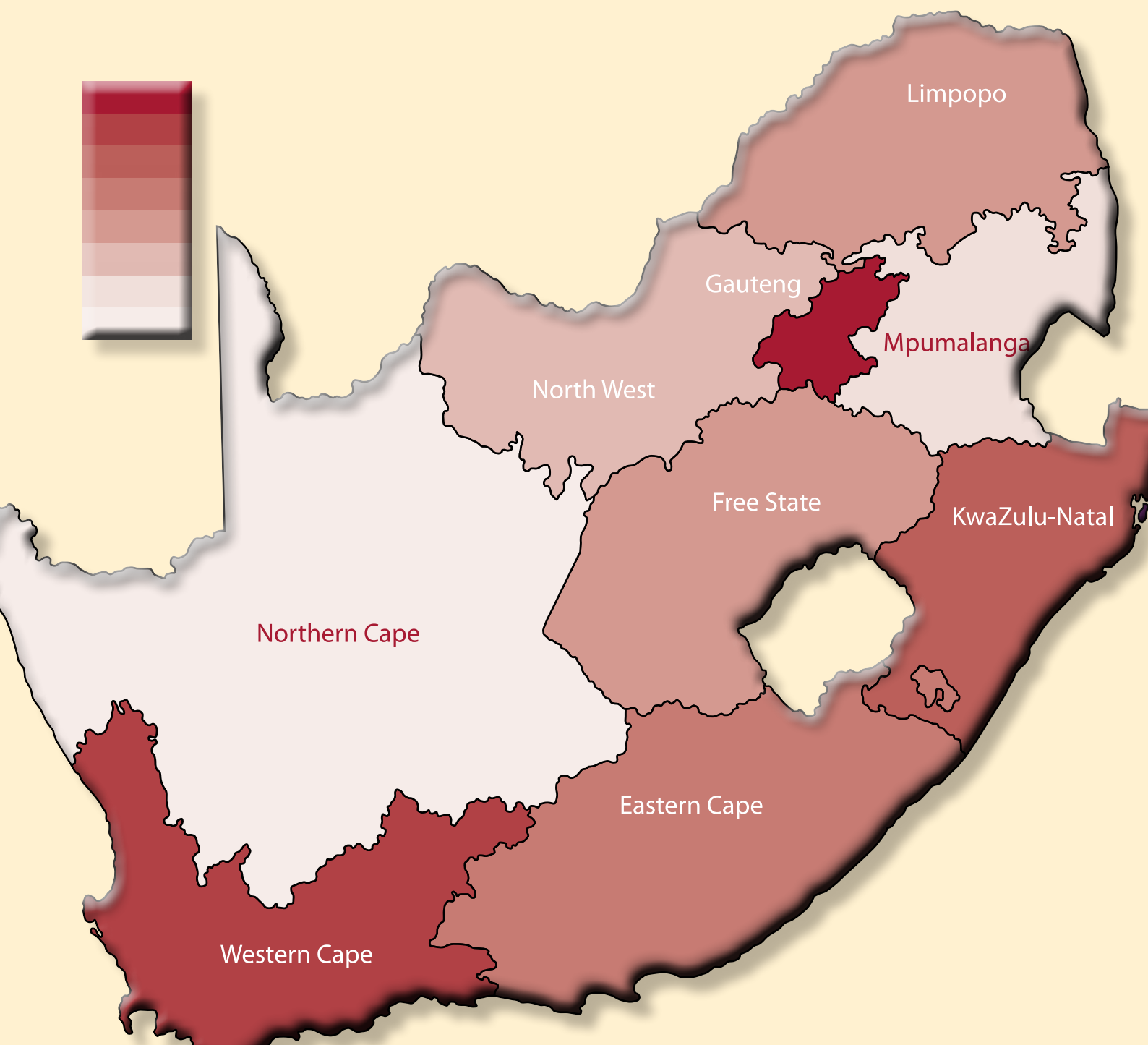
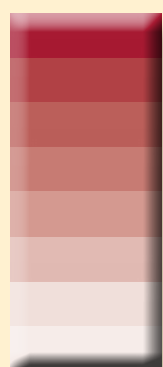


# Annual Trends' Analysis Report 2015/2016 Financial Year





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## 1. LIST OF ACRONYMS

AdvoComm	Advocacy and Communications Unit of the South African Human Rights Commission
ADR	Alternative Dispute Resolution
CCMA	Commission for Conciliation, Mediation and Arbitration
CHP	Complaints Handling Procedures
CRLR	Commission for Restitution of Land Rights
DSD	Department of Social Development
DOJCD	Department of Justice and Constitutional Development
JICS	Judicial Inspectorate for Correctional Services
Legal Aid SA	Legal Aid South Africa
LSU	Legal Services Unit of the South African Human Rights Commission
PAIA	Promotion of Access to Information Act, (No. 2 of 2000)
PAJA	Promotion of Administrative Justice Act, (No. 3 of 2000)
PEPUDA	Promotion of Equality and Elimination of Discrimination Act, (No. 1 of 2000)
SAHRC	South African Human Rights Commission
SAHRC ACT	South African Human Rights Commission Act (No. 40 of 2013)
SAPS	South African Police Service
StatsSA	Statistics South Africa

## 2. EXECUTIVE SUMMARY

The South African Human Rights Commission (the Commission) presents this annual trends' analysis report for the 2015/2016 financial year. The annual trends' analysis report provides statistical and substantive analyses on a number of activities undertaken by the Legal Service Unit (LSU) of the Commission, both at its head office and in all nine of its provincial offices during the year under review. The indicators in this annual trends' analysis report have been derived from the data collected from the enquiries and complaints into alleged human rights' violations lodged with the provincial offices of the Commission.

The report draws a comparison between various indicators over the past three financial years, namely the 2012/2013, 2013/2014 and 2014/2015 financial years, and those of the 2015/2016 financial year. The comparative analyses of the indicators enable the Commission to improve operational efficiencies in responding to reported violations of rights, to identify trends in reported violations, inform the nature of interventions required for the promotion of the protection of rights and to serve as a resource for reference by other stakeholders.



*The comparative analyses of the indicators enable the Commission to improve operational efficiencies in responding to reported violations of rights, to identify trends in reported violations, inform the nature of interventions required for the promotion of the protection of rights and to serve as a resource for reference by other stakeholders.”*

The report also provides an analysis on the rights forming the subject of complaints received by the Commission and the prevalence of such complaints registered at each of the Commission's provincial offices. The analyses reveal that, over the last four financial years, a majority of the complaints lodged with the Commission related to the alleged violation of the rights to equality, labour relations, healthcare services, water, food and social security, just administrative action and arrested, detained and accused persons. The Commission has termed these complaints the “Top 5 Rights Violations”.

Alleged infringements of the right to equality comprised an overwhelming majority of the complaints received by the Commission. Alleged discrimination on the basis of race, disability and ethnic or social origin constitute the most common grounds of unfair discrimination. For example, in the 2015/2016 financial year, the Commission received a total of 749 equality related complaints, 505 of which were on the basis of race. Allegations of discrimination on the basis of disability and ethnic and social origin respectively comprised the second and third common grounds of unfair discrimination. The Commission's statistics demonstrate that despite the establishment of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the plethora the anti-racism laws, racism remains endemic in South Africa.

During the 2015/2016 financial year, the Commission celebrated 20 years of its existence. It used this opportunity to reflect on the considerable achievements toward the realisation and building of the society envisaged in the Constitution and the challenges encountered along the way. The Commission noted, however, that for some communities the transformational imperatives of the Constitution remain a distant reality.

In March 2016, the Commission hosted a two-day conference to reflect on its service to human rights and South Africa's constitutional democracy since its establishment in 1995, as well as to consider the obstacles it encountered in its quest to promote, protect and monitor human rights in the country.

For the thematic segment of the conference, the Commission chose to focus on the scourge of racism in South Africa. The rationale for the choice of the theme was triggered by the spike in racism related complaints lodged with the Commission, particularly in relation to allegations of racism perpetuated on social media.

In considering complaints regarding alleged violations of socio-economic rights, access to health care services, food, sufficient water and social security have consistently formed part of the Top 5 Rights Violations. In the 2015/2016 financial year, these complaints amounted to 428 of those received by the Commission. In respect of other socio-economic rights, the Commission received 290 housing related complaints and 276 education related ones. This is not surprising in light of South Africa's highly unequal society. The Constitutional Court has repeatedly pronounced on the disparities that exist in our society, largely a consequence of our history shaped by institutionalised discrimination and systemic deprivation. In addition monitoring bodies have identified South Africa as one of the most unequal countries in the world.

In line with its constitutional and legislative mandate to take steps to secure appropriate redress where human rights have been violated, as well as its 2014 – 2017 Strategic Plan to adopt a holistic approach to redressing human rights' violations, the Commission instituted litigation, alongside other dispute resolution mechanisms. These included conducting investigations with a view to make findings and recommendations, using Alternative Dispute Resolution (ADR) mechanisms and hosting national hearings investigating systemic human rights' violations. The Commission dealt with 16 of the complaints lodged with it by way of ADR.

During the 2015/2016 financial year, the Commission was involved in civil proceedings in the Gauteng and Western Cape Divisions of the High Court of South Africa, the Supreme Court of Appeal and the Constitutional Court. The Commission's involvement in litigation included litigation in the equality courts, defending a delictual suit, opposing a judicial review, promoting the respect and protecting of consumer rights against unlawful practices relating to emolument attachment orders and enforcement of socio-economic rights.

At the provincial office level, the Commission undertook a number of litigious interventions in various courts in South Africa. The right to equality remains the right most frequently litigated by the Commission in the Equality Courts. Most of these cases involve the use of the "k-word" and other derogatory comments with racial undertones, such as use of the terms "baboon" or "monkey". In the 2015/2016 financial year, 31 of 54 matters litigated by the provincial offices related to the right to equality and hate speech.

The Commission published four Investigative Reports in which it made adverse findings against the Respondents and recommended certain steps to be taken to redress human rights' violations. These relate to the alleged violation of the environmental right in terms of section 24 of the Constitution, the constitutionality of the administering of corporal punishment in the home, discrimination on the basis of disability, and access to adequate housing and lack of poor access to basic municipal services.

The Commission received 169 appeals against decisions made by provincial offices on complaints lodged with the Commission. An overwhelming majority of those appeals were procedural in nature and have been dismissed by the chief operations officer of the Commission. Of the 169 appeals, only seven were upheld.

Two National Hearings were convened to address complaints identified as being systemic in nature: the National Hearing Relating to the Human Rights Situation of Indigenous Peoples in South Africa, and the National Hearing on Unfair Discrimination in the Workplace.

### 3. INTRODUCTION

The Commission is an independent institution, established in terms of section 181 of the Constitution to support constitutional democracy. Its mandate, as contained in section 184 of the Constitution, is to:

- promote respect for human rights and a culture of human rights;
- promote the protection, development and attainment of human rights; and
- monitor and assess the observance of human rights in the Republic.

**The mandate of the Human Rights Commission is to:**

- **promote respect for human rights and a culture of human rights;**
- **promote the protection, development and attainment of human rights; and**
- **monitor and assess the observance of human rights in the Republic.**

In terms of section 184(2) of the Constitution, the Commission is empowered to investigate and report on the observance of human rights; to take steps and secure appropriate redress where human rights have been violated; to research; and to educate. The additional powers and functions are prescribed by the South African Human Rights Commission Act, (No. 40 of 2013) (the SAHRC Act). Additionally, the Promotion of Equality and Prevention of Unfair Discrimination Act, (No. 1 of 2000) (PEPUDA), provides for the functions and powers of the Commission including the authority to institute legal proceedings under PEPUDA.<sup>1</sup>



*In terms of section 184(2) of the Constitution, the Commission is empowered to investigate and report on the observance of human rights; to take steps and secure appropriate redress where human rights have been violated; to research; and to educate.”*

The Commission has a national footprint through its provincial offices in the nine provinces of South Africa. Each office is staffed by a manager of a provincial office (provincial manager), senior legal officer(s), legal officer(s), advocacy officer(s), fieldworker(s) and administrative staff. The provincial offices receive complaints from walk-in complainants, telephonically, electronically and from communities they visit through various outreach and advocacy initiatives.

The manner in which the Commission handles the complaints is governed by the Commission's Complaints Handling Procedures (the CHP),<sup>2</sup> which makes provision for the Commission to:

- a) accept a complaint if it makes a finding that the complaint constitutes a *prima facie* violation of a fundamental right;<sup>3</sup>

1 Section 20(1)(f) of PEPUDA.

2 Complaints Handling Procedures of the South African Human Rights Commission Government Gazette No. 34963 of 27 January 2012; accessible on [www.sahrc.org.za](http://www.sahrc.org.za).

3 In accordance with article 12(11) of the Complaints Handling Procedures.

- b) reject a complaint,<sup>4</sup>
- c) directly or indirectly refer a complaint that does not fall within the jurisdiction of the Commission, or that could be dealt with more effectively or expeditiously by another organisation, institution, statutory body or institution created by the Constitution or any applicable legislation;<sup>5</sup> and
- d) refer a complaint to the Equality Court in terms of PEPUDA.<sup>6</sup> The Commission may assist the complainant in instituting proceedings in this court in compliance with PEPUDA and the applicable regulations.

This fourth edition of the annual trends' analysis report provides an overview of a number of activities of the LSU of the Commission at both its head office and provincial offices during the 2015/2016 financial year. The indicators in this report have been derived from the data collected from the enquiries and complaints that were lodged with the provincial offices of the Commission. To this end, the report also draws a comparison between the indicators of the past three financial years and those of the 2015/2016 financial year.

The report provides background information and the context as contained in the Commission's Strategic Plan for the 2014 – 2017 cycle. An overview of the complaints received by the Commission in the 2015/2016 financial year and how those were dealt with by the Commission follows. The overview is structured to include:

- a) the total number of complaints received by the Commission alleging rights' violations;
- b) the number of complaints received by each of the provincial offices;
- c) the breakdown of complaints that were accepted referred, rejected and those that were active when the 2015/2016 financial year commenced;
- d) the top 5 rights forming the subject of the majority of complaints received by the Commission, including matters not accepted by the Commission. These are referred to as the Top 5 Rights Violations. This is followed by a breakdown of basis or the grounds upon which the rights' violations allegedly occurred; and
- e) the Top 5 Rights Violations that were accepted by the Commission during the 2015/2016 financial year.

The annual trends' analysis report also provides information about the enquiries directed to the Commission and an analysis of them. The mode of resolution of matters per category of resolution such as litigation, ADR, issuing of report based findings, hearings and appeals are then detailed, followed by concluding remarks.

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4 In terms of article 4(2) of the Complaints Handling Procedures which states, in part, that [T]he Commission may reject any complaint, which –

- (a) is based on hearsay, rumour or reports disseminated through the media;
- (b) is couched in language that is abusive, insulting, rude or disparaging;
- (c) is the subject of a dispute before a court of law, of law, tribunal, any statutory body, any body with internal dispute resolution mechanisms, or settled between the parties, or in which there is a judgment on the issues in the complaint or finding of such court of law, tribunal, statutory body or other body;
- (d) is an anonymous complaint, subject to the provisions of article 8 of these Procedures;
- (e) is viewed to be frivolous, misconceived, unwarranted, incomprehensible, and manifestly incompatible with fundamental rights or does not comply with the provisions of the Act and these Procedures; and
- (f) is lodged after the expiry of a period of three years from the date upon which an alleged violation of a fundamental right occurred, subject to the provisions of article 11 of these Procedures.

5 Articles 12(8) and 12 (9) of the Complaints Handling Procedures.

6 Article 12(10) of the Complaints Handling Procedures.



## 4. BACKGROUND

The Commission is an “A” rated National Human Rights Institution (NHRI) which adheres to the Paris Principles<sup>7</sup>. The Paris Principles serve to guide the nature and functioning of an NHRI and also emphasise the independent nature of NHRIs. They state, among other things that national human rights institutions should:

- a) monitor any situation of violation of human rights;
- b) be able to advise the government, Parliament and any other competent body on specific violations;
- c) educate and inform on issues of human rights; and
- d) be able to use their quasi-judicial powers where these exist.

The Commission undertook several strategic planning sessions to conduct a situational assessment through a PESTEL<sup>8</sup>, SWOT<sup>9</sup> and strategic analyses in terms of which:

- a) The Commission committed itself to explore the possibility of expanding its partnership with institutions supporting democracy, civil society, academic institutions and other stakeholders to mitigate the funding challenges;
- b) The Commission deemed that, given the limited resources available, it may be useful to identify and focus on specific areas of human rights protection, monitoring and promotion that are not covered by the mandates of any other existing Constitutional bodies. Partnerships with institutions supporting democracy would ensure greater strategic focus and prioritisation of rights; and
- c) The Commission noted that it realises the increasing need for an integrated approach in delivering on its mandate to monitor, protect and promote human rights, and to consider its mandate as a value chain, with each component equally contributing to a human rights culture.

This report seeks to demonstrate how the Commission achieved these objectives by providing an overview of work undertaken to achieve its promotion and protection mandate.

During the 2015/2016 financial year, the Commission continued to ensure that complaints were resolved expeditiously, as prescribed in its CHP, so that efficiency in its CHP was improved, and delays in the resolution of and response to complaints was overcome. In addition, the Commission continued to train and empower its staff in the LSU at all levels, in order to enhance their capacity.



*During the 2015/2016 financial year, the Commission continued to ensure that complaints were resolved expeditiously, as prescribed in its CHP, so that efficiency in its CHP was improved, and delays in the resolution of and response to complaints was overcome.”*

7 Paris Principles, adopted by the UN General Assembly on 20 December 1993, resolution A/RES/48/134.

8 A framework or tool used to analyse and monitor the macro-environmental (external environment) factors that have an impact on an organisation. The result of this is used to identify threats and weaknesses, which are used in a SWOT analysis.

9 A study undertaken by an organisation to identify its internal strengths and weaknesses, as well as its external opportunities and threats.

By and large, over the four financial years under review<sup>10</sup>, the Commission has made good progress in achieving the targets it set in the 2014 – 2017 Strategic Plan of the Commission. These include:

- a) Exceeding the targeted finalisation rate of all complaints lodged with the Commission;<sup>11</sup>
- b) Tracking rights' violations that form the subject of the majority of complaints that are lodged with it.<sup>12</sup> This has enabled the Commission to identify ways to improve the efficiency of handling those persisting rights' violations and to adopt appropriate measures to address these;
- c) Increasingly use the courts to determine and create precedent in matters involving human rights. The number of litigious interventions by the Commission has accordingly increased during the financial years under review.<sup>13</sup>

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10 2012/13, 2013/14, 2014/15 and 2015/16 financial years.

11 See table 1.1 for the finalisation rate of complaints over the financial years under review.

12 See graph 9 for Top 5 Rights Violations over the financial years under review.

13 See chapter 11 (Litigation) for a discussion on the Commission's litigious interventions over the financial years under review.

## 5. PROFILE OF COMPLAINTS

### 5.1 NATIONAL OVERVIEW: YEAR-ON-YEAR COMPARISON OF CASELOAD

	Caseload (complaints & enquiries)				Finalised (% of total)		Carried over/active	
	Complaints	Enquiries	Total caseload	Year-on-year change	Finalised + once-off enquiries	% Target achieved		
2011-2012			11 363		9 851	87%	1 512	13%
2012-2013	4 947	3 972	8 919	-22%	7 047	79%	1 872	21%
2013-2014	4 980	4 237	9 217	3%	8 550	93%	667	7%
2014-2015	3 685	4 494	8 179	-13%	7 337	90%	842	10%
2015-2016	4 613	4 625	9 238	13%	8 200	89%	1 038	11%

Table 1: Year-on-year comparison of caseload

The table above is made up of the statistical information from the 2011/12 period to the 2015/2016 period.<sup>14</sup> Statistical information for the 2011/2012 financial year was extracted from that year's Annual Report in order to calculate percentage change from year to year.

Table 1 includes the total number of complaints recorded at the end of each financial year as well as once off enquiries. The two totals are added together to provide a total of the caseload for each of the financial years under review. The percentage difference in the caseload for each financial year is calculated and illustrated as the year-on-year change. The total number of finalised complaints, including once off enquiries, are extracted from the caseload in order to calculate the percentage of finalised complaints in relation to the Annual Performance Plan target set. The target to finalise all complaints received in each financial year has been consistently set at 85%, measuring the number of complaints finalised through the various mechanisms available to the Commission as specified in its CHP.

### 5.2 CUMULATIVE DASHBOARDS

STATUS as @ MONTH END	2012-2013	2013-2014	2014-2015	2015-2016
Registration	7	0	0	0
Assessment	572	122	93	97
Unclear - steering committee consideration	1	5	4	4
Allocate	7	0	5	2
Investigate	1 219	449	661	829
Litigation - equality	20	42	32	34
Litigation - other	1	2	1	0
Negotiation/conciliation /mediation	7	9	2	2
Hearing	1	0	1	1
Report	20	26	24	45
Final sign off	17	12	19	24
Monitoring report recommendation	10	6	7	1

<sup>14</sup> The statistical information for the 2011/2012 financial year was extracted from the Annual Report compiled at the end of the said financial year.

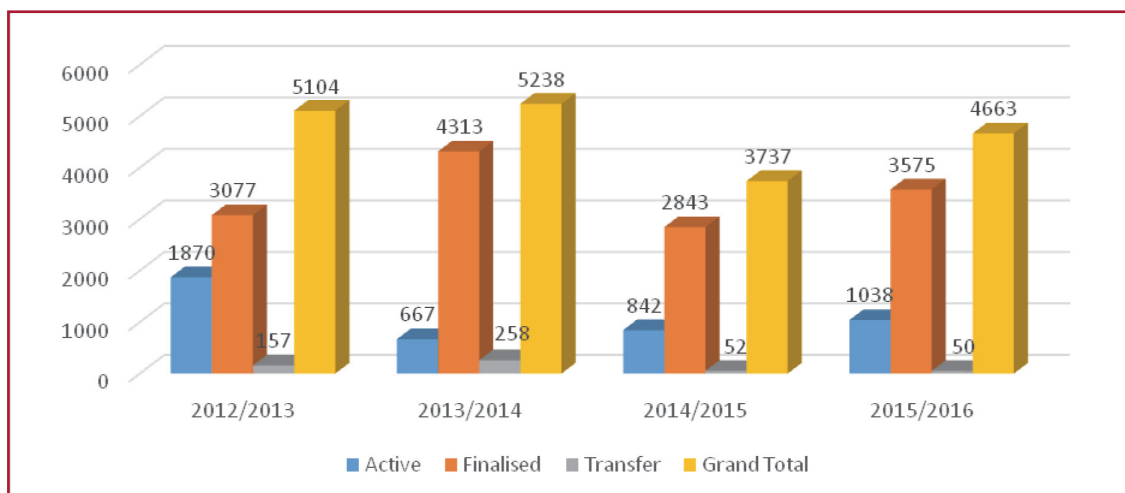
STATUS as @ MONTH END	2012-2013	2013-2014	2014-2015	2015-2016
Monitoring direct referral (report/info. required)	62	45	33	19
Rejected	680	685	398	461
Indirect referral	1 228	1 843	1 122	1 251
Direct referral	168	419	512	802
Resolved	267	470	363	515
Closed	660	845	408	526
Grand totals	4 947	4 980	3 685	4 613
Transfer	157	258	52	50
Total complaints	5 104	5 238	3 737	4 663
Enquiries finalised	3 972	4 237	4 494	4 625
Percentage finalisation of cases (Target 85%)	79%	93%	90%	89%

Table 2: Cumulative Dashboards per financial year under review

The Cumulative Dashboard provides a snapshot of statistical information on complaints received by the Commission nationally at the end of each of the four financial years under review. The dashboard provides the status of complaints received in each financial year and the target percentages achieved at the end of each financial year. That number includes enquiries made to the Commission. The finalised complaints are shaded in yellow as opposed to the active complaints which are shaded in white. The total number of complaints includes those that have been transferred to other provincial offices for further processing and handling. For the purposes of percentage calculations, transferred complaints are not included in the calculation and these are listed under the pink header in the table above.

### 5.3 TOTAL COMPLAINTS PER FINANCIAL YEAR

As has been highlighted above the Commission’s complaint handling is dealt with by its provincial offices. Complaint information from each of the provincial offices is collated at national level, on a monthly basis, and verified through the Commission’s case management system.



Graph 1: Complaints received per financial year

For the four financial years under review, the Commission received over 5 000 complaints only during 2012/13 and 2013/14. The highest for any year was 5 238 complaints, which was recorded at the end of the 2013/2014 financial year.

At the end of the 2014/2015 financial year a significant decrease in the number of complaints received was discernible. The decrease could be attributed to the fact that during the 2013/2014 financial year, the Commission embarked on a process of finalising backlogged complaints that had not been finalised for a number of years. The backlog project ensured that the number of complaints carried over to 2014/2015 was reduced significantly, resulting in the relatively low number of complaints at the end of the 2014/2015 financial year.

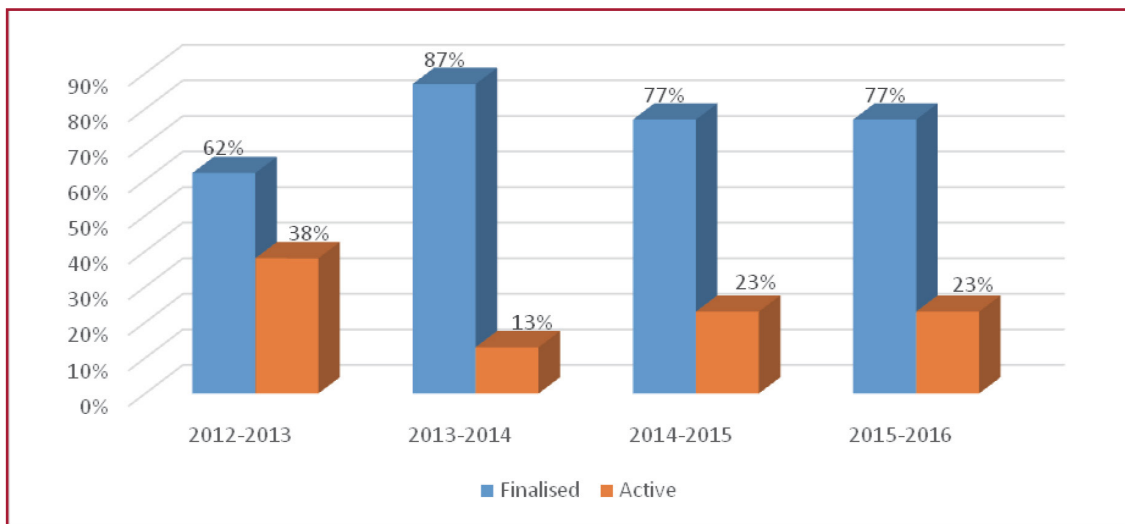
The 4 663 complaints received at the end of the 2015/2016 financial year increased from the 3 737 recorded at the end of the 2014/2015 financial year. In December 2015 and January 2016, the Commission received a high number of equality related complaints that had been fuelled by media reports of racial utterances on social media, together with complaints relating to violations of other rights that were not related to any utterances made on social media. Accordingly, the increase in the number of complaints that were recorded at the end of the 2015/2016 financial year could not directly be attributed only to utterances made on social media. Other factors that contributed to the high number of complaints in the 2015/2016 financial year included, but were not limited to, complaints that were carried over from the previous financial years.



*The 4 663 complaints received at the end of the 2015/2016 financial year increased from the 3 737 recorded at the end of the 2014/2015 financial year.”*

As evident from the graph 1 above, the number of complaints that have been carried over into subsequent financial years have increased steadily from the low of 667 complaints in the 2013/2014 financial year to 1 038 in the 2014/2015 financial year. The increase is partly attributable to those complaints that were not finalised in preceding financial years, due to human capacity constraints and a lack of engagement by respondents. These are part of the next financial year's data.

On average, the Commission finalised 3 450 complaints per financial year. The highest number of complaints finalised by the Commission was during 2013/2014 when a total of 4 313 complaints was finalised. The average number of active complaints at the end of each financial year is 1 104. The Commission recorded the highest number of active complaints at the end of 2012/2013 with a total number of 1 870 complaints.



Graph 2: Percentage of finalised and active complaints

The percentages depicted in the graph above are calculated from the number of complaints received, excluding enquiries and complaints that have been transferred to other provincial offices. When calculating the target percentage of the entire workload for a financial year, enquires are included as they form part of the work of the LSU at provincial offices. As shown above, more than 60% of complaints received in each of the four financial periods under review were finalised. The highest percentage achieved in all the four financial years was during 2013/2014, with 87% of complaints received having been finalised. On average the Commission finalised 76% of complaints received.

The average percentage of active complaints at the end of each financial year in review is 24%. At the end of each period, active complaints that have not been finalised are carried over to the following financial year and reflected in that year’s figures. If finalised during the subsequent financial year, carried over complaints are counted as forming part of the statistics for that financial year. The lowest percentage of complaints carried over into another financial year was recorded at the end of the 2013/2014 financial year as shown in the graph above. The Commission identifies matters which have not been resolved within 180 days as a backlogged complaint and where appropriate responds to such complaints accordingly.



*The Commission identifies matters which have not been resolved within 180 days as a backlogged complaint and where appropriate responds to such complaints accordingly.”*

#### 5.4 TOTAL COMPLAINTS PER PROVINCIAL OFFICE PER FINANCIAL YEAR

For the purposes of complaint handling, provincial offices are categorised according to the caseload that each receives. They are distinguished by either being a high, medium and low caseload province. Provincial offices that fall under the high caseload category are those in Gauteng and the Western Cape. Medium caseload offices are the KwaZulu-Natal, Eastern Cape and Free State provincial offices. Provincial offices that fall in the low caseload category are those of North West, Northern Cape, Limpopo and Mpumalanga.

**Gauteng and the Western Cape receive high levels of cases. Medium caseload offices are KwaZulu-Natal, Eastern Cape and Free State. North West, Northern Cape, Limpopo and Mpumalanga have low caseload levels.**

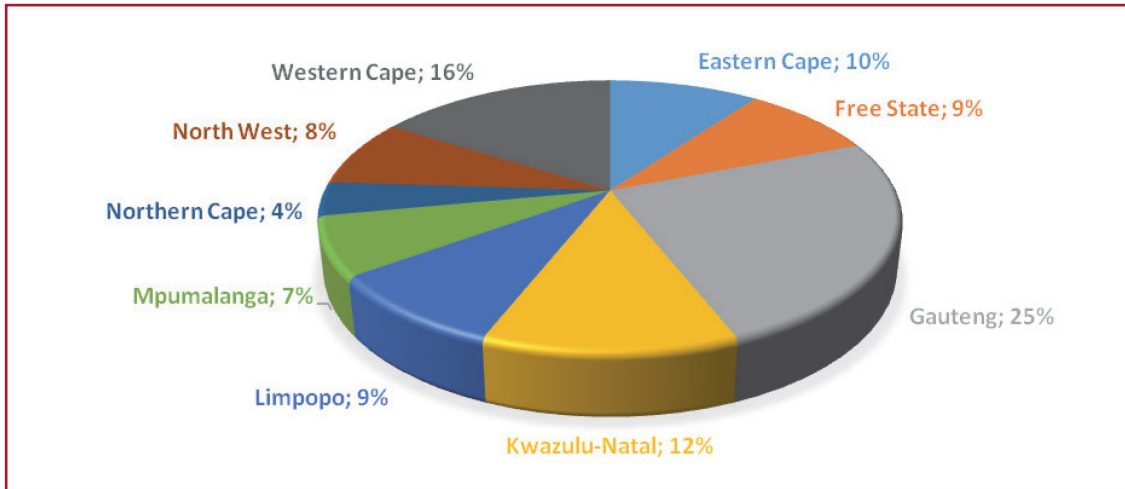
Factors which affect the number of complaints the provincial offices receive include the size of the province, the population of the province, the accessibility of the provincial offices and the extent to which the people in the province know about the Commission and its work. The table below illustrates the numbers of complaints received by the Commission per provincial office for each of the financial years under review.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	452	425	450	472
Free State	468	460	316	485
Gauteng	1 544	1 344	939	1 110
KwaZulu-Natal	411	578	520	581
Limpopo	255	480	405	417
Mpumalanga	373	438	248	280
Northern Cape	233	248	160	134
North West	420	385	180	514
Western Cape	948	880	519	670
<b>Totals</b>	<b>5 104</b>	<b>5 238</b>	<b>3 737</b>	<b>4 663</b>

Table 3: Total number of complaints per provincial office

The table above shows the total number of complaints that have been recorded by provincial offices for each of the four financial years under review. These totals include complaints that have been transferred internally to other provincial offices. For purposes of calculations, transfers are excluded to avoid an inflation of case volume statistics. The Gauteng provincial office consistently receives the highest number of complaints, followed closely by the Western Cape provincial office and then KwaZulu-Natal. This has also been the case in terms of the numbers recorded at the end of the 2015/2016 financial year. One noticeable change in the number of complaints recorded at the end of the 2015/2016 financial year, however, is the relatively high increase in the number of complaints recorded by the North West provincial office. During the year, this provincial office relocated to a more visible area, which could account for the increase in the number of complaints registered.

The pie chart below illustrates the average percentage distribution of complaints received by the Commission per provincial office over the four financial years under review. The percentages are derived from the total number of complaints received, shown in the table above, at the end of each financial year under review.



Graph 3: Percentage complaints received per financial year, per provincial office

There have been three official censuses since South Africa’s first democratic election in 1994: in 1996, 2001, and October 2011 respectively. The population in 1996 was 40.6 million, increasing by 10.4% to 44.8 million in 2001. The population grew by 15.5%, or almost 7 million people, in the space of 10 years to reach a total of 51.7 million in 2011. The provinces of Gauteng and KwaZulu-Natal account for 42% of South Africa’s population. Gauteng, with 12.3 million people (23,7% of the national population) is the most populated province, while 10.3 million (19.8%) people live in KwaZulu-Natal. The Eastern Cape has 6.56 million (12.7%) people, the Western Cape 5.82 million (11.3%), Limpopo 5.4 million (10.4%), Mpumalanga 4.04 million (7.8%), North West 3.51 million (6.8%), and Free State 2.75 million (5.3%). Although the Northern Cape is geographically the largest province, at almost a third of South Africa’s land area, it is an arid region and has the smallest population, with only 1.15 million people, or 2.2% of the total population, living there.<sup>15</sup>

The information provided by Statistics South Africa (StatsSA) above appears to suggest that the Commission receives its highest complaint volumes from the most densely populated areas of South Africa.

15 <http://www.southafrica.info/about/people/population.htm#.V2ex9k0kqpo#ixzz4C6pGuk3t>

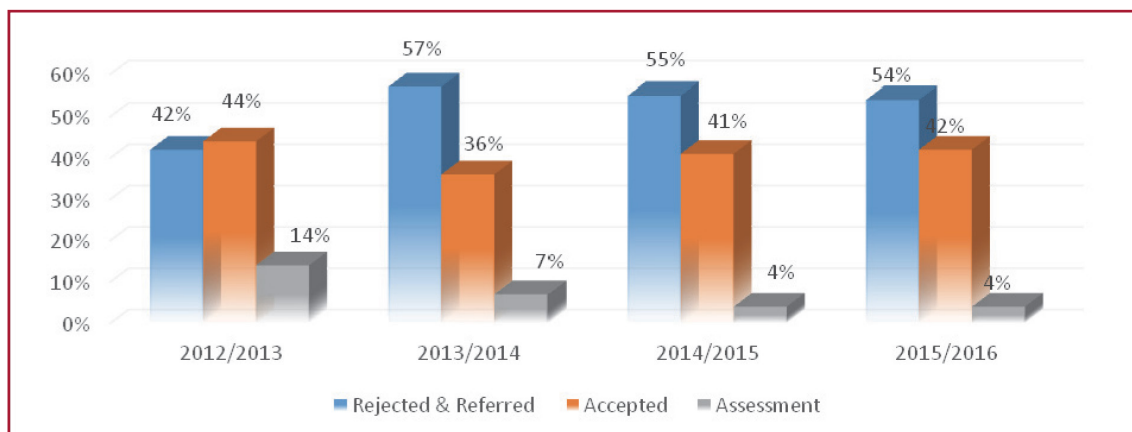


## 6. ACCEPTED VERSUS REJECTED COMPLAINTS

The determination of accepted and rejected complaints is informed by the definitions of the two terms as set out in the definitions' section of the Commission's CHP. Rejected complaints are described as those complaints where there was no human rights' violation; the violation took place before 1994; or the matter is currently before another legal forum. The complaints handling flowchart (attached as Annexure 1), indicates that complaints that are referred, although not rejected complaints, are not investigated by the Commission. The latter are sent to another organisation, body or institution which can more effectively and efficiently deal with them after an assessment of such complaints has indicated this may be appropriate based on the facts of the complaint. Referred complaints are those where the Commission does not have the jurisdiction to deal with them. Such complaints are either directly referred (only to legislated bodies) or indirectly referred.<sup>16</sup>



*Referred complaints are those where the Commission does not have the jurisdiction to deal with them. Such complaints are either directly referred (only to legislated bodies) or indirectly referred.”*



Graph 4: Percentage of complaints per rejected and referred, accepted and assessment status

The graph above illustrates the percentage distribution of accepted and rejected complaints, as well as those complaints that are still at the assessment stage. Notwithstanding the percentage of accepted

16 In practical terms, the provincial manager is responsible for assessment and may make any of the following findings relating to complaints received at their respective provincial offices, namely, referral to the Steering Committee, rejection, referral (direct or indirect) and acceptance. In instances where the provincial manager makes a finding that the complaint does not fall within the jurisdiction of the Commission, or could be dealt with more effectively or expeditiously by another organisation, institution, statutory body or institution created by the Constitution or any applicable legislation, then in terms of article 12(8)(a) of the Commission's Complaints Handling Procedures "the complaint must ... be referred to such appropriate organisation, institution or body ... and the complainant must ... be notified thereof, in writing, and be provided with the contact details of such appropriate organisation, institution or body." The Complaints Handling Procedures distinguish between direct referrals and indirect referrals. A direct referral is classified as a complaint which is referred directly to another organisation, institution or statutory body because the provincial manager has found that the complaint does not fall within the jurisdiction of the Commission, or could be dealt with more efficiently or expeditiously by another organisation, institution or body. An indirect referral requires notification of the complainant, in writing, and for the complainant to be notified with the contact details of the organisation, institution or body to pursue the alternative option himself or herself. The complainant is also advised to contact the Commission again should he or she not get a response from the organisation, institution or body. This does not preclude the Commission from writing to the institution on behalf of the complainant. In instances where a complainant has withdrawn the complaint or has failed to provide the further information requested by the Commission within the timeframe given and therefore prevents the provincial office from taking the complaint any further, such complaint may be closed.

complaints during the 2013/2014 financial year decreasing from the 2012/2013 financial year, the percentage steadily increased over the two subsequent financial years. The percentage of accepted complaints did not constitute more than 50% over the four financial years under review. A basis for the percentage of accepted complaints could be that complainants that approach the Commission appear, generally speaking, to be unaware of its constitutional mandate. The Commission devotes significant resources in referring complaints to other organisations, institutions or statutory bodies that can more effectively and efficiently deal with these. A concerted effort needs to be undertaken to reach rural and peri-urban communities who appear to remain unaware of the Commission and its mandate.

**Complainants that approach the Commission appear, generally speaking, to be unaware of its constitutional mandate... A concerted effort needs to be undertaken to reach rural and peri-urban communities who appear to remain unaware of the Commission and its mandate.**

In line with the provisions of the CHP, provincial offices must either accept, reject or refer complaints brought to the Commission. The provincial manager is responsible for assessing complaints lodged and deciding whether to accept, reject or refer them. According to article 34(1) of the CHP, any party who feels aggrieved by any determination, decision or finding made by the provincial manager may lodge an appeal with (a) the Chairperson of the Commission, if the appeal is of a substantive nature or (b) the chief operations officer, if the appeal is of a procedural nature.<sup>17</sup>



*In line with the provisions of the CHP, provincial offices must either accept, reject or refer complaints brought to the Commission.”*

## 6.1. ACCEPTED COMPLAINTS

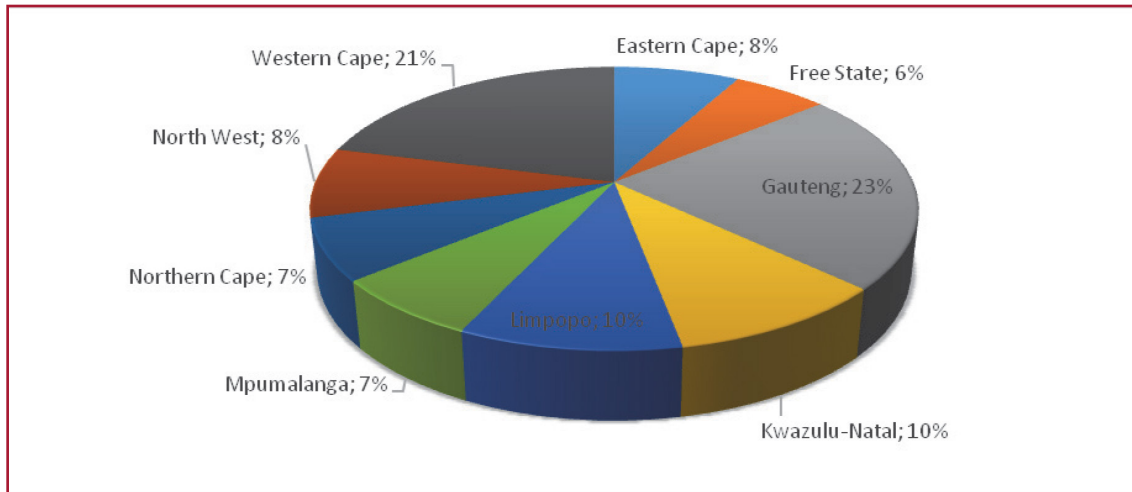
### 6.1.1. Total number of accepted complaints per financial year per provincial office

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	159	147	144	152
Free State	149	135	67	138
Gauteng	520	377	329	500
KwaZulu-Natal	135	195	193	186
Limpopo	197	212	153	154
Mpumalanga	140	137	117	158
Northern Cape	171	161	116	79
North West	185	183	72	201
Western Cape	573	317	327	411
<b>Totals</b>	<b>2 229</b>	<b>1 864</b>	<b>1 518</b>	<b>1 979</b>

Table 4: Accepted complaints per provincial office per financial year

17 See below a discussion on appeals lodged with the Commission during the 2015/2016 financial year.

The Gauteng provincial office has received and recorded the highest numbers of complaints over the four financial years under review, with a smaller number being received in Western Cape provincial office. These two provincial offices have consistently been the only ones to accept over 300 complaints annually. Complaints that have been accepted by the remaining seven provincial offices over the four financial years under review have been around 200 (between 7 to 10%). These figures are proportionate to complaint volumes for each of the provincial offices per annum.



Graph 5: Percentage accepted complaints per financial year, per provincial office

The pie chart above shows the average percentage of accepted complaints per financial year, per provincial office. These are the percentages that each provincial office contributed to the total percentages of complaints accepted by the Commission per financial year under review.

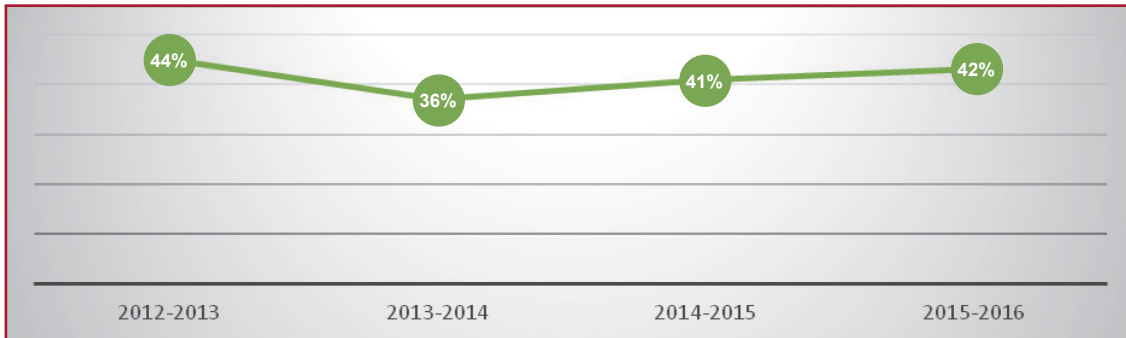
Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
<b>Eastern Cape</b>	35%	35%	32%	32%
<b>Free State</b>	32%	29%	21%	28%
<b>Gauteng</b>	34%	28%	35%	45%
<b>KwaZulu-Natal</b>	33%	34%	37%	32%
<b>Limpopo</b>	77%	44%	38%	37%
<b>Mpumalanga</b>	38%	31%	47%	56%
<b>Northern Cape</b>	73%	65%	73%	59%
<b>North West</b>	44%	48%	40%	39%
<b>Western Cape</b>	60%	36%	63%	61%
<b>National</b>	<b>44%</b>	<b>36%</b>	<b>41%</b>	<b>42%</b>

Table 5: Percentage of accepted complaints per provincial office

The table above illustrates the total percentages of accepted complaints per provincial office in relation to the individual caseload of each provincial office. The table indicates that, nationally, the Commission has accepted less than 50% of complaints lodged each year. At a provincial level, the Northern Cape has consistently accepted over 50% of complaints received for each of the four years shown. In fact, Table 5 above illustrates that, on average, the Northern Cape accepted just over two-thirds of the complaints it received between 2012 and 2016, while the Western Cape accepted over half. Limpopo, Mpumalanga and the North West accepted just under half of the complaints registered with those offices, while Gauteng, KwaZulu-Natal and the Eastern Cape accepted around one-third of all complaints. The Free State accepted approximately one-quarter of all lodged complaints.

The reasons for the discrepancy in the number of accepted complaints between provinces may be attributable to a number of factors. However, the numbers of complaints which require referrals to other bodies or which are rejected, are perhaps indicative of a considerable need to popularise the mandates of bodies like the Commission, and other institutions created through the Constitution and statutes. In addition, the Commission itself must do more to improve visibility and to initiate investigations of its own accord where complaint volumes are not a true reflection of human rights challenges on the ground.

The graph below is the percentage trend line of the overall total numbers of complaints accepted over the four financial years for the institution as a whole.



Graph 6: Percentage of accepted complaints per financial year

Notwithstanding the decline in the number of complaints accepted from 2012/2013 to the 2013/2014 financial year, over the previous three financial years, the percentage of accepted complaints appears to be increasing. The increase reflected in the statistics may indicate that public confidence levels in the Commission are increasing. Alternatively, they may be an indicator that violations in respect of human rights are on the increase.

## 6.2. REJECTED COMPLAINTS

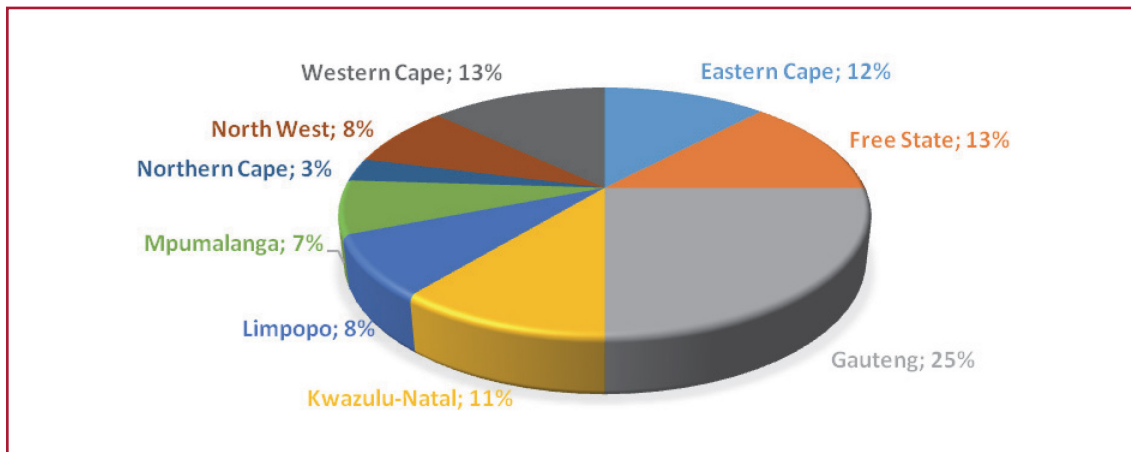
### 6.2.1. Total number of rejected complaints per financial year per provincial office

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	272	262	296	313
Free State	281	317	237	344
Gauteng	719	732	531	539
KwaZulu-Natal	159	298	285	343
Limpopo	50	264	248	262
Mpumalanga	141	287	130	121
Northern Cape	56	84	43	52
North West	166	200	105	302
Western Cape	294	545	190	257
<b>Totals</b>	<b>2 138</b>	<b>2 989</b>	<b>2 065</b>	<b>2 533</b>

Table 6: Rejected complaints per provincial office per financial year

The Gauteng provincial office has over the previous four financial years recorded the highest number of rejections. This figure has shown a decline in that 719 complaints were rejected at the end of the 2012/2013 financial year, compared to 539 at the end of the 2015/2016 financial year. The Limpopo and KwaZulu-Natal provincial offices have shown the highest increases in complaints rejected from

2012/2013 to 2015/2016. The graph below gives a percentage calculation of rejected complaints per provincial office, per financial year under review.



Graph 7: Percentage of rejected complaints per provincial office, per financial year

The Commission embarked on a process of addressing backlogged complaints commencing during the 2012/2013 financial year. Consequently, the process of analysis and review entailed in its backlog process was intensified in the succeeding year. An outcome of this was that the number of complaints rejected by the Commission rose to almost 3000 at the end of the 2013/2014 financial year. A large number of complaints were identified as having been addressed through other bodies, government programmes, where matters had in fact arisen before 1994.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
<b>Eastern Cape</b>	60%	62%	66%	66%
<b>Free State</b>	60%	69%	75%	71%
<b>Gauteng</b>	47%	54%	57%	49%
<b>KwaZulu-Natal</b>	39%	52%	55%	59%
<b>Limpopo</b>	20%	55%	61%	63%
<b>Mpumalanga</b>	38%	66%	52%	43%
<b>Northern Cape</b>	24%	34%	27%	38%
<b>North West</b>	40%	52%	58%	59%
<b>Western Cape</b>	31%	62%	37%	38%
<b>National</b>	<b>42%</b>	<b>57%</b>	<b>55%</b>	<b>54%</b>

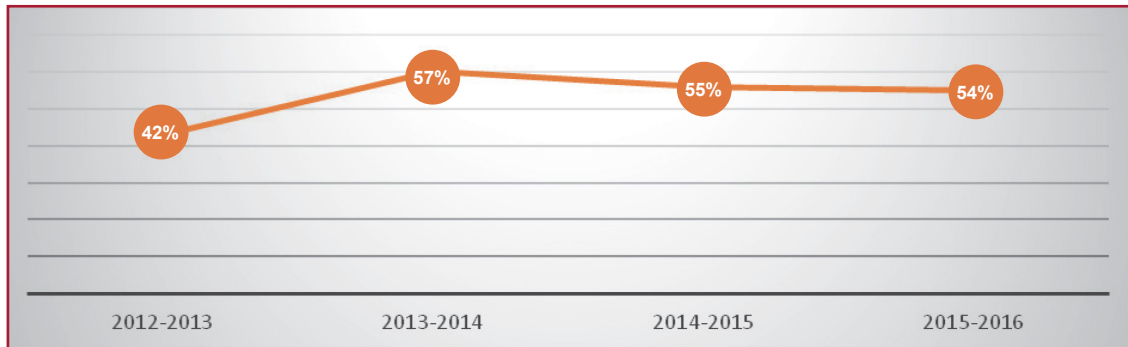
Table 7: Percentage of rejected complaints per provincial office

Table 7 above comprises the actual percentages of the complaints rejected by provincial offices in relation to their respective complaint caseload per financial year under review. In as much as the Northern Cape provincial office received the lowest number of complaints throughout the four financial years under review, it also consistently rejected the lowest percentage of complaints. The Mpumalanga and North West provincial offices have also recorded a low number of complaints over the four financial years under review, rejecting approximately 40% per financial year since the 2013/2014 financial year.

The Gauteng, Western Cape and KwaZulu-Natal provincial offices recorded a high number of complaints over each financial year, while the Free State, Eastern Cape and Limpopo provincial offices recorded the highest number of complaints rejected per financial year.

As a trend the percentage of complaints rejected by the North West provincial office declined over the first three of the four financial years under review. At the end of the 2015/2016 financial year an increase in the percentage of complaints that were rejected by the North West provincial office is noteworthy. This may be attributed to the increase in the number of complaints that were recorded at the end of that year.

Below is the trend line of rejected complaints nationwide over the previous four financial years under review.



Graph 8: Percentage of rejected complaints per financial year

At a national level, the lowest recorded percentage by the Commission was during the 2012/2013 financial year with 42% of complaints having been rejected. At the end of the 2013/2014 financial year 57% of complaints received were rejected. This percentage is the highest percentage of rejected complaints throughout the four financial years under review.

Following the 2013/2014 financial year, the percentages of rejected complaints have declined annually, as illustrated by the trend line in graph 8. Complaints that have been referred to other organisations, either directly or indirectly, form part of complaints that have been rejected as they have not been investigated by the Commission.

## 7. NATURE OF RIGHTS

### 7.1. RIGHTS VIOLATIONS

Rights violations	2012-2013	2013-2014	2014-2015	2015-2016
Equality	511	556	493	749
Human dignity	353	317	175	244
Life	27	23	7	9
Freedom and security of the person	105	148	94	114
Slavery, servitude and forced labour	1	1	0	0
Privacy	49	51	42	49
Freedom of religion, belief and opinion	14	15	17	14
Freedom of expression	62	77	91	117
Assembly, demonstration, picket and petition	6	7	6	6
Freedom of association	4	4	1	5
Political rights	1	1	6	2
Citizenship	31	26	26	41
Freedom of movement, residence, passport and to leave the Republic	13	11	9	18
Freedom of trade, occupation and profession	11	14	10	8
Labour relations	574	527	334	440
Environment	74	92	64	94
Property	142	189	134	115
Housing	290	285	157	290
Health care, food, water and social security	236	361	338	428
Children	135	142	155	165
Education	227	265	221	276
Language and culture	5	8	0	1
Cultural, religious and linguistic communities	16	15	17	15
Access to information	192	144	110	150
Just administrative action	592	635	366	379
Access to courts, independent tribunals and forums	50	53	34	33
Arrested, detained and accused persons	536	655	473	409
Limitation of rights	0	0	3	1
No jurisdiction	145	315	247	382
No violation	414	261	97	102
Assessment	288	40	10	7
<b>Totals</b>	<b>5 104</b>	<b>5 238</b>	<b>3 737</b>	<b>4 663</b>

Table 8: Total number of complaints per rights violations per financial year

Table 8 above shows the number of complaints lodged with the Commission alleging a violation of the rights in the Bill of Rights. The table also provides numbers of complaints in respect of each of the rights in the Bill of Rights. For purposes of this report reference shall be made to rights' violations which describes such category. The top and bottom five rights' violations are discussed in the next section.



7.2. TOP 5 RIGHTS VIOLATIONS

Consideration of the Top 5 Rights Violations provides the basis for identifying prevalent complaint types. The complaint categories are of value as they provide information regarding prevalence, and whether levels of prevalence are marked in certain areas. They also indicate levels of awareness about particular rights, inform preventative action and accountability measures, and give some indication whether those who are most vulnerable or marginalised are able to access bodies like the Commission. Internally, the analysis of trends is relied on by other operational units in the Commission to inform priority focus areas for interventions and monitoring.

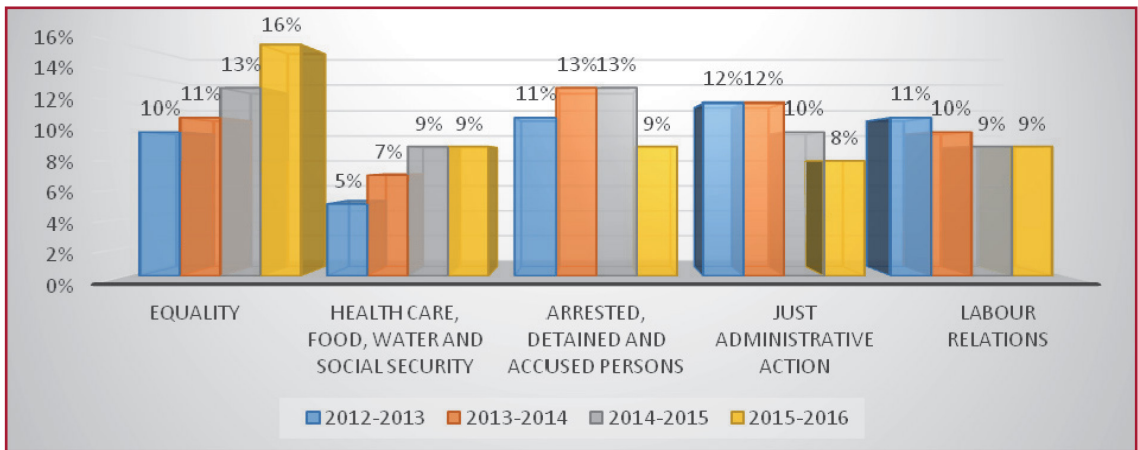
**A significant number of complaints lodged with the Commission related to the alleged violation of the rights to equality, labour relations, access to healthcare services, water, food and social security, just administrative action, and arrested, detained and accused persons. These are classified as the Top 5 Rights Violations.**

During the four financial years under review, a significant number of complaints lodged with the Commission related to the alleged violation of the rights to equality, labour relations, access to healthcare services, water, food and social security, just administrative action, and arrested, detained and accused persons. The Commission has classified these complaints as the Top 5 Rights Violations.



*During the four financial years under review, a significant number of complaints lodged with the Commission related to the alleged violation of the rights to equality, labour relations, access to healthcare services, water, food and social security, just administrative action, and arrested, detained and accused persons.”*

It is noteworthy that the reporting on the complaints relating to healthcare services, food, water and social security, have been consolidated as they are all enshrined in section 27 of the Constitution. The Commission appreciates that these rights are distinct, and yet mutually supporting, and will provide a disaggregated report in respect of each of them in terms of section 27 of the Constitution in the next issue of the annual trends’ analysis report.



Graph 9: Top 5 Rights Violations per financial year



Graph 9 above illustrates the percentage breakdowns of the Top 5 Rights Violations received by the Commission over the four financial years under review. The right to equality has seen a consistent increase over this period from 10% during the 2012/2013 financial year to 16% as at the end of the 2015/2016 financial year. Percentage calculations of the Top 5 Rights Violations are based on the total number of complaints recorded at the end of each year.

### 7.2.1. Equality

The right to equality is enshrined in section 9 of the Constitution, which provides for the promotion of equality and prohibition of discrimination. Section 9(2) of the Constitution states that in order “to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.” In South Africa, section 9(3) of the Constitution prohibits unfair discrimination on the basis of 16 identified grounds, viz. race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Discrimination on one or more of these grounds is considered unfair unless it is established that the discrimination is fair. This distinction is important, particularly because of South Africa’s unique history of classifying and privileging groups according to race, gender, disability and other characteristics.

Section 16(1) of the Constitution guarantees everyone the right to freedom of expression. The Constitutional Court emphasised the importance of the right to freedom of expression as follows;

*“... freedom of expression is one of a ‘web of mutually supporting rights’ in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) . . . The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.”<sup>18</sup>*

The right to freedom of expression is, however, not absolute but subject to limitation. In particular, section 16(2)(c) of the Constitution states that the right to freedoms of expression does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Section 16(2) of the Constitution is directed at prohibiting what is commonly referred to as hate speech.

Accordingly, there is an interplay between some complaints relating to alleged violation of the right to equality in terms of section 9 of the Constitution and hate speech in terms of section 16(2) of the Constitution.

The measures envisaged under section 9(2) of the Constitution include the PEPUDA. The Preamble of PEPUDA confirms the interplay between sections 9 and 16(2) of the Constitution. It states that PEPUDA was enacted *inter alia* to give effect to section 9 of the Constitution and to prevent and prohibit hate speech. Other legislation envisaged under section 9(2) of the Constitution include the Employment Equity Act (No. 55 of 1998), the Domestic Violence Act (No.116 of 1998), and the Protection from Harassment Act (No. 17 of 2011).

18 *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294; 2002 (5) BCLR 433 para 26.

PEPUDA makes specific provisions regarding the role of the Commission and its reporting obligations, particularly on the state of equality in the country, including:

- Instituting legal proceedings;
- Requesting information regarding any measures relating to the achievement of equality;
- Assessing the extent to which unfair discrimination on the grounds of race, gender and disability persists in South Africa, and the effects thereof; and
- Making recommendations on how best to address the problems.

The Equality Court, which adjudicate matters specifically relating to unfair discrimination and hate speech, was created in terms of PEPUDA.

PEPUDA was enacted and came into operation in September 2000. The main objectives of this Act are, among others, to

- Fulfil South Africa's international obligations under binding treaties;
- Promote equality;
- Prevent and prohibit unfair discrimination on one or more prohibited grounds set out under section 9(3) of the Constitution;
- Prevent and prohibit hate speech;
- Prevent and prohibit harassment and as indicated above; and
- Establish Equality Courts. (These courts have been operational throughout the country since late 2003.)

Despite the enactment of legislation, there remain a number of considerable challenges in respect of the achievement of equality in South Africa. Inequality and discrimination remain a significant challenge to our democracy. According to the Gini coefficient, as well as other inequality measurements, South Africa ranks as one of the most unequal countries in the world. These disparities are largely attributed to apartheid and its discriminatory laws and practices.

The Employment Equity Commission Report of 2015 highlights huge inequalities on the basis of race, gender and disability in employment opportunities and practices, particularly in respect of the composition of top management positions.

In line with its constitutional and legislative mandate to promote the respect and protection of the right to equality, the Commission has, over the years:

- Received and dealt with a large number of complaints relating to the violation of the right to equality and the use of racial epithets and other derogatory remarks such as "baboon" or "monkey". These incidents of racial discrimination take place across spectrums of society including schools, universities, businesses and the workplace.
- Litigated a number of equality and hate speech related cases in the Equality Courts. Most of these Equality Court cases involve the use of racial epithets and other derogatory comments with racial undertones such as "baboon" or "monkey".<sup>19</sup>
- Released a number investigative reports in which it found certain conducts to amount to a violation of the right to equality and the interrelated right to dignity. These are available on the Commission's website ([www.sahrc.org.za](http://www.sahrc.org.za)).

<sup>19</sup> See section 12.2 for a discussion on the Commission's litigation in the Equality Court.

- More recently, hosted a National Hearing on Unfair Discrimination in the Workplace.<sup>20</sup>
- Mediated and assisted parties to reach a settlement in a number of complaints involving discrimination on the basis of race.
- Published Equality Reports which provide a report on the country’s progress towards the attainment of equality in respect of the national legislative framework.

Race, Disability and Ethnic or Social Origin are the most common grounds of discrimination reported to the Commission. In the 2015/2016 financial year, the Commission received a total of 749 equality related complaints, 505 of which were on the ground of race. Discrimination on the ground of disability, and ethnic and social origin, respectively comprised the second and third most common grounds of discrimination.

Given our past, inequality in South Africa is highly correlated with race. South Africa’s history has been shaped by segregation, oppression and institutionalised discrimination. The institutionalised policies of segregation and apartheid resulted in the systematic discrimination and exclusion of black people in all facets of economic, political and social life.

Apartheid ended in 1994 and its political institutions were dismantled. Key political, policy and legislative changes were made during the transition to democracy. Chiefly, the transition culminated in the adoption of the Interim Constitution of the Republic of South Africa of 1993 and the first democratic elections in 1994. Almost all legislation which discriminated on explicitly racial grounds had been abolished. Subsequently, in 1996, the Constitution was adopted against a historical backdrop of the apartheid system which had entrenched racial discrimination and inequality throughout South African society. The Constitution provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to one in which we all can live in dignity. It (specifically the Bill of Rights) has been described as a transformative document aimed at redressing the social and economic inequalities of the past. Our constitutional democracy is founded on explicit values. Underpinning these are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. Despite the Constitution and the provisions relating to equality, unfair discrimination remains endemic in South Africa.<sup>21</sup>

**7.2.1.1. Equality complaints received per financial year**

During the four financial years under review, equality related complaints have consistently been one of the Top 5 Rights Violations that the Commission has dealt with. The number of these complaints has steadily increased, peaking in the 2015/2016 financial year. With the increasing number of people being aware of their rights, and as technology evolves, the inequality of lived realities and the disparity in the social dynamics in South Africa has come to the fore. A number of matters that have been investigated by the Commission relating to unfair discrimination have ended up being litigated before Equality Courts.

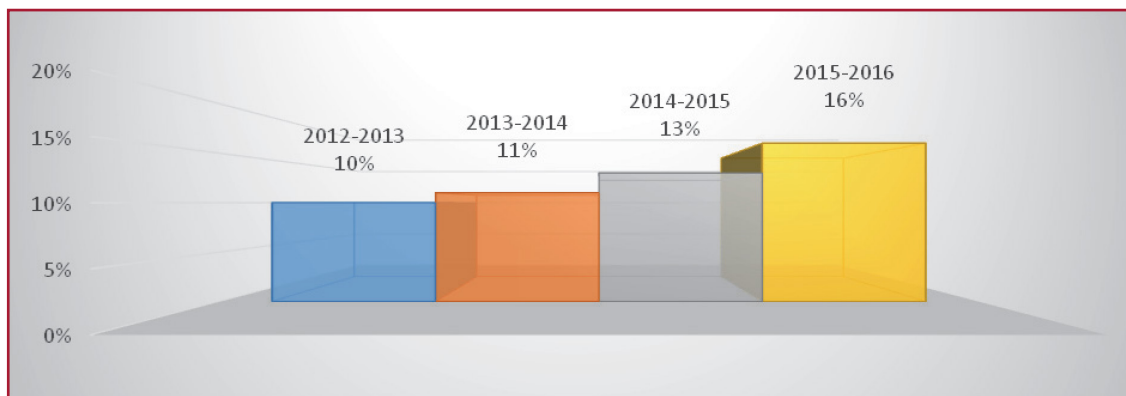
Financial year	Complaints per financial year	Equality per financial year
2012-2013	5 104	511
2013-2014	5 238	556
2014-2015	3 737	493
2015-2016	4 663	749

Table 9: Equality complaints received per financial year

20 See 16 of this report for a discussion on the National Hearing on Unfair Discrimination in the Workplace.

21 See the discussion on race based equality related complaints below.

The table above reflects the percentages of equality related complaints recorded in the period under review. The percentages of equality related complaints received have steadily risen. The highest percentage of equality related complaints that the Commission received was at the end of the 2015/2016 financial year, in December 2015 and January 2016 respectively. The increase appears directly related to the number of racial utterances on social media and other media.



Graph 10: Percentage of equality complaints per financial year.

Equality related complaints made up 10% of those received during the 2012/2013 financial year. The percentage of complaints received went up to 11% during the next year and this trend continued with 13% of complaints recorded during the 2014/2015 financial year. At the end of the 2015/2016 financial year the percentage of equality related complaints increased to 16% of complaints having been recorded during the said financial year.

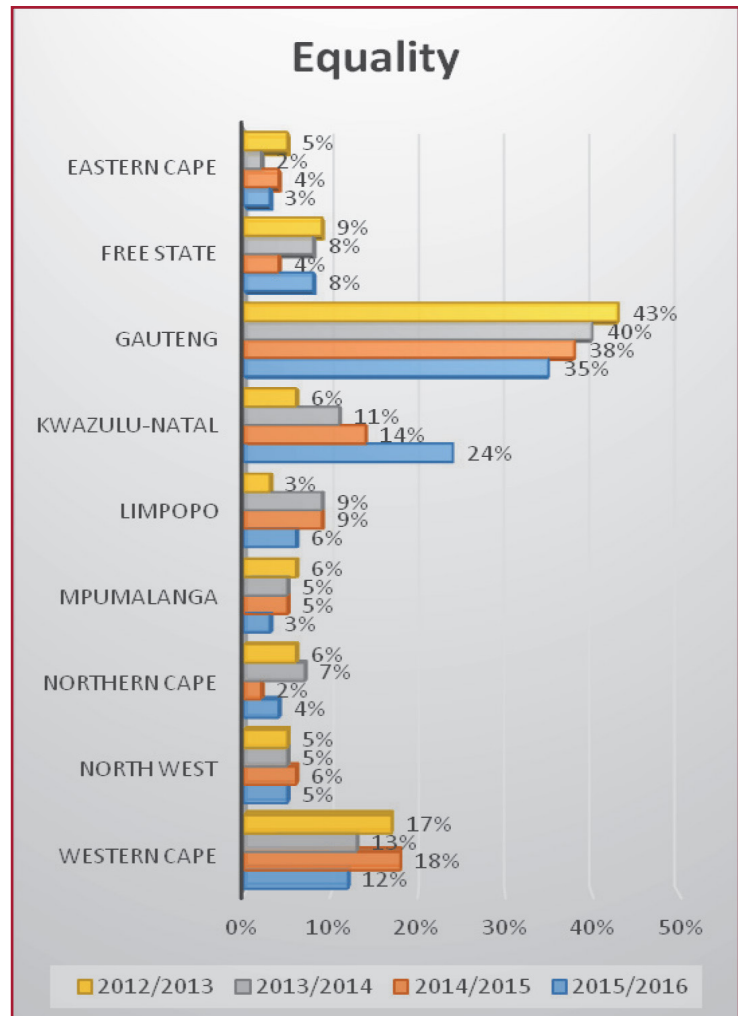
Given the historical background of the country, it is inevitable that conflict behaviour throughout South African society is inevitable in the wake of years of social, cultural and political conditioning. Changing social dynamics and social perceptions are a formidable challenge to overcome. The ever increasing number of equality related complaints that the Commission has received over the period under review, specifically on race, is but one indicator of the challenge faced.

**7.2.1.2. Equality complaints per provincial office**

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	24	13	22	20
Free State	45	46	19	57
Gauteng	219	219	185	265
KwaZulu-Natal	33	63	70	183
Limpopo	16	49	43	46
Mpumalanga	31	29	25	19
Northern Cape	29	36	27	32
North West	28	27	12	34
Western Cape	86	74	90	93
<b>National</b>	<b>511</b>	<b>556</b>	<b>493</b>	<b>749</b>

Table 10: Equality complaints per provincial office

The table above comprises statistical information of equality complaints per provincial office, per financial year under review and the total national figure. Of the three high caseload provincial offices of the Commission, the KwaZulu-Natal provincial office's rate of equality related complaints has shown an annual increase. The Gauteng provincial office has registered the highest totals of equality related complaints throughout the period under review.



Graph 11: Percentage equality rights per provincial office, per financial year

The graph illustrates the percentage distribution of complaints received by the Commission by each of the provincial offices over the four financial years.

The percentage of equality related complaints recorded by the Gauteng provincial office has, surprisingly, decreased over the four financial years under review. The Western Cape's percentage of equality related complaints has been inconsistent. Complaints peak and decline, in most cases, each alternate year.

At the end of the 2015/2016 financial year, the Commission recorded the highest number of equality related complaints when compared to the previous three financial years under review. As Graph 11 shows, the highest percentages are from the high caseload provincial offices. The percentage distribution of equality complaints recorded by the Western Cape has been sporadic throughout the four financial years. Whereas there is a decline in the percentages of equality complaints recorded by the Gauteng provincial office, the converse is noted in respect to the percentage distribution for KwaZulu-Natal. For the first three financial years under review, the percentages of equality related complaints recorded in KwaZulu-Natal have increased at a steady pace of between 3% and 6%. At the end of the 2015/2016 financial year, however, the percentage increased by 10%.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	15	9	16	10
Free State	29	28	17	45
Gauteng	112	116	115	178
KwaZulu-Natal	15	47	41	47
Limpopo	14	27	33	35
Mpumalanga	25	20	20	15
Northern Cape	16	34	26	25
North West	27	17	7	26
Western Cape	75	50	77	78
<b>Totals</b>	<b>328</b>	<b>348</b>	<b>352</b>	<b>459</b>

Table 11: Accepted equality complaints per provincial office

From the total number of equality related complaints recorded by provincial offices, only the accepted complaints are illustrated in the table above. Table 11 shows that the Gauteng provincial office has accepted the highest numbers of equality based complaints. This statistic is in line with the high complaint volumes recorded in the province annually.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	63%	69%	73%	50%
Free State	64%	61%	89%	79%
Gauteng	51%	53%	62%	67%
KwaZulu-Natal	45%	75%	59%	26%
Limpopo	88%	55%	77%	76%
Mpumalanga	81%	69%	80%	79%
Northern Cape	55%	94%	96%	78%
North West	96%	63%	58%	76%
Western Cape	87%	68%	86%	84%
<b>National</b>	<b>64%</b>	<b>63%</b>	<b>71%</b>	<b>61%</b>

Table 12: Percentage of accepted equality complaints

The percentages in the table above represent all accepted complaints per provincial office in relation to the number of complaints that have been recorded by each office. The overall totals of equality related complaints have increased over the period under review. During this period, Gauteng has recorded the highest numbers of equality related complaints. The provincial office with the second highest number, the Western Cape, received significantly less equality related complaints. Gauteng has, however, accepted only a small number of equality complaints when compared to the Western Cape as illustrated in Table 12 above. Both the Gauteng and the KwaZulu-Natal provincial offices received a large number of race based complaints. The table above, however, shows that only 26% is reflected for KwaZulu-Natal in 2015/2016. This is because complaints from multiple complainants, but on the same facts or cause of action, were consolidated in each of the offices.

### 7.2.1.3. Equality complaints per specific ground

Section 9(3) of the Constitution stipulates the grounds of discrimination under the right of equality and provides that “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

Equality	2012-2013	2013-2014	2014-2015	2015-2016
Equality – age	10	20	13	24
Equality – any other ground	11	17	13	22
Equality – belief	2	1	1	2
Equality – colour	8	1	1	0
Equality – conscience	0	1	0	0
Equality – culture	4	6	8	5
Equality – disability	45	70	62	66
Equality – ethnic or social origin	39	55	35	47
Equality – gender	12	19	11	18
Equality – language & birth	4	3	2	7
Equality – marital status	3	6	0	1
Equality – pregnancy	1	2	0	1
Equality – race	208	297	292	505
Equality – religion	17	34	36	22
Equality – sex	4	2	2	3
Equality – sexual orientation	14	22	17	26
Equality – no specific ground mentioned	129	0	0	0
<b>Totals</b>	<b>511</b>	<b>556</b>	<b>493</b>	<b>749</b>

Table 13: Equality complaints in terms of the grounds of discrimination

From table 13 above, three grounds of unfair discrimination listed under section 9(3) have been prevalent over the four financial years under review, namely, race, disability, and ethnic or social origins. In each of these financial years the number of race related complaints have exceeded 200 peaking at 505 in the 2015/2016 financial year. Disability and social origin have remained consistently high.

### 7.2.1.4. Equality – race

South Africa became a democracy in 1994. Notwithstanding 22 years of democracy that the country has enjoyed, the eradication of the consequences of apartheid have been challenging to address.

Racism has shaped South African society since colonial times. Racist beliefs found expression in the laws of colonial and apartheid South Africa and shaped both state and society. It is not surprising that when South Africa became a democracy, it adopted a Constitution founded on explicit values of human dignity, equality and non-racialism.

Despite the Constitution and the plethora of anti-racism laws, racism remains endemic in South Africa. In January 2016, a white woman, Ms Penny Sparrow, posted a racist message on the social media platform, *Facebook*, in which she said:

*“These monkeys that are allowed to be released on New years Eve And new years day on to public beaches towns etc. obviously have no education what so ever so to allow them loose is inviting huge*



*dirt and troubles and discomfort to others. I am sorry to say I was amongst the revellers and all I saw were black on black skins what a shame. I do know some wonderful thoughtful black people. This lots of monkeys just don't want to even try. But think they can voice opinions about the statute and get their way dear oh dear .from now I Shall address the blacks of South Africa as monkeys as I see the cute little wild monkeys do the same pick drop and litter. ” (unedited version)*

Ms Sparrow’s comments caused widespread outrage and became a trending topic on various platforms on social media. Some people were reportedly contemplating to have Ms Sparrow criminally charged while others lodged complaints against Ms Sparrow to the Commission. The Commission received a number of complaints against Ms Sparrow. The African National Congress instituted proceedings against her in the Equality Court.

In the same year, several alleged racist incidents were reported involving other individuals, both black and white. Other complaints addressed reactions to Ms Sparrow’s comments such as those lodged against Mr Velaphi Khumalo, a public official. Mr Khumalo reacted to Ms Sparrow’s comments by allegedly calling for black South Africans to do to white people what “Hitler did to the Jews”. Not only do such utterances violate the rights to equality but they are also inimical to the vision of the Constitution to create a society founded on the values of equality and non-racialism.

The Commission has, on various platforms, raised its concerns about the prevalence of unfair discrimination, in particular race based discrimination in South Africa and its impact on basic human rights. In addition to the conference hosted in March 2016, the Commission has in the past hosted consultative processes and conferences on racism, including the National Conference on Racism in 2000. The Commission has also hosted public hearings and published reports, such as one relating to racism at the University of Pretoria, and racism in the South African Police Service, Vryburg District in 1999.

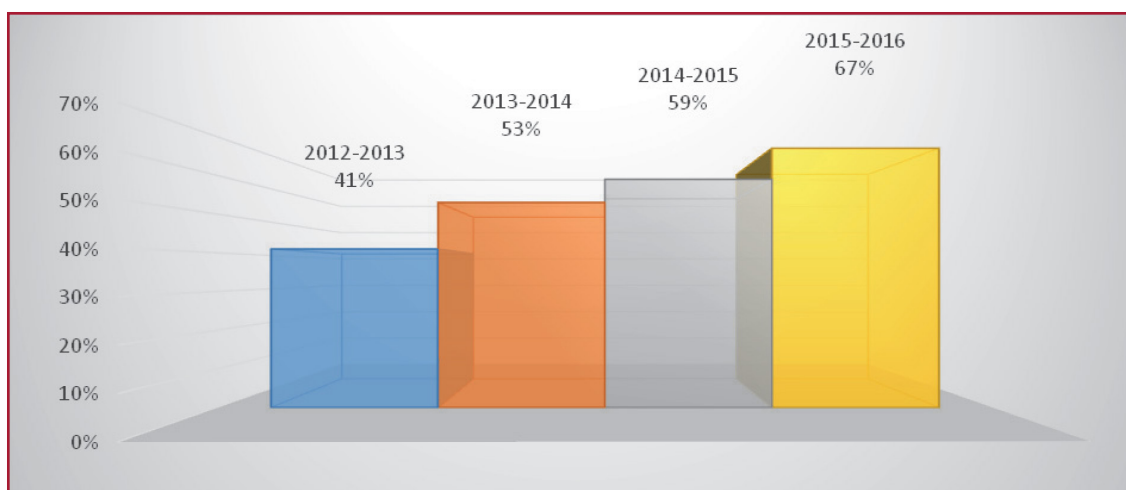
Despite the significant achievements over the past 22 years of democracy, deep inequalities and unfair discrimination remain commonplace. The achievement of equality and non-racialism will remain a distant reality for many if the scourges of inequality, particularly racism, are not addressed fully and collectively.

Equality – race	Eastern Cape	Free State	Gauteng	KwaZulu-Natal	Limpopo	Mpumalanga	Northern Cape	North West	Western Cape	Totals
<b>2012-2013</b>	1	0	105	16	5	25	17	4	35	<b>208</b>
<b>2013-2014</b>	4	37	100	40	28	23	28	12	25	<b>297</b>
<b>2014-2015</b>	6	17	109	50	24	20	20	6	40	<b>292</b>
<b>2015-2016</b>	11	42	183	163	24	10	23	13	36	<b>505</b>

Table 14: Equality – race complaints per provincial office, per financial year

The table above is made up of the number of race related complaints that the Commission received during the period under review. In all four years, the Gauteng provincial office recorded the highest number of equality related complaints. In three of the four financial years, the KwaZulu-Natal provincial office recorded the second highest number of equality related complaints. The number of complaints recorded by the KwaZulu-Natal provincial office have increased annually but not as sharply as it did at the end of the 2015/2016 financial year.





Graph 12: Percentage equality – race complaints per financial year

### 7.2.2. Labour relations

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	56	62	35	59
Free State	55	30	24	58
Gauteng	156	146	101	83
KwaZulu-Natal	28	63	49	58
Limpopo	13	44	40	38
Mpumalanga	96	41	25	27
Northern Cape	37	17	7	2
North West	55	37	20	52
Western Cape	78	87	33	63
<b>National</b>	<b>574</b>	<b>527</b>	<b>334</b>	<b>440</b>

Table 15: Section 23 complaints per provincial office, per financial year

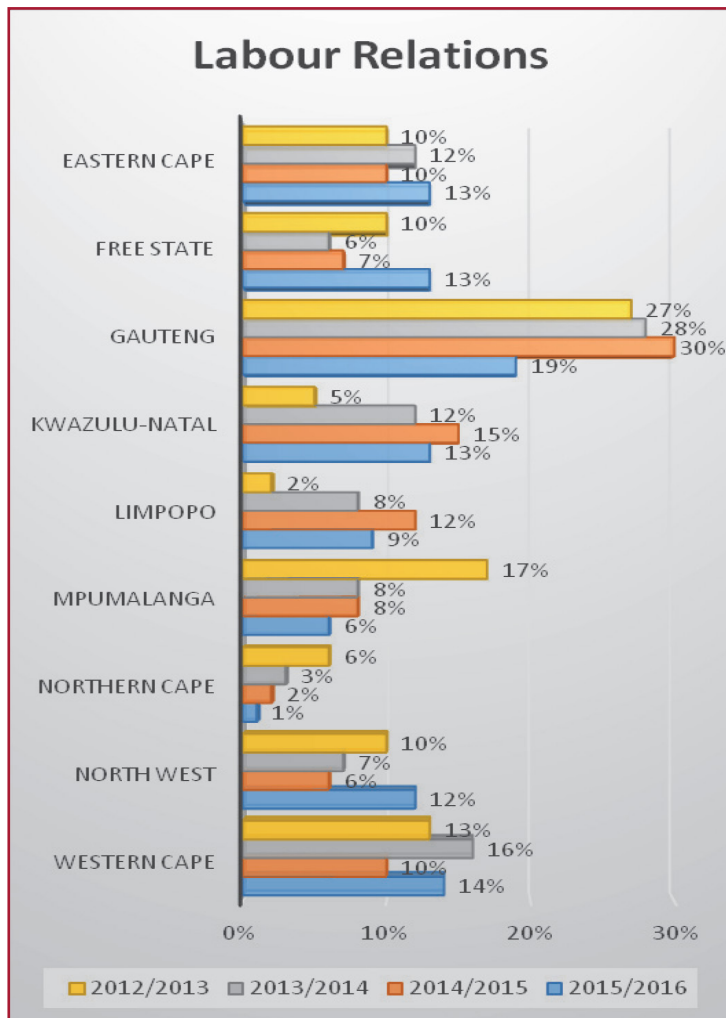
The table above shows the number of labour relations complaints that have been received by the Commission per provincial office.

Labour relations are second on the list of Top 5 Rights Violations in terms of section 23 of the Constitution, which guarantees everyone the right to fair labour practices, including the right to join a trade union and to participate in trade union activities. The Labour Relations Act, (No. 66 of 1995) (LRA), was promulgated to provide particularity and content to section 23 of the Constitution.<sup>22</sup> The purpose of the LRA is to create a system under which all labour disputes can be resolved. Other legislation that has been enacted *inter alia* to give effect section 23 of the Constitution include the Basic Conditions of Employment Act, (No. 75 of 1997) and the Employment Equity Act, (No. 55 of 1998).

A majority of the labour relations related complaints lodged with the Commission relate to unfair dismissal, unfair labour practice and other labour related matters. While these matters fall within the ambit of section 23 of the Constitution, the LRA has entrusted other statutory institutions the jurisdiction to deal with labour disputes. These include the Commission for Conciliation, Mediation and Arbitration

<sup>22</sup> *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) para 10.

(the CCMA),<sup>23</sup> the Labour Court, the High Court and other appellate courts. The Commission refers most of these labour relations related complaints to the CCMA in terms of article 12(8) and (9) of the Commission's CHP. As shown in table 6, complaints relating to labour relations comprise the majority of the complaints that the Commission directly or indirectly refers to more appropriate institutions.



Graph 13: Percentage of section 23 complaints per provincial office, per financial year

The Commission refers labour related matters to either the CCMA, applicable bargaining councils or labour courts (which were also established as per part D, section 151 of the Labour Relations Act. Labour courts handle disputes arising from the relationship of the employer, employee and trade unions.

In such instances, the Commission defers to the statutory mandate of such structures and bodies to provide appropriate relief to complainants.

While the Gauteng provincial office recorded the highest percentage of complaints classified as falling under the category of fair labour relations in the period under review, the percentage of complaints received declined at the end of the 2015/2016 financial year.

23 The CCMA is an independent dispute resolution body established in terms of the LRA.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	12	3	3	2
Free State	2	1	0	2
Gauteng	21	23	5	2
KwaZulu-Natal	5	6	4	2
Limpopo	12	8	2	2
Mpumalanga	3	2	2	4
Northern Cape	17	2	0	0
North West	10	8	0	2
Western Cape	34	8	9	13
<b>National</b>	<b>116</b>	<b>61</b>	<b>25</b>	<b>29</b>

Table 16: Number of labour related complaints registered at provincial offices

The nationwide picture of complaints that have been recorded which relate to labour relations is a different one when the number of complaints that have been accepted is analysed.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	21%	5%	9%	3%
Free State	4%	3%	0%	3%
Gauteng	13%	16%	5%	2%
KwaZulu-Natal	18%	10%	8%	3%
Limpopo	92%	18%	5%	5%
Mpumalanga	3%	5%	8%	15%
Northern Cape	46%	12%	0%	0%
North West	18%	22%	0%	4%
Western Cape	44%	9%	27%	21%
<b>National</b>	<b>20%</b>	<b>12%</b>	<b>7%</b>	<b>7%</b>

Table 17: Percentage of labour related complains accepted by provincial offices

The percentage of accepted complaints that relate to labour relations nationwide were at 20% at the end of the 2012/2013 financial year and declined to 7% at the end of the 2015/2016 financial year. Throughout the period under review, the Gauteng provincial office recorded the highest numbers of labour relations complaints. The acceptance percentage of these complaints has been below 20% throughout the period under review. Provincial offices with greater economically active or employed populations tend to deal with more labour related complaints than other provinces. A sharp decline in the acceptance rate throughout the four financial years was noted in the Limpopo provincial office where the 92% acceptance rate for labour relations complaints during the 2012/2013 financial year dropped to a low of 5% at the end of the 2015/2016 financial year.

### 7.2.3. Health care, food, water and social security

Third on the list of Top 5 Rights Violations received by the Commission over the period under review are complaints relating to the alleged violation of the rights in terms of section 27 of the Constitution, namely, the right to have access to health care services, food, sufficient water and social security.

Complaints relating to these rights have gradually increased over the past four financial years under review. During the 2015/2016 financial year, they comprised the fourth highest complaints received by the Commission and constituted 9% of the overall complaints received by the Commission in that financial year. The increase in complaints relating to health care services, water, food and social security appear to coincide with the general trends of protest action over the lack or insufficient delivery of basic services in various communities in South Africa. During the 2013/2014 and 2014/2015 financial years, the Commission hosted public enquiries on Access to Housing, Local Governance and Service Delivery, the Right to Access Sufficient Water and Decent Sanitation in South Africa (2014) and Access to Emergency Medical Services in the Eastern Cape (2014). These public hearings investigated, among others, systematic challenges experienced in respect of the realisation of the rights to have access to healthcare services and water, and may, given their public nature, have increased visibility of the Commission, and awareness of the rights to recourse in such matters.

Typically, the right to access health care services generated complaints about the poor state of affairs in hospitals and clinics. Issues included poor working conditions, staff shortages, shortage of medication and essential drugs, training of personnel, building infrastructure, equipment, emergency transportation, and waiting times in these public health establishments. The water related complaints are lodged by individuals and communities who have no, or limited, access to sufficient water. Others are lodged by complainants whose water supply had been discontinued by the water service authority. The complaints continue despite the instructive pronouncement by the Constitutional Court in the *City of Johannesburg v Mazibuko* judgment, where O'Regan J stated that:

*“... access to water has long been grossly unequal. This inequality is evident in South Africa. While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools and distant taps. In 1994, it was estimated that 12 million people (approximately a quarter of the population), did not have adequate access to water. By the end of 2006, this number had shrunk to 8 million, with 3,3 million of that number having no access to a basic water supply at all. Yet, despite the significant improvement in the first fifteen years of democratic government, deep inequality remains and for many the task of obtaining sufficient water for their families remains a tiring daily burden. The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor.”<sup>24</sup>*

Deprivation of access to socio-economic rights, particularly to the poor, remains a challenge in our constitutional democracy. The context of this is aptly recorded in the matter of *Nkotyana and Others v Ekurhuleni Metropolitan Municipality and Others*<sup>25</sup> where the Constitutional Court stated that:

*“On several occasions this Court has been called on to decide difficult issues in connection with access to health care, housing and water, as well as the provision of electricity. This is understandable. Our history is one of land dispossession, institutionalised discrimination and systemic deprivation. The need for housing and basic services is still enormous and the differences between the wealthy and the poor are vast.”*

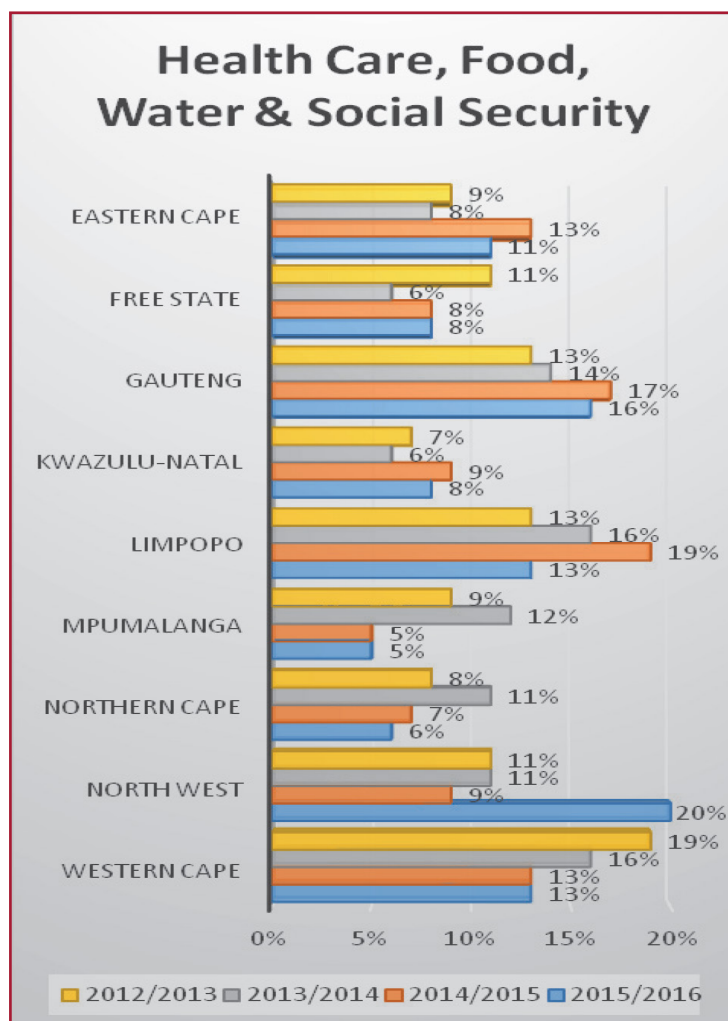
24 *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) para 2.

25 2010 (4) BCLR 312 (CC) para 1.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	21	29	44	48
Free State	25	22	26	34
Gauteng	32	49	57	71
KwaZulu-Natal	17	22	32	34
Limpopo	30	59	62	54
Mpumalanga	22	45	18	20
Northern Cape	18	39	32	24
North West	27	40	24	85
Western Cape	44	56	43	58
<b>National</b>	<b>236</b>	<b>361</b>	<b>338</b>	<b>428</b>

Table 18: Section 27 complaints per provincial office, per financial year

The table above is made up of the total numbers of section 27 complaints that have been recorded by individual provincial offices over the four financial years under review. At the end of the 2015/2016 financial year the North West provincial office recorded the highest number of complaints relating to section 27 followed by the Gauteng provincial office.



Graph 14: Percentage of section 27 complaints per provincial office, per financial year

There has been an increase in the percentage of complaints received by the Commission from the 2012/2013 to the 2014/2015 financial year, and a steadying of volumes at the end of the 2015/2016 financial year.

The Limpopo provincial office recorded a high percentage of complaints relating to this section in the Constitution. As at the end of the 2015/2016 financial year, the Limpopo provincial office saw a sharp decline compared to the previous financial years. Four other provincial offices have seen declines in the percentages of complaints received in terms of section 27 at the end of the 2015/2016 financial year, but no decline as significant as the Limpopo provincial office. Notwithstanding this, section 27 remains one of the most important rights that is entrenched in Chapter 2 of the Constitution.

The percentage distribution for the North West provincial office, indicates that from the 2012/2013 financial year to the 2014/2015 financial year, percentages have hovered around the 11% mark. By the end of the 2015/2016 financial year the percentage of section 27 complaints jumped to a staggering 20%, making this provincial office the highest one to have recorded complaints that relate to section 27. The basis for this increase may be placed on the recent proactive interventions by the provincial office in engaging with communities where violations of their socio-economic rights have been highlighted.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	12	18	27	35
Free State	16	15	18	22
Gauteng	12	20	37	44
KwaZulu-Natal	7	13	25	26
Limpopo	28	41	36	33
Mpumalanga	21	38	14	18
Northern Cape	18	33	32	23
North West	15	28	19	79
Western Cape	41	34	37	56
<b>National</b>	<b>170</b>	<b>240</b>	<b>245</b>	<b>336</b>

Table 19: Accepted section 27 complaints per provincial office, per financial year

Accepted complaints in terms of section 27 per individual provincial office are reflected above. The number of these complaints recorded by the Western Cape provincial office over the four financial years under review, show a noteworthy trend: this provincial office accepted and investigated from 60% to above 90% of complaints during the period under review. In previous trends analyses reports, some factors attributing to this uptake were attributed to the initiative by the Commission to actively promote service delivery and socio-economic rights in the Western Cape.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	57%	62%	61%	73%
Free State	64%	68%	69%	65%
Gauteng	38%	41%	65%	62%
KwaZulu-Natal	41%	59%	78%	62%
Limpopo	93%	69%	58%	76%
Mpumalanga	95%	84%	78%	61%
Northern Cape	100%	85%	100%	90%
North West	56%	70%	79%	93%
Western Cape	93%	61%	86%	92%
<b>National</b>	<b>72%</b>	<b>66%</b>	<b>72%</b>	<b>79%</b>

Table 20: Percentage accepted section 27 complaints per provincial office, per financial year

Most section 27 rights' violations lodged with the Commission over the four financial years under review have consisted of those relating to access to health care and access to water. Throughout the four financial years the Commission has accepted well over 60% of section 27 complaints.

#### 7.2.4. Arrested, detained and accused persons

During the four financial years under review, complaints relating to the rights of arrested, detained and accused persons have consistently formed part of the Top 5 Rights Violations. In the 2015/2016 financial year, these complaints constituted the third highest type of complaint lodged with the Commission and numbered 409. Most of them came from inmates detained in correctional services facilities requesting assistance to secure copies of trial transcripts as well as assistance with appeals against their convictions or sentences or both. A few related to alleged non-conducive prison conditions. These complaints are ordinarily referred to Legal Aid South Africa (Legal Aid SA) or to the Judicial Inspectorate for Correctional Services, depending on the nature of the complaint.

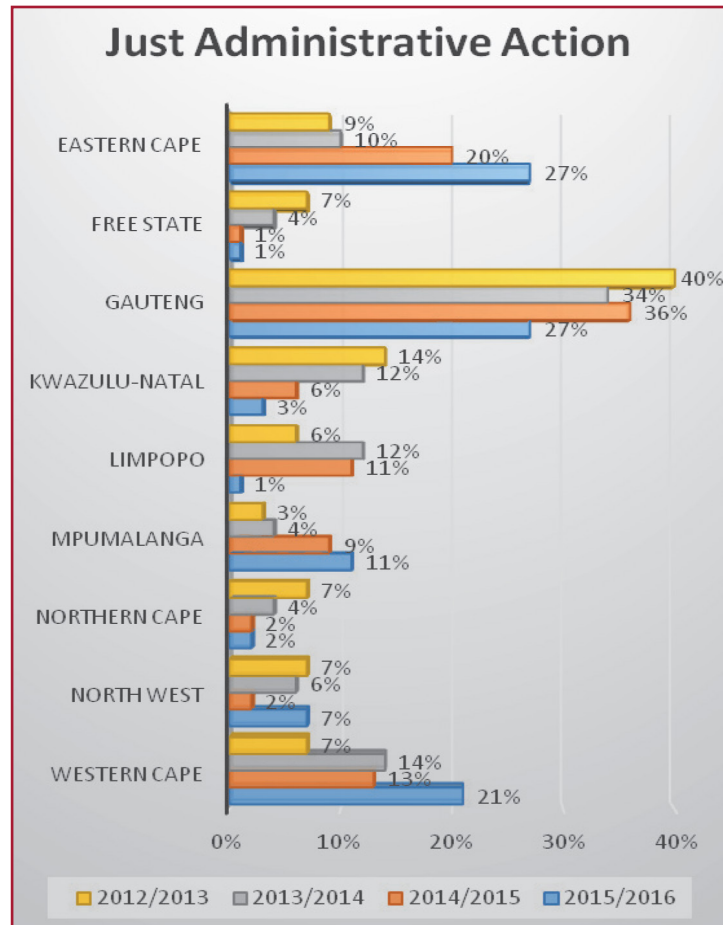
Some complaints from inmates in correctional centres relate to their living conditions and/or treatment they receive. Such complaints are directly or indirectly referred to the Office of the Judicial Inspectorate.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	57	56	48	53
Free State	115	124	113	99
Gauteng	197	171	55	49
KwaZulu-Natal	36	136	67	55
Limpopo	30	49	43	44
Mpumalanga	11	16	16	9
Northern Cape	15	6	12	9
North West	17	21	44	16
Western Cape	58	76	75	75
<b>National</b>	<b>536</b>	<b>655</b>	<b>473</b>	<b>409</b>

Table 21: Section 35 complaints per provincial office, per financial year



The table above shows the total number of complaints that relate to section 35 of the Constitution and recorded by provincial offices during the period under review. In this time, the Free State provincial office recorded high numbers of complaints relating to arrested, detained and accused persons due to the high public profile nature of correctional centres such as Mangaung and Groenpunt. The said provincial office has consistently recorded the second highest totals of complaints relating to section 35 throughout the four financial years under review.



Graph 15: Percentage of section 35 complaints per provincial office, per financial year

Of the three provincial offices that are regarded as high caseload offices, two showed a decline in the percentages of complaints relating to arrested, detained and accused persons. These are Gauteng and KwaZulu-Natal . The decrease may be attributable to the interventions by these provincial offices in highlighting other organisations, institutions and statutory bodies that are better placed to more efficiently and effectively deal issues relating to the conditions of detention at correctional centres (such as the Office of the Judicial Inspectorate) and representation in criminal proceedings and/or appeal and review procedures (such as Legal Aid SA). However, the percentages of such complaints have gradually increased in the Western Cape provincial office. Increases are also noted in the percentage distributions for the Limpopo provincial office.

The Mpumalanga, Northern Cape and the North West provincial offices, which are regarded as the low intake offices of the Commission, have had low percentage distributions that are below 10% throughout the four financial years under review.



Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	7	5	0	0
Free State	7	6	0	0
Gauteng	21	13	9	11
KwaZulu-Natal	3	4	3	1
Limpopo	17	9	6	3
Mpumalanga	3	2	2	1
Northern Cape	6	1	3	2
North West	4	10	16	2
Western Cape	31	8	7	7
<b>National</b>	<b>99</b>	<b>58</b>	<b>46</b>	<b>27</b>

Table 22: Accepted section 35 complaints per provincial office, per financial year

The numbers of section 35 complaints lodged with the Commission have varied from a high of 655 to a low of 409. Less than 100 of these complaints were accepted by the Commission.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	12%	9%	0%	0%
Free State	6%	5%	0%	0%
Gauteng	11%	8%	16%	22%
KwaZulu-Natal	8%	3%	4%	2%
Limpopo	57%	18%	14%	7%
Mpumalanga	27%	13%	13%	11%
Northern Cape	40%	17%	25%	22%
North West	24%	48%	36%	13%
Western Cape	53%	11%	9%	9%
<b>National</b>	<b>18%</b>	<b>9%</b>	<b>10%</b>	<b>7%</b>

Table 23: Percentage of accepted section 35 complaints per provincial office, per financial year

Table 23 above reflects percentage distributions of accepted complaints per provincial office that relate to section 35 during the period under review. At the end of the 2012/2013 financial year, the Limpopo provincial office had accepted the highest percentage of complaints relating to section 35, followed by the Western Cape.

During the 2012/2013 year, the highest category of complaints accepted by the Commission fell under section 35 of the Constitution.

#### 7.2.5. Just administrative action

Last on the list of Top 5 Rights Violations are complaints relating to just administrative action. The right to just administrative action is guaranteed in section 33 of the Constitution,<sup>26</sup> which essentially embraces the concept of administrative justice. Administrative justice aims, *inter alia*, to ensure good governance and administration, ensure fair dealing in an administrative context, enhance protection of the individual against abuse of state power, promote public participation in decision making, and strengthen the notion

26 Section 33(1) of the Constitution states that *everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

that public officials are answerable and accountable to the public they are meant to serve.<sup>27</sup> There is a close relationship between administrative justice and the term “administrative action”. The meaning of “administrative action” in section 33(1), is demarcated to include actions of an administrative nature which are taken by bodies that exercise public power.<sup>28</sup>

The right to just administrative action has been given statutory form in the Promotion of Access to Justice Act, (No. 3 of 2000). A total of 379 of the complaints received by the Commission in 2015/2016 financial year related to alleged violations of the right to just administrative action. By and large, these were lodged by persons who are aggrieved by decisions of government departments such as the Department of Home Affairs, Social Development and others. Others relate to alleged maladministration by organs of state. Such complaints are generally referred to other institutions, such as the Public Protector,<sup>29</sup> for resolution.

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	52	64	74	101
Free State	44	26	2	3
Gauteng	235	217	130	104
KwaZulu-Natal	81	76	23	11
Limpopo	39	73	41	3
Mpumalanga	17	23	33	44
Northern Cape	41	26	9	7
North West	40	39	9	26
Western Cape	43	91	45	80
<b>National</b>	<b>592</b>	<b>635</b>	<b>366</b>	<b>379</b>

Table 24: Just administrative action complaints per provincial office, per financial year

The table above is made up of the number of complaints that relate to just administrative action recorded by provincial offices per financial year. Over the four financial years under review a decline in the numbers recorded by the KwaZulu-Natal provincial office stands out, as do those for Gauteng.

The numbers recorded by the Western Cape, however, have been sporadic over the four financial years in review.

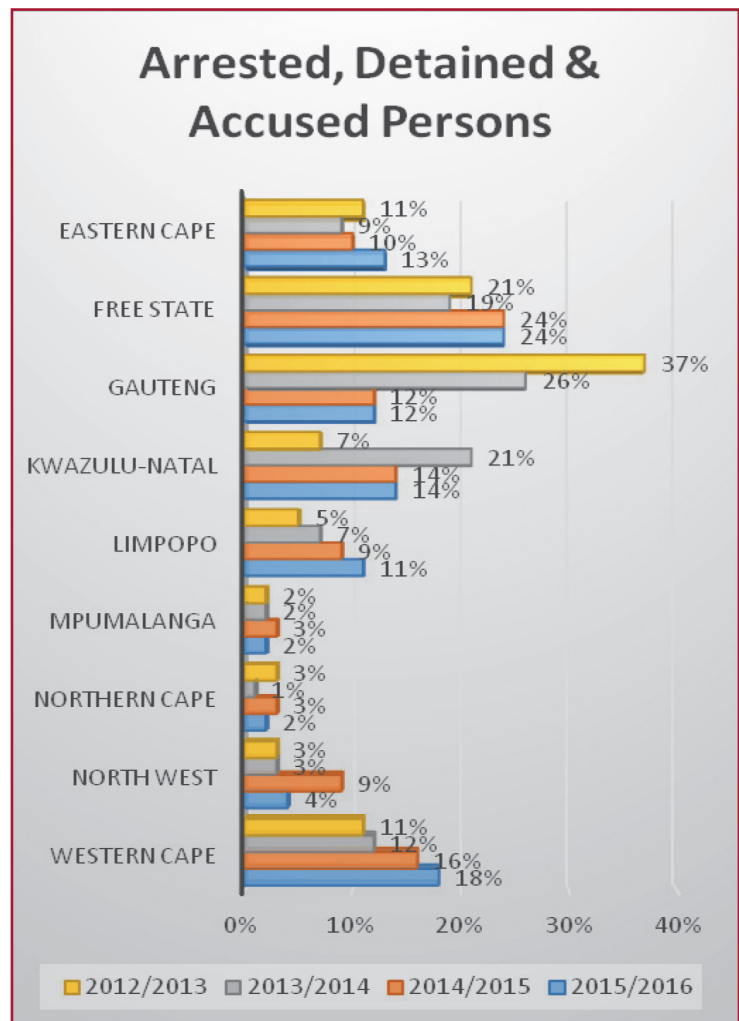
27 LJ Kotze *The application of just administrative action in the South African environmental governance sphere: An analysis of some contemporary thoughts and recent jurisprudence* PELJ volume 7 (No 2) 2004 67.

28 LJ Kotze *The application of just administrative action in the South African environmental governance sphere: An analysis of some contemporary thoughts and recent jurisprudence* PELJ volume 7 (No 2) 2004 67 – 68.

29 Section 182 of the Constitution states that:

(1) [T]he Public Protector has the power, as regulated by national legislation—

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.



Graph 16: Percentage of section 33 complaints per provincial office per financial year

Although the Commission has a mandate to deal with complaints relating to all the rights listed in the Bill of Rights, it refers some of the complaints to organisations or institutions that could deal with such complaints in a more efficient and efficient manner in accordance with article 12(8) and (9) of the CHP. It must be borne in mind that the Commission, in certain respects, has an overlapping mandate with other institutions established to support constitutional democracy in terms of chapter 9 of the Constitution. The highest percentage of complaints relating to just administrative action was recorded by Gauteng . The reason for this may be due to the fact that National Government departments are based in the Gauteng Province. However, at the end of the 2015/2016 financial year a decline in the percentage of section 33 related complaints received was noted.

Over the four year period, the Eastern Cape and Western Cape provincial offices progressively recorded a higher number of complaints that relate to just administrative action.

## 8. BOTTOM 5 RIGHTS VIOLATIONS

### 8.1. RIGHTS VIOLATIONS PER FINANCIAL YEAR

Rights violations	2012/2013	Rights violations	2013/2014	Rights violations	2014/2015	Rights violations	2015/2016
Assembly, demonstration, picket and petition	6	Assembly, demonstration, picket and petition	7	Assembly, demonstration, picket and petition	6	Assembly, demonstration, picket and petition	6
Freedom of association	4	Freedom of association	4	Freedom of association	1	Freedom of association	5
Political rights	1	Political rights	1	Political rights	6	Political rights	2
Slavery, servitude and forced labour	1	Slavery, servitude and forced labour	1	Life	7	Freedom of trade, occupation and profession	8
Language and culture	5	Language and culture	8	Freedom of movement, residence, passport and to leave the Republic	9	Language and culture	1
<b>Total</b>	<b>17</b>	<b>Total</b>	<b>21</b>	<b>Total</b>	<b>25</b>	<b>Total</b>	<b>15</b>

Table 25

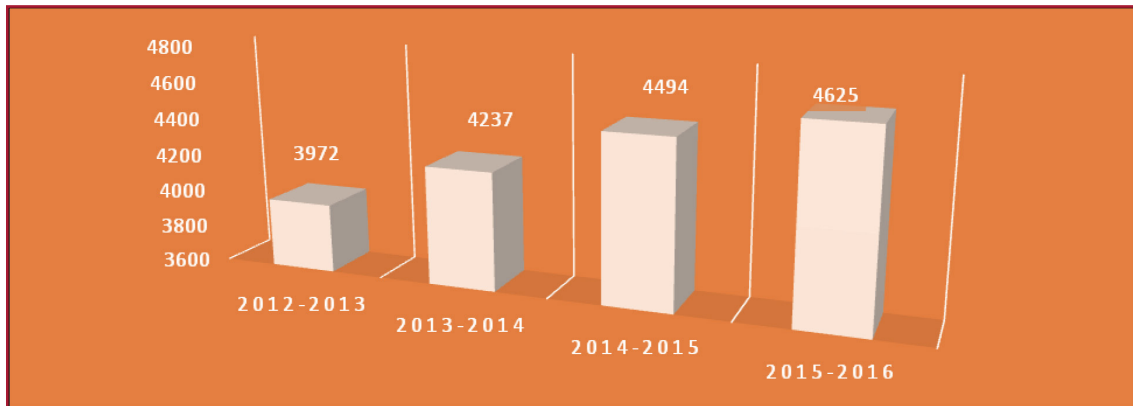
In all of the four financial years under review, three rights' violations have remained consistently low in terms of complaints received by the Commission: the right to assembly, demonstration, picket and petition, freedom of association and political rights. Noting that the rights stated in the table above are entrenched in the Bill of Rights, these rights are as important as other rights enshrined in the Constitution. The rights in the table above are those for which the Commission received the fewest complaints during the period under review.

High levels of protest action have been documented in South Africa over recent years. The incidents of protest action relate to a number of issues, including labour, political issues and socio-economic issues to name a few. Protest action falls within the ambit of the rights that are protected under section 17 of the Constitution. The Commission has recorded just seven complaints that relate to protest action. Rules and regulations govern the conduct of legally permissible protest action. The low incidence of reporting on protest action may mean that awareness and adherence to legal prescripts are working well. The Commission notes, however, that actions that exceed the prescribed bounds for protest action have often resulted in arrests and criminal prosecution in certain instances. Protest action, expression and association remain important rights around which awareness initiatives and public mobilisation for consensus are required. The table above provides useful information on rights which require attention through their promotion.



*Protest action, expression and association remain important rights around which awareness initiatives and public mobilisation for consensus are required. The table above provides useful information on rights which require attention through their promotion.”*

## 9. ENQUIRIES

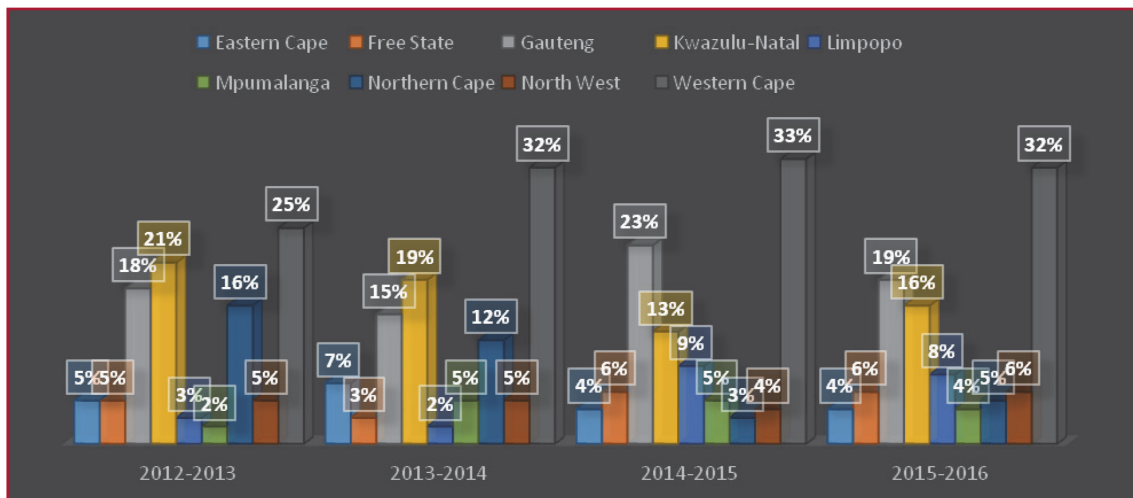


Graph 17: Total number of enquiries per financial year

The total number of enquiries received by the Commission has increased annually during the four financial years under review. At the end of the 2012/2013 financial year, the total number of enquiries recorded was 3 972. The number of enquiries received increased at a steady average of 217 per financial year. The total number of enquiries at the end of the 2015/2016 financial year stood at 4 625.



*The total number of enquiries at the end of the 2015/2016 financial year stood at 4 625.”*



Graph 18: Percentage of enquiries per provincial office, per financial year

Throughout the four financial years under review, the Western Cape provincial office has recorded the highest percentage of enquiries. The average annual percentage of enquiries that has been recorded by the Western Cape is 31% of all enquiries recorded nationwide. The high number of enquiries in the Western Cape Province is disproportionate to the number of non-enquiry based complaints received by the provincial office. The Gauteng provincial office, also a high volume province, receives fewer enquiries, but more complaints, compared to the Western Cape.

## 10. LITIGATION

In terms of section 38 of the Constitution, Section 13(3)(b) of the SAHRC Act and section 20(1)(f) of PEPUDA, the Commission may bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or group or class of persons. Similarly, in terms of article 42 of the CHP of the Commission, the Commission may institute proceedings in a competent court or tribunal in its own name, or on behalf of a group or class of persons at any stage after a complaint is received. In line with this authority, the Commission is entitled to use litigation, alongside other dispute resolution mechanisms, to secure appropriate redress where human rights have been violated. As evidenced below, during the 2015/2016 financial year, the Commission was involved in civil proceedings in the Gauteng and Western Cape divisions of the High Court of South Africa, the Supreme Court of Appeal and the Constitutional Court. The Commission's involvement in litigation ranged from litigation in the equality courts, defending a delictual suit, opposing a judicial review, promoting the respect and protection of consumer rights against unlawful practices relating to emolument attachment orders, and enforcement of socio-economic rights.



*In line with this authority, the Commission is entitled to use litigation, alongside other dispute resolution mechanisms, to secure appropriate redress where human rights have been violated.”*

### 10.1. LITIGATION AT NATIONAL LEVEL

#### ***Minister of Basic Education & 4 others v BEFA & 23 Others (SCA Case No. 20793/2014 & NGHC Case No. 23949/2014)***

This matter relates to the failure by the National and the Limpopo Department of Basic Education (the DBE) to deliver textbooks to a number of schools in Limpopo province in 2014. In March 2014, a number of Limpopo based school governing bodies and a community organisation named Basic Education for All (BEFA) launched urgent proceedings seeking an order declaring unlawful the failure by the Respondents, who are educational authorities, to deliver textbooks to various schools in Limpopo. BEFA alleged that the DBE's failure to deliver textbooks to the affected schools amounted to a violation of, *inter alia*, the right to basic education, equality, and dignity. BEFA succeeded in the High Court in Pretoria.

On 5 May 2014, the High Court granted an order declaring the failure by the DBE to complete the delivery of textbooks to learners in Limpopo a breach of section 29(1)(a) of the Constitution. The high court *inter alia* declared the right to basic education to include the right of every learner in Limpopo to be provided with every textbook prescribed for the learner's grade before the teaching of the curriculum for which such textbook is prescribed is due to commence.

The DBE appealed with leave of the court *a quo* to the Supreme Court of Appeal (SCA) against the judgment of the high court. BEFA lodged a cross-appeal against the refusal by Tuchten J, in the court *a quo*, to find that the State Respondents had failed to comply with a previous court order granted by Kollapen J on 24 October 2012.

The Commission participated in both the High Court and the SCA proceedings. Its participation was motivated by its constitutional and statutory mandate to promote the respect, protection and monitoring of human rights in South Africa. The Commission had earlier investigated and convened hearings on the procurement and delivery of textbooks nationally.

The Commission made submissions on the importance of textbooks to realise the right to basic education and other rights such as the right to equality and dignity. Mr Ngcukaitobi argued that textbooks are an essential component of the right to basic education. The lead evidence contained in international studies, which showed that the performance of poor learners from rural areas who had access to textbooks was better than the performance of those without textbooks.

The SCA heard the appeal on 24 November 2015 and judgment was delivered on 1 December 2015. The SCA dismissed the appeal and overwhelmingly approved the submissions proffered by the Commission and BEFA, which had put across similar arguments to the Commission. The SCA confirmed that the right to basic education entitles every learner to be provided with every textbook prescribed for the learners' grade before the commencement of the curriculum year. The SCA went on to declare that the DBE had violated the learners' rights to basic education, equality and dignity, and that the DBE had failed to comply with previous orders of the court *a quo*.

***Association of Debt Recovery Agents NPC v The University of Stellenbosch Legal Aid Clinic & Others (CCT Case No. 127/2015 & WCHC Case No. 16703/2014)***

At the time of this report, this matter was on appeal before the Constitutional Court against the judgment of the Western Cape High Court. It relates to the debt collection procedure employed in the micro-lending industry and the constitutional validity of section 65J of the Magistrates Court Act, (No. 32 of 1994), which permits the attachment of a debtor's earnings and obliges his or her employer (the garnishee) to pay out of such earnings specific instalments to the judgment creditor or his or her attorney.

The initial application was lodged by the University of Stellenbosch Legal Aid Clinic, acting in the public interest and on behalf of its clients who were cited as the second to sixteen applicants in the initial application. The Commission was admitted as an *amicus curiae*. Some of the issues which arise in this matter fall within the Commission's mandate to promote access to justice, respect for human rights, monitor and prevent rights' abuses, especially in vulnerable communities who are at greater risk of exploitation.

Prior to this judgment, Emolument Attachment Orders (EAOs) were issued in the magistrate courts to compel employers to deduct moneys (instalments in terms of judgment debt) owing to creditors, from the wages of employees. This continued until the full amount of the debt was paid off. Such orders were issued by a clerk of the court. The clerk was not obliged to evaluate the implications of the order on the livelihood of the debtor. This meant that there was no judicial oversight in the process of issuing such orders. The orders could also be issued in courts where the debtor did not live or work. In some instances, the debtors resided in Stellenbosch but the judgments were granted and EAOs issued in Kimberley, Wynberg and elsewhere.

The Commission made submissions on the implications of the current practice in relation to the granting of EAO against debtors. The Commission's submission was based on South African and foreign jurisprudence in relation to the attachment of property to satisfy a debt. It highlighted the practice in the USA, Australia, Germany and Rwanda, where EAOs are capped, and recommended that the same should be done in South Africa. It also made submissions on the implications of attaching salaries of debtors and the correct interpretation of sections of the Magistrates Courts Act in relation to the geographical areas where EAOs should be granted.

The Court found in favour of the applicants and placed on record in the judgment its indebtedness to the Commission and its counsel for their contribution to the proceedings. The Court went on to declare certain provisions of section 65 of the MCA unconstitutional and invalid to the extent that they failed to provide for judicial oversight over the issuing of an EAO against a judgment debtor.



The Respondents in the matter *a quo* proceeded to launch appeal proceedings before the Constitutional Court on 27 July 2015 in this regard. The Commission has been admitted as an *amicus curiae* in the Constitutional Court but the Chief Justice has limited the Commission's written submission to the treatment of emolument attachment orders in foreign and international law and appropriate remedies. The appeal shall be heard before the Constitutional Court on 3 March 2016.

***Labia Theatre CC v SAHRC, The RIGHT2KNOW Campaign & Palestinian Solidarity Campaign (WCHC Case no. 8569/2015)***

This is a judicial review application against the findings and recommendations of the Commission.

In February 2012, the Palestine Solidarity Campaign (PSC) approached Labia Theatre CC (Labia) to lease one of its cinemas for purposes of screening a film entitled *Roadmap to Apartheid* (the film). The PSC alleged that Labia had initially agreed to screen the film but later advised the PSC that it would no longer lease the cinema to the PSC. Labia alleges that it declined to screen the film because of its "controversial political nature". The PSC then lodged a complaint with the Commission alleging that the refusal to screen the film amounted to a violation of the rights to equality and freedom of expression. The Western Cape provincial office of the Commission determined that the dispute between the PSC and Labia centred on the correct interpretation to be given to the terms of the agreement between the parties and deemed that the court of law was the correct forum to adjudicate the issues of the interpretation of the contract between the parties. The PSC appealed against the findings of the Western Cape provincial office. The Commission upheld the PSC's appeal and ordered Labia to screen the film within three months from the date of the appeal findings.

On 8 May 2015, Labia lodged a high court application to declare unlawful, and to review and set aside the appeal findings. The Commission opposed the judicial review application. The pleadings have closed. On 16 January 2016, the Commission filed a notice to enrol the application for hearing but a date has not been assigned as yet.

On 25 May 2015, the PCS proceeded to lodge an application in the Western Cape High Court sitting as an Equality Court for an order directing Labia to screen the film. The Commission has been cited as a respondent but no order has been sought against it in the Equality Court matter.

At the directions' hearing which took place on 1 December 2015, Judge Bozalek ordered that:

- i) The parties are to file all outstanding papers by 15 December in terms of both the review application and the Equality Court matter. No applications for condonation are necessary in this regard;
- ii) The Commission is to obtain an independent mediator to mediate both disputes (the review and the Equality Court matter);
- iii) The parties are to afford their full co-operation to the mediation process;
- iv) The directions hearing is postponed *sine die*; and
- v) A report is to be filed regarding the outcome of the mediation.

The Commission facilitated a mediation between the parties in accordance with the order of Bozalek J on 25 to 26 February 2016.



***Prophet Paseko Motsoeneng v Minister of Justice and Constitutional Development, SAHRC & Isaac Mangena (GHCJHB Case No. 23013/2015)***

This is a delictual action brought by Prophet Paseko Motsoeneng, the plaintiff, against the Commission. The plaintiff alleges that the Commission's head of communications made defamatory statements against him in February 2013. Such statement was allegedly contained in written answers to media requests into an investigation that the Commission had lodged in 2011 against the plaintiff.

In his delictual suit, the plaintiff asserts that the statement was wrongful and defamatory. The Commission is defending the action.

## **10.2. LITIGATION BY PROVINCIAL OFFICES**

In addition to the abovementioned constitutional and legislative provisions that empower the Commission to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or group or class of persons, section 20(1)(f) of PEPUDA specifically empowers the Commission to institute proceedings in terms of PEPUDA.

Article 12(11) of the Commission's CHP provides that:

*"If the Provincial Manager makes a finding that the complaint should be referred in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000) (hereinafter referred to as "PEPUDA"), the complainant must, within seven days of the finding, be notified thereof, in writing and be advised that the Provincial Manager or any member of staff, as duly designated may assist him or her in instituting proceedings in the Equality Court, in compliance with PEPUDA and the Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination, 2003 (Government Notice R. 764 of 13 June 2003)."*

Against the above backdrop, the provincial offices of the Commission undertook a number of litigious interventions in the different courts across South Africa. Most of these Equality Court cases involve the use of the racial epithets and other derogatory comments with racial undertones such as "baboon" or "monkey". In the 2015/2016 financial year, 31 of 51 matters litigated by the provincial offices related to the right to equality and hate speech.

The Supreme Court of Appeal<sup>30</sup> held that *"the word kaffir is racially abusive and offensive and was used in its injurious sense. This was an unlawful aggression upon the dignity of the complainants. The State witnesses testified about how they felt when so insulted by the appellant. It is trite that in this country, its use is not only prohibited but is actionable as well. In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. The appellant cannot claim that he did not know that the use of such word is offensive and injurious to the dignity of the complainants."*

30 See Prinsloo v The State [2014] ZASCA 96 at para 20.

In *President of the Republic of South Africa & Another v Hugo*<sup>31</sup>, Goldstone, J, explained that the object of the prohibition of unfair discrimination and the manner of approach unfair discrimination, should be dealt with as follows:

*“The prohibition of unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups, it seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional democratic orders, the establishment of a society in which all human beings will be accorded equal dignity and respect, regardless of their membership of particular groups.”*

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	0	0	3	5
Free State	1	0	3	7
Gauteng	6	0	7	6
KwaZulu-Natal	0	0	1	2
Limpopo	3	1	8	7
Mpumalanga	6	12	17	17
Northern Cape	0	10	9	7
North West	10	5	1	1
Western Cape	1	14	13	2
<b>Totals</b>	<b>27</b>	<b>42</b>	<b>62</b>	<b>54</b>

Table 26: Litigation complaints per provincial office

The Gauteng provincial office, despite receiving the highest number of equality based complaints, has not litigated in all such matters. As the table above shows, the Mpumalanga provincial office had the highest number of complaints in litigation over the four financial years under review. The KwaZulu-Natal provincial office, which historically records the third highest number of complaints on an annual basis, recorded the lowest number of complaints in litigation over the four financial years under review. The table below highlights the categories of complaints that the Commission has taken on litigation over the four financial years under review.

31 1997 (4) SA 1 (CC) at para 41.

<b>Rights violations</b>	<b>2012/2013</b>	<b>2013/2014</b>	<b>2014/2015</b>	<b>2015/2016</b>
<b>Equality</b>	11	14	32	31
<b>Human dignity</b>	9	8	6	14
<b>Freedom of expression</b>	1	11	14	4
<b>Property</b>	1	1	0	0
<b>Housing</b>	1	2	3	2
<b>Health care, food, water &amp; social security</b>	1	3	4	1
<b>Children</b>	0	1	1	1
<b>Education</b>	0	1	0	0
<b>Cultural, religious and linguistic communities</b>	0	1	1	0
<b>Just administrative action</b>	1	0	0	0
<b>Arrested, detained and accused persons</b>	0	0	1	1
<b>No human rights violations listed</b>	2	0	0	0
<b>Totals</b>	<b>27</b>	<b>42</b>	<b>62</b>	<b>54</b>

Table 27: Litigation complaints per status, per financial year

The overall numbers of complaints that the Commission has taken on litigation nationwide increased during the first three years under review, but these numbers decreased at the end of the 2015/2016 financial year. The table above illustrates the rights violations in complaints that the Commission has litigated. In all the four financial years, equality related complaints were the most litigated, followed by the right to the freedom of expression.

## 11. COMPLAINTS RESOLVED THROUGH ALTERNATIVE DISPUTE RESOLUTION (ADR)

In terms of section 14 of the SAHRC Act, “the Commission may, by mediation, conciliation or negotiation endeavour— (a) to resolve any dispute; or (b) to rectify any act or omission, emanating from or constituting a violation of or threat to any human right.”<sup>32</sup> Mediation is defined in the Commission’s CHP as the process of intervention between parties by an independent person or mediator to reach an agreement, whereas conciliation is defined as the process of reconciling a matter between parties. Negotiation is defined as the process of conferring with parties in order to reach an agreement. Collectively, these three processes are referred to as Alternative Dispute Resolution (ADR).

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	0	2	1	2
Free State	4	6	2	3
Gauteng	3	3	11	3
KwaZulu-Natal	3	4	4	5
Limpopo	0	0	5	1
Mpumalanga	0	0	3	0
Northern Cape	0	5	0	2
North West	0	0	1	0
Western Cape	1	0	0	0
<b>Totals</b>	<b>11</b>	<b>20</b>	<b>27</b>	<b>16</b>

Table 28: Alternative Dispute Resolution (ADR) complaints per provincial office, per financial year

Table 28 shows the number of complaints dealt with by making use of ADR mechanisms. The number of matters resolved by way of ADRs declined from 27 in the 2014/2015 financial year to 16 in 2015/2016.

The Commission utilises ADR mechanisms to deal with complaints on the basis that they are more cost effective than other means, such as litigation. The use of ADR mechanisms also result in a speedy finalisation of complaints since the process can be set up quickly. Importantly, in ADR mechanisms, the Commission does not adjudicate or take sides in disputes but tries to assist the parties in reaching and agreeing to a settlement of their dispute through consensus building. In terms of dealing with human rights’ violations ADR mechanisms secure long lasting resolutions as opposed to more adversarial courses of action which, in most instances, polarises parties.



*The Commission utilises ADR mechanisms to deal with complaints on the basis that they are more cost effective than other means, such as litigation. The use of ADR mechanisms also result in a speedy finalisation of complaints since the process can be set up quickly.”*

32 Section 14 of the South African Human Rights Act, 40 of 2013.

## 12. APPEALS

Chapter 9, Article 34(1) of the Commission’s CHP states: “...any party to proceedings under these Procedures, who feels aggrieved by any determination, decision or finding, save for a finding made at a hearing as contemplated in Chapter 7 of these Procedures, may lodge an appeal with the following persons (a) the Chairperson, if the appeal is of a substantive nature regarding any determination, decision or finding of a Provincial Manager, within 45 days from the date of being notified of such determination, decision or finding by post, delivery, facsimile or e-mail; or (b) the Chief Operations Officer, if the appeal is of a procedural nature regarding any determination, decision or finding of a Provincial Manager, within 45 days from the date of being notified of such determination, decision or finding by post, delivery, facsimile or e-mail.”



Graph 19: Total number of appeals per financial year

On average, the Commission receives 160 to 170 complaints on appeal each financial year. The highest number of appeals that the Commission recorded was during 2014/2015 as illustrated in the graph above. Appeals are finalised by either the chief operations officer (COO), on procedural grounds, or the chairperson of the Commission, on substantive grounds.



*On average, the Commission receives 160 to 170 complaints on appeal each financial year.”*

Provincial office	2012/2013	2013/2014	2014/2015	2015/2016
Eastern Cape	29	14	22	16
Free State	22	33	43	34
Gauteng	71	60	58	46
KwaZulu-Natal	9	11	24	16
Limpopo	4	7	19	16
Mpumalanga	0	4	6	9
Northern Cape	2	2	6	6
North West	5	6	10	13
Western Cape	17	21	34	13
<b>Totals</b>	<b>159</b>	<b>158</b>	<b>222</b>	<b>169</b>

Table 29: Appeals per provincial office, per financial year

The average number of appeals over the four year period ranged between 160 and 170, with the exception of the 2014/2015 financial year when the Commission received 222 appeals. Most of these appeals originate from the Gauteng and Free State provincial offices. As mentioned in previous sections of this report, the Gauteng provincial office records the highest numbers of complaints on an annual basis, and the high numbers of appeals recorded correlates with the number of complaints received each financial year. There is a high number of appeals originating from complaints from the Free State provincial office. This is due to the significant number of internal appeals lodged by complainants who originally lodged complaints from correctional centres. The provincial office receives a significant number of complaints falling under section 35 of the Constitution.

### 12.1. UPHELD VERSUS DISMISSED APPEALS

Financial year	Procedural (upheld)	Substantive (upheld)	Totals	Procedural (dismissed)	Substantive (dismissed)	Totals	Finalised per financial year
2012-2013	19	1	20	123	5	128	148
2013-2014	13	0	13	84	5	89	102
2014-2015	5	1	6	132	11	143	149
2015-2016	6	1	7	111	8	119	126

Table 30: Upheld and dismissed appeals per financial year per category

The total number of appeals finalised each financial year have varied. The table above shows the number of appeals finalised each financial year, and the number of procedural and substantive appeals upheld and dismissed. Most appeals that have been finalised over the four financial years have been procedural. On a year-on-year basis, the Commission receives more procedural appeals than substantive ones. The majority of appeals in both categories are dismissed.

## 13. INVESTIGATIVE REPORTS

During the 2015/2016 financial year, the Commission undertook several investigations into alleged violations of fundamental rights and released four Investigative Reports in which it made adverse findings against the Respondents and recommended certain steps be taken to redress human rights' violations. These relate to:

- The alleged violation of the environmental right in terms of section 24 of the Constitution;
- The constitutionality of the administration of corporal punishment in the home;
- Unfair discrimination on the basis of disability and access to adequate housing; and
- The lack of poor access to basic municipal services.



*During the 2015/2016 financial year, the Commission undertook several investigations into alleged violations of fundamental rights and released four Investigative Reports in which it made adverse findings against the Respondents and recommended certain steps be taken to redress human rights' violations."*

The findings and recommendations in the investigative reports relating to the alleged violation of the environmental right and the administration of corporal punishment in the home are both the subjects of substantive appeals in progress.

The Western Cape provincial office released two Investigative Reports, while the Free State and Gauteng provincial offices each released one Investigative Report.

Summaries of each of the Investigative Reports follow. The full Investigative Reports may be accessed from the Commission's website ([www.sahrc.org.za](http://www.sahrc.org.za)).

### 13.1. FREE STATE

#### **Mr Johan Waldemar De Beer v E.C. Incinerators Services (Pty) Ltd (Enviroserv) & Mangaung Metropolitan Municipality (FS/1314/0071)**

This is an Investigative Report into the complaint lodged by Mr Johan Waldemar De Beer against a private company called E.C. Incinerators Services (Pty) Ltd (Enviroserv) and the Mangaung Metropolitan Municipality (the Mangaung Municipality).

On 24 May 2013, the complainant lodged a complaint with the Commission in which he alleged that Enviroserv was violating his right to an environment that is not harmful to his health and wellbeing by operating a medical waste incinerator within two (2) kilometres from his home at Orange Grove Farm in Bloemfontein. He further alleged that as a result of the incinerator, the air in the area was polluted and that this adversely affected his health. The Commission determined that the complaint constituted a *prima facie* violation of the environmental right in terms of section 24 of the Constitution and proceeded to launch a full investigation into this matter.

The complainant further alleged that since he moved to the farm two and half years from the date of lodging the complaint he had been suffering from various medical conditions, including sinusitis, swollen glands in the neck and under the tongue, a stuffy nose, a burning sensation in throat, blood



coming out of his nose, burning eyes, a bad bitter taste in his mouth from solid present in the air which he inhales, dizziness and headaches. He indicated in the complaint that he had visited his doctor on several occasions to receive medical attention.

The complainant also complained of large volumes of black smoke emanating from the incinerator throughout the day and night. He alleged that he could not get any assistance from the Department of Environmental Affairs which told him that it does not regulate incinerators. He then proceeded to telephonically lodge a complaint with the Mangaung municipality's health department and subsequently requested a copy of Enviroserv's atmospheric emission licence, which was given to him on 29 May 2013.

In June 2013, the Commission addressed an allegations letter to Enviroserv. In its response, Enviroserv alleged that its incineration facility underwent rigorous permitting processes including the Environmental Impact Assessment and Public Participation Process as required by law. It further alleged that it complied with applicable laws, including the National Environmental Management: Waste Act, (No. 59 of 2008), and that it had obtained a waste management licence. It denied that it was polluting or degrading the environment.

The Commission requested monitoring based data from Enviroserv including its audit and emissions' reports. The information revealed that Enviroserv had commissioned an Air Quality Impact Assessment after receiving a complaint from the complainant. It had also commissioned an ambient air sampling study which allegedly concluded that the ambient concentrations of VOC and Benzene at all four sampling sites of the incineration facility were minimal and low, and that it was very unlikely that any person exposed to them would develop any adverse health effects or cancer as a result of such exposure.

The respondent alleged that it had at all times acted reasonably and with the full knowledge and approval of the authorities.

The Mangaung municipality alleged, in its response to the Commission, that Enviroserv was operating on a permit issued in 2001 in terms of the Atmospheric Pollution Prevention Act (No. 45 of 1965) and that Enviroserv was required to apply for a new atmospheric emissions licence in terms of the National Environmental Management Air Quality Control Act (No. 39 of 2004). During an inspection in loco, the Mangaung municipality observed the emission of black smoke which it attributed to personnel overstocking the incinerator. It then issued a compliance notice dated 7 May 2013. The compliance notice directed Enviroserv not to cause pollution or environmental degradation and required Enviroserv to take steps to prevent the excessive emission of black smoke.

The Commission considered the right to an environment that is not harmful to the health and wellbeing in terms of the Constitution and other legislation enacted to give effect to the constitutional environmental right such as NEMWA, NEMA and NEMAQA. The Commission also considered the relevant case law, including the Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd and Others (10083/2008) [2009] ZAWCHC 6 (23 January 2009), in which the court found a company operating without the required licence under the air quality laws to constitute the environmental right in terms of section 24 of the Constitution.

The Commission found that Enviroserv's failure to ensure that its medical waste incinerator reached correct temperatures at all material times and the consequent excessive black emissions which polluted air in the area violated the complainant's constitutional right to a clean environment that is not harmful to their health and wellbeing.

**The Commission found that Enviroserv's failure to ensure that its medical waste incinerator reached correct temperatures at all material times and the consequent excessive black emissions which polluted air in the area violated the complainant's constitutional right to a clean environment that is not harmful to their health and wellbeing.**

The Commission recommended that:

- a) The Mangaung municipality, as the licensing authority under NEMAQA, is directed to use the provisions of sections 45 or section 46 to review or vary the Atmospheric Emission Licence issued to Enviroserv health care waste incinerator to ensure that the conditions are aligned with best practice, with specific reference to comparative international regulation within a period of six months.
- b) Enviroserv was required to provide proof that it is able to meet the requirements of the revised Atmospheric Emissions Licence before it could be allowed to recommence operations.

Enviroserv has appealed against the findings and recommendations made in this matter. An appeal in this regard is being processed by the chairperson of the Commission.

## 13.2. GAUTENG

### **Lubbe Viljoen v University of Pretoria (GP/2012/0677)**

This matter concerns a complaint lodged by the complainant, Mr Lubbe Viljoen, against the University of Pretoria (UP). The complainant alleged *inter alia* that he had suffered a rare medical genetic metabolic disease since 2006, which was diagnosed as Mitochondrial Cytopathy in 2007. He alleged that Mitochondrial Cytopathy is categorised as a medical disability. The complainant further alleged that UP failed to provide him with reasonable accommodation for his medical disability during his postgraduate studies which resulted in his academic career being negatively impacted. Such reasonable accommodation would include, as recommended by the complainant's ophthalmologist, adequate rest in between work sessions to recover and perform normally.

The Commission noted that the complainant had also lodged complaints involving ongoing academic issues, including ordering the remarking of the complainant's past examination scripts, to the Department of Higher Education and Training (DEHT), the Council for Higher Education (CHE) and the Public Protector. Based on a preliminary assessment of the matter, the Commission determined that these academic issues should be dealt with by the relevant educational authorities. The Commission thus confined its investigation to the allegations relating to the lack of a disability policy at the time the complainant lodged the complaint.

The Commission addressed a letter containing the allegation made by the complainant to which the UP responded in November 2012 by stating *inter alia* that it did not have an approved Student Disability Policy but used the general guidelines and procedures pertaining to students with special needs. Such guidelines had been incorporated into a draft policy which was in the process of being finalised. In May 2013, the UP advised the Commission that a review of its overall policies and guidelines pertaining to persons with disabilities had been conducted. The UP also advised that it made provision for students

with disabilities. In October 2013, the UP submitted its approved Policy of Student with Disabilities to the Commission. This was followed by consultative processes with various stakeholders with a view to assist in the drafting of the disability policy. The UP then contracted Disability Management Services Inc. to assist in the drafting of the disability policy. The disability policy was communicated to the university community through various media, including the UP website, the intranet and student newspaper.

As to the honours degree that the complainant could not complete, the UP emphasised that the complainant must comply with the relevant requirements in order to be awarded the degree.

The complainant had also complained that the UP had violated his right to have access to information in terms of the Promotion of Access to Information Act (No. 2 of 2000) (PAIA). In particular, the complainant alleged that the UP had contravened section 14(1)(e) of PAIA in that it did not list the categories of records held by the UP which were automatically available. He also alleged that he was forced to lodge a PAIA request for documents such as the examinations' regulations and examinations' scripts which, in the complainant's view, ought to have been automatically made available.

The Commission noted that while other jurisdictions, like the United States of America and Ireland, have legislation providing for prevention of discrimination on the basis of disability at university, no such distinct legislation existed in Africa. In South Africa, legislation such as the PEPUDA prohibits discrimination on the basis of disability.

**The Commission noted that while other jurisdictions, like the United States of America and Ireland, have legislation providing for prevention of discrimination on the basis of disability at university, no such distinct legislation existed in Africa. In South Africa, legislation such as the PEPUDA prohibits discrimination on the basis of disability.**

The Commission proceeded to find *inter alia* that:

- a) Some aspects of the complaint fell outside of the jurisdiction of the Commission, in particular those relating to ordering retrospective relief, such as the re-mark of any past examination papers.
- b) The lack of a disability policy amounted to a violation of section 28 of PEPUDA which obliges institutions performing public functions to enact policies to eliminate discrimination on the basis of disability. The Commission noted, however, that during the course of the investigation, the UP developed the Policy on Student with Disabilities, which was implemented in October 2013.
- c) Given the dispute of fact, no finding could be made whether or not the UP failed to provide reasonable accommodation for the complainant.
- d) The UP's manual in terms of section 14 of PAIA did not provide a list of all categories of automatically available records and that the notice in terms of section 15 of PAIA did not clearly state the records that could be requested without lodging a PAIA request.
- e) The UP's failure to respond to the complainant's internal appeal in terms of PAIA did not amount to a violation of this Act, and that PAIA does not provide for an appeal against the refusal of PAIA requests by universities, but requires such matters to be determined by a court of law. However, the Commission noted that the UP ought to have been more responsive to the complainant by timeously informing him that he did not have a right to appeal against the refusal of his PAIA request.

The Commission further disagreed that the examination scripts ought to have been made automatically available to all persons as that would undermine the right to privacy and would have resources' implications.

The Commission went on to recommend that:

- a) the university undertake the publicising or messaging of the disability policy to the wider university community;
- b) the UP reviews and aligns its processes in accordance with PAIA; and
- c) the UP provide a list of automatically available records in its manual in terms of section 14 of PAIA.

### 13.3. WESTERN CAPE

#### **Adriaan Mostert and Others v Joshua Generation Church (WP/1213/0887)**

This is an Investigative Report into a complaint lodged by four complainants, namely, Adriaan Mostert, Hannah Mostert, Sonke Gender Justice and Carol Bower, against the Joshua Generation church.

The complainants alleged that the church's religious doctrines requires the use of corporal punishment by means of a rod. The complainants further alleged that the respondents asserted that corporal punishment does not have a negative impact on a child and the parenting manual on the respondent's website amounted to a promotion of corporal punishment as a means of discipline. The Commission attempted to resolve the complaint by way of mediation or conciliation but the parties failed to reach a mutually agreeable outcome and the mediation process was ended.

The Commission considered the following issues key to its determination:

- a) Whether the respondent's conduct amounted to a violation of the right of every child to be protected from maltreatment, neglect, abuse or degradation in terms of section 28(1)(d) of the Constitution;
- b) Whether the promotion of corporal punishment by the respondent is inconsistent with the standard of best interest of the child under section 28(2) of the Constitution; and
- c) Notwithstanding that the complainants had not raised this, the Commission also needed to determine whether or not the conduct of the respondent amounted to a violation of the rights to equality, human dignity and freedom and security of the person.

The Commission considered the law promoting and protecting the rights of children at the international, regional and domestic level. The Commission also considered case law dealing with the administration of corporal punishment. In particular, the Commission considered the *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 in which Sachs J held that the banning of corporal punishment was part of a comprehensive process of eliminating state sanctioned use of physical force as a method of punishment.

The Commission also considered a minority dissenting opinion of the European Commission of Human Rights in *Campbell and Cosans v United Kingdom* which held that "*corporal punishment amounted to a total lack of respect for the human being...*"

In its defence, the respondent alleged that the teachings of corporal punishment are consistent with common law defence of reasonable chastisement and constitute a constitutionally acceptable limitation (in terms of section 36 of the Constitution) of the children's rights to equality, human dignity, freedom and security of the person and protection from maltreatment, neglect, abuse or degradation.

The Commission made findings in the following terms:

- a) That corporal punishment in any form is inconsistent with the constitutional values and violates the provisions of international and regional human rights standards;
- b) That corporal punishment amounts to a violation of the right of every child to be protected from maltreatment, neglect, abuse or degradation;
- c) The pre-constitutional common law of reasonable chastisement violates children's rights to freedom and security of the person; and
- d) That corporal punishment or chastisement amounts to a violation of the right to equality and human dignity.

**The Commission made findings in the following terms:**

- a) That corporal punishment in any form is inconsistent with the constitutional values and violates the provisions of international and regional human rights standard;**
- b) That corporal punishment amounts to a violation of the right of every child to be protected from maltreatment, neglect, abuse or degradation;**
- c) The pre-constitutional common law of reasonable chastisement violates children's rights to freedom and security of the person; and**
- d) That corporal punishment or chastisement amounts to a violation of the right to equality and human dignity.**

The Commission made recommendations requiring the respondent to desist from using and advocating for corporal punishment as a means of disciplining children and that its pastor and trainers involved in presenting the parenting course take a course on alternative forms of non-violent discipline of children. The Commission also recommended that Cabinet should direct the Department of Social Development to initiate Amendments to the Children's Act (No. 38 of 2005), in order to give effect to the prohibition of corporal punishment in the private sphere (at home) and to provide for access to justice, appropriate remedies and appropriate penalties against offenders. Other recommendations to the Department of Social Development included the development of non-violent parenting courses, a budget for the inclusion of non-violent parenting in order for South Africa to meet its obligation under the United Nation Convention on the Rights of the Child and to report to the Commission within six months from the date of this Investigative Report. Finally, the Commission recommended that a copy of this report be given to the Department of Justice and Correctional Services in order to inform advocacy programmes during the 16 days of activism of no violence against women and children.

The Joshua Generation church has appealed against the findings and recommendations of the Commission in this matter and the appeal is under consideration by the Commission's chairperson.

### **Netreg Concerned Residents Organisation v City of Cape Town (WP/1213/0055)**

This Investigative Report concerns the complaint lodged by a non-governmental organisation, called Netreg Concerned Residents Organisation, against the City of Cape Town. The complainant lodged the complaint on behalf of the residents of Netreg, Bonteheuwel who reside in rented housing units that are owned and managed by the City of Cape Town. The complaint relates to a number of issues including poor maintenance of the housing unit in which the residents reside, lack of access to basic services such as water and sanitation, and inadequate storm water drainage systems.

In particular, the complainant alleged that due to poor maintenance, the housing units are in a state of disrepair with ceilings falling down, leaking roofs and non-flushing toilets. The complainant also alleged that:

- a) the residents are unable to access their homes during rainy days as a result of the poor drainage system that causes flooding in the area;
- b) the toilets are frequently blocked and unable to flush resulting in the residents using buckets to dispose of the human waste and hand dug pit latrines. At times, raw sewage overflows on to the adjacent properties; and
- c) some residents have limited access to water and others have no access at all.

As part of its investigation processes, the Commission conducted an inspection *in loco* of the area and conducted interviews with the complainant between July 2012 and October 2012. In October 2012, the Commission addressed an allegations' letter to the City of Cape requiring it to respond. In November 2012, the City of Cape Town responded by denying some of the allegations made by the complainants. It confirmed the state of disrepair of the electrical and water fittings and the toilets, but blamed the residents for the poor state of affairs. In particular, the City of Cape Town alleged that:

- a) the City of Cape Town and the Western Cape Provincial Government had had several interactions with the complainant in terms of which the parties agreed that a survey of occupancy and the structural condition of the housing units would be carried out;
- b) many of the residents' rental accounts were in arrears;
- c) the building surveyed were found to (a) be structurally sound on the outside; (b) have no construction faults; (c) be in a state of disrepair due to neglect by the residents, and said that the water and electrical fittings were damaged or stolen;
- d) there is poor communication between the City of Cape Town as the residents do not approach it for assistance; and
- e) the City of Cape Town could not dispute the alleged inadequacy of the storm water drainage system but again blamed the residents for causing the blockages of the drainage system by throwing waste directly into it.

The allegations made against the City of Cape Town claimed that the survey that the City of Cape Town allegedly undertook, was conducted in the wrong area. The complainant further alleged that the accrual of arrear rentals was due to the overcharges that the City of Cape Town levied for water and the leakages of water from the broken toilets.



The Commission considered international, African regional and domestic law, in the area of socio-economic rights. The Commission also considered case law including the judgment in *Beja and Others v Premier of the Western Cape and Others* (21332/10) [2011] ZAWCHC 97; [2011] 3 All SA 401 (WCC) in which the court quoted paragraph 35 of the judgment in *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 stating *inter alia* that “[Human] dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights.” The Commission also considered case law dealing with the relationship between the rights to dignity and privacy.

On the issue of the adjudication of socio-economic rights, the Commission looked at the *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 in which the Constitutional Court favoured the reasonableness test as opposed to the minimum core approach in determining the reasonableness of the measures taken by the state to realise the right to have access to adequate housing in terms of section 26 of the Constitution. The Commission also considered case law dealing with the government’s obligations to deliver basic services and to meaningful engagement between residents and government.

The issues that remained for determination by the Commission were (a) whether the state of the buildings and facilities alleged by the Complainants is of such condition that it infringes on the Complainants’ right to access to housing and sufficient water and sanitation; their right to an environment not harmful to their health or wellbeing, dignity, and their right to privacy, and (b) whether the municipality had fulfilled its legal obligations to remedy the situation.

The Commission stated that it was common cause that the housing units were in a deplorable condition. It further noted the outdated inadequate sanitation network, blocked toilets, leaking roofs, damaged ceilings, and damaged electrical system. The Commission further noted that, notwithstanding that the City of Cape had been made aware of the deplorable conditions under which the residents lived, it had failed to take reasonable steps to realise the rights of the residents of Netreg, Bonteheuwel.

The Commission found that:

- a) the conditions of the housing units amounted to a violation of the residents’ rights to have access to adequate housing, privacy and human dignity;
- b) the inadequate sanitation services violated the residents’ rights to have access to sanitation, dignity and privacy. It further found that the poor waste disposal system violated the residents’ environmental right;
- c) the City of Cape Town’s failure to remedy the defects in the housing units, after it acquired knowledge of the defects, was unreasonable; and
- d) there was no meaningful engagement between the parties.

The Commission proceeded to recommend that the City of Cape Town (a) Advises the Commission, within three months of receipt of the signed report, of its progress in developing a plan to resolve the problems which have already been identified in Netreg and surrounds. It added that the plan should make provision for urgent repairs as well as ongoing maintenance, and provide clear timeframes; (b) Addresses the communication breakdown between the residents and its officials and to engage meaningfully with the residents; and (c) Reviews and strengthens its public consultation and education processes to ensure that it meets with the requirement of meaningful engagement as required by the Constitution, national legislation and as clarified by the Constitutional Court.



## 14. HEARINGS

In terms of section 184(2) of the Constitution, section 15(1)(c) and (d) of the SAHRC Act and Articles 20 to 27 of the CHP, the Commission is empowered to conduct an investigation by way of hosting a hearing whereby it may require a person to appear before a presiding commissioner to answer questions under oath or affirmation. According to section 184(2)(c) and (d) of the Constitution, the Commission is empowered to carry out research and to educate. In addition Section 13(3) of the SAHRC Act, states that the Commission is competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights, and if, after a due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it must, in so far as it is able to do so, assist the complainant, and other persons adversely affected thereby, to secure redress.



*The Commission applies a mixed methods' approach whereby the hearing process is conducted in two key phases, namely conducting a number of public hearings whereby identified stakeholders are invited to make written and/or oral submissions under and oath or affirmation before the hearing panel."*

Section 15(1) of the SAHRC states that *[P]ursuant to the provisions of section 13(3) the Commission may, in order to enable it to exercise its powers and perform its functions:*

- (a) Conduct or cause to be conducted any investigation that is necessary for that purpose;*
- (b) through a commissioner, or any members of staff duly authorised by a commissioner require from any person such particulars and information as may be reasonably necessary in connection with any investigation;*
- (c) require any person by notice in writing under the hand of a member of the Commission, addressed and delivered by a member of its staff or a sheriff, in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation: provided that such notice must contain the reasons why such person's presence is needed and why any such article or document should be produced; and*
- (d) through a Commissioner, administer an oath to or take an affirmation from any person referred to in paragraph (c), or any person present at the place referred to in paragraph (c), irrespective of whether or, not such person has been required under the said paragraph (c) to appear before it, and question him or her under oath or affirmation in connection with any matter which may be necessary in connection with that investigation."*

Article 21 of the CHP states that in resolving a complaint, the Commission is entitled, *inter alia*, to conduct hearings in the following instances:

- (a) *if a complaint cannot be resolved by way of conciliation, negotiation or mediation;*
- (b) *if a hearing will offer an appropriate solution regarding the complaint;*
- (c) *if it is in the public interest;*
- (d) *if the complaint cannot be fairly decided on the basis of documentary evidence or written statements submitted by the parties or any other person having information relevant to the complaint only; or*
- (e) *if a party requesting a hearing supplies reasonable grounds.*

Moreover, in terms of article 26 of the Commission's CHP, the hearing panel must consider information and/or evidence submitted at the hearing together with other forms of information obtained by the Commission. Following this, the panel must summarise the information received and may make findings and recommendations.

During the 2015/16 financial year, the Commission hosted two national hearings to address complaints identified as being systemic in nature, requiring them to be probed at a broader level. The aforementioned sections form the basis of initiating the Commission's intervention in respect of national hearings.

The nature of the hearing process is generally inquisitorial, as opposed to being accusatorial, as its primary objective is to enlighten the Commission about the challenges confronting various stakeholders in addressing systemic human rights violations. During this process, a wide number of relevant stakeholders, including organs of state; civil society and non-profit organisations; representative bodies; experts; and communities, among others are invited to participate.

The Commission applies a mixed methods' approach whereby the hearing process is conducted in two key phases, namely conducting a number of public hearings whereby identified stakeholders are invited to make written and/or oral submissions under and oath or affirmation before the hearing panel. The panel then poses questions in order to acquire additional information or clarity on information arising from submissions. Following the conducting of the public hearings, an analysis of information received in addition to analysis of secondary sources through desktop research is conducted.

During the 2015/2016 financial year, the following hearings were conducted:

- National Hearing Relating to the Human Rights Situation of Indigenous Peoples in South Africa (25-26 November 2015; 9-10 December 2015; 18 January 2016; 11-12 and 14-15 April 2016)
- National Hearing on Unfair Discrimination in the Workplace (8 March 2016)

## National Hearing Relating to the Human Rights Situation of Indigenous Peoples in South Africa

There is no internationally recognised definition of the term “indigenous peoples”,<sup>33</sup> and although the Commission notes that multiple African communities in South Africa, including Nguni, Sotho-Tswana, Venda and Tsonga-speakers, identify themselves as indigenous, for the purpose of this investigation, reference to indigenous peoples was limited to the different groups of the Khoi and San peoples in South Africa.

The peculiar issues faced by indigenous peoples began to gain momentum through the establishment of the United Nations (UN) Voluntary Fund for Indigenous Populations (1985), the adoption of the International Labour Organisation Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (1989), and the adoption of the United Nations Declaration of the Rights of Indigenous Peoples<sup>34</sup> (2007).

The situation of indigenous peoples globally has been described as critical and precarious,<sup>35</sup> noting the systemic discrimination, marginalisation and exclusion from social, political and economic affairs. Indigenous peoples have historically suffered horrific injustices including dispossession of land; forced assimilation; dehumanisation and extermination. This historical legacy is a direct result of the widespread poverty and exclusion still experienced today, and indigenous peoples are some of the most poverty stricken in the world, and as a group, are over-represented in this category. The Khoi-San in South Africa are no exception, and although they form only a small portion of the poor in the country, their dire situation is exacerbated by multiple factors, including the pervasive negative stigma and social exclusion, a declining culture, lack of official recognition and a strong political voice, which essentially give rise to multiple rights violations which occur on a daily basis.

The complaints laid at the Commission have predominately focused on, but are not limited to issues dealing with equality, language, education, land redistribution, and the lack of recognition of the indigenous communities and their respective leadership. These complaints have either been brought forward on an individual basis, collectively by the Khoisan Council, or by the Leaders and Chiefs of the indigenous communities at various roundtable meetings hosted by the Commission.

On 27 April 2015, the Commission received a memorandum from the Gauteng Provincial Khoi and San Council, which was simultaneously delivered to the CRL Commission, the Public Protector of South Africa, and the Constitutional Court.

33 The term “indigenous” has been the source of contention in the African context, with many countries advancing the idea of indigeneity of all Africans to Africa, which is particularly due to the desire to promote ideals of national unity in a multicultural context. The African Commission’s Working Group notes that domination and colonisation have not been exclusively practiced by white settlers and colonialists, and limiting the term “indigenous” to this context may make it difficult to apply the term meaningfully in Africa. While all Africans may rightly be considered indigenous to Africa, recognition must be given to the fact that some groups are structurally more marginalised and vulnerable than others, leading to systemic discrimination and increased vulnerability.

The true spirit of the term, as explained by the African Commission’s Working Group, is not aimed at one group gaining advantage over another nor is it aimed at promoting ethnic, cultural or racial distinction, but seeks to provide equal opportunities and a voice to severely marginalised groups. The historical legacy of subordination and dispossession from land and natural resources, together with the distinct cultures and ways of life of indigenous persons has given rise to the reality that indigenous peoples continue to suffer from discrimination and marginalisation, and frequently have less representation and access to recourse through government institutions. In this way, the desire to identify indigenous peoples within the broader society serves as a tool for democracy and the protection of fundamental rights and protections for all persons (African Commission on Human and Peoples Rights “Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities” (2005), p 101-103).

34 UN General Assembly Resolution A/RES/61/295, 2 October 2007.

35 United Nations “State of the World’s Indigenous Peoples” (2009), p 1.

The Commission notes that the memorandum outlined, among others, concerns relating to racial classification, language, access to housing and land, the concern of indigenous peoples in celebrating Freedom Day and Human Rights Day unless their rights to dignity and equality are fully restored in terms of the United Nations on the Rights of Indigenous Peoples, and allegations of violence against the indigenous communities since the “arrival of the Bantu groupings in the 1440s and the white settlers in 1652”.<sup>36</sup>

In light of the above, the Commission resolved to host a series of public hearings throughout the country with a view of understanding prevailing challenges, the measures taken by the State to address the challenges and to identify appropriate practical measures which can be further implemented to address these. Hearings were hosted in Gauteng, the Western Cape and Northern Cape, where communities, civil society organisations, academics and organs of state were invited to participate.

In essence, the Inquiry found that South Africa has been progressive in respect of the protection of the rights of indigenous peoples, which include the establishment of numerous specific bodies and institutions and the enactment of multiple laws and policies aimed at preventing unfair discrimination and protecting the rights of indigenous peoples. These include, *inter alia*, an abundance of laws aimed at protecting the rights of indigenous peoples’ indigenous knowledge systems as well as plans with respect to the restitution of land. However, these efforts, on their own, are insufficient to adequately protect and promote the rights of indigenous peoples, and an overall failure to effectively design and implement laws and policies has inevitably given rise to a situation whereby their rights continue to be eroded.

As a result of colonisation and apartheid, the Khoi-San in South Africa became virtually invisible as a distinct group, forcibly assimilated into other ethnic groups and classified as “Coloured”. These peoples were therefore systematically denied recognition as a people of equal worth and value, and thus were essentially denied the right to their very existence as a distinct group. Notwithstanding the historic significance of the country’s transition to a democracy founded on dignity, equality and freedom, the Commission has recognised as a serious concern the continued failure to officially recognise the Khoi-San peoples in the current democratic dispensation, with their continued ethnic categorisation as “Coloured”. After centuries of forced assimilation; discrimination and dehumanisation, this official recognition forms an imperative component in the ability the Khoi-San peoples to live a life of dignity and respect.

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36 The memorandum called for the following relief:

- An amendment of the Constitution to include and recognise the San and Khoi as the first indigenous peoples of South Africa;
- An amendment of the Constitution to provide for participation of the indigenous peoples in the parliamentary processes in terms of the House of Traditional Leadership;
- Reclassification of the race/nation of Khoi-San people to indigenous peoples and not ‘Coloured’;
- The promotion of the Khoi, Nama and San languages;
- An amendment of the Broad-Based Black Economic Empowerment and Affirmative Action policies to include Khoi-San and Coloured peoples;
- The provision of affordable housing for the indigenous peoples;
- Restitution of land; and
- Integration of former Khoi-San South African Defence Force Soldiers and Cape Corps Military Personnel into the South African Military Services.

As a result of a combination of a multitude of factors, including inter-marriage, forced assimilation and the oppression of Khoi-San identity and culture during the colonial and apartheid eras, the practice of traditional cultures and the use of traditional Khoi-San languages has significantly and consistently declined. In addition, the marginalisation of indigenous peoples means that they are often not represented in the decision making bodies of the state, and lack the visibility and political leverage to ensure that their voice is heard. This gives rise to a situation where the special needs and views of indigenous peoples are not taken into account, and may lead to further discrimination.

Access to land is of paramount importance to indigenous peoples, not only as a result of their close spiritual link to land, but is also vital in ensuring that they are able to live a unique way of life in line with their cultural beliefs. It is well established that the link between the multiple socio-economic challenges faced by indigenous peoples is directly attributable to the past discriminatory practices and dispossession of land. In understanding the interdependence of rights, the hearing highlighted the fact that the achievement of a number of other rights, including those of self-determination, development, culture, and the progressive realisation of socio-economic rights, is thus predicated on the fulfilment of the right of access to land, territories and natural resources. Although some land has been returned to indigenous peoples in South Africa, this has been restricted to small groups. It has been insufficient to meet the needs of the majority of Khoi-San peoples, while the provision of land without the necessary capacity and skills development to accompany this measure has further hindered the ability of these peoples to fully realise their rights.

The Commission's Inquiry may have contributed to improved access to justice for indigenous people by encouraging a recognition of them in South Africa, allowing a platform for public expression, and enhancing an understanding of the rights and persistent challenges. More is required to be done by the State, however, to ensure that the vision of the Constitution may be realised.

The rights of indigenous people are integral and indispensable for their continued existence as a people with distinct culture, values, identity and way of life. In this regard, it is noted that national identity is not comprised of dominant identities and cultures alone, but is built upon the foundation of all cultures within a state, and the protection and promotion of diverse cultures on an equal level is an important aspect of maintaining our national heritage.

While the constitutional guarantee of cultural rights is a good starting point, this alone is insufficient to fulfil the obligations of the State. Therefore, what is required is more than an abstention from the prevention of an exercise of rights. The obligations of the state to respect, protect, promote and fulfil rights speaks to the need to establish an environment in which people are freely and equally able to realise their rights through the implementation of positive measures designed and capable of actually promoting the realisation of these rights.

In light of all available evidence, the Commission's recommendations, although not prescriptive on the form that measures and mechanisms designed to achieve the progressive realisation of rights for indigenous peoples should take, stresses the dire need for measures that are capable of rebuilding trust between the Khoi-San peoples, other social groups, and the State. It emphasises that the true healing of indigenous peoples in South Africa cannot take place in an environment in which their rights continue to be eroded.

## National Hearing on Unfair Discrimination in the Workplace

Prior to 1994, the institutionalised system of segregation under apartheid was based on oppression and discrimination. While racial discrimination was the most obvious manifestation, other forms of discrimination inherently developed, including on the basis of gender and disability among others, resulting in a system of privilege and disadvantage. As a result of this legacy, the fundamental importance of equality is emphasised, and consequently forms one of the founding principles of the Constitution.

Despite the existence of a number of laws and policies aimed at preventing unfair discrimination and promoting the achievement of equality, widespread instances of discrimination persist in South African society, including in the workplace. The Commission continues to receive individual complaints which indicate systemic issues relating to discrimination in the workplace. Indeed, labour related complaints have continuously formed part of the Top 5 Rights Violations received by the Commission over the last few years, together with complaints relating to equality.

Data and research on racial, gender and disability-based discrimination, particularly in relation to employment diversity, management diversity and wage discrepancy, is readily available. However, initial research conducted reveals that a gap exists in understanding the overall trends in discrimination in the workplace in South Africa, particularly with regard to discrimination on grounds other than race, gender and disability. Further, studies that are available do not always seek to identify issues relating to systemic forms of discrimination outside of employment equity and wage related factors, and are therefore unable to provide insight into the underlying causes and contributing factors. On this basis, the Commission resolved to host a national hearing investigating unfair discrimination in the workplace in order to develop a deeper understanding of the overall equality trends in the workplace in South Africa, and to analyse why, notwithstanding an abundance of laws and policies in place, discrimination in the workplace persists on a wide scale. While keeping the scope broad to enable the Commission to examine all forms and manifestations of discrimination, the hearing also looked at the prevalence of deeper forms of structural or institutionalised discrimination.

Notwithstanding the vital roles played by each stakeholder in relation to labour relations and the promotion of equality in the workplace, the Commission's Inquiry revealed that limited, and in some instances, no interaction between the parties takes place, resulting in a somewhat silo approach to issues.

It is noted that most submissions received were limited to an exploration of direct discrimination, and generally neglected considerations of access barriers, indirect or institutional manifestations of discrimination. Moreover, the majority of submissions focused on issues of racial, gender and disability discrimination and, to a lesser extent, discrimination on the basis of language, culture and religion, age, and HIV and Aids. Despite an analysis of complaints' trends highlighting discrimination on the basis of sexual orientation as consistently featuring within the top 10 discrimination grounds, almost no submissions specifically dealt with this.

Stakeholders recognised that significant advances and gains had been made in labour practices since 1994. However, in as much as trends showed that unfair discrimination was still pervasive in the workplace, there was also a recognition that there are numerous instances where unfair discrimination may occur inconspicuously or remain unreported. Therefore, while an analysis of the available data may be indicative of the general trends, these are not necessarily an accurate reflection of the reality on the ground, particularly due to the fact that many new grounds of discrimination frequently emerge and are not necessarily well understood.

A lack of awareness, in this way, significantly impacts on the reporting and the incidence of discussion and debate on these issues. What is required therefore, is a careful consideration and committed recognition of lesser known forms of discrimination and of noting that the vulnerability of persons suffering from such forms of discrimination may be amplified due to its inherently inconspicuous manifestation.

The right to equality is broad and all-encompassing, and requires an examination of the nexus between the numerous variables that have contributed to the vast inequalities still prevalent in South African society. The historical inequalities in the country as a result of apartheid, the growing gap between rich and poor, and the prevalence of poverty in the country, require that interventions that are aimed at promoting and realising the right to equality be grounded in its substantive form. As such, the challenge of achieving equality involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality.<sup>37</sup> More than the mere absence of unfair discrimination is therefore required: a commitment to advance those who continue to suffer from disadvantage and inequitable opportunities is needed.

As at the end of the 2015/2016 financial year, the drafting of the reports into the abovementioned National Hearings was in progress. The Commission aims to public the Hearing Reports in the 2016/2017 financial year.

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37 Albertyn, C & Goldblatt, B. (1998). Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality, *South Africa Journal on Human Rights*, 14, p. 248-270.



## 15. CONCLUSION

During the 2015/2016 financial year, the Commission continued to deliver on its mandate to protect, promote and monitor human rights in South Africa. This annual trends' analysis report contains indicators that have been derived from the data collected from the enquiries and complaints into alleged human rights violation that were lodged with the provincial offices of the Commission. This report also draws a comparison between the indicators of the past three financial years and those of the 2015/2016 financial year.

Through this and previous annual trends' analysis reports, the Commission has been able to identify complaints that have consistently comprised the majority of the overall complaints received by the Commission. This has enabled the Commission to track rights' violations that are prominent and sometime systemic. Throughout the four financial years under review, an overwhelming majority of the complaints received by the Commission related to the alleged violation of the right to equality. In some instances, the equality related complaints were on the basis of derogatory utterances which constitute hate speech. Discrimination on the basis on disability and ethnic and social origin respectively comprised second and third common grounds of discrimination.

Despite the Constitution and the plethora of anti-racisms laws, racism remains endemic in South Africa. This is indicative of the fact that the legacy of colonialism and apartheid which was shaped by segregation, oppression and institutionalised discrimination could not be undone overnight.

Given the prevalence of racism and the constantly rising number of racism related complaints lodged with the Commission, particularly complaints relating mainly to allegations of racism perpetuated mainly through the use of social media, the Commission chose to focus on the scourge of racism in South Africa as a thematic segment of this annual trends' analysis report.

By virtue of its position as a National Human Rights Institution, the Commission serves as a thought leader on the subject of the advancement of human rights broadly and, by extension, on the eradication of rights' violations, including race related discrimination and other related intolerances. The Commission is in the process of developing a comprehensive strategy to address racism and xenophobia through all of its regular activities. It will endeavour to include the activities highlighted in South Africa's Draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances (NAP) within this strategy. Moreover, knowledge gained through dialogue and research activities may significantly enhance the work of the Commission in seeking to ensure that NAP related activities are relevant and effective. As an institution with a presence in all nine provinces, the Commission also serves as a useful and neutral platform for the promotion of the NAP and as an accessible route through which all South Africans will be able to familiarise themselves with the instrument. The Commission is therefore well positioned to educate people in South Africa about the NAP and its relevance. However, the Commission may require additional funding and staffing in order to properly pursue this added responsibility and would have to plan strategically to make optimal use of limited capacity and resources to achieve this.

By and large, over the four financial years under review, the Commission achieved the targets set out in the 2014 – 2017 Strategic Plan of the Commission. These include that the Commission exceed the 85% target to finalise all complaints lodged with the Commission. The Commission has also tracked rights' violations that form the subject of the majority of complaints that are lodged with it. This has enabled the Commission to identify ways to improve the efficiency of handling persistent violations of certain rights, and to adopt appropriate measures to address these.

The Commission has also continued to use litigation as a tool to protect and promote human rights of the poor and marginalised. It has assisted communities and individuals to have access to justice through the free legal representation it provided to them.

The Commission remains concerned at the rate of human rights violations in the country. It notes with concern, *inter alia*, (a) the poor infrastructure and lack of essential medication and shortage of staff at some public hospitals and clinics, (b) the lack of access to sufficient water and basic sanitation particularly to the residents of informal settlements and rural areas, (c) the lack of access to adequate housing, (d) the administration of corporal punishment at schools despite such punishment having been outlawed many years ago, and many other violations of right that undermine the transformational imperatives of the Constitution. Most of all, the Commission is deeply concerned at the scourge of racism that vexes our country and continues to undermine dignity. South Africa's history has been shaped by segregation, oppression and institutionalised discrimination. However, South Africa denounced the discriminatory laws and practices of apartheid when it became a constitutional democracy in 1994.

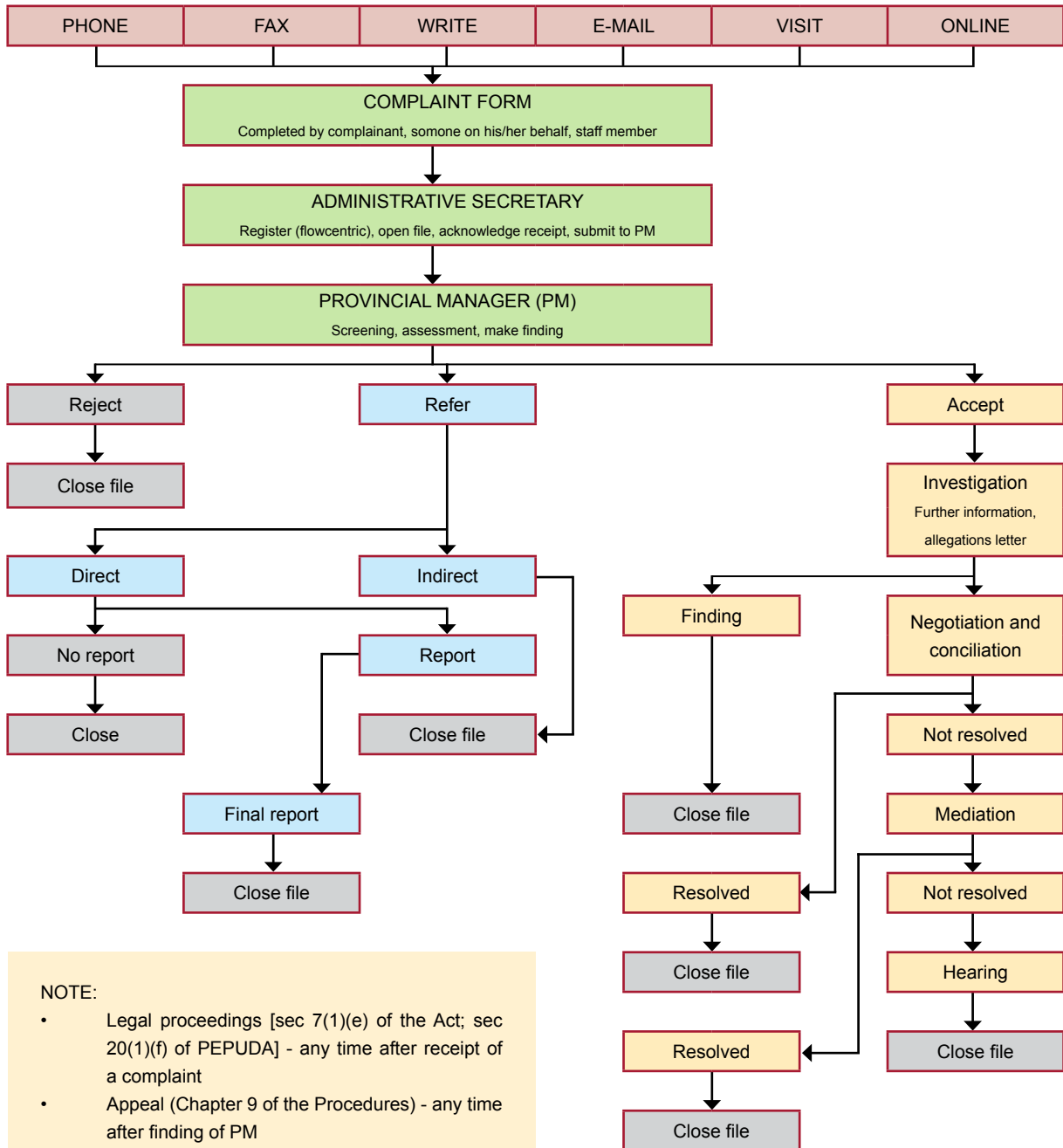
It is believed that the indicators in this annual trends' analysis report will inform the work of provincial offices and other business units of the Commission to implement measures, programmes and strategies to address human rights violations in the country. It is also hoped that the Commission's AdvoComm Unit adopts strategies to get the message across to members of the public that racism has no place in our constitutional democracy and that it is inimical to the constitutional values of equality, human dignity and non-racialism.

The Commission will also request relevant organs of state to provide it with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment in terms of section 184(3) of the Constitution. Given the scourge of racism, the Commission will liaise with the relevant organs of state to implement measures aimed at the achievement of equality in the areas of responsibility by eliminating any form of unfair discrimination or the perpetuating of inequality in any law, policy or practice.

At a macro level, in terms of section 181(5) of the Constitution, the Commission is required to report to the Parliament of South Africa on its activities and the performance of its functions. Accordingly, this annual trends' analysis report will be submitted to Parliament with other reports on the Commission's activities and the performance of its functions. It is hoped that the indicators in this annual trends' analysis report will provide some value in assisting Parliament in the exercise of its powers to consider, pass, amend or reject any legislation before the House of Assembly and to ensure that that all executive organs of state in the national sphere of government account to it on all the measures they have taken to ensure that that the rights in the Bill of Rights are respected, protected, promoted and fulfilled.

It is the view of the Commission that the aspirations of our Constitution will have a hollow ring as long as violations of human rights remain prevalent in our society. The Commission reminds everyone that the provisions of the Bill of Rights bind natural or juristic persons in terms of section 8(2) of the Constitution. Against this backdrop, the Commission will continuously engage with all stakeholders including government, civil society organisation, individuals and communities to develop awareness of fundamental rights in order to promote understanding, mutual respect and equality.

## Annexure 1



## NOTE:

- Legal proceedings [sec 7(1)(e) of the Act; sec 20(1)(f) of PEPUDA] - any time after receipt of a complaint
- Appeal (Chapter 9 of the Procedures) - any time after finding of PM
- Judicial review - after appeal (sec 78 of PAIA; sec 6 of PAJA)





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