

south african
human
rights
commission

ANNUAL TRENDS ANALYSIS REPORT

2020 - 2021

Credits:

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- *Design and Layout by Broadsword Communications (www.broadsword.co.za)*



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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
ARP	Alexandra Renewal Project
CBD	Central Business District
CMW	UN Committee on the Protection of the Rights of all Migrant Workers and Members of their families
CCMA	Commission for Conciliation, Mediation and Arbitration
CEO	Chief Executive Officer
CERD	Committee on the Elimination of Racial Discrimination
COCT	City of Cape Town
COJ	City of Johannesburg
COGTA	Cooperative Governance and Traditional Affairs
CFCHP	Child Friendly Complaints Handling Procedures
CHP	Complaints Handling Procedure
COO	Chief Operating Officer
CRLR	Commission for Restitution of Land Rights
CRPD	Committee on the Rights of Persons with Disabilities
DAC	Diversity Advisory Committee
DBE	Department of Basic Education
DHS	Department of Human Settlement
DPW	Department of Public Works
DRDLR	Department of Rural Development and Land Reform
DMRE	Department of Mineral Resources and Energy
DSD	Department of Social Development
DOJCD	Department of Justice and Constitutional Development
DWCPD	Department of Women, Children and Persons with Disabilities
DWS	Department of Water Services
EDVAW	Independent Expert Mechanisms on Discrimination and Violence against Women
ELRC	Educational Labour Relations Council
ESR	Economic and social rights
GANHRI	The Global Alliance of National Human Rights Institutions
GBVF	Gender-Based Violence and Femicide
GPO	Gauteng Provincial Office
GPT	Gauteng Provincial Treasury
IPID	The Independent Police Investigations Directorate
JICS	Judicial Inspectorate for Correctional Services
Legal Aid SA	Legal Aid South Africa
LGBTQIA++	Lesbian, Gay, Bi-Sexual, Transgender, Queer, Intersex, Asexual
LO	Legal Officer
LTSM	Learning and Teaching Support Material

LIST OF ABBREVIATIONS (continued)

LSU	Legal Services Unit
MEC	Member of the Executive Council
NANHRI	Network of African National Human Rights Institutions
NHRI	National Human Right Institutions
NCC	Coronavirus National Command Council
NCOP	National Council of Provinces
NEMA	National Environmental Management Act
NGO	Non-Governmental Organisation
NICD	National Institute for Communicable Diseases
NRF	National Research Foundation
NWPO	North West Provincial Office
OHCHR	Office of the High Commissioner for Human Rights
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PED	Provincial Department of Basic Education
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PHEIC	Public Health Emergency of International Concern
POPIA	Protection of Personal Information Act
PPE	Personal Protective Equipment
QLFS	Quarterly Labour Force Survey
RDP	Reconstruction and Development Programme
SAHRC	South African Human Rights Commission
SAHRC ACT	South African Human Rights Commission Act
SANDF	South African National Defence Force
SAPO	South African Post Office
SAPS	South African Police Service
SCA	Superior Courts Act
SDG	Sustainable Development Goals
SLO	Senior Legal Officer
UN	United Nations
UNCRC	United Nations High Commissioner for Human Rights
UIF	Unemployment Insurance Fund
UISP	Upgrading of Informal Settlements Programme
USDG	Urban Settlement Development Grant
WCPO	Western Cape Provincial Office
WHO	World Health Organization
WSA	Water Services Act
WLC	Women's Legal Centre

DEFINITIONS

TERM	DEFINITION
Accepted complaints	Complaints accepted by the Commission and communicated to the Complainant in writing.
Appeal	The process of lodging an appeal by any party to proceedings, who feel aggrieved by any determination, decision or finding, save for a finding made at a hearing.
Appellant	A person who lodges an appeal as contemplated in Chapter 9 of the Procedures against a determination, decision or finding made in terms of the Procedures.
Assessment	The process of determining a complaint by the PM to confirm jurisdiction and make an initial determination whether to reject, refer, accept or send the complaints to the steering committee for guidance.
Association	A group of persons organised for a joint purpose.
Allocate	To appoint a SLO or Investigator (LO), depending on the complexity of the matter, to investigate the complaint.
COVID-19	An acute respiratory illness in humans caused by a coronavirus
Cases	Includes both complaints and enquiries.
Chairperson	The Chairperson of the Commission.
Child	Any person under the age of 18 years.
Closed	The complaint is finalised because the complainant has withdrawn the complaint or has failed to provide the further information requested by the Commission within the timeframe given.
Commission	The South African Human Rights Commission.
Complainant	Any person, group or class of persons, association, organisation or organ of state, lodging a complaint with the Commission.
Complaint	An oral, written or electronic communication alleging conduct or an omission in violation of a fundamental right addressed to the Commission or a complaint initiated by the Commission on its own accord.
Complaint Handling Procedures	Procedures for Handling Complaints reported to the SAHRC as set out in the South African Human Rights Commission Complaints Handling Procedures 27 January 2002. The Complaint Handling Procedures were revised and new procedures for the handling of complaints were adopted on 1 January 2018.
Conciliation	The process of resolving a matter between parties through conciliation.
Constitution	The Constitution of the Republic of South Africa, 1996.
Direct Referral	The complaint is referred directly to another organisation, institution or statutory body because it was found that the complaint does not fall within the jurisdiction of the Commission, or could be addressed more efficiently or expeditiously by that other organisation, institution, or body which has legislative authority to conduct such investigations.
Direct Referral (finalised)	A final report is received from the organisation, institution or body to which it was referred and the complaint is finalised (archived). See also Monitoring - direct referral below.
Enquiry	An oral, written, or electronic communication which can be established at point of receipt by the Commission, that the matter is clearly not about a human rights violation, and is not within the jurisdiction of the Commission. Where complaints are not clear, such matters are registered as complaints and assessed by the Commission to determine whether they should be investigated as human rights violations.
Finalised complaints	A collective term for the final stage of all complaints which are rejected, referred (indirectly or directly), resolved or closed.
Finding	A conclusion reached after an assessment or investigation of a complaint, an inquiry, or a hearing regarding an alleged violation of, or a threat to, a fundamental right.
Fundamental rights	The fundamental rights contained in Chapter 2 of the Bill of Rights, sections 9 to 35 of the Constitution.

TERM	DEFINITION
Hearing	A formal investigation contemplated in section 15(1)(c) read with section 15(1)(d) of the SAHRC Act, taking on the nature of a hearing.
Indirect Referral	Directing a complaint to another body. The complainant is provided contact information of the body and may engage with the body to which a complaint is referred on behalf of the complainant.
Intake Officer	The person who receives and registers a complaint.
Investigation	An investigation as contemplated in Section 15 of the SAHRC Act.
Judicial review	The review of an administrative action by a court or tribunal as contemplated in section 6 of the Promotion of Administrative Justice Act, 3 of 2000.
Investigator (SLO, LO, or delegated staff member)	Staff member appointed by the Provincial Manager to investigate the complaint.
Litigation	A matter brought before the courts for determination. Complaints maintain this status until the litigation is concluded.
Mediation	The process of dispute resolution through intervention between parties by an independent person or mediator to reach an agreement.
Monitoring – direct referral	The Commission refers the complaint directly to the appropriate organisation, on behalf of a complainant, and monitors progress in the resolution of the complaint in the form of status reports about the matter from the organisation, institution or body.
Monitoring – report recommendations	To monitor the implementation of any recommendations made in a report on which a finding was made.
Non-derogable right	A right whose infringement is not justified under any circumstances.
Negotiation	The process of conferring with the parties in order to reach an agreement.
Organisation	An organised body, including a business, political party, trade union and charity.
Organ of state	Means any department of state or administration in the national, provincial, or local sphere of government; or Any other functionary or institution – <ul style="list-style-type: none"> exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation but does not include a court or judicial officer.
Panel	The panel of the Commission appointed in a hearing or inquiry process.
Period under review	2020-2021 financial year (1 April 2020 to 31 March 2021).
Provincial Office	The office of the Commission as contemplated in section 3(2) of the SAHRC Act, in each of the nine provinces as contemplated in section 103 of the Constitution.
Referred complaint	The Commission does not have jurisdiction. Complaints can be either directly referred or indirectly referred. Direct referrals must be to statutory bodies.
Rejected complaint	Where there is no human rights violation; the violation took place before 1994; or the matter has already been determined through the courts or is currently before another legal forum.
Report	A written account or opinion formally expressed after an investigation, consideration, or finding.
Resolved complaint	The final status of any accepted complaint where all internal processes have been exhausted (negotiation, conciliation mediation, and hearing); where the parties agree to end the process; or the complainant is satisfied with the outcome through the intervention of the SAHRC.
Respondent	A person, group or class of persons, association, organisation or organ of state who is allegedly in violation of, or a threat to, a fundamental right.
Transfer	The internal transfer of a complaint from one provincial office to another.

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ACKNOWLEDGMENTS

Gratitude and appreciation are extended to the Chief Executive Officer and Chief Operating Officer of the South African Human Rights Commission, Mr Tseliso Thipanyane and Ms Chantal Kisoon respectively, for their leadership, guidance and support in the compilation of the report.

Thank you to the Provincial Managers and the various units of the Commission; Research, Advocacy and Communication, Parliamentary and International Affairs, as well as the Legal Services Unit for their notable contributions.

This report is in honour of the essential workers and healthcare professionals in South Africa for their exceptional efforts on the frontline during the COVID-19 pandemic. They are the heroes and heroines to whom we are all indebted for their tireless fight against the COVID-19 virus. Sincere acknowledgment and heartfelt condolences for the lives lost, and to the ongoing individual and collective grief.

Together we are strong and we will overcome.



FOREWORD BY THE CHIEF EXECUTIVE OFFICER

Adv. Tseliso Thipanyane, Chief Executive Officer

It is the pleasure of the South African Human Rights Commission to present its eighth Annual Trends Analysis Report (TAR) for the financial period April 2020 – March 2021. This report is presented with a sense of accomplishment and as a testament to the dedication and hard work of all who have worked in partnership and within the Commission during a year beleaguered by the COVID-19 pandemic. News of the fast-spreading virus stunned the world and more than two years since the first case was reported, the Commission continues to monitor the observance of human rights under the lockdown measures and regulations of the Disaster Management Act 57 of 2002.

The devastating impact of the pandemic on human rights is evident in the near-collapse of the healthcare, security and educational systems, all of which were under considerable strain preceding the pandemic. Furthermore, with the severe decline of the global economy, glaring socio-economic inequalities continue to be exacerbated. The gap between the poor and their accessibility to basic rights and a life of dignity has widened. It is within this context that this report - distinct from previous reports due to its unique COVID-19 locality - seeks to provide a detailed statistical and substantive analysis of how the Commission has advanced its mandate to promote, protect and monitor the attainment of human rights in the Republic.

Despite the ongoing myriad of obstacles presented by the pandemic, the Commission was pleased to mark its 25th anniversary in October 2020. This offered an opportunity for the Commission to reflect on its legacy of establishing and deepening a culture of human rights in the country. Coinciding with the onslaught of the pandemic, the celebration of this milestone was a poignant reminder that the Commission's existence and collaborative role with other Chapter 9 institutions remains pertinent, now more than ever. The Commission welcomed the June 2020 Constitutional Court ruling which paves the way for independent candidates to stand for provincial and national elections. Additionally, the effective commencement of the Political Party Funding Act in April 2021 was viewed as a contribution to transparency and strengthening democracy.

Despite a slight reduction compared to previous years, complaint trends for the financial year under review indicate the public need for the Commission's protection against the violation of human rights. COVID-19 related complaints are comprehensively reported in respect to economic and social rights (ESR) which include the rights to; healthcare, food, water, education, social security and housing. On average the Commission has recorded a total of **499** complaints relating to ESR on a yearly basis, with the year under review indicating the highest number of complaints over a nine year period. The Commission is acutely concerned that ESR related complaints have remained at the top five human rights violations with minimal indication of urgent state intervention.

The Commission's varied interventions through its Advocacy and Communication programme targeted underserved communities to promote the awareness and education of human rights. Key outputs such as human rights clinics have bolstered an active and informed citizenry toward a culture of human rights. The unforeseen

circumstances of the COVID-19 pandemic necessitated an adjusted approach and format which employed new technologically driven initiatives to enable the Commission to continue the essential work of public outreach and engagement. Robust dialogues with partners and stakeholders through online roadshows proved effective for critical reflections regarding a rights-centric approach to address the pandemic.

As the Commission's promotion mandate ameliorated the impact of the COVID-19 pandemic on at-risk communities¹, successful litigation was undertaken to protect complainants and redress human rights violations. The judiciary's role and impartiality to uphold and inculcate the democratic values of the Constitution is incontestable. During the year under review, the Commission instituted proceedings through the Equality Courts to resolve matters pertaining to discrimination on the basis of race, gender and ethnicity. Contemptible widespread gender-based violence (GBV) and deeply fractured race relations continue to haunt democratic South Africa. Trends highlighted a grave concern for recurrent hate speech on social media which has increasingly become an anonymous and unrestricted platform for publishing intolerant views. With consideration to the historical, social and political contexts of our country, the Commission remains steadfast in calling for and supporting efforts for social cohesion and nation building. Although not within the ambit of this report, the Commission's National Investigative Hearing into the July 2020 civil unrest reaffirmed the need for platforms for collective healing and redress in the country's struggle for equality.

Notably, several of the Commission's Provincial Offices undertook strategic impact litigation as a powerful means to strengthen law reform. This was evidenced in the case of **SAHRC v Msunduzi Local Municipality and Others**, in which the Commission's KwaZulu-Natal Provincial Office brought an urgent application in the Pietermaritzburg High Court against the Municipality for the poor state of the New England Road landfill site in Pietermaritzburg. The court found that the Municipality was in breach of national legislation and international law. This judgment was an assertion of constitutional and environmental rights. Similarly, the Western Cape Provincial Office also found continued success in strategic impact litigation in a case against the City of Cape Town with respect to monitoring the observance of rights for Homeless People during the COVID-19 Lockdown.

These matters spotlighted the urgency for organs of state to act in compliance to their constitutional obligation to eradicate systemic violations to human rights. The pervasive corruption and maladministration witnessed during the pandemic, at the time when the country was most in need of ethical leadership, have been an outrage and deterrent to the attainment of human rights. While litigation continues to be a potent tool for access to justice, it is plagued by administrative delays and resource constraints. These prevailing issues have only worsened as the courts focused on urgent matters only during the Lockdown period. Therefore, this report offers a glimpse into the ways in which the Commission has improved its use of Alternative Dispute Resolution (ADR) as a mechanism to assuage human right complaints outside of the purview of the courts.

Additionally, the key findings from investigative hearings and inquiries conducted by the Commission and the monitoring of the implementation of recommendations through its Chapter 11 Committees² are evaluated within the novel landscape of the COVID-19 pandemic. Issues of violence against foreign nationals, unsatisfactory wastewater management and sanitation, water shortages and improper housing were investigated.

Certainly, the 2020/2021 financial year brought unprecedented challenges. Amid a financially constrained operating environment and an under-capacitated staff complement, the Commission strives to serve the South African public dutifully. Furthermore, as an accredited National Human Rights Institute (NHRI), it seeks to optimise its regional and international partnerships to alleviate the effect of the global pandemic on human rights. Therefore, the Commission hopes that this report will be an invaluable source of reflection and lessons learned as we all look forward to better days.

1 The concept of at-risk is derived from a set of social and economic conditions which place individuals or communities in the unfavourable position of encountering significant challenges for access to employment as well as all economic and social rights.

2 These are Committees established in terms of section 11 of the South African Human Rights Commission Act 40 of 2013 (SAHRC Act) to assist in monitoring the observance of human rights across the country.

A large, stylized golden graphic of four human figures with their arms raised, set against a white background. The figures are positioned in the center of the page, and their arms extend upwards, creating a sense of unity and celebration. The overall shape of the graphic is roughly oval, matching the white area of the page.

CHAPTER ONE: INTRODUCTION

1

1.1. PURPOSE OF REPORT

The South African Human Rights Commission (the Commission) presents this eighth Annual Trends Analysis Report (TAR) for the 2020/2021 financial year. Previous reports have focused on providing narrative and statistical analyses on the activities of the Legal Services Unit (LSU) - in its provincial and national capacity - in handling complaints relating to human rights violations. Since the publishing of the first TAR in 2012/2013, the pertinence of providing substantive reporting on the patterns of human rights complaints is rooted in strengthening and promoting our constitutional democracy.

Through this report, the Commission has sought to provide a comprehensive view into its initiatives, complaints handling processes, hearings and investigations, as well as strategic interventions, to secure appropriate redress for human rights violations. Furthermore, the Commission has taken great care to adopt a holistic and integrated approach in addressing complaints through negotiation and mediation, which are embedded in Alternative Dispute Resolution (ADR), and where this has failed or established to be inappropriate, litigation through competent courts has been an effective way to restore the dignity of complainants and hold perpetrators accountable.

Over its landmark 25 year existence, the Commission has built and maintained close working relationships with NGO's, civil society organisations and other stakeholders whose goals are to make human rights accessible to all. Therefore, the publication of the TAR is an invaluable source of reflection and reference for the Commission, the state, human rights defenders, as well as for its local, regional and international collaborators. Most importantly, presentation of the TAR in Parliament has proven informative to the state and the general public of the work undertaken by the Commission in the effort to remedy persistent inequalities in the country. Furthermore, this report serves as an important reference in supporting effective oversight of delivery and compliance by the government with human rights norms and standards.

This report is therefore critical to the state's awareness of the nature and extent of human rights violations in developing and implementing policies that are well-versed, informed by updated research and responsive to the needs of the public. Both laudatory and critical feedback from external stakeholders has afforded the Commission indispensable guidance and a rich reservoir of sharp reflections to draw on in its continuous mission to expand the reach of its various initiatives and interventions. This complementary relationship with external stakeholders and the public at large has ensured that the Commission remains an open, accessible and transparent institution, in touch with contemporary discourse on human rights and the rule of law as well as possessive of insights into variations of lived experiences and the socio-cultural milieu of the nation.

The context of this year's TAR differs from those previously produced because of its unique location within the global COVID-19 pandemic. The world has changed irrevocably during the period under review. The focus of this report is to provide insight on the effect of the COVID-19 pandemic on human rights. The Commission has received complaints and intervened in several matters bred by the advent of the pandemic. Although trends in complaints have in some ways remained similar due to the historical and persistent nature of systemic inequality in the country, they have also been altered by the distinctive challenges begot by the pandemic. Therefore, an overview of the COVID-19 context is vital to understanding complaint trends and the evolving strategies engaged by the Commission to improve access to justice.

1.2. OVERVIEW OF THE COMMISSION

The Constitution of the Republic of South Africa 1996, is the supreme law, and the Bill of Rights contained in Chapter 2, is the foundation that enshrines the democratic rights and values of human dignity, equality, and freedom for all who live in South Africa. The Commission is a state institution established under Chapter 9, Section 181 of the Constitution mandated to support and strengthen constitutional democracy. As an independent institution, which is only subject to the Constitution and the law, the Commission remains an impartial and effective organisation which fulfils its mandate to³:

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

In its vision to transform society, secure rights and restore dignity, the Commission subscribes to Batho Pele Principles⁴ and the values of integrity, honesty, respect, objectivity and equality. As regulated by national legislation, the Commission is empowered by the Constitution to perform its functions, including the power to⁵:

- a) investigate and report on the observance of human rights;
- b) take steps to secure appropriate redress where human rights have been violated;
- c) carry out research, and
- d) educate.

These powers, and the additional functions of the Commission are regulated and prescribed by legislative obligations as set out in the South African Human Rights Act (No.40 of 2013) (the SAHRC Act), the Promotion of Access to Information Act (No.2 of 2000) (PAIA) and the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (No.4 of 2000) (PEPUDA) through which the Commission is permitted to institute proceedings in the Equality Courts (EC) on behalf of complainants⁶.

It is further the duty of the Commission to promote awareness, monitor compliance, report to parliament and provide recommendations to ameliorate challenges as it pertains to these statutes. Additionally, the Commission is constitutionally mandated to oblige organs of state on an annual basis to furnish information on the measures they have taken toward the attainment of rights relating to housing, healthcare, food, water, social security, education and the environment⁷.

The Commission is an accredited 'A' status National Human Rights Institute (NHRI) and operates in accordance with the United Nations Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights ("the Paris Principles")⁸, to respond effectively to serious claims of human rights abuses. To remain compliant to the requirements of re-accreditation, the Commission is reviewed every five years by the National Institutions and Regional Mechanisms Section of the Office of the United Nations High Commissioner for Human Rights (OHCHR).

3 Section 184(1) of the Constitution

4 The Batho Pele Principles of 1997 are a pledge by government and public servants to instil a culture of accountability, safeguarding resources and caring for the communities they serve. Batho Pele is a Sotho/Tswana word which means 'People First' and the principles stand for transformational and efficient service delivery to the public.

5 Section 184(2) of the Constitution

6 Section 25(3)(a) of PEPUDA.

7 Section 184(3) of the Constitution.

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

The Commission is empowered to act as an impartial resource for accountability, to systematically review government's human rights policies, and to provide recommendations where shortcomings are detected. To ensure independence, the Commission must meet the following six criteria⁹:

- a) independence from government;
- b) independence granted from constitution or legislation;
- c) appropriate powers of investigation without referral from a higher authority or receipt of an individual complaint;
- d) pluralism, allowing the NHRI to coexist with the governing body;
- e) adequate financial and human resources; and
- f) clearly defined and broad mandate including the protection and promotion of universal human rights.

The Commission's NHRI status therefore substantively augments its capacity to provide a distinguished protection service to the country and to pursue its agenda and responsibilities to:

- a) monitor situations of violations of human rights;
- b) advise the government, parliament and other competent body on specific violations;
- c) educate and inform on issues of human rights; and
- d) use its quasi-judicial powers to obtain redress where rights have been violated.

To achieve its key strategic objectives, the Commission is headed by Commissioners whose role is to provide strategic leadership and guidance, as well as facilitate the South African human rights agenda on national, regional and international platforms¹⁰. The Chief Executive Officer and Chief Operations Officer work in alignment with the Commissioners to regulate performance and maintain efficient corporate governance that ensures management accountability¹¹.

The Commission strives to deliver its services to the public far and wide in urban, peri-urban and rural areas. While the Commission's work and impact is palpable in the metropolitan areas, there is a concerted effort to continuously educate and train on human rights through various advocacy and community outreach programmes in rural areas. To achieve this goal and maintain a national footprint, the Commission is visible through its provincial offices in all nine provinces in South Africa¹². Each office is supervised by a provincial manager and has a staff complement consisting of legal, advocacy and administrative teams, as well as fieldworkers to operationally fulfil the Commission's goals.

For ease of access, complaints are lodged through the provincial offices via telephone, email and walk-ins. In the last four years, the Commission developed an online complaint platform on its website which was instrumental for accessibility during the COVID-19 pandemic, where physical attendance at the Commission's offices was prohibited due to lockdown regulations or discouraged to limit in-person contact. Social media platforms such as Facebook and Twitter also proved invaluable mediums for complainants to raise concerns and flag human rights violations emanating from the ongoing pandemic crisis. Protecting both its staff members and the public from the spread of the virus was a priority for the Commission, as was responding expeditiously to complaints and ensuring that the public's accessibility to the Commission was not impeded. Lodged complaints are handled through the Complaints Handling Procedures (CHP)¹³, which make provision for the Commission to:

9 Part A.3 of the Paris Principles adopted in March 1993 by the United Nations Commission on Human Rights.

10 More information about the Office of the Commissioners with detailed biographies is found here: <https://www.sahrc.org.za/index.php/about-us/commissioners>.

11 Current CEO is Advocate Tseliso Thipanyane and COO is Ms Chantal Kisoona.

12 Biography available here: <https://www.sahrc.org.za/index.php/provinces>.

13 Complaints Handling Procedures of the South African Human Rights Commission which came into effect on 1 January 2018 through publication on the Commission's website; accessible on www.sahrc.org.za.

1.3. METHODOLOGICAL APPROACH

The methodology used to compile this report is largely based on data research and the relevant submissions made by the Commission to oversight bodies and stakeholders such as Parliament, the African Commission and other NHRIs. Quantitative data and statistics received through the complaints management system as well as internal programmatic information informed the nine year comparative analysis. External sources such as academic articles and media reports were considered and duly referenced.


There are inherent limitations in statistical systems-based reports which should be considered; identified trends are not entirely conclusive as they rely on and reflect the inputs to the system. Some of the qualitative aspects such as complainants cannot be expressed through quantitative terms. Furthermore, data integration and coverage does not entirely reflect or reveal systemic deficiencies from which human rights violations emanate.

Notwithstanding the considered methodological challenges, the TAR is expansively compiled to provide substantive analyses on the nature and extent of human rights violations compounded by the effect of the COVID-19 pandemic. Specifically, the types, volume, and management of complaints across the Commission's provincial offices are reflected. A nine-year comparative statistical analysis from 2012 to the period under review takes stock of the transformational progress of the observance of human rights and the Commission's societal impact in this regard.

Hence, the aim of this report is not merely to report on statistics and trends, but also to reflect on the vulnerable groups in need of protection from human rights violations. To this end, disaggregated data on complainants' gender, age, geographical location and other demographic details of significance were considered to give nuanced insight into at-risk groups and to identify gaps.

Additionally, this report evaluates the top and bottom five rights violations and the similarity of trends despite, but also compounded by, the COVID-19 pandemic. Narrative analyses of litigation and ADR as a mechanism to circumvent lawsuits are discussed, particularly in alignment with the Commission's effort to adopt an integrated approach to resolve complaints and ensure appropriate redress. Additionally, the findings and recommendations of provincial and national investigative hearings and inquiries are outlined. So too is a reflection of the Commission's partnerships and meaningful engagements with rights protection bodies on regional and international platforms. The protracted nature of the COVID-19 pandemic has, in some ways, caused a disorientation of time, therefore key events outside of the period under review are mentioned to provide holistic context to the fluidity and evolving strategic approach of the Commission to successfully fulfil its mandate.





CHAPTER TWO:
**CONTEXT OF COVID-19 AND
IMPACT ON HUMAN RIGHTS**

2

2.1. OVERVIEW

South Africa awakened on the morning of the 5th of March 2020 unaware that this would be the day that the first COVID-19 case in the country would be confirmed. A few days earlier, a citizen had arrived from group leisure travel in Italy with the mild flu symptoms of a headache, cough, sore throat, slight fever and malaise, all of which could normally be fixed with over-the-counter medication. However, with growing reports of an outbreak ravaging North America and Europe, South Africa braced itself for the reality that the virus had reached its shores. Confirmation by the National Institute of Communicable Diseases (NICD) that the citizen and several others who were on the group trip had indeed tested positive with the virus, sent a wave of shock and panic throughout the country.

What followed were several parliamentary debates, media briefings and announcements. Consultations with committees comprising epidemiologists, virologists and clinicians were undertaken as the public, private and academic sectors aimed to get a better understanding of the virus. Within two weeks of the first confirmed case, the President of the Republic, Cyril Ramaphosa, declared a national state of disaster by invoking provisions of the Disaster Management Act (no.57 of 2002)¹⁷ and subsequently implementing a national lockdown of 21 days effective 27 March 2020 in an attempt to flatten the curve of COVID-19 infections. On 23 April 2020, the President announced that a Risk Adjusted Strategy would be implemented through which the government would take a cautious and systematic approach to the easing of lockdown regulations. This approach was based on the need to balance the resumption of the country's economic activity while attempting to contain the virus and save lives.

This unprecedented national lockdown would see all South Africans - and the world - shutting down businesses, schools, places of worship, as well as recreational and social spaces to evade in-person contact. Perhaps most disconcerting was the notion that the entire population within a country, with the exception of healthcare practitioners and those designated as essential workers, would be confined in their homes for weeks on end. The reality of it all, that life as we all knew it could come to an abrupt halt, was equally inconceivable and distressing.

Globally shared information described the virus as fatal, especially for the elderly with comorbidities¹⁸. It was further determined that the virus spread from person to person contact during instances when an infected person coughed or exhaled in close proximity to an uninfected person, or when droplets landed on surfaces and uninfected persons touched these surfaces, in so doing contracting the virus when touching their eyes, nose or mouth without thorough sanitisation. Considering how easy it was to contract and rapidly transmit the virus, severe measures were taken in efforts to mitigate the situation.

17 A State of National Disaster under Section 27 (1) and Section 27 (2) of the Disaster Management Act 2002 (Act no.57 of 2002) was declared by the President of the Republic of South Africa Cyril Ramaphosa on 15 March 2020 as a response to the COVID-19 pandemic. The first national lockdown was announced on 23 March 2020 to take effect on 27 March 2020 for a period of 21 days.

18 In the medical field, comorbidity is defined as the presence of two or more diseases or health conditions in a patient. A COVID-19 infected patient with comorbidities is rendered more vulnerable to the physiological effects of the virus and is therefore more susceptible to fatality or not making a full recovery.

On several occasions, the public contended with following the new regulations which resulted in the South African Police Service (SAPS) and South African National Defence Force (SANDF) internal deployment to restore order and compliance. Those exempted from the lockdown had to carry permits clearly denoting their occupation and capacity as essential workers. Their social media images of eerie ghost-towns, empty highways and patrolling SA Army vehicles solidified the pandemic-era. The exponential rise of infections consumed an already overwhelmed health sector. Hospitals, which before the pandemic were under-resourced, understaffed and plagued by a general public health crisis, were left desperate for beds, ventilators and quarantine space.

As the government scrambled to contain the swift spread of the virus and the population grappled with the uncertainty of the situation, utter panic soon ensued giving a glimpse into how the pandemic would inevitably expose the vast inequalities in the country. While some South Africans had the means to panic-buy groceries and household essentials, effectively emptying the stores to prepare for the near-apocalyptic experience, others went home with their last wages in hand with no foreseeable income to sustain their households for the duration of the lockdown period. Some comfortably isolated in spacious houses with yard space, while others were confronted with home confinement in overcrowded and dilapidated informal settlements. As the middle and upper classes indulged in philosophical reflections about self-care, several communities in South Africa were besieged with inadequate access to clean water as a necessary means for hygiene and sanitation. The juxtaposed socio-economic realities were poignant and inescapable. South Africa had nowhere to hide the extent of its disparities. As the global economy plunged and more people came dangerously close to or plummeted below the poverty line, it was clear that the pandemic's exacerbation of pre-existing inequalities would have far-reaching consequences.

The public and private sectors, civil society and humanity at large has had to earnestly consider the high stakes involved in living in a world beleaguered by human rights violations. There has never been a more pertinent time to take stock of and address the systemic inequalities which have deepened during the pandemic. The COVID-19 pandemic calls for a different approach to all aspects of life, governance and leadership, to re-imagine and create a future which truly leaves no-one behind.

The World Health Organization (WHO) as the custodian of international public health and specialised agency of the United Nations (UN), formally declared a Public Health Emergency of International Concern (PHEIC) and subsequently a pandemic in March 2020.¹⁹ Since then, the National Department of Health continues to navigate the country through the pandemic by reporting on the rate of infections, recoveries and fatalities, as well as emphasizing compliance with public health measures. The South African government's reaction to the pandemic was lauded by the international community²⁰ for its implementation of regulations, closing of borders and commencing an extensive testing programme to curb the spread of the virus. Government's consultation with experts and the establishment of the Coronavirus National Command Council (NCC)²¹ were also viewed as decisive and responsible action.

Furthermore, the launch of the Ministerial Advisory Committee on Coronavirus Disease on 25 March 2020 by the National Department of Health and Social Development, assured a multi-sectoral approach to providing relief plans for health and social concerns²². While the immediate interventions of government, in the early stages of the pandemic, reassured the public during the most distressing and uncertain of times, the notable effort was soon engulfed by shocking reports of mass looting and gross maladministration. Most wounding about corruption during the pandemic, is the harrowing impact it has had on the socio-economic realities of millions of people who have been further plunged into abject poverty. Corruption is not a victimless crime and the onslaught of the pandemic have in some cases, resulted in permanent closure of businesses, wide-spread

19 WHO Statement (31 January 2020). Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV).

20 de Villiers, C., Carbone, D., & Van Zijl, W. (2020). The South African government's response to COVID-19. Journal of Public Budgeting, Accounting & Financial Management.

21 The NCC is chaired by the President and comprises 19 cabinet ministers, their respective Director Generals, the Chief of the SANDF, National Police Commissioner and a secretariat.

22 Singh, J. A. (2020). How South Africa's Ministerial Advisory Committee on COVID-19 can be optimised. South African Medical Journal, 110(6), 439-442.

loss of jobs and therefore increased unemployment, as well as diminished income to secure basic needs such as food, clothing and shelter.

At the time of writing this report, Statistics South Africa released the results of the Quarterly Labour Force Survey (QLFS) and reported a record high national unemployment rate of 34.4% amid the pandemic in the second quarter of 2021. Even more disconcerting was that it had increased from the first quarter by almost two percentage points, suggesting that the rate of joblessness and income loss were intensifying. The upsurge of the national unemployment rate also meant that youth unemployment and underemployment were aggravated²³. A reported 64.4% of South African youth are currently unemployed²⁴. Putting these alarming figures into perspective, this means that of the 35.9 million people of working age in South Africa, approximately 8 million are unemployed, 14.5 million are categorised as non-economically active and a further 3.5 million are considered to be discouraged work seekers²⁵. These are astonishing numbers for the country's adult population who are at risk of, or unable to support themselves and their households with work-generated income.

Furthermore, in every group of 10 young people between the ages of 15 to 24 years, approximately 7 are struggling to get access to the labour market. The unemployment narrative in South Africa, both prior and in the ongoing COVID-19 pandemic, is indicative of a crisis. Reports of a shrinking middle class and a significantly weakened tax base, economic recovery and growth is expected to be a slow and agonising uphill climb²⁶. Government has repeatedly urged the country to adhere to the COVID-19 protocols of social distancing, frequent sanitisation of hands and surfaces, as well as constant wearing of masks in public spaces. However, the practicalities of these protocols proved to be in stark contrast to the realities of some parts of South African society. For instance, more than 3 million of the country's residents do not have access to uninterrupted tap water or provisional water tanks for consumption and daily essential use such as cooking, cleaning and sanitation²⁷. Living without sufficient water is a violation of a basic human right which not only prevents people from leading dignified lives, but within the context of the pandemic it increases susceptibility to contraction and spread of the virus.

Added to this complexity is that the constitutional right to adequate housing for all is not yet realized. Over 12.5 million people reside in informal settlements which continue to grow in size and population, and this excludes those living in traditional dwellings such as huts²⁸. The congestion in informal settlements make physical distancing a significant challenge, if not an impracticable ask. The poorly built makeshift structures made from corrugated iron, planks and other material are unsafe, uncomfortable and often inaccessible to both water and electricity. Sanitisation is a constant threat to health as residents share communal toilets which receive no plumbing services and municipal refuse collection is near non-existent. Millions of people continue to endure deplorable conditions and human right violations amid the COVID-19 pandemic.

While the economic implications of the COVID-19 crisis are quantifiable, its psychosocial impact is incalculable. For many, it has been a debilitating experience to witness loved ones and colleagues lose the battle to COVID-19. While physical health is at the centre of dealing with the pandemic, research in South Africa and around the globe has highlighted the importance of psychological and psychosocial wellbeing. Public mental health is a

23 A general distinction between unemployment and underemployment is noted; the former pertains to joblessness, whereas the latter refers to a job that underutilises a worker's skills, education or experience.

24 South African youth are those between the ages of 15 to 34 years. This statistic pertains to job seekers between the ages of 15 to 24 years as they're considered to be the most vulnerable in the labour market. Children from the ages of 15 to 18 years are included in the working-age population owing to the South African Schools Act number 84 of 1996 which states: "Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first."

25 The Quarterly Labour Force Survey has expanded the definition of unemployment to include people who are no longer actively looking for work.

26 The 2021 publication of the National Income Dynamics Study by the University of Cape Town's Liberty Institute of Strategic Marketing shows that between June 2017 and 2021, adults categorised as middle-class decreased from approximately 6.1 million to 2.7 million individuals.

27 Statement by the South African Local Government Association (SALGA) - Portfolio Committee on Cooperative Governance and Traditional Affairs.

28 Department of Human Settlement Budget Vote, May 2021.

concern as services are severely restricted and disproportionately accessible to socioeconomically advantaged groups²⁹.

With the outlined context in mind, this report seeks to emphasize that while the South African population in general has struggled to navigate through the pandemic, groups and communities which are systemically subjugated and excluded in accessing human rights are the focus of the Commission's work to provide redress.

As discussed in the various chapters of this report, some complaints received by the Commission during the period under review were related to the pandemic and subsequent lockdown regulations. Violations are discussed as they pertain to:

1. Access to sufficient water and sanitation;
2. Inadequate health services;
3. Improper housing;
4. Access to education;
5. Access to social security, and
6. Freedom of movement.

Furthermore, the treatment of foreign nationals was of grave concern as xenophobic and Afrophobic attacks were reported in several parts of the country. Sentiments which blamed immigrants for inaccessibility to services and employment during the pandemic led to the eruption of violence in various areas within Gauteng, which year after year is a hotspot for xenophobic incidents. The Commission remains committed to protecting the rights and vulnerabilities of immigrants and through its sphere of influence, will continue to rebuke the unfair treatment of foreign nationals.

2.2. THE COMMISSION'S RESPONSE TO COVID-19

The Commission's response to the COVID-19 pandemic was immediate considering the nature of complaints received from the public, such as access to COVID relief grants and Unemployment Insurance Fund (UIF) payments. To address the myriad of issues, the Commission assembled a multidisciplinary team which convened weekly to share information and resolve matters through a spontaneous and rapid response-based engagement with government departments and leadership. The Commission was promptly involved in alleviating the strain emanating from the implementation of lockdown, such as in cases where parents sought access to their children across provincial borders, as well as for citizens who were stranded abroad due to global travel restrictions. The Commission also made various submissions to the Minister of Cooperative Governance and Traditional Affairs (COGTA) as the Chairperson of the Coronavirus Committee pertaining to, among others, evictions and credit holidays to allay the socio-economic impact of the pandemic. The Commission relied on international norms and standards, as well as consistently monitoring the fluid global situation for implications on human rights. Furthermore, it remained essential for the Commission to evaluate and effectively implement the evolving directives issued by the various United Nations mechanisms.

Like all other organisations, the Commission experienced challenges as it adapted to the unprecedented situation and mitigated this by initiating a response to swiftly adapt its operations to remote work requirements. The Commission encouraged its members who were able to execute their work remotely to do so. It further continues to seek opportunities to digitize all systems so that the public's access to justice is not impeded by the restrictions of the COVID-19 pandemic. The Advocacy and Communications Unit made a concerted effort to conduct outreach programmes, particularly to rural areas where broadband and electronic means of communication may not be feasible³⁰. As an additional step to promote agency, the Commission held several

²⁹ Kim, A. W., Nyengerai, T., & Mendenhall, E. (2020). Evaluating the mental health impacts of the COVID-19 pandemic: perceived risk of COVID-19 infection and childhood trauma predict adult depressive symptoms in urban South Africa. *Psychological Medicine*, 1-13.

³⁰ The Advocacy and Communications Unit Annual Report provides a detailed account of the Commission's objectives and efforts to fulfil its promotion and education mandate on human rights. The COVID-19 pandemic presented a multitude of challenges particularly for marginalised groups in peri-urban or rural areas, however the implementation of outreach programmes to monitor the state of human rights during the pandemic remained a priority.

provincial information sessions with learners and educators on Child Friendly Complaints Handling Procedures (CFCHP) to empower minors to exercise their own voices to speak out against injustices.

Auxiliary measures also included postponing all gatherings and engagements with external stakeholders until such a time that convening was deemed safe for all parties involved. Pending investigations and inspections were halted during the most severe periods of high lockdown levels on account of limitations of movement. Access to data and connectivity presented an enormous challenge to accessing vulnerable groups particularly in rural communities. To circumvent some of the challenges to accessibility³¹, the Commission utilised community radio stations to reach communities and to support the reporting of human rights violations during the pandemic. A synopsis of some of the Commission's efforts are hereby provided.

2.2.1. Admonition of force used by security forces during lockdown

The SAPS and the SANDF were deployed as the security forces who would ensure compliance with lockdown regulations. The joint enforcement operations were necessitated during the most severe alert levels and restrictions. Regrettably, there were several reported incidents in which undue force was used on civilians who were allegedly defiant and uncooperative. The Commission called for compliance to lockdown regulations, which when applied in their strictest, limited the movements of all in South Africa within their homes with the exception of essential workers.

The Commission recognised that compliance with disaster management regulations was in the interest of public health to prevent the widespread of the COVID-19 virus, but remained concerned about the manner through which enforcement action was being taken. Videos showed the undignified manner in which law enforcement treated Muslims who had been attending a mosque in Mpumalanga heightened these concerns. Public calls by the Commission for respect of human rights, and dignity in particular even in the context of a pandemic were made in response to the disparaging and anti-Islamic remarks made by members of SAPS while executing their duties³².

Many other incidents were reported where human dignity was, at times, blatantly disregarded under the guise of enforcing compliance. In a case which shocked and infuriated the country, a civilian named Collins Khosa sustained fatal injuries after being beaten for what security forces said were infringements of lockdown regulations. The Commission unequivocally rebuked excessive force on civilians and welcomed the Gauteng High Court judgment³³ in favour of the family and neighbours of Collins Khosa for orders against the security forces. The Commission supported that government and security forces must be held to account for violations against human rights and the decision handed down by the court was a stern reminder that Constitutionalism and the Bill of Rights are imperative. While several limitations of rights had to be effected to curb the spread of the virus, the Commission's position was that further Constitutional violations would not be tolerated³⁴.

31 To minimise the spread of COVID-19 as well as protect its staff and members of the public, the Commission widely circulated the contact details of all its provincial offices to reassure the public that both existing and new complaints would be expeditiously dealt with during the pandemic. In this regard, not compromising the public's accessibility to the Commission was essential considering the impact of the pandemic on the country's ability to advance social, economic and all other human rights.

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

33 Khosa and Others v Minister of Defence and Military Veterans and Others 2020 (7) BCLR 816 (GP).

34 Per Section 36 of the Constitution for limitation rights, the COVID-19 pandemic negatively impacted on the right to freedom of movement, freedom of association, as well as the exercise of rights to education and employment among others.

2.2.2. Civil Society Advisory Committee

The Commission established a Civil Society Advisory Committee (CSO Advisory Committee)³⁵ in partnership with Civil Society Organisations (CSOs) and community-based workers in April 2020. This committee would assist in monitoring the impact of regulations on human rights in South Africa. Chaired by Commissioner Chris Nissen, the Committee was issued with accreditation letters and exemption permits to be able to observe the state of human rights in communities throughout the country without obstruction.

The Commission encouraged and, when required to, challenged organs of state and law enforcement to not interfere or pose a hindrance to the Committee in the execution of its task to ensure that rights are upheld at all times. The necessity of this intervention was highlighted when within the first few days of the lockdown announcement, reports began to surface that regulations were being inconsistently and inequitably applied. For instance, the ill-treatment of law enforcement on residents in disadvantaged areas was inconsistent to the lax implementation of restrictions in areas of affluence³⁶. In some instances human dignity was blatantly disregarded under the guise of enforcing compliance to regulations³⁷. It was therefore the role of the CSO Advisory Committee to safeguard fairness and maintain the observance of human rights especially for disenfranchised groups and communities.

2.2.3. Partnership with UNICEF to advance children's rights

Children's rights remain a core focus area for the Commission. Children globally are a vulnerable group and, in South Africa, remain the most susceptible to suffer human rights violations. Although the elderly with comorbidities were identified as the most vulnerable to contract the COVID-19 virus³⁸, the psychological and social impact of the pandemic continues to affect children irrevocably. Specifically, emotional distress and anxiety caused by fear of the virus, lack of physical activity, considerably reduced or increased sleep duration, screen time, internet use and social isolation all contribute to developmental changes³⁹. Although research has yet to determine the full extent of the pandemic on the psychosocial wellbeing of children, school closures and strained parent-child interaction may have far reaching implications into adulthood.⁴⁰

Moreover, children of all ages are significantly affected by plunging resources of their households as the pandemic continues to devastate the employment sector. Children from already disadvantaged backgrounds are likely to bear the brunt as caregivers lose their source of income, putting them at further risk of not having access to education, nutrition, water, housing and adequate healthcare⁴¹. Deprivation and poverty were pre-existing problems for many households prior to the pandemic, therefore children living in acute and multifaceted poverty is a dire reality. With their immediate and long-term wellbeing jeopardised, the Commission aims to proactively apply interventions to ameliorate the impact of the pandemic, especially for children from disadvantaged backgrounds.

35 Section 11 of the South African Human Rights Commission Act 40 of 2013 states that the Commission may establish committees to fulfil its constitutional mandate.

36 One such incident of surfers in Cape Town who insisted that surfing was an essential activity was reported by News24 here: <https://www.news24.com/news24/SouthAfrica/News/lockdown-western-cape-surfer-claims-surfing-is-essential-activity-in-cut-and-paste-of-us-petition-20200415>. A similar media report of surfers bypassing regulations is found here: <https://www.thesouthafrican.com/lifestyle/surfers-managed-to-bypass-beach-regulations-in-cape-town/>

37 This incident was highly circulated by traditional and social media, and it generated much public outrage. The details of the incident were reported by the South African Broadcasting Corporation (SABC) and details can be found here: <https://www.sabcnews.com/sabcnews/man-who-was-allegedly-killed-by-soldiers-in-alexandra-buried/>

38 World Health Organization.

39 Chawla, N., Tom, A., Sen, M. S., & Sagar, R. (2021). Psychological Impact of COVID-19 on Children and Adolescents: A Systematic Review. *Indian journal of psychological medicine*, 43(4), 294-299.

40 Tso, W. W., Wong, R. S., Tung, K. T., Rao, N., Fu, K. W., Yam, J. C. & Wong, I. C. (2020). Vulnerability and resilience in children during the COVID-19 pandemic. *European child & adolescent psychiatry*, 1-16.

41 <https://data.unicef.org/covid-19-and-children/>



The partnership between the Commission and UNICEF in April 2020 was to advance children's rights so that their needs are not overshadowed within the complexity of the pandemic. The collaboration includes advocacy for all children regardless of migratory status to secure the rights to birth registration, health, education, immunization, food and shelter. The Commission remains acutely aware that children in South Africa are at high risk for incidents of violence⁴² and has committed to prioritising its focus on the rights of children over the course of the next five years.

2.2.4. Survey on school readiness

In August 2020, the Commission conducted an electronic survey of schools to establish readiness for the safe return of learners for in-contact lessons. The COVID-19 pandemic placed immense strain on the education sector. The disparities in the accessibility of online education were particularly highlighted and continue to be of grave concern⁴³. Alternative learning through online platforms, require the unfettered access to a laptop or computer, sufficient data and a secure network for uninterrupted connectivity.

The pandemic crisis exposed many inadequacies and inequities within the South African education system. In addition to the socio-economic issues of obtaining the necessary electronic devices, learning aids and broadband, the social circumstances of learners in underserved communities are an impediment to learning. With these issues in mind, the Commission sought to monitor the readiness of schools to resume classes after almost 100 days of teaching were lost in the curriculum calendar as a result of the COVID-19 pandemic.

The nationwide survey received substantive responses from all nine provinces, with the highest number of responses obtained from Gauteng, Limpopo and KwaZulu-Natal. The survey evaluated several crucial aspects which would prove informative to the Department of Basic Education (DBE) on the extent of readiness for schools to handle the pandemic:

- a) staff and learner attendance;
- b) health and safety measures at schools;
- c) plans for the remainder of the academic year (2020);
- d) implementation of the National School Nutrition Programme (NSNP); and
- e) the provision of learner-teacher-support-material (LTSM).

Key findings from the survey showed that 271 schools reported not having adequate access to water, sanitation, ablution facilities and soap to prevent the contraction and spread of COVID-19 during physical attendance. The Commission's role in the monitoring, development and attainment of children's rights, was to intervene in such cases.

⁴² Chetty, R. (2019). A country with a broken psyche: violence against children in South Africa. *Child abuse research in South Africa*, 20(1), 1-10.

⁴³ Schleicher, A. (2020). *The impact of COVID-19 on education insights from education at a glance 2020*. Retrieved from [oecd.org/education/the-impact-of-covid-19-on-education-insights-education-at-a-glance-2020.pdf](https://www.oecd.org/education/the-impact-of-covid-19-on-education-insights-education-at-a-glance-2020.pdf).

A large, stylized golden graphic of several human figures with their arms raised, set against a white background. The figures are arranged in a row, with their arms reaching upwards, creating a sense of unity and celebration. The graphic is positioned in the center of the page, behind the chapter title.

CHAPTER THREE: PROFILE AND NATURE OF COMPLAINTS

3

3.1. OVERVIEW

Each year, the Commission receives complaints alleging a range of human rights violations. For the period under review, the Commission intervened on complaints concerning human rights issues in the context of the COVID-19 pandemic which intensified inequalities in South Africa. While previous reports analysed trends in respect to the volume and nature of complaints, the current report seeks to continue this evaluation with specific focus on the impact of COVID-19 on the protection of human rights. Therefore, this chapter will provide a statistical and narrative analysis of the number of complaints lodged, accepted and finalized as well as those which were referred or rejected by the Commission.

Insight is provided on the application of the CHPs both provincially and nationally, with a comparative exploration of the changing patterns of complaints over a five year period⁴⁴. Additionally, an assessment is conducted on whether the impact of the COVID-19 pandemic resulted in systematic challenges for complainants to successfully submit grievances to the Commission via online and telephonic platforms. Similarly, the Commission's implementation of working remotely to minimise in-person interaction, is gauged in respect to its ability to efficiently conclude complaints.

Firstly, a cumulative report of the profile of complaints per province is deliberated. The cumulative statistics provide a national snapshot of complaints registered by the Commission, as well as a pattern of the most frequently occurring complaints in the last year. In particular, an indication of the top five rights violations and complaints offers an understanding of the most critical areas for concern; similarly, the bottom five rights violations - although still important to consider because all human rights are fundamental to the pursuit of a dignified life - are outlined for comparative purposes⁴⁵. Secondly, a five year comparative study of complaints is discussed, particularly to illuminate the impact of COVID-19 on the profile of complaints and transgressed rights.

Complaints lodged to the Commission are handled through the CHP. Despite the multi-faceted challenges of the COVID-19 pandemic, the Commission's interventions to fulfil its human rights protection and monitoring mandate continues to nurture public trust at its most critical time of need. The Commission's constitutional powers and capability were extensively tested in managing complaints and providing appropriate redress. To ensure a wide reach of its services, the Commission maintained open channels of communication with the public via telephone, email, social media pages, and updates on the official website.

⁴⁴ A comparative analysis of trends for the financial years 2016/2017, 2017/2018, 2018/2019, 2019/2020 and the current year under review 2020/2021 is essential to holistically view the changing nature of complaints and to conduct an assessment on the effects of the COVID-19 pandemic with respect to the reporting and handling of complaints.

⁴⁵ See chapter 3 for a detailed discussion and comparison of the top five and bottom five human rights violations for the last five financial years, inclusive of the period under review.

3.2. AMENDMENTS TO THE COMPLAINTS HANDLING PROCEDURE (CHP)

The CHP serves as a regulatory mechanism for the handling of complaints by the Commission. No decisions are taken on review, as the Commission is benchmarked by other regulatory bodies such as the Information Regulator and other NHRIs. In addition to the Commission's efforts to maintain accessibility to the public during the pandemic crisis, the goal to continuously improve on its processes and delivery of its service is further evidenced in ongoing reviews of the CHP. With the passage and commencement of laws such as the Protection of Personal Information Act, No.4 of 2013 (POPIA), the Commission has begun to review the CHP to further test its potential for enhancement and to ensure that resources are better directed to more complex complaints, while other, less resource intensive, complaints are handled at the frontline. The CHP is therefore an organic document which is subject to periodic review for the purposes of promoting effectiveness and efficiency in the handling of complaints. Extensive internal and external consultation by the Commission to critically evaluate and address concerns regarding the existing CHP highlighted the following:

- a) simplification of the CHP to become less vague as well as easier to read and understand;
- b) provision of clarity on guidelines such as the permissible context for own accord investigations and when complaints may proceed from investigation stage to ADR and then to litigation;
- c) provision of clarity on what constitutes 'high profile', 'complex' or 'priority complaints';
- d) provision for sanctions and criminal offences to not overstep the powers, duties and functions of other democracy protection institutions, but rather to appropriately refer such matters to the Office of the Public Protector and the National Prosecuting Authority (NPA);
- e) compliance with the POPI Act (no.4 of 2013) in terms of safeguarding personal information, confidentiality and informed consent of complainants during investigations; and
- f) implementation and explicit functions of the Frontline Resolution Unit (FRU) to assist the Commission with capacity constraints in handling enquiries from the public.

Identifying concerns relating to the CHP is an important part of the Commission's ability to communicate to the public with clarity and transparency on a number of issues such as; the platforms available to lodge complaints, how said complaints will be addressed, the requisite criteria to proceed with investigation, instructions on the appeal process, as well as under which circumstances the Commission may reject or refer a complaint. A continuous and systematic review of the CHP on an annual basis also provides the Commission with the opportunity to be explicitly responsive to the fast-changing environment (technological and otherwise) created by the pandemic. In alignment with the Commission's Strategic Plan 2015 - 2020, complaints handling is to fulfil the mandate for protection of human rights through the Legal Services Unit's (LSU), efficient response to and resolution of complaints, prevention of delays and improvement of the provision of quality legal advice and assistance.

3.3. ANALYSING DISAGGREGATED DATA

The importance of disaggregated data should be noted as it has both immediate and long-term benefits for identifying and addressing human rights issues. Analysis of such data has also been found valuable for the development of targeted policies, critical resource allocation and implementation of interventions⁴⁶. In the backdrop of the COVID-19 pandemic for example, disaggregated data has emphasized the existence of physical, sociological and socio-economic disparities on the basis of gender⁴⁷. As research on the virus is new and emerging, ongoing studies show that gender is an important factor to understanding COVID-19 outcomes.

⁴⁶ Doss, C. (2014). Collecting sex disaggregated data to improve development policies. *Journal of African Economies*, 23(suppl_1), i62-i86.

⁴⁷ Womersley, K., Ripullone, K., Peters, S. A., & Woodward, M. (2020). Covid-19: male disadvantage highlights the importance of sex disaggregated data. *bmj*, 370.

Across nations, there is adequate evidence to demonstrate that men are more prone to the severity of the virus, likelihood of hospitalisation and mortality than women⁴⁸. Continuing research and vaccine trials also suggest different side effects in men and women, which bears implications for the extent to which medical care should vary on the basis of gender. Women have also been reported to have a higher risk of exposure, contraction and transmission of the COVID-19 virus than men. This is primarily because the majority of workers in social sectors such as hospitality, retail, leisure and healthcare are women⁴⁹. Research in other parts of the world has emphasized the severity of the pandemic on the socio-economic status for women as compared to their male counterparts, considering for instance the discriminatory incidents against pregnant women who were discharged from their place of work without consultation and subsequently paid less, if at all⁵⁰.

Taking into consideration the dangers of overlooking disaggregated data, this report was cautious to explore the profile and nature of complaints in a manner that is impartial, provides nuance and highlights the plight of substantially affected groups. Disaggregated data allows for interpretations and conclusions to be drawn with a distinct understanding of the kinds of complaints submitted by specific sub-populations and where patterns can be revealed on their most recurrent complaints. Inversely, aggregate data provide a summarised level of interpretation and in the context of this report, would mask the extent of human rights violations against specific groups in comparison to others and subsequently, conceal the groups or areas the Commission's protection and monitoring interventions are most needed and would have the greatest impact.

3.4. PROFILE OF COMPLAINTS

The sections below provide a statistical analysis regarding the complaints received and handled by the Commission's nine provincial offices for the 2020-2021 financial year under review. Disaggregated data was analysed to provide an indication of the nuanced aspects of complaints in terms of gender, race, age, geographical location and other important demographic details. Cumulative dashboards are also provided for an informative, yet summative view.

3.4.1. Year-on-Year Change

Table 1: Year-on-year change over nine-year period

Financial year	Complaints	Enquiries	Total Caseload	Year-on-Year Change	Finalised + Once off Enquiries			% Achievement	Carried over
					Complaints	Enquiries	Total		
2011-2012			11 363				9 851		1 512
2012-2013	4 947	3 972	8 919	-22%	3 075	3 972	7 047	79%	1 872
2013-2014	4 980	4 237	9 217	3%	4 313	4 237	8 550	93%	667
2014-2015	3 685	4 494	8 179	-11%	2 843	4 494	7 337	90%	842
2015-2016	4 613	4 625	9 238	13%	3 575	4 625	8 200	89%	1 038
2016-2017	4 938	4 792	9 730	5%	3706	4 792	8 498	87%	1 235
2017-2018	5 144	4 316	9 460	-3%	3 523	4 316	7 839	83%	1 621
2018-2019	5 268	5 145	10 413	10%	3 346	5 145	8 491	82%	1 922
2019-2020	6 092	5 711	11 803	13%	3 180	5 711	8 891	75%	2 927
2020-2021	5 438	4 331	9 769	-17%	2 798	4 331	7 129	73%	2 640

⁴⁸ ICNARC. Report on covid-19 in critical care. 4 April 2020. https://webcache.googleusercontent.com/search?q=cache:YVPYsW_wOHAJ:https://www.icnarc.org/DataServices/Attachments/Download/76a7364b-4b76-ea11-9124-00505601089b+&cd=2&hl=en&ct=clnk&gl=uk

⁴⁹ WHO. Women in the health workforce. 7 March 2018. www.who.int/hrh/events/2018/womenin-health-workforce/en.

⁵⁰ Maternity Action. Covid-19. <https://maternityaction.org.uk/tag/covid-19>.

The year-on-year statistics provide an overview of all complaints and enquiries recorded by the Commission, reflecting the total caseload for the financial year. The most significant statistical information that this overview provides, is the percentage changes in complaints received by the Commission per financial year. It also provides the number of actual finalised complaints (with percentages) per financial year.

At the end of the 2021 financial year, the total number of complaints recorded by the Commission showed a reduction of **17%**. This shows a downward trend from the norm of an annual increase that the Commission has experienced for the past two financial years. This decrease is mainly, but not limited to the worldwide pandemic and the lockdown that was imposed.

Despite the slight reduction in the total number of complaints, the Commission remains in need of additional human resources to effectively investigate complaints. The workload handled by officials continues to far outweigh capacity, and with the growing uncertainty of imminent policies pertaining to the COVID-19 pandemic⁵¹, an upsurge of complaints and enquiries submitted to the Commission is expected.

3.4.2. Carried over complaints per Financial Year

Table 2: Carried over complaints over a nine-year period

Carried Over complaints per financial year	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021
EC	105	68	67	92	61	75	61	133	122
FS	110	22	40	94	85	112	122	198	224
GP	372	146	214	251	280	242	167	168	172
KZN	149	132	91	111	144	187	153	337	271
LP	181	63	53	82	80	110	199	252	317
MP	195	54	43	50	37	49	62	164	89
NC	83	63	42	36	40	60	141	129	118
NW	231	32	28	36	53	48	102	216	187
WC	444	87	264	286	452	738	915	1330	1 140
National	1 870	667	842	1 038	1 232	1 621	1 922	2 927	2 640

The table above illustrates a breakdown of carried-over complaints per provincial office over a period of nine financial years. Carried-over complaints refer to complaints that were not finalised at the end of a financial year and are carried over into the next financial year. 180 days are allocated for the finalisation of complaints accepted for investigation by the Commission. These timelines serve as a means of determining priorities and carving strategies for the quicker resolution of complaints to mitigate against delays in securing appropriate relief and large backlogs of complaints.

Not all accepted complaints are however capable of resolution within the 180 day period. A number of factors contribute to the delay in the finalisation of investigations apart from the complexity of investigations. Some of the contributing factors which result in delays include unresponsiveness of parties, the large number of local government bodies which are under administration; congested court rolls and protracted litigation proceedings, and the need for expert services. In the context of the COVID-19 pandemic, the factors, which historically contributed to delays in the finalisation of complaints, were greatly exacerbated as role players implemented

⁵¹ At the time of writing this report, one of the most contested issues pertained to compulsory and mandatory vaccination, with employers, government and the public at large divided about the issue.

and adapted work systems such as remote work and offices operated at minimal capacities. Provincial offices of the Commission, which typically receive large numbers of complaints, continued the trend. The Western Cape provincial office reported on this trend but was equally consumed with complaints involving evictions and monitoring of shelters during the period. Office closures due to infections and the need for support staff added to the delays experienced in this office.

3.4.3. New complaints per province

Since the inception of the Commission, new complaints have provided an indication of alleged human rights violations and how they manifest in a fractured post democratic society. The residues of a violent and divided history, as well as discontent with governance and service delivery standards, continue to consume society and remain the key factors for violations of human rights. The table below reflects the number of new complaints the Commission received.

Table 3: New complaints received over nine-year period

New Complaints per Provincial Office	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	9 years Totals
EC	343	351	377	379	368	355	383	364	272	3 192
FS	340	430	269	388	513	559	517	468	405	3 889
GP	1 069	989	707	842	629	676	390	380	216	5 898
KZN	258	439	419	457	371	517	569	447	494	3 971
LP	74	416	348	334	400	357	345	422	457	3 153
MP	177	380	204	229	602	270	240	358	123	2 583
NC	148	182	117	97	114	112	110	137	121	1 138
NW	189	351	149	467	400	392	409	341	231	2 929
WC	479	775	253	382	309	285	383	263	233	3 362
National	3 077	4 313	2 843	3 575	3 706	3 523	3 346	3 180	2 552	30 115

The Commission has recorded a total of **30 115** new complaints over a nine year period. The bulk of these complaints were recorded by the Gauteng and Western Cape provincial offices, followed by the KwaZulu-Natal provincial office. These three 'high complaint intake' provincial offices reflect high population density and are also economically active provinces. Large numbers of inhabitants in these provinces are socially active and well informed in the many urban spaces they occupy. Through its outreach initiatives however, the Commission continues to engage peri-urban and rural communities across the country so that all people, regardless of geographical location, are rights aware.

3.4.4. Enquiries per financial year

The total number of enquiries recorded at the end of the 2020-2021 financial year shows a decline from those received in the previous financial years. This decrease can be attributed to the global pandemic and the working arrangements that came with the lockdown regulations. At the end of March 2020 the Commission noted a significant decrease in the number of 'walk in' enquiries at its provincial offices. The Western Cape and Gauteng provincial offices however, recorded over a thousand enquiries during the 2020-2021 financial year, although not all of these were physical 'walk in' enquiries.

Table 4: Enquiries over nine financial year period

Enquiries per financial year	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	9 Years Totals
EC	197	291	172	204	232	187	113	197	164	1 757
FS	185	115	274	286	168	188	181	189	155	1 741
GP	713	658	1 050	863	894	951	1 344	2 000	1 010	9 483
KZN	826	790	592	747	766	714	870	702	516	6 523
LP	113	97	376	363	387	561	481	331	264	2 973
MP	105	195	206	185	493	306	492	603	461	3 046
NC	642	529	149	252	284	262	490	399	239	3 246
NW	189	196	175	260	208	163	262	344	369	2 166
WC	1 002	1 366	1 500	1 465	1 360	984	912	946	1 153	10 688
National	3 972	4 237	4 494	4 625	4 792	4 316	5 145	5 711	4 331	41 623

Enquiry assessments reveal that most emanated from the uncertainty of what constitutes human rights violations, particularly in relation to COVID-19 and evictions, mandatory vaccination enforced by employers, access to social relief, as well as limitations of rights during the lockdown. The overall total of enquiries recorded over a period of nine financial years stands at **41 623** at the end of the 2020-2021 financial year.

3.4.5. Workload finalised per Provincial Office

Table 5: Workload finalised per PO for the 2020-2021 financial year

Province	Enquiries	Finalised complaints	Complaints Received	Complaints and Enquiries Received	Complaints and Enquiries finalised	Percentage
EC	164	274	396	560	438	78%
FS	155	375	599	754	530	67%
GP	1 010	200	372	1 382	1 210	88%
KZN	516	558	829	1 345	1 074	80%
LP	264	390	707	971	654	67%
MP	461	194	283	744	655	88%
NC	239	130	248	487	369	76%
NW	369	257	444	813	626	77%
WC	1 153	420	1 560	2 713	1 573	58%
TOTALS	4 331	2 798	5 438	9 769	7 129	73%

The table above is an indication of the Commission's workload, which refers to the total number of complaints and enquiries received and finalised by the provincial offices in the previous year. The Commission planned to finalise at least **7 000** enquiries and complaints per annum. Some **7 129** complaints and enquiries were achieved in the period, despite the pandemic. Furthermore, the organisation aims for an averaged 85% finalisation rate per financial year⁵². A range of factors require reflection in the unprecedented and severe context of the COVID-19 pandemic on the resolution of complaints - particularly, the effect of the pandemic on the expeditiousness of the courts to handle heavy caseloads, pre-existing backlogs, as well as delays due to COVID-19 positive infections of complainants and respondents and legal staff whose time of recovery needed due consideration.

Although both litigation and ADR procedures were handled virtually, technological challenges tended to defer the extent to which complaints could be finalised. The Commission's recalibration for all offices to function interdependently and remotely, while maintaining uninterrupted accessibility and correct following of procedures similarly proved initially challenging. Additionally, finalisation of complaints was affected by the complexity of matters presented to the Commission and subsequently to the courts on pertinent COVID-19 related issues such as mandatory vaccination and evictions during lockdown.

The combined complaint and enquiry finalisation rate in the last financial year is an average of 73%, with the highest rate of 88% from Gauteng and Mpumalanga, and the lowest rate of 58% from the Western Cape Provincial Office (WCPO). The Western Cape is the fourth largest province and the third most populated in Southern Africa with an estimated population, during the period under review, of about 6.84 million people⁵³. The province has a total of 30 municipalities, which are grouped by region, into 1 Metropolitan municipality, 5 District municipalities and 24 Local municipalities. Compared to previous years, the WCPO reported an increase in complaints lodged in respect of alleged violations of several fundamental rights, namely; rights to basic education, access to adequate housing, healthcare, water and sanitation, equality, just administrative action, the rights of arrested and detained persons, as well as the right to fair labour practices.

The WCPO case load in terms of the number of enquiries (**1 153**) and complaints (**1 560**) totalling **2 713**, is overall more than any other province in the country. Comparatively, volumes in the WCPO are almost five times higher than the enquiries received by Limpopo, Northern Cape and North West, and almost 10 times more than the Eastern Cape and the Free State. Similarly, the complaints received by WCPO far exceeds those received by all the provincial offices, even five times higher than Gauteng which is more densely populated and where public complaint awareness is typically high.

With the COVID-19 pandemic's exacerbation of inequalities, and together with ambiguity on some matters concerning the law, the public's need for the Commission's services were magnified. The situation placed considerable strain on the Commission to meet demands, both pre-existing and bred by the pandemic. Low staffing levels as well as the time spent on lengthy and cumbersome litigation processes remain obstacles to overcome in the Commission's fulfilment of its protection mandate. However, the Commission's insistence on strategic interventions to progress reform is invaluable to the long-term goal of realising human rights for all.

⁵² APP 2019/2020.

⁵³ This is the population estimate as of July 2020. See the Statistics South Africa mid-year population estimates at <http://www.statssa.gov.za/publications/P0302/P03022019.pdf>.

3.4.6. Finalised Accepted Complaints

Table 6: Finalised accepted complaints per provincial office

Province	Complaints excluding transfers	Accepted complaints	Finalised Accepted complaints	Target finalised Accepted complaints (40%)
EC	396	217	96	44%
FS	599	313	90	24%
GP	372	284	112	39%
KZN	829	440	203	46%
LP	707	463	146	32%
MP	283	235	152	65%
NC	248	174	59	34%
NW	444	328	144	44%
WC	1 560	1 263	145	12%
TOTALS	5 438	3 717	1 147	31%

The Commission's CHP delineates the conditions under which new complaints are accepted, referred or rejected. Upon the receipt and assessment of the complaint, the Commission will proceed to accept the complaint if it constitutes a *prima facie* violation of a fundamental right and which may be handled within the Commission's mandate⁵⁴. The table above reflects the number of complaints accepted and finalised by each provincial office over the last financial year, with a required target of 40%. A fifth of the total **5 438** complaints were accepted and finalised by the Commission.

The finalised accepted complaints (**1 147**) in relation to the accepted complaints (**3 717**), suggests that although the Commission may have proceeded to secure redress for reported human rights violations, a total of more than a third of such cases were yet to be concluded within the financial year they were lodged. These statistics should however not be viewed in isolation and should be interpreted in the context of the national state of disaster, and the more complex investigations embarked on by the Commission during the period. The latter, although reported as single complaints, impacted large numbers of people, particularly in respect of access to water and the right to a safe environment discussed later in this report.

⁵⁴ In accordance with article 12(11) of the complaints handling procedures.

3.4.7. Rejected and Referred Complaints

Table 7: Total number of complaints rejected or referred by the Commission

Province	Complaints excluding transfers	Complaints excluding accepted	Rejected and Referred	Rejected and Referred (90%)
EC	396	179	178	99%
FS	599	286	285	100%
GP	372	88	88	100%
KZN	829	389	355	91%
LP	707	244	244	100%
MP	283	48	42	89%
NC	248	74	71	96%
NW	444	116	113	97%
WC	1 560	297	275	93%
TOTALS	5 438	1 721	1 651	96%

The Commission's CHP delineates the process applied by all provincial offices and the National Head Office in the handling of complaints. Human rights violations are addressed under the jurisdiction of the SAHRC Act, 40 of 2013 (the Act) which governs the fair and appropriate application of the CHP in resolving disputes and ensuring redress. While the Commission possesses unfettered discretion to deviate from the CHP if the conditions of a complaint are unique⁵⁵ and therefore require it, (which was an occurrence during the pandemic), impartiality and fairness in the decision to accept, refer or reject a complaint remains paramount.

According to the definitions provided in the CHP, rejected complaints are described as those where no human rights violation was determined. Although it may be valid for members of the public to be aggrieved by conflicts, the complaint has to satisfy the condition that *a constitutional right was violated* in order for the Commission to intervene. On the other hand, complaints which are referred⁵⁶ are those sent to another organisation, institution or body which is empowered to more effectively handle the complaint. Therefore, upon receipt of a new complaint, the relevant provincial office conducts an assessment⁵⁷ to determine whether there is substance or sufficient cause that warrants the intervention of the Commission.

⁵⁵ The CHP determines that complaints older than three years from the occurrence of the violation may be re-lodged with the Commission if there were (a) substantive reasons for the delay in addressing the complaint, (b) failure to investigate would cause prejudice to the complainant, (c) the alleged violation is ongoing, (d) if the required evidence and subsequent resolution of the of the complaint were not previously available, but have recently become available, and lastly, other relevant information which may be considered as special circumstances.

⁵⁶ The criteria which prevents the Commission from accepting a complaint include; complaints regarding conduct that occurred before 27 April 1994, complaints which fall within the mandate of other competent bodies or institutions, complaints which are subject to the exhaustion of internal procedures of a particular mechanism or lawful body, or complaints where the alleged violation occurred more than 3 years prior to the lodging of the complaint (unless the late submission of the complaint is condoned in terms of section 9 of the CHP).

⁵⁷ The CHP defines an assessment as the investigative process of screening a complaint to determine whether there is substance to it as contemplated in section 13(3)(a) of the Act



As indicated in Table 7, the Commission rejected and referred a total of **1 651** complaints across all nine provinces which is three times less than the accepted complaints (**3 717**) over the last financial year. The relatively high number of rejected and referred complaints shows that there remains considerable work to be done to educate the public on the separate roles and mandates of other Chapter 9 institutions to which their complaints may be more relevant. However, through advocacy the Commission seeks to continue collaborative human rights awareness interventions with a view that the roles and responsibilities of other regulatory and Chapter bodies are more widely and better understood.

Considering the close collaboration of the Commission with other institutions, it is likely that most of these complaints would have been referred as opposed to rejected, as there are limited grounds for rejecting complaints. The Commission aims as far as possible to address complaints which fall within its jurisdiction expeditiously to restore dignity to the complainants.

Figure 1 below shows a summative version of the aggregate enquiries received and addressed by the Commission, rejected and referred complaints, as well as the finalised accepted complaints over the previous financial year.

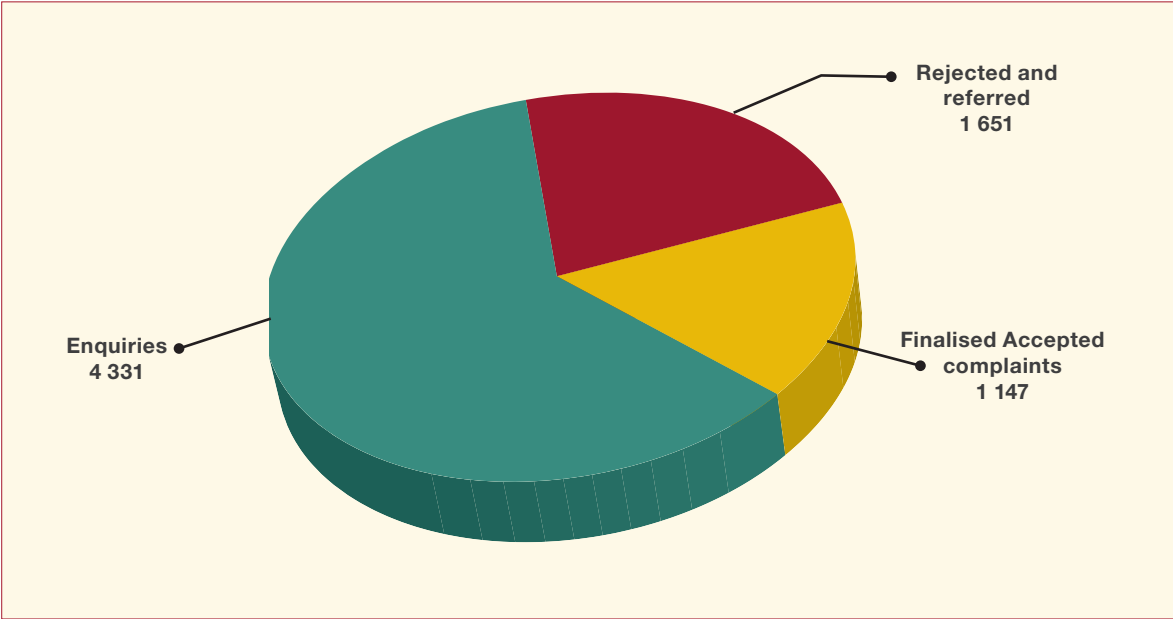


Figure 1: The proportion of received enquiries, rejected/referred complaints and finalised accepted complaints

3.5. COVID-19 CASES IN SOUTH AFRICA

As at end of March 2021, the total number of confirmed Covid-19 infections was reported to be **1 548 157⁵⁸**. At this stage, the country had been at lockdown level 1 and this meant that the restrictions on movement had been eased in order to allow citizens to be able to go to work and most importantly to boost the ailing economy.

Table 8: Total number of COVID-19 cases in SA ending March 2021

Province	Total cases for 31 March 2021	Percentage total
Eastern Cape	195 425	12,6
Free State	83 327	5,4
Gauteng	414 261	26,8
KwaZulu-Natal	334 027	21,6
Limpopo	63 181	4,1
Mpumalanga	75 022	4,8
North West	63 828	4,1
Northern Cape	36 256	2,3
Western Cape	282 830	18,3
Total	1 548 157	100

3.6. COVID-19 COMPLAINTS LODGED WITH THE COMMISSION

Table 9: COVID-19 complaints and enquiries lodged in the year under review

COVID-19 Complaints	Complaints	Enquiries	Totals
Eastern Cape	19	26	45
Free State	64	18	82
Gauteng	57	165	222
KwaZulu-Natal	15	24	39
Limpopo	23	16	39
Mpumalanga	6	20	26
North West	12	69	81
Northern Cape	8	69	77
Western Cape	17	45	62
GrandTotal	221	452	673

The Commission disaggregated complaints involving the national state of disaster occasioned by the COVID-19 pandemic from other complaints and enquiries received during the period. Table 9 above illustrates that variations in complaints trends were reflected in the respective provincial offices. The Gauteng provincial office received the highest number of pandemic-related complaints. On the other hand, Mpumalanga and the Northern Cape reported the lowest COVID-19 related complaints.

⁵⁸ The presented statistical information was extracted from the National Institute for Communicable Diseases' website. These numbers illustrate the totals of Covid-19 cases per province from the beginning of the pandemic in South Africa until the end of March 2021.

With enquiries⁵⁹ taken into account, Gauteng reported considerably higher volumes than all other provinces, which suggests the public's awareness of their rights and the process to engage the Commission in ameliorating human rights violations, remains more perceptible in Gauteng than in provinces which require targeted interventions for public outreach. A total of **221** complaints were received nationally as the pandemic exacerbated inequalities and gaps in socio-economic standing. Noticeably, more than double of the complaints consisted of enquiries, with a total of **452**, as a consequence of the murkiness through which the country – and the world – continues to navigate in terms of what constitutes violations under the unprecedented context of the pandemic. For context, one of the most contentious issues and potentially the biggest cause for enquiries at the Commission pertains to mandatory vaccination⁶⁰.

On the 11 June 2021, the Minister of Employment and Labour issued the *Consolidated COVID-19 Direction on Occupational Health and Safety Measures in the workplace*⁶¹ (the direction) which in the interest of public health imperatives, ostensibly gave employers autonomous discretion to enforce mandatory vaccination for vulnerable employees. However, without promulgated legislative policy clearly delineating a law of general application, the direction left much for interpretation. What then ensued were multiple reports of employees being dismissed from work for refusing to get vaccinated⁶². Others were placed on suspension or disciplinary procedures for not having adequate justification for refusal to vaccinate⁶³.

The Constitution is unambiguous about the non-negotiable right to bodily and psychological integrity⁶⁴. However, the effected limitation of rights⁶⁵ and the government's response to pertinent and complex questions of the law was not always clear, aligned or consistent. The direction determined that employers had discretion to conduct a risk assessment and provide justification for organisational policy on mandatory vaccination taking into account the operational requirements of the workplace.

The Commission, and in particular the Gauteng office, was - for a period of time - inundated with formal complaints from employees resisting coercion from their employers to be vaccinated. The intricate struggle between the right to freedom of choice and the right for everyone to be in an environment that is not harmful to their health and wellbeing⁶⁶ continue to dominate public discourse. At the time of writing this report, the matter was still under intense public debate and referral to the courts for jurisprudence was to be taken under consideration.

Evictions during the period of strict lockdowns were another highly contested issue in the advent of the pandemic from which multiple enquiries were made to the provincial offices by both tenants and landlords alike. While some enquiries, upon further clarification, did not result in the lodgement of a complaint, others inevitably escalated and had to be resolved through ADR or litigation⁶⁷.

59 For the purpose of complaints handling, enquiries are defined as “An oral, written or electronic communication which can be established at point of entry into the Commission that the matter is clearly not about a human rights violation, and is not within the jurisdiction of the Commission”. Enquiries are therefore a form of seeking clarity rather than lodging a formal complaint to the Commission.

60 For a detailed discussion on the issue of mandatory vaccination, a Legal Opinion was compiled by the LSU and is available for perusal.

61 The direction was issued in terms of Regulation 4(10) of the National Disaster Regulations.

62 The legal precedent in the judgment of *Eskort Limited vs. Stuurman Mogotsi and Others [2021] 8 BLLR 811 (LC) (28 March 2021)* is of importance when considering employers' grounds for dismissing employees found to be non-compliant, exhibiting gross misconduct or negligence to COVID-19 safety protocols, thereby jeopardising the health of others in the workplace.

63 The direction posited that only persons with medical conditions preventing them from getting vaccinated or undergoing treatment not compatible with the vaccine were exempt from inoculation. Particularly, “medical grounds refer to issues of an immediate allergic reaction of any severity to a previous dose or a known (diagnosed) allergy to a component of the COVID-19 vaccine”.

64 Section 12(2) of the Constitution enshrines the right to Freedom and Security of the Person which includes the right (a) to make decisions concerning reproduction, (b) to security in and control over their bodies, (c) not to be subjected to medical or scientific experiments without their informed consent.

65 Section 36(1) of the Constitution defines the conditions for the limitation of rights as enshrined in the Bill of Rights

66 Section 24 of the Constitution.

67 See Chapters 5 and 6 of this report on ADR and litigation pertaining to evictions and other matters during the pandemic crisis.

In totality, the number of complaints recorded by the Commission at the end of the 2020-2021 financial year stood at **5 464**. As mentioned from this total, **221** complaints were recorded as being COVID-19 related. At the same juncture, the total number of enquiries recorded nationally was **4 331** and the number of COVID-19 related enquiries was **452**. The bar graph below illustrates the percentage distributions of the mentioned totals.

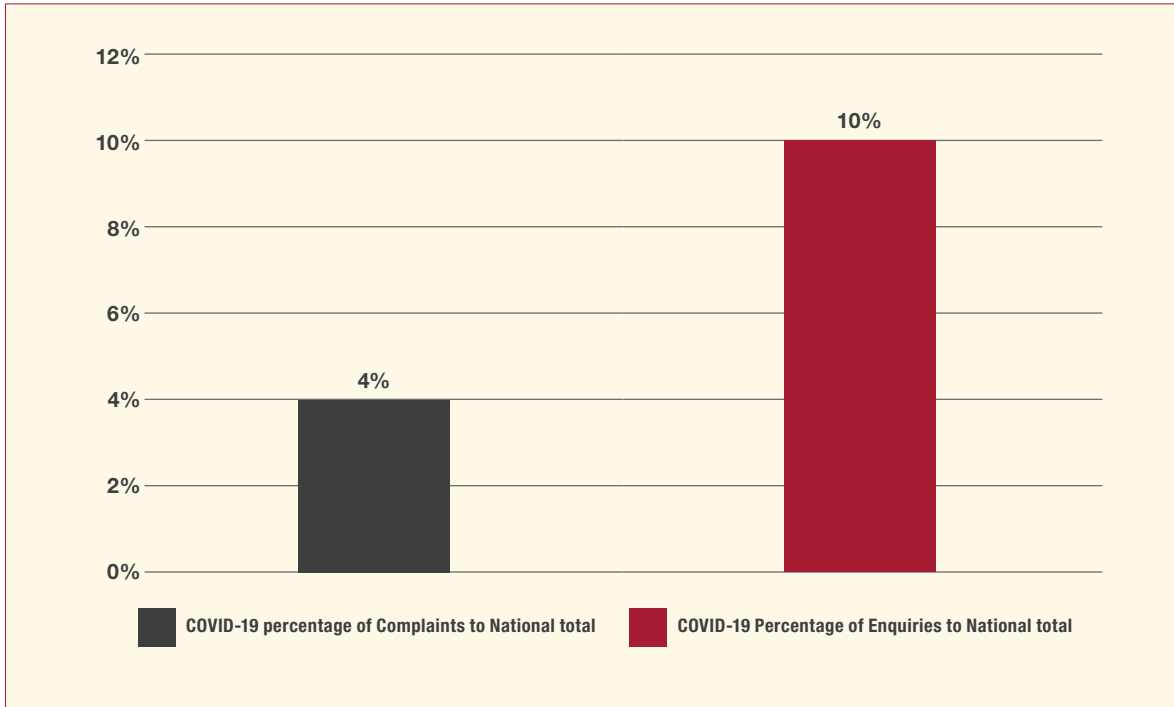


Figure 2: Percentage distribution of COVID-19 related complaints and enquiries

The combined total workload of COVID-19 complaints and enquiries stood at **672** and this made up **7%** of the recorded workload for the 2020-2021 financial year. The graph above shows that the bulk of COVID-19 complaints that were recorded were mostly through enquiries indicating that contact was being made with the Commission largely for the purposes of seeking information as opposed to reporting actual alleged violations.



3.7. PERCENTAGE BREAKDOWN OF COVID-19 COMPLAINTS PER PROVINCE

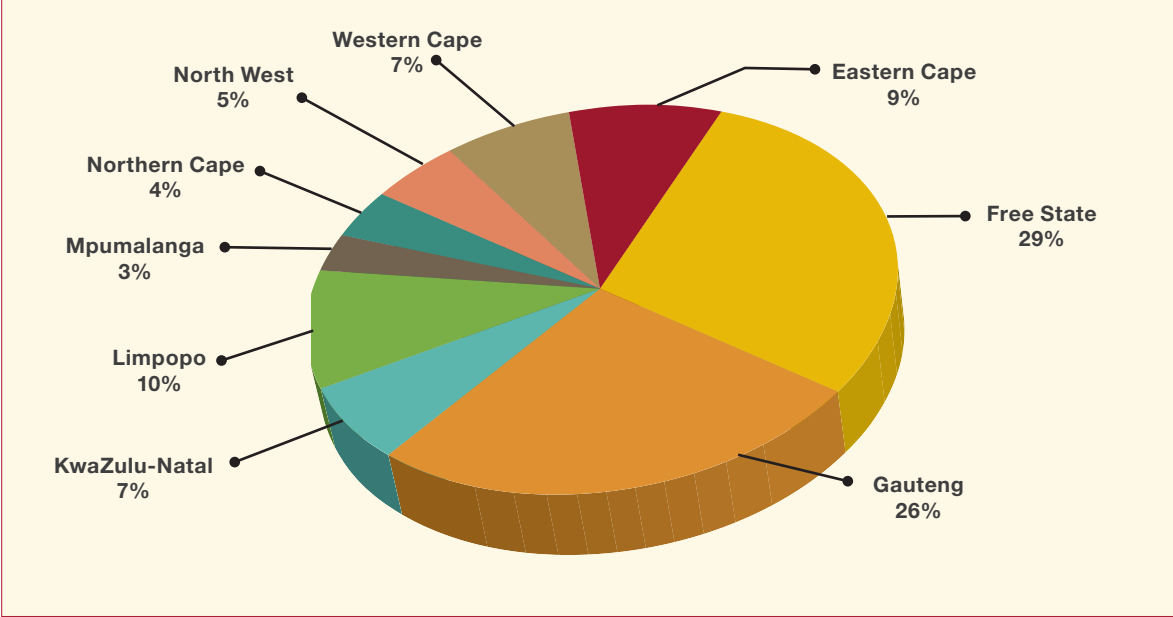


Figure 3: COVID-19 complaints per province

As at end of March 2021, the total number of COVID-19 related complaints that were recorded by the Commission stood at **220**. This total made up **4%** of complaints recorded by the Commission at the end of March 2021.

3.8. PERCENTAGE BREAKDOWN OF COVID-19 ENQUIRIES PER PROVINCE

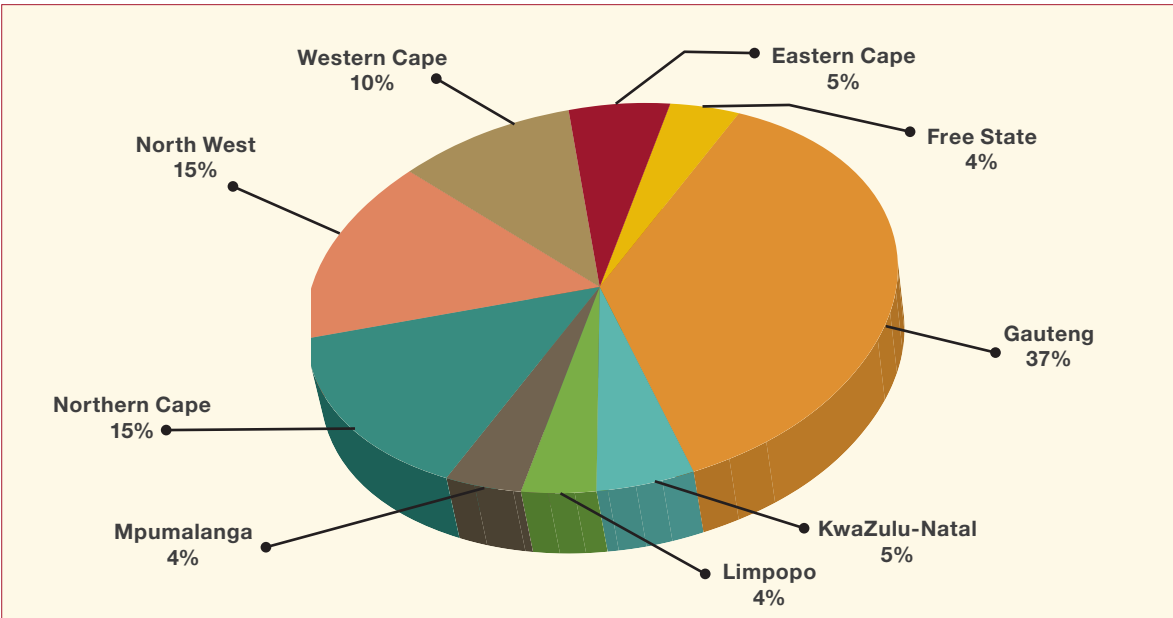


Figure 4: COVID-19 enquiries per province



The total number of COVID-19 related enquiries recorded by the Commission as at the end of March 2021 stood at **452**. This total makes up **10%** of all enquiries recorded by the Commission. The pie chart above illustrates the percentage distribution of the **452** enquiries recorded by the Commission per provincial office. The bulk of COVID-19 related enquiries were recorded by the Gauteng provincial office with the total percentage of **37%**, some of which reflected the public's uncertainty about evictions during lockdown periods, and the insistence of mandatory vaccination by employers.

3.9. COVID-19 WORKLOAD BREAKDOWN PER PROVINCE

Table 10: COVID-19 workload per province

COVID-19 Complaints	Complaints	Enquiries	Totals
Eastern Cape	19	26	45
Free State	64	18	82
Gauteng	57	165	222
KwaZulu-Natal	15	24	39
Limpopo	23	16	39
Mpumalanga	6	20	26
Northern Cape	8	69	77
North West	12	69	81
Western Cape	16	45	61
Grand Total	220	452	672

At the end of the 2020 – 2021 financial year, the total number of COVID-19 related complaints was **673**. These totals consisted of both complaints and the number of enquiries received by provincial offices. The Gauteng provincial office recorded the highest number of COVID-19 related complaints. Most of these complaints that were recorded were made up of enquiries. The provincial office normally provides legal advice on the validity of the complaint and direct complainants to the relevant institution that would best be suited to assist. Further to this the provincial office would provide advice on whether the complaint necessitated the institution of proceedings by the complainant, which would require the complainant to get the assistance of a private attorney.

3.10. NATURE OF RIGHTS

Table 11: Total number of complaints per rights violations for the 2020-2021 financial year

Political Rights	1	
Slavery, servitude and forced labour	1	
Language and Culture	4	
Assembly, Demonstration, Picket And Petition	5	
Freedom of religion, belief and opinion	10	
Access To Courts, Independent Tribunals And Forums	15	
Freedom Of Trade, Occupation And Profession	15	
Freedom of movement, residence, passport and to leave the Republic	26	
Life	28	1%
Assessment	30	1%
Privacy	39	1%
Cultural, Religious And Linguistic Communities	51	1%
Access to Information	101	2%
Citizenship	146	2%
Freedom of Expression	149	3%
Property	172	3%
Environment	180	3%
Freedom And Security Of The Person	180	3%
Children	204	4%
Arrested, Detained and Accused persons	262	5%
Housing	276	5%
Education	368	7%
Human Dignity	425	8%
Labour Relations	435	8%
Just Administrative Action	501	9%
Health Care, Food, Water and Social Security	704	13%
Equality	771	14%
Grand Total	5 464	

For this section, the number of complaints lodged with the Commission alleging violations of rights contained in the Bill of Rights are considered⁶⁸. As the foundation of democracy in South Africa, the Bill of Rights enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom⁶⁹. It is the obligation of the state to respect, protect and fulfil the rights contained in the Bill of Rights⁷⁰.

The third clause in the Bill of Rights was tested considerably and applied during the COVID-19 pandemic. It states that the rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36 (of the Constitution), or elsewhere in the Bill⁷¹. However, the Bill of Rights is paramount and enjoins every organ of state, businesses and individuals to respect these basic rights. In addition, all rights enshrined in the Bill of Rights are commonly accepted as human rights and therefore fall within the legislative mandate of the Commission as a democracy protection body and accredited NHRI.

⁶⁸ The Bill of Rights are contained in Chapter 2 of The Constitution of the Republic of South Africa, 1996.

⁶⁹ Section 7 (1).

⁷⁰ Section 7 (2).

⁷¹ Section 7 (3).

The Constitution highlights seven sections as non-derogable rights, in other words, these are rights that cannot be contravened and whose infringement cannot be justified under any circumstances, even in the extreme context of a State of Emergency which is declared only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency⁷², therefore necessitating such a declaration to restore peace and order⁷³. The seven non-derogable rights include the rights to:

1. Equality⁷⁴:
 - a) Everyone is equal before the law and has the right to equal protection and benefit of the law
 - b) Equality includes the equal and full enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons, or categories of persons disadvantaged by unfair discrimination may be taken⁷⁵.
2. Human Dignity⁷⁶ states that everyone has inherent dignity and the right to have their dignity respected and protected.
3. Life⁷⁷ declares that everyone has the right to life.
4. Freedom and security of the person⁷⁸
5. Slavery, servitude and forced labour⁷⁹
6. Children⁸⁰
7. Arrested, detained and accused persons⁸¹

The impact of COVID-19 on equality in South Africa compels national reflection regarding the inequalities which have been exacerbated, compounded and escalated during the pandemic crisis. The right to equality is the core of the Bill of Rights and fortifies all other rights. The Constitution was derived for the fundamental right of equality to restore the dignity that was stripped from various subgroups of people during the despotic apartheid regime, including and especially its segregation laws on the basis of race. Even with the continued efforts by the Commission and other Chapter 9 institutions, as well as civil society and human rights defenders, as depicted in Table 11, the right to equality remains the most violated right in democratic South Africa. This is also with due consideration to **425** complaints regarding the right to dignity which shows that allegations have increased compared to previous years as a consequence of the pandemic.

72 Section 37 (1)(a) specifies that a State of Emergency may be declared only in terms of an act of Parliament as well as the conditions which may uphold such a declaration.

73 Section 37 (1)(b).

74 Section 9 (1- 5).

75 In labour law and in accordance to Section 6 of the Employment Equity Act, direct or indirect unfair discrimination is prohibited on one or more grounds, including on the basis of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground.

76 Section 10.

77 Section 11.

78 Section 12 – this particular right declares that everyone has the right to freedom and security of the person and it is non-derogable in so far as subsections 1(d) and (e) and 2(c). One of the most highly contested issues during the COVID-19 pandemic pertains mandatory vaccination and the notion that persons do not have the freedom of choice to vaccinate and can be coerced for the prioritisation of public health. Subsection 2(b) states that everyone has the right to security in and control over their body, however as it is not specified as non-derogable, it suggests that in extreme circumstances this right may be limited for justifiable cause.

79 Section 13.

80 Section 28 – in particular this right may not be infringed with respect to subsection (d) every child has the right to be protected from maltreatment, neglect, abuse and degradation, subsection (e) the right to be protected from exploitative labour practices, as well as subsections (i) and (ii) of 1(g) and 1(i) for children 15 years and younger.

81 Section 35 with respect to the subsections specified thereunder.

3.11 LIMITATION OF RIGHTS UNDER THE COVID-19 PANDEMIC

The Constitution provides for a limitation of rights under the following conditions:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable - in an open and democratic society based on human dignity, equality and freedom - taking into account all relevant factors, including:
 - a) the nature of the right;
 - b) the importance of the purpose of the limitation;
 - c) the nature and extent of the limitation;
 - d) the relation between the limitation and its purpose, and
 - e) less restrictive means to achieve the purpose.
2. Except, as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Rights may be limited if they meet the standards of rationality and proportionality. Specifically, 'if it is found to be reasonable and justifiable in an open and democratic society based on freedom, dignity and equality'⁸². In the advent of the COVID-19 pandemic, several limitations of rights were imposed in the greater interest of public health. With the declaration of the State of National Disaster all persons, with the exception of health practitioners and essential workers, were prohibited from all public spaces and confined within the boundaries of their homes. This limitation of Section 21 of the Bill of Rights⁸³ was imposed to limit in-person contact and interaction of the public, which otherwise would have resulted in a rapid spread of the virus.

The limitation on freedom of movement globally was particularly important considering the mutations and variants of the virus which occurred in different countries and regions⁸⁴. Variants are defined as newly evolving strains which are critical to understanding virus transmission and development of effective vaccines⁸⁵. Therefore the closing of international and local provincial borders was critical to minimising further spread and safeguard against further deterioration of general public health.

Further limitation of rights were imposed on the right of religion, belief and opinion⁸⁶ which protects uninhibited observance of and practising of religion. Specifically, under levels four and five of lockdown restrictions, the gathering of large crowds were prohibited to prevent a surge of virus contraction and transmission. The complexities of the pandemic for protection of human rights, as enshrined in the Constitution, while complying with the legislated measures to protect the right to life and health for all in South Africa, continue to coexist in tension.

⁸² Van Staden, M. (2020). Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa. *African Human Rights Law Journal*, 20(2), 484-511.

⁸³ The right to freedom of movement and residence declares that everyone has the right to move freely; to leave the Republic; enter, remain in and reside anywhere in the Republic, as well as the right to have a passport.

⁸⁴ Four COVID-19 variants were detected, namely; the Alpha variant which was found in samples from patients in the UK, the Beta variant was the second that was detected in South Africa and found to affect younger age groups compared to previous variants, it soon spread into the UK due to international travel. The third variant discovered was the Gamma variant which was detected from Brazil and lastly, considered the most perilous, fastest and fittest strain of the four, the Delta variant was first detected in India and rapidly spread to SA and other parts of the world.

⁸⁵ Roy, B., Dhillon, J. K., Habib, N., & Pugazhandhi, B. (2021). Global variants of COVID-19: Current understanding. *Journal of Biomedical Sciences*, 8(1), 8-11.

⁸⁶ Section 15.



CHAPTER FOUR:
TOP HUMAN RIGHTS VIOLATIONS -
EQUALITY AND ESR

4

4.1. OVERVIEW

This chapter explores the top five human rights violations and complaints per province. An analysis of recommendations of key provincial investigative reports, which constitute a narrative to provincial statistics is reflected, as are common trends which have persisted over several years concerning economic and social rights (ESR) in South Africa.

As a state institution that supports constitutional democracy, the mandate, function and powers of the Commission are clearly outlined in respect to the requirement to monitor and assess the attainment of ESR for all who reside in the country. Specifically, section 184 (3) highlights that:

“Each year the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment”.

Notwithstanding the Commission’s investigations and enquiries⁹² regarding ESR violations in the last financial year and the directives put forth to enforce constitutional compliance, the advancement of social and economic rights for the poor and vulnerable in society have been weak at best. Government’s response to the impact of the COVID-19 pandemic on ESR has been marred by controversy, corruption and maladministration. Although it appears that government has resources to effectively respond to challenges relating to access to water and sanitation, food, housing and healthcare, the manner in which resources are allocated, directed, and managed is deeply problematic.

The Commission’s investigations, as well as those from other constitutional bodies, mandated to protect human rights and monitor the state’s responsiveness, have shown a disconcerting pattern of poor management on municipal level, which contributes to government’s inability to ensure attainment of rights for the poor and marginalised communities in our society. These issues remain a serious concern for the Commission, particularly as the effects of the plunging economy are incalculable during the COVID-19 pandemic.

ESR complaints continue to be among the most extensively reported and although this trend is unsurprising given South Africa’s history of entrenched inequality, it is most concerning that minimal progress in the realisation of these particular human rights in the country has been achieved. The residual effects of colonialism and apartheid continue to be evident in generational cycles of poverty and inaccessibility to socio-economic opportunities. While there is cognisance of progress, systemic violence continues to shape South African society as well as persisting racial inequality⁹³.

⁹² A detailed overview of national and provincial investigations and enquiries is provided in Chapter 7 of this report

⁹³ Mariotti, M., & Fourie, J. (2014). The economics of apartheid: An introduction. *Economic history of developing regions*, 29(2), 113-125.

The Top Five Rights violations were the rights to:

1. Equality;
2. Labour relations;
3. Access to healthcare services, water, food and social security;
4. Just administrative Action and,
5. Arrested, detained and accused persons.

However, figure 5 below reflects a distinct shift in the last financial year which, when compared to previous years, is uniquely characterised by the exceptional strain of the COVID-19 pandemic on human rights complaint trends. While equality, Section 27 rights, and just administrative action have consistently remained top violations, labour relations and human dignity featured more prominently during the national state of disaster.

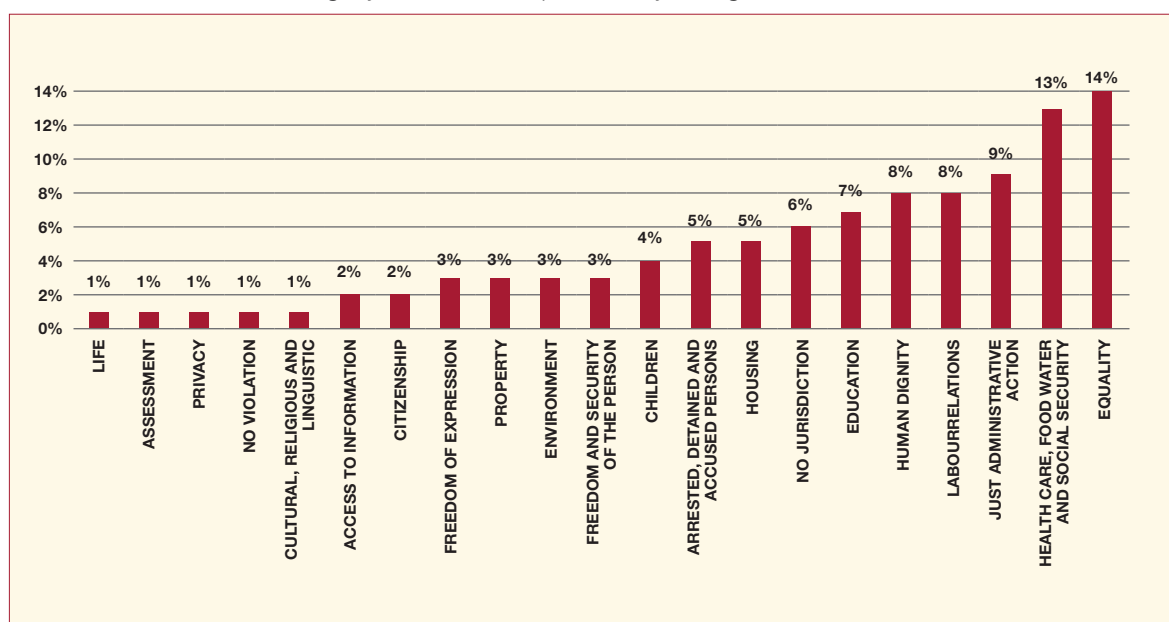


Figure 5: A scaled statistical indication of human rights violations over the 2020-2021 period

Furthermore, despite falling outside of the top five rights violations, education and housing also ranked high and these violations have particular impact on the rights of children. Through monitoring, the Commission observed that poverty continues to affect this vulnerable group in our society. In a 2021 report titled ‘*South Africa’s poor little children*’, a vivid illustration is provided on the extent of multi-dimensional poverty experienced by minors aged 0 – 17 years⁹⁴. Multidimensional child poverty exists in households where children are deprived of at least three of the seven dimensions of healthcare, (1) housing, (2) nutrition, (3) protection, (4) education, (5) information as well as (6) water and (7) sanitation. This was evident during the COVID-19 pandemic with the closure of schools, meal programmes, access to transport and inaccessibility to data which exacerbated the impact on children and, in particular, special needs learners and those residing in rural areas.

As shown in Table 12 below, a comparative analysis over the last nine financial years is provided to demonstrate the top five violations, which were further intensified by the impact of the COVID-19 pandemic. The data shows a discernible increase of equality complaints with a peak of **827** in the 2019 – 2020 financial year. Although this figure has dropped in the year under review, it remains considerably higher than when complaint trends analysis reporting commenced in the 2012 – 2013 financial year. Furthermore, violations of Section 27 rights are at their highest with **704** complaints in the period under review. Intriguingly, this differs only marginally from the recorded number in 2019 – 2020 which suggests that existing concerns with the realisation of these rights continued in the period under review with little to no change to circumstance.

⁹⁴ Full report can be found here: [South Africa’s poor little children | Statistics South Africa \(statssa.gov.za\)](https://www.statssa.gov.za/publications/20210101/20210101.pdf)



Given the landscape in the country during the pandemic, it is likely that delivery projects were slow or delayed, and that many affected persons did not have the means to continue challenging violations through traditional means, such as actions in protest or through the courts. During this period, priorities shifted from a struggle for wider social justice to a fight for life. Large numbers of people in the country were dealing with health concerns, fear of the virus, anxiety as well as contending with the loss of family and friends. Viewed in the context of the inter-related nature of these rights, the statistics remain a concern for both access to basic services and access to justice. Rights violations on human dignity have also seen a steady increase, with a marginal difference in the two last financial years.

Table 12: Top five rights violations over nine-year period

Right/s Violations	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021
Equality	511	556	493	749	705	747	783	827	771
Health Care, Food, Water And Social Security		361	338	428	631	492	595	702	704
Just Administrative Action	592	636	366	379	407	457	452	641	501
Labour Relations	574	527	334	440	426	397	386	457	435
Human Dignity	353					389	411	446	425
Arrested, Detained and Accused Persons	536	655	473	409	443				

A total of **5 464** complaints were received by the Commission in the last financial year alone, with equality complaints as the highest rights violation. The Bottom Five rights have remained consistent over time, with political rights; slavery, servitude and forced labour; language and culture; the right to assembly, demonstration, picket and petition, and lastly; freedom of religion, belief and opinion presented the least complaints over the last financial year, similar to previous years.

Table 13: Total number of complaints per category

Political Rights	1	
Slavery, servitude and forced labour	1	
Language and Culture	4	
Assembly, Demonstration, Picket And Petition	5	
Freedom of religion, belief and opinion	10	
Access To Courts, Independent Tribunals And Forums	15	
Freedom Of Trade, Occupation And Profession	15	
Freedom of movement, residence, passport and to leave the Republic	26	
Life	28	1%
Assessment	30	1%
Privacy	39	1%
No Violation	44	1%
Cultural, Religious And Linguistic Communities	51	1%
Access to Information	101	2%
Citizenship	146	2%
Freedom of Expression	149	3%
Property	172	3%
Environment	180	3%
Freedom And Security Of The Person	180	3%
Children	204	4%
Arrested, Detained and Accused persons	262	5%
Housing	276	5%
No Jurisdiction	321	6%
Education	368	7%
Human Dignity	425	8%
Labour Relations	435	8%
Just Administrative Action	501	9%
Health Care, Food, Water and Social Security	704	13%
Equality	771	14%
Grand Total	5 464	

Without question, all human rights should be fully accessed, enjoyed and protected as they are fundamental to leading a dignified life, although the top five rights are an essential indication of prevalent complaints. The value of such trends is to gauge the level of awareness of particular rights and to inform the key areas of concern to which additional resources and alertness from the operational units within the Commission are warranted. It also serves as a barometer for trends violations which have continued unabated without meaningful progress being achieved by the state. Moreover, top rights violations signal to the Commission the extent to which preventative action and accountability measures are so far ineffectual and in need of active review.

It should further be noted that reporting on complaints pertaining to rights enshrined in Section 27 of the Constitution, that are those relating to healthcare services, food, water and social security, have been consolidated. The Commission recognises that these rights are distinct and yet mutually supportive. Additionally, for the purposes of objective interpretation, the Commission remains cognisant that it is not the only constitutionally mandated body to which alleged violations are reported and therefore, these statistics do not purport to be a full reflection of the scale of violations in respect of the rights discussed.

4.2. EQUALITY

The Promotion of Equality and Promotion of Unfair Discrimination Act 4 of 2000 (PEPUDA) gives effect to section 9 of the Constitution to prohibit unfair discrimination and harassment, promote equality and prevent hate speech. Particularly, section 7 of PEPUDA prohibits discrimination based on race, including:

- a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;
- b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;
- c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate, but which is actually aimed at maintaining exclusive control by a particular race group;
- d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;
- e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.

A special consideration of the right to equality in analysing trends in complaints is warranted considering that it has consistently been the highest rights violation reported to the Commission. Of these complaints, the majority emanate from discrimination on the basis of race. Inequality in South Africa is endemic and results in the negation and violation of numerous other basic rights preserved within the Bill of Rights. Deleterious race relations which have remained unresolved since the advent of democracy reached a fatal peak during the July 2021 civil unrest, which culminated in people being killed in Phoenix, KwaZulu-Natal, as a result of violence allegedly spurred by racial tensions. Although this event falls outside of the current period of reporting, it serves as a poignant reminder of the racial and ethnic divisions which persist in South Africa.

Furthermore, discernible violations of the right to equality have been evident in the role of social media as an anonymous and untrammelled outlet for publishing prejudiced views and hate speech. Leading up to and after the July 2021 civil unrest, the country continues to be embattled by microcosmic incidents of verbal and physical racially-motivated altercations between citizens. The Constitution places a premium on equality, dignity and social cohesion, although it is clear that there remains a deep need for substantive and concerted effort toward achieving a culture of national unity.

Figure 6 below depicts the breakdown of equality violations based on various categories, all of which are fundamental to human dignity and enshrined in Section 10 of the Constitution. The Commission remains committed to ensuring that discrimination on all of the listed grounds in Section 9 of the Constitution are prevented, and in the event that violations are reported, that they are addressed steadfastly. Combating discrimination remains a major challenge, particularly on the grounds of race, which continues to be the main complaint in so far as equality is concerned. In the 2020-2021 financial year, **60%** of equality complaints related to race.

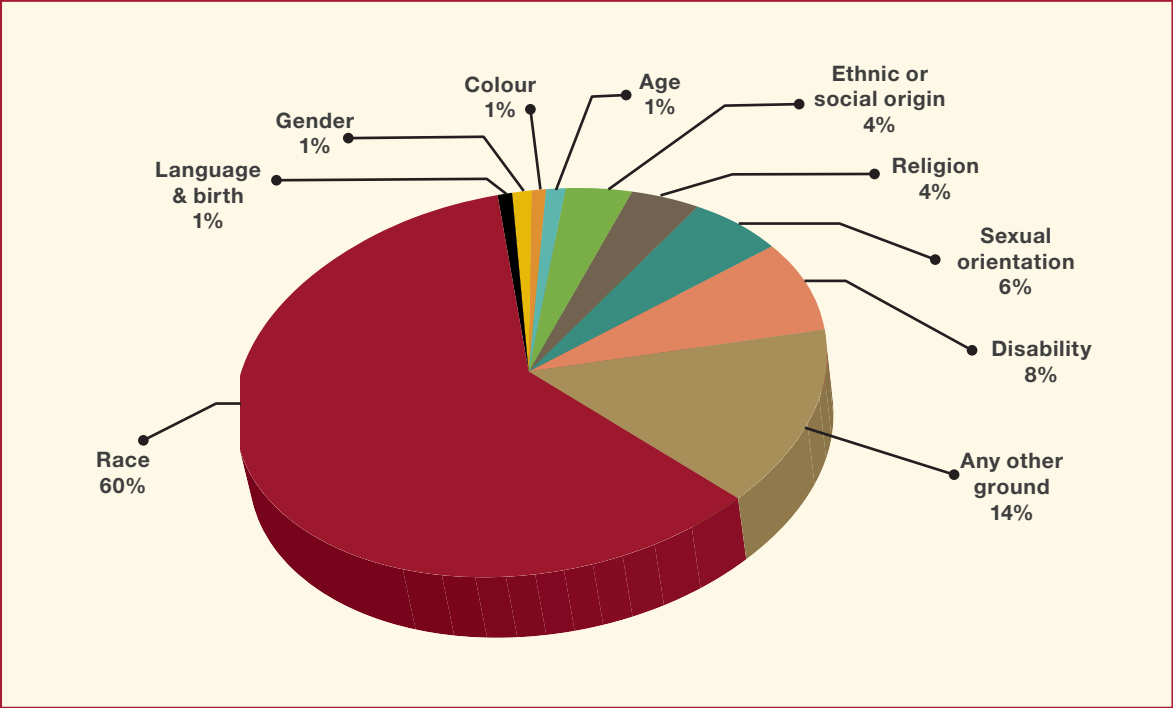


Figure 6: Distribution of categorised equality complaints received in 2020-2021

It is of grave concern that the Commission still receives complaints of inequality and of this magnitude. The post-democratic project for the last 27 years has been to eradicate all forms of discrimination, particularly on the basis of race which was rooted in systemic segregation laws. The country’s social reality, influenced by the socio-political landscape, indicates caustic race relations and the continuous need for discursive and actioned collective healing. As shown in Table 14 below, apart from issues pertaining to racial discrimination, a notable proportion of the complaints received pertained to discrimination on the grounds of disability 8% and sexual orientation 6% respectively of the total complaints received during the 2020-2021 financial year.



Table 14: Disaggregated equality complaints by percentage

Belief	1	
Culture	1	
Sex	2	
Colour	4	1%
Language & Birth	5	1%
Gender	9	1%
Age	11	1%
Ethnic or social origin	27	4%
Religion	30	4%
Sexual orientation	50	6%
Disability	59	8%
Any other ground	108	14%
Race	464	60%
Equality	771	

4.2.1. Equality Complaints

Table 15: Equality complaints per provincial office

Province	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	Average per Year
Eastern Cape	24	13	22	20	18	31	27	33	24	24
Free State	45	46	19	57	70	75	83	74	59	59
Gauteng	219	219	185	265	257	250	200	155	122	208
KwaZulu-Natal	33	63	70	183	98	112	118	106	121	100
Limpopo	16	49	43	46	74	44	45	64	74	51
Mpumalanga	31	29	25	19	23	34	45	37	30	30
Northern Cape	29	36	27	32	30	32	26	36	30	31
North West	28	27	12	34	30	34	57	84	46	39
Western Cape	86	74	90	93	105	135	182	238	265	141
Totals	511	556	493	749	705	747	783	827	771	683

The table above illustrates the total number of Equality related complaints recorded by the Commission per provincial office. On average, the highest number of Equality related complaints were received in Gauteng with an average total of **208** complaints, followed by the Western Cape which reported a total of **141**.

4.2.2. Equality complaints per ground of discrimination

Social cohesion is impeded by persisting inequalities and entrenched systemic violence. In the year under review, complaints relating to discrimination on the basis of race were the highest at **464**. Even though the numbers show a slight reduction from the previous two financial years, this does not represent the full extent and gravity of the problem.

Table 16: Equality complaints per ground of discrimination over nine-year period

EQUALITY	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021
Equality – Race	208	297	292	505	486	496	509	511	464
Equality - Disability	45	70	62	66	69	80	76	78	59
Equality - Sexual Orientation	14	22	17	26	24	38	50	52	50
Equality - Ethnic or Social Origin	39	55	35	47	27	30	31	35	27
Equality - Religion	17	34	36	22	22	29	35	25	30
Equality - Any other ground	140	17	13	22	21	25	40	82	108
Equality - Gender	12	19	11	18	9	21	16	13	9
Equality - Age	10	20	13	24	21	15	14	13	11
Equality - Language & Birth	4	3	2	7	5	5	3	4	5
Equality - Culture	4	6	8	5	13	3	3	3	1
Equality - Colour	8	1	1	0	3	2	3	6	4
Equality - Sex	4	2	2	3	2	1	1	2	2
Equality - Marital Status	3	6	0	1	1	1	0	0	0
Equality - Pregnancy	1	2	0	1	2	1	1	0	0
Equality - Belief	2	1	1	2	0	0	1	3	1
Equality - Conscience	0	1	0	0	0	0	0	0	0
Total	511	556	493	749	705	747	783	827	771

4.3. EQUALITY COURTS

A joint research report⁹⁵ published by the University of the Witwatersrand and the National Research Foundation (NRF) highlights that Equality Courts have become increasingly accessible since their inception, almost 20 years ago, in 2003. However, this has not necessarily been the experience of the Commission as there were several concerning issues raised with the Department of Justice (DOJ). In general, the Commission has experienced low levels of awareness by court functionaries and there has been low uptake of these courts. The Deputy Minister of Justice has shown a keen willingness to address challenges, strengthen the courts and enhance uptake.

Notwithstanding the limited uptake, the operation of Magistrate Courts in handling equality complaints proved to be essential – especially in the social media era where racist incidents quickly go ‘viral’ and offenders are held accountable in Equality Courts and to some respect, in full view of the public⁹⁶. Awareness and access to Equality Courts have enhanced active citizenry, less tolerance for bigotry and subsequent swift action against culprits. This has largely contributed to resonant calls for improved social cohesion and the recognition that the project of post-apartheid nation building requires all who reside within South Africa to respect and demonstrate the values upon which the country’s democracy was established.

To promote access to justice, equality complaints are resolved either through ADR mechanisms or through litigation. The Commission frequently assists individuals to have their matters heard in the Equality Courts⁹⁷. In most instances where the complaint concerns allegations of racial discrimination, the Respondents are ordered to pay a fine for damages and provide an unconditional apology. While it is acknowledged that compensation in the form of money cannot restore the harm suffered or the impact that racial discrimination has on one’s dignity, monetary compensation can add to the weight of the apology. It also signals to the Respondent that such matters cannot be taken lightly and that inter-group solidarity is paramount to South Africa’s democracy.

However, in the year under review, serious challenges have been identified in so far as equality matters are concerned. For instance, the LPO reported a consistent refusal by the Limpopo High Court to hear equality matters. As per section 16 of the Equality Act, 2000, every High Court is an equality court for the area of its jurisdiction. The Limpopo High Court, Polokwane however has declined to hear new matters which the Commission instituted for the last two years since 2019. This unfortunately resulted in matters, some requiring declarations of unconstitutionality of legislation, to be referred to a lower court. Consequently, no new precedent in respect of the Equality Act has emanated from the High Court in the Limpopo province, which posed a major concern for the Commission.

Several provinces have access to justice pertaining to equality through the High Courts as determined by the mandating legislation. However, this access is not consistently extended to vulnerable complainants in the Limpopo province. The argument of equal access to justice based on geo-demographics is an issue which should continuously be explored.

Violations of the right to equality on the grounds of race continue to be the highest reported ground of unfair discrimination, with a significant number of such complaints constituting race-based hate speech. In 2020 the NWPO investigated 9 equality complaints, 3 of which were hate speech related and referred to the Equality Court for adjudication. The NWPO also dealt with equality related complaints relating to discrimination on the basis of sexual orientation, disability, ethnicity and social origin. A further 6 complaints alleging violations of the right to dignity were reported in the North West. As has been recognised in our law, dignity often intersects with other basic rights such as environmental or equality rights.

95 The Equality Courts in South Africa: A Research Report of the NRF South African Research Chair in Equality, Law and Social Justice, School of Law, University of the Witwatersrand.

96 The Penny Sparrow and Adam Catzavelos incidents are examples of the power of social media in demanding justice and the insistence of human dignity for all.

97 Chapter 4 (ss 16-23) of PEPUDA

4.4. HEALTHCARE, FOOD, WATER AND SOCIAL SECURITY

On average the Commission recorded a total of **499** complaints relating to Health Care, Food, Water and Social Security annually.

Table 17: Section 27 complaints received over nine-year financial period

Province	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	Average per year
Eastern Cape	21	29	44	48	49	56	87	69	70	52
Free State	25	22	26	34	50	65	65	66	67	47
Gauteng	32	49	57	71	74	76	41	36	28	52
Kwazulu-Natal	17	22	32	34	48	57	58	76	77	47
Limpopo	30	59	62	54	42	57	65	111	118	66
Mpumalanga	22	45	18	20	236	22	42	52	38	55
Northern Cape	18	39	32	24	30	51	73	103	60	48
North West	27	40	24	85	37	37	49	55	103	51
Western Cape	44	56	43	58	65	71	115	134	143	81
National	236	361	338	428	631	492	595	702	704	499

Community members from the City of Tshwane reported that raw sewerage was polluting the drinking water being supplied to the communities and negatively impacting on animals and aquatic life. A formal complaint was lodged against the City of Tshwane with complainants stating that the water was polluted and contaminated due to malfunctioning of the Waste Water Treatment Works (WWTW). Furthermore the Commission was informed that due to the malfunctioning of Baviaanspoort WWTW, raw sewerage was being discharged into the Pienaar River and from Pienaar River into the Roodeplaat dam that provides water for?

Following the complaints about the Baviaanspoort WWTW and ongoing complaints received by people living in Hammanskraal, the Commission convened an inquiry into the state of the WWTW's in the city of Tshwane. The Commission's investigative report concluded that WWTW's and its consequent pollution of South African water resources be declared a national disaster in accordance with the Disaster Management Act.

Following its investigation the Commission recommended that a National Water Care Entity be established for a more effective response to the challenges, to serve as a central point of expertise and integration for the proper management of waste water services in the country. The purpose of such a mechanism would be to ensure that the persistent issues around the WWTW were holistically addressed, as well as pooling and harnessing existing resources in the sector. Furthermore, monitoring the effectiveness, efficiency and need of communities through a wider lens in the region was essential.

The Commission found that there was a general neglect of waste water treatment infrastructure which resulted in the pollution of waterways and the destruction of ecosystems. Further, the continuous failure by the relevant authorities to attend to the repair and maintenance of waste water treatment infrastructure was threatening the main sources of drinking water and further affecting the health of members of the affected communities.

Similarly, in the North West province, several complaints related to lack of access to sufficient water in various communities and, as a result thereof, many communities had challenges with complying with the lockdown regulations (i.e maintaining hygiene). The NWPO registered 52 complaints related to allegations of the violation of the rights in terms of section 27 of the Constitution. Most of these complaints related to the violation of the rights to have access to sufficient water of appropriate quality. The complaints relating to inadequate access to water invariably also include a lack of access to basic sanitation particularly with regard to informal settlements.

In light of the failure by the local government to execute their constitutional mandate to provide water, the NWPO held direct engagements with the provincial Department of Water and Sanitation (DWS) as the custodian of the provision of water resources. During this period the Department assisted the municipalities in their duty to provide access to clean water. A number of water tanks were donated by the Department to the Taung Local Municipality, Moretele Local Municipality and Madibeng Local Municipality.

The NWPO received a number of complaints and inquiries relating to covid-19 concerns and the spread of the virus due to shortage of Personal Protective Equipment (PPE) in the workplace and in schools. Some of these challenges were observed during the monitoring of North West schools on the compliance with the Disaster Management Act by the NWPO. Some health inquiries and complaints were submitted by educators living with comorbidities who alleged rejection of their applications by the Department of Education to work remotely as detailed in the Departmental Circular No. 23 of 2020. This, as alleged by educators, puts their lives at considerable risk should they contract the coronavirus.

The NWPO successfully intervened in these complaints by engaging with the respective school principals, District Directors and the provincial Department of Education to secure redress. These matters were successfully resolved through frontline resolutions and complaints handling.

4.5. PROPERTY AND HOUSING

In the wake of the COVID-19 pandemic, it became clear that social distancing and regular sanitization would pose a challenge for informal settlements all over the country. With some communities sharing communal taps and which are often located far away from most households, what should be the simple task of washing hands regularly to prevent virus contraction remained a concern. Shacks and other types of makeshift housing are generally connected back-to-back with little to no space for movement between them. Therefore physical distancing, cited repeatedly as an effective way of prevention, was a tough ask in the context of informal living conditions.

Housing investigations conducted by the Commission revealed that many South Africans continue to live in structures not fit for human inhabitation despite the clear stipulation in section 26 of the Constitution and the Housing Act of 1997 that all citizens have the basic human right to adequate, safe and dignified housing. It is the responsibility of the state, in its national, provincial and local capacities to provide the necessary resources and ensure the progressive attainment of this right. The implementation of stringent lockdown measures were necessary in the effort to curb the spread of COVID-19 and flatten the curve, however it had to be effected with due consideration to the poor.

Inaccessibility to adequate housing invariably means not having access to other essential services such as water and electricity, both of which are necessary for daily life. The locality of informal settlements are also notoriously distant from healthcare facilities, police stations, public transportation, places of work and schools; which further aggravates the challenging living experiences of the poor who have no other choice but to reside in such conditions. Social protection concerns are also a major issue as the connection between low socio-economic status and highly compromised physical safety have long been established, with excessive violent crimes frequently occurring in informal settlements compared to other communities.

The Commission's Gauteng Provincial Office investigated the extent of the need for adequate housing and upgrading of informal settlements to improve the safety and dignified condition within which residents live in the province. Specifically, the metros of Ekurhuleni, Johannesburg and Tshwane were evaluated for the proposed or implemented interventions toward community housing development in the effort to reduce, if not eradicate, the hazardous makeshift structures of informal settlements. The efficacy of the Upgrading of Informal Settlements Programme (UISP) was gauged in alleviating the vast housing and basic amenity challenges in the province.

The Commission's research shows that between one in six households in Gauteng metros currently live in makeshift corrugated iron structures and traditional dwellings. This is alarming considering that government has, since the dawn of democracy, pledged to resolve the housing crisis. Part of the crisis is located at the

municipal level where service delivery is the primary mandate. Gross underspending and mismanagement of budgets allocated in terms of Urban Settlements Development Grant (USDG), which is provided to aid cities with building infrastructure to improve living conditions, has stunted the formalisation of informal settlements throughout Gauteng. Maladministration, evidenced in the delays in procurement, improper subcontracting and poor project management, has led to the suspension of allocating the Grant to various metros whose residents need urgent housing development.

The Gauteng State of Human Rights Report for the period under review paints a clear and worrying picture of the prevailing systemic issues which maintain the status quo of human rights violations against the poor and vulnerable groups⁹⁸. Although the 2020/2021 national government budget review UISP as a successful component, the Commission's scrutiny of the cities of Ekurhuleni, Johannesburg and Tshwane show a greater need for housing development to be prioritised and the funds received from the fiscus to be appropriately managed toward the attainment of water, electricity, physical safety and dignity for all residents.

In the North West Province, 12 complaints relating to housing and property rights were received pertaining to building rights and ownership. There were also complainants which had requested the aid of the Commission regarding allegations of unlawful eviction. The Commission notes the close relationship between the right to property and the right against arbitrary eviction. Two complaints related to allegations of unlawful demolition of homes. Some of these matters are subject to pending investigations whilst others were referred to Legal Aid South Africa for assistance to lodge a spoliation application. Other noted complaints related to disputes over the ownership of land and RDP houses. Additionally, matters concerning the illegal eviction of farm dwellers were referred to the Department of Agriculture, Land Reform and Rural Development to ensure redress.

4.6. LABOUR RELATIONS

Table 18: Labour Relations complaints per province

Province	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	Average per year
Eastern Cape	56	62	35	59	41	24	41	47	40	45
Free State	55	30	24	58	48	72	82	97	98	63
Gauteng	156	146	101	83	62	39	21	7	10	69
KwaZulu-Natal	28	63	49	58	52	89	58	76	45	58
Limpopo	13	44	40	38	38	25	21	30	83	37
Mpumalanga	96	41	25	27	36	24	19	34	7	34
Northern Cape	37	17	7	2	15	39	39	30	9	22
North West	55	37	20	52	57	6	14	5	44	32
Western Cape	78	87	33	63	77	79	91	131	99	82
National	574	527	334	440	426	397	386	457	435	442

⁹⁸ Full report available here: <https://sahrc.org.za/home/21/files/SoHRR%20in%20Gauteng%202020-2021.pdf>

The period under review saw a slight decrease of 22 complaints related to labour relations. KwaZulu-Natal, Mpumalanga and the Northern Cape reported a substantial decrease in labour relations complaints for the period under review. Whereas Limpopo and the North West reported a considerable increase in complaints related to unfair discrimination and employer/employee relations in the workplace. The COVID-19 pandemic presented unique labour relations challenges around issues of permissible remote working, mandatory vaccination and an increasingly bleak labour market after colossal loss of jobs. It is also worth noting that over a nine year period, the number of labour relations complaints in Gauteng and Mpumalanga have consistently declined. These decreases may in part be attributable to closer working relationships between the Commission for Conciliation, Mediation and Arbitration (CCMA) and increased advocacy awareness interventions in these regions about the different forums⁹⁹ available for the determination of labour related matters.

4.7. JUST ADMINISTRATIVE ACTION

The Promotion of Administrative Act of 2000 (PAJA) was enacted to regulate the rights as contemplated by section 33 of the Constitution. Sections 33 (1) and (2) state that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”, and “everyone whose rights have been adversely affected by administrative action, has the right to be given written reasons”. The right to just administrative action allows citizens to demand acceptable treatment from the state and review decisions which may be deemed as unlawful or unfair.

The table below indicates that the Western Cape and Free State received the highest number of complaints in the period under review. Complaints increased across all provinces from the previous financial year, with Gauteng also showing a high increase comparatively.

Table 19: Complaints received for just administration action over nine financial years

Province	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	Average per year
Eastern Cape	52	64	74	101	82	78	38	43	22	62
Free State	44	26	2	3	6	36	68	95	88	41
Gauteng	235	217	130	104	75	39	29	107	47	109
KwaZulu-Natal	81	76	23	11	33	40	47	74	68	50
Limpopo	39	73	41	3	1	0	1	5	4	19
Mpumalanga	17	23	33	44	76	47	52	70	48	46
Northern Cape	41	26	9	7	8	81	28	37	64	33
North West	40	39	9	26	47	8	42	47	31	32
Western Cape	43	91	45	80	79	128	147	163	129	100
National	592	635	366	379	407	457	452	641	501	492

⁹⁹ In addition to the CCMA, relevant forums include the Judicial Inspectorate for Correctional Services (JICS), Legal Aid South Africa (Legal Aid-SA), the Independent Police Investigations Directorate (IPID) or applicable Bargaining Councils in the context of a labour dispute, unfair dismissal, or workplace discrimination to handle complaints extensively.

A large, stylized golden graphic of several human figures with their arms raised, set against a white background. The figures are arranged in a row, with their arms reaching upwards, creating a sense of unity and triumph. The graphic is positioned in the center of the page, overlapping the white background and the red border.

CHAPTER FIVE: LITIGATION

5

5.1. OVERVIEW

This chapter reviews the strategic impact litigation undertaken by the Commission during the period of review. A statistical and narrative analysis is provided with regard to the effect of litigation on the national and provincial levels as a means of securing redress for violations of human rights through the courts. While Alternative Dispute Resolution is a vital mechanism to influence remedial action, litigation remains a potent approach to enforce redress and accountability. The COVID-19 pandemic yielded several unique and cutting-edge litigation matters in civil proceedings in the High Courts, Equality Courts and the apex Constitutional Court.

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 complaints handling procedures 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.

Through litigation where Alternative Dispute Resolution is unsuccessful, the Commission seeks to strengthen constitutional democracy and jurisprudence for equality in South Africa. As established in chapter 3, equality and socio-economic rights remain the most threatened and least addressed in the country. Thus, the broad aim of litigation for the Commission for the period under review was to safeguard against the further deterioration of human rights and marginalisation of vulnerable groups during the national crisis begot by the COVID-19 pandemic. Litigation in these instances were on account of the circumstances of the cases and proved to be the most effective recourse for the Commission.

5.2. COVID-19 IMPACT ON LITIGATION

The COVID-19 pandemic has had a substantial impact on access to and efficiency of litigation processes. This was particularly evident in Equality Court litigation within the Limpopo Province. In May 2020, the National Department of Justice and Constitutional Development issued a directive under Regulation 4(2) of the Regulations under the Disaster Management Act, 2002. This directive determined that civil cases, which were not deemed as urgent, would be removed from the roll. It also provided for a discretion by the relevant judicial officer on whether they wished to indeed proceed with some matters via video conferencing.

Unfortunately, some courts determined that equality court matters were not urgent, and accordingly, relegated them as a lesser priority until the adjusted levels under the Regulations of the Disaster Management Act, 2002 allowed for them to be presented.

The approach created a backlog not only in the handling of the Commission's matters within the province, but in general for all civil litigation matters. A similar directive was issued in February 2021 under Government Gazette No. 44133 which again provided a discretion to the judicial officer to put on hold any civil matter which was not deemed urgent.

5.3. LITIGATION FROM NATIONAL OFFICE

Below is a detailed outline of the high profile cases litigated during the 2020-2021 financial year, some of which were of significant public interest and strategic impact.

After having to adjust to the new normal of online hearings, the Commission was able to successfully fulfil its mandate of protection of human rights in a number of now seminal matters that were heard before the Supreme Court of Appeal and the Constitutional Court.

In *Women's Legal Centre (WLC) v President of RSA and Others - Essau v Essau and Others*,¹⁰⁰ the Commission was the seventh respondent in this matter, which has moved through several levels of court over the past 5 years. In the SCA the court declared that the Marriage Act 25 of 1961 and the Divorce Act 70 of 1979 are inconsistent with ss 9, 10, 28 and 34 of the Constitution of the Republic of South Africa, 1996, in that they fail to recognise marriages solemnised in accordance with Sharia law (Muslim marriages) as valid marriages (which have not been registered as civil marriages) as being valid for all purposes in South Africa, and to regulate the consequences of such recognition. The order of constitutional invalidity was referred to and heard by the Constitutional Court for confirmation on 5th August 2021.

The litigation involving Qwelane resulted in a seminal pronouncement by the Constitutional Court, long awaited by practitioners and other stakeholders.¹⁰¹ Following on an order of constitutional invalidity of the PEPUDA legislation by SCA, in which the Commission sought to confirm an order of constitutional invalidity handed down by the Supreme Court of Appeals, where the court found that section 10 of PEPUDA. The case was heard in the Constitutional court on 22 September 2020. Judgment was handed down on 31 July 2021, where the Apex court declared that section 10(1) of the Equality Act is inconsistent with section 1(c) of the Constitution and section 16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word "hurtful" in the prohibition against hate speech. This means the PEPUDA will have to be amended to bring it in line with the Constitution, and clarify when speech falls foul of Constitutional protection.

This position was further confirmed in the case of *Masuku*¹⁰², where the Commission appealed the decision of the SCA which deemed certain utterances by Bongani Masuku as not falling foul of section 16(2) of the Constitution. On appeal to the Constitutional Court, the first statement is declared to be harmful, and to incite harm and propagate hatred; and amounts to hate speech as envisaged in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Mr Masuku was ordered to tender an unconditional apology to the Jewish Community within thirty (30) days of this order, or within such other period as the parties may agree. Such an apology must at least receive the same publicity as the offending statement.

These two cases have clarified the law insofar as hate speech is concerned and has in effect increased the threshold for when speech will be found to fall foul of the protections afforded by the law.

100 *President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (612/19) [2020] ZASCA 177.*

101 *Qwelane v South African Human Rights Commission and Another (CCT 13/20) [2021] ZACC 22.*

102 *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another (CCT 14/19) [2022] ZACC 5 (16 February 2022).*

5.3.1. Whistle-blower protection cases

Whistle-blowers in South Africa remain some of the most vulnerable and unprotected members in our society. Legislation and policy frameworks have proven insufficient to protect whistle-blowers from victimisation as a result of harassment, violence and threat to life by perpetrators of corruption and illicit activity in the public sector. Corruption in South Africa is a malignant cancer eating away at the moral fibre of institutions whose mandate is to serve the public and deliver essential services. Rampant corruption is not only found to be characteristic within the functioning of key state institutions, but it is also evident in the private sector where shocking revelations of coordinated criminal acts by trusted corporations have affirmed that corruption besieges the country.

Corruption is not a victimless crime. Those who are committed to stemming out the rot of corruption within the state and in the private sector do so at the risk of their lives because they understand the cost of corruption for the poor and betridden in this country. When resources that are meant to provide essential services to millions whose survival depend on it, are embezzled and plundered by entrusted custodians, the cost is far too high to ignore. Whistle-blowers are human rights defenders who exercise their constitutional right and moral compass to hold perpetrators accountable for abusing and misusing their positions of designated authority.

The South African law and the government do not protect whistle-blowers adequately, which in itself perpetuates the erosion of values and vicious cycle of corruption. Without tangible culpability, severe punitive measures taken against errant officials and leaders, as well as effective legislated mechanisms to shield and compensate whistle-blowers, millions of South Africans will continue to suffer abject poverty. Economic growth and furthermore recovery within the context of the ravaging effect of the COVID-19 pandemic will be impeded as funds allocated to building infrastructure, skills development, employment creation and healthcare are pocketed for personal gain. Inequality will remain a distinctive feature of the country and the just society that was envisioned in the dawn of democracy will remain out of reach.

The cost of corruption when stripped bare eventually translates to the loss of lives of people; when they're murdered, driven to suicide or left so food insecure that they face the threat of starvation because they could not access the basic goods and services needed to survive. Corruption is an act of unequivocal apathy and direct deprivation of resources that people need to better their lives. Whistle-blowers are vital to upholding and strengthening constitutional democracy and it is the government's duty to secure their rights so that corruption, as a desecration to human rights, can systematically be rooted out of our society.

The Commission is committed to supporting human rights defenders and represented a whistle-blower who lifted the lid on tender irregularities and murder cases in KwaZulu-Natal. A complaint was submitted to the Commission in November 2019 after attempts were made on the complainant's life by enactors of corruption who sought to silence him. Regrettably, the ministerial office of the SAPS remained unresponsive to the urgency of the complainant's plea and need for state sponsored protection.

In March 2020, the Commission litigated on behalf of the complainant and the decision of the North Gauteng Division of the High Court granted the Commission's application for an order to compel the state to fulfil its duty and provide witness protection¹⁰³. This case was yet another unfortunate example of how organs of state fail when they do not cooperate or coordinate efficiently to live up to the ideals they have sworn to. The case together with others reported in the media indicates an urgent need for a review of the existing framework which regulates protected disclosures and protections for whistle-blowers. The Commission's triumph in obtaining state protection for the complainant was in recognition of the inviolable right to life, a right that every whistle-blower should not have to negotiate or forgo.

103 The order was made in line with Section 8 of the Witness Protection Act pending an application with Section 7 of the same Act.

5.4. LITIGATION BY PROVINCIAL OFFICES

5.4.1. Gauteng

Education has long been established as the gateway to a better life. However, higher education still eludes many South Africans especially those living in poor communities. Though it is understood that education is a powerful means through which the cycle of poverty and inequality may be broken, not enough has been done to facilitate this breakthrough by the State. The Economic Freedom Fighters Student Command vs Minister of Higher Education, Science and Technology & Others litigation provided the platform through which the Commission could intervene and bring to the attention of the courts, the far reaching findings and recommendations arising from a hearing into transformation of institutions of higher learning. In the litigation the Commission, as an *amicus curiae*, tabled its report entitled *Transformation at Public Universities* to support the motion for the protection of the right to higher education by increasing access to the University of South Africa (UNISA)¹⁰⁴.

The matter stemmed from the unilateral decision of the Minister of Higher Education, Science and Technology to direct UNISA to reduce its 2021 first-time entering student intake by 20 000 from a planned 57 857 to 37 857. According to the Minister, this decision was based on funding constraints. The applicants in the matter argued that the Minister did not have the power to dictate to the universities the number of students it may take. Moreover, even when a university strains beyond a condition attached to state funding, the applicants argued that the Minister was not empowered to cut down the number of potential students to be enrolled.

The applicants further argued that the decision of the Executive Committee of UNISA (Third Respondent), was to comply with the directive instead of working independently. Therefore the applicants argued that the decisions should be reviewed and set aside. The Commission submitted that the Minister's defence of financial constraints did not meet constitutional standards. Further, that the Minister was required to consider the consequences of the decisions on the vulnerable groups such as for First Time Entrants (FTEN)¹⁰⁵ students, and to give details of why and how it was impossible for such students to be accommodated.

The Commission pointed out the recommendations of its *Transformation at Public Universities in South Africa* report had not been considered adequately by the Department of Higher Education, the remaining respondents, and the Minister as the context provided in the report would have allowed for a more substantive and meaningful intervention by the Respondents. The Court ordered that the decision taken by the Minister to instruct UNISA to reduce the number of first time students by 20 000 would be set aside.

5.4.2. Limpopo

For the period under review, the Limpopo Provincial Office (LPO) instituted and managed eight litigation matters in the equality courts within the province. The majority of these matters related to discrimination based on race, gender and ethnicity. Three of these matters were instituted in the Limpopo High Court, Polokwane.

The popularization of social media has caused an increase in misconduct on platforms such as Twitter, Facebook and WhatsApp. As a result, three of the matters managed and instituted in the LPO emanated from users displaying discriminatory and abusive conduct through social media. One such matter, SAHRC v Mathothokga, has contributed to jurisprudence in respect of discrimination based on ethnic and social origin which has been markedly thin over 25 years.

104 Although children's rights and basic education are focus areas for the Commission, equitable access to higher education falls within the Commission's mandate to protect and monitor the rights of vulnerable groups, as well as to hold accountable executive members of government in legal proceedings.

105 FTEN or first-time entrants are students who have enrolled for the first time at a Higher Education Institution for the undergraduate level. Most of these students in South Africa come from historically disadvantaged backgrounds and would be assessed in terms of the NSFAS financial criteria to meet the financial means test in order to receive funding support. Therefore, by reducing the intake number, UNISA would have excluded a great proportion of these students from accessing the life-changing opportunity of higher education.

In July 2020 the LPO received complaints from several members of the public relating to a social media post which was widely disseminated made by one Hamilton Mathothokga, who was a student and comedian, popularly known as Mr Chase. The Respondent was found to have made remarks regarding the Vatsonga nation which the Commission determined to constitute hate speech, harassment as well as unfair discrimination based on ethnic and social origin. The remarks included, amongst others, statements referring to offering the lives of the Vatsonga nation as sacrifices to the Covid19 virus, as this specific ethnic group did not, according to him, bring any value to society.

In the Equality Court in Tiyani, the Commission highlighted the fragile nature of ethnic and tribal relations and social cohesion in South Africa, and specifically within the Limpopo Province in demonstrating context and impact of such remarks to the affected tribal group and to basic rights such as equality and dignity. The Commission was of the view that the remarks were harmful to our democracy and, if not rebuked, may further fuel tribal tensions within the country.

On 9 February 2021, the Equality Court in Tiyani Magistrate Court delivered a scathing judgement lamenting the actions of the Respondent herein. The Court indicated that the Respondent's right to freedom of expression as stipulated in the Constitution, did not outweigh the right to dignity and equality of the Mashangaan and Vatsonga people, who were at the receiving end of the prejudicial remarks. The Court further described at length, the negative effects colonialism had on the separation of Africans into homelands, and that this was exploited by the apartheid government. The Court also questioned why a 20 year old young man, who only lived, as the Court described it "with the hangover of apartheid", would share and propagate the views of oppressive regimes. This, the Court indicated, could only be as a result of indoctrination by others who actively seek to dismantle the objectives of the Constitution.

The Court found in favour of the Commission, and handed down the following order which included, amongst others:

1. That the comments made by the Respondent constituted hate speech and harassment based on social and ethnic origin, culture and language;
2. That the Respondent pay damages to an NGO identified by the Commission which works directly with social cohesion matters promoting the rights of the Vatsonga and Mashangaan ethnic groups;
3. That the Respondent apologises on all his media platforms for the abovementioned transgressions.

The Court was also confronted with the predicament that, although the Respondent was found to be in contravention of the Equality Act, he presented limited means of income and would be unable to pay the fines. To address this, and to prevent Respondents who transgress the above mentioned Act from thinking they may propagate inflammatory and harmful statements without having to be held accountable for such conduct, the Court made an order in terms of section 21 (2)(n) of the Act which directed the clerk of the Equality Court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation.

The judgment was welcomed and lauded by the Commission as it was novel in its application of section 10 of the Equality Act towards the protection of the rights of persons belonging to specific ethnic groups. The Court was meticulous in measuring the rights of the Respondent against the rights of those affected, and confirmed that although the Respondent meant the statements as a "joke", that his intent was irrelevant.

The LPO viewed the judgment as a warning to all those who moved to hide their bigotry under the mantle of comedy and freedom of expression. Furthermore, the Commission committed to continue to expose and pursue those who stray from the mandate of social cohesion derived from the Constitution.

5.4.3. KwaZulu-Natal

As strategic impact litigation in the case of *SAHRC v Msunduzi Local Municipality & Others*,¹⁰⁶ the Commission's KwaZulu-Natal Provincial Office brought an urgent application in the Pietermaritzburg High Court against the Msunduzi Municipality for the deterioration and poor state of the New England Road landfill site in Pietermaritzburg.

Given the Commission's constitutional obligations to promote, protect and monitor the observance and attainment of human rights, the manner in which the Municipality was operating and maintaining the Landfill site had been of great concern to the Commission due to its considerable impact on the environment and the quality of life for the citizens of Pietermaritzburg. One of the communities that had been acutely affected by the landfill site is the Township of Sobantu, which is located in close proximity to the site. The effects of the frequent fires at the site also significantly affected local schools and surrounding businesses.

The application was instituted following the Commission's investigation into the state of the landfill site, which had been the source of several fires that had engulfed the city of Pietermaritzburg on various occasions. The Commission's initial investigation revealed that the fires were commonplace and that they occurred regularly. The landfill site and the manner in which it has been managed and /or operated by the Municipality had resulted in it being plagued with numerous challenges over several years which contributed to the emission of strong toxic fumes, which pose severe threats to the sustainability of the environment and to the health, livelihoods and well-being of residents in both the local and surrounding communities. Given the widespread impact of the effects of the landfill site, the Commission's investigation also included engaging with a variety of interested and affected parties in order to assess the extent of the impact.

Both the Head of Department and Member of the Executive Council (MEC) for Economic Development, Tourism and Environmental Affairs in the KwaZulu-Natal Provincial Government were cited as Second and Third Respondents respectively in the matter given their roles and responsibility for waste management in the Province. The application was initially set down for a Rule Nisi on 11 December 2020 before the Honourable Judge R Vahed. The Rule Nisi was not granted and Judge Vahed stipulated time frames by which all parties were to file their respective opposing / answering affidavits. The Application was eventually heard and finalised on 28 May 2021 and Judge Rishi Seegobin delivered judgment in favour of the Commission on 17 June 2021.

The two-pronged court order / judgment included a declaratory as well as a structural interdict as per the initial relief sought by the Commission. In terms of the declaratory, the Court found the Msunduzi Municipality to be in breach of the Revised Compliance Notice and the Variation Waste Management Licence that was issued to it by the Department of Economic Development, Tourism and Environmental Affairs (Second Respondent). The Court further found the Municipality to be in breach of Section 24 of the Constitution and Sections 20 (b), 31L (4), 28 (1) and (3) of the National Environmental Management Act No. 107 of 1988 (NEMA). In addition, the Municipality was also found to be in breach of the National Water Act No. 36 of 1998 as well as its obligations in terms of international law.

The judgement was a vindication of the Constitutional rights of the citizens of Pietermaritzburg including the highly disadvantaged community of Sobantu as well as a victory for environmental rights. The judgement highlighted that the protection of the environment is vital for the enjoyment of many other rights that are enshrined in the Bill of Rights including the right to life. The Court's finding in this matter also emphasised that organs of state need to act in an exemplary manner in complying with their constitutional obligations taking into account that when a municipality fails, it renders the residents within said municipality vulnerable.

¹⁰⁶ *South African Human Rights Commission v Msunduzi Local Municipality and Others*, KwaZulu-Natal (8407/2020P) 2021 ZAKZPHC (17 June 2021).

Below are visual illustrations of the landfill site. Figures 7 and 8 are aerial visuals of the landfill site. Figures 9, 10 and 11 illustrate visuals of the landfill site and its poorly controlled operations, whereas image 6 provides an external view.



Figure 7: A map of the locality of the New England Road Landfill Site



Figure 8: The proximity of the landfill site to the Sobantu Township



Figure 9: Landfill debris/ waste



Figure 10: Waste pickers sorting through the rubble



Figure 11: A makeshift home in the landfill



Figure 12: An external view of the landfill site from Sobantu Township

5.4.4. North West

North West Province is one of the vast and predominantly rural provinces in South Africa with 65.1% of the population living in this rural area¹⁰⁷. In 2016 the population of the province was at 3 748 435¹⁰⁸, the estimated population in 2021 is at 4 023 505¹⁰⁹. The province has four (4) District Municipalities namely: Bojanala Platinum District, Dr Kenneth Kaunda District, Dr Ruth Segomotsi Mompati and Ngaka Modiri Molema District. These district municipalities have eighteen (18) Local Municipalities combined. Some of these Municipalities are placed under administration in terms of Section 139 of the Constitution¹¹⁰.

In the report¹¹¹ dated 28 October 2020 on the state of municipalities in the North West Province, the MEC for Cooperative Governance, Human Settlements and Traditional Affairs presented to the National Council of Provinces (NCOP) that the provincial government had made its intentions clear that 12 municipalities had to be placed under administration because of previous poor performance, not showing signs of improvement, previous roll-over applications which had not been approved, as well as those that were showing a risk of not performing in the current financial year. This was of grave concern considering the significant number of underperforming municipalities and the impact of poor service delivery to communities during the COVID-19 pandemic.

In terms of the Constitution, Section 100 stipulates that national government interventions in a provincial administration may take place when a province cannot, or does not, fulfil an executive obligation in terms of the Constitution or legislation. Embattled municipalities under the threat of being dissolved include Kgetlengrivier Local Municipality, Tswaing Local Municipality, Ratlou Local Municipality and Ditsobotla Local Municipality¹¹². In the North West province, reasons advanced for dissolving the affected municipalities are among others; their failure to execute their constitutional legislative mandate, being unable to provide services and elements of parallel political leadership which is reported to have caused political instability that undermines administrative capacity and service delivery. The dysfunctionality of these municipalities and lack of service delivery continues to adversely affect the residents of the North West Province and their human rights, such as their right to access to water, which is critical under normal circumstances, but even more so during the pandemic.

The North West Provincial Office (NWPO) was involved in seven Equality Courts matters during 2020/21, and three of these matters were finalised after obtaining a positive Court Order on behalf of the Complainants. As at 31 March 2021, the NWPO had four (4) matters pending before the Equality Courts. Notable litigation in progress in the North West province commenced in 2017 when the Gauteng Provincial Division of the High Court (Pretoria) granted an order compelling the Madibeng Local Municipality ("the Municipality") to increase water supply to the Klipgat C community. Despite the aforesaid court order, the Klipgat C residents repeatedly complained to the Commission that the Municipality was failing to supply sufficient water and that the community would go for days and sometimes weeks without access to water supply.

The contempt of Court application in respect of Part A (compliance with provision of interim supplies of water), was set down for a hearing 09 July 2021 at the Pretoria High Court, however, the hearing could not proceed due to an error on the Court's papers. The Commission is actively moving the contempt proceedings forward with a view not limited to securing access to water, but to encourage greater commitment to respect for the rule of law and compliance with basic responsibilities under the Constitution by the local government respondent.

107 <https://pmg.org.za/tailed-committee-report/661/>

108 <http://Wazimap.co.za/profiles/province-NW-north-west/>

109 <http://population.city/south-africa/adm/north-west/>

110 Section 139 outlines the conditions for provincial intervention in local government when municipalities fail to fulfil executive obligations which indelibly impacts on service delivery to communities.

111 https://www.parliament.gov.za/storage/app/media/Pages/2020/october/20-10-2020_National_Council_of_Provinces_Provincial_Week_2020/presentations/North_West/COGTA_Presentation_on_State_of_Municipalities_in_North_West.pdf

112 <https://www.iol.co.za/pretoria-news/news/dysfunctional-north-west-municipalities-under-threat-6986a7d8-8ff2-4b8c-b3bf-a880a57ac972>

5.4.5. Mpumalanga

Mpumalanga has an estimated population of 4 679 786, making it the fourth least populous province in South Africa¹¹³. In 2015, 54.6% of the population lived below the upper-bound poverty line, trailing Gauteng, the Western Cape, Free State and the Northern Cape.

The Mpumalanga Provincial Office (MPO) continues to litigate in an attempt to secure appropriate redress on behalf of victims of human rights violations. In the period under review, six litigation proceedings were instituted. Three of the instituted proceedings were strategic, whilst the other three were instituted in the lower Equality Courts. In addition to the newly instituted matters, six Equality Court matters were carried over from the previous year. Only one complaint involved discrimination on the basis of sexual orientation, and eight of the matters pertained to hate speech and prejudicial remarks which violated the right to equality and human dignity of the complainants.

The details of these cases emphasise persisting historical wounds, as pejorative remarks were uttered by White persons and directed to Black Africans. The Commission continues to protect and monitor social cohesion, as well as take the necessary steps to ensure redress. While some of these cases are ongoing, those for which rulings were made resulted in compensation to the complainant along with an unreserved apology for the harm caused by the respondent.

Below is a summative account of the strategic impact litigation cases which the MPO handled during the previous reporting year:

a) Aderemi Adesoji Obilana & The South African Human Rights Commission v The Member of The Executive Council for the Department Of Education, Mpumalanga; The Educational Labour Relations Council (ELRC)¹¹⁴

Litigation in this matter was instituted on 20 March 2020 in the Labour Court. The matter related to the enforcement of the award issued by the ELRC ordering the reinstatement of Mr Obilana by the Mpumalanga Department of Education ("the Department"), after it found that the termination of his employment was invalid. The reinstatement was ordered from 27 August 2018 to 27 August 2019 (the employment contract period). Mr Obilana obtained an enforcement certificate from the CCMA after the Department failed to reinstate him. The CCMA ordered compensation in his favour for the employment contract period. In turn, the Department obtained a Labour Court order which found the enforcement certificate to be invalid in that it purported to transform arbitral relief based on performance to an award sounding in money. The Commission assisted Mr Obilana in the Labour Court with a contempt of court application against the Department.

From a strategic perspective, the proceedings seek to strengthen observance of the rule of law and respect for court orders by the state.

b) Thabiso Kobedi v Bushbuckridge Local Municipality¹¹⁵

Litigation in this matter was instituted by the MPO on behalf of Mr Kobedi in the Bushbuckridge Magistrates' Court on 4 December 2020. In the complaint, Mr Kobedi alleged that in and around October 2018, he procured a site within the jurisdiction of the Municipality. He procured the site from a third party, who had procured the site from the Kgarudi Traditional Council. Mr Kobedi had commenced with the construction of his home on the site, even though he was not residing on the site. In May 2019, however, the Municipality demolished what would be his home without any notice or court order, resulting in him sustaining general and personal damages.

¹¹³ Stats SA. (2020). Mid-year population estimates, retrieved on 12 October 2020, from <http://www.statssa.gov.za/publications/P0302/P03022020.pdf>.

¹¹⁴ Case number 40151/2020

¹¹⁵ Case number 626/2020

The proceedings aimed to assist Mr Kobedi recover the damages sustained. At a strategic level, the MPO sought an order to the effect that a court order must be obtained for any demolitions of property, even if the property in question may not be deemed a “home” within the contemplation of section 26 of the constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE Act”). The MPO was therefore seeking to challenge the popular narrative that a court order is not necessary for the demolition of property that does not constitute a “home” within the contemplation of section 26 of the Constitution and the PIE Act.

c) Patrick Chiloane v Bushbuckridge Local Municipality

Similar to the aforementioned case, litigation in this matter was instituted by the MPO on behalf of Mr Chiloane in the Bushbuckridge Magistrates’ Court on 19 January 2021. In the complaint, Mr Chiloane alleged that in October 2018, he procured a site within the jurisdiction of the Municipality. He procured the site from the Kgarudi Traditional Council. Mr Chiloane had commenced preparations for constructing his would-be home on the site, even though he was not residing on the site. In this regard, he had moulded bricks and bought building material for the construction of his home, amongst others. In and around May 2019, however, the Municipality demolished what would be his home without a court order, resulting in him sustaining general and personal damages.

5.4.6. Free State

During the financial year under review, the Free State Provincial Office (FSPO) reinstated all matters that were removed from the Equality Courts after the long awaited Qwelane decision by the Constitutional Court. There were four pending Equality Court matters, of which three related to racially motivated pejorative remarks, a concerning and recurring issue across all provinces in the period under review. The remaining matter pertained to discrimination on the basis of gender, gender identity and sexual orientation, also an emerging concern for increased and focused intervention.

Two strategic impact litigation cases were handled by the FSPO for the period under review.

a) Cephass Motsari Motsoane vs SAHRC

This was an urgent application brought against the SAHRC. The applicant in this matter sought to review an administrative decision of the Commission regarding the handling of his complaint. The Applicant is a sentenced inmate serving his sentence at the Mangaung G4S Correctional Centre. From the documents filed in court, the Applicant wanted the SAHRC to be held liable for his continued stay in prison. Amongst others, the Applicant cited that the Commission had neglected and/or failed to discharge its constitutional obligation when it did not assist him in respect of a complaint that he had brought against prison authorities for alleged human rights violations.

In his papers the Applicant felt aggrieved that the Commission referred his complaint to the JICS as well as the subsequent dismissal of his appeal for refusal to investigate his complaint. The matter appeared before the opposed motion judge and was adjourned at the insistence of the court to afford the Applicant an opportunity to secure legal representation.

b) Evictions in Maluti a Phofung Municipality

The Commission undertook an investigation into evictions of residents by the Maluti a Phofung Municipality. The FSPO approached the Free State High Court seeking requesting an order in the following terms (a) compelling the Municipality to comply with the Commission’s recommendations (b) compelling the Municipality to relocate the Bokamoso evictees to Phuthalithaba, which is an area that has basic services. The evicted residents were initially cited as third Respondents and amounted to 105 households, and the fourth Respondents who were regarded as potential unlawful occupiers amounted to over 500 households.

These evictees had illegally occupied part of Farm 199, Bluegumbosch a vacant land adjacent to the QwaQwa University of Free State¹¹⁶.

The FSPO had several engagements with the Municipality with a view that the Municipality would be encouraged to comply with recommendations documented in the Commission's investigative report into the matter. The FSPO notably also engaged with the relevant provincial structures to secure support for compliance with its recommendations. Despite undertakings by the responsible authorities full compliance had not been demonstrated for a long period of time.

Litigation in this instance was a measure of last resort on behalf of the large number of people affected by protracted non-compliance. The aims of the strategic litigation are therefore directed to securing accountability and respect for human rights, constitutional bodies like the Commission and additionally to positively influence eviction laws in so far as they relate to "illegal occupants" in the complex milieu of access to housing related matters.

5.4.7. Eastern Cape

As was perceptible across the country, the Eastern Cape Provincial Office (ECPO) noted the impact of COVID-19 on the courts which had been under immense pressure to ensure that lockdown provisions were complied with, that employees are rotated and that offices are constantly disinfected.

Three equality related matters therefore remain ongoing in the Equality Courts in the Eastern Cape. The first and second matters involved hate speech and racism in which a Respondent is alleged to have called the complainant a '*fucken monkey*'. In the other separate matter is where a Respondent called the Complainant '*jou pussy kaffir*'. Both matters are still before the Court. The third pending matter is against the South African Post Office (SAPO). The matter stems from a complaint that the building of the SAPO is not accessible to persons living with disabilities. At the time of reporting, the matter was awaiting judgement.

5.4.8. Western Cape

The WCPO engaged in two matters of strategic value during the period, each involving vulnerable groups of people and carrying at the same profound implications for how the Commission as a constitutional body is able to react in the context of national disasters.

a) City of Cape Town - Strandfontein Homeless People Site¹¹⁷

The Commission undertook monitoring of an interim structure referred to as the Strandfontein Camp (the Camp) created by the City of Cape Town to house 'homeless persons' during the national state of disaster. The Commission undertook monitoring of the Camp together with monitors accredited by the Commission in support of the monitoring exercises. The City of Cape Town ("CoCT") applied for an interdict preventing monitoring of the Camp by the accredited monitors. In the main, the CoCT took issue with the standing of the monitors who had been appointed on the basis of section 11 of the SAHRC Act. The Court found that the Commission was entitled to appoint monitors and that they had in fact been acting lawfully and pronounced on the costs associated with the matter. Importantly, the court recorded remarks regarding the duty of cooperation by public authorities with constitutional bodies like the Commission. Regrettably, however, the litigation and the subsequent view of the court appeared to have been negatively received and interpreted by the CoCT which subsequently again attacked the Commission in a statement inferring a lack of independence by a Commissioner at the Commission. The matter highlights the fragile and often charged landscape within which the Commission must fearlessly and independently execute its mandate as a national human rights institution

¹¹⁶ Case number 827/2012

¹¹⁷ *City of Cape Town v South African Human Rights Commission and 10 Others*, Case no: 5633/2020

b) SAHRC vs City of Cape Town – Evictions, Housing Assembly, B Qolane and Others

The WCPO instituted an application in the Western Cape High Court against the CoCT with regard to unlawful evictions in various informal settlements in the WC and the undignified conduct against Mr Qolane during an eviction process. In widely reported coverage, images of a naked Mr Qolane being removed from his informal dwelling could be seen.

In August 2020, the Commission successfully interdicted the CoCT from evicting, and demolishing dwellings during the State of National Disaster without a court order. The interim order (PART A) extended to all dwellings whether occupied or not. The court recommended settlement of the matter between the parties, but such settlement could not be achieved. The CoCT argued that the occupied land was in fact much needed for social housing projects, and presented further arguments around its entitlement in law to spoliage such property without the need for a court order to do spoliage. The Commission however, highlighted the South African context, the ambiguity in law especially in respect of what may be deemed to be a structure and or occupied. In particular, the Commission expressed concern about the absence of controls and observance of human rights norms and standards in the implementation of evictions. The hearing was finalised on 27 November 2020. The court thereafter advised that the two presiding officers were not in agreement about the decision to be reached. In line with section 14(4) (b) of the Superior Courts Act (SCA), the court therefore directed that the matter be heard afresh before three other judges.

The CoCT appealed against the decision to grant the interim interdict to the SCA. The issues for determination before the SCA were:

- a) The extent of constitutional protection against unlawful and arbitrary deprivation of property in terms of section 25 of the Constitution;
- b) The City's ability to give effect to its constitutionally-mandated socio-economic and developmental obligations;
- c) Balancing the various constitutional rights implicated; and
- d) Whether the grant of an interdict against the appellants was justified in light of the facts of the matter, with reference to the specific facts relevant to each of the appellants.

The SCA matter is yet to be determined as is the recommencement of proceedings regarding the structural reforms sought by the Commission in PART B of the matter.

A large, stylized golden graphic of several human figures with their arms raised, set against a white background with a red curved border on the left. The figures are arranged in a row, with their arms reaching upwards, creating a sense of unity and achievement.

CHAPTER SIX: ALTERNATIVE DISPUTE RESOLUTION

6

6.1. OVERVIEW

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.” Mediation is therefore 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. On the other hand, negotiation is the process of conferring with parties in order to reach an agreement. Collectively, these three processes are referred to as Alternative Dispute Resolution (ADR).

In the Annual Trends Analysis Report covering the financial period 2017 – 2019, the Commission discussed at length the then newly introduced Rule 41A of the Uniform Rules of Court. Rule 41A instructed that parties intending on launching litigation in the High Court first attempt compulsory mediation before embarking on such litigation. In addition, the Rule made provision for mediation to also be reverted to at any time during litigation proceedings with leave of the Court. Also, in national legislation the Commission is designated as one of the public bodies to which meditation proceedings can be referred. However, long before the advent of Rule 41A, the Commission- while acting under its constitutional mandate to protect, observe and promote a culture of human rights - had adopted mediation as its primary and preferred method of dispute and complaint resolution. The nature of disputes and complaints encountered by the Commission demanded a platform engineered to centralize a space for common understanding and to restore broken social relations in line with the values and spirit of the constitution. A platform which, as far as possible, was independent of legalistic procedures, acrimony and ruinous litigation cost was necessary.

The COVID-19 pandemic added an unexpected dynamic to the reach, efficacy, and practical application of how ADR was carried out by the Commission. Since the wheels of justice had to keep turning despite impediments, the paradigm shift to resolving matters virtually was applied to ensure redress. The Commission took its cue from the country’s court system, which like many around the world, tends to be typically characterized by a conservative preference for technology. Notwithstanding the context of a traditional court system, online litigation proceedings proved successful during the pandemic. This ensured the safe and continued functioning of the judiciary even in the midst of great uncertainty.

The courts launched online filing systems. Furthermore, online hearings became the most common and preferred method of conducting court proceedings. Even litigation matters of high public importance during the 2020-2021 financial year were conducted online which allowed for the country to follow in real time. This resulted in increased critical public discourse around constitutional matters. The functioning of our judicial system was positively demystified for those who, before the pandemic, could not have travelled or possessed the resources to observe legal proceedings in the consistent manner in which publicly broadcasted legal proceedings had permitted. With this context in mind, the Commission’s approach to ADR inspired the convention of virtual meetings between complainants and respondents so as to facilitate and resolve matters cost effectively, speedily and without the intervention of the courts. Virtual ADR proceedings also prevented logistical issues involved in parties convening physically at common mediation venues. However, the Commission notes that with of virtual ADR also presented challenges, particularly regarding the systemic digital divide where reliable internet infrastructure is not accessible to all. The Commission continues to strategize solutions to fulfil the promise of access to justice and enjoyment of human rights for all.

6.2. PROVINCIAL ADR

6.2.1. Gauteng

ADR (Alternative Dispute Resolution), as a method of resolving disputes has proved to be the most appropriate course of action when dealing with complaints. The Gauteng Provincial Office (GPO) received two complaints dealing with racial discrimination at schools. Both complaints were lodged by groups of alumni and/or current learners. During the ADR process, parties shared their live experiences. The Commission heard testimonies from alumni, learners and staff members as it relates to their experiences of racism. The resolution of these two complaints aimed to effect systemic change and transformation in each school. The settlement terms therefore sought to implement lasting reforms and mechanisms that parties could utilize in the long term to address racial discrimination. Some of the settlement terms included:

1. The School will introduce policies which are aimed at promoting anti-racism and training for anti-discrimination behaviour and conduct targeted specifically on interventions directed towards addressing casual racism, micro-aggressions and tone-policing for members of staff and learners;
2. The establishment of a Diversity Advisory Committee (DAC) to advise it on, inter alia, the implementation and monitoring of its diversity and inclusivity plans and to ensure that it upholds its commitments to current and future learners. As part of the conciliation process, the Respondent agreed to share its Framework/Vision with the Complainants;
3. It was specifically stated by the Complainants, that the purpose of requesting the Framework/Vision is not to oversee the actions of the DAC and/or the Respondent, but to be informed of the direction and the nature of the change anticipated by the Respondent;
4. It is also recorded that the Respondent takes ownership and pride in a process of diversity and inclusivity to be driven by the Respondent;
5. The DAC will undertake introductory sessions and/or awareness campaigns to ensure that all stakeholders are aware of their presence and work at the School;
6. The School will put in place a grievance procedure for learners and members of staff to report any incidents of racism and discrimination and establish effective mechanisms to investigate cases of racism and other forms of discrimination including incidents
 - (1) from a member of staff to a learner;
 - (2) from a learner to a member of staff;
 - (3) between learners;
 - (4) between members of staff.

The changes to be implemented by the Respondent were to ensure that diversity and inclusion are owned by the Respondent in a substantive way, and that part of the efforts to eradicate racism would be to include awareness campaigns for all the schools and direct stakeholders. Furthermore, it was important to establish an accessible grievance procedure which would be implemented for all staff and students. The Respondent's role - as custodian for information sharing and awareness regarding matters of diversity and inclusion - would further reaffirm accountability.

6.2.2. North West

The North West Provincial Office (NWPO) used mediation to resolve a number of complaints expeditiously. Similar to the trends of other provincial offices, complaints involved hate speech on the basis of race and discrimination based on sexual orientation. The NWPO held two mediation processes, both of which were successful with parties signing settlement agreements.

e) NW/1920/0323: Obakeng Seitlholo // Ikanyeng Guesthouse

The complainant alleged that the Respondent refused to allow him and his male partner to stay in a guestroom because they are gay men. The matter was successfully mediated on 06 October 2020. A settlement agreement was signed by both parties.

f) NW/ 2021/0129: Kebareng Mokone// Andries Jacobsz & Cornelius Muller

The complainant alleged that the Respondents called him a “kaffir” and “baboon”. A mediation was held successfully on 08 February 2021. A settlement agreement was signed by all parties.

6.2.3. Free State

The Free State Provincial Office (FSPO) successfully resolved eight matters through ADR mechanisms in the period under review. Complaints ranged from unpaid provident funds, rental disputes between tenants and landlords, unpaid life insurance claims and prevention of access to personal information as well as social grant. In one particular dispute involving access to education, the Commission intervened to ensure that a learner was not discriminated against on the basis of sexual orientation.

In this matter, the Complainant was a parent of a learner who had refused to sign the school’s code of conduct which stated that all girls must wear the skirt uniform. The learner was expelled from school for refusing to wear a skirt as she was always more comfortable wearing pants. The Commission determined that the learner was being unfairly discriminated on the basis of her sexual orientation and was consequently denied access to education. The FSPO jointly engaged both the school principal and the Complainant. An agreement was reached with the school that the learner would be allowed to wear the uniform options of choice and would not be coerced to wear a skirt. The school also undertook to be more sensitive towards learners who could be in the same position in future.

The successful mediation of all eight matters through ADR resulted in restorative justice sought by complainants. Resolutions ensured that complainants were not dispossessed, prevented from accessing much needed provident funds, life insurance and basic education. The intervention of the Commission expeditiously corrected the human rights violations without undertaking the onerous process of litigation, which bears a prolonged psycho-emotional impact on both complainants and Respondents alike.

6.2.4. Mpumalanga

As with other provincial offices, the Mpumalanga Provincial Officer (MPO) utilised alternative dispute resolution mechanisms to address alleged human rights violations, however, not all outcomes were successful. A decline in the number of complaints finalised through ADR was primarily due to parties not being amenable to ADR. The impact of the COVID-19 pandemic also meant that ADR could not be attempted for the first half of the financial year.

Unsuccessful ADR pertained to matters involving discrimination on the basis of sexual orientation, eviction, and defamatory remarks. The matter of Mzwandile Ngubane/ Ralph Smeets was successfully resolved through ADR and involved a complaint in which Mr Ngubane alleged that one Mr Smeets used the racial slur “kaffir” on a residents’ WhatsApp group. The matter was settled between the parties on the basis that Mr Smeets would offer a public apology to all residents and attend a race sensitisation programme.

In another mediation undertaken on 24 February 2021 in which Mr Dhlongolo, a resident of Boschbank Farm owned by Mr Greyling, alleged that Mr Greyling closed off a stream where they (Mr Dhlongolo and his family) fetch water, consequently leaving them with no water source. Upon closer investigation the Commission found that there were two other water sources on the farm accessible to the complainant and his family. The matter was finalised shortly thereafter on the basis that there was no violation of a right.

6.2.5. KwaZulu-Natal

The KZN Provincial Office (KZNPO) has utilised ADR in respect of two complaints during the period under review. Parties generally have been reluctant to participate in ADR due to the effect of the COVID-19 pandemic on the process. The use of virtual platforms has not always proved suitable, considering that many people still do not have access to computers or personal laptops, stable network service, Wi-Fi, data and even emails.

The geographical and socio-economic aspects of a great proportion of the population in KZN have had to be carefully considered during the COVID-19 pandemic while the KZNPO pursues justice for complainants.

A mediation involving prejudicial remarks on a residential complex WhatsApp group chat between a tenant and a body corporate chairperson was held and the dispute successfully resolved. The Complainant felt deeply aggrieved, offended and humiliated by the comments which he considered a violation of his human dignity and equality. The Commission's intervention allowed the parties to ventilate their feelings and views on the matter, to which the Respondent tendered an unconditional verbal apology for the comments made and the resultant impact on the Complainant. The apology was accepted by the Complainant and welcomed in light of the fact that both parties live in one complex and would need to have cordial relationships into the future.

6.2.6. Western Cape

The Western Cape Provincial Office (WCPO) has utilised ADR to successfully address human rights violations in respect of the right to a basic education, equality, rights of the elderly and persons with disabilities, service delivery and others. Due to the COVID-19 pandemic and the restrictions put in place by the government through the implementation of the Disaster Management Regulations, a number of proposed matters that could be best resolved by means of ADR, during the 2020/2021 year, could not proceed. This was due to the parties being either elderly or without the necessary resources to partake in a virtual ADR, or where the matter was of a sensitive nature and parties were not comfortable with a virtual meeting.

Two notable examples of cases finalised or awaiting finalisation through ADR are set out below. Both pertain to protest action against unmet service delivery in the province.

a) Protests affecting service delivery in Botrivier – WC/1819/0434

The complaint emanated from wide-reaching protest action that took place in Botrivier in May 2020 which led to the closure of the N2 highway. The community was protesting against the municipality due to the ongoing lack of service delivery issues within the area. Similar protest action had taken place previously by the Community.

The WCPO met with the identified leaders of the protest to better understand the details of the concerns for the community. The community's demands were submitted to the Waterskloof Municipality for an immediate response. In response to calls from the Municipality to assist with the reopening of the national N2 roadway, the Commission engaged with the community and was able to secure a suspension of the protest allowing free use of the road and the reopening of schools. The Commission was also able to secure a direct address by the Mayor with the community to provide assurance that their concerns were taken seriously.

b) Protests affecting service delivery in Vredebes Housing Project in Ceres – WC/2021/009

The complaint emanated from wide-reaching protest action that took place in Ceres in the Witzenberg Municipal area due to a dispute with regard to the allocation of houses in the Vredebes Housing Project. A meeting between the Nduli community leaders and the Municipality did not result in a solution. The peaceful protest became violent as petrol bombs and stones were used. It was reported that a 12 year old child was shot, allegedly by the police, during the protests and that the child was subsequently hospitalised. A truck allegedly belonging to retail store, Shoprite, was set alight in the process and the R45 Road had to be closed as a result.

A mediatory process to bring calm and prevent further protest action and acts of violence was urgently implemented involving the Commission, community leaders, the SAPS, the local municipality and the Mayor to chart a constructive way forward. The intervention by the Commission was seen as necessary both as an independent and neutral body and as a mediatory agency, allowing constructive, calm engagement for better outcomes.



6.2.7. Eastern Cape

The Eastern Cape Provincial Office (ECPO) conducted four ADR's during the period under review despite the instability caused by the COVID-19 pandemic. All matters pertained to access to basic education. Two of the four matters involved the Respondent (a school) refusing to provide the complainant with the report cards of their children due to unpaid school fees. The report cards were needed to enrol the children to the next grade or transfer to a different school. Both matters were resolved amicably, although it is noteworthy that one of the mediatory sessions was conducted telephonically on account of inaccessibility during the national state of disaster.

In the third matter it was alleged that the Respondent (a school) expelled a learner who refused to cut their hair due to religious beliefs. The ECPO held a constructive discussion with the school and the School Governing Body (SGB) which led to an amicable solution and the learner was allowed to return to school.

The final matter involved an application for accommodation to an old age home by a couple who had been together for 40 years. Their application was refused on the basis that the home's policy stated that only married couples could apply and that the complainant ought to get married to be considered for accommodation. Despite remote mediation processes the Respondent put forward proposals that they would duly change their policy to include partnered relationships and that they would retrospectively place the complainants' name on the waiting list, an apology was also offered. However, the Complainants were unhappy with the proposals and refused to budge in this regard. As such the matter had to be continued on the basis that the ADR was unsuccessful.

6.2.8. Northern Cape

The Northern Cape Provincial Office (NCPO) dealt with three ADR matters during the reporting period, two of which were related to access to basic education. In the first and second matters the Complainants were two high schools who alleged that Eskom (Electricity Supply Commission) had disconnected their electricity supply due to unpaid accounts. The power cuts mainly affected the accommodation and hostels at the schools, which meant that students struggled to attend to their studies when the school's study facilities were closed. The NCPO engaged with Eskom and the regional representative to determine a plausible way forward. The Respondent, Eskom, was prepared to accept meaningful offers to settle the debt and thereafter reconnect electricity supplies.

However, due to serious financial constraints, the schools could not commit to making immediate payments. The Commission further intervened by approaching the Provincial Department of Basic Education (PED) to make funds available to settle the outstanding amounts. Eskom subsequently reconnected the electricity supply. The Complainants agreed to the NCPO facilitating discussions with Eskom to provide cheaper rates.

In the third matter, the Complainant alleged that a high school would not permit the enrolment of their child for Grade 12, this after he was previously withdrawn from the school to attend at another school closer to the Complainant's home. The decision to re-enrol the child in the first school was attributable to the fact that the new school did not offer the subjects required by the Complainant. The Commission was able to secure an amicable solution that would see the learner return to the school in the following academic year as two terms of the current academic year had already been completed and the learner would not be able to cover the work missed.

Lastly, in the fourth ADR matter, the NCOP received a complaint from a non-national who was born and raised in South Africa as a result of her father being South African. The Complainant informed the Commission that she gave birth to a blind child who at the time of lodging the complaint was ten years old. The Complainant had applied for admission of the child at a school for the blind in Kimberly, however her application was being denied because the child did not have the required documents required for admission to the school. The NCPO engaged with the principal of the school highlighting a judgement in which the Constitutional Court ruled¹¹⁸ that the Department of Education (DBE) should not refuse any child admission for basic education merely because the child does not possess the necessary documents, as this is a right which cannot be limited. The matter was resolved as both parties agreed that the principal would aid the Complainant with the enrolment processes and procedures so that the child can receive the education best suited for their needs.



118 In December 2019 the Grahamstown High Court ruled that the DBE could not remove or exclude migrant children, including illegal foreign children, from admittance into schools on the basis of inadequate identification documents. The court held that the right to education extends to all children within South Africa; furthermore, the DBE circular 1 of 2019 on the Admission of Learners to Public Schools states that all children must be conditionally admitted to school while their parents arrange the required documents.

A large, stylized golden graphic of three human figures with their arms raised, set against a white background. The figures are composed of simple, flowing shapes that resemble flames or a sunburst. The entire graphic is centered on the page.

CHAPTER SEVEN: NATIONAL/PROVINCIAL INVESTIGATIVE HEARINGS AND INQUIRIES

7

7.1. OVERVIEW

This section outlines the various investigative hearings and enquiries undertaken by the Commission upon receiving complaints of human rights violations. The structure employed in this chapter outlines the purpose of the hearing, complainants' written submissions and version of the issues, the respondents' replies on the allegations levelled against them, as well as findings and recommendations by the Commission. Section 184(2) of the Constitution empowers the Commission to independently investigate and ensure the protection, development and attainment of human rights.

The Commission's mandate is to monitor observance of rights, and to evaluate the extent to which recommendations have been duly fulfilled. The SAHRC Act, 40 of 2013 determines the procedures and frameworks to be adhered to in order to thoroughly and fairly conduct investigations on human rights violations. This is reflected in light of the effects of the COVID-19 on human rights over the 2020-2021 financial year.

7.2. INVESTIGATIVE HEARING AND INQUIRY REPORTS

7.2.1. Water Shortages in Emalahleni

In August 2020 the Commission released its final investigative report on the water shortages reported in Emalahleni local municipality in Mpumalanga following a series of hearings. Various complaints were lodged by residents about systemic water challenges over several years, some which occurred before 2018. In particular, complaints alleged that some areas had no water access at all, while others experienced unexpected and prolonged water cuts. In other parts of the municipality it was alleged that supplied water was not consumable as it was polluted and milky from an excess of magnesium and, at times it was also found to be muddy which further posed a threat to their health and wellbeing. There were further allegations that water purification infrastructure was ill-maintained and resulted in water which did not meet the national standard for compliance.

These various allegations pointed to a clear violation of the basic human right to have access to clean water in accordance with Section 27(1) (b) of the Constitution. Complainants lodged their complaints and urged the intervention from the Commission after having consulted with the municipality without success. The situation left them without sufficient water for essential daily use such as cooking, cleaning, personal hygiene and sanitisation which further posed a major threat to their health and wellbeing in the context of the COVID-19 pandemic.

Moreover, the frequency of water cuts were reported to have increased over the previous two years, and the municipality had failed to promptly provide communities with alternative water supply (such as tanked water), which was a contravention of the National Water Standards Regulations that water should not be interrupted for more than 24 hours unless discontinued for reasons such as non-payment of services¹¹⁹. The tendency of 'water shedding' in the area became problematic as it left residents with no other alternatives for accessing water.

¹¹⁹ See Section 4 of the Water Services Act

When interviewed by the Commission the municipality acknowledged that the area experienced various water shortages and had to frequently implement 'water shedding' as a result of power outages, capacity constraints, pipe bursts and other infrastructure challenges. Water purification and distribution relied on consistent power and therefore Eskom 'load shedding' played a significant role in the systemic challenges experienced.

Furthermore, funding constraints posed a challenge to purchasing generators and fixing or maintaining ageing infrastructure. This limitation in budget also restricted procurement of tanks to sufficiently supply water to communities in the event of water cuts. To ameliorate these issues, the municipality submitted to the Commission that it had repaired some of the infrastructure required to supply alternative water in the event of power outages and had received additional generators as a donation to ensure that their water purification process is uninterrupted. The municipality further committed to pursuing capital projects which would directly address water access and sanitisation in the area.

For further insight and accountability, the Commission addressed these issues with the DWS and COGTA and both were requested to make written submissions regarding the complaints. As a department that is responsible for the development, maintenance, regulation and quality monitoring of water services, COGTA provided several factors which impede successful execution of their mandate. The Commission found that there was no agreement between the department and the municipality on the scale of the issue considering that both cited differing information in respect of capacity relating to the water shortage.

Submissions provided by DWS stated that the municipality met water standards and that the mushrooming of informal settlements and illegal water connections had exacerbated the challenge of water shortages to communities in the area. To alleviate the issues the department indicated that they would allocate the municipality additional raw water connections and a grant of R60 million across two financial years to be allocated to the water facility refurbishment of the Emalahleni Treatment Works.

Water is essential for daily life and to live in a manner which is dignified and healthy. Therefore, inaccessibility to water poses a significant threat to life and should not be accepted as an enduring reality for any human being in South Africa. The effect of water shortages are immeasurable in the context of the COVID-19 pandemic in which water is required to survive. The shortages have an added adverse impact on women, children and the elderly. While the Commission found that indeed the municipality provided consumable water, it was evident that the complainants' concerns regarding frequent water cuts, inaccessible alternative water supply and poorly maintained infrastructure were substantiated. It found therefore that the basic right of access to sufficient water and sanitation as stipulated respectively in the Constitution and the Water Services Act 108 of 1997 was violated.

The Emalahleni Municipality's shortcomings placed residents in an urgent and desperate situation which affected not only their ability to meet daily practical needs, but also their emotional and psychological wellbeing. The undercurrents of pandemic anxiety are challenging to cope with under normal circumstances where all basic needs are met, but are significantly aggravated in the absence of a necessity such as water.

The Commission did not accept defences of resource constraints tendered by the Municipality and specified requirements with which the municipality is to comply to ensure it meet the minimum requirements for water supply. To this end the municipality was requested to:

1. Provide a plan with adequate financial and human resources to address the crisis of water availability in the short and long term
2. Indicate capability, flexibility and reasonable conception and implementation of the plan
3. Indicate how the entirety of the affected population will be provided with basic water supply, rather than provide optimal levels of water supply for some of the residents and no supply at all for others

As national government through the DWS and COGTA, the Commission issued the following directives:

1. Impact assessments should be conducted for all communities experiencing the water access crisis.
2. The departments should undertake and provide an assessment of the municipality's holistic financial, human and technical capabilities to implement resolution plans.
3. Impact assessments of mining activities in the Emalahleni Municipality should be conducted and results provided in relation to water provision in the area.

Quarterly feedback was requested from the national departments and the municipality regarding substantive progress on resolving the water crisis.

7.2.2. Gauteng Provincial Inquiry on the Sewage Problem in the Vaal River

In February 2021 the Commission published the final report on the Gauteng Provincial Inquiry into the sewage problem of the Vaal River. The inquiry was prompted as a result of several media reports as well as complaints from community members and non-profit organisations in 2018 which highlighted the severity of the situation at the Emfuleni Local Municipality. In particular, waste facilities such as the Rietspruit Waste Water Care and Management Works in Vanderbijlpark, and the Leewkuil Waste Water Care and Management Works in Vereeniging were found to be leaking sewage directly into the Vaal River. To establish the causes and channels of accountability, the Commission's Gauteng Provincial Office undertook to investigate and inspect the waste management facilities and immediately determined that raw sewage was flowing into the Vaal River, as well as in residents' homes, streets, graveyards and surrounding areas within the Emfuleni Municipality. Among the established causes were burst sewage pipes, defective bio-filters and a clogged sewage manhole at the Sharpeville Cemetery.

The Commission's prima facie observation found that several constitutional rights were violated, namely; the right to human dignity, freedom and security, an environment that is not harmful to health and wellbeing and the right for children to be protected from maltreatment and degradation. The Commission further found that the extent of pollution in the Vaal River constituted a disaster as defined in the Disaster Management Act of 2002 considering that kilolitres of untreated sewage contaminated the single most important source of water in the Vaal region. Evidence pointed to gross mismanagement of waste facilities, dilapidated treatment plants and poorly maintained waste management infrastructure. The municipality claimed that insufficient support and funds to maintain infrastructure posed a challenge to managing waste successfully. Furthermore, frequent occurrences of vandalism of infrastructure and theft of equipment were a hindrance to addressing the waste spillage into the river and surrounding communities.

Several concerning factors were noted on the part of the municipality including inadequate skills and competence of appointed personnel and a general lack of expertise/specialists to assist the municipality with managing waste appropriately. The service providers contracted with the municipality were found to have not been fulfilling their duties to provide effective waste management services. Furthermore, the municipality's monitoring and evaluation processes were dismal in holding service providers accountable for the collapse of the waste management system and on the contrary, payments were made for work not executed.

Adding to the mismanagement woes of the municipality, the Commission also found an excessive unpaid debt to Rand Water for bulk water provision and despite assistance from the Gauteng Provincial Treasury (GPT) and COGTA to determine repayment arrangements, the municipality reneged on such agreement.

Most concerning about the waste pollution into the Vaal River is that almost 20 million people rely on it as a source of water for domestic and commercial use. River fauna such as the Yellow Fish faced extinction due to the incessant flow of waste, and livestock which drank the contaminated water often died. Contamination of the Vaal River has posed an immense risk to the health, safety and dignity of the residents. With raw sewage flowing into the roads, homes, businesses, graveyards and surrounding areas, residents have had to contend with deplorable health hazards which in the context of the COVID-19 pandemic increase susceptibility to the spread of diseases and viruses.

The disconcerting occurrence of children swimming in polluted water placed a significant threat to their health. A plethora of research has shown that particularly in poorer areas, child development is impeded by the prevalent condition of poverty. Therefore, health deficiencies already pre-existed due to inadequate nutrition and weakened immune systems that struggle to robustly fight off diseases and viruses. Additionally, some schools within the area were consuming polluted water, which was a daily threat to the health, wellbeing and development of children in the Emfuleni Municipality.

The Department of Environment Forestry and Fisheries (DWS), and COGTA were found to have reacted sluggishly to a situation which required urgency. The national departments neither adequately supported nor held the Emfuleni Municipality accountable for non-compliance to ensure containment of the issue even after the severity and prolonged nature were established. The Commission sought immediate redress to mitigate the long-term effects of raw waste flowing into the Vaal River and surrounding communities. To this end a set of recommendations were provided to the Emfuleni Municipality, as well as to the national departments involved in the failed containment and mismanagement of waste systems in the Vaal:

1. Immediate compliance with constitutional and legislative obligations;
2. Employment of waste water specialists to develop an interim plan to urgently stop or limit the flow of raw waste into the streets and homes of residents in the Vaal;
3. Effective performance management and accountability for employees and service providers;
4. Development of a detailed medium-term and long-term needs assessments to eradicate all waste contamination from the Vaal River;
5. Development of policies and standards specific to the Vaal water crisis;
6. Regular inspections of the Vaal River and regular submissions detailing progress;
7. Clear standard procedures on how theft and vandalism will be handled through appointed security and subsequently reported to the SAPS;
8. Declaration of the Vaal River as critical infrastructure according to the Critical Infrastructure Act 8 of 2019 to ensure its protection and restoration;
9. An intervention by National Government and the collaboration of organs of state such as Rand Water and SALGA to implement recommendations.

At the time of writing this report, it was not clear whether the municipality and implicated national departments had adhered to the 60 day period for providing feedback to the Commission, however media reports indicate that some steps have been taken¹²⁰.

7.2.3. Water and housing challenges at Msukaligwa Local Municipality

In February 2019, Democratic Alliance leader from the Mpumalanga Provincial Legislature lodged a complaint with the Commission about the scarce supply of clean water and inadequate housing development within the Msukaligwa Local Municipality. In particular, the complaint was made on behalf of the residents of six areas within the Municipality, namely; Skaapruiz, Nyibe, Sheepmoor, Lothair, Enkakini, Chrissiesmeer, as well as Thutukani and Goodehoop Farms. The concerns highlighted in the complaint was that several of the informal settlements and farms were without alternative water supply i.e. water tankers when communal tap water supply was interrupted. Furthermore, most residents lived in makeshift and unsafe mud housing not fit for human habitation.

With both water and decent housing compromised and, in some cases, only inconsumable water from underground water sources and a stream utilized by cattle, residents lived in deplorable conditions which adversely impacted on their wellbeing and health. Despite the number of years over which the complainants had complained about the sub-standard service delivery by the Municipality, minimal remedial action had been taken despite budgets being allocated for water and housing projects. The Commission's *prima facie* observation in the investigation was that the rights to sufficient clean water and adequate housing as enshrined in section 27(1) (b) of the Constitution were violated.

¹²⁰ <https://www.skillsportal.co.za/content/solution-vaal-river-pollution-cards>

The Municipality presented several challenges pertaining to their inadequate provision of water, citing vandalism, equipment theft, a surge in population growth, a lack of bulk water supply and insufficient groundwater during dry seasons. During site inspections the Commission observed that while some of the areas received water tank services and access through water sandpipes, others went for weeks on end without water supply which greatly hampered basic daily activities. The Municipality's inconsistency in this regard was problematic and needed immediate redress.

Even more concerning was the lack of sufficient water in schools within Sheepmoor, where there were no functioning water reticulation systems to supply clean water for drinking purposes, sanitation and toilets. Consequently, this had a detrimental impact on the childrens' health and ability to learn, as well as the effectiveness of the teaching staff to execute their duties.

Also observed was a lack of compliance with the Water Services Act (WSA) which stipulates that each individual should have uninterrupted access of 25 litres of water per day, whereas the municipality in some cases filled water tankers which were meant to service the entire community only once a week. Furthermore, it was found that many households were located more than the stipulated 200 metres from the nearest available water source which was also in direct violation to the WSA. Unaddressed, this made these communities all the more susceptible to COVID-19 contraction, and decreased the chances of a full recovery.

However, with further investigation it was clear that housing issues in these areas were a complex matter. For example, although given the opportunity to be relocated by the Provincial Department of Human Settlements (DHS), residents of Skaapruiz were unwilling to vacate their uninhabitable environment owing to their psycho-social connection to the burial sites of their family members on the land. Had the department taken a consultative, rather than coercive approach with the community in developing its solutions, the process to alleviate these issues would have been more constructive.

Furthermore, a lack of formalisation of informal settlements such as in Nyibe exacerbated the inaccessibility to basic services such as electricity and housing fit for human habitation. In February 2020, the Department of Mineral Resources and Energy (DMRE) was then requested by the Commission to intervene and to equip the Municipality with the necessary resources.

Through the second and third quarters of 2020, the Municipality submitted various time-bound plans to the Commission outlining how it would resolve the complaint by increasing water supply in all of the areas and farms by installing additional communal taps, embarking on a wide-ranging infrastructure maintenance project, completion of the process for bulk water supply and to purchase land for township low cost housing development to significantly reduce the growth of informal settlements in the area.¹²¹

To ensure substantive redress, the Commission issued directives for the DHS, DMRE and the Municipality relevant for and in consultation with each of the affected areas. The Municipality was expected to report to the Commission in the final quarter of 2020 to determine compliance and progress on the resolution for the water and housing challenges.

7.2.4. Final investigation report on the Total Shutdown in Alexandra

Considered the oldest township in South Africa, Alexandra, remains plagued by inadequate housing and healthcare, inaccessibility to sufficient water and sanitation, pollution, widespread crime and overpopulation in predominantly informal settlement makeshift housing. Efforts to develop Alexandra have not been realised and while some progress has been made, it has been inexcusably slow. The Alexandra Renewal Project (ARP) and the Reconstruction Development Programme (RDP) have both been beleaguered with issues of malfeasance which have hindered advancement.

¹²¹ The Housing Act 107 of 1997 is clear that housing development should be prioritised for poor communities and it is within the mandate of local government to purchase land to provide residents with adequate housing.

In July 2021 the Commission published the final report on the Gauteng Provincial Inquiry into the Alexandra Township Total Shutdown that occurred in February 2019. Residents of the township initiated protests against the City of Johannesburg's (CoJ) service delivery failures and the prevailing socio-economic conditions which hampered the pursuit of a dignified life. The formation of the Alex Total Shutdown Movement further spotlighted the various challenges and human rights grievances experienced by communities in Alex.

In summation, the following human rights violations and inadequacies were reported by protesting community members and further noted by the Commission's investigation:

1. Inadequate allocation of housing and slow progress of state housing development;
2. Insufficient access to clean and consumable water;
3. Unsatisfactory wastewater management and sanitation;
4. Inconsistent refuse removal.

Further concerns were raised pertaining to the unmet constitutional rights for access to:

1. Healthcare: Inaccessibility due to distance and gap in ratio between residents and resources of the clinics
2. Social Welfare: Inaccessibility to the Department of Social Development for services
3. Education: Disruption to education owing to criminal activity and illegal land invasion
4. Freedom and Security: Lack of prompt response from SAPS regarding the frequent criminal activity in the township

The Commission and the Office of the Public Protector undertook a joint inquiry to determine the underlying causes of the protests and the organs of state responsible for neither preventing nor addressing the human rights violations. In accordance with their respective obligations, the Commission focused on issues relating to the protection of socio-economic rights, while the Public Protector initiated a probe into issues of corruption, maladministration and improper governance which led to inadequate service delivery. Among other identified reasons, the Commission determined that improper use of budgets, uncoordinated efforts between relevant organs of state, as well as deteriorating public trust and participation have, in part, led to the culmination of unaddressed problems in Alexandra Township.

The violation of constitutional rights have created an ongoing desperate situation in Alex which, when juxtaposed to the effects of the COVID-19 pandemic, have been nothing less than devastating to those who have had to endure it. Water scarcity, overcrowded and under-resourced clinics and informal dwelling have all contributed to increased susceptibility to contract and further spread the Coronavirus. Exceedingly high unemployment, continued job losses and therefore diminished income capacity have exacerbated residents' inability to provide for themselves. The impact of living under these constraints on the physical and mental health of residents cannot be underestimated. In accordance with the Commission's mandate, it was essential to determine how these various violations could be addressed toward the promotion, protection and attainment of basic human rights and freedoms.

In its investigation, the Commission conducted both a public and a private inquiry; the former allowed members of the public and interested parties to make oral and written submissions on the presented issues affecting Alex, and the latter comprised of in-camera sessions which inclusively documented the oral submissions of the organs of state responsible for the inefficient service delivery to Alexandra Township. In particular, the CoJ, DHS, COGTA, Water and Sanitation (DWS), Basic Education (DBE) and the SAPS were all engaged for submissions to the inquiry.

Additionally, the Commission engaged the Gauteng Office of the Premier, Inter-Ministerial Task Team on Alexandra, the Auditor-General, as well as political parties to partake in developing solutions to the multitude of socio-economic and human right challenges faced by Alexandra Township. Since finalisation of the inquiry, all departments were directed to provide feedback of their short and medium term plans within 60 days of publication of the impact assessment and inquiry report, with particular focus on how integrated planning and collaboration will be effected to resolve violations.



CHAPTER EIGHT:
**OVERVIEW OF REGIONAL AND
INTERNATIONAL INTERVENTIONS**

8

8.1. OVERVIEW

This chapter provides a synopsis and critical reflection of the regional and international collaborations undertaken by the Commission during the 2020-2021 financial year. There are various mechanisms the Commission utilizes to advance the protection of human rights and this includes focused engagements with other accredited NHRIs and human rights bodies. While domestically the Commission's close relationship with fellow Chapter 9 institutions and other stakeholders ensures that appropriate redress is provided in response to human rights violations and complaints, the enduring partnerships with the African Commission, Network of African National Human Rights Institutions (NANHRI), relevant United Nations treaty bodies and the Global Alliance of National Human Rights Institutions (GANHRI) further supplements and strengthens efforts by the Commission to encourage observance of international and regional human rights standards and norms.

The Commission's Parliamentary and International Affairs Unit is tasked with - and actively engages South Africa's legislative framework and its adherence to the Constitution - to promote and protect human rights. Moreover, to strengthen the state of human rights, particularly in a country plagued with systemic and structural inequality, this unit monitors, reports and raises awareness about South Africa's obligations to law reform, as well as government's adoption and implementation of recommendations submitted by the Commission, human rights defenders and democracy protection institutions.

Indubitably, the context of the COVID-19 pandemic has irrevocably affected the world and the mechanisms through which cross-border collaborative efforts are developed to improve access to justice. Arguably, there has never been a more pertinent era which calls for and is most demanding of internal, regional and international alliance to safeguard lives, the global economy and the re-establishment of mutual cooperative governance. Therefore, it is fitting to engage in a critical reflection of the regional and international developments, human rights instruments and initiatives which buttressed relief for the tremendous impact of the COVID-19 pandemic on human rights globally.

A comparative discussion is undertaken on the human rights approaches, standards and lessons on key aspects of concern such as the global vaccine program, immigration and travel restrictions as well as transparency of sharing COVID-19 scientific data. The Commission's role is reflected in its extensive efforts to promote that; all who reside within the country have equitable access to the necessary defensive means against the COVID-19 virus, and moreover, to engage on international platforms to both stay abreast with ongoing global discourse, as well as monitor compliance on the state level. The Commission has, from the onset, recognised that human rights are rendered the most vulnerable during times of crises, particularly on the unprecedented magnitude of this pandemic on social, economic, political and environmental concerns.

As such, the Commission's focus has also been to ensure that government centres a human rights approach when developing strategies to combat the pandemic. During times of crisis, marginalised groups often become further side-lined and it remains the Commission's commitment to be an easily accessible, approachable and effective aid for those who suffer human rights violations during the pandemic. The following information and

engagements were extracted from the Commission's comprehensive research brief¹²² on the key international and regional human rights mechanisms response to the COVID-19 pandemic during 2020.

8.2. KEY COLLABORATIONS

In its call for a human rights centric approach to deal with the public emergency caused by the COVID-19 pandemic, the United Nations and its various specialised agencies were at the forefront of providing guidance to member states. In March 2020, the United Nations (UN) High Commissioner for Human Rights, issued a formal letter for the attention of UN Member States across the world, calling for solidarity and cooperation to tackle the spread of the virus, and asserting that respect for human rights, including economic, social and cultural rights and civil and political rights, are fundamental to the success of the public health response¹²³.

In April 2020, the UN published a policy brief¹²⁴ that prompts member states to develop solutions that consider human rights at the core by ensuring access to adequate healthcare for all and preserving human dignity. The virus, which thrives in socio-environments that have a deficit of access to water, minimal sanitation, overcrowdedness and scarcity of healthcare resources, disproportionately affects the poor and deepens existing socio-economic strife. Therefore, true to the Sustainable Development Goals (SDG) principle to 'Leave no one behind', the UN's call to 'not neglect human rights in situations of crises' has revealed that global recovery from the pandemic depends on each country's ability to defend *all* lives from the virus.

This points to the urgency for improved strategies to fulfil constitutional obligations and provide adequate access to basic rights such as housing, healthcare, food, water and social security¹²⁵. Despite their significance in the attainment of a dignified life in general and in the current era, to aid in the protection against the COVID-19 virus, progress in fulfilling these rights for all continues to be unacceptably slow and plagued by skulduggery in South Africa. The role of constitutional bodies such as the Commission is therefore indispensable in holding the government accountable to providing respite to communities in dire need during the pandemic crisis. The UN three-point system¹²⁶ provides comprehensive guidance to member states on the large-scale coordinated response required to mobilise all sectors to confront the COVID-19 pandemic, addressing the socio-economic fallout for those hardest hit, as well as developing a transformative recovery process that will lead to a post-COVID world which is intentional in its inclusivity.

The UN further highlights that the fear and panic provoked by the pandemic has globally escalated violent acts against migrants and asylum seekers, intensified hate speech and discrimination, as well gender-based violence and femicide (GBVF) which has scourged the female population in South Africa, with one in five women (which translates to 21%) having experienced physical violence from an intimate partner¹²⁷. South Africa's President Cyril Ramaphosa declared GBV and femicide as a *second pandemic* which continues to relentlessly terrorise communities and devastate lives¹²⁸.

122 The research brief is titled: *Uniting Nations: A snapshot of the key international and regional human rights mechanisms response to the COVID-19 Pandemic during 2020*. It should be read in conjunction with the briefs developed on socio-economic rights and equality for a rich contextual understanding of the state of human rights in South Africa in relation to international norms and standards. All three briefs will soon be available on the Commission's website upon completion of review.

123 OHCHR Letter from UN High Commissioner for Human Rights, (Ms Michelle Bachelet), addressed to the Permanent Missions, 31 March 2020, available at, https://www.ohchr.org/Documents/Events/COVID-19/HC_OHCHR%E2%80%933COVID-19_Letter.pdf.

124 The policy brief titled *COVID-19 and Human Rights: We are all in this together*, can be found here: [un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf](#).

125 These Section 26 and 27 rights remain in the top five rights violations as discussed in Chapter 4 of this report.

126 Full report on the United Nations Comprehensive Response to COVID-19: Saving lives, protecting societies, recovering better, available here: <https://www.un.org/sites/un2.un.org/files/un-comprehensive-response-to-covid-19.pdf>.

127 Conveyed in 2020 to Parliament by Stats SA's report titled: *Crimes against women in South Africa, an analysis of the phenomenon of GBV and femicide*.

128 Global Risk Insight is an organisation which analyses political risk around the world and has determined that South Africa is sometimes referred to as 'the destination of femicide' owing to its increasingly alarming rate of GBV, a crisis further worsened by COVID-19 lockdown measures. Full analysis can be retrieved here: *South Africa's Secondary Pandemic: A Crisis of Gender Based Violence | Global Risk Insights*

Analysts have determined that femicide in South Africa is five times more than the global average and that out of 183 countries listed by the World Health Organisation, the death rate for female victims was the fourth highest¹²⁹. Although GBV is a world-wide issue, the prevalence of GBV in South Africa and the extent of the plight of women and girls during the pandemic, has raised rational concerns of a secondary pandemic that the criminal justice system continues to fall short to address. Therefore, considering the gravity of the issue, joint developments at a treaty level are necessitated.

8.2.1. Joint Statement by CEDAW and the EDVAW Platform of women's rights mechanisms on COVID-19 and the increase in violence and discrimination against women

In July 2020, the Platform of Independent Expert Mechanisms on Discrimination and Violence against Women (EDVAW),¹³⁰ which includes the CEDAW, released a collective call to States and relevant stakeholders, to take urgent steps to combat the global pandemic of gender based violence against women, particularly, domestic violence, through ensuring 'Peace at home' during lockdown and integrating the elimination of discrimination and gender based violence against women in the COVID-19 recovery phase and beyond¹³¹.

The joint statement recognises that the extraordinary measures adopted by national governments around the world in response to the COVID-19 pandemic have revealed glaring political, social and economic inequalities that continue to pervade many societies, and exacerbates the deep-rooted gender discrimination and violence, with a disproportionate impact on women and girls.¹³² The statement recognises the dramatic increase in domestic violence cases in many countries, due to the social confinement (lockdown) measures, and that the home has become a place of fear for many women and children, allowing their perpetrators additional power and control. It further notes that as a result of the pandemic, resources available to women are curtailed, such as, *inter alia*, fewer police interventions; closure of the courts and limited access to legal assistance; access to counselling and emergency services; and, the closure of shelters and services for victims of domestic violence (including intimate partner violence and sexual abuse)¹³³. These have further exacerbated the risks faced by women and girls and contributed to a rise in femicide.

Through the statement, the EDVAW Platform cites that, 'despite the disproportionate negative effects of the crisis on women, as well as their critical role in keeping communities running, they are largely absent from local, national and global COVID-19 response teams, policy spaces and decision-making. It is further noted that in the absence of gender sensitive intersectional responses, different forms of systemic discrimination already faced by women and girls will be exacerbated'¹³⁴.

Discrimination against migrants and asylum seekers were also flagged for immediate regional and international intervention during the pandemic. South Africa has long been embattled with microcosmic implosions of Xenophobia and Afrophobia¹³⁵ against foreign nationals which in part have been fuelled by government's

129 Article retrieved here: 'No safe place': South African women suffering 'epidemic' of violence, activists warn | Reuters.

130 The EDVAW Platform is made up of the following expert mechanisms: UN Special Rapporteur on violence against women (SRVAW); UN Committee on the Elimination of Discrimination against Women (CEDAW); UN Working Group on the issue of discrimination against women and girls (WGDW); Committee of Experts of the Follow-up Mechanism to the Belém do Pará Convention (MESECVI); Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO); African Commission on Human and Peoples' Rights Special Rapporteur on the Rights of Women in Africa (A SRWHR); Inter-American Commission on Human Rights Rapporteur on the Rights of Women (IA RWHR). Further information about the EDVAW is available at, <https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/CooperationGlobalRegionalMechanisms.aspx>

131 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26083&LangID=E>

132 Ibid.

133 Ibid.

134 Ibid.

135 Xenophobia is defined as the intense or irrational dislike or fear of people from other countries. It is entrenched in discriminatory attitudes, prejudices and behaviours which reject, exclude and vilify persons who are considered outsiders or foreigners to the community, society or national identity. Both Xenophobia and Afrophobia often culminate in violence by indigene against foreign nationals; the difference being that Afrophobia is discriminatory violent action specifically directed at Africans or persons with African ancestry. Therefore, what is often characterised as Xenophobia in South Africa is often actually Afrophobia as primarily foreign nationals with African ancestry are viewed as a threat.

taciturn response to the underlying issues of socio-economic underdevelopment of the masses¹³⁶. Additionally, the deepening divisions and deterioration of race relations, emanating from a ruptured history and further polarization by political lines, have obstructed efforts to unite and to build social cohesion in the interest of collectively fighting the COVID-19 pandemic.

8.2.2 Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants

In May 2020, the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), together with the UN Special Rapporteur on the Human Rights of Migrants, issued a joint Guidance Note addressing the impact of the COVID-19 pandemic on the human rights of migrants¹³⁷.

The Guidance Note emphasises, *inter alia*, that States must guarantee access to social services for migrants and their families, who in some countries represent the highest levels of contagions and deaths from COVID-19¹³⁸. The CMW and Special Rapporteur also noted that migrants who are in an irregular situation or are undocumented, face even greater vulnerability, indicating that many work in unstable jobs, and in some cases have been excluded from government social assistance measures. They accordingly called on, 'governments to promote the regularisation of migrants in an irregular situation'¹³⁹. Furthermore, that States consider the temporary suspension of deportations and forced returns during the pandemic, noting that a significant number of migrants have been deported or returned from different countries carrying the COVID-19 disease¹⁴⁰. The Guidance Note further advises that States integrate migrant workers into national COVID-19 prevention and response plans and policies, including economic recovery policies.

8.2.3 Committee on the Elimination of Racial Discrimination

In August 2020, the Committee on the Elimination of Racial Discrimination (CERD), issued a 'Statement on the coronavirus (COVID-19) pandemic and its implications under the International Convention on the Elimination of All Forms of Racial Discrimination'¹⁴¹.

Through the Statement, the CERD notes that the COVID-19 pandemic is having significant adverse impacts on the enjoyment of human rights, in particular on the right to non-discrimination and to equality as set forth in the International Convention on the Elimination of All Forms of Racial Discrimination. Further, that persons belonging to minorities and marginalised groups are more vulnerable to the pandemic due to greater exposure to the virus, often as a result of inadequate living conditions, and that those faced with racial discrimination are furthermore disproportionately impacted by the negative impact of COVID-19¹⁴².

According to the Committee, the pandemic exposes and further deepens structural inequalities affecting vulnerable groups protected under the Convention, based on entrenched structures and practices of discrimination and exclusion¹⁴³. The statement also noted reports which indicate practices and incidents of racially discriminatory enforcement of restrictions on human rights during the pandemic, and that access to justice and national mechanisms combatting racial discrimination, have been further hindered due to the pandemic. These observations resonated with the complaints trends noted by the Commission.

136 Masenya, M. J. (2017). *Afrophobia in South Africa: A general perspective of xenophobia*. *Bangladesh Sociological Society*, 14(1), 81.

137 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25904&LangID=E>.

138 *Ibid.*

139 *Ibid.*

140 *Ibid.*

141 <https://www.ohchr.org/Documents/HRBodies/TB/COVID19/Statement-CERD-COVID-19.docx>.

142 *Ibid*, section I..

143 *Ibid.*

The Committee emphasises the obligations of States to respect, protect and fulfil their obligations, including in times of crisis, and that States may enact and enforce restrictions of human rights on public health grounds *only* if they are necessary, reasonable, proportionate and non-discriminatory¹⁴⁴. In an expansive list setting out the obligations of States under the ICERD, the Committee states that, *inter alia*, States have an obligation to ensure measures are implemented to address the disparate effects of the pandemic on groups and minorities (as reflected in the ICERD), including through: i) equal access to healthcare services, including for migrants and undocumented persons;¹⁴⁵ ii) access to education, taking into account the needs of these groups and advancing ways of alternative learning solutions in order to bridge the digital divide;¹⁴⁶ iii) guaranteeing that all persons and groups have access to financial aid and other economic support measures taken in the context of the COVID-19 pandemic without discrimination, and consider adopting special measures to secure the full enjoyment of human rights and fundamental freedoms of disadvantaged groups.¹⁴⁷

The Committee also impressed on States the need to ensure access to vaccines against COVID-19 are distributed in a non-discriminatory manner, taking into account the situation and needs of groups which are marginalised and subjected to discrimination, and also adopting an inclusive approach through ensuring participation of these persons¹⁴⁸ in the pandemic response measures. It should be noted that through the Statement, the Committee requests States to include in their periodic reporting to the Committee, measures taken in relation to COVID-19 and the impact on groups and minorities.¹⁴⁹

8.2.4 Office of the UN High Commissioner for Human Rights

In April 2020, the UNCHR released a detailed guidance note on the *rights of persons with disabilities within the context of the COVID-19 pandemic*¹⁵⁰. Further emphasising that while the COVID-19 response should prioritise the human rights and needs of all members in society, strategies should be especially circumspect for those who are disproportionately impacted by institutional barriers exacerbated by the pandemic. Persons with disabilities have been highlighted as substantially more at risk of contracting COVID-19 and experiencing heightened or severe symptoms owing to pre-existing conditions¹⁵¹. The UNCHR sought to bring attention to the additional plight of persons with disabilities and to convey the promising practices around the world which have responded appropriately to this issue.

Auxiliary to this, and to ensure practicability, the guidance note sought to identify key actions for States and other stakeholders as well as to provide sufficient learning resources to ensure a rights-based approach and inclusivity for persons with disabilities when tackling the COVID-19 pandemic. The strain of the COVID-19 pandemic on the right to health was immediately observable, particularly for hundreds of communities whose access to healthcare under normal circumstances were compromised. Persons with disabilities face greater disparities in the provision and access of healthcare considering that the allocation of scarce resources is often not directed to improving the quality of life for persons with disabilities.

Therefore, the impact of the COVID-19 pandemic on persons with disabilities must be considered on various fronts including; their right to health within live-in institutions; barriers to the fulfilment of their daily needs

¹⁴⁴ *Ibid*, Part II.

¹⁴⁵ *Ibid*, Part II, para 4(a).

¹⁴⁶ *Ibid*, Part II, para 4(d).

¹⁴⁷ *Ibid*, Part II, para 4(e).

¹⁴⁸ *Ibid*, Part II, para 5 and 7.

¹⁴⁹ Part III, para 2 further lists that the following be included in the periodic reports: (b) Measures taken to ensure the participation of all groups and minorities, in particular women, children and persons with disability, in the design and implementation of their response to the COVID-19 pandemic; (c) Measures taken to protect people belonging to groups and minorities protected under the Convention from the impact of the COVID-19 pandemic; (d) Measures taken to protect members of vulnerable groups against discriminatory acts and to counter hate speech and stigmatization in connection with the COVID-19 pandemic; (e) Measures taken to mitigate the socio-economic impact of the COVID-19 pandemic on members of marginalized and vulnerable groups in accordance with their obligation to respect, protect and fulfil economic, social and cultural rights.

¹⁵⁰ Available at, https://www.ohchr.org/Documents/Issues/Disability/COVID-19_and_The_Rights_of_Persons_with_Disabilities.pdf

¹⁵¹ World Health Organisation, Disability considerations during the COVID-19 outbreak.

in communities; declining employment, income and livelihood; accessibility to education and the necessary electronics and devices in the context of the pandemic; adequate housing and lastly; protection from violence which leaves them vulnerable in situations of unrest.

The UNCHR provides several recommendations and actionable steps for each outlined area of concern so that States may prioritise the needs of persons with disabilities proactively. Awareness of the risks borne by persons with disabilities during a global pandemic and the interventions required to ameliorate the same, were further addressed in engagements which the Commission noted as priority.

8.2.5 Committee on the Rights of Persons with Disabilities

In April 2020, the Committee on the Rights of Persons with Disabilities (CRPD), together with the Special Envoy of the United Nations Secretary-General on Disability and Accessibility, released a joint statement on, 'Persons with Disabilities and COVID-19'. The statement highlights the linkages between the Convention on the Rights of Persons with Disabilities (CRPD), the SDGs and the COVID-19 pandemic.

It further recognises that the UN 2030 Agenda for Sustainable Development sets targets aimed at responding to epidemics, specifically through achieving universal health coverage; ensuring access to medicine and vaccines; promoting mental health and well-being; and, reinforcing the capacity of all countries in early warning; risk reduction and risk management for national and global health.¹⁵² Furthermore, that through implementing their obligations under the CRPD, and fulfilling their commitments under the 2030 Agenda, States will be able to safeguard the rights and well-being of persons with disabilities¹⁵³.

The statement recognises that States should take all appropriate measures to ensure access for persons with disabilities to health services and provide persons with disabilities with the same range, quality and standard of health care as provided to other persons, including mental health services.¹⁵⁴ Further, that States should continue providing persons with disabilities the necessary health services specific to their disability needs and, moreover during the COVID-19 pandemic, should prevent the discriminatory denial of health care or life-saving services, food or fluids on the basis of disability. Through the statement, the CRPD and the Special Envoy called on relevant authorities to adopt measures to appropriately respond to the COVID-19 pandemic, ensuring inclusion and effective participation of persons with disabilities,¹⁵⁵ through the planning, implementation, monitoring and containment measures related to COVID-19.¹⁵⁶

Additionally, in May 2020, the UN issued a policy brief¹⁵⁷ to further encourage a COVID-19 response and recovery that serves everyone, with particular care to ensure that all action prohibits any form of discrimination. The pandemic has been a true litmus test of the pledge to *leave no one behind* and on the commitment and shared responsibility to not only provide adequate support to persons with disabilities, but also to realise transformative change. The brief contains specific recommendations for key sectors - such as healthcare, education, social protection and employment - but also highlights four overarching areas of action which are pertinent for all sectors to imbue inclusivity for persons with disabilities in reacting to the pandemic by:

152 Joint Statement: Persons with Disabilities and COVID-19 by the Chair of the United Nations Committee on the Rights of Persons with Disabilities, on behalf of the Committee on the Rights of Persons with Disabilities and the Special Envoy of the United Nations Secretary-General on Disability and Accessibility. Available at, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25765&LangID=E>

153 Ibid, para 4.

154 Ibid, para 7.

155 Ibid, para 6.

156 Ibid, para 8.

157 As released by the UN Sustainable Development Group, available at, https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_persons_with_disabilities_final.pdf.

1. Ensuring the mainstreaming of disability in all COVID-19 response and recovery together with targeted action;
2. Ensuring accessibility of information, facilities, services and programmes in the COVID-19 response and recovery;
3. Ensuring meaningful consultation with and active participation of persons with disabilities and their representative organisations in all stages of the COVID-19 response and recovery, lastly,
4. Establishing accountability mechanisms to safeguard disability inclusion in the COVID-19 response.

In March 2021, the global study on *COVID-19 and National Human Rights Institutions*¹⁵⁸ provided insight to the actions taken by NHRIs to address the impact of the COVID-19 pandemic, particularly on at-risk groups. Around the world, women, persons with disabilities, children, as well as migrants and internally displaced persons are most in need of the support and protection of the international human rights community. The elderly, having been especially hard hit by the pandemic, are similarly recognised as at risk of being left behind in health and economic recovery plans. Therefore, the Commission's role in strengthening, while monitoring government's approaches on an international standard, remains critical in this regard.

The study also investigated the effectiveness of the collaborative efforts of cross-border partnerships in ameliorating the impact of COVID-19 on vulnerable groups. While acknowledging that the functions of NHRIs are essential to navigating the pandemic through a rights-centric approach, equally important is continuous reflection on the functioning of NHRIs during the crisis. Both the interaction with the public as well as the internal and operational aspects have been gravely affected by the crisis. Strategic plans have had to take unexpected turns to take into account the regression of rights accessibility during the current circumstances.

No organisation has been left untouched by the devastation of the pandemic and the Commission looks forward to impending lessons from its regional and global partnerships as it continues to navigate the unprecedented terrain of the COVID-19 pandemic.

¹⁵⁸ Full research document found here: <https://www.ohchr.org/Documents/Countries/NHRI/GANHRI/COVID-19-and-NHRI.pdf> .



A large, stylized golden graphic of several human figures with their arms raised, set against a white background. The figures are arranged in a row, with their arms reaching upwards, creating a sense of unity and achievement. The graphic is positioned in the center of the page, overlapping a dark red background on the left and bottom.

CHAPTER NINE: **CONCLUSION**

9

During the 2020-2021 financial year, the Commission continued to deliver on its mandate to promote respect for, observance of and protection of human rights for all without fear or favour. Despite the ongoing challenges presented by the unprecedented COVID-19 pandemic, the Commission has endeavoured and continues to succeed to take steps to secure appropriate redress where human rights have been violated. As the country, and the world, endures the effects of the pandemic, the Commission seeks to make full use of its powers and functions to ameliorate the impact of the pandemic, especially on marginalized groups and communities who characteristically, have taken the most strain during this time of crisis.

The severity of the COVID-19 pandemic on the country's healthcare and education systems is incalculable. The closure of non-essential services, schools, businesses and the protracted lockdown restrictions have placed immense strain on infrastructure which before the pandemic, were already in precarious positions. The impact of travel restrictions and closure of borders resulted in the disruption of supplies and resources both necessary to mitigate the pandemic and to sustain the country. Insufficient personal protective equipment (PPE) and ventilators, shortage of health practitioners and key support staff, aggravated mental health, high mortality rates as well as increased hospitalizations from COVID-19 contraction brought the health system to its knees.

Equally, education changed for all learners of all ages as virtual learning became the primary medium for the transference of knowledge and skills. The plight of children living in poverty and at-risk communities was glaring when juxtaposed with those who had the benefit of well-resourced and technologically advanced delivery modalities. The recovery from educational losses and valuation of disparities remain focal areas for basic education and institutions of higher learning.

The country's socio-economic discrepancies as well as structural and systemic inequalities have not only been exacerbated by the pandemic, but they have also spotlighted the consequences of ineffectual institutions and their failure to transform this narrative. The Commission's role in investigating and reporting on human rights violations is pertinent now more than ever; so too is its constitutional mandate to hold organs of state accountable on the measures that they should take toward the realisation of rights, especially those concerning housing, healthcare, food, water, social security, education and the environment.

The Commission continues to fulfil a broad mandate while operating under grave resource constraints. While this is a barrier to the provision of redress, especially within the unique context of the COVID-19 pandemic, significant progress has been made in responding to and finalizing complaints through litigation and ADR mechanisms. The improvement of the Commission's internal functioning and organisational structure has also contributed to the expeditiousness in addressing complaints, however the need for adequate resourcing of chapter bodies like the Commission remains a critical one in the face of increasingly complex demands and needs. Furthermore, the inspection and upgrading of the CHPs, as well as the Commission's collaboration with fellow Chapter Nine institutions, civil society and other human rights defenders have been vital to cementing the public's trust in the Commission's ability to provide redress. The Commission has also upheld its monitoring mandate by conducting investigations and hearings of national importance, and has provided state departments with extensive recommendations to remedy recursive problems in service delivery.



Notwithstanding the Commission's resolve and efforts to make a difference, the near collapse of critical government institutions besieged by corruption, and the subsequent loss of confidence by the public, have substantially undermined the democratic project. *Corruption is not a victimless crime and it is marginalized communities who disproportionately bear the burden of the callous acts of errant officials and leaders.* South Africa remains one of the most unequal countries in the world. With the pandemic plunging the global economy to new depths, the skulduggery of misappropriating and looting state funds is a brazen mutilation of the democratic ideals and equality for which this country strives. The Commission's role in safeguarding the enjoyment of human rights and leading reinvigorated lives calls for ethical leadership at all levels remains at the core for a pandemic recovery that has a human-centric approach.

To this end, the Commission's strategic regional and international partnerships have proven beneficial to intervening on human rights issues in accordance to universally inclusive standards. Although, the geo-political landscape and cross-border alliances - since the advent of the pandemic - have raised interesting questions and concerns about global vaccine equity and the ramifications of vaccine nationalism for low and middle income countries, the Commission nevertheless continues to harness and nurture its partnerships and remains committed to fortifying its utility to the country both as an accredited NHRI, and an accountable member of the global human rights community.

As the country and the world continues to grapple with unremitting and devastating experiences of grief, loss and collective memorialization, the Commission remains steadfast for transformational change.

With intention and optimism, the Commission hopes that the Annual Trends Analysis Report galvanizes reflection and critical discourse about the state of human rights in South African during the pandemic era. Furthermore, the Commission hopes that by showing its successes, admitting to its challenges and taking stock of lessons, the general public as well as stakeholders within and external to the Commission, will be encouraged that a promising post-pandemic future is imminent.

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