groups (which include stateless persons, women and girls and LGBTI communities), for protection against racism, racial discrimination, xenophobia and related intolerances;
- i. The strengthening of support and empowerment programmes for victims of racism, racial discrimination, xenophobia and related intolerances;
- j. The development of mechanisms for the collection, compilation, analysis, dissemination and publication of reliable disaggregated statistical data, to assess the extent of racism, racial discrimination, xenophobia and related intolerances; and,
- k. The finalisation and passing of the Hate Crime legislation to deal with crimes based on one's identity which include race, religion, national origin, sexual orientation, gender, or gender identity.

### **Recommendations to the Committee**

51. The Committee should encourage the South African government to expedite the processing of the NAP so as to adhere with its obligations under Durban Declaration and Programme of Action and further strengthen the existing legislative and policy frameworks in South Africa to combat racism, racial discrimination, xenophobia and related intolerance.

## **Section 5: Article 4: Condemnation and criminalisation of all propaganda based on ideas or theories of racial discrimination**

### **5.1 Examples of South Africa response to racial propaganda**

52. Adding on to the limited information contained in section V of the State report in relation to hate speech, the SAHRC points out that there have been increases in the manifestation of hate speech and hate crimes in South Africa (as alluded to under section 3.4 herein). These are further expanded on below.

#### **5.1.1 Hate Speech**

53. The SAHRC recognises that the phenomenon of hate speech in South African society is a manifestation of the continued social divisions and racist attitudes, and further notes with concern, the increase in the use of social media to disseminate hate speech.<sup>74</sup> Although *para* 107 alludes to the establishment of draft hate speech legislation and a policy to deal with contemporary forms of racism, the SAHRC draws the Committee's attention to the December 2015 response, provided by the South African government in respect of the Human Rights Committee's List of Issues to South Africa under the ICCPR:

South Africa has developed a comprehensive policy framework on combating hate crimes, hate speech and unfair discrimination. This policy framework is a result of intense research and will provide for the development of measures to combat hate crimes, hate speech and unfair discrimination. There is currently a first working draft of a Prevention and Combating of Hate Crimes Bill. The Bill is based on recommendations contained in the developed policy framework. It is noted that earlier version of the Prohibition of Racism, Hate Speech, Xenophobia and Related Intolerance Bill has been discontinued on the basis that, like any Bill, it must be preceded by a policy; hence the development of the policy framework on combating hate crimes, hate speech and unfair discrimination. It is anticipated that the Prevention and Combating of Hate Crimes Bill will be submitted to Parliament

---

<sup>74</sup> See SAHRC List of Issues Report to the Human Rights Committee on South Africa's Implementation of the International Covenant on Civil and Political Rights, April 2015, p. 34

during the 2016 session of Parliament, probably in the second half of 2016, after a comprehensive consultation process on the Bill. The Bill is intended to address discrimination in the form of hate crimes in all spheres. It will target direct, indirect and multiple discrimination and contain a comprehensive list of grounds for discrimination, including national origin, sexual orientation and gender identity, among others. It will also provide for adequate sanctions to be imposed by our courts of law.<sup>75</sup>

54. With regard to the remarks in *para* 107 of the State report, it is noted that the original intent of the initial policy framework and legislation sought to address both hate crimes and criminalise hate speech. However, based on the government's response to the Human Rights Committee, it would appear that the initial draft policy framework has been abandoned in favour of proposed hate crimes legislation which does not specifically include hate speech.<sup>76</sup> The SAHRC expresses concern in this regard, as there is a critical need for a specific legislative framework addressing both hate crimes and hate speech. To date, the South African government has not shared any draft legislation or policies. It is vital that the government keeps the public abreast of developments and engages in a widespread consultative process for any proposed hate crimes / hate speech legislation.
55. In specific relation to hate speech which manifests itself in the online space (digital world), the SAHRC highlights the landmark resolution adopted by the UN Human Rights Council in July 2012, on the Promotion, Protection and Enjoyment of Rights on the Internet, which affirms that '*the same rights that people have offline must also be protected online*'.<sup>77</sup> In both 2014 and 2016 the resolution was further expanded upon, however, the South African government voted against the latter version of the resolution during the recent 32<sup>nd</sup> (July 2016) session of the Human Rights Council. Whilst the resolution seeks to protect human rights online such as freedom of expression and privacy, the South African government representative remarked that, 'the South African constitution guarantees the exercise of the right of freedom of opinion and expression,' and that, 'incitement to hatred is problematic in the context

---

<sup>75</sup> See Replies of South Africa to the List of Issues, CCPR/C/ZAF/Q/1/Add.1 31 December 2015, p. 4

<sup>76</sup> Also see, Department of Justice and Correctional Services. 2015. Status/Progress Report: Review of Equality Act. Presentation delivered to the Equality Review Committee Secretariat, 14 August 2015.

<sup>77</sup> *Para* 1 resolution on the Promotion, Protection and Enjoyment of Rights on the Internet, A/HRC/20/L.13 (June 2012)

where we are having our domestic debates on racism and the criminalisation thereof'.<sup>78</sup> In voting against the resolution, the South African government opined, *inter alia*, that the resolution did, 'not make reference to acts of hatred propagated through cyberspace, including cyber-bullying'.<sup>79</sup> However, paragraph 11 of the adopted resolution clearly stresses, 'the importance of combating advocacy of hatred that constitutes incitement to discrimination or violence on the Internet, including by promoting tolerance and dialogue'.<sup>80</sup>

56. The SAHRC further draws the Committee's attention to the Human Rights Committee's concluding observation no. 15, which was issued in March 2016, and wherein it specifically recommended to the South African government that it, 'should pass appropriate legislation explicitly prohibiting hate crimes and hate speech as soon as possible'.<sup>81</sup>

#### **Recommendations to the Committee**

57. The Committee may wish to further reiterate the concluding observation no.15 of the Human Rights Committee and further highlight the urgency of South African government to enact hate crimes and hate speech legislation.
58. The Committee should emphasise the critical importance of the public's full participation in the development of any legislation and policies which relate to hate speech and hate crimes.

---

<sup>78</sup> See video footage of South Africa's deputy permanent representative to the UN in Geneva, Ncumisa Notutela address to the Human Right Council. Available at, <https://www.enca.com/south-africa/sa-justifies-contentious-un-decision>

<sup>79</sup> <https://www.enca.com/south-africa/sa-justifies-contentious-un-decision>

<sup>80</sup> Para 11, Resolution on the promotion, protection and enjoyment of human rights on the Internet, A/HRC/32/L.20 (June 2016)

<sup>81</sup> Concluding Observations on the Initial Report of South Africa, CCPR/C/ZAF/CO/1, 2006, p. 4

## **Section 6: Article 5: Guarantee to everyone the right to equality before the law in the enjoyment of their rights**

### **6.1 Equality and access to justice**

59. The SAHRC notes the Committee's concluding observation no. 24 in respect of strengthening measures to ensure access to justice, particularly for marginalised groups. Notwithstanding the information provided in *paras* 113 to 115 of the State report in this regard, the SAHRC highlights that exercising the right of access to justice remains highly elusive for many in South Africa. It is argued that the reason for this is partly due to the general lack of awareness of legal rights and remedies, the complexity of the South African legal system, and the lack of access to legal services.<sup>82</sup> In addition, legislation, regulations and policies are usually gazetted in English and / or Afrikaans and therefore remain linguistically inaccessible to the many other linguistic communities of South Africa. Conventional methods of access to justice such as physical access to courts for redress have also proven to be ineffective in affording justice to the marginalised and poor in South Africa.<sup>83</sup>
60. The SAHRC supports a broad view of the concept of access to justice which includes accessing legal services and judicial relief, as well as social justice, economic justice, and environmental justice.<sup>84</sup> Whilst there have indeed been gains in realising access to justice, as reflected in the State report, numerous barriers such poverty, illiteracy and discrimination, continue to exist in South Africa and impede the full exercise of this right.<sup>85</sup> This is further exacerbated by the high cost of legal services and the shortage of free legal assistance in civil matters.<sup>86</sup> To this end, the SAHRC highlights the remarks made by South Africa's Deputy Chief Justice of the Constitutional Court, Justice Dikgang Moseneke, who stated that, 'proper access to justice is often a function of one's bank balance'.<sup>87</sup>

---

<sup>82</sup> *Ibid*, note 72, p. 30

<sup>83</sup> See SAHRC Report on the Colloquium of the Launch of Access to Justice Campaign, June 2015, p. 18

<sup>84</sup> See, Jody Kollapen on "Access to Justice within the South African context" Keynote Address to Open Society Foundation for South Africa Access to Justice Round-Table Discussion (22 July 2003)

<sup>85</sup> AfriMAP & Open Society Foundation for South Africa "South Africa: Justice sector and the rule of law: a discussion paper" (2005) p. 29.

<sup>86</sup> *Ibid*

<sup>87</sup> Justice Dikgang Moseneke on "Reflections on South African Constitutional Democracy – Transition and Transformation" speech delivered at the MISTRA – TMALI – UNISA Conference entitled "Twenty years of South African Democracy: so where to now?" 12 November 2014.



61. The existing dynamics and marginalisation of non-nationals in South Africa also impacts on the right of access to justice. Xenophobia and immigration policing are often undertaken on the basis of racial profiling, rather than reasonable suspicion, and allegations of corruption and bribery by police and/or immigration officers are frequently raised.<sup>88</sup> There have been several instances where perpetrators of crimes against non-nationals are often not prosecuted, or receive minimal punishment, essentially denying the victim's access to justice.<sup>89</sup> The SAHRC has also found that following the 2008 xenophobic violence in South Africa, judicial outcomes for cases have limited the attainment of justice for victims of the attacks and have allowed for significant levels of impunity for perpetrators.<sup>90</sup>
62. Noting the challenges in exercising the right of access to justice, the SAHRC launched its 'Access to Justice Campaign' in June 2015. The campaign seeks to enhance and deepen the country's understanding of human rights as well as bring together key stakeholders such as law clinics, law schools, professional bodies for legal practitioners, community advice offices, paralegals, non-governmental organisations and government departments etc. to address the gaps in the attainment of the right of access to justice.

### **Recommendations to the Committee**

63. The Committee should recommend that the South African government introduce public education initiatives through accessible platforms such as community radio, newspapers, etc. on the rights of access to justice, particularly at the rural level. These should be conducted in the local language/s of the community.
64. The Committee may wish to advise that the South African government explore appropriate means of service to communities where physical access to the courts are situated at a far geographical distance. These measures could include, for example,

---

<sup>88</sup> Consortium for Refugees and Migrants in South Africa (CORMSA) and Lawyers for Human Rights, 'The Impact of the Criminalisation of Migration on the Protection of Human Rights', July 2010, Submission to the Special Rapporteur on the Human Rights of Migrants, p 3. Available at, <http://www.cormsa.org.za/wp-content/uploads/2009/05/cormsa-and-lhr-submission-on-criminalisation-of-migration.pdf>

<sup>89</sup> SAHRC Report on Report on Investigation into issues of Rule of Law, Justice and Impunity arising out of the 2008 public violence against non-nationals, p.68

<sup>90</sup> *Ibid*

the provision of free transport to the courts; exploring the role of community advice offices; and promoting alternative dispute resolution.

65. In order to effectively ensure the right of access to justice, the Committee may wish to recommend that, where possible, that the South African government ensure that laws and policies are available in all 11 official languages of South Africa.

## **6.2 Liberty and freedom of movement**

### **6.2.1 Places of Detention**

66. Whilst noting the information provided in *para* 118 of the State report regarding the freedom of movement and liberty within the borders of South Africa, the response provided by the South African government in the State report is limited and only references judicial precedent relating to the deprivation of liberty. In order to provide further insight, the SAHRC highlights to the Committee that in 2006, the South African government signed, but did not ratify, the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Under the OPCAT, States are required to establish an independent national preventive mechanism to, *inter alia*, monitor and inspect places where persons are deprived of their liberty.
67. The SAHRC also brings to the Committee's attention the Human Rights Committee's concluding observation no. 11 wherein it recommended that the South African government should, 'speed up the preparations for the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and should establish a system for the regular and independent monitoring of all places of detention'.<sup>91</sup>

### **Recommendations to the Committee**

68. The South African should provide the Committee with information on the reasons for the delay in the ratification of the OPCAT. In addition, the government should indicate when it plans to submit its outstanding periodic report under the United Nations

---

<sup>91</sup> *Ibid*, note 79, Human Rights Committee Concluding Observation no. 11.

## 6.2.2 Freedom of movement and residence within the border of the State

69. The State report does not make reference to the freedom movement within the borders of South Africa, notwithstanding the Committee's reporting guidelines to submit such information. In this regard, the SAHRC points out that the right to freedom of movement and residence is enshrined in Section 21 of the South African Constitution. This right is significant in light of South Africa's apartheid history where discrimination against the movement of black persons was routinely administered through spatial segregation and apportionment of land.<sup>93</sup>
70. The SAHRC has noted with concern the ongoing racialised spatial segregation in South Africa, and the effects it has on the enjoyment of the rights to freedom of movement and residence by many previously disadvantaged South Africans.<sup>94</sup> Subsequently, in 2004, the SAHRC conducted public hearings on the use of public road closures, boom gates and gated communities, following a series of complaints on these issues.<sup>95</sup> Through its hearings, the SAHRC found that such access-control measures were prevalent in South Africa and were utilised by certain communities for security purposes.<sup>96</sup> The SAHRC further found that the use of road closures and boom gates has, 'the potential to and does indeed in practice violate a number of rights...including the right to freedom of movement and residence and the right to equality'.<sup>97</sup> These rights were directly encroached on through the arbitrary denial of certain persons or groups of persons to access certain public spaces in South Africa. In addition, the SAHRC found that these forms of access control measures may result in social division, dysfunctional cities and lead to the further polarisation of South Africa's society".<sup>98</sup>

---

<sup>92</sup> It is noted that in December 2014, Cabinet approved the submission of South Africa's Periodic Report (2002 to 2013) under the UNCAT. However, there is no information available as to whether the government deposited the report with the Committee. Also see, <http://www.gov.za/statement-cabinet-meeting-10-december-2014>.

<sup>93</sup> *Ibid*, note 72, p. 26

<sup>94</sup> *Ibid*

<sup>95</sup> SAHRC, "Report on Road Closures/Boomgates" (2004), available at, <http://www.sahrc.org.za/home/21/files/Reports/Boomgate%20Report%20Content.pdf>.

<sup>96</sup> *Ibid*, note 72, p.27

<sup>97</sup> *Ibid*, note 93, p.26

<sup>98</sup> *Ibid*

71. The SAHRC also notes with concern the phenomenon of, 'rental racism', where it is alleged that property agents and landlords exercise preferential treatment in selecting property buyers / tenants along racial lines.<sup>99</sup> The SAHRC has received numerous complaints from tenants being denied property on the grounds of race.<sup>100</sup> As recent as June 2016, the SAHRC instituted an own-initiative investigation following allegations of a guesthouse property owner denying accommodation to black persons.<sup>101</sup>

### Recommendations to the Committee

72. The South African government should provide information to the Committee on the measures it has put in place to address the continued polarisation between persons living in informal settlements and townships and those living in more affluent neighbourhoods.
73. The Committee should encourage the South African government to engage the property and tourism sector with a view to provide education initiatives to discourage discriminatory practices, such as 'rental racism'.

## 6.3 Marriage and family life

### 6.3.1 Forced and servile marriage

74. Whilst the State report indicates in *paras* 131 to 136 that there are several legislative measures in place to protect children from harmful cultural practices such as *ukuthwala*, the phenomenon is still prevalent in many black traditional / rural communities in South Africa and often goes unreported. The SAHRC highlights that the vulnerable position of the girl child, particularly in rural areas in South Africa requires the government to take immediate action and introduce interventions that will safeguard children from harmful practices such as *ukuthwala*.<sup>102</sup>

<sup>99</sup> See, <http://www.news24.com/Archives/City-Press/Rental-racism-No-non-whites-in-my-house-20150429> and, <http://mg.co.za/article/2016-01-20-real-estate-nails-race-to-the-mast>

<sup>100</sup> <http://www.moneyweb.co.za/archive/property-rental-racism-can-be-costly-2/> also see, <http://mg.co.za/article/2009-01-20-hrc-probes-racist-homeowner>

<sup>101</sup> <http://www.timeslive.co.za/local/2016/06/29/SAHRC-opens-its-own-complaint-against-racist-guest-house-owner>

<sup>102</sup> SAHRC NHRI Report to the Committee on the Rights of the Child, November 2015, p. 26

75. The SAHRC also draws the Committee's attention to the CEDAW Committee's recommendation to South Africa in 2010 wherein it specifically urged the state to address harmful cultural practices such as *ukuthwala*.<sup>103</sup> This call was further reiterated in the concluding observations issued to South Africa by the Human Rights Committee in March 2016, wherein it was recommended that the government 'undertake effective measures, including education campaigns, designed to combat harmful traditional, customary or religious practices'.<sup>104</sup> In addition, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), has also called on the South African government to combat this practice.<sup>105</sup>

### Recommendations to the Committee

76. The Committee should recommend that the South African government focus greater attention on eradicating the practice of *ukuthwala*, in order to safeguard children's lives. Furthermore, that there ought to be increased public awareness campaigns in the affected parts of the country and education initiatives for traditional leaders regarding the harmful nature of the practice. Where individuals are prosecuted such prosecutions should be widely publicised to ensure deterrence.
77. The South African government should also provide the Committee with feedback on the progress made by the South African Law Reform Commission (SALRC) in respect of *ukuthwala*, as noted in *para* 136 of the State report, particularly in light of the dissolution of the DWCPD.

### 6.3.2 Discrimination against LGBTI persons

78. The SAHRC notes that there is no reference in the State report regarding the challenges faced by the Lesbian, Gay, Bisexual Transsexual and Intersex (LGBTI) community. The SAHRC therefore raises the matter insofar as it relates to the theme of marriage and family life, as well as harmful cultural and traditional practices.

<sup>103</sup> CEDAW Recommendations to the South African government, CEDAW/C/ZAF/2-4 *para* 21(b).

<sup>104</sup> *Ibid*, note 79, concluding observations 18 and 19 of the Human Rights Committee.

<sup>105</sup> *Para* 65 of the African Committee of Experts on the Rights and Welfare of the Child Concluding Recommendations on South Africa, at <http://aasscerwc.org/?wpdmdl=8754>

79. In February 2014, the Department of Home Affairs (DHA) issued the Draft Regulations to the Immigration Act, 13 of 2002. The SAHRC noted a number of concerns with the draft regulations, including the lack of recognition of customary marriages and the onerous nature of provisions which required proof of an existing relationship between same-sex partners.<sup>106</sup> The SAHRC further noted that this places same-sex partners in a vulnerable situation to disclose their status and provide evidence of their relationship, particularly if their country of origin has criminalised same-sex relationship.
80. The SAHRC's recommendation was subsequently taken into account and the requirement of proof of an existing same-sex relationship from an applicant's country of origin was amended to include 'if available'.<sup>107</sup> However, no further guidance is provided in the Regulations as to how this may affect the practical application of the principal Act. The SAHRC has also noted the need for further engagement on the subject of asylum-seekers who may have fled persecution without the 'requisite' documentation and the need for sensitisation of immigration officials in this regard.<sup>108</sup>
81. The rights of cultural and religious communities to enjoy their culture and practice their religion are protected in section 31(1) of South Africa's Constitution. However, section 31 (2) of the Constitution makes it clear that this protection does not extend to practices that violate other constitutional rights.<sup>109</sup> The SAHRC therefore expresses concern that certain traditional and cultural practices may be misconstrued as encouraging the violations of the rights of women and LGBTI persons. In particular, elements of traditional, cultural and religious beliefs that emphasise heteronormativity and assign gender stereotypical, dominant or submissive roles contribute towards the marginalisation and victimisation of LGBTI persons.<sup>110</sup> This is exacerbated by false claims that LGBTI persons are 'un-African', sinful and harmful to traditional values and are that they are contributing to the moral and ethical degeneration of society.<sup>111</sup> These discriminatory beliefs have also found to be more prevalent in rural areas which tend to be more conservative and traditional.<sup>112</sup>

---

<sup>106</sup> SAHRC Comments to the Draft Immigration Regulations, March 2014, p.5

<sup>107</sup> See section 3(2)(e) of the Immigration Regulations,

<sup>108</sup> *Ibid*

<sup>109</sup> SAHRC Equality Report, 2016, p. 48

<sup>110</sup> *Ibid*

<sup>111</sup> JA Nel & M Judge 'Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and Responses' *Acta Criminologica* 21, 3, 19-36

<sup>112</sup> G Reid & T Dirsuweit 'Understanding Systemic Violence: Homophobic Attacks in Johannesburg and its Surrounds' (2002) 13 3 *Urban Forum* 99

82. The SAHRC further alerts the Committee to the phenomenon of ‘corrective rape’, where LGBTI persons are violently attacked and raped to ‘cure’ them of their sexual orientation. Black lesbian women have found to be particularly vulnerable to these form of attacks,<sup>113</sup> which are often perpetrated to dehumanise women who do not conform to the traditional norm of an ‘African woman’. The SAHRC expresses concern that many of these attacks are not reported as victims fear secondary victimisation due to societal intolerance towards LGBTI persons.<sup>114</sup> Through its advocacy initiatives, the SAHRC’s provincial offices have reported lack of education and acceptance of LGBTI rights, particularly in rural areas.<sup>115</sup> It further noted that negative cultural and religious beliefs have reinforced discrimination against LGBTI persons and that such beliefs hamper the full acceptance and integration of LGBTI persons in the community.<sup>116</sup>
83. Whilst the SAHRC is aware of the initiatives undertaken by government to combat the negative stereotypes and violent attacks on LGBTI persons<sup>117</sup>, it reiterates the need for dedicated legislation addressing hate crimes in South Africa.

#### **Recommendations to the Committee**

84. The Committee should encourage the South African government to establish a database on crimes experienced by LGBTI people so as to ensure that the details of crimes committed against LGBTI victims are comprehensively captured. This may be incorporated into, or may complement, the envisaged hate crimes legislation.

## **6.4 Socio-economic and cultural rights**

### **6.4.1 Land**

85. The Restitution of Land Rights Act, 22 of 1994, and its 2004 amendment, sought to offer a solution to the persons who has lost their land due to racially discriminated practices under the apartheid regime. Noting the concerns and recommendations of the Committee in concluding observation no. 18, as well as the response provided by

<sup>113</sup> <http://www.sowetanlive.co.za/news/2011/10/25/shock-of-corrective-rape-uncovered>

<sup>114</sup> <http://www.capechameleon.co.za/2014/09/corrective-rape/>

<sup>115</sup> SAHRC Equality Report, 2016, p.51

<sup>116</sup> *Ibid*

<sup>117</sup> The South African government has established a national task team to address the issues facing the LGBTI community. See, <http://www.nationallgbtitaskteam.co.za/>

the State in *para* 141 of the State report, the extent of land restitution still remains a challenge in South Africa.

86. In addition, in 2014, the Restitution of Land Rights Act was further amended so as to re-open the lodgement of claims for land restitution to persons who missed the initial 1998 cut-off date, as envisaged in the principal Act. However, based on several complaints relating to land restitution, the SAHRC held investigate hearings into the issue and released its, 'Report of the Investigative Hearing: Monitoring and investigating systemic challenges affecting the land restitution process in South Africa' (Land Restitution Report).<sup>118</sup> The SAHRC expressed concern regarding the inefficiencies and ineffectiveness of the country's ongoing post-apartheid land-restitution processes. Through its investigations, the SAHRC revealed that there are a significant number of challenges with the land restitution process, including understaffing, lack of technical skills and inadequate research capacity as some of the challenges that have hindered the restitution of land rights.<sup>119</sup> The report further notes that these systemic challenges and gaps remain unresolved and that thousands of people have been waiting for almost two decades to have their matters dealt with.<sup>120</sup> The SAHRC's report accordingly provided several recommendations to government on ways to address the issue of land restitution in a comprehensive manner.

#### **Recommendations to the Committee**

87. The Committee should enquire from the South African government, the progress made in respect of land restitution claims and the envisaged time frame to resolve such claims. An update should also be requested regarding the number of claimants afforded land title deeds.
88. The Committee should recommend that the South African government gives effect to the recommendations contained in the SAHRC's Land Restitution Report.

---

<sup>118</sup> SAHRC Land Restitution Report, available at, <http://www.sahrc.org.za/home/21/files/Land%20Restitution%20Report%20Proof%202.pdf>

<sup>119</sup> <http://www.sahrc.org.za/home/index.php?ipkArticleID=309>

<sup>120</sup> *Ibid.* Also see p. 6 of Land Restitution Report. The backlog of unresolved restitution claims raises concerns that claims filed under the new restitution period might further undermine the fulfillment of existing claims- even those that are already approved but where the land titles and development moneys have not yet been handed over.



## 6.4.2 Housing

89. The SAHRC notes the measures that the government has put in place for the realisation of the right to housing, as reflected in *paras* 142 to 144 of the State report. Despite these gains, the country continues to face significant challenges in providing access to adequate housing to poor and vulnerable persons, many of whom continue to live in deplorable conditions without access to basic services or the economic opportunities.<sup>121</sup>
90. In February 2015, the SAHRC convened a national investigative hearing to examine the challenges related to the provision of adequate housing in South Africa and subsequently released the, 'Report on the Investigative Hearing on Access to Housing, Local Governance and Service Delivery' (Right to Housing Report).<sup>122</sup> The SAHRC found that current housing policies and programmes fail to take into account the needs of a variety of people and although mechanisms are available for ensuring that even the most destitute of individuals are accommodated, their needs are not adequately addressed.<sup>123</sup> The SAHRC further found that the housing process lacks transparency and adequate access to information, denying millions of people the right to participate in the development of policies and plans which impact on their daily lives.<sup>124</sup> While community engagements relating to the delivery of basic services, including housing, are held, these engagements tend to lack any substance as information is not provided in a manner which is easily relatable to communities.<sup>125</sup>
91. It should be pointed out that despite the landmark judgement in the *Grootboom* case referred to in the State report, the applicant Ms. Irene Grootboom, died in 2008 without being provisioned with adequate housing.<sup>126</sup>

### Recommendations to the Committee

92. The Committee should recommend that the South African government gives effect to the recommendations contained in the SAHRC's Housing Report. Furthermore, the

<sup>121</sup> SAHRC Right to Housing Report, p.9, available at, <http://www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf>

<sup>122</sup> *Ibid*

<sup>123</sup> *Ibid*

<sup>124</sup> *Ibid*

<sup>125</sup> *Ibid*

<sup>126</sup> <http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>

government to urgently address housing programmes that have had the unintended consequences of reinforcing apartheid spatial planning and ensure that any future or subsequent policies are thoroughly analysed prior to implementation.

### 6.4.3 Healthcare

93. Notwithstanding the remarks in *paras* 145 to 147 in the State report, inequality and the high cost of healthcare services remain an ever-present challenge for many in South Africa. In 2007, the SAHRC released its report on the, 'Right of Access to Healthcare' (Right to Healthcare Report), where it was found that access to healthcare services, especially for the poor, is severely constrained by expensive, inadequate or non-existent transport, emergency transport shortages, and long waiting times at clinics or health care service providers.<sup>127</sup> In rural areas access to healthcare is further influenced by the far geographical distance to the nearest facility, level of service and the quality of care provided.
94. Given the high costs of private healthcare in South Africa, there is a general perception that it is only the wealthy who can afford private healthcare which in turn translates to a better level of service and care. Research indicates that only 16% of the population belong to medical schemes, which enable well-heeled consumers to insure themselves against future health expenses and access private healthcare whilst the rest of the population depends on the state healthcare, where the quality and availability of services vary widely.<sup>128</sup>
95. In December 2015, the South African government released the White Paper on National Health Insurance (NHI).<sup>129</sup> The NHI is envisaged to act as, a 'health financing system that is designed to pool funds to provide access to quality, affordable personal health services for all South Africans based on their health needs, irrespective of their socioeconomic status.'<sup>130</sup> The White Paper proposes sweeping reforms to the healthcare sector in an attempt to narrow the gap between the services enjoyed by

---

<sup>127</sup> SAHRC Right to Healthcare Report, p.5, available at, <http://www.sahrc.org.za/home/21/files/Health%20Report.pdf>. Also see SAHRC's Report on Access to Emergency Medical Services in the Eastern Cape, March 2015 at <https://www.health-e.org.za/wp-content/uploads/2016/04/Access-to-Emergency-Medical-Services-in-the-EasternCape.pdf>

<sup>128</sup> <http://www.bdlive.co.za/national/health/2016/02/01/motsoaledi-does-not-want-nhi-to-limit-choices>, (also see *para* 92 of the White Paper on the NHI).

<sup>129</sup> Available at, <https://www.health-e.org.za/wp-content/uploads/2015/12/National-Health-Insurance-for-South-Africa-White-Paper.pdf>

<sup>130</sup> *Ibid*, *para* 1

rich and poor.<sup>131</sup> The Department of Health's Strategic Plan 2014/15 – 2018/9 specifically calls for the National Health Insurance Bill to be come into law by 2018/19.<sup>132</sup> The NHI will however be gradually phased-in "over a period of 14 years".<sup>133</sup>

### Recommendations to the Committee

96. Noting that the NHI is still at the initial phases, the Committee may wish to inquire what are the interim measures the South African government is taking to address the inequalities in access to healthcare.
97. The Committee should recommend that the South African government gives effect to the recommendations contained in the SAHRC's Right to Healthcare Report.

## 6.4.4 Poverty reduction and special services

### 6.4.4.1 Persons with disabilities

98. The SAHRC notes the progress and commitment to the realisation of rights for persons with disabilities through the government's adoption of various legal instruments as well as the ratification of the UN Convention on the Rights of Persons with Disabilities (UNCRPD).<sup>134</sup> Whilst there are indeed several legislative and policy measures law to advance the rights of people with disabilities as reflected in *paras* 152 and 153 of the State report, the SAHRC points out that the full implementation of these measures requires detailed planning, monitoring and oversight. As mentioned under section 3.2 above, the dissolution of the DWCPD has resulted in a vacuum as there is no longer a dedicated national focal point for disability rights.<sup>135</sup>
99. The SAHRC specifically points out that in terms of South Africa's obligation under the UNCRPD, article 33(2) which requires States Parties to 'maintain, strengthen, designate or establish' one or more independent mechanisms in accordance with the

<sup>131</sup> <http://www.bdlive.co.za/national/health/2016/02/01/motsoaledi-does-not-want-nhi-to-limit-choices>

<sup>132</sup> Health-E News, "Report: Department of Health Strategic Plan 2014/15 – 2018/9", 25 September 2014, <http://www.health-e.org.za/2014/09/25/report-department-health-strategic-plan-201415-20189/>.

<sup>133</sup> Department of Health, *National Health Insurance in South Africa Policy Paper*, p.4 available at, <http://www.hst.org.za/sites/default/files/2bcce61d2d1b8d972af41ab0e2c8a4ab.pdf>

<sup>134</sup> The SAHRC notes that the South African government has submitted its initial report under the CRPD in 2014 and that issues relating to disability rights shall be further analysed when South Africa appears before the CRPD Committee.

<sup>135</sup> Children's and disability rights have shifted to the Department of Social Development which already has a relatively large mandate.

*Paris Principles* to promote, protect and monitor the Convention.<sup>136</sup> The SAHRC is well placed to serve as the independent monitoring mechanism and remains in discussion with relevant organs of state in this regard.

#### **Recommendations to the Committee**

100. The Committee should encourage the South African government to adhere to its obligations under the CRPD and expedite the establishment of the article 33(2) independent monitoring mechanism. The government should further ensure that the independent monitoring mechanism is with adequately resourced to fulfil the mandate envisaged by the CRPD.

#### **6.4.4.2 Water and sanitation**

101. In *para* 155 of the State report, reference is made to the achievements of government in respect of the provision of water and sanitation to households in South Africa. Whilst there have indeed been a substantial increase in the number of people accessing water and sanitation, many residents, particularly those in the poorer areas of South Africa, still do not have adequate access to these services.<sup>137</sup>
102. During 2012 and 2013, the SAHRC conducted investigations and public hearings to assess the extent to which these rights were being realised in South Africa and in 2014 released its 'Report on the Rights to Access Sufficient Water and Decent Sanitation in South Africa' (Water and Sanitation Report). Although the statistics provided in the State report show an improvement, the SAHRC's investigations revealed that the level of service delivery, access to water and sanitation in poor and rural communities remained below the national average.<sup>138</sup>
103. Despite the State report's assertion that the prevalence of the bucket system has been reduced, close to four million children still use unventilated pit latrines or buckets at their homes or schools.<sup>139</sup> Following the provincial hearings, the SAHRC developed a set of comprehensive findings and recommendations to improve the access to water

---

<sup>136</sup> Article 33(2) of the CRPD

<sup>137</sup> SAHRC Report on the Rights to Access Sufficient Water and Decent Sanitation in South Africa, 2014, p. 52.

<sup>138</sup> SAHRC Section 184(3) Report, 2012/13, p. 53.

<sup>139</sup> *Ibid*

and sanitation in the country. The recommendations spoke to: improving institutional arrangements; enhancing a human rights based approach to service delivery; and improving access to services in schools, particularly for girls.<sup>140</sup>

### Recommendation to the Committee

104. The Committee may wish to request the South African government to provide feedback on the measures taken to implement the recommendations as contained in the SAHRC's Water and Sanitation Report.

### 6.4.5 Education

105. Noting the comments made in the State report in *paras* 156 to 165 in respect to education, the SAHRC highlights that education in South Africa remains characterised by high drop-out rates, weak infrastructure, poor quality of education and the inefficient usage of education resources.<sup>141</sup> These challenges are further heightened based on socio-economic and racial lines with black children living in rural areas being the most affected.<sup>142</sup> Opportunities for development continue to be shaped by apartheid's categorisation of racial groups as education in previously disadvantaged areas is found lacking relative to education offered in previously classified, '*white schools*'.<sup>143</sup> Statistics reveal that the levels of education below matric<sup>144</sup> were higher among people classified as black African and coloured, while white and Indian/Asian South Africans were most likely to have secondary or higher-level education.<sup>145</sup> In addition, tertiary level enrolment figures demonstrate that access to higher education is still noticeably higher for white South Africans (representing 23.3% within group) than for black African (4.8%) or coloured students (3.1%).<sup>146</sup>
106. In January 2015, the South African government ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, at the time of ratification, the government entered a declaration in respect of the right to education stating that it shall, "give progressive effect to the right to education... within the framework of its

<sup>140</sup> *Ibid*, note 135, p. 71.

<sup>141</sup> SAHRC Charter of Children's Basic Education Rights, p 8, available at, [http://www.sahrc.org.za/home/21/files/SAHRC%20Education%20Rights%20Charter\\_Part1.pdf](http://www.sahrc.org.za/home/21/files/SAHRC%20Education%20Rights%20Charter_Part1.pdf)

<sup>142</sup> *Ibid*

<sup>143</sup> SAHRC Equality Report, 2015 p. 26

<sup>144</sup> This is the final year of secondary education which is Grade 12.

<sup>145</sup> Statistics South Africa. (2015). Quarterly Labour Force Survey 1 2015.

<sup>146</sup> *Ibid*.

National Education Policy and available resources". The SAHRC reiterates that the right to basic education, as enshrined in Section 29(1)(a) of the Constitution, is an unqualified socio-economic right and not subject to availability of resources or progressive realisation.<sup>147</sup> It has therefore been argued that the declaration entered by the government contradicts the guarantees under section 29(1)(a) of the Constitution.<sup>148</sup> Furthermore, that it is contrary to the Constitutional Court judgement in the case of *Juma Masjid*<sup>149</sup> wherein the Court clarified section 29(1)(a) and held that there is 'no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures"'.<sup>150</sup>

107. The SAHRC addresses further concerns related to racism in higher education under section 8 herein and in respect of article 7 of the Convention.

#### **Recommendation to the Committee**

108. The Committee should encourage the South African government to ratify the Optional Protocol to the ICESCR so as to further strengthen the justiciability of socio-economic rights and permit the ICESCR Committee to receive communications in instances where the rights under the Covenant have allegedly been violated.
109. The Committee should establish through the South African government, the measures that have been adopted by the State to ensure that a minimum level of infrastructure relating to school buildings, access to water, electricity, basic electrical equipment, sufficient toilets for the number of children attending the school, fences and a library are provided to all schools throughout South Africa.<sup>151</sup>
110. The Committee should inquire as to whether the State will adopt urgent measures to address geographical differences in the provision of basic education, in particular that

---

<sup>147</sup> South African Charter of Children's Basic Education Rights: briefing by SAHRC to Parliament's Portfolio Committee on Basic Education, 14 May 2013, <https://pmg.org.za/committee-meeting/15839/>

<sup>148</sup> See, <https://www.equaleducation.org.za/article/2015-01-21-sa-govts-declaration-on-education-clause-mars-the-welcome-ratification-of-the-international-covenant-on-economic-social-and-cultural-rights-icescr> and <http://www.bdlive.co.za/national/education/2015/05/22/our-right-to-learn-is-under-siege>

<sup>149</sup> *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011)

<sup>150</sup> *Ibid*, para 37

<sup>151</sup> This recommendation was also submitted to the Committee on the Rights of the Child for its review of South Africa's obligations under the Convention on the Rights of the Child, scheduled to occur in September 2016.

the DBE investigate the underlying reasons and seek to find solutions for the discrepancies in the provisioning of quality basic education.<sup>152</sup>

## **Section 7: Article 6: Effective protection and remedies against any acts of racial discrimination**

### **7.1 The protection of non-nationals against racially motivated violence**

111. The Committee may recall that in 2008, South Africa experienced an unprecedented level of violence against non-nationals of predominantly African descent, in which over 60 people were killed. The attacks were accompanied by looting and the subsequent displacement of a large number of people including children.<sup>153</sup> The SAHRC subsequently conducted an investigation and released the report, 'Investigation into issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals', (Xenophobia Report), wherein 21 recommendations were issued to government. The recommendations included the need to establish early warning systems and put in place measures to prevent a recurrence of the xenophobic violence. However, as noted in *para* 196 of the State report, the SAHRC's recommendations were only partly responded to by the government.
112. The SAHRC also notes that in March 2011, the Committee issued an 'Early Warning' to the South African government where it expressed concern over the country's xenophobic acts and continuing "racist violence targeting refugees and asylum-seekers".<sup>154</sup> However, notwithstanding both the Committee's concern and the SAHRC's numerous recommendations, in 2015 South Africa once again witnessed violent attacks against non-nationals in the country's *KwaZulu Natal* province. At least 7 people were reported to have been killed in the violence, with over 5000 non-nationals left homeless following the outbreak of attacks.<sup>155</sup>

---

<sup>152</sup> *Ibid*

<sup>153</sup> SAHRC Report on Report on Investigation into issues of Rule of Law, Justice and Impunity arising out of the 2008 public violence against non-nationals, available at, [http://www.sahrc.org.za/home/21/files/Non%20Nationals%20Attacks%20Report\\_1-50\\_2008.pdf](http://www.sahrc.org.za/home/21/files/Non%20Nationals%20Attacks%20Report_1-50_2008.pdf)

<sup>154</sup> United Nations, High Commissioner for Human Rights, Palais de Nations, GH/CBR, 11 March 2011, available from, [http://www2.ohchr.org/english/bodies/cerd/docs/SouthAfrica\\_11March2011.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/SouthAfrica_11March2011.pdf).

<sup>155</sup> 'South Africa's Johannesburg marches against xenophobia' *BBC News*, 23 April 2015, <http://www.bbc.com/news/world-africa-32432205>

113. Statistics released by the African Centre for Migration and Society estimates that at least 350 non-nationals have been killed in xenophobic violence since 2008 alone,<sup>156</sup> whereas the African Diaspora Forum marks the number as being as high as 900.<sup>157</sup> In addition to this, surveys conducted in 2008 and 2013,<sup>158</sup> relating to the perception of South Africans to migration, illustrate that anti-migration sentiment has grown substantially. The survey results show that 32% of participants in the survey would take action to prevent non-nationals moving into their neighbourhood while 36% would take action to prevent them from operating a business.<sup>159</sup>
114. Numerous factors are thought to contribute to xenophobic attitudes which fuel attacks against non-nationals. These include socioeconomic hardship faced by South Africans and the perception that non-nationals pose a threat to the livelihoods of locals.<sup>160</sup> There is also a perception that non-nationals perpetrate criminal activities and as a result, many non-nationals have often been wrongfully harassed or victimised.<sup>161</sup> South Africa's response to acts of violence and discrimination against non-nationals have also been criticised as problematic, due to the fractured and inconsistent nature of State actions.<sup>162</sup> Despite guarantees of inter-ministerial coordination and rapid response mechanisms following the outbreak of violence in 2008, these have not been sufficiently operationalised, with the result that the response to the violence in 2015 was criticised as slow and inefficient.<sup>163</sup>
115. The SAHRC further highlights that in May 2015, a member of parliament posed questions to the Minister of Home Affairs in respect of the implementation of the SAHRC's recommendations as contained in the Xenophobia Report.<sup>164</sup> In a question relating to whether the Department of Home Affairs had conducted an evaluation of the challenges faced during the 2008 xenophobic crisis and if an action plan for

---

<sup>156</sup> Statistical research conducted by the African Centre for Migration and Society, see <http://www.economist.com/news/middle-east-and-africa/21649429-south-africas-poor-are-turning-those-even-more-downtrodden-blood-end-rainbow>.

<sup>157</sup> <http://www.issafrica.org/iss-today/is-xenophobia-becoming-part-of-the-south-african-way-of-life>.

<sup>158</sup> Mataure, Mandla. "Citizens Perception on Migration in South Africa" AfroBarometer, February 2013, available at, <http://www.afrobarometer.org/publications/bp112-citizen-perceptions-migration-south-africa>

<sup>159</sup> *Ibid*

<sup>160</sup> 'South Africa must confront the roots of its xenophobic violence' *The Guardian*, 20 April 2015, <https://www.theguardian.com/commentisfree/2015/apr/20/south-africa-xenophobic-violence-migrant-workers-apartheid>

<sup>161</sup> *Ibid*.

<sup>162</sup> 'No singular response from government against xenophobia' *News24*, 26 May 2015, <http://www.news24.com/Live/SouthAfrica/No-singular-strong-response-from-government-against-xenophobia-20150526>

<sup>163</sup> *Ibid*

<sup>164</sup> Question No. 1690 for Written Reply, Internal Question Paper 13 of 2015, 8 May 2015, MP, MH Redelinghuys questions to Minister Malusi Gigaba, available at, <http://www.politicsweb.co.za/news-and-analysis/xenophobia-we-implemented-sahrc-report--malusi-gig>



improvements had been submitted to the SAHRC, the Minister responded that his Department had not conducted an evaluation nor issued a report on the challenges faced during the 2008 xenophobic crisis<sup>165</sup>. In specific reference to the SAHRC's recommendation that the Department of Home Affairs conducts and provides an annual assessment of the progress made in actioning the recommendations contained in the Xenophobia Report,<sup>166</sup> the Minister responded that although several initiatives were implemented following the 2008 xenophobic violence, annual progress reports have not been provided to the SAHRC. In a further question on whether guidelines had been developed to prevent xenophobia, the Minister responded that, 'the prevention of xenophobia is a matter that requires an all-of-government and all-of-society approach, for as much as the Department issues enabling documentation to foreign nationals to facilitate their integration into society, such persons become part of communities as they conduct their daily lives and access services....thus, enabling social cohesion requires the cooperation of all tiers of government and civil society.'<sup>167</sup> The Minister further opined that the Department of Home Affairs was the process of reviewing an integration strategy aimed to prevent violence against foreign nationals and that asylum seekers and refugees will be systematically integrated into communities through this strategy.<sup>168</sup> However, the SAHRC notes that progress is required as to the current status of this integration strategy.

116. The SAHRC also brings to the Committee's attention that following the outbreak of the 2015 xenophobic violence, Parliament established the 'Ad-Hoc Joint Committee on Probing Violence Against Foreign Nationals'.<sup>169</sup> The Ad-Hoc Committee noted that there is a need for more initiatives aimed at integration of non-nationals and locals and that the failure to implement a social cohesion programme following the 2008 violence against non-nationals, have influenced successful integration of non-nationals into communities.<sup>170</sup>
117. The most recent development in respect of the studies available on the phenomenon of xenophobia in South Africa, is the 'Report of the Reference Group on Migration and Community Integration in *KwaZulu Natal*', (Pillay report). The report of the reference

<sup>165</sup> *Ibid*, question and response no. 2(a-b)

<sup>166</sup> See recommendation no. 8 in the SAHRC's Xenophobia Report, *ibid* note 153.

<sup>167</sup> *Ibid*, note 164, question and response no. 4

<sup>168</sup> *Ibid*

<sup>169</sup> The Committee consisted of 11 members of the National Assembly and 9 members of the National Council of Provinces, see <https://pmg.org.za/committee/126/>

<sup>170</sup> Report of the Ad-Hoc Committee on Probing Violence Against Foreign Nationals, 19 November 2015, para 7.9 p.36, available at, [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/151119Final\\_Report.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/151119Final_Report.pdf)

group, which was headed by the former UN High Commissioner for Human Rights, Judge Navi Pillay, was released in April 2016 following a seven month inquiry into the causes and consequences of the 2015 xenophobic attacks.<sup>171</sup> Whilst the Pillay report focused mostly on the dynamics within the *KwaZulu Natal* province, there are observations and recommendations which bear relevance for South Africa at large. The Pillay report notes that the underlying tensions between local communities and foreign nationals, (which can be traced back to the period before and during the similar 2008 violent attacks), have not been resolved and that there is a strong possibility for recurrence.<sup>172</sup> The Pillay report further notes that whilst many non-nationals allege that they face constant discrimination and prejudice in their daily lives, local communities in turn complain about a lack of engagement and dialogue with non-nationals.<sup>173</sup>

118. Although South Africa has demonstrated its commitment to human rights of non-nationals through a host of a progressive policies towards asylum seekers and refugees as reflected in the State report, these policies do not account for the status and protection of undocumented foreign nationals who are already in the country.<sup>174</sup> Challenges also remain in the implementation of immigration-related policies, as well as the shortcomings in the policing, justice and intelligence agencies which have all contributed to the long-term vulnerabilities and tensions between locals and non-nationals.<sup>175</sup> The Pillay report offers a number of recommendations to address the immediate and long-term challenges related to xenophobia and includes, *inter alia*, the following:<sup>176</sup>

- i. The need to develop and enhance national policies on migration as existing policies are insufficient and do not speak sufficiently to the realities and current projections of migration trends in the region;<sup>177</sup>
- ii. A nationwide campaign to incentivise all undocumented non-nationals already in the country to register and receive appropriate documentation without

---

<sup>171</sup> Report of the Special Reference Group on Migration and Community integration in KwaZulu-Natal was commissioned by the *KwaZulu Natal* provincial government and is available at, <http://reliefweb.int/sites/reliefweb.int/files/resources/Special%20ref%20group%20on%20Migration%20and%20Community%20Intergration%20in%20KZN.pdf>

<sup>172</sup> Navi Pillay report p.xi

<sup>173</sup> *Ibid*, para 15, p.7

<sup>174</sup> *Ibid*, para 16, p.8

<sup>175</sup> <https://www.enca.com/south-africa/xenophobia-report-released-today>

<sup>176</sup> *Ibid*, note 170 p. x and xi

<sup>177</sup> *Ibid* para 23.2, p.17

criminalising their current presence in the country or mandating their repatriation;<sup>178</sup>

- iii. Pro-active information sharing on the rights of non-nationals and the need to clarify and counteract the inaccurate information and speculation about the number of non-nationals in the country;<sup>179</sup>
  - iv. Ensuring that leaders make responsible public statements and consider the potential ramifications of their statements which may be perceived as harmful to a group of persons.<sup>180</sup>
  - v. Widespread education campaigns and initiatives to promote diversity, social cohesion and sustainable community relations<sup>181</sup> as well as creating local forums to act as a dialogue forum and promote peace in communities;<sup>182</sup> and;
  - vi. Sensitising and educating civil servants in law enforcement, social security, public health, etc. about the rights non-nationals and the different classification of non-nationals' documentation.<sup>183</sup>
119. Noting the challenges, the SAHRC plans to host a National Investigative on the Rights of Migrants, Xenophobia and Related Intolerance during the 2016/17 financial year and shall issue recommendations to government and other relevant stakeholders.

### **Recommendations to the Committee**

- 120. The Committee should inquire from the South African government, what measures have been put in place to address the ongoing human rights violations of non-nationals detained at repatriation centres such as Lindela.
- 121. The Committee should request feedback on what changes have been introduced to give effect to the recommendations contained in the SAHRC's Xenophobia Report as well as the court judgements.

---

<sup>178</sup> *Ibid*

<sup>179</sup> Para 23.9, p.20

<sup>180</sup> *Ibid* 23.10 p 20

<sup>181</sup> *Ibid*, para 23.11 p.20

<sup>182</sup> *Ibid*, para 23.11 p.20

<sup>183</sup> *Ibid*, para 23.4, p.18

122. The Committee should inquire from the South African government, what proactive measures is being undertaken to ensure due process is being afforded to non-nationals, both during their initial processing and documentation as migrants and throughout their time spent living in the country.
123. The Committee may wish to question the South African government on the extent to which they have implemented policies and practices that will ensure anti-discrimination towards non-nationals by public officials and whether these initiatives, if any, have been effective.
124. To further demonstrate its commitment to the rights of migrant workers, the Committee should encourage the South African government to sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

#### **7.1.2 Position with regard to Article 14 declaration**

125. *Para 213 of State report confirms the declaration made by the State at the time of ratification of the ICERD in 1998, and South Africa's willingness to be subjected to scrutiny with regard to compliance with the provisions of the Convention under article 14 of the Convention. However, the SAHRC further emphasises the declaration entered by the State under article 14(2) of the ICERD which confirms that, 'the South African Human Rights Commission is the body within the Republic's national legal order which shall be competent to receive and consider petitions from individuals or groups of individuals within the Republic's jurisdiction who claim to be victims of any of the rights set forth in the Convention.'*

#### **Section 8: Article 7: Measures in the fields of teaching, education, culture and information to combat racial discrimination**

126. Paras 214 to 221 of the State report addresses the government's measures, vision and the legislative framework to combat racial discrimination in education. However, the SAHRC specifically brings the following to the attention of the Committee which is not captured in the State report.

## 8.1 Racial Discrimination at Institutions of Higher Education

127. Over the past few years, the SAHRC has received several complaints relating to racism, abusive language and sexual discrimination from students at institutions of higher education.<sup>184</sup> The SAHRC specifically points out that in 2012, a complaint was received from the Higher Education Transformation Network, regarding the death of a student during a university orientation programme.<sup>185</sup> The SAHRC was subsequently requested by the Department of Higher Education and Training (DHET), to determine what role discrimination, on the basis of race and language, played both in the student's death and generally at universities.<sup>186</sup> Thus, between July and November 2014, the SAHRC conducted investigative hearings to analyse the state of race relations and transformation challenges at South African universities.<sup>187</sup>
128. The SAHRC accordingly found that that discrimination remains prevalent in public universities in South Africa, particularly on the ground of race, gender, disability and class.<sup>188</sup> It was also found that the historical legacy of apartheid exacerbates the prevailing inequalities and negative stigma associated with poor students. Furthermore, that transformation in the higher education sector has been relatively slow and has been hindered by numerous factors including i) a lack of understanding as to what transformation means; ii) lack of appreciation for or understanding of cultural diversity; iii) a lack of capacity and/or institutional will to successfully implement transformation plans; and, iv) a myriad of persisting social challenges and inequality which exacerbate access to higher education. The SAHRC noted that mechanisms aimed at promoting the achievement of substantive transformation should address inherent inequalities between historically white and black universities.<sup>189</sup>
129. The draft re 'Report on Transformation at Universities', (Transformation Report) has accordingly been circulated to stakeholders and the final report shall be released during the course of 2016. Whilst still pending finalisation, it should be noted that the SAHRC's preliminary recommendations aim to promote the acceleration and

---

<sup>184</sup> <http://citizen.co.za/222614/500-race-related-cases-investigated-sahrc/> and

<http://www.bdlive.co.za/national/education/2014/08/01/racist-and-sexist-terms-rife-at-sas-universities>

<sup>185</sup> The student, died in a swimming pool during the orientation programme. It was found that his death was an accident.

<sup>186</sup> <http://www.sahrc.org.za/home/index.php?ipkMenuID=91&ipkArticleID=288>

<sup>187</sup> Stakeholders include the DHET, vice-chancellors, student representatives and organisations representing both academic and non-academic staff. The SAHRC's Report on Transformation at Universities will be (to be uploaded to SAHRC website in due course)

<sup>188</sup> SAHRC's Draft Report on Transformation at Universities, p.10

<sup>189</sup> *Ibid*

achievement of substantive transformation in the sector. In specific relation to government, the SAHRC has found that there is a need that, i) The DHET design appropriate mechanisms to ensure a greater level of oversight and accountability for transformation at universities;<sup>190</sup> ii) The DHET should require university councils to report annually on the state of transformation at their respective university;<sup>191</sup> and, iii) The DHET, together with the Transformation Oversight Committee,<sup>192</sup> should produce an annual report on the state of transformation in the higher education sector at a national level.<sup>193</sup>

130. The SAHRC brings to the Committee's attention that in March 2015, a campaign was initiated which sought to 'decolonise' a prominent South African university, through the removal of a statue on campus of former colonial prime minister, Cecil John Rhodes.<sup>194</sup> The campaign, which came to be known as the 'Rhodes Must Fall' movement, signified a continuing struggle in South Africa's institutions of higher education to address issues of race and class.<sup>195</sup> The subsequent removal of the Rhodes statue also ignited a broader conversation around the perceived failures of South Africa's transformation project<sup>196</sup> and the fact that the higher education sector have arguably mirrored the challenges of the broader South African society. The SAHRC is aware that the nature and extent of challenges witnessed through the Rhodes Must Fall movement, serve as a stark reminder of the fact that race-related tensions also has resonance with persons born post-apartheid.<sup>197</sup>

### Recommendations to the Committee

131. The Committee may wish to request feedback on how the government intends to give effect to the recommendations which shall be contained in the SAHRC's Transformation Report and what interim measures are being put in place to address the slow pace of transformation at institutions of higher learning.

<sup>190</sup> *Ibid*, draft recommendation 9.7.5, p.97

<sup>191</sup> *Ibid*, draft recommendation 9.7.6, p.97

<sup>192</sup> The Transformation Oversight Committee was established by the Minister of Higher Education to monitor progress on transformation in public universities and to advise the Minister on matters related to, inter alia, race relations, social cohesion, sexism, unfair discrimination etc. See, <http://www.politicsweb.co.za/documents/the-oversight-committee-on-university-transformati>

<sup>193</sup> *Ibid*

<sup>194</sup> Cecil John Rhodes, was a British Prime Minister of the Cape Colony from 1890 to 1896.

<sup>195</sup> SAHRC Equality Report, 2016, p.31

<sup>196</sup> 'Rhodes Must Fall – Decolonisation Symbolism – What is happening at UCT, South Africa?' *The Post Colonialist*, 29 March 2015, <http://postcolonialist.com/civil-discourse/rhodes-must-fall-decolonisation-symbolism-happening-uct-south-africa/>

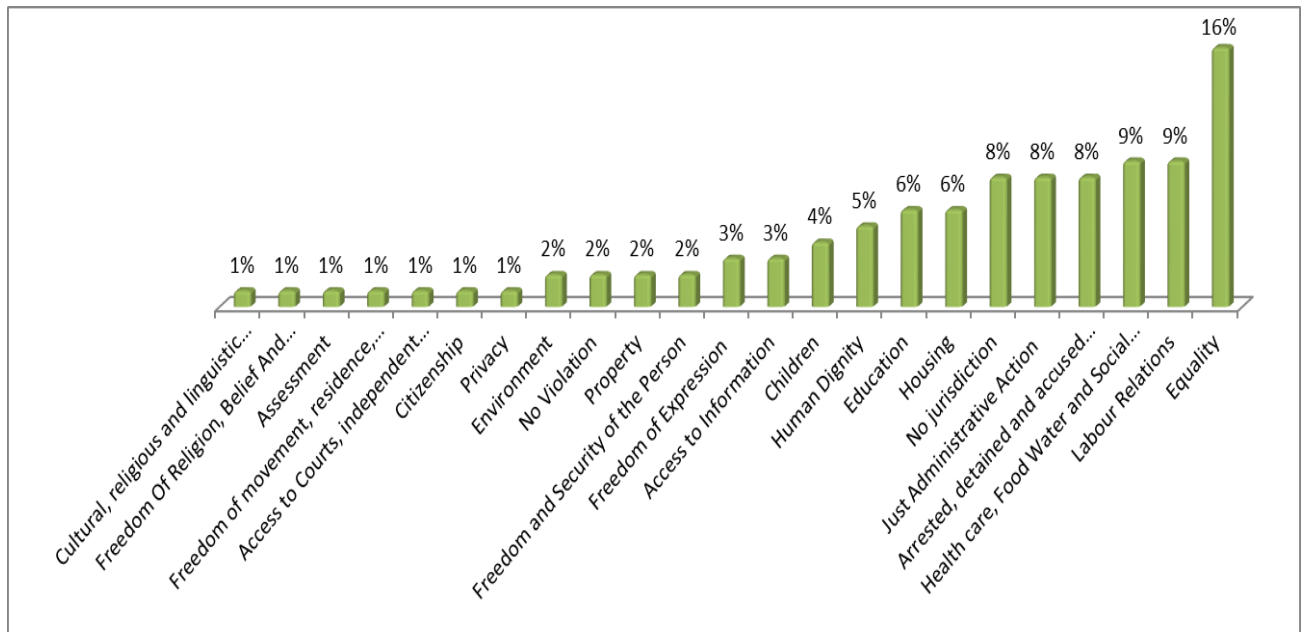
<sup>197</sup> These are known as the 'born frees' i.e. born after the demise of apartheid, post-1994.

132. The Committee may wish to recommend that the government, together with institutions of higher learning, student representative bodies and other stakeholders, convene a national dialogue to explore the challenges faced at South Africa's universities and propose solutions.
133. The Committee should ascertain what measures are in place to bridge the inequality gap at universities, particularly as it affects poorer students.

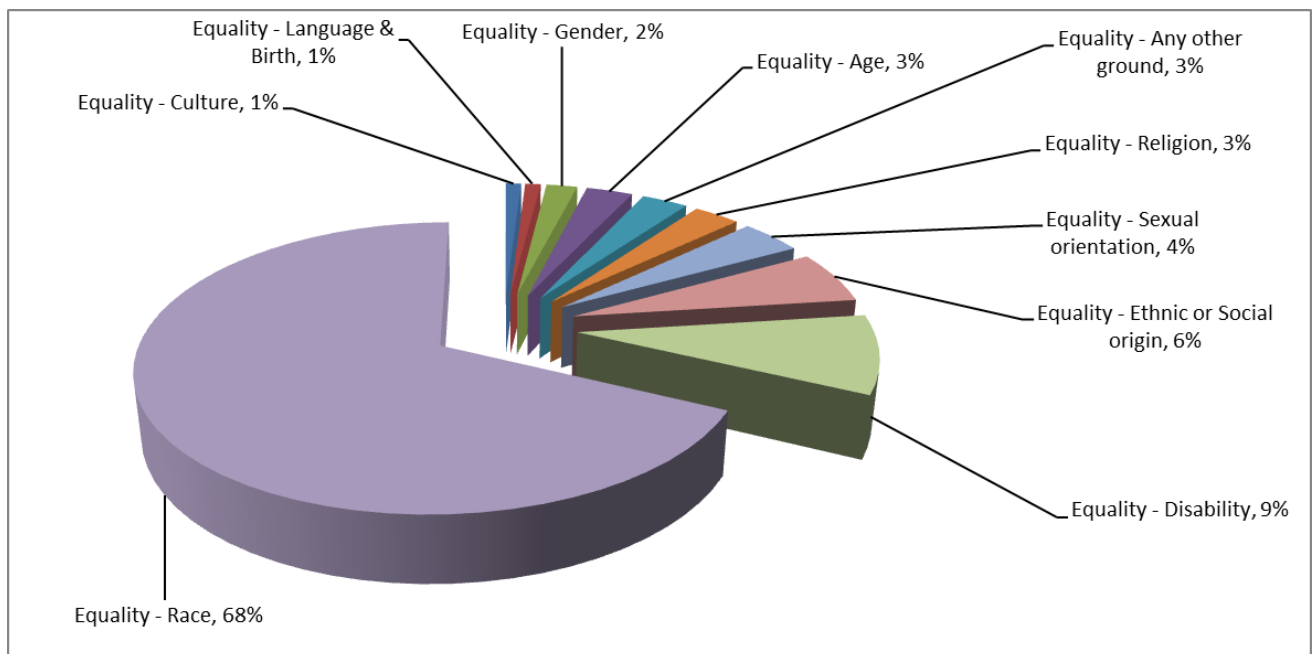
### **Section 9: Concluding remarks**

134. The SAHRC acknowledges the tremendous constitutional and legislative advances made by the South African government since the final demise of apartheid in 1994. Whilst the country's democracy is relatively young, discriminatory social attitudes, inequalities and racism hamper efforts to build a non-racist, non-sexist society as envisaged by the constitution and international human rights instruments. Review mechanisms under the treaty bodies therefore serve as a rich guidance to assist the government, as well as institutions such as the SAHRC, to develop South Africa's democracy and further advance the realisation of human rights, respect for the rule of law and growth of social cohesion in the country. The SAHRC therefore commends the Committee for its work and looks forward to further engagement with the Committee during its review of South Africa at the 90<sup>th</sup> session.

## Annex: SAHRC's 2015/16 Complaints Breakdown



Proportion of total complaints received in the period 1<sup>st</sup> April 2015 and 29<sup>th</sup> February 2016 (Total=4397)



Breakdown of equality complaints received in the period 1<sup>st</sup> April 2015 to 29<sup>th</sup> February 2016 (Total=716)