



ANNUAL TRENDS ANALYSIS REPORT 2016/17



equality

health care food water

dignity



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LIST OF ACRONYMS

ADR	Alternative Dispute Resolution
Advocom	Advocacy and Communications Unit of the SAHRC
CBD	Central Business District
CBO	Community Based Organisation
CCMA	Commission for Conciliation, Mediation and Arbitration
CGE	Commission for Gender Equality
CHP	Complaints Handling Procedures
CRL	Commission for Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
CRLR	Commission for Restitution of Land Rights
CSG	Chief Surveyor General
DBE	Department of Basic Education
DPW	Department of Public Works
DRDLR	Department of Rural Development and Land Reform
DSD	Department of Social Development
DWCPD	Department of Women, Children and Persons with Disabilities
DOJ&CD	Department of Justice and Constitutional Development
EC	Equality Courts
ESR	Health care, food, water and social security
GANHRI	Global Alliance of National Human Rights Institutions
HOD	Head of Department
IPID	Independent Police Investigative Directorate
JICS	Judicial Inspectorate for Correctional Services
LRMF	Land Rights Management Facility
Legal Aid SA	Legal Aid South Africa
LGBTIQ	Lesbian, Gay, Bisexual, Transsexual, Intersex, Queer
LO	Legal Officer
LSU	Legal Services Unit
MEC	Member of the Executive Council
NANHRI	Network of African Human Rights Institutions
NCPR	National Child Protection Register
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
PAIA	Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)
PAJA	Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)
PanSALB	Pan South African Language Board
PED	Provincial Department of Basic Education
PEPUDA	Promotion of Equality and Elimination of Discrimination Act, 2000 (Act No. 4 of 2000)
PM	Provincial Manager
SAHRC	South African Human Rights Commission
SAHRC Act	South African Human Rights Commission Act, 2014 (Act No. 40 of 2014)
SAPS	South African Police Service
SC	Steering committee
SLO	Senior Legal Officer
TAR	Trends Analysis Report

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 that feels aggrieved by any determination, decision or finding, save for a finding made at a hearing
Appellant	A person who lodges an appeal 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 LO, depending on the complexity of the matter, to investigate the complaint
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 established by section 181 of the Constitution of South Africa, 1996
Complainant	Any person, group or class of persons, association, organisation or organ of state as contemplated in article 6 of the CHP
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 ¹
Conciliation	The process of resolving a matter between parties through conciliation
Constitution	The Constitution of the Republic of South Africa, 1996
Day	Any calendar day excluding Saturdays, Sundays and public holidays
Direct referral	The complaint is referred directly to another organisation, institution or statutory body because the provincial manager has found that the complaint does not fall within the jurisdiction of the Commission or could be addressed more efficiently or expeditiously by that other organisation, institution or body. The organisation must be a statutory 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 <i>monitoring direct referral</i> below

¹ The CHP referred to in this Report were operational during the period under review but were repealed on 31 December 2017.

TERM	DEFINITION
Enquiry	An oral, written or electronic communication that 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 <i>Note: 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</i>
Finalised complaints	A collective term for the final stage of all complaints which are rejected, referred (indirectly or directly), resolved or closed
Final sign off	Matters approved by the Commission
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 the Chapter 2 of the Bill of Rights, sections 9 to 35, of the Constitution
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 as contemplated in Chapter 7 of the procedures
Indirect referral	Directing a complaint to another body. The complainant is provided with the contact information of the body and may engage with the body to which a complaint is referred
Intake officer (or designated staff member)	The person who receives and registers a complaint or an appeal
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, 2000 (Act No. 3 of 2000)
Senior legal officer or investigator (or delegated staff member)	An officer 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 to reach an agreement through intervention between parties by an independent person or mediator
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	The monitoring of the implementation of any recommendations made in a report on which a finding was made
Negotiation	The process of conferring with the parties in order to reach an agreement

TERM	DEFINITION
Organisation	An organised body, including a business, political party, trade union or charity
Organ of state	Bears the meaning assigned to it in section 239 of the Constitution
Panel	The panel of the Commission as contemplated in article 21 of the procedures
Person with a mental disability	A person aged 18 years or older whose cognitive ability appears to be comparable to that of a child or appears to render such person vulnerable and in need of assistance or protection
PEPUDA	The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) was enacted to implement measures to address the constitutional right to equality and freedom from unfair discrimination
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	A complaint in which the Commission does not have jurisdiction. Complaints can be either directly referred or indirectly referred <i>Note: Direct referrals must be to legislated bodies</i>
Rejected complaint	A complaint in which 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 in which all internal processes (negotiation, conciliation, mediation, and hearing) have been exhausted, the parties have agreed 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
Sheriff	A person appointed in terms of section 2 of the Sheriffs Act, 1986 (Act No. 90 of 1986), and also a person appointed in terms of section 5 and section 6 of that Act as an acting sheriff and a deputy sheriff respectively
Transfer	The internal transfer of a complaint from one provincial office to another
The South African Human Rights Commission Act	The South African Human Rights Commission Act, 2013 (Act No. 40 of 2013)
Unclear – refer to the steering committee	The provincial office is uncertain of what the assessment outcome should be in a complaint and thus refers it to the steering committee (SC) for guidance and advice



Introduction and context

The South African Human Rights Commission (SAHRC or Commission) is an independent institution established in terms of section 181 of the Constitution of the Republic of South Africa, 1996 (Constitution) to support constitutional democracy. Its mandate, as contained in section 184 of the Constitution, is to:

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

In terms of section 184(2) of the Constitution, the Commission is empowered to investigate and report on the observance of human rights, to take steps and secure appropriate redress where human rights have been violated, to research, and to educate. The additional powers and functions are prescribed by the South African Human Rights Commission Act, 2013 (Act No. 40 of 2013) (SAHRC Act). Additionally, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (PEPUDA), expressly permits the Commission to institute proceedings under the Act² and allows the Commission to assist complainants to institute proceedings in the equality courts (EC).³

The Commission has produced annual trends analysis reports (TAR) since the 2012/13 financial year. These reports provide a general overview of the handling of complaints for the year under review. They provide statistical information on the numbers and types of complaints received, referred and finalised by the Legal Services Unit (LSU), methods of resolution, as well as a narrative analysis of complaints lodged with the LSU. They also document the use of the alternative dispute resolution (ADR) mechanisms, litigation, investigations, and national hearings for the year under review. The TAR informs Parliament and the public of the trends in human rights' violations reported to the Commission through its complaints' mechanisms, and the interventions it has undertaken. It provides insight into the types of human rights' violations occurring in the country and has assisted the Commission to adopt a more integrated approach to executing its mandate and resolving complaints received, and to identify issues that require strategic intervention through litigation services, advocacy and research. The TARs also serve as a baseline to inform future strategic initiatives of the Commission.

There are two aspects to this assessment. The first involves an inward reflection that examines the procedures and practices of the Commission with a view to enhancing the effectiveness of the Commission's work. The second examines the substantive work and identifies external challenges faced by the Commission.

The current 2016/17 Annual TAR has been restructured to provide an analysis of trends and findings in human rights' violations over the past five years, and to include the work of the Research Unit and the Advocacy and Communications (Advocom) Unit to provide an overview of the Commission's work overall and:

- assess findings and trends on the basis of complaints reported to the LSU over the five year period from 2012/13 to date;
- analyse the work produced by the different units of the Commission, to consolidate and holistically reflect on all of the work undertaken by the Commission;
- identify opportunities, challenges and gaps that affect the ability of the Commission to achieve its strategic goals; and
-

² Section 20(1)(f) of PEPUDA.

³ Section 25(3)(a) of PEPUDA.

- inform the future strategic planning of the Commission, bearing in mind the Commission's commitment to strengthen its protection mandate and to deepen understanding of human rights.⁴

The methodology used in compiling the 2016/17 report is largely based on desktop research and includes analysis of:

- quantitative data and statistics of complaints recorded by the LSU over the period 2012/13 to 2016/17;⁵
- findings and recommendations of national and provincial investigative hearing reports, the outcomes, orders and judgments emanating from ADR and litigation proceedings, and reports produced by the Research and Advocacy Units of the SAHRC;
- relevant submissions made by the SAHRC to Parliament, African Commission and various United Nations' bodies relating to identified complaint trends;
- relevant academic research; and
- relevant work of human rights NGOs and by civil society organisations, particularly those with whom the SAHRC has close working relationships.

At the stage of writing this report, the Commission did not have a comprehensive knowledge portal. This has posed a challenge to the task of consolidating the work undertaken by the LSU over the last five financial years. While this has not affected the accuracy of the information in the report, it has limited the analysis. The Commission has since taken measures to develop the database of the LSU to capture details not previously recorded, including demographic detail such as the profile of the complainant's gender and age, to provide more detail on ADR and litigation cases, to disaggregate data, and other measures. The aim is not merely to accurately reflect statistics and trends, but to facilitate, enhance and promote synergy between the work of the LSU, Research and Advocom Units.

The current 2016/17 Annual TAR has been restructured to provide an analysis of trends and findings in human rights' violations over the past five years.

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⁴ SAHRC Revised Strategic Plan 2015-2020.

⁵ The SAHRC financial year runs from 1 April to 31 March.

Profile and nature of complaints over the five year period 2012/13 - 2016/17

The Commission has a national footprint through its provincial offices in all nine provinces of South Africa. Each office is staffed by a manager of a provincial office (provincial manager), senior legal officers (SLO), investigators or legal officers (LO), advocacy officer, human rights officer and administrative staff. The provincial offices receive complaints personally from walk-in complainants, telephonically, electronically, and from communities they visit through various outreach and advocacy initiatives. The national office is based in Johannesburg.

This second chapter of the TAR provides an overview of complaints trends and Commission activities at its provincial offices and national head office for the financial year 1 April 2016 to 31 March 2017. The 2016/17 report also draws a comparison between the indicators of the past five years from April 2012 to 31 March 2017.

This chapter of the TAR provides the basis for more detailed considerations in later chapters. The overviews and profiles create the broad canvas for the analysis and provide:

- a national “snapshot” of complaints registered with the SAHRC, highlighting the top five and bottom five rights’ violations reported to the Commission;
- complaints per province, highlighting the top five and bottom five rights’ violations reported to each provincial office;
- an overview of accepted, rejected and referred complaints and enquiries; and
- a profile of complainants (where this information has been recorded) including gender, location, and income.

Complaints to the Commission are dealt with in accordance with the Commission’s complaints handling procedures (CHP).⁶ In the early stages of receipt of a complaint, they are assessed and addressed by:

- accepting a complaint if it makes a finding that the complaint constitutes a *prima facie* violation of a fundamental right;⁷
- rejecting a complaint;
- directly or indirectly referring a complaint that does not fall within the jurisdiction of the Commission, or that could be addressed more effectively or expeditiously by another organisation, institution, statutory body or institution created by the Constitution or any applicable legislation; and
- referring a complaint to the equality courts (ECs) in terms of PEPUDA.⁸ The Commission may assist the complainant in instituting proceedings in these courts in compliance with PEPUDA and the applicable regulations.

⁶ Complaints handling procedures of the South African Human Rights Commission Government Gazette No. 34963 of 27 January 2012. The complaints handling procedures have since been amended. The new complaints handling procedures (which took effect from 1 January 2018) are available here: <https://www.sahrc.org.za/home/21/files/Complaints%20Handling%20Procedures%20-%20SAHRC%20-%20Public%20-%201%20January%202018.pdf>.

⁷ In accordance with article 12(11) of the complaints handling procedures.

⁸ Article 12(10) of the complaints handling procedures. *The Commission also refers complaints to NGOs and other civil society bodies that specialise in dealing with specific types of human rights’ violations.

2.1 Year on year change

Table 1: Complaints and enquiries: Finalised and carried over per financial year

Financial year	Complaints	Enquiries	Total case-load	Year on year % change	Finalised and once off enquiries			% achievement	Carried over
					Complaints	Enquiries	Total		
2011/12			11 363				9 851		1 512
2012/13	4 947	3 972	8 919	-22	3 075	3 972	7 047	79	1 872
2013/14	4 980	4 237	9 217	3	4 313	4 237	8 550	93	667
2014/15	3 685	4 494	8 179	-11	2 843	4 494	7 337	90	842
2015/16	4 613	4 625	9 238	13	3 575	4 625	8 200	89	1 038
2016/17	4 938	4 792	9 730	5	3 706	4 792	8 498	87	1 235

Table 1 reflects the workload statistics of the Commission over the five financial years under review.⁹ It shows the year on year changes in the number of complaints and enquiries received by the Commission. The total number of complaints and enquiries make up the caseload of the Commission per financial year. The year on year changes are represented in percentages as a decrease or an increase from the previous year. The annual performance plan of the Commission sets a target for finalisation of cases of 85% per financial year. The Commission has both reached and exceeded this target over the past four financial years. The highest finalisation percentage was reached at the end of the 2013/14 financial year where 93% of cases were finalised. A decline in the percentage of cases finalised annually is noted from 2013/14. At the end of the 2016/17 financial year, the percentage of finalised cases was 87%.

However, a year on year comparative analysis by percentages is misleading, as the percentages do not equate to the actual numbers of total cases finalised against the percentage finalisation rates year on year. Case finalisation rates by percentage against a total number of complaints received does not take account of the increased number of cases per year. The measure of analysis is therefore limited. For example, 7 337 cases finalised in 2013/14 equates to a 90% finalisation, while 8 200 cases, which is a higher number of finalised cases, equates to a lower percentage finalised of 89%. This method of analysing productivity creates a misconception that efficiencies are decreasing, whereas they are increasing, as illustrated in Table 2.

Table 2: Number of cases finalised as percentage

Financial year	Number of cases finalised	Percentage finalisation
2013/14	7 337	90
2016/17	8 200	89

The Commission has noted a significant increase in the number of cases that have not been finalised between the 2014/15 and 2016/17 financial periods. This is mainly attributable to a much higher case load in the 2015/16 and 2016/17 years. The number of reported cases rose from 8 149 in 2014/15 to 9 238 in 2015/16, an increase of 1 089 complaints. This increase may be due to the number of cases exposed on social media, and that the Commission has a wider reach than previously.

⁹ The statistical information for the 2011/12 financial year was extracted from the annual report compiled at the end of the particular financial year.

There are a range of other factors that may affect resolution of complaints, including the complexity of matters, matters which are in the process of litigation, factors of a more systemic nature, such as capacity and resource constraints, and external factors such as longer finalisation times of litigation matters due to the heavy case loads in courts. Based on its own interactions with the ECs, the Commission has noted considerable delays in matters litigated by the ECs, from the point of institution of litigation to the conduct of proceedings which often entail multiple postponements. Provincial offices of the Commission have also alluded to challenges regarding the availability of magistrates in the ECs. The Commission's analysis indicates that equality matters can take between one and four years to finalise. Pursuant to the Commission's desire to develop equality jurisprudence in South Africa, it has identified and committed itself to increasing the number of cases litigated in each year. As a result, the number of litigation matters finalised increased by 32% between 2013/14 and 2016/2017.

The method adopted by the Commission for resolution of complaints has a significant impact on the time taken to finalise matters. Litigation is typically time and resource intensive. The number of complaints resolved through either ADR mechanisms or litigation constitute only a small number of cases finalised from the total number of cases before the Commission and the number of cases which are backlogged. The success rates for the resolution of cases through ADR, viewed in terms of enhanced restorative justice outcomes, time, resources and efficacy, make this approach a viable one for general handling of complaints by the Commission. A number of complainants are, however, not amenable to the use of ADR mechanisms.¹⁰

2.1.1 Finalised and active complaints per province

Table 3: Number of complaints finalised and active per province

Province	2012/13		2013/14		2014/15		2015/16		2016/17	
	Finalised	Active	Finalised	Active	Finalised	Active	Finalised	Active	Finalised	Active
EC	343	105	351	68	377	67	379	92	368	61
FS	340	110	430	22	269	40	388	94	513	85
GP	1069	372	989	146	707	214	842	251	629	280
KZN	258	149	439	132	419	91	457	111	371	144
LP	74	181	416	63	348	53	334	82	400	80
MP	177	195	380	54	204	43	229	50	602	37
NC	148	83	182	63	117	42	97	36	114	40
NW	189	231	351	32	149	28	467	36	400	53
WC	479	444	775	87	253	264	382	286	309	452
Totals	3 077	1 870	4 313	667	2 843	842	3 575	1 038	3 706	1 232

Table 3 lists the numbers of finalised and active complaints recorded by the provincial offices of the Commission for the five financial years under review. The complaint finalisation rate is on average 76% per year, with the lowest rate of 62% in 2012/13 and the highest rate of 87% in 2013/14. The percentage of active complaints in 2012/13 was 37% and in 2013/14 it dropped to 15%. The percentage of active complaints in the last three years has remained steady at an average of 23% per annum.

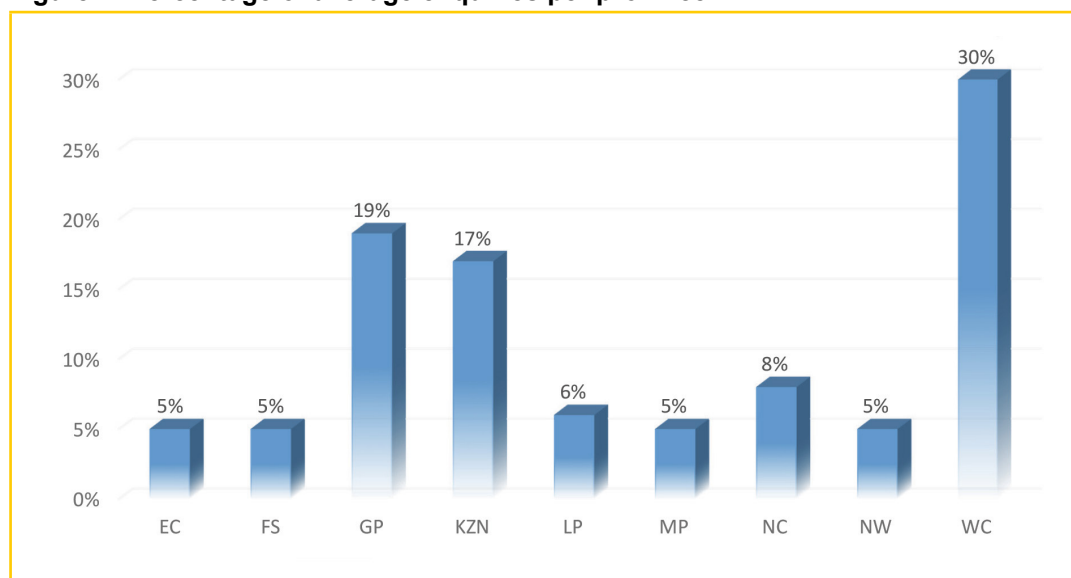
¹⁰ The courts have recognised the advantages of ADR as a method of conflict resolution of cases prior to proceeding with litigation. ADR is used in divorce and maintenance courts to facilitate agreement between the parties. Labour disputes are referred to the Commission for Conciliation Mediation and Arbitration (CCMA) for resolution before they can be referred to the Labour Courts. The rules of the magistrate's courts (court annexed rules inserted in 2014) provide the procedure for voluntary submission to civil disputes through mediation.

The percentage of active complaints in the 2016/17 year increased slightly to 25%.¹¹

In the Eastern Cape there has been no significant decreases or increases in the rates of finalised and active complaints. However, in the Free State provincial office, the rate of finalised complaints has been consistently high and increased to 85% in 2016/17. Gauteng receives the highest volume of complaints. The finalisation rate declined from 77% in 2015/16 to 69% in 2016/17. Many of these complaints are complex in nature. In addition, public interest matters involve a significant number of complainants and it takes a long time to prepare and bring such a matter to trial. Complaints in the North West provincial office dropped to 177 in 2014/15, and then increased to an average of 425 per annum in 2015/16 and 2016/17. The Western Cape provincial office is of concern, with a high number of active complaints that exceeded finalised complaints in 2016/17 by a ratio of 2:3.

2.1.2 Average enquiries per provincial office

Figure 1: Percentage of average enquiries per province



The total number of enquiries received and finalised by the Commission are included in its consideration of matters finalised within a particular financial period. Figure 1 illustrates the average percentage of enquiries recorded by each provincial office over the five financial years under review. The Western Cape provincial office received the highest number of enquires, followed by Gauteng and KwaZulu-Natal provincial offices. The Eastern Cape, Free State, Mpumalanga and North West provincial offices received the smallest number of enquiries, with Limpopo and the Northern Cape provincial offices receiving similarly few enquiries. The considerable variation in enquiry rates per province suggest that there is a need to ensure that the public is aware of the existence of provincial offices where there are low enquiry volumes. High enquiry volumes tend to correlate with high density populations. However, the number of enquiries to the Commission in these provinces bears out the need to intensify initiatives seeking to increase awareness about the various complaints' bodies in South Africa. This has been documented in a 2015 public survey by the Foundation for Human Rights (FHR) that indicates that only about 10% of the population is aware of the mandates of the Chapter 9 institutions. One of the consequences of the low levels of awareness is that members of the public typically approach the Commission for advice regarding a range of legal matters ranging from will and estates to contracts and corruption. These enquiries, by their sheer volume, place significant strain on existing resources required for the finalisation of accepted matters.

2.2 Complaints per provincial office

¹¹ Measures were put in place during 2016/17 to address the increased number of active complaints and are to be assessed for their effectiveness in future evaluations.

Table 4: Number of complaints per province per financial year

Province	2012/13	2013/14	2014/15	2015/16	2016/17
EC	452	425	450	472	435
FS	468	460	316	485	603
GP	1 544	1 344	939	1 110	924
KZN	411	578	520	581	534
LP	255	480	405	417	484
MP	373	438	248	280	642
NC	233	248	160	134	154
NW	420	385	180	514	466
WC	948	880	519	670	770
Total	5 104	5 238	3 737	4 663	5 012

In terms of the Commission's complaints handling manual, "A complaint is an oral, written or electronic communication alleging conduct or omissions in violation of a human right addressed to the SAHRC. The SAHRC may, on its own accord, also investigate an alleged violation of or a threat to a human right."¹² These soft laws align with the discretion accorded to the Commission for the handling of complaints entrenched in the SAHRC.

Table 4 comprises the total number of complaints recorded by the Commission over five financial years per provincial office. The Commission recorded the highest number of complaints during the 2013/14 financial year. One of the reasons for this may be the carryover of a significant number of complaints from the periods prior to 2013/14. The bulk of these complaints were addressed through a dedicated complaints handling backlog project. The success of this project resulted in a significant drop in the number of active complaints recorded in the following year.

2.3 Accepted, referred, and rejected complaints

The Commission assesses complaints received and will either accept the matter, reject or refer it. Complaints are accepted if they evidence a *prima facie* violation of a human right.¹³ Rejected complaints are defined as those complaints where it has been determined that there is no human rights' violation, the violation took place before 1994, or the matter is currently before another dispute resolution forum. Referred complaints are complaints that fall within the broad mandate of the Commission, but that may more appropriately be addressed by a body created in terms of statute to address such matters. Complaints which fall within the jurisdiction of such bodies are referred to them either as direct or indirect referrals. These complaints are not investigated by the Commission. However, in referred matters where the Commission has specific interest in the outcomes of the matter, it will monitor the progress and outcome of the matter.

¹² p.22, Manual: handling of complaints, September 2011

¹³ The Commission's complaints handling procedures provides that the complainant must be informed that the complaint has been accepted (within seven days).

2.3.1 National percentages for accepted, referred, and rejected complaints and complaints under assessment

Figure 2: Percentage complaints accepted, rejected and referred

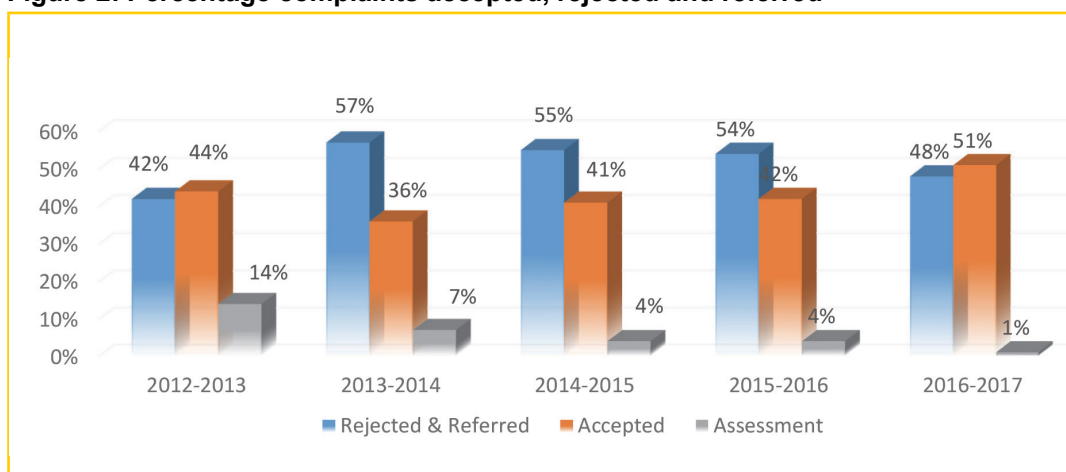


Figure 2 illustrates the percentage of complaints classified as accepted, rejected and referred, or under assessment in that year.

In the course of the five year review period the percentage of rejected¹⁴ or referred¹⁵ complaints significantly exceeded the percentage of accepted complaints in the 2013/14, 2014/15, and 2015/16 financial years. The data is not disaggregated between referred and rejected complaints. However, it is likely that most of these complaints would have been referred as opposed to rejected as there are limited grounds for rejection of complaints.¹⁶ These statistics reinforce considerations discussed in paragraph 2.1.2 about the need to increase awareness of the scope of the Commission's work, and to improve access to justice and other rights. Many complainants approach the Commission as a last resort, when their complaints have not been resolved by the appropriate bodies. There is a need for the Commission to engage with other bodies and human rights institutions regarding the fulfilment of their mandates. The decline in the percentage of complaints that are at the assessment stage indicates that improved skills sets and training, enhanced operational measures, the creation and awareness of a number of bodies with mandates to investigate complaints, jurisprudence, and other factors have positively contributed to more expeditious assessments of complaints at entry stage.

¹⁴ In terms of article 4(2) of the complaints handling procedures, [T]he Commission may reject any complaint that is: (a) based on hearsay, rumour or media reports; (b) couched in language that is abusive, denigrating, etc.; (c) is the subject of a dispute before a court of law, of law, tribunal, any statutory body, any body with internal dispute resolution mechanisms; or that has already been settled between the parties, or in which there is already a judgment or finding on the issues in the complaint or finding; (d) an anonymous complaint; (e) is frivolous, misconceived, etc. and manifestly incompatible with fundamental rights; or does not comply with the provisions of the Act and these Procedures; and (f) is lodged after the matter has prescribed, that is, a period of three years from the date of the alleged violation, subject to the provisions of article 11 of these Procedures. These grounds are subject to provisos that may allow the Commission to deal with the complaint.

¹⁵ Articles 12(8) and 12 (9) of the complaints handling procedures.

¹⁶ It is suggested that referred and rejected complaints be disaggregated to facilitate analysis.

2.3.2 Accepted, rejected and referred complaints per provincial office

Table 5: Number of complaints accepted, referred and rejected per province per financial year

Province	2012/13		2013/14		2014/15		2015/16		2016/17	
	Accepted	Rejected/ Referred	Accepted	Rejected/ Referred	Accepted	Rejected/ Referred	Accepted	Rejected/ Referred	Accepted	Rejected/ Referred
EC	159	272	147	262	144	296	152	313	166	259
FS	149	281	135	317	67	237	138	344	171	427
GP	520	719	377	732	329	531	500	539	518	390
KZN	135	159	195	298	193	285	186	343	238	230
LP	197	50	212	264	153	248	154	262	206	251
MP	140	141	137	287	117	130	158	121	403	235
NC	171	56	161	84	116	43	79	52	75	79
NW	185	166	183	200	72	105	201	302	148	305
WC	573	294	317	545	327	190	411	257	561	200
Total	2 229	2 138	1 518	2 989	1 518	2 065	1 979	2 533	2 486	2 376

The table above illustrates the total number of accepted and rejected or referred complaints per provincial office of the Commission. The totals do not include:

- the number of complaints transferred from one provincial office to another; or
- the number of complaints that were still at the assessment stage at the end of each of the five financial years under review.

The number of complaints accepted by the Commission has steadily risen from 1 518 accepted complaints at the end of the 2013/14 financial year to 2 486 at the end of the 2016/17 financial year. The Commission accepted the highest number of complaints during the 2016/17 financial year. Except for the Eastern Cape and the Western Cape provincial offices, where accepted complaints exceeded rejected complaints in the five year period under review, most provincial offices rejected more complaints than they accepted. However, the total number of complaints for the Eastern Cape in 2015/16 and 2016/17 declined significantly, indicating a need for education and awareness about the work of the Commission, and making the Commission more accessible to rural areas. Community outreach programmes arranged by provincial offices through the Advocom Unit have been effective in addressing this problem. These initiatives may need to be carried out in a more systematic way for wider reach. Referred and rejected complaint rates declined somewhat in 2016/17. The reasons why there are more rejected complaints in general could benefit from further analysis.

Complaints are accepted if they evidence a prima facie violation of a human right.

2.4 Nature of Rights

The Bill of Rights (Chapter 2 of the Constitution) affirms the cornerstone democratic values of human dignity, equality and freedom. For the purposes of this analysis, these rights are broadly categorised as:

- rights to equality and freedom from discrimination on any of the grounds listed;
- civil and political rights; and
- social, economic and cultural rights.

The right to equality underpins of all these rights. The latter includes:

- equality and equal protection before the law;
- the full and equal enjoyment of all rights and freedoms, including positive measures taken to advance and protect people previously disadvantaged by unfair discrimination; and
- the prohibition of unfair discrimination on a number of listed grounds including race, colour, gender, sex, ethnic and social origin, culture, language, and a host of other grounds of discrimination found in South Africa.

Civil human rights comprise rights such as:

- freedom from slavery, servitude, and forced labour, torture and arbitrary arrest;
- access to justice; and
- equality before the law.

Political rights include:

- freedom of expression, conscience, and religion;
- freedom of association, assembly, demonstration, picket and petition; and
- political participation.

Socio-economic human rights include social rights such as health care, food, water, and social security (section 27 referred to as economic and social rights (ESR) in this categorisation), and housing and education. Economic rights include the right to work and fair wages, an adequate living standard, and social security. These rights are interrelated and interdependent.

2.4.1. Rights' violations

The Commission receives a broad range of complaints regarding violations of human rights. The table below records the number of complaints received that have been accepted by the Commission over the 2012/13 to 2016/17 period, categorised by rights. Note that these statistics reflect all reported complaints accepted by the Commission. While the interdependent, interrelated nature of these various rights is recognised for monitoring purposes, the Commission records complaints received against the primary right implicated and not all the rights affected on the basis of the reported violation. Records of complaints will reflect details of all or most of the rights violated by one act of violation.¹⁷ For example, access to housing, water and sanitation, and discrimination on multiple grounds and intersecting grounds, such as race, gender, socio-economic status, and class.

¹⁷ ESR Research Brief 2016/2017.

Table 6: Number of complaints per rights' violations per year

Rights' violations	2012/13	2013/14	2014/15	2015/16	2016/17
Section 13					
Slavery, servitude and forced labour	1	1	0	0	1
Section 30					
Language and culture	5	8	0	1	4
Section 36					
Limitation of rights	0	0	3	1	0
Section 19					
Political rights	1	1	6	2	5
Section 18					
Freedom of association	4	4	1	5	3
Section 17					
Assembly, demonstration, picket and petition	6	7	6	6	3
Assessment	288	40	10	7	30
Section 22					
Freedom of trade, occupation and profession	11	14	10	8	17
Section 11					
Life	27	23	7	9	6
Section 15					
Freedom of religion, belief and opinion	14	15	17	14	9
Section 31					
Cultural, religious and linguistic communities	16	15	17	15	31
Section 21					
Freedom of movement, residence, passport and to leave the Republic	13	11	9	18	16
Section 34					
Access to courts, independent tribunals and forums	50	53	34	33	19
Section 20					
Citizenship	31	26	26	41	75
Section 14					
Privacy	49	51	42	49	47
Section 24					
Environment	74	92	64	94	114
No violation	414	261	97	102	108
Section 12					
Freedom and security of the person	105	148	94	114	120
Section 25					
Property	142	189	134	115	129
Section 16					
Freedom of Expression	62	77	91	117	150
Section 32					
Access to information	192	144	110	150	171
Section 28					
Children	135	142	155	165	165
Section 10					
Human dignity	353	317	175	244	280
Section 29					
Education	227	265	221	276	297
Section 26					
Housing	290	285	157	290	289

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Rights' violations	2012/13	2013/14	2014/15	2015/16	2016/17
Section 33					
Just administrative action	592	635	366	379	407
No jurisdiction	145	315	247	382	311
Section 35					
Arrested, detained and accused persons	536	655	473	409	443
Section 27					
Health care, food, water and social security (ESR)	236	361	338	428	631
Section 23					
Labour relations	574	527	334	440	426
Section 9					
Equality	511	556	493	749	705
Total	5 104	5 238	3 737	4 663	5 012

2.4.2. Top five rights' violations reported to the Commission

Table 7: Top five complaints per rights' violations per year

Right/s violations	2012/13	2013/14	2014/15	2015/16	2016/17
Equality	511	556	493	749	705
Health care, food, water and social security (ESR)	236	361	338	428	631
Arrested, detained and accused persons	536	655	473	409	443
Labour relations	574	527	334	440	426
Just administrative action	592	636	366	379	407

The top five rights' violations comprised 52% of total number of complaints at the end of the 2016/17 financial year. For the first four financial periods under review, the top five rights' violations have remained the same. However, an interesting pattern is a significant decrease in the number of complaints regarding just administrative action, labour relations, and arrested, detained and accused persons between 2012/13 and 2016/17, whereas there has been a significant increase in the number of complaints regarding ESR and equality. The 2016/17 figures illustrate a complete shift in the hierarchy of complaints. ESR related complaints far exceed three of the four remaining complaints categories, namely, administrative action, labour relations; and arrested, detained and accused persons. ESR complaints (631) are second on the hierarchy of complaints, with equality (705) the highest.

More significantly, when ESR complaints (631) are taken together with other socio-economic rights complaints relating to housing (297) and education (289), the total number of socio-economic rights complaints (1 217) exceeds equality complaints (705) by 512 in the 2016/17 year. A more detailed discussion around the top five rights' violations follows.

Complaints relating to just administrative action, arrested, accused and detained persons and labour relations should normally be reported to the appropriate bodies specifically mandated to deal with these rights' violations (such as the Offices of the Judicial Inspectorate, Legal Aid South Africa, the Independent Police Investigations Directorate (IPID), and the Commission for Conciliation, Mediation and Arbitration (CCMA)) or applicable bargaining councils for labour disputes, unfair dismissals, and discrimination in the workplace. The Commission would refer these complaints to the appropriate bodies. Many of these complaints may not have reached the Commission at all had the complainants been aware of the appropriate bodies to approach, which indicates a need for more and wider education about the mandates of the various bodies. However, many of these complaints are reported to the Commission because complainants are not getting the assistance they need from the appropriate bodies, and complainants turn to the Commission as the mandated arbiter of equality and human rights as a last resort.

2.4.3 Equality

Over the five year period of review, the highest number of human rights' violation reported to the Commission was in the category of equality rights' violation. Between 2014/15 and 2015/16, equality complaints jumped from 493 to 749, representing an increase of 34%. The number dropped marginally in 2016/17 to 705. A special consideration of the right to equality in analysing trends in complaints is thus warranted. Endemic inequality in South Africa results in the negation and violation of numerous other basic rights guarantees within the Bill of Rights.¹⁸

The right to equality, enshrined in section 9 of the Constitution, provides for the promotion of equality and the prohibition of unfair discrimination. Section 9(2) of the Constitution states that in order “to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.” In South Africa, section 9(3) of the Constitution prohibits unfair discrimination on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Discrimination on one or more of these grounds is deemed to be unfair discrimination unless it is established that the discrimination is fair.¹⁹ This distinction is important, particularly because of South Africa's unique history of entrenched, systemic racism against and oppression of black people, and its huge inequalities. Apartheid perfected, in a most pernicious way, white supremacy and racism and oppression that existed under colonialism.

Enabling legislation in the form of PEPUDA was enacted in terms of Section 9(2) of the Constitution to:

- prevent and prohibit unfair discrimination and harassment;
- promote equality and eliminate unfair discrimination;
- prevent and prohibit hate speech; and
- provide for matters connected therewith.

PEPUDA endeavours to facilitate South Africa's transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom for all.

Equality is a key focus area of the work of the Commission in discharging its mandate to promote a culture of respect for human rights in a democratic South Africa through protection, monitoring and education about basic rights. The constitutionally guaranteed right to equality and the equal protection and benefit of the law must be understood in the context of South Africa's history of inequality, racism, and sexism briefly outlined above. For these reasons, together with the understanding that the right to equality is intrinsically linked to other basic rights, the Commission adopts a broad approach to equality complaints, accepting those which sometimes have an overlap with bodies such as the Commission for Gender Equality (CGE) or other Chapter 9 institutions. The Commission has committed itself to the eradication of inequality and unfair discrimination since its inception by responding to public interest matters in the form of national hearings and facilitating dialogues to deepen an understanding of the right to equality. Over time, particular focus has been brought to bear on violations relating to the grounds of race, disability, and ethnic and social origin.

¹⁸ See page on equality on the SAHRC website, as well as current reports on equality.

¹⁹ Section 9(5).

The Commission's continued strategic focus on the right to equality is informed by its recognition of the need to transform society economically, socially, and politically to ensure meaningful realisation of rights for all. It is acutely aware that the continued manifestation of violations to the right to equality requires reactive responses to complaints on the one hand, and more long-term proactive interventions to promote social cohesion and fully eradicate the scourge of inequality on the other.

The Commission has oriented itself to respond to the increasing equality related complaints it receives through the use of systemic investigations, ADR and litigation. These interventions are discussed in the chapters which follow.

Equality related complaints received per year

Table 8: Percentage of equality related complaints as a percentage of total complaints per year

Financial year	Complaints per financial year	Equality complaints per financial year	%
2012/13	5 104	511	10
2013/14	5 238	556	11
2014/15	3 737	493	13
2015/16	4 663	749	16
2016/17	5 012	705	14

Table 8 indicates the number of complaints based on equality received annually against the total number of complaints received by the Commission. Equality related complaints have consistently constituted the highest number of complaints received by the Commission over the period under review, which is unsurprising given the historical context set out above. Equality related complaints have increased by 12.8% on average over the last five years, reaching highs of 16% in 2015/16 and 14% in 2016/17.

Figure 3: Average percentage of equality complaints recorded per provincial office

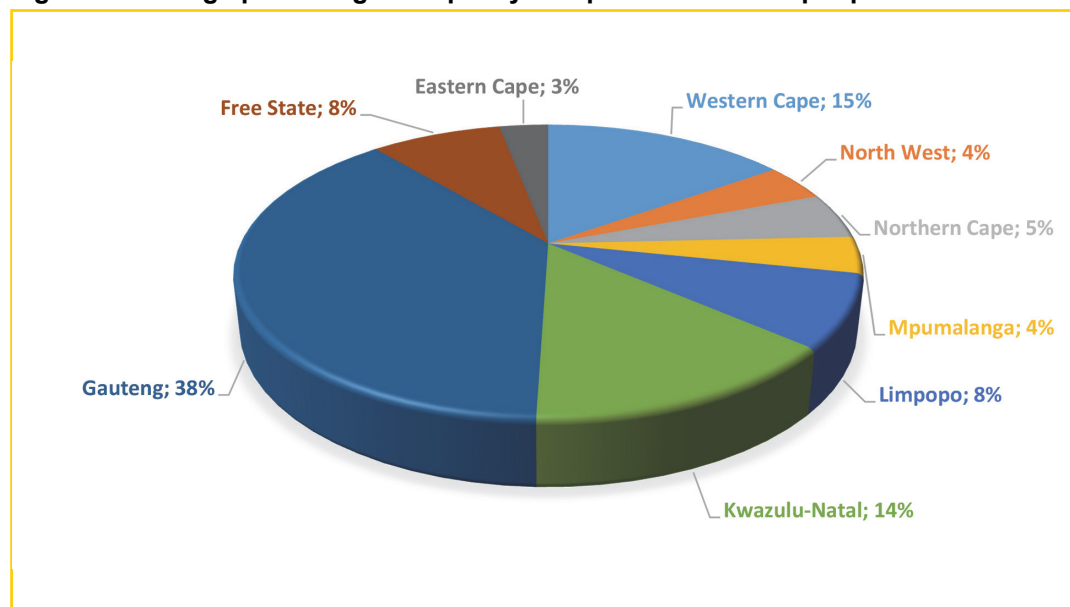


Figure 3 illustrates the average percentage of equality complaints recorded by the Commission per provincial office over the five years under review. The Gauteng provincial office recorded the highest percentage of equality related complaints over the review period (38%). This was followed by the Western Cape (15%) and the KwaZulu-Natal provincial offices (14%). These three provincial offices are referred to as the "high intake" offices of the Commission.

Equality complaints on specified grounds of discrimination

The listed grounds of unfair discrimination in section 9(3) of the right to equality include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The Commission records complaints of unfair discrimination on the basis of any of the listed grounds. Such complaints are categorised based on the primary equality rights' violation implicated in the complaint, and not all the rights affected in the violation. Interrelated rights are not recorded. Inequality on the basis of more than one ground of discrimination, such as race and gender and class, gender and disability, race and sexual orientation, race and social origin and disability, is not recorded, although it is often obvious from the circumstances of the rights' violation. The Commission now records all demographic information about the complainants, as well as all rights violated by the transgression (recommended by the SAHRC research brief on ESR 2015/16).²⁰ The concept of intersectionality²¹ explains how racism is compounded for black women by patriarchy, an entrenched system of oppression and inequality of women, and compounded even further by poverty, class, sexual orientation, religion, disability, xenophobia and other forms of oppression and vulnerability.

Types of equality complaints

Table 9: Number of complaints on grounds of equality per year

Equality	2012/13	2013/14	2014/15	2015/16	2016/17
Equality – age	10	20	13	24	21
Equality – belief	2	1	1	2	0
Equality – colour	8	1	1	0	3
Equality – conscience	0	1	0	0	0
Equality – culture	4	6	8	5	13
Equality – disability	45	70	62	66	69
Equality – ethnic or social origin	39	55	35	47	27
Equality – gender	12	19	11	18	9
Equality – language and birth	4	3	2	7	5
Equality – marital status	3	6	0	1	1
Equality – pregnancy	1	2	0	1	2
Equality – race	208	297	292	505	486
Equality – religion	17	34	36	22	22
Equality – sex	4	2	2	3	2
Equality – sexual orientation	14	22	17	26	24
Equality – no specific listed ground	129	0	0	0	21
Totals	511	556	493	749	705

Table 9 shows that unfair discrimination on the grounds of race, disability, and ethnic and social origin are the top three complaints. In 2015/16, 505 complaints out of a total of 749 equality complaints were race related, an increase of 40% from 2014/15 which had 289 recorded complaints, and approximately 10 times more than the next two highest grounds, namely, disability (66), and ethnic and social origin (47). The number of disability related complaints has been on average 67, excluding 45 complaints in 2012/13. Ethnic or social origin related complaints has been on average 44 over the years reviewed.

In the 2016/17 year, race, disability, and ethnic or social origin continue to be the highest grounds of equality related complaints reported to the Commission. Almost all equality related complaints have decreased in number, except for disability. The latter increased

²⁰ SAHRC research brief on ESR 2015/16.

²¹ The term 'intersectionality' was first coined by legal scholar Kimberlé Crenshaw in 1989.

from 45 in the 2012/13 financial year to 69 in the 2016/17 year and appear to be on an upward trajectory. Race related complaints have decreased marginally from 505 in 2015/16 to 486 in 2016/17, but the numbers remain extremely high, particularly in comparison to the first three financial years under review, which averaged 266 race related complaints a year. Ethnic and social origin related complaints have had the most significant decrease from 47 to 27, which puts them on par with sexual orientation (24) and age related (21) complaints.

While gender related complaints reported to the Commission are very low, this does not reflect an accurate picture of gender based discrimination in South Africa, and complaints of this nature reported to the Commission are, as a matter of course, referred to the CGE. Most gender based complaints are reported directly to the CGE. Discrimination on the grounds of gender constitutes the highest ground of discrimination, with 894 complaints reported to the CGE in 2013/14, compared to 297 race related complaints reported to the SAHRC.²² In addition, the SAHRC deals with a number of race and other grounds of equality related complaints reported by women that would also constitute gender related discrimination. Similarly, the number of sexual orientation related complaints reported to the SAHRC remains low at 24 for 2016/17.

Most of these complaints are reported directly to the CGE. Pervasive discrimination against members of the South African LGBTIQ community, high levels of homophobic hate speech and the frequency of hate crimes, particularly the murder of black women who identify as lesbian or queer, are an issue of great concern. Despite the mandate of the CGE, the Commission has addressed cases of discrimination against LGBTIQ people, and brought an application to the EC in a case of hate speech at the request of LGBTIQ organisations in 2016/17.²³ It has also undertaken a number of initiatives outside of the complaints handling process to enforce rights and secure reforms, including the 2014 equality roundtable dialogue,²⁴ the African regional seminar on violence and discrimination based on sexual orientation gender identity and expression (SOGIE) in 2016,²⁵ and submissions to treaty bodies.²⁶

2.4.4. Equality: Race

Race based discrimination presents the greatest challenge to the work of the Commission, as evidenced by the extremely high volume and the frequency of race related complaints received by the Commission in 2015/16 and 2016/17.

Figure 4 shows that race related complaints comprise the highest percentage of equality complaints per year. Between 2013/14 and 2016/17, the number of race related complaints has exceeded the total number of equality complaints by an average of 62% per year. The percentage of race related complaints is increasing year on year and reached 69% in 2016/17.

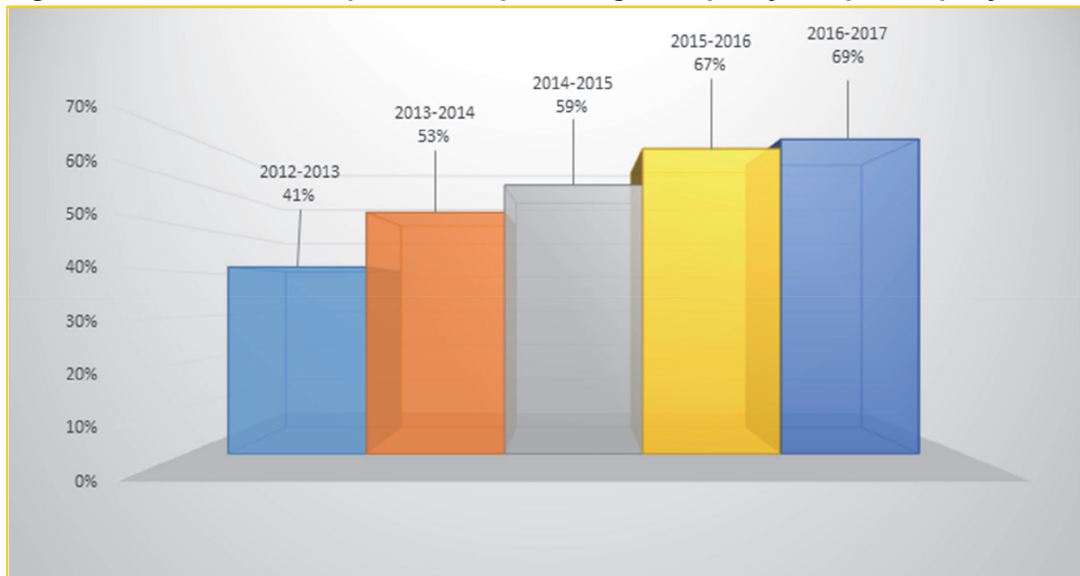
²² Commission on Gender Equality annual report 2013/14. Available at: <https://drive.google.com/file/d/0B43RY8hVdugGQ3JvaWF5RFFZVTg/view>. More recent reports are not available on the CGE website.

²³ *South African Human Rights Commission and 3 others v Dubula Jonathan ("Jon") Qwelane Case No. EQ44/2009 9EQ13/2012*. The case involved a journalist, Jon Qwelane, who published an article in a national newspaper, in which he expressed extreme contempt for LGBTIQ people, calling homosexuality unnatural and referring to gay marriages as bestiality.

²⁴ The report addresses the issues of sexual orientation and equality, and migration and the rights of non-nationals. Equality roundtable dialogue report, 27 March 2014. Available here: <https://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf>.

²⁵ SOGIE explored practical solutions for addressing violence and discrimination against persons based on sexual orientation, gender identity and expression and primarily focused on implementing resolution 275. The seminar culminated in the adoption of the 2016 Ekurhuleni declaration.

²⁶ SAHRC NHRI report to CERD 2016.

Figure 4: Race related complaints as a percentage of equality complaints per year

The public exposure of many racist incidents can be attributed to the growing popularity and use of various social media platforms (particularly Facebook and Twitter). In addition, people use social media as a platform to express racism. Derogatory comments, intended to denigrate the intelligence, humanity, appearance, and beliefs of black people, are rife. Racist remarks commonly include demeaning epithets like “baboon”, “monkey”, “aap” “hotnot”, and “coolie”. The use of the “K” word is endemic. These incidents of racial discrimination take place at schools, universities, businesses, and in the workplace. They are not limited to verbal abuse, but often also entail further violations, including physical violence, intimidation, sexual harassment or assault, and being physically excluded or removed from establishments or businesses.

The Commission deals with race based complaints through the use of ADR mechanisms to assist parties to reach settlement, or through litigation if the matter is very serious or the complainant does not want to settle. The Commission has litigated on a number of high profile hate speech related cases in the ECs and the high courts. These have involved denigrating remarks that reinforce racist attitudes to and stereotypes about black people, comments that amount to and promote incitement to hatred, and comments that express and promote white supremacy. The courts have found that these expressions of racism amount to hate speech. The Commission has thus been developing the EC jurisprudence on hate speech. These cases are discussed in chapter 5.

However, racism is systemic and racist attitudes remain largely unchanged. For many poor black people, for example, farm and domestic workers, in South Africa, racism is a part of the daily fabric of their lives, and they remain vulnerable to racist treatment and name calling, and race based attacks.

The public exposure of many racist incidents can be attributed to the growing popularity and use of various social media platforms.

Racism has been an integral feature of Western society for centuries. It has been and continues to be the dominant world view, shaping South African society since the colonial era. Racism is arguably the most pernicious system of oppression in the world. It is informed by an assumption of innate racial superiority, and the denial of the humanity of people of different racial and/or ethnic groups. Despite democracy, patterns of racism and systemic racial inequality remain entrenched in South Africa. Persistent inequality contributes to ongoing violations of basic human rights and extreme poverty. Complaints about racism remain of serious concern to the Commission. However, when the compounded effects of its impact, and violations to multiple rights of impacted people are considered, the need for concerted interventions by all sectors of society to eradicate racism are most urgent. Over a period of time, the Commission has raised its concerns about the prevalence of racial discrimination in South Africa and its impact on basic human rights through a range of interventions. These have included the production of equality reports, the equality roundtable dialogue report 2014 and reports to various international bodies such as the committee on the elimination of racial discrimination (ICERD). These reports inform the extent to which the country has progressed towards the attainment of equality and contain recommendations to responsible authorities for reforms by the Commission. In 2016/17, the Commission intervened to accelerate efforts for the adoption of the national action plan to combat racism, racial discrimination, xenophobia and related intolerance (NAP) and the National Development Plan (NDP) by the end of 2018. To this end, the Commission convened a multi-sectoral dialogue on racism, which culminated in the Midrand declaration against racism, adopted on 15 March 2017.²⁷

Equality – Race complaints per provincial office, per financial year

Table 10 reflects the number of race related complaints reported to the Commissions provincial offices during the period under review. In the five year period, the Gauteng provincial office recorded the highest number of race related complaints. In three of the four financial years, the KwaZulu-Natal provincial office recorded the second highest number of race related complaints. The number of complaints in this category has increased in KwaZulu-Natal year on year, while it has been unpredictable in Gauteng, peaking dramatically in both provinces during 2015/16. Most other provinces do not demonstrate increases of great significance, with margins in peaks and troughs for these provinces around 5% to 10% except for the Free State province which increased from no equality/race based complaints in 2012 to 42 complaints during 2015/16.

Table 10: Number of equality complaints per province per year

Equality – Race	Eastern Cape	Free State	Gauteng	KwaZulu-Natal	Limpopo	Mpumalanga	Northern Cape	North West	Western Cape	Totals
2012/13	1	0	105	16	5	25	17	4	35	208
2013/14	4	37	100	40	28	23	28	12	25	297
2014/15	6	17	109	50	24	20	20	6	40	292
2015/16	11	42	183	163	24	10	23	13	36	505

²⁷ The Midrand declaration called on all stakeholders - state and non-state - to pledge their support to the implementation of the policies and programmes outlined in the national action plan. SAHRC research brief on race and equality 2013-2017. Available here: www.sahrc.org.za/home/21/files/20170601%20SAHRC%20Midrand%20Declaration%20against%20Racism.pdf

2.4.5. Health care, food, water and social security (ESR)

Socio-economic rights have consistently been in the top five complaints reported to the Commission. However, ESR related complaints increased drastically between 2015/16 and 2016/17, from 428 to 631 respectively, an increase of 203 complaints (more than 30%). ESR related complaints now far exceed three of the four remaining complaints categories, namely, administrative action, labour relations, and arrested, detained and accused persons, and ESR is now the second highest complaint reported to the Commission, with equality (705) the highest.

More significantly, when ESR complaints (631) are taken together with other socio-economic rights' complaints relating to housing (297) and education (289), the total number of socio-economic rights complaints (1217) exceeded equality complaints (705) by 512 in the 2016/17 year.

Table 11: Health care, food, water and social security complaints per financial year

Financial year	Complaints per financial year	Health care, food, water and social security per financial year	%
2012/13	5 104	236	5
2013/14	5 238	361	7
2014/15	3 737	338	9
2015/16	4 663	428	10
2016/17	5 012	631	13

Table 11 sets out the total number of ESR related complaints over the five financial years under review. There has been a steady increase in the percentage of complaints received annually by the Commission. The total percentage of ESR complaints increased substantially to 13% of the total number of human rights complaints for the 2016/17 year, with equality recorded at marginally higher levels of 14.07%. The rate of ESR complaints for the entire period of review increased by 395 complaints from 236 to 631. This is the highest increase in any complaint category over the five year period.

ESR related complaints cannot be considered in isolation from the interrelated socio-economic complaints of housing and education,²⁸ as this is not an accurate reflection of trends in socio-economic complaints reported to the Commission. When housing and education complaints are considered, the total number of socio-economic related complaints exceeds all other rights' violations, including equality, by a very high margin. Violations of socio-economic rights are in themselves a function of inequality in South Africa. In addition, the number of socio-economic rights' related complaints is not an indicator of the extent of socio-economic rights' violations, as many, such as housing, water and sanitation, impact on entire communities and groups of affected people. Trends in socio-economic rights related complaints thus show rapidly increasing levels of socio-economic rights' violations, and a high level of ongoing violations that are not addressed year on year.

The high number of ESR complaints in 2016/17, together with housing and education, is an indication of a number of factors: higher levels of poverty, the slow pace of service delivery at local, provincial and national levels, and ineffective or dysfunctional local governance. Poor communities have limited or no access to basic rights such as housing, water and sanitation, and these matters are not adequately addressed by local municipalities.

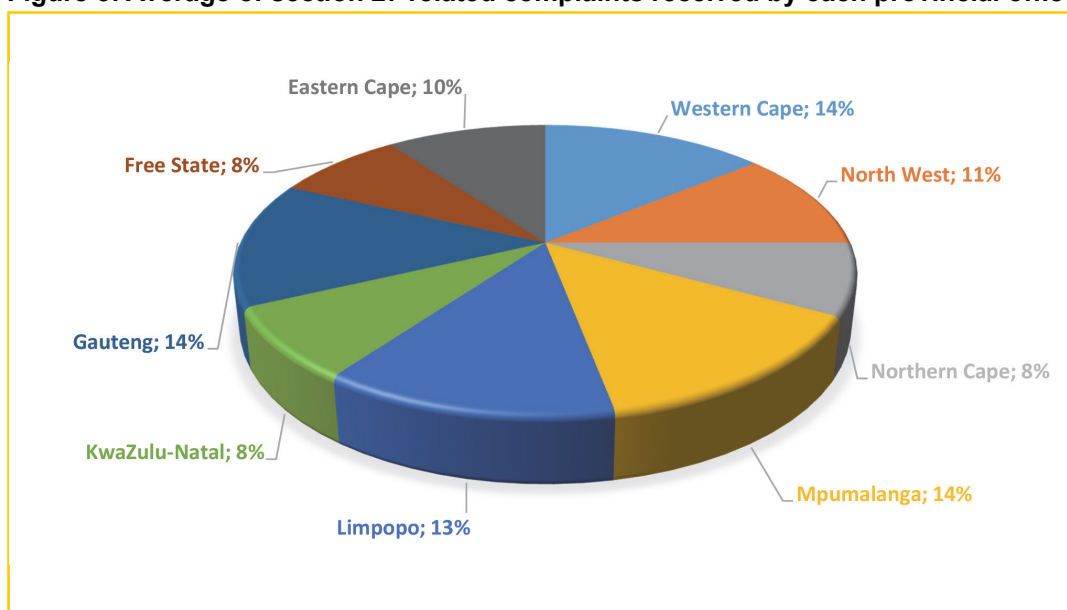
²⁸ Statistics for ESR related complaints are not disaggregated, so the number of complaints for each right to health care, food, water, and social security is not available. Disaggregation of these complaints would be very helpful in assessing the extent of these individual rights' violations in the country. Housing and education are discussed in para 3.2.4.

There is an increasing frustration about service delivery, evidenced by the increase in the number and frequency of service delivery protests by communities all over country.²⁹ That these complaints are increasingly being brought to the Commission also indicates that NGOs working directly on service delivery issues in communities are using the Commission to resolve these complaints through litigation, investigative hearings, and national hearings. It also indicates that the Commission is achieving a wider reach into affected communities.

The Advocom Unit in the provincial offices have outreach programmes in various communities, where community members are educated about their rights and can relate the challenges they are facing.³⁰ The Commission's 2020 strategic plan recognises the need to intensify advocacy, increase public and community outreach programmes, and extend their reach.

Lack of access to socio-economic rights provides the clearest reflection of the levels of systemic poverty, unemployment, and inequality in South Africa and demonstrates the persistent recurrence of the cycle of poverty. The severely disproportionate gap between poverty experienced between the white population group and the coloured and black African population groups starkly illustrates the persistence of structural inequality and the intersection of race and socio-economic disadvantage.³¹ Most poor people do not break out of the cycle of poverty in their lifetimes, and such poverty is perpetuated for generations, with its attendant social ills. These are the challenges faced by the equality project of our constitutional democracy.

Figure 5: Average of section 27 related complaints received by each provincial office



In the period under review, complaints relating to health care, food, water and social security comprise an average 9% of total complaints per financial year. Figure 5 comprises the average percentages of ESR related complaints received by the Commission's provincial offices. These percentages are relatively evenly distributed amongst all provincial offices. Gauteng and Western Cape, the more densely populated and developed provinces, have the highest percentage of complaints. The phenomenon of urbanisation as people migrate to urban centres in search of work has resulted in a failure by cities to provide adequate access to housing and other basic services.

²⁹ Report of the South African Human Rights Commission investigative hearing access to housing, local governance and service delivery 23 – 25 February 2015. Available here: <https://www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf>

³⁰ SAHRC annual human rights advocacy and communications unit report 2016 – 2017. Available here: <https://www.sahrc.org.za/home/21/files/29567%20A4%20adv%20report%20FINAL%20FOR%20PRINT.pdf>

³¹ SAHRC policy brief on race and inequality in South Africa 2013-2017. Available here: www.sahrc.org.za/home/21/files/RESEARCH%20BRIEF%20ON%20RACE%20AND%20EQUALITY%20IN%20SOUTH%20AFRICA%202013%20TO%202017.pdf

Informal settlements on the perimeters of urban areas are most affected by the lack of adequate housing, water, sanitation, and other basic services. The Northern Cape, which is one of the poorest and most underdeveloped provinces in South Africa, has a low percentage of complaints. This province is largely rural with great distances between towns. Underreporting of complaints can be attributed to people not knowing about the Commission, and difficulty accessing Commission offices.

2.4.6. Housing and education

Aside from a decrease in complaints to nearly half in 2014/15, the number of housing complaints has been consistent over the past five years, averaging 248 per year. Education complaints, at a similar level, have increased steadily. Together with ESR complaints, these socio-economic rights comprise 24% of all complaints, significantly exceeding equality related complaints. Socio-economic rights, in particular, housing, water and sanitation, are often interrelated. Lack of access to socio-economic rights provides the clearest reflection of the levels of poverty, unemployment, and inequality in South Africa and demonstrates the persistent recurrence of the cycle of poverty.

The Constitutional Court recognised the challenges to poor people of a lack of access to basic rights:

“On several occasions this Court has been called on to decide difficult issues in connection with access to health care, housing and water, as well as the provision of electricity. This is understandable. Our history is one of land dispossession, institutionalised discrimination and systemic deprivation. The need for housing and basic services is still enormous and the differences between the wealthy and the poor are vast.”³²

Access to housing, water and sanitation remain key challenges. Housing evictions in the inner cities, on farms, informal settlements, and squatter camps are endemic all over the country. A major factor in evictions and demolitions is a lack of access to housing and land, due to the critical shortage of housing in South Africa, inefficient and corrupt systems of allocation of housing and land by municipalities and provinces, and a lack of engagement by municipalities with affected communities. Communities often settle on vacant state land - so-called unlawful occupation - because they do not have access to housing or have been removed from their homes. There is usually no access to basic services like water and sanitation in these areas. Sanitation is a key issue particularly in the Western Cape but also in other provinces and the Commission has held several investigative hearings on this issue.

Most poor people do not break out of the cycle of poverty in their lifetimes.

In response to systemic and enduring rights' violations relating to basic economic and social rights, the Commission has adopted multi-pronged approaches to address past, present and continued need for appropriate redress. During the five year period under review, the Commission hosted a range of public enquiries on ESR rights related topics:

- In 2013/14, national enquiries on access to housing, local governance and service delivery,³³ the right to access sufficient water and decent sanitation in South Africa³⁴ and access to emergency medical services in the Eastern Cape were held.³⁵ These public hearings investigated, among others, systematic challenges experienced in the realisation of the rights to access to housing, basic service delivery, water and sanitation, and health care services.
- In 2014/15, an investigation was conducted into the delivery of primary learning materials at schools. The Commission, together with NGOs working on education, also litigated to compel the delivery of textbooks to schoolchildren in Limpopo and Mpumalanga.³⁶
- In 2015/16, the Commission held a national investigative hearing on the impact of protest-related action on the rights to a basic education in South Africa in 2016 to 2017.³⁷
- In 2015/16 and 2016/17 the Commission held a national hearing on transformation at public universities.³⁸

The Commission's analysis of ESR-related complaints for 2015/16

In April 2016, the Commission's Research Unit conducted an analysis of ESR related complaints received in 2015/16 and developed a recording tool to more fully access information about complaints and complainants. Information on ESR related complaints was collected between September 2016 and January 2017. Approximately 18% of all complaints received by the Commission during this financial year were ESR related. The most common complaints related to the right to water and sanitation, basic education, housing and health care.

While a complainant's demographic information is typically not recorded by provincial offices, such information was recorded in this instance. The majority of complainants were black (43%), while 12% of complainants were coloured. In all provinces, the majority of complainants were black, except in the Northern Cape and Western Cape, where most complainants were coloured. Where the gender of the complainant was recorded, one third of all complainants were male, while just over one quarter were female. All provinces followed this trend in terms of gender, except Mpumalanga, where most complainants were listed as "both male and female". Approximately 3% of complainants were recorded as both male and female, which may indicate that two people or a group of people lodged these complaints. Where the age of the complainant was recorded, most complainants were between 40 and 49 years old. Just fewer than 10% of complainants were 60 or over. All provinces followed this trend except the Northern Cape, where most respondents were aged between 30 and 39 years.

³³ Report of the South African Human Rights Commission investigative hearing access to housing, local governance and service delivery 23 – 25 February 2015. Available here: <https://www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf>

³⁴ Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014. Available here: <https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20%282%29.pdf>

³⁵ Access to emergency medical services in the Eastern Cape hearing report. Available here: <https://www.sahrc.org.za/home/21/files/SAHRC%20Report%20on%20Access%20to%20Emergency%20Medical%20Services%20in%20the%20Eastern%20Cape....pdf>

³⁶ Delivery of primary learning materials to schools country-wide. Available at: <http://www.sahrc.org.za/home/21/files/Delivery%20of%20Learning%20Material%20Report%20Final%20.pdf>

³⁷ National investigative hearing into the impact of protest-related action on the right to a basic education in South Africa. Available at: <https://www.sahrc.org.za/home/21/files/WEBSITE%20Impact%20of%20protest%20on%20edu.pdf>

³⁸ Transformation at public universities in South Africa. Available at: <https://www.sahrc.org.za/home/21/files/SAHRC%20Report%20-%20Transformation%20in%20Public%20Universities%20in%20South%20Africa.pdf>

The trends for ESR related complaints received per province were as follows:

- Basic education in Eastern Cape, Mpumalanga, and Limpopo;
- Access to water in KwaZulu-Natal, North West, Northern Cape, and Western Cape;
- Housing in Gauteng; and
- Social security in Free State.

Basic education

In Limpopo, access to textbooks has been a major issue.³⁹ Basic education in Limpopo and Mpumalanga has also been disrupted by protest action, resulting in the closure of schools and affecting children's access to education.⁴⁰ Protest action characterised by disruptive behaviour, violence, and damage to property infringes the right of every child to a basic education. Poor school infrastructure and inadequate service delivery is the main problem in the Eastern Cape. The Commission has responded to these concerns by holding hearings on access to education and intervening in provincial and national departments of education and with Parliament. Complaints relating to education manifest themselves in a number of violations. These have included use of force on protesting students and the public during the #FeesMustFall protests, individual complaints relating to citizenship and admission policies, corporal punishment, school infrastructure, and racism at schools.

Access to water

A lack of access to sufficient water and water related problems was the overwhelming ESR complaint across four provinces (KwaZulu-Natal, North West, Northern Cape and Western Cape). The main challenges related to non-functioning water infrastructure, disconnections, and poorly performing local governments. Access to adequate water often limits access to functioning sanitation and results in non-functioning sewage infrastructure. Complaints regarding the right to access have largely been about the provision of adequate water services, the lack of which have been most pronounced in informal settlements and rural communities.

Housing

Housing complaints in Gauteng centred on illegal evictions and problems with the Reconstruction and Development Programme (RDP) home allocation process. The legality of evictions, lack of consultation with tenants and occupiers, failure to provide alternative accommodation, and the inhumane manner in which evictions are carried out in the province were some of the main issues of concern.⁴¹ It is necessary for the Commission and stakeholders to monitor the implementation of its recommendations relating to evictions. Gauteng has the highest number of housing complaints, with reports indicating that the most densely populated provinces experience challenges around the supply and allocation of housing support. Complaints about other pressing problems relate to a lack of access to water, followed by problems in relation to basic education, housing and health care.

Access to housing, water and sanitation are key challenges. A major factor in evictions and demolitions is a lack of access to housing and land, due to the critical shortage of housing in South Africa and inefficient and corrupt systems of allocation of housing and land by municipalities and provinces, and lack of engagement by municipalities with affected communities.

³⁹ *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA) (2 December 2015). The SCA noted the fact that in the past, white public schools were well resourced, while black schools were poorly resourced and underfunded, and *therefore* "perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education."

⁴⁰ See the SAHRC report on 'The impact of protest related action on the right to basic education'.

⁴¹ See SAHRC 2013 report on access to housing, local governance and service delivery SAHRC. (2013). Access to Justice, Service Delivery and Local Governance: <http://www.sahrc.org.za/construction-site/home/21/files/Access%20to%20Housing%202015.pdf>

Communities often settle on vacant land - so-called unlawful occupation - because they have been removed from their homes and have nowhere else to go. There is usually no access to basic services such as water and sanitation in these areas. Sanitation is a key issue particularly in the Western Cape but also in other provinces and the Commission has held a number of investigate hearings on this issue.

Social security

The high proportion of social security complaints in the Free State relate mainly to accessibility.⁴² It is recommended that the provincial office determine the causes of the problem and engage the provincial Department of Social Development (DSD) to address it.

2.4.7. Arrested, detained and accused persons

Under the apartheid regime, inmates could be detained without trial and were often subjected to torture and death. For this reason, freedom is one of the founding values of the Constitution. To this end, the Constitution seeks both to guarantee the freedom and security of persons (section 12(1)) and seeks to ensure that arrested, detained and accused persons are afforded due process (section 35). The two rights are closely connected.

The right to freedom and security of the person provides protection against arbitrary and unjust deprivation of freedom and detention without trial. The section prohibits all forms of violence from either public or private sources, and guarantees the right not to be tortured, or treated or punished in a cruel, inhuman or degrading way.⁴³

Section 35 was implemented to ensure the fair treatment of arrested, detained and accused persons, and sets out in detail the rights of a person when they have been arrested, detained and/or accused. The Commission receives a significant number of section 35 related complaints annually.

Table 12: Arrested, detained and accused complaints per financial year

Financial year	Complaints per financial year	Arrested, detained and accused persons per financial year	%
2012/13	5 104	536	11
2013/14	5 238	655	13
2014/15	3 737	437	13
2015/16	4 663	409	9
2016/17	5 012	443	9

Table 12 sets out the numbers of complaints that relate to section 35 rights for each financial year in the five year period under review. The percentages for each financial period reflect section 35 complaints received as a percentage of the total number of reported complaints. Complaints regarding arrested, detained and accused persons comprise an average of 11% per year, and are decreasing. In 2013/14, there were 655 complaints out of a total of 5 238, compared to 443 out of 5 012 in 2016/17. This is a decrease of 4%.

⁴² The SASSA grants crisis. In March 2017, in the matter of *Black Sash and Freedom under Law v Minister of Social Development, South African Social Security Agency, et al CCT 48/17*, the applicants brought an urgent application to the Constitutional court compelling the Minister to act to prevent the imminent social grants crisis in which over 13 million recipients of social grants were in danger of not receiving their grants in 1 April 2017.

⁴³ Complaints regarding the right to freedom and security of the person are not discussed in any detail in the Report, as they do not fall within the top highest or lowest number of complaints received by the Commission per year. An average of 116 freedom and security complaints are reported per year. These complaints comprise 2.4% of all complaints in 2016/2017.

Over the last five years, complaints relating to the rights of arrested, detained and accused persons have consistently formed part of the top five rights' violations complaints lodged with the Commission. Most of these complaints are from inmates detained in correctional services facilities requesting assistance to secure copies of trial transcripts, as well as assistance with appeals against their convictions and/or sentences. These complaints fall within the mandate of Legal Aid SA. There is a high number of awaiting trial prisoners caused by delays in prosecution of cases due to inefficiency in the criminal justice system. Complaints relating to prisoner treatment and conditions in prison are referred to the Judicial Inspectorate for Correctional Services⁴⁴. Police brutality in detention and police maladministration is referred to the IPID. The Commission often appears to be a last resort for arrested, detained and accused complainants who have not received the required assistance.

The SAHRC has expressed concern over the poor conditions in correctional centres, particularly overcrowding, dilapidated infrastructure, unsanitary conditions, inadequate food, lack of exercise, poor ventilation and limited access to health services, and the South African government's lack of concrete plans to improve conditions and address overcrowding. In addition, there is a high level of violence against prisoners by correctional services officials, and other rights' violations.

The Commission has been actively involved in securing the rights of undocumented migrants held in unlawful detention at the Lindela repatriation centre for undocumented foreign nationals. The issues involved unlawful detention of undocumented migrants for periods longer than prescribed by the law, the continued arrest and detention of unaccompanied minors at Lindela and police stations, allegations that human rights' violations are pervasive in police stations, and that the detention period at police stations is not considered when a person arrives at Lindela, or with people released from correctional facilities. The section 33 right to just administrative action and procedural fairness is essential to the right of detained persons.

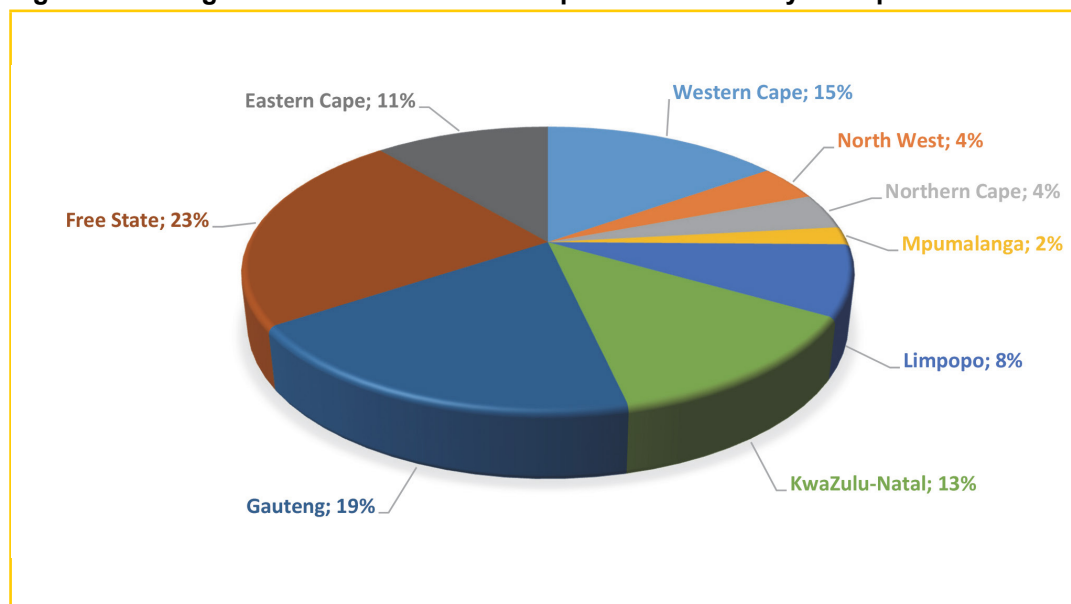
In 2014, the Commission conducted an investigation into living conditions at the Lindela repatriation centre on request of Mediciens Sans Frontiers and a group of NGOs working on issues of migrancy and refugees.⁴⁵ The Commission recommended that the Department of Home Affairs implement measures to remedy the conditions in Lindela, as well as monitor and report to the Commission on progress made at scheduled times. The Commission has continued to fulfil its monitoring mandate in 2016/17. In February 2016, in the matter of *Lawyers for Human Rights (PASSOP as amicus) v Minister of Home Affairs*, the Provincial Division of the Gauteng High Court (Pretoria) found that section 34(1) of the Immigration Act was unconstitutional as it did not provide for court oversight of detention as required by the Constitution.⁴⁶

Freedom is one of the founding values of the Constitution.

⁴⁴ Annual Report of the Judicial Inspectorate for Correctional Services 2000 Available here: <http://judicialinsp.dcs.gov.za/Annualreports/annual2000.asp#1>

⁴⁵ Mediciens' Sans Frontiers, Section 27, LHR and PASSOP v Department of Home Affairs, National Department of Health and Others GP/ 2012 / 0134.

⁴⁶ The judgment was confirmed by the Constitutional Court on 29 June 2017. In a landmark decision, the Court unanimously found that sections 34(1) (b) and (d) of the Immigration Act are inconsistent with the Constitution and therefore invalid. The Court ruled that the rights guaranteed in section 12 and 35 of the South African Constitution—the right to challenge in court a detention within 48 hours of arrest and the right to be protected against arbitrary detention without trial—apply to foreign nationals as well as South African citizens.

Figure 6: Average of section 35 related complaints received by each provincial office

On average the Free State provincial office has a 23% portion of all recorded section 35 related complaints over the five years reviewed, possibly due to the fact that the Supreme Court of Appeal is situated in Bloemfontein.

2.4.7. Just administrative action

A high number of complaints to the Commission involve violations to right of just administrative action. A number of complaints around just administrative action are referred to other Chapter 9 bodies. Complaints relating to just administrative action that concern the conduct of state parties or representatives in the public administration have been either directly or indirectly referred to the offices of the Public Protector for investigation. The alleged violations often concern the non-responsiveness of government departments and inefficiencies in public administration relating to blocked identity documents and delays in administrative processes. Depending on the nature of the right concerned, the seriousness or urgency of the violation, and its impact on vulnerable groups, the matter will either be referred to the Public Protector for determination or dealt with by the Commission itself.

Table 13 comprises complaints that relate to the right to just administrative action in terms of section 33 of the Constitution, per financial year.

Table 13: Section 33 complaints per financial year

Financial year	Complaints per financial year	Just administrative action per financial year	%
2012/13	5 104	592	12
2013/14	5 238	636	12
2014/15	3 737	366	10
2015/16	4 663	379	8
2016/17	5 012	407	8

The Promotion of Administrative Act, 2000 (Act No. 3 of 2000) (PAJA) gives effect to section 33 of the Constitution. Table 13 illustrates that the number of complaints relating to the right to just administrative action recorded by the Commission over the past five financial years has declined from 12% during the 2012/13 financial year to 8% in 2016/17. Section 33 complaints received by the Commission amount to an average of 10%.

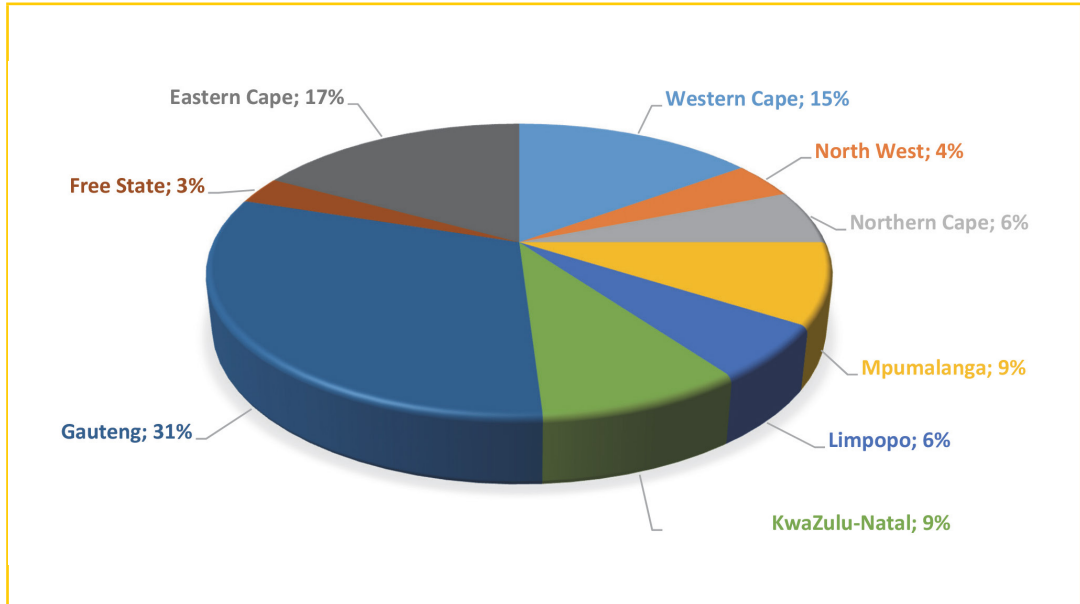
Figure 7: Average of section 33 related complaints received by each provincial office

Figure 7 illustrates the average annual percentage of section 33 complaints per provincial office over the past five financial years. The Gauteng provincial office has consistently recorded a noticeably high average of 31% just administrative action complaints throughout the five financial years, followed by the Eastern Cape (17%) and the Western Cape (15%). The high level of administrative action complaints in Gauteng is unsurprising given that it is the economic hub of South Africa with a large population and the highest immigrant population. People in metropolitan areas are possibly also more aware of their rights to just administrative action.

2.4.8. Labour relations

Labour relations remain one of the top five rights' violations reported to the Commission. Section 23(1) of the Constitution states that, "[e]veryone has the right to fair labour practices". To give effect to this right, the legislature enacted the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) (BCEA), which regulates employment rights and conditions of employment and the Employment Equity Act, 1998 (Act No. 55 of 1998) (EEA), which deals specifically with unfair discrimination in the workplace and affirmative action measures.

The Commission refers a significant number of labour related matters to either the Commission for Conciliation, Mediation and Arbitration (CCMA), applicable bargaining councils, or the labour courts (which were also established in terms of part D, section 151 of the Labour Relations Act, 1995 (Act No. 66 of 1995) (LRA)) as bodies created specifically to determine such matters.

Table 14: Labour relations complaints per financial year

Financial year	Complaints per financial year	Labour relations per financial year	%
2012/13	5 104	574	11
2013/14	5 238	527	10
2014/15	3 737	334	9
2015/16	4 663	440	9
2016/17	5 012	426	9

The table above records the number of labour related complaints lodged with the Commission per financial year and the percentage of the total of complaints recorded by the Commission each year. For three financial years, namely 2014/15, 2015/16 and 2016/17, the total percentage of complaints relating to labour relations has decreased from 11% to 9% and have been on average 10% of total complaints per year.

The high number of labour relations complaints was of concern to the Commission. Unfair discrimination in the workplace constitutes a major violation of equality, despite the Employment Equity Act.⁴⁷ The high prevalence of workplace discrimination indicates that the problem is systemic. In 2016, the Commission hosted a national hearing with stakeholders on unfair discrimination in the workplace in March and April 2016 to consider the far reaching implications and the prevalence of substantial inequalities.⁴⁸ It found that unfair discrimination in the workplace remains pervasive in South Africa and includes both barriers of entry as well as discriminatory practices in the workplace itself. The major grounds of discrimination such as race, gender and disability persist.

However, “[T]he changing nature of the workforce and social relations over time has given rise to ... [other] forms of discrimination, including discrimination on the basis of HIV status, age, sexual orientation and gender identity, language, religion and culture.”⁴⁹ Discrimination thus requires constant attention and evaluation to ensure an inclusive approach to combating discriminatory practices and achieving the goal of equal rights. In essence, discrimination is about social exclusion, reinforcing perceptions of inferiority or difference. Prejudice and stereotypes about the inherent characteristics of people based on their race, gender, disability, and sexual orientation, etc. are intrinsically linked to discrimination and other forms of intolerance in the workplace.

Figure 8: Average of labour relations related complaints received by each provincial office

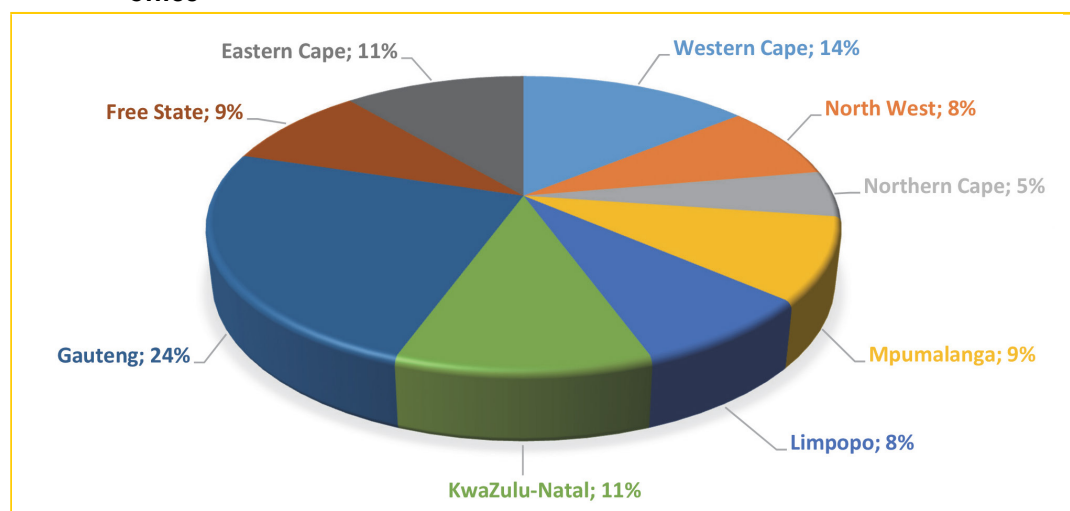


Figure 8 is the average percentages of complaints that each provincial office records in relation to labour relations on an annual basis. Gauteng, as the main economic hub of South Africa, has the highest number of reported complaints (24%) while Western Cape has the second highest (14%). Data on labour relations complaints is not disaggregated to reflect the occurrence of complaints dealing with unfair discrimination in the workplace specifically, but it provides a general trend. Disaggregated data would be useful to establish the extent of unfair discrimination in the workplace. Most complaints go directly to the CCMA or the relevant bargaining council.

⁴⁷ Employment Equity Amendment Act, 47 of 2013

⁴⁸ SAHRC unfair discrimination in the workplace report Available here: www.sahrc.org.za/home/21/files/SAHRC%20-%20Unfair%20Discrimination%20in%20the%20Workplace%20Report%20_%20September%202017.pdf

⁴⁹ Page 7.

According to the CCMA's complaints statistics, unfair discrimination complaints have increased substantially over the last three years.⁵⁰

The discriminatory employment and educational policies of apartheid created significant racial disparities in employment opportunities, occupation, and income that persist today. This has entrenched income inequality and poverty. An inconsistent or inadequate income has long lasting effects on the ability of persons to access quality education, health care, and other social services. This in turn contributes to multiple and compounded rights' violations while continuing to limit opportunities to advance oneself and break the cycle of poverty. These disadvantages cannot be addressed by measures to prevent unfair discrimination alone, or responses to individual cases, but require the implementation of special measures designed to bring about substantive equality for previously disadvantaged groups. Measures are also required to more effectively bring to bear the responsibilities of business to human rights and to hold business accountable for the eradication of discrimination and unfair labour practices. The EEA has not achieved its objectives to facilitate transformation in the workplace due to major deficits in enforcement measures and non-compliance of South Africa's corporate sector.

2.5. Bottom five rights' violations

Table 15 sets out the total numbers of rights' violations complaints the Commission has received the period of review. The average number of complaints per year for each rights' violation over the five year period ranges from 0.6 for slavery, servitude and forced labour, to 5.6 for assembly, demonstration, picket and petition.

Table 15: Bottom five rights' violations per year

Rights violations	2012/13	2013/14	2014/15	2015/16	2016/17	Average per year
Slavery, servitude and forced labour	1	1	0	0	1	0.6
Language and culture	5	8	0	1	4	3.6
Political rights	1	1	6	2	5	3
Freedom of association	4	4	1	5	3	3.4
Assembly, demonstration, picket and petition	6	7	6	6	3	5.6

2.5.1. Slavery, servitude and forced labour (section 13)

Section 13 states that, "[n]o one may be subjected to slavery, servitude or forced labour". Section 13 complaints comprise the lowest number of rights' violations reported. This is not surprising considering the context of powerlessness of people thus affected. It is likely that abuse of this right is unreported to all institutions, including the South African Police Service (SAPS). Farm workers as a group are amongst the most vulnerable workers in South Africa. Violations of their human rights are widespread, and they have limited or no protection against such violations. Their living conditions are very poor, and they often have no access to affordable electricity, water and food. They are subject to beatings, brutality, racist abuse, and unsafe working conditions. They have little recourse for unfair labour practices. Many of these workers are very poorly paid, often much lower than the minimum wage for the sector,⁵¹ and live in extreme poverty. High levels of dependency may exist, with the farmer exercising extensive control over almost every aspect of workers' lives.

⁵⁰ Report of the South African Human Rights Commission investigative hearing on unfair discrimination in the workplace 8 March 2016; 25 April 2016. Available here: https://www.sahrc.org.za/home/21/files/SAHRC%20-%20Unfair%20Discrimination%20in%20the%20Workplace%20Report%20_%20September%202017.pdf

⁵¹ DOL sectoral determination 13: farm worker sector. Available here: <http://www.labour.gov.za/DOL/legislation/sectoral-determinations/sectoral-determination-13-farm-worker-sector>

They have limited or no access to unions, the criminal justice system, social services and social grants, education, and adequate health care and housing. These issues are systemic. Forced evictions are common place and leave farm workers in very precarious positions. Farmers often resort to cutting access to services like electricity, water, and sanitation to force workers off the land. Job losses in the sector through legal and illegal forced evictions have resulted in displaced farm workers and farm dwellers living in peri urban informal settlements. The Commission has held several hearings on the victimisation of farm workers.⁵²

Black African children are most affected by child labour. The International Labour Organisation (ILO) defines the term “child labour” as work that deprives children of their childhood, their potential and their dignity, and that is harmful to their physical and mental development. This work affects children’s health, personal development, interferes with their schooling, and has a negative impact on children’s well-being. According to Stats SA, child labour is prevalent in South Africa, and, while the situation is slowly improving, there are still many children who are obliged to work to survive.⁵³ Girls are more likely to drop out of school early to take up the responsibility of taking care of their families, particularly in orphan headed households.

Human trafficking has become a major concern internationally and nationally, yet is amongst the most under reported violation right in South Africa. A working definition of human trafficking is the forcing or manipulating a person against their will into sexual or labour exploitation, within their own country or across borders.⁵⁴ The forms of human trafficking include sex trafficking (prostitution and other forms of sexual exploitation), child labour, forced domestic servitude (referred to as “slavery” in its extreme form), and organ smuggling. Human trafficking is an offence that is difficult to expose. South Africa remains a primary source, destination, and transit country for human trafficking.⁵⁵ Uneducated and unemployed young women and girls living in poor communities and rural areas are among the most vulnerable. Internally, victims are targeted from economically poorer provinces and brought to the cities. The demand for human trafficking is channelled through the tourism industry, and the sex and drug trades. Child sex tourism is prevalent in several South African cities.⁵⁶

2.5.2. Language and culture (section 30)

The Commission received an annual average of 3.6 complaints relating to language and culture. The context of our colonial history in South Africa is that of extermination, violence, and dehumanisation of indigenous groups, and the brutal oppression, forced assimilation, and suppression of their cultures and languages. Complaints which are intimately bound to the right to language and culture have arisen mostly in the context of the rights of indigenous peoples. The Commission investigated the plight of the Khoi and the San. At its national hearing relating to the human rights situation of the Khoi-San in South Africa, the Commission received evidence of basic violations which require wide ranging policy and legislative reforms to be effected together with other interventions for violations and perceptions of “otherness” to be remedied.⁵⁷ Complaints lodged at the Commission focused predominantly on equality, education, land redistribution, and the lack of recognition of the indigenous communities and their respective leadership.

⁵² Report on safety and security challenges in farming communities Report 2014 Available here: www.sahrc.org.za/home/21/files/SAHRC%20Farm%20Report%20Errata%20included%2027%20November%202015%20low%20res.pdf

⁵³ Statistics South Africa, survey of activities of young people 2017.

⁵⁴ <https://www.lexisnexis.co.za/news/rule-of-law/about-human-trafficking>

⁵⁵ The reality of human trafficking in South Africa (2017) Dewhurst, J. The Southern Cross.

⁵⁶ The Commission has addressed the issue of human trafficking in its report on civil and political rights of 2016-2017. The SAHRC has called on the government to do more to assist the victims of trafficking – usually children, women and migrant workers in the agriculture and fishing sectors – who are often fearful to engage with government authorities, and to provide more information regarding efforts to identify and protect groups of persons who may be vulnerable to trafficking.

⁵⁷ The Commission’s report on the hearing will be released in 2018.

“The situation of indigenous peoples globally has been described as critical and precarious,⁵⁸ noting the systemic discrimination, marginalisation and exclusion from social, political and economic affairs. Indigenous peoples have historically suffered horrific injustices including dispossession of land, forced assimilation, dehumanisation and extermination. This historical legacy is a direct result of the widespread poverty and exclusion still experienced today, and indigenous peoples are some of the most poverty stricken in the world, and as a group, are over represented in this category. The Khoi-San in South Africa are no exception, and although they comprise a minority of the poor in the country, their dire situation is exacerbated by multiple factors, including pervasive negative stigma and social exclusion, a declining culture, lack of official recognition and a strong political voice, which essentially give rise to multiple rights’ violations which occur on a daily basis.”⁵⁹

2.5.3. Political rights (section 19)

The Commission received three complaints per financial year relating to political rights. Given the political turmoil that the country has seen in recent years, ranging from service delivery protests to allegations of corruption and maladministration, it is likely that such complaints are pursued through other avenues.

The Commission has been involved in a campaign by My Vote Counts (MVC), a non-governmental organisation that advocates for the reform of the electoral system and seeks to compel political parties to disclose information regarding their sources of private funding.⁶⁰ The Commission has also expressed several concerns relating to “evidence of political intimidation, violence and assassinations (particularly around the selection and finalisation of party lists) as a result of the local government election.” The Commission noted that: “[a]t present there is confusion around how many political killings have taken place in the country, what constitutes a political killing, and who is responsible to monitor and investigate political killings. A comprehensive analysis of the criminal justice response to the problem of political killings is needed. The IEC and the Ministry of Police need to look into the issue of political violence more seriously, particularly ahead of the upcoming 2019 general election.”

2.5.4 Freedom of association

The right to freedom of association refers to the right to form societies, clubs, and other groups of people, and to meet with people individually, without interference by the government. On average, the Commission has received 3.4 complaints relating to this right a year over the review period. The right is closely linked to the right to freedom of expression. It provides a platform for public expression and is one of the cornerstones of a democratic society. The right applies to protests, marches and demonstrations, press conferences, public and private meetings, counter-demonstrations, and ‘sit-ins’, amongst others.

2.5.5. Assembly, demonstration, picket and petition

Section 17 of the Constitution protects the right of people to assemble, demonstrate, picket and present petitions, unarmed and in a peaceful manner. This is often referred to as ‘the right to protest’. The section reads as follows: “Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.” The Commission received an average of six complaints per year over the period reviewed.

⁵⁸ United Nations “State of the world’s indigenous peoples” (2009), p 1.

⁵⁹ http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf United Nations “State of the World’s Indigenous Peoples” (2009), p 1.

⁶⁰ MVC is bringing an application to declare PEPUDA invalid because it does not make provision for the disclosure of such information. SAHRC Civil and Political Rights Report 2016-2017. Available here: www.sahrc.org.za/home/21/files/Civil%20and%20Political%20Rights%20Report%20Final%20Version.pdf

High levels of community protests on issues of lack of service delivery and inefficient or corrupt local governance are widespread and frequent among poor communities in South Africa. In addition, in the 2016/17 year, nation-wide protests and campaigns on a broad range of issues have taken place, including calls for the removal of the incumbent President from office, corruption in government departments, maladministration of state-owned enterprises, and lack of employment opportunities.

Of great concern is the prevalence of police brutality during protest action. The SAPS response to student protests around the #FeesMustFall campaign on university campuses across the country escalated in 2016. The Socio-Economic Rights Institute (SERI) report on police action against protesting students evidences high levels of police brutality.⁶¹ The 2014 Marikana Commission of Inquiry into the massacre of 34 and the serious injury of 78 striking miners by police in August 2012 made recommendations relating to the prosecution of police officers implicated in the killings, and the settling of civil claims made by the families of those who were murdered in August 2012. The Commission is concerned that by March 2017, SAPS had cleared 87 of its members in relation to the killings at Marikana, and compensation for the families of the dead miners had still not been paid.

The UN Human Rights Committee has expressed its concern about numerous reports of excessive and disproportionate use of force by law enforcement officials in the context of public protests in South Africa. The African Commission on Human and Peoples' Rights (ACHPR) also recently adopted a resolution which recognises the need to develop guidelines on policing and assemblies in Africa, expressing concern over the persistence of police violence during assemblies in Africa.⁶²

Of great concern is the
prevalence of police brutality
during protest action.

⁶¹ In 2016 the SAHRC published the report on transformation at public universities in South Africa, based on national hearing convened in 2014 on transformation in institutions of higher learning in South Africa, and plans to hold a hearing to follow up on issues including of free tertiary education for the poor, student protests and police action. Available here: www.sahrc.org.za/home/21/files/SAHRC%20Report%20-%20Transformation%20in%20Public%20Universities%20in%20South%20Africa.pdf

⁶² SAHRC civil and political rights report 2016-2017. Available here: www.sahrc.org.za/home/21/files/Civil%20and%20Political%20Rights%20Report%20Final%20Version.pdf

Alternative dispute resolution mechanisms

In terms of section 14 of the SAHRC Act, “the Commission may, by mediation, conciliation or negotiation endeavour –

- to resolve any dispute; or
- to rectify any act or omission, emanating from or constituting a violation of or threat to any human right.”⁶³

Mediation is defined in the Commission’s complaints handling procedures as the process of intervention between parties by an independent person or mediator to reach an agreement whereas conciliation is defined as the process of reconciling a matter between parties. Negotiation is defined as the process of conferring with parties to reach an agreement. Collectively, these three processes are referred to as alternative dispute resolution (ADR). Usually, negotiation and conciliation are initially attempted. If these fail, the matter is mediated. If ADR fails, the matter may be referred to the EC, or any other court for litigation. Note that complaints can be referred to the EC for determination or to the other courts for litigation at any stage of the process of handling complaints.

Table 16 reflects the number of complaints in the five-year period under review in which provincial offices have used ADR mechanisms to resolve complaints. The number of race related complaints addressed through ADR proceedings per province has also been recorded for the 2013/14 to 2016/17 period.

Table 16: Number of complaints per province in which ADR has been used for resolution

Province	2012/13	2013/14	Race 2013/14	2014/15	Race 2014/15	2015/16	Race 2015/16	2016/17	Race 2016/17
Eastern Cape	0	2	0	3	1	3	1	3	3
Free State	4	6	1	2	1	10	0	8	1
Gauteng	3	12	3	18	11	10	7	5	2
KwaZulu-Natal	3	4	1	4	1	6	3	6	1
Limpopo	0	4	2	14	6	5	4	11	3
Mpumalanga	0	1	0	5	1	7	1	6	3
North West	0	1	1	1	2	7	2	3	1
Northern Cape	0	5	1	4	0	3	3	5	1
Western Cape	1	4	2	4	1	6	1	2	1
Totals	15	29	10	62	23	57	22	48	16

The total number of complaints addressed through ADR over the five years reviewed was 211, an average of 42 cases per year. The total number of race complaints addressed through ADR over the five year period was 71 out of 211, i.e., 34% of these cases were race related. ADR mechanisms have a high rate of successful resolution. ADR provides parties with a platform to engage and achieve consensus around outcomes of their dispute resolution without resorting to costly litigation. It is effective, inexpensive, and simpler.

⁶³ Section 14 of the South African Human Rights Act, 40 of 2013.

The process lends itself to a speedy resolution of complaints. It allows for deeper outcomes, enhanced understanding, high probabilities of behavioural future change, and improved restorative justice. In ADR, the Commission does not adjudicate or take sides in disputes but tries to assist the parties to reach a settlement of their dispute through building consensus. In terms of dealing with human rights' violations, ADR mechanisms secure long lasting resolutions as opposed to more adversarial courses of action that polarise parties.

ADR is under used as a complaints' resolution mechanism despite its numerous advantages. Provincial offices are thus promoting the use of ADR for complaint resolution. Initially complainants were reluctant to use ADR mechanisms to deal with their complaints. This accounts for the low number of complaints dealt with through ADR in 2012/13 and 2013/14. In 2014/15, the number of complaints referred for ADR in Gauteng increased to 18. Limpopo used ADR mechanisms in 14 complaints for the same year, the second highest, an increase of 10 from the previous year. 2015/16 showed an increased use of ADR across all provincial offices, with Gauteng and Free State both at 10. This indicates willingness by complainants and affected parties to discuss and engage in a less adversarial manner. In Gauteng in 2016/17, the number of complaints addressed through ADR dropped from 10 in the previous year to five. By contrast, the Limpopo provincial office undertook 11 ADR processes during 2016/17, the highest of all provincial offices, and Free State undertook eight, the second highest for the year. Matters resolved through ADR processes averaged between none and seven for the other provinces. The Western Cape used ADR proceedings on average five times per year under review. This is surprising considering that the Western Cape is the second biggest urban hub in the country. 2014/15 recorded the highest number of ADR matters at 62, declining to 54 in 2015/16 and 48 in 2016/17.

In the 2016/17, 90% of complaints addressed through ADR mechanisms were successfully resolved. The nature of complaints shows that race based complaints accounted for the highest number of ADR applications. On average, 34% of all complaints addressed through ADR mechanisms from 2013/14 to 2016/17 were race related. This has remained consistent over the review period, with 33% of ADR complaints being race related in 2016/17. In all provinces the racism complained of was for the most part racist remarks, comments, epithets, and almost always involved the use of the "K" word. The derogatory comments were almost always directed at black people and inevitably violated the right to dignity.

A smaller number of complaints involved active discrimination, such as refusal of access to old age homes, guest houses and restaurants, and a refusal to allow a child to continue attending school on the basis of what was described as her 'black hair'. The frequent use of the 'K' word demonstrates both the normalisation of racism in South African society and the disturbingly casual contempt for, and disrespect of, black people in South Africa. The success rate of mediation in race related complaints appears to be high. ADR lends itself to this kind of conflict resolution, in which the respondent has made hurtful comments. The parties then engage through ADR, and the respondent is willing to apologise. More recently, applicants have also requested compensatory damages in addition to an apology. Matters in which the respondent refuses to apologise are usually referred to the ECs. In these matters, some respondents fail to appear, ignore summonses, ask for numerous postponements and use other delaying tactics. Even at this stage, respondents may simply refuse to apologise. The Limpopo office addressed two social media race complaints involving extreme racist comments, amounting to hate speech. The matters were resolved through conciliation and agreements which included apologies, training or awareness interventions, and complaint specific reforms. The Western Cape provincial office of the Commission also intervened in a high profile matter of racism on social media in the Western Cape provincial office. The racist outburst was in response to the Minister of Sport placing a ban on sporting codes that failed to comply with equity targets. Respondent referred to government as a "bunch of k's" and "black f.....g c....s". The matter was conciliated. The respondent agreed to publish an apology, and to do community service in sport. 81% of race related complaints were resolved by ADR for the 2016/17 year.

The second highest category of complaints is on the grounds of disability, some involving derogatory and humiliating comments. However, most were about inclusion, accessibility and special accommodation. A number of disability related complaints were addressed using mediation. In the Eastern Cape two disability complaints were successfully negotiated. In one case the applicant was referred to as a “cripple”. However, most complaints are about lack of access and the need to make special accommodation to facilitate access. These matters were negotiated and resolved. One Gauteng complaint involved a case where Passenger Rail Agency of South Africa (PRASA) refused to allow a blind person to travel with a dog that was not a designated “blind dog”. An agreement was reached to allow the person to travel with his dog. Mpumalanga had one disability complaint about special accommodation for a disabled child where an RDP house did not meet the needs of a disabled child. Successful negotiation was concluded, and the complainant was given a new house. In another matter in Gauteng, the Gauteng Department of Education (GDE) undertook to refurbish a school to accommodate disabled children. The GDE was required to monitor progress and report to the Commission.

The KwaZulu-Natal provincial office dealt with an interesting matter about the right to privacy and discrimination on the basis of mental illness. The applicant suffered from a depressive disorder. His employer breached his right to privacy by disclosing his medical condition to other prospective employers. The employer’s actions resulted in actual harm to the complainant. Stigma and ignorance about mental health illness results in multiple violations of the rights of the mentally ill. The plight of people suffering from mental health issues requires further investigation. The North West province also dealt with two matters involving discrimination, stigma and the violation of the right to privacy on the basis of health status, namely, disclosure of confidential information. In both matters the respondents disclosed the HIV status and the TB status of each applicant respectively to third parties. The matters were mediated and settled.⁶⁴

In terms of education the Free State provincial office had three accesses to education related complaints, two of which involved schools withholding matriculation results and test transcripts for referral to another school because of unpaid fees. In terms of section 5(3) (a) of the South African Schools Act, 1996 (Act No. 84 of 1996), no child can be denied access to education because of an inability to pay fees, neither can a child be refused results of tests or exams because of unpaid fees. The parent may apply for a full or partial exemption from school fees, depending on a means test. Schools often refuse to allow children to attend school because of an inability to pay fees, and poor parents will use money for other basic necessities including food to pay their children’s fees, causing great hardship. The matters were negotiated and resolved, with the schools reaching an agreement with the parent to pay the outstanding fees. While provincial offices assess and will adopt ADR approaches to identified matters, some matters are, by their nature, direct violations and should not be subjected to ADR, since such an action may violate recognised legal protections in law. The Commission will assess ADRs more closely to ensure that such challenges are effectively mitigated. The Mpumalanga offices mediated a matter where a school was inflicting corporal punishment on learners. The respondent agreed to investigate the matter and to install cameras to monitor classes.⁶⁵

⁶⁴ It is suggested that in matters of this nature, the harm of disclosure caused to the applicant by the respondent is always there, regardless of a settlement agreement. The information is already in the public domain.

⁶⁵ Details of this matter are not known. It seems improbable that the school should not have known who the offending teachers were. It is not the kind of matter that is suitable for resolution through ADR mechanisms.

In respect of culture, the Free State addressed two complaints regarding accusations of witchcraft levelled at traditional women healers in communities. Given the potential danger to the safety of the accused, these matters should be assessed and if necessary, reported to the police. The Limpopo office addressed a complaint regarding the use of the derogatory word 'makwapa' during a comedy show. The respondent, a comedian, apologised, and undertook to refrain from using the word in his content again, together with an undertaking to sensitise all contracted comedians in his events. The Commission facilitated two complainants regarding refusal to grant access to ancestral graves on respondents' farms Limpopo. The negotiations failed. Denial of access to ancestral graves is a rights' violation that often occurs in the context of farming evictions in which the farmer refuses permission for a farm worker to visit his or her ancestral graves after they have been removed from the property. In another matter, foreign nationals had their street permits withheld, allegedly because they were selling drugs. The matter was successfully mediated, and settlement reached. Discrimination against foreign nationals is, however, not limited to isolated incidents but is part of a larger, systemic problem.

In terms of land, housing and environment, the Mpumalanga provincial office successfully mediated a matter involving a community that had been removed from their land, had their houses demolished, and had not been provided with alternative accommodation. The matter was mediated, and an offer was made to relocate the complainants, build homesteads for them, and compensate them.

The Western Cape office used ADR mechanisms in three complaints involving claims for the provision of housing, water and sanitation, and electricity in rural or agricultural areas in 2015/16.

One of the complaints involved the squalid living conditions of a group of people informally occupying an area of land in a rural area. A councillor of the van Brede municipality moved a motion to provide land, housing, water and sanitation to the community. This motion was opposed by the municipality. The matter was mediated and settled. The occupiers were provided with serviced plots and state funding for building houses. This is a good example of active engagement by a committed municipality councillor to ensure the human rights of the community he serves are vindicated. It is recommended that the Commission recognise these individual efforts and even consider hosting an awards ceremony for this purpose.

Two other similar matters related to a group of farm workers living in squalid conditions with no access to electricity, sanitation and refuse removal. The first matter was settled, and a committee was established, headed by the applicant, to address the workers' issues in future. The second complaint, brought by the same applicant, involved access to electricity and sanitation for a group of pensioners living on a farm. The respondent farmer had cut off the electricity supply in an attempt to force the group to leave the farm. The respondent sought to evict the group because they were coloured, and of no use to his farm. One of the pensioners was disabled and was forced to use an inaccessible field for ablution purposes. The matter was conciliated and settled. The respondent restored utilities and a committee, headed by the applicant, was established to address outstanding issues. These are excellent examples of active engagement by concerned parties that assist in resolving the plight of marginal, poor communities, with the support of the Commission.

4

Appeals

This chapter provides an overview of procedural and substantive appeals lodged with the Commission. In the case of substantive appeals, it identifies key issues of concern.

Chapter 9, Article 34 (1) of the Commission's complaints handling procedures states: "any party to proceedings ..., who feels aggrieved by any determination, decision or finding, save for a finding made at a hearing as contemplated in Chapter 7 of these Procedures, may lodge an appeal with the following persons: (a) the Chairperson, if the appeal is of a substantive nature regarding any determination, decision or finding of a Provincial Manager, ...; or (b) the Chief Operations Officer, if the appeal is of a procedural nature regarding any determination, decision or finding of a Provincial Manager,...."

4.1. Appeals per provincial office

Table 17: Number of appeals per province per year

Province	2012/13	2013/14	2014/15	2015/16	2016/17
EC	29	14	22	16	28
FS	22	33	43	34	35
GP	71	60	58	46	38
KZN	9	11	24	16	14
LP	4	7	19	16	19
MP	0	4	6	9	11
NC	2	2	6	6	3
NW	5	6	10	13	8
WC	17	21	34	13	12
TOTALS	159	158	222	169	168

The Commission recorded an annual average of 175 appeals over the five years reviewed. Annually, the Commission records more procedural appeals than substantive ones, with an annual average of 95% procedural appeals and 5% substantive ones. Gauteng has the highest number of appeals per year. The number of appeals lodged in Gauteng per year is decreasing.

4.2. Finalised appeals per year

Table 18: Number of appeals finalised per year

Financial year	Procedural *(upheld)	Substantive (Upheld)	Total	Procedural (dismissed)	Substantive (dismissed)	Total
2012/13	19	1	20	123	5	128
2013/14	13	0	13	84	5	89
2014/15	5	1	6	132	11	143
2015/16	6	1	7	111	8	119
2016/17	9	1	10	91	0	91

The average number of appeals finalised annually by the Commission over the review period is 125. The average number of procedural appeals finalised annually is 118. The average number of substantive appeals finalised annually is 7. As per Table 18, the Commission has dismissed a large number of both procedural and substantive appeals. During the review period, only one substantive appeal was upheld a year, except for 2013/14, when none was upheld.

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5

Litigation

This Chapter covers key litigation that the Commission has undertaken over the review period, and gains made by the Commission in developing, promoting, and enforcing compliance with human rights. It includes an analysis of the impact of such litigation at national and provincial levels. The Commission has recently been involved in a number of ground-breaking public interest litigation matters in the high courts, as *amicus curiae* or as applicant, on the two key violations of rights in South Africa, namely, socio-economic rights and the right to equality, in particular on the grounds of race. Litigation at the provincial level has been predominantly confined to ECs. This chapter also includes a consideration of the role of ECs in ensuring redress for unfair discrimination, challenges to the effective functioning of these courts, and the effect of these challenges on the resolution of complaints brought to the ECs for adjudication.

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

Table 19: Number of ADR complaints per province per year

Province	2012/13	2013/14	2014/15	2015/16	2016/17
EC	0	0	3	5	5
FS	1	0	3	7	12
GP	6	0	7	6	7
KZN	0	0	1	2	3
LP	3	1	8	7	11
MP	6	12	17	17	17
NC	0	10	9	7	4
NW	10	5	1	1	2
WC	1	14	13	2	1
Totals	27	42	62	54	62

The broad aim of litigation brought by the Commission is to protect human rights, secure appropriate redress where rights have been violated or threatened, strengthen constitutional democracy, and develop the jurisprudence on equality in South Africa. In particular, the Commission has used litigation in the period under review to promote and protect the right to equality and freedom from discrimination, as well as socio-economic rights, and enforcement of the Commission's recommendations.

The focus on equality and socio-economic rights reflect the trends in human rights' violations in South Africa. This is not to say that the Commission has not engaged with civil and political and other rights' violations. As discussed in the statistical analysis above, equality related complaints, specifically race, disability, and ethnic or social origin are the most common grounds of discrimination reported to the Commission, with race comprising the overwhelming majority of complaints. The Commission recognises the systemic and entrenched nature of racism in South Africa and is committed to resolving race based equality complaints in order to vindicate the rights of the victims of racial discrimination and give meaning to the founding values of non-racialism, equality and human dignity.

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62 matters initiated by the Commission came before the courts during the 2016/17 period. Some of these matters were carried over from 2015/16 to 2016/17. The time taken to finalise these matters is unsurprising, given the overburdened court system, delays in court processes, and the protracted nature of contested litigation. Some matters instituted in the 2013/14 period were only resolved in 2016/17. Complaints are litigated in a number of forums, namely ECs, high courts, the Supreme Court of Appeal (SCA) and the Constitutional Court (CC). Most of these cases were instituted by the Commission on behalf of a complainant.

5.1 The Commission's role in strategic impact litigation (SIL)⁶⁶

The courts often request the Commission to provide its expertise on human rights issues and on South Africa's international human rights obligations in terms of various international conventions and other instruments. The courts have also requested that the Commission fulfil a monitoring role to ensure compliance with court orders. The Commission works closely with human rights NGOs on strategic impact litigation (SIL) matters and have initiated SIL at the request of complainant NGOs, joined as respondent in such cases, as well as intervening as *amicus curiae*.⁶⁷ Complaints to the Commission are often initiated by NGOs working in the sector. In the case of *Jon Qwelane v DJCS*,⁶⁸ the Commission brought a hate speech action in the EC at the behest of members of the LTGBIQ community, and a number of NGOs. In the case of *Minister of Basic Education & 4 others v BEFA & 23 Others (Head Office)*,⁶⁹ the applicants brought an urgent application against the Department of Basic Education (DBE) for the delivery of textbooks to schools in Limpopo, citing the Commission as sixth respondent in the matter with an application that it monitor the full delivery of textbooks as well as compliance with the plan recommended by the court. In 2014 the Commission brought a challenge to the detention of 39 non-nationals in the Lindela repatriation centre, who were held for over 120 days, beyond the requisite time frame of 30 days as stipulated under section 34 of the Immigration Act, in the Gauteng High Court in the case of *South African Human Rights Commission and 40 Others v Minister of Home Affairs*.⁷⁰ The court found that the extended detention period was unlawful and unconstitutional, and ordered the respondents to take all reasonable steps to terminate such unlawful detention practices. The respondents were ordered to provide the Commission with regular or at least quarterly basis reports, and to provide the Commission with regular access to the repatriation centre and its detainees. This case illustrates the important role of the Commission not only in initiating SIL, but in its power to hold the respondents accountable by enforcing compliance with the court order. The case of *University of Stellenbosch v Minister of Justice*, discussed below, is a good example of this.

⁶⁶ Strategic impact or public interest litigation is the practice of bringing litigation intended to effect social justice, in particular, cases, that have the potential to bring about broad legal and social change. The aim is to change and develop the law to protect and further the rights of disadvantaged people. These cases may be class actions or individual claims.

⁶⁷ Aside from its involvement in strategic impact litigation, the Commission has other effective mechanisms at its disposal to address complex issues of systemic discrimination and rights' violation, in particular, its power to conduct investigations into a complaint and make recommendations regarding remedial action to be taken by state departments. These investigations are discussed in Chapter 6.

⁶⁸ *South African Human Rights Commission and 3 others v Dubula Jonathan ("Jon") Qwelane Case No. EQ44/2009 9EQ13/2012*. The case involved a journalist, Jon Qwelane, who published an article in a national Sunday newspaper, in which he expressed extreme contempt for LTGBTIQ people, calling homosexuality unnatural and referring to gay marriages as bestiality.

⁶⁹ Confirmed in the SCA in *Minister of Basic Education v Basic Education for All (20793/2014) [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA) (2 December 2015)*.

⁷⁰ *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others (41571/12) [2014] ZAGPJHC 198; 2014 (11) BCLR 1352 (GJ); [2014] 4 All SA 482 (GJ) (28 August 2014)*.

The cases discussed in this section highlight matters of national and/or provincial significance for the 2016/17 year:

- Racism and utterances of racial epithets which constitute hate speech, often communicated on social media, brought to the ECs. Unfair discrimination on the grounds of disability, culture, and sexual orientation, were also instituted or launched in ECs by provincial offices. The Commission's litigation on racism is important to the extent that it has brought issues of racism to the forefront of public discourse. Many of these cases have been of a high profile nature, and the outcome of these matters has demonstrated that unfair discrimination on the grounds of race is a serious rights' violation for which people will be held accountable.
- Recurring socio-economic rights cases concerning the denial of access to land and housing to marginalised communities. These include eviction, housing, water, sanitation, and degrading living conditions matters. The compounded impact of these issues on women and children is explored in the context of these cases.
- Emerging socio-economic rights cases of a different kind, brought by human rights NGOs, interrogating practices in the financial sector, challenging systems of business lending, the law on defaulting debtors, and specifically practices that cause harm to poor people especially in the context of unemployment and deepening poverty in South Africa. Unscrupulous business practices that exploit poor people have frequently gone unchallenged. Cases like these have a substantial impact on bettering the lives of the marginalised. The Commission intends to develop strategic partnerships with other NGOs to identify cases of this nature to systematically challenge financial practices and policies that impact negatively on South Africans.⁷¹

5.2 Litigation 2016/2017

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

This matter was brought by the University of Stellenbosch Legal Aid Clinic in 2014 on behalf of a group of 10 low income employees at Berco Cleaning Services in Stellenbosch. The employees earned an average salary of R1 400 per month. They were approached by a credit agency and offered small loans. On default of repayment of these loans, the agency then obtained garnishee orders on the salaries of the employees. Amounts ranging from R4 000 to R7 000 had already been garnished against the salaries of each of these persons when they sought the assistance of the Legal Aid Clinic. An investigation into the matter revealed that the balance of the debt increased substantially from month to month, notwithstanding that the debtors had been making regular payments. The employees were unaware of the terms of the debt they had incurred. They had fallen into arrears, and their salaries were attached by micro lenders through a debt collection mechanism known as an emolument attachment order (EAO). An EAO is a court order that attaches a debtor's earnings in execution of a judgment debt. The orders were issued by the Bloemfontein court, where the creditor resided, even though the debtors were employed (and resided) in Stellenbosch. The University of Stellenbosch Legal Aid Clinic (LAC) and other applicants sought to challenge the constitutional validity of legislative provisions that allow for EAOs to be issued by a clerk of the court (an administrative official) without judicial oversight.

⁷¹ The Commission conducted a hearing on the human rights impact of unsecured lending and debt collection practices in South Africa. The report is available here: <https://www.sahrc.org.za/home/21/files/SAHRC%20BHR%20RA%203%20-v3.pdf>

The Commission applied to be admitted as *amicus curiae* in the matter. The court ruled in favour of the applicants, finding that, insofar as it allowed for the issuance of EAOs by a clerk of the court without judicial oversight, section 65J of the Magistrates' Court Act, 1944 (Act No. 32 of 1944) (MCA) was invalid, and that the practice of obtaining EAOs in jurisdictions and magisterial districts that had no relationship to the place of employment or residence of a debtor or his or her employer constitutes clear forum shopping and was detrimental to the applicants. This called into question the ethics of the law firm (Flemix) which acted on behalf of the majority of the Association of Debt Recovery Agents. The court enjoined the Commission to put into place appropriate measures to monitor the situation.

Following the declaration of constitutional invalidity of S65J of the MCA, the matter proceeded to the Constitutional Court for confirmation. The Constitutional Court agreed with the high court that, in principle, seeking an order to execute against or seize the property of another person is part of a judicial process and an emoluments attachment order is a substantive decision because, when a court grants the order, it is determining how the debt will be paid. Judicial oversight is therefore a constitutionally indispensable requisite. A debtor's personal circumstances are likely to change between when the judgment debt is entered and ordered to be paid and when an emoluments attachment order is sought. Not insisting on judicial oversight may thus limit debtors' constitutional rights of access to court. It may also implicate the debtors' protection against arbitrary deprivation of property in section 25 of the Constitution. Judicial oversight over the EAO process will thus alleviate the harsh effects of an EAO on distinctly vulnerable low income debtors' dignity and livelihood. The lack of judicial oversight in the issuance of EAOs enables the abuse of such orders to occur. This abuse has severe and adverse consequences for individuals against whom EAOs are issued, including the violation of their constitutional rights to dignity (section 10), Access to Courts (section 34) and access to socio-economic rights such as housing, food, health care and education. Often, the individuals against whom such orders are issued are already heavily indebted and are therefore amongst the most economically vulnerable members of our society. This was a ground breaking decision in that it recognised the particular economic vulnerability of poor people and the need to protect them from abuse of their human rights. It also sent a clear message to an industry that preys on the economically vulnerable that practices that violate the human rights of such people will not be tolerated.

b) Nedbank Limited v Julia Mampuru Thobejane and other related matters (GPPHC Case No. 84041/2015 and Others)

In this matter, the High Court of South Africa, Gauteng Division (Pretoria High Court) postponed proceedings in which numerous actions against debtors who had defaulted on their housing loans had been consolidated by Nedbank Limited in the high court. The court directed that a notice in terms of Rule 16A of the Uniform Rules of Court be served on several institutions, including the Commission, in July 2016.

The courts have also requested
that the Commission fulfil
a monitoring role to ensure
compliance with court orders.

The high court raised a number of issues regarding the case for direction by the Commission and other listed institutions, the most pertinent of which was whether there was not an obligation on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular forum is considered, in circumstances where each individual matter fell within the jurisdiction of the magistrate's court. The court was basically examining a banking practice in which banks consolidate a number of individual matters against debtors in order to obtain judgment, at the expense of the debtors, in the high courts. Its concern was that such practices may constitute a violation of the constitutional rights of economically vulnerable people, in particular their rights of access to adequate housing and access to courts. The Commission intervened as *amicus curiae* in this matter. The matter was set down for 9 October 2017.

This case raises important questions about the level of scrutiny required of the courts and bodies like the Commission in the protection of the human rights of marginalised members of our society. These are long established business practices that have unfairly disadvantaged the economically vulnerable and gone unchallenged. What is notable about the case is that the court proactively sought the Commission's opinion in order to protect the human rights of poor indebted people. It is recommended that the Commission publish legal opinions on these matters in order to raise the profile of the Commission.

c) *Women's Legal Centre Trust v The President and Five Others* (WCHC Case no.: 22481/2014)

This matter involved an application by the Women's Legal Centre Trust to have Muslim marriages declared lawful in terms of South African law. The Cape Town High Court, following argument in the present matter, ruled that the Commission be joined as a respondent in the matter. In its judgment, the Court stated that comment from the Commission "is not only significant but vital. It is vital because if there is merit in the serious allegation that the country has failed in its human rights obligations then to some extent the Human Rights Commission is accountable for that and one has to hear what they have to say about it." The Court also required the input of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL) in this matter. To assist it in making its decision, the Court wished to obtain clarity from the Commission on whether or not the country is in violation of its international obligations.

In regard to the court's formulation of the matter, the Commission noted that its accountability for the state's failure to comply with its international obligations was shared with institutions more appropriately tasked with monitoring gender obligations, namely, the Commission for Gender Equality. The Commission made submissions regarding its role in monitoring the implementation of South Africa's international human rights obligations, and its obligations in relation to the recognition of Muslim marriages concluded according to Shari'a law and the protection of women's rights.

The Commission submitted that South Africa ratified international agreements, including the International convention on the elimination of discrimination against women (CEDAW) and the International covenant on civil and political rights (ICCPR) which require the State to regulate marriages. Therefore, legislation is required for compliance with South Africa's obligations under international law. As there is no such legislation, South Africa is not in compliance with its international obligations. The Commission further submitted that the failure to legislate is unreasonable because South Africa willingly signed various international instruments that impose an obligation to adopt legislation that recognises and regulates all marriage.⁷²

⁷² *Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others* [2018] ZAWCHC 109 (31 August 2018). Available here: <http://www.saflii.org/za/cases/ZAWCHC/2018/109.pdf>.

The importance of this case lies in its evaluation of the extent of the obligation on Chapter 9 institutions to hold the state accountable in terms of its international human rights' commitments.

- d) *SAHRC and 19 Others v Madibeng Municipality, MEC for Local Government and Human Settlements, Minister of Water and Sanitation and Minister of Health* (NGHC Case No.: 21099/17)

The Commission's North West provincial office received a complaint from George Mkhwanazi on behalf of the residents of Klipgat C against the Madibeng Local Municipality (municipality). Residents in the Klipgat C area had been without water for a period of five weeks at the time the complaint was lodged, and the amount of water supplied to them in the normal course was inadequate for their basic needs. The community had met with the municipality on a number of occasions to resolve the water crisis. However, the respondent failed to provide residents with information on steps taken to address the water supply challenges. The Commission brought an application, firstly, seeking urgent interim relief premised on a written undertaking that the municipality had breached, undertaking to increase the number of water deliveries to Klipgat C to three times a week in order to meet the amount of water required, and that it would disinfect the water trucks and Jojo tanks on site once a month.

The North Gauteng High Court ordered the Madibeng municipality, the MEC for Local Government and Human Settlements, and the Ministers of Water and Sanitation and Health, to provide adequate water as per the undertaking of the municipality to the community of Klipgat C. The Commission is to monitor progress on the delivery of water in line with the ruling and to seek further relief from the Court if the municipality fails to deliver water in accordance with the court order.⁷³

Secondly, the Commission sought more comprehensive and long term relief to provide residents with access to a reliable or sufficient supply of safe water and put in place measures to protect their right to adequate water. The Commission requested that the court declare the first, third and fourth respondents in breach of their constitutional and statutory obligations and directed them to remedy this in a manner that properly gives effect to the rights of community. The matter is ongoing.

- e) *Truworths Limited and Others v Minister of Trade and Industry and National Credit Regulator* (WCHC Case No.: 4375/16)

This was a challenge by retail companies to the new affordability regulations promulgated by the Minister of Trade and Industry to address high consumer indebtedness and reckless lending. The companies submitted that the regulations were published in a procedurally fair manner and that they were not substantively rational in both their content and purpose.

The Court wished to obtain clarity from the Commission on whether or not the country is in violation of its international obligations.

⁷³ 11 May 2017.

The Commission intervened as *amicus curiae*, submitting that the obligation to implement measures which address irresponsible lending, over indebtedness and reckless lending arises out of South Africa's obligations in terms of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Commission submitted that South Africa's obligations in terms of ICESCR compel it to take certain legislative measures to protect economic, social and cultural rights (ESCR), including the affordability regulations. The regulations are intended to protect consumers. They are also consistent with international standards, best practices and financial consumer protection measures which have been developed by the EU, the G20 and the World Bank in jurisdictions such as Europe, Australia and Japan. The matter was heard in the High Court (Western Cape Division, Cape Town) on 7, 8 and 10 August 2017 and judgment was reserved.

f) *Frank Sout and Four Others v Mangaung Metropolitan Municipality* (BHC Case No.: 1424/2016)

The matter concerned an eviction order secured by the Mangaung Local Municipality evicting occupants of farm Rodenbeck 2972, Bloemspruit, Bloemfontein. The occupiers only became aware of the eviction order after it was handed down. The Commission applied for a rescission of the judgment on the grounds that the court that the complainants had not received proper notice of the eviction proceedings, and that the magistrate had failed to ascertain whether the eviction of the applicants, and the date upon which the applicants were ordered to vacate the property, would be just and equitable as required by the Prevention of Illegal Eviction from and Unlawful Occupation of the Land Act, 1998 (Act No. 19 of 1998) (PIE). The Commission also argued that the court had not complied with its obligations in terms of section 4(7) of the PIE Act, as it had not taken account of relevant evidence concerning the circumstances of the applicants, including the history of the applicants' occupation of the property, the applicants' means and ability to find alternative accommodation, the availability of alternative accommodation within the area, the rights and needs of those applicants who are elderly, children, disabled and/or living in households headed by women, and the municipality's compliance with the procedural requirements of the PIE Act. In addition, the magistrate did not enquire into whether the applicants' eviction would render them homeless, whether suitable alternative accommodation would be available to the applicants, and whether the respondent had engaged and consulted meaningfully with the applicants. Finally, the court did not consider the constitutional rights of the applicants, including the right to dignity (section 10), life (section 11), the right to freedom and security of the person (section 12), the right to have access to adequate housing (sections 26(1) and (2)), the right to protection against arbitrary evictions (section 26(3)), and the rights of children to basic shelter (section 28).

The Mangaung Metropolitan Municipality filed a notice calling on the applicants to provide their particulars including identity numbers in order to determine their eligibility for benefits under the municipality and the Free State provincial government's housing policies. The matter was still ongoing as at the end of the period under review.

g) *Residents of Arthursstone Village v Amashangana Tribal Authority and Others* (17978/15) [2016] ZAGPPHC 382 (8 June 2016)

Approximately 150 residents who were evicted from a piece of communal land known as the Arthursstone farm in Bushbuckridge, Mpumalanga, approached the Commission for assistance a day after their eviction and contended that the eviction order was erroneously granted and that their eviction was arbitrary. The residents alleged that they were evicted, and their homes demolished at the behest of their traditional council, the Amashangana tribal authority. The eviction and demolition of homes had devastating effects on the community, particularly the women, children and older persons. They were left traumatised by the loss

of their homes and were rendered destitute. The Commission conducted an investigation into whether residents' right to have access to adequate housing including their rights not to be evicted or have their homes demolished arbitrarily, was a violation of their rights. The Commission found that there was *prima facie* evidence that the eviction application, the eviction order and the eviction process itself did not comply with the PIE Act and section 26 (3) of the Constitution and approached the high court for appropriate relief.

In terms of the PIE Act, the traditional council was required to follow certain prescribed procedures such as giving adequate notice of the eviction proceedings to the occupiers. It failed to follow the procedures laid down in the PIE Act. The presiding magistrate was required to satisfy himself that the PIE Act was complied with, consider issues such as the availability of alternative accommodation and the rights and needs of women, children, elderly people and child-headed households which the magistrate allegedly failed to do. The court regarded the magistrate's granting of the eviction and demolition order as a dereliction of duty and a failure to apply an independent judicial mind to the proceedings. The high court reviewed and set aside the order of the magistrate's court and declared the eviction and demolition of homes unlawful. It also ordered the Amashangana tribal authority to construct temporary habitable dwellings equivalent to those destroyed by the demolition on a piece of land in the vicinity of the Arthurstone farm pending the construction of permanent habitable dwellings at a site to be agreed to between the parties. The high court authorised the Commission to monitor compliance and to approach the court in the event of non-compliance with the court order.

The Commission is concerned about non-compliance with legislation especially laws enacted to give special protection to marginalised and vulnerable groups. The PIE Act, amongst other legislation, aims to prevent abuse and ensure that evictions take place in a manner consistent with the values of the new constitutional dispensation. In the case of the residents of Arthurstone farm, non-compliance with the PIE Act enabled abuse to prevail. Accordingly, the eviction of the residents of Arthurstone farm was inimical to values underpinning our constitutional dispensation. The PIE Act was specifically enacted to protect unlawful occupiers of land, in particular people who have occupied land unlawfully for over six months, from eviction, and to ensure that such eviction is just and equitable, and that alternative land has been made available to illegal occupiers of land.

5.3 Litigation by provincial offices

The provincial offices of the Commission instituted proceedings in ECs across the country. The majority of the cases involved the use of the racial epithet 'k' and other derogatory comments such as "baboon" or "aap", "monkey". In the 2015/16 financial year, 61% of all matters litigated by the provincial offices related to the right to equality and hate speech. In 2016/17, race and hate speech related matters comprised 72% of all litigated complaints for the year. Other equality complaints that were the subject of provincial office litigation relate to disability, HIV status, and sexual orientation. ESR complaints including housing, almost exclusively evictions, access to water and sanitation, and education, were litigated. Some notable cases taken to EC by the provincial offices during the period under review are discussed below.

Gauteng provincial office

SAHRC obo Clement Mkhondo v Vicki Momberg (GP/1516/0816)

The complainant, Constable Clement Mkhondo, had responded to an alleged smash and grab incident which involved the respondent, Vicki Momberg. When he arrived at the scene to assist her, she called him a ‘useless ‘k’ word’ and subjected him to a racist tirade. “Let me tell you something. This is the type of police force we have got. We’ve got a low calibre of people working. If I see a black person, I will drive them over. If I have a gun, I will shoot everyone,” she told the officer before driving off. A video recording of the incident was posted on social media and evoked outrage. The Gauteng provincial office instituted proceedings in the Randburg EC on behalf of the complainant on 31 March 2016. The court held that the conduct complained of amounted to hate speech in terms of section 10 of PEPUDA. The respondent was ordered to undertake community service, apologise unconditionally, participate in sensitivity training, and pay an amount of R100 000. Ms Momberg was also found guilty of *crimen injuria* in the criminal court.

The resolution of this high profile matter sends a strong message that racism is a serious violation of the rights to equality and dignity in our society and is unacceptable in our constitutional democracy. The conviction served to underscore this message. Sensitivity training is an important element of the resolution of this matter.

Limpopo provincial office

Nare, Mphela v Frans Manamela (LP/1415/0047)

The Commission instituted proceedings in the Seshego EC in Limpopo on behalf of a transgendered secondary school learner. The case arises from allegations of humiliation and harassment based on the gender identity of the learner that created a hostile and intimidating environment. The proceedings have been instituted to procure relief for alleged unfair discrimination, harassment, and hurtful speech. Judgment was handed down in favour of the Commission and the complainant on 17 March 2017. The Seshego EC ordered the Limpopo education department to pay the applicant R100 000 in compensation for the discrimination and harassment she endured while at school.⁷⁴

The Commission is concerned about non-compliance with legislation especially laws enacted to give special protection to marginalised and vulnerable groups.

⁷⁴ SAHRC annual report 2017. Available here: www.sahrc.org.za/home/21/files/SAHRC%20Annual%20Report%202017%20HR.PDF

Western Cape provincial office

SAHRC v Sunette Bridges (WP/1213/0618, WP/1213/0763, WP/1213/0732 and WC/1415/0024)

The respondent was Ms Sunette Bridges, a well-known public figure, singer, and celebrity in Afrikaans society with a substantial following on social media. The complainants approached the Commission and laid a complaint against Ms Bridges on a number of grounds, including that:

- The respondent allegedly made racist statements or comments against “non-white South African citizens” on a daily basis on a social media platform, and her statements are subsequently endorsed and reiterated by her social media followers;
- the respondent has made reference to “ ‘k’, ‘k’ kind, K4, groenies, gemors” and the like when referring to “non-white South African citizens”;
- by making such statements/comments the respondent is promoting violence and racism against “non-white South African citizens”;
- the respondent continuously boasts about her affiliation with far rightwing organisations from whom she seeks support on behalf of the rightwing community in South Africa and fosters the idea that South Africa is carrying out an alleged “boere genocide”;
- through the respondent’s involvement with various European and American right wing groups, as well as Dr Greg Stanton of Genocide Watch, the respondent is perpetuating a distorted view of South African; and
- there was a comment of a 16 year old minor on the respondent’s wall asking “her to collect him and his friends as they are offering to help her ‘to get rid of the ‘k’s – “dan kom help om jou die ka@@ers uitroeï”, and that the respondent approved of the comment and “trivialised the incident, protecting him and describing it as freedom of speech”.

In short, the respondent violated the rights of black South African people to freedom from discrimination on the basis of race by making extremely provocative, damaging derogatory remarks, that she spread hatred and contempt for black South Africans, that she promoted violence against black South Africans, and that her conduct amounted to hate speech. The Commission brought an action against her for hate speech, on the grounds that her racial commentary amounted to hate speech in terms of PEPUDA.

On 27 March 2015 the Western Cape provincial office received an offer of settlement from the respondent’s attorney. It was agreed that the terms were favourable to the objectives of the Commission and the draft order was made an order of court on 31 March 2015. Bridges was found guilty of violent hate speech and racist comments in the EC.

The Commission’s litigation on racism is important to the extent that it has brought issues of racism into the forefront of public discourse. Many of these cases have been of a high profile nature, and the outcome of these matters has demonstrated that hateful racist epithets and hate speech is a serious rights’ violation for which people will be held accountable. In addition, bringing cases to the ECs contributes to developing a jurisprudence around unfair discrimination, harassment and hate speech on the grounds listed in section 9 of the Bill of Rights, and affirms the role of the ECs as the arbiter of matters of equality.

5.4 The comparative role of Chapter 9 institutions

The Chapter 9 institutions, in particular the SAHRC, the CGE and the CRL Commission, have an explicit mandate of transformation in terms of section 184 to build and support human rights norms, thereby strengthening the ability of our democracy to protect the values set out in the Constitution. These three human rights institutions complement each other neatly. The SAHRC has the broadest mandate, one that is focused by the requirement to monitor equality and social and economic conditions in South Africa. One may argue that the CRL Commission and CGE supplements the work of the SAHRC with their specialised focuses.

These Chapter 9 institutions are designed to ensure that the state remains open and responsive to the needs and rights of all citizens, acting as a kind of intermediary between the two. Together with the Bill of Rights, they enhance the “protective framework for civil society”. They deepen democracy and promote and protect human rights on a daily basis and have made substantial achievements in this role. In addition, their role is to check and hold government accountable. The check they provide on the exercise of government power is not through the exercise of power, but by providing a legitimate and authoritative account of government’s record, which can be used by citizens and Parliament in scrutinising government’s performance.

They hold government to account not only through ‘enforceability’ but through ‘answerability’. Chapter 9 institutions often hold much sway through their moral authority, and this is particularly true of the SAHRC.⁷⁵

5.5 Equality courts

South African equality courts (ECs) were set up in 2009 to give effect to section 9 of the Bill of Rights. Chapter 4, sections 16 to 23 of PEPUDA, provides for the establishment of ECs throughout South Africa. The Minister of Justice and Constitutional Development established designated ECs in all magisterial district courts in South Africa. Members of the public may approach the EC directly, or through the Commission. Article 15(g) of the Commission’s CHP allows for the Commission to direct any complaint to the EC at any stage. A provincial office can proceed with a hearing process (section 15(e)), or can institute legal proceedings in terms of section 15(f), or refer the matter to the EC directly in terms of section 15(g), at its discretion. The EC adjudicates matters specifically relating to unfair discrimination and hate speech, created in terms of PEPUDA.

The role envisaged for the Commission in promoting equality, in terms of Chapter 5 of PEPUDA, is twofold. The Commission, together with the CGE, is tasked with promoting equality by assisting complainants to institute proceedings in the ECs, and to monitor the functioning of the ECs. To assist it in its monitoring function, the Commission has the authority to request information from any component of the state or any person regarding any measures taken to achieve equality. The ECs are central to the promotion of equality in South Africa, and the Commission has the role of ensuring that state departments are accountable for their effective functioning.

⁷⁵ “The Chapter 9 institutions in South Africa”, Langeveldt v. South African Catholic Bishops Conference: Parliamentary Liaison Office April 2012 Briefing paper 287.

“The Human Rights Commission et al: What is the role of South Africa’s Chapter 9 institutions?” Murray C. PER/PELJ 2006(9)2.

5.6 Litigation as a means of securing reforms

Non-compliance with the Commission's recommendations, particularly by organs of state, continues to undermine the independence and effectiveness of the Commission. This has seriously impacted levels and quality of delivery, planning and effective policy implementation. The lack of awareness of human rights and responsibilities for the fulfilment of rights within the public service results in delays in implementing recommendations for long term corrective reforms such as sustained training for officials. Non-compliance seriously compromises the prospect of attaining a culture of respect for human rights in organs of state. In such instances soft approaches to persuade compliance are less likely to provide timely remedies and a compelling case is made for the Commission to enforce compliance with its recommendations through the courts. Litigation of this nature is likely to yield judgments that will greatly contribute to an understanding of the nature of the recommendations by the Commission. The landmark judgment of the Constitutional Court that the remedial action recommended by the Public Protector is binding unless set aside by a court of law has clarified and affirmed the authority of the office of the Public Protector thus increasing its credibility and status.⁷⁶ State bodies are compelled to cooperate with that office and to take steps to comply with its recommendations. The Commission could adopt a similar strategy to enforce the duty of cooperation owed to the Commission entrenched both in the Constitution and its enabling legislation.

ECs were created as an alternative court system to enhance access to justice for the poor and were designed to be accessible to all South Africans. They hear only cases relating to unfair discrimination, harassment, and hate speech. The courts play a critical role by protecting and interpreting these constitutional rights and are meant to remove many of the major barriers to judicial access for poor people. It is envisaged that both the equality clerk and the presiding officer would play an active role in assisting litigants in bringing their cases, to provide guidance on how to develop the case, and on the type of evidence to be presented. Presiding officers are also required to question witnesses themselves, when necessary, and even have authority to call witnesses.⁷⁷

Over the five years reviewed, it is evident that where matters are referred to the ECs by the provincial offices, there are often delays in the resolution of cases due to their postponement. Equality magistrates may not be available for a number of reasons. They may be sitting in for other magistrates in the court or transferred to other courts to work on non-equality cases. It appears that, in an already under resourced and over loaded court system, ECs are not prioritised in the magistrates' courts. The Commission has considered the system of ECs in a number of its reports and national hearings and has raised concerns about challenges in the access and operations of the ECs, based on its own experience and on public reports by the Department of Justice and Constitutional Development (DOJ&CD).⁷⁸ The SAHRC has found several instances where the ECs are not functional, court officials are not trained to deal with equality complaints, and there are no dedicated staff members, for example, EC clerk, to process complaints. The shared location of the ECs in magistrates' court buildings were meant to lower the costs of these courts, as some magistrate court personnel were assigned to do double duty in ECs. However, the sharing of equality clerks with the magistrates' courts has meant that resources are too easily diverted away from the work of ECs, as well as interfering with the accumulation of expertise.

⁷⁶ The Nkandla decision in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016). See also *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP) (13 December 2017).

⁷⁷ Equality courts in South Africa: Legal Access for the poor, Kaersvang, D. *Journal of the International Institute* (2008) at 4.

⁷⁸ The Commission's National Human Rights Institution (NHRI) report on the South African government's combined fourth to eight periodic country report under the international convention on the elimination of racial discrimination (CERD) also discusses some of the challenges in this regard.

In addition, ECs have not been established in all magistrates' courts, as was envisaged by the legislation. There is a dearth of information about the location of ECs and most equality complaints are brought in provinces with the largest urban areas, namely, Gauteng, Western Cape and KwaZulu-Natal.

Despite initiatives undertaken by the government to strengthen and ensure the efficacy of the functioning of these courts, these courts remain underutilised. There is a need for a more sustained effort by the DOJ&CD to promote the ECs both in and outside the court system. The Commission's regional offices can also play a greater role in raising awareness of ECs and in referring complaints to identified ECs. Lack of information and awareness of the courts by EC staff, court officials, and the public, is a major obstacle to the utilisation of the EC's. Statistics published by the DOJ&CD in its 2016/17 annual report⁷⁹ illustrates that the number of cases registered at the ECs, including the number of cases resolved during the financial year period, were 480 nationwide. This is a marked decline in EC cases from 844 in 2014/15 to 480 in 2016/17. The number of complaints referred has dropped, with each EC averaging just over one case a year. According to statistics from the Department of Justice and Constitutional Development (DOJ&CD), complaints related to hate speech in ECs increased by 36% and accounted for 328 of the overall complaints received by ECs for 2016/17, with 38% of the complaints lodged for unfair discrimination in terms of race, followed by "any other ground that undermines human dignity" (16%).

Resolutions coming out of the roundtable, for implementation by the DOJ&CD, include strengthening the ECs structures, re-assessing the functionality of ECs, considering resource constraints, and raising public awareness of the right to equality and of the ECs as forums where access to remedy may be facilitated. This is an area where the Advocom Unit of the SAHRC could play a role. It was noted that EC orders and remedies provide opportunities for advancing substantive rather than merely formal equality and achieving justice. The issue of remedies emerged as a major area requiring effective training for presiding officers, bearing in mind that PEPUDA seeks more preventive and reparative, rather than retributive justice.

There is a need to invest substantial resources in ECs, particularly in the creation of a dedicated, expert staff complement, and in raising awareness about the courts, both in and outside the court system, if such courts are to be successful. If the South African government continues on its current track of underfunding and closing ECs because of low levels of use, it will guarantee the failure of the courts and similarly fail in its promise to make courts accessible to all. "The South African EC model has tremendous potential to revolutionise judicial access... However, its potential is not being realised."⁸⁰

⁷⁹ DOJ&CD annual report 2016/17. www.justice.gov.za

⁸⁰ Op cit footnote 75 at 6.



Investigative reports

Aside from its involvement in litigation, the Commission has at its disposal the means to directly address complaints reported to it regarding unfair discrimination and other rights' violations. The Commission may, of its own accord, or at the request of NGOs and complainants, conduct investigations into a complaint and, based on its findings, make a determination regarding remedial action to be taken by state departments, or make a determination on whether a matter constitutes unfair discrimination. The advantage of investigative hearing is that it facilitates an immediate response to individual issues reported to the Commission. The Commission has the power to order organs of state directly implicated in the reported rights' violation to provide information pertinent to the enquiry, and it can hold organs of state accountable for their failure and compel them to act to remedy the situation complained of. The Commission makes findings based on the outcome of its investigations and provides detailed recommendations to the relevant government departments as well as directives for reporting on and monitoring progress. These recommendations may direct the state department involved to take immediate action to remedy the situation in the short term, as well as make recommendations for the long term resolution of systemic problems. These recommendations set out time frames for each step of the process.

Pursuant to Section 184(2)(a) of the Constitution, the SAHRC Act confers powers on the Commission to *inter alia* conduct or cause to be conducted any investigation necessary for the exercise of its broad powers under the Constitution. Section 13(3) empowers the Commission to conduct an investigation into an alleged violation or threat to fundamental rights. Section 15 of the SAHRC Act sets out the procedures to be followed in conducting such an investigation.

6.1 Reflection on the investigative reports produced by the Commission

During the five-year period under review, the Commission undertook a number of investigations into violations of rights.⁸¹ Many of these investigations are relatively straightforward, evidencing a clear rights' violation and an easily implementable remedy. Most of these investigations are conducted by the provincial offices of the Commission. Some are very complex and require a more in-depth investigation, and a number of recommendations directing various state organs to remedy the particular situation.

Accommodation for people with disabilities

The Commission has investigated complaints by members of the public regarding the inaccessibility of certain public spaces and made recommendations for special accommodation that should be made to make these spaces accessible to disabled people. A number of these investigations related to access to disabled students at various universities. The Commission has in these cases also directed institutions to conduct a needs assessment of accommodation required to enhance access for disabled students, and that the institutions either put in place a disability policy or review existing policies. The matter of Tshwane University below illustrates the kind of recommendations made by the Commission. It also illustrates the extent of the Commission's powers in issuing practical directives to the institution involved, ordering the university to secure emergency funding to effect special accommodation for disabled students.

In the Gauteng Province, in *SAHRC Own Accord (obo Lekae Combrinck-Nawa v Tshwane University of Technology)* (GP/1415/0596), the Commission investigated a complaint about a lack of accommodation for disabled students at Tshwane University of Technology.

⁸¹ The full investigative reports may be accessed from the Commission's website at www.sahrc.org.za

The University was found to be in violation of the rights of a student with disabilities. The Commission found that the respondent failed to provide reasonable accommodation to Mr Lekae Combrinck-Nawa and therefore discriminated against him. The Commission recommended that the Respondent review its needs audit to enhance accessibility to students with disabilities; that it must secure emergency funding to effect basic accommodation improvements to assist student with disabilities, including the installation of handrails and signage and the provision of a toilet. In addition, the respondent was ordered to apologise to the complainant and to review its Disability Policy, within certain time frames.

Special accommodation in public spaces is only the tip of the iceberg as far as ensuring equality for disabled people is concerned, and relatively easy to remedy. Disability has consistently been the second highest equality complaint reported in the five-year review period and has increased in 2016/2017. People with disabilities face multiple forms of discrimination in accessing employment, education and health care and continue to experience exclusion from the economy and education system, despite legislation and policy measures in place to ensure equality, including employment equity measures.

Access to housing, water and sanitation

The Commission conducted investigations into a number of complaints regarding lack of inadequate access to housing, water and sanitation over the five year review period. Some concerned houses left to fall into a state of complete disrepair by municipalities, with inadequate basic services like water and sanitation. Other housing violations investigated involved communities evicted from municipal land and moved to sites with inadequate shelter, water and sanitation, and evictions from informal settlements. There have been numerous investigations into access to water and sanitation in communities, conducted by provincial offices, on an annual basis.

In the Mpumalanga provincial office, in the matter of *Katrina Morema and Other v Thaba Chweu Local Municipality* (MP/1415/0159), the Commission investigated the unlawful eviction of the occupiers of station 10 in Lydenburg, Mpumalanga without an order of court. The Commission found that the respondent violated the occupiers' right to have access to adequate housing and their right to dignity. The Commission recommended that the respondent undertake a housing needs assessment and report to the Commission within a certain time frame, meaningfully engage with the occupiers, and determine any compensation payable for the loss suffered, enhance community participation, and provide the Commission with a housing plan and policy by a date set by the Commission.

Access to basic education

Complaints investigated by the Commission include access to textbooks and learning materials, scholar transport in communities, and lack of infrastructure, at a municipal and provincial level. In 2014 the Commission conducted an investigation to identify the causes of problems with delivery of school textbooks in all provinces and made a number of recommendations for each province to ensure delivery of textbooks to schools, including a monitoring component.⁸² In complex matters, the Commission often recommends that different state departments, and at provincial and national levels, collaborate to effect long term changes.

Access to health care

The Commission has investigated a number of complaints regarding access to local and provincial health care. These include an investigation into the state of health care in the Mpumalanga state hospitals,⁸³ access and to emergency medical services in the Eastern

⁸² Report: delivery of primary learning materials to schools Available here: www.sahrc.org.za/home/21/files/Delivery%20of%20Learning%20Material%20Report%20Final.pdf

⁸³ Available here: www.sahrc.org.za/home/21/files/Mpumalanga%20Healthcare%20Services.pdf

Cape.⁸⁴ Most recently the Commission investigated a crisis in the provision of oncology treatment in the KwaZulu-Natal health care system, discussed below.

Violation of the rights of foreign nationals

Xenophobia in South Africa has manifested in discrimination, harmful stereotypes, and violence targeting foreign nationals. As a result, migrants and refugees face numerous challenges, struggling to obtain proper documentation from home affairs offices, and access to basic services. The Commission has investigated the inhumane conditions of detention at migration detention centres such as at the Lindela repatriation centre, at the request of human rights' NGOs, and has the role of monitoring compliance with the recommendations.⁸⁵

6.2 Selected investigative reports for 2016/17

Dr Imraan Keeka, DA, MPL v Addington Hospital, the Nkosi Albert Luthuli Central Hospital, Department of Health, MEC for Health in KwaZulu-Natal (Complaint Ref. No. KZ/1516/0451)

The applicant lodged a complaint with the Commission regarding shortages of staff and the lack of medical equipment for screening, diagnosing, and treating cancer patients in KwaZulu-Natal hospitals, which impacted negatively on the provision of oncology services in the province. The Commission launched an investigation to determine if the respondents, in particular, the provincial Department of Health, had violated the right to access to health care services, and the rights to life and dignity of cancer patients. The Commission found *inter alia* that there had been a conspicuous failure to provide adequate oncology services in KwaZulu-Natal for a considerable length of time, and that the Department's plan to allocate resources to the treatment of cancer was not coherent. It also found that the respondents had failed to provide necessary and adequate human and technological resources for the provision of oncology services and had thus not complied with its duty to provide access to health care services to oncology patients. It made a number of recommendations, including that a further investigation be conducted through the Provincial Health Council of the NHS, to advise the MEC for Health in KwaZulu-Natal regarding policy and practice in the provision of oncology services, conduct an evaluation of the level and quality of oncology health care services in the province, and other measures designed to improve the functioning of provision of oncology services. The respondents were ordered to provide the Commission with a plan of action for remedying the situation.

NETREG Concerned Residents' Association v City of Cape Town (Complaint Ref. No.: WP/1213/0055)

The Commission investigated a complaint against the City of Cape Town Metropolitan Municipality by the residents of the poor coloured township of Bonteheuwel on the Cape Flats. The residents alleged that the municipality had failed to maintain rental housing units in Bonteheuwel resulting in a serious deterioration of the condition of the houses. Inadequate sewage drainage had caused human waste to overflow on to the properties, leaking roofs had damaged the ceilings, walls and electrical installations, and inadequate storm water drainage caused flooding making the properties inaccessible in winter.

Sanitation was deplorable, with not enough toilets and the few usable toilets becoming blocked because of over usage and overflowing human waste. Some properties did not have access to water because of damaged water pipes. After a lengthy investigation, the Commission found that the conditions of the housing units amounted to a violation of the complainants' right to access to adequate housing, sufficient water and sanitation, and to

⁸⁴ Available here: www.sahrc.org.za/home/21/files/SAHRC%20Report%20on%20Access%20to%20Emergency%20Medical%20Services%20in%20the%20Eastern%20Cape....pdf

⁸⁵ 2014 Lindela report: MSF, S27, LHR, and PASSOP v DHA and others. Available here: www.sahrc.org.za/home/21/files/Gauteng%20-%20Investigative%20Report%20-%20Lindela%20-%201%20September%202014.pdf

an environment that was not detrimental to their health and wellbeing. It found that the respondent had failed to take reasonable steps to remedy the living conditions of the residents. The Commission's provisional recommendations were that the respondent develop a plan to address the situation, attend to the urgent repair and maintenance of the housing units, put in place interim measures regarding the provision of basic services within certain timeframes, and report to the Commission. The respondent was also required to attend to the breakdown in communication between residents and the local housing offices and strengthen its public communication and education initiatives to facilitate meaningful engagement with the residents.

Investigations into the failure of local and provincial governance structures to provide access to services like health care, housing, water and sanitation, and education may be very complex, and the issues may not lend themselves to tidy solutions. However, the Commission's interventions and its ability to make recommendations to state departments on how to remedy these matters are a powerful method of ensuring justice for vulnerable people in situations that often appear intractable. The Commission's role in holding government to account is invaluable, and its role of monitoring important in this process.

African Diaspora & 30 Others v King Goodwill Zwelithini

The Commission investigated a complaint against King Goodwill Zwelithini, by the African Diaspora, Lawyers for Human Rights (LHR), and 29 private individuals, regarding statements he made in his address at a moral regeneration conference in Pongola on 15 March 2014. It was alleged the King's statements constituted hate speech and incitement to violence against migrants in KwaZulu-Natal and that the statements did in fact incite violence against migrants starting on 30 March 2015 and continuing to May 2015.

The applicants asked that the King be ordered to apologise and to retract his statements, that he be subjected to an enquiry by the Commission and a declaration that his statements amounted to hate speech and other human rights' violations, and that the Commission bring the matter to the EC for a determination on hate speech.

The King accused the government of failing to protect locals from the "influx of foreign nationals" and continued that "we are asking that foreign nationals be sent back home" (para 18). The respondent argued that the statements did not amount to hate speech, and that it was not his intention to incite violence, nor did his subjects understand him to be saying so.

The Commission found that the King's statements did not amount to hate speech and incitement to violence. The statements had been taken out of context, as the speech addressed a range of societal ills, and the King had publicly condemned violence on several occasions. However, the statements had been made with a clear intention to be hurtful, and a clear intention to be harmful. The King held an *imbizo* a month later in which he committed himself to a range of conciliatory measures to punish xenophobia, protect foreign nationals, including asking for their participation in governance structures in the province.

The Commission's investigation of the utterances made by the King underscores the independence of the Commission and enhances its credibility as a body that holds all people to account, regardless of their status. The findings highlight the delicate balancing of the right to freedom of expression on the one hand and hate speech on the other. In this matter, the Commission did not find incitement to violence because there was an absence of intention. However, a person in a position of power should have a special duty not to make discriminatory comments that can be interpreted by people under his influence as incitement to violence.

7

National and/or provincial investigative hearings

This chapter provides an overview of national and/or provincial investigative hearings conducted by the SAHRC, including key findings and recommendations. It also assesses the impact of these hearings and assesses whether they have achieved their objectives.

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

Where violations are widespread and systemic in nature, the Commission is enjoined to institute a national public hearing. Such a process assists in identifying the underlying factors leading to such violations as well as the policy and institutional mechanisms that the state and others may put in place to prevent violations of human rights. Section 13(1) (a) of the SAHRC Act provides that the Commission is entitled to make recommendations to organs of all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution.

The national hearing into the impact of protest related action on the right to a basic education is part of a wider response by the Commission to promote and protect the right to a basic education. The Commission has held national hearings on a number of right violations over the five years under review.⁸⁶

The Commission has also, in the 2016/17 year, convened a national hearing on the underlying socio-economic challenges of mining affected communities in South Africa, and a national hearing on racism and Social Media, which will be reported on in the 2017/18 SAHRC annual trends report.

A person in a position of power should have a special duty not to make discriminatory comments that can be interpreted by people under his influence as incitement to violence.

⁸⁶ Reports on many of these hearings for 2015/2016, 2014/2015 and 2013/2014, have been discussed in previous Trends Analysis Reports. These Reports are available on the Commission's website.

7.1. National investigative hearings 2015/16 and 2016/17

7.1.1. Report on the impact of protest related action on the right to a basic education⁸⁷

In the light of the growing number of protest related disruptions to schooling and destruction of school infrastructure, the Commission convened a national hearing to investigate the impact of protests on education and to consider ways of protecting, in particular, the right to basic education. Factors considered include the burning of educational infrastructure, and the barring of learners from accessing school premises and other sites of learning.

The level of protest action in the Limpopo province has had a devastating impact on children's right to basic education. On 29 April 2016, the Limpopo High Court handed down a judgment confirming the demarcation by the Municipal Demarcation Board (MDB) that had been contested by the community. The community embarked on extensive protest action, which resulted in 29 schools in the area being set on fire, allegedly by protesters. The total number of schools disrupted was 102 with 52 827 learners subsequently unable to attend school. The impact on learners and the cost of restoring the damaged infrastructure was considerable.⁸⁸ These protest actions had resulted in school closures and in children having to repeat the school year. The protests were typically around issues arising from inadequate service delivery, for example, access to water, roads and housing.

The Commission found that the right to a basic education was affected by protest related action arising from causes that in most cases may be unrelated to the provision of basic education. Protesters who deny access to education are violating the right to a basic education of the affected learners. Learners are disadvantaged by certain protest related action in that they are physically barred or intimidated from school, and/or infrastructure on which learners rely to access education is damaged or destroyed.

Responses from the DBE and the SAPS had often been slow, and it appeared that there was no uniform policy or approach in place to deal with such events. A systemic failure of local government to provide basic services and a breakdown of communication between local authorities and affected communities had resulted in communities destroying schools and other buildings to draw attention to their grievances.

The Commission found that the responsibility to ensure the safety of learners, educators and schools did not rest with one department, and it was unclear which department took the lead in cases where protest related action targeted schools. It recommended that the DBE should constitute an interdepartmental national public protest response team (national response team), including relevant government departments, in particular SAPS and the Department of Cooperative Governance and Traditional Affairs (CoGTA), and other relevant stakeholders. The team will be tasked with, *inter alia*:

- Developing guidelines that set out the roles and responsibilities of the relevant government departments;
- Establishing early warning systems and responses;
- Considering the crucial role of the police, providing for procedures and/or protocols on how information can be shared or obtained as soon as possible about planned school disruptions due to public protests;
- Determining actions to be taken in circumstances in which learners have been deprived of education due to protest action to facilitate catching up of the missed schooling;

⁸⁷ Available here: www.sahrc.org.za/home/21/files/WEBSITE%20Impact%20of%20protest%20on%20edu.pdf

⁸⁸ There had been protest action across most provinces, including North West, Gauteng, Northern Cape, and Eastern Cape. In one province, children were kept at home for four months.

- Clearly setting out the responsibilities of the different government departments where school infrastructure and buildings have been damaged or destroyed; and
- Other measures including reporting and raising the awareness of government about incidents of such protest action, educating and raising awareness in communities about their right to protest action and its effect on their children's right to basic education, and local government engagement with communities.

Similarly, the growing intensity of student protests and related action at various universities across the country highlighted the slow transformation progress and the underlying systemic factors perpetuating inequality and especially access to funding at institutions of higher learning, as evidenced in the student driven #FeesMustFall campaigns across campuses.

7.1.2 Report on access to housing, service delivery, and local governance⁸⁹

In 2015 the Commission held a national hearing into access to housing, service delivery and local governance.⁹⁰ It recognised that despite significant progress since 1994 in the provision of housing and improvements in access to other basic services including adequate water, sanitation, electricity, and refuse removal, significant challenges remain in providing access to adequate housing to poor and vulnerable persons, many of whom continue to live in deplorable conditions without access to basic services or the economic opportunities required to escape from poverty.

The enquiry found that current housing policies and programmes fail to take into account the needs of a variety of people and although mechanisms are available for ensuring that even the most destitute of individuals are accommodated, their needs are not adequately addressed. Emphasis on the “world class city” narrative as a means to attract foreign direct investment to boost the economy, has resulted in preference being granted to private investment in the development of prime land situated close to economic hubs, as opposed to prioritising the needs of the poor, thus confining poor people to land situated on the outskirts of these cities, far removed from access to economic opportunities. In this way, policies have effectively failed to reverse the historic legacy of apartheid spatial planning. The Commission confined its investigation to urban metropolises, namely the provinces of the Western Cape, Gauteng and KwaZulu-Natal and the municipalities of the City of Cape Town, the City of Johannesburg and the eThekweni Municipality.

Trends in basic service delivery identified by the Commission include the poor quality of housing, a lack of co-operative governance between departments jointly responsible for municipal services (including the delivery of housing), a lack of capacity at municipal level, under-spending of budget, lack of meaningful consultation with communities, failure to make provision for the special needs of different groups in housing policy, inconsistent interpretation and implementation of policies, lack of accountability for private sector contractors for the quality of housing units produced, lack of monitoring and evaluation of projects implemented by local government, and the fact that policies and practices relating to the upgrading of informal settlements had become synonymous with evictions. The Commission further identified that evictions were largely carried out with excessive use of force, as well as with disregard for the safety and well-being of children and other vulnerable groups. Local municipalities often failed to provide alternative accommodation or implement appropriate emergency housing plans. Private contractors frequently delivered houses of poor quality and were not held to account. The delivery of sub-standard housing results in wasteful expenditure, and poor, vulnerable communities bear the cost of it.

⁸⁹ Available here: www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf

⁹⁰ SAHRC. (2015). *Access to justice, service delivery and local governance*: <http://www.sahrc.org.za/construction-site/home/21/files/Access%20to%20Housing%202015.pdf>

Communities in informal settlements are either subjected to the threat of eviction in the name of developmental processes or are relocated to temporary alternative accommodation that lacks basic services required to live a life with dignity. In addition, the lack of infrastructure exposes residents of informal settlements to perpetual dangers such as violent crime. Security of tenure is recognised as forming an integral part of the right of access to adequate housing and it is widely acknowledged in international law that all persons should possess a degree of security of tenure that guarantees legal protection against forced eviction, harassment, and other threats. Despite this, many evictions continue to be conducted in a manner which results in large-scale rights' violations. Communities therefore face significant barriers in voicing their concerns, with local participatory structures largely superficial and at times driven by political loyalties, with protest action as their only recourse. State respondents appear to be adopting a rigid approach to realising the right to adequate housing, with the result that poor people continue to experience daily rights' violations. Consequently, the approaches to housing programming are not having the desired impact of progressively realising the right to adequate housing, and in some cases, are leading to perpetual rights' violations as a result of which poor people continue to be excluded from the benefits democracy should be delivering to them.

Approaches to housing
programming are not having
the desired impact.

Overview of regional and international interventions undertaken by the Commission

This chapter provides an overview of all regional and international interventions undertaken by the Commission, including submissions made to the African Commission, the Network of African National Human Rights Institutions (NANHRI), relevant United Nations treaty bodies, and the Global Alliance of National Human Rights Institutions (GANHRI). It also discusses any concluding observations issued by the African Commission and by the United Nations regarding the status of human rights in South Africa. The SAHRC's 2016 annual international and regional human rights report provides a comprehensive account of key human rights developments at the international and regional level during 2016, and connects these with developments at a domestic level, highlighting the links between South Africa's regional and international human rights obligations and their application domestically. However, this chapter focuses on documenting those interventions that seek to address trends in human rights' violations identified by the Commission as well as its interventions in key human rights' violations in South Africa over the review period.

8.1 Context informing the regional and international interventions

The work of the Commission in monitoring and reporting on state compliance with regional and international human rights' obligations is an important aspect of its overall mandate to promote and protect human rights. State parties to regional and international human rights' conventions and treaties are obliged to implement domestic measures in order to enact an international instrument by national legislation. Once domesticated, the state is bound by the provisions under the instrument. These include a system of periodic review and reporting by oversight committees to assess the measures taken by a state party in giving effect to its human rights' obligations, and to issue specific findings, areas of concern and/or recommendations for the state to further action. The Commission has a duty to monitor and report on how South Africa meets its regional and international treaty obligations, which are essential in informing progress toward the attainment of equality. In addition, as a national human rights institution (NHRI), the Commission is guided by the principles relating to the status of national institutions (the Paris Principles) as adopted by the UN General Assembly through resolution 48/134 in 1993. The resolution guides NHRIs in the exercise of their duties and functions, including monitoring human rights' violations, advising the government, Parliament and other competent bodies on issues in legislation, promoting the implementation and harmonisation of international norms and standards within domestic legislation, and educating on human rights.⁹¹

8.2 SAHRC regional interventions: the African charter on human and peoples' rights (African Charter)

The African Charter addresses civil, political, economic, social and cultural rights as well as people's and group rights. It recognises the rights and the duties of African citizens, including duties towards family, society, the state and the international community. The mandate of the African Commission on Human and Peoples' Rights (ACHPR) is to promote, protect and interpret the human and peoples' rights as espoused under the African Charter.

⁹¹ The SAHRC is recognised as an 'A' status NHRI and is regarded as fully compliant with the Paris Principles. In October 2016, the UN Human Rights Council (HRC) adopted a resolution on, 'national institutions for the promotion and protection of human rights', which recognised the important role they play in the link between national human rights structures and international and regional human rights' mechanisms.

The resolutions and protocols of the ACHPR deal with violation of rights in the African context, and both complement and expand on the international human rights contained in UN conventions. State parties are required to submit a report to the ACHPR every two years setting out the measures taken to implement the African Charter. In September 2016, the Commission submitted a NHRI activity report to the ACHPR, providing an overview of the developments within the institution over a two-year period and recommendations for improving the relationship between the ACHPR, member states and NHRIs.

ACHPR resolution 275 on human rights' violations against persons on the basis of their real or imputed sexual orientation or gender identity (SOGIE)

Resolution 275 specifically urges states to end all acts of violence and abuse committed by both state and non-state actors, to enact and apply laws which prohibit and penalise all forms of violence targeted at LGBTIQ persons, and to ensure the investigation and prosecution of such offences. Recognition of the rights of LGBTIQ persons was one of the Commission's key issues in 2016, and, together with the Department of Justice and Correctional Services (DOJ&CS), the Commission hosted the African regional seminar on violence and discrimination based on sexual orientation, gender identity and expression (SOGIE). The seminar explored practical solutions for addressing violence and discrimination against persons based on SOGIE, and culminated in the adoption of the Ekurhuleni Declaration, which focuses on practical solutions to the issues facing LGBTIQ persons to address changing perceptions and creating awareness around:

- LGBTIQ rights;
- violence against LGBTIQ people;
- discrimination in accessing education;
- economic justice;
- health and psycho-social support;
- legal support for victims of violence and discrimination and their families;
- secondary victimisation in the criminal justice system;
- victimisation in border control systems; and
- maintaining accurate data on incidences of violence and discrimination based on SOGIE.⁹²

ACHPR resolution on the right to freedom of information and expression on the internet in Africa

The ACHPR condemned the use of hate speech on the internet noting that it encourages violence against a group on the basis of criteria including race, colour, religion, national origin, gender, and disability. It called on state parties to respect and take legislative and other measures to guarantee, respect and protect citizens' right to freedom of information and expression through access to the internet. Through the resolution, the ACHPR noted the critical importance of clear and comprehensive principles to guide the promotion and protection of human rights in the online environment.

⁹² In May 2016, the ACHPR together with the UN Committee on the Rights of the Child and other international human rights experts, called for an urgent end to the 'pathologisation' of LGBTIQ adults and children. The group noted that branding LGBTIQ persons as 'ill' continues to be one of the root causes of discrimination and stereotype and called for states to adopt measures to prevent, investigate and prosecute all forms of forced, coercive and otherwise involuntary treatments and procedures on LGBTIQ persons.

ACHPR resolution on the need to develop guidelines on policing and assemblies in Africa

This resolution is an expression of concern over the persistence of police violence during assemblies in Africa and that, in many cases, the legal frameworks in states does not sufficiently protect the right to freedom of assembly, expression and access to information in the context of public assemblies.

Further exacerbating the situation is the interference of political actors, lack of training for police officers and the non-existence of special mechanisms to monitor policing. It recognised the, “urgent need to develop guidelines on policing and assemblies in Africa to guide states parties to the African Charter, in particular law enforcement officials to ensure greater observance of human rights during assemblies in Africa”.

ACHPR resolution on the right to education in Africa

During its 58th session in April 2016, the ACHPR adopted a resolution on the right to education in Africa as an expression of concern for children, particularly girls, children with disabilities, refugee children, migrant children, street children, internally displaced children, girls who abandon school as a result of pregnancy, and children from marginalised communities who have not been given equal opportunity to exercise this basic right. The ACHPR urged state parties to guarantee the opportunity for all children to enjoy free and compulsory primary education without distinction by progressively providing adequate financial and other resources, and ensuring equal opportunity and general accessibility, both physical and economic, for all persons to education without discrimination.

ACHPR protocol on the rights of women in Africa (Maputo Protocol) 2005

The protocol complements and strengthens the African Charter’s protection and promotion of women’s rights. It contains provisions relating to civil and political rights, physical and psychological integrity, sexual and reproductive health, non-discrimination, economic emancipation, among others, which symbolise African states’ commitments to put an end to discrimination and violence against, and gender stereotypes about women. In their periodic reports to the ACHPR, state parties are required to report on the measures taken to implement the Maputo Protocol.

ACHPR Resolution on the collaboration between the African Commission on Human and Peoples’ Rights and partners on promoting the revised United Nations’ standard minimum rules for the treatment of prisoners (Nelson Mandela rules)

The resolution, adopted at its 58th ordinary session in April 2016, reaffirms the responsibility of state parties to the African Charter for people deprived of their liberty and the obligation on state parties to improve prison conditions and protect the human rights of prisoners, detainees and all persons deprived of their liberty in Africa. The ACHPR expressed concern about “the [poor] conditions of prisons and prisoners in many African countries...” The standard minimum rules for the treatment of prisoners (the Nelson Mandela rules), which are essentially an upgrade of minimum standards for treatment of prisoners and people held in detention, provides a key framework used by monitoring and inspection mechanisms in assessing the treatment of prisoners.

Violations of the rights of arrested, detained and accused persons, in terms of section 35 of the Bill of Rights, are one of the top five complaints reported to the Commission. It is discussed in 8.3 below.

ACHPR African Charter on the rights and welfare of the child in Africa (Children's Charter) 1999

The Children's Charter establishes the African committee of experts on the rights and welfare of the child (ACERWC) which has the mandate to monitor the implementation of and ensure the protection of children's rights in line with the Charter. The South African government submitted its initial report to the ACERWC in December 2013. The report was considered in October 2014 and the Committee indicated that it would undertake a follow up mission to South Africa to ascertain the implementation of its recommendations.

ACHPR resolution on human rights issues affecting African youth

During its 58th session in April 2016, the ACHPR adopted a resolution addressing the human rights issues affecting African youth. The resolution recognised the important contributions of youth to society. However, it expressed concern that inequality in income and wealth, lack of access to decision-making institutions, high illiteracy rates, unemployment and underemployment and HIV/AIDS present serious threats to the human rights of youth. The resolution urges state parties to promote the participation of youth movements in decision making and government, and to improve the situation of young girls who face structural and cultural obstacles, in particular forced and early marriages, female genital mutilation (FGM), discrimination and other harmful cultural practices. State parties should be compelled to pass legislation criminalising FGM, and other customary practices that violate the human rights of young girls. The customary practices of initiation rituals, FGM and *ukuthwala* are discussed under the relevant International conventions below.

ACHPR resolution on the right to dignity and freedom from torture or ill-treatment of persons

This resolution on torture and ill-treatment was adopted in April 2016. It reaffirms the rights enshrined in the UNCRPD, in particular the right to equal recognition before the law, the prohibition of arbitrary deprivation of liberty, the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, and the right to receive treatment on the basis of free and informed consent. The ACHPR expressed deep concern over the violation of the rights to dignity, freedom from torture or ill-treatment, and freedom from arbitrary deprivation of liberty of persons with psychosocial disabilities by state and non-state actors. It called on state parties to ensure that persons with psychosocial disabilities enjoy legal capacity on an equal basis with others in all aspects of life, and to review and amend mental health laws which have been used as a basis for the torture or ill treatment of persons with psychosocial disabilities. The resolution also calls on NHRIs to monitor institutions which provide services to persons with psychosocial disabilities on a regular basis. The gross negligence and consequent loss of life that occurred in 2016 in the Life Esidimeni tragedy in South Africa constituted a direct contravention of this resolution in respect of persons with mental health-related disabilities. This is discussed in 8.3 below.

These African resolutions are discussed in conjunction with their partner international instruments below.

State parties should be compelled to pass legislation criminalising female genital mutilation (FGM).

8.3 SAHRC international interventions

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The South African government submitted several reports to UN treaty bodies in 2014 in an endeavour to bring its reporting on treaty obligations up to date. In November 2014, it submitted combined periodic reports under the following treaties:

- the international convention on the elimination of racial discrimination (CERD);
- the international covenant on civil and political rights (ICCPR);
- the United Nations convention on the rights of the child (UNCRC) and its optional protocol on the sale of children, child prostitution and child pornography (OPSC); and
- the convention on the rights of persons with disabilities (CRPD).

Consequently, in 2016, the South African government appeared for its review before the human rights committee (HRC) in respect of its obligations under the ICCPR, the CERD, and the CRC. The Commission accordingly submitted NHRI reports on the latter three state reports to the relevant UN committees for consideration during the review process.

8.3.1 International covenant on civil and political rights (ICCPR) 1966

The scope of the ICCPR is very broad. It requires state parties to promote the rights to life and human dignity, equality before the law, freedom of speech, the rights to assembly and association, religious freedom, privacy, freedom from torture, ill-treatment, and arbitrary detention, gender equality, the right to a fair trial, and minority rights. In review of its first report, the South African government appeared before the human rights' committee in March 2016.

The committee expressed concern over several matters including racism, xenophobia and associated violence, treatment of prisoners and conditions of detention, the rights of migrants, and the rights of indigenous communities. It made a number of recommendations, urging the South African government to redouble its efforts to prevent and eradicate all manifestations of racism and xenophobia, protect all communities in South Africa against racist and xenophobic attacks, improve policing responses to violence against foreign nationals, and prosecution of perpetrators. Recently, the Commission has undertaken a number of investigations and instituted litigation to protect the rights of foreign nationals. In 2009, it held a national hearing to investigate the nationwide deadly attacks on non-nationals in May 2008. Secondly, noting the high levels of discrimination and sexual and physical violence against persons based on their real or perceived sexual or gender identity, the committee recommended that the South African government should redouble its efforts to eradicate discrimination and violence against persons based on their sexual orientation and gender identity.

Several resolutions relating to civil and political rights were passed in 2016, at both the international and regional level. The HRC adopted 'resolution 32/2' on the protection against violence and discrimination based on SOGIE, which established an independent expert to assess the implementation of international human rights law. In March 2016, the Commission and the DOJ&CS co-hosted a regional three-day seminar on finding practical solutions for addressing violence and discrimination against persons based on sexual orientation, gender identity and expression.⁹³

Over the last five years, complaints relating to the rights of arrested, detained and accused persons have consistently formed part of the top five rights' violations complaints lodged with the Commission.

⁹³ The Commission has undertaken further research and international work on the issues of SOGIE.

8.3.2 International covenant on economic, social and cultural rights

In 2016, the United Nations Human Rights Council (HRC) adopted a number of resolutions, some of which speak directly to the challenges experienced in South Africa.⁹⁴ Of relevance is the HRC resolution on the right to safe drinking water and sanitation which deals with affordable access to water, sanitation and hygiene facilities and expresses concern that the lack of access to water and sanitation contributes to poor health and high mortality rates. It recognises the particular challenges faced by women and girls in their access to water and sanitation, and how deprivation of access can reinforce stigma associated with menstruation and impacts on both the right to the girl child to education and the right to health. In August 2016, the special rapporteur on adequate housing presented a report to the General Assembly illustrating the link between the right to life and the right to housing, noting the high death rate among homeless people and among people who lack access to clean water and sanitation. The special rapporteur asserted that the right to life cannot be separated from the right to a secure place to live, and the right to a secure place to live only has meaning in the context of a right to live in dignity and security, free of violence. Housing policies should thus be properly framed around the implementation of core human rights obligations. The special rapporteur also called on NHRIs to “ensure that full attention is given to violations of the right to life linked to socio-economic deprivation, including homelessness and inadequate housing.”

The Commission has held national hearings on both the right of access to sufficient water and adequate sanitation, and the right of access to housing in 2014 and 2016 respectively. The hearings identified the challenges faced by local government that had a negative impact on delivering basic municipal services, and the significant challenges in providing access to adequate housing to poor and vulnerable persons. Socio-economic rights’ violations have become the most reported complaints to the Commission in 2016/17, second only to violations of the right to equality, in particular on the grounds of race.

The Commission has initiated a number of investigative hearings and has litigated on access to learning material for poor learners in South Africa. In July 2015, as an expression of concern about the ongoing attacks on students, teachers, schools and universities in the global south, the HRC adopted a resolution on the right to education. The Commission conducted an investigative hearing on the impact of protest related action on the right to education in July 2016, in the light of many incidents of destruction of school infrastructure during service delivery related protests in poor communities. The Commission found that protesters often target schools to draw attention to causes unrelated to education, which infringed on the right of children to basic education.

Labour relations remain one of the top five rights’ violations reported to the Commission in the review period. In 2016, the HRC adopted the general comment no. 23 on the right to just and favourable conditions of work (article 7 of the ICESCR). The general comment deals with all aspects of article 7, namely, conditions of employment, remuneration and equal opportunity for employment promotion. It emphasises that state parties must guarantee that the right to just and favourable conditions of work is exercised without discrimination, particularly gender based discrimination. The Commission conducted a national hearing on unfair discrimination in the workplace in 2016, concluding that there were still high levels of unfair discrimination against black people and particularly black women, in the workplace. Discrimination against LGBTIQ people was also an emerging trend in the workplace.

⁹⁴ In March 2016, the Human Rights Council adopted a resolution on protecting human rights’ defenders, whether individuals, groups or organs of society, that address economic, social and cultural rights, and obliges states to take all measures necessary to ensure the safety of human rights’ defenders.

8.3.3 International convention on the elimination of all forms of racial discrimination (ICERD)

The ICERD prohibits discrimination based on race, descent, national or ethnic origin, and sets out the obligations on state parties to combat racial discrimination and to ensure that “effective protection and remedies” are in place to address any acts of racial discrimination. The violation of equality on the grounds of race remains the highest violation of equality over the period of review.

In November 2014, the South African government submitted a comprehensive report addressing its outstanding fourth to eighth periodic reports. The Commission submitted its NHRI report on the South African government’s combined fourth to eighth periodic country report under the international convention on the elimination of racial discrimination in July 2016, for consideration at the CERD review.⁹⁵ The report assesses the South African government’s state report to CERD which sets out the advances made in the implementation of the ICERD, identifies gaps in the state report and provides recommendations that the committee may wish to consider during its review of the South African government. In May 2016, the Commission submitted information to the OHCHR on the recent measures the institution has undertaken to combat racism, racial discrimination, xenophobia, and related intolerance. In addition, in June 2016, the Commission responded to a questionnaire from the UN special rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance. The questionnaire sought information on the role of equality bodies such as the Commission and the CGE, and progress on the national action plans in the elimination of racism, racial discrimination, xenophobia, and related intolerance. In 2016/17, the Commission intervened to accelerate efforts for the adoption of the national action plan to combat racism, racial discrimination, xenophobia and related intolerance (NAP) and the National Development Plan by the end of 2018. To achieve this, the Commission convened a multi-sectoral dialogue on racism, which culminated in the Midrand declaration against racism, adopted on 15 March 2017.⁹⁶ The Commission also drafted a response to the inter-parliamentary union and GANHRI’s questionnaire on the SAHRC’s relationship with Parliament. 2016 has seen a strong focus on the investigation of racism, in the international human rights arena.

The report notes that between 2009 and 2013 the Commission received over 35 000 complaints of which it resolved 33 000. In addition, the Commission has conducted over 30 investigations into structural systemic challenges to service delivery across the country. The outcomes of these investigations have culminated in reports containing recommendations to government. These reports were also tabled at Parliament for consideration and as a resource to exercise due oversight over government departments. The single largest proportion of complaints received by the Commission is equality-based, with the huge majority of these complaints related to allegations of racial discrimination against black people.

⁹⁵ National human rights institution report on the South African government’s combined fourth to eighth periodic country report under the international convention on the elimination of racial discrimination. Submitted to the United Nations committee on the elimination of racial discrimination for consideration at the 90th session in August 2016. Available here: www.sahrc.org.za/home/21/files/SAHRC%20NHRI%20REPORT%20TO%20CERD-%20FINAL%2025.7.16.pdf

⁹⁶ The Midrand Declaration called upon all stakeholders, state and non-state, to pledge their support to the implementation of the policies and programmes outlined in the national action plan. SAHRC research brief on race and equality 2013-2017. Available here: www.sahrc.org.za/home/21/files/20170601%20SAHRC%20Midrand%20Declaration%20against%20Racism.pdf

The CERD conducted the review of the South African government's report under the convention in August 2016. The government informed the committee of the steps taken to address the systematic inequality which underpinned South African society under apartheid. The committee listed a number of concerns regarding:

- discrimination against indigenous persons, persons with albinism and black women and girls, and the treatment of "non-citizens" (non-nationals);
- the urgent enactment of the draft Bill on the Prevention of Combating of Hate Crimes and Hate Speech. It recommended that the government ensure that incidents of hate crimes and hate speech are investigated and prosecuted, and that South Africa provide feedback, within one year, on the measures taken to give effect to the recommendations; and
- violence against non-nationals, prosecution of cases of violence, detention and conditions of detention in repatriation centres like Lindela, access to basic services, schooling, and health care. It recommended that the state conduct education campaigns to end racism and xenophobia.

It requested that South Africa ratify the outstanding international treaties, particularly the optional protocol to the convention against torture and other cruel, inhuman or degrading treatment or punishment. The committee encouraged the South African government to facilitate a visit by the special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

The committee was also concerned that the Commission does not have sufficient resources to effectively execute its mandate. It recommended that the South African government provide the SAHRC with adequate financial resources and to implement the recommendations emanating from the institutions' various investigative reports. The committee specifically requested that the South African government provide a follow up report within one year on steps taken to implement this recommendation.

In July 2016, the HRC adopted a resolution on addressing the impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls. The council expressed concern about the multiple and intersecting forms of discrimination that affect many women and girls, including those belonging to national or ethnic, religious and linguistic minorities, and recognised their increased vulnerability. It called on states to develop and strengthen comprehensive gender responsive, multi-sectoral policies and programmes in order to promote the human rights of affected women and girls.

The single largest proportion of complaints received by the Commission is equality-based, with the huge majority of these complaints related to allegations of racial discrimination against black people.

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The UN working group of experts on people of African descent released a report to the General Assembly in August 2016. The working group observed a resurgence and legitimatisation of racism and xenophobia in public discourse in the media and in states, and the threat that this poses to the human rights of people of African descent. It recommended that states demonstrate strong political will to combat racism and xenophobia, take positive measures to eliminate the conditions that cause or contribute to perpetuating racism, and compile data to monitor the situation and formulate public policies and recommendations.

In 2016, the South African government finally launched the draft national action plan against racism, racial discrimination, xenophobia and related intolerance (NAP), for public consultation.⁹⁷ The objective of the NAP is to provide South Africa with a comprehensive policy framework to address racism at a private and public level, to complement existing laws and policies, and to consolidate these into a workable programme of action. The NAP also provides for the establishment of a rapid response team to monitoring ongoing incidents of racism, racial discrimination, xenophobia and related intolerances. The NAP is also specifically intended to assist South Africa to meet its international and regional human rights' obligations, particularly those listed under the ICERD. The Commission has been closely involved in the process and submitted comments in August 2016 to the DOJ&CS on the draft version of the NAP. The Commission has encouraged government to expedite the processing of the NAP.

8.3.4 International convention on the elimination of discrimination against women (CEDAW)

The convention provides the basis for realising equality between men and women through ensuring women's equal access to, and equal opportunities in political and public life as well as education, health and employment. The CEDAW committee monitors state compliance with its obligations. This Commission has intervened in issues affecting the equality of women and girls, namely, the practice of *ukuthwala* and the Traditional Courts Bill. The convention is not discussed in any great detail here as it is of limited relevance to the main work of the Commission and falls under the domain of the CGE.

In its NHR report to CERD, the Commission recommended to the committee that the South African government should focus greater attention on eradicating the practice of *ukuthwala* to safeguard children's lives. It also recommended increased public awareness campaigns in the affected parts of the country and education initiatives for traditional leaders regarding the harmful nature of the practice. Where individuals are prosecuted such prosecutions should be widely publicised to ensure deterrence. The South African government should also provide the committee with feedback on the progress made by the South African Law Reform Commission (SALRC) in respect of *ukuthwala*.

The South African government should focus greater attention on eradicating the practice of *ukuthwala* to safeguard children's lives.

⁹⁷ In terms of the 2001 Durban declaration and programme of action (DDPA).

In December 2016, the new draft of the Traditional Courts Bill was approved. This version recognises the participation of women in traditional court proceedings and aims to improve access to justice services by all with the view to promote social cohesion, and in particular the challenges faced by rural women in their right to access justice. The Commission has called on Parliament to engage in a comprehensive public engagement process, with due consideration to the concerns raised by affected women, and to apply the CEDAW committee's 2015 general recommendation on women's access to justice, and the 2016 general recommendation on the rights of rural women. The Commission also recommends that Parliament encourage the South African government to urgently submit its overdue reports under the CEDAW.

8.3.5 United Nations convention against torture and other cruel, inhuman or degrading treatment or punishment (UNCAT)

UNCAT places an obligation on state parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture within its jurisdiction. The committee against torture (CAT) was established by article 17 of the UNCAT, and the optional protocol to the convention against torture and other cruel, inhuman or degrading treatment or punishment (OPCAT) establishes the sub-committee on prevention of torture (SPT) which has a mandate to visit places where persons are deprived of their liberty. OPCAT requires that state parties establish an independent national preventive mechanism (NPM) which is authorised to inspect places of detention.

In March 2016, the HRC passed a resolution on “safeguards to prevent torture during police custody and pre-trial detention, which obliges states to take effective measures to prevent and combat all acts of torture and other cruel, inhuman or degrading treatment or punishment, and stresses the importance of inspections at places of detention by an independent authority”.

Deaths in police custody and as a result of police action, and deaths in prisons, all of which are most likely to affect poor and disadvantaged people, are unacceptably high. In 2015/16, IPID reported a total of 216 deaths in police custody in South Africa, attributed to suicide, natural causes, injuries sustained prior to custody and injuries sustained in custody by a SAPS official. Of great concern is the prevalence of police brutality during protest action by students, community service delivery protests, and labour strikes (Marikana). The SAPS' response to student protests around the #FeesMustFall campaign on university campuses across the country in 2016 was characterised by high levels of police brutality.⁹⁸ The UN HRC has “expressed its concern about numerous reports of excessive and disproportionate use of force by law enforcement officials in the context of public protests in South Africa. The ACHPR also recently adopted a resolution which recognises the need to develop guidelines on policing and assemblies in Africa, expressing concern over the persistence of police violence during assemblies in Africa.”⁹⁹

The 2014 Marikana commission of inquiry into the massacre of 34 striking miners and the serious injury of 78 by police in August 2012, made recommendations relating to the prosecution of police officers implicated in the killings, and the settling of civil claims made by the families of those who were murdered in August 2012.

⁹⁸ In 2016 the SAHRC published the report on transformation at public universities in South Africa, based on national hearing convened in 2014 on transformation in institutions of higher learning in South Africa, and plans to hold a hearing to follow up on issues including of free tertiary education for the poor, student protests and police action. Available here: www.sahrc.org.za/home/21/files/SAHRC%20Report%20-%20Transformation%20in%20Public%20Universities%20in%20South%20Africa.pdf

⁹⁹ SAHRC civil and political rights report 2016-2017. Available here: www.sahrc.org.za/home/21/files/Civil%20and%20Political%20Rights%20Report%20Final%20Version.pdf

In 2016 the HRC also expressed its concern about the slow pace of the investigation into the Marikana massacre, recommending *inter alia* that South Africa expedite the work of the task team and panel of international experts established by the Ministry of Police to implement the recommendations of the Marikana commission of inquiry, revise laws and policies regarding public order policing and the use of force, prosecute and punish perpetrators of illegal killings, and provide effective remedies to victims. The UN HRC has “expressed its concern about numerous reports of excessive and disproportionate use of force by law enforcement officials in the context of public protests in South Africa. The ACHPR also recently adopted a resolution which recognises the need to develop guidelines on policing and assemblies in Africa, expressing concern over the persistence of police violence during assemblies in Africa.”¹⁰⁰

The Commission is concerned that the recommendations in the report have not been fully implemented by the South African government, particularly the prosecution of police officers implicated in the killings, and the settling of civil claims made by the families of those who were murdered in August 2012. By March 2017 SAPS had apparently investigated and cleared 87 of its own members in relation to the killings at Marikana, in contravention of IPID’s role in investigating the killings by SAPS officers. The Commission, in August 2016, released a report entitled, “An overview of the South African Human Rights Commission’s participation at the Marikana commission of inquiry”, tabled in Parliament in September 2016, which sets out the role of the Commission in the commission of inquiry. The Commission monitored procedural aspects of the proceedings to ensure fairness, transparency and impartiality, and brought independent experts to address any gaps in existing evidence presented.¹⁰¹

The Commission brought a challenge to the detention of 39 foreign nationals in the Lindela repatriation centre who were held for over 120 days, beyond the requisite time frame of 30 days as stipulated under section 34 of the Immigration Act, in the Gauteng High Court. The court found that the extended detention period was unlawful and unconstitutional, and ordered the respondents to take all reasonable steps to terminate such unlawful detention practices. The respondents were ordered to provide the Commission with regular reports and with regular access to Lindela and its detainees. In giving effect to the judgment, the Commission released its report on the Lindela monitoring and oversight project in 2016, which revealed several systemic issues at Lindela, including:

- allegations of abuse, corruption and/or bribery;
- the use of isolation as a conflict management tool;
- overcrowding;
- consistent outbreaks of infections and deficient hygiene standards;
- detention of unaccompanied and separated migrant children; and
- continued detention of undocumented migrants beyond the prescribed periods.

While the Commission continues to monitor Lindela closely, these findings further demonstrate a critical need for South African government to ratify the OPCAT and establish an independent monitoring mechanism to ensure that places of detention are adequately monitored and that preventive mechanisms are put in place to curtail any abuse of rights. The Commission calls on Parliament to exercise its oversight on the government to ensure that the ratification of the OPCAT is expedited.

¹⁰⁰ SAHRC civil and political rights report 2016-2017. Available here: www.sahrc.org.za/home/21/files/Civil%20and%20Political%20Rights%20Report%20Final%20Version.pdf

¹⁰¹ The SAHRC were of the opinion that the Marikana commission’s investigations had not focused sufficiently on the underlying causes of the events at Marikana, particularly in relation to the material conditions experienced by mining-affected communities. It subsequently hosted a ‘national hearing on the underlying socio-economic challenges of mining-affected communities in South Africa’ in September 2016.

8.3.6 United Nations convention on the rights of the child (UNCRC)

The Convention is premised on four guiding principles:

- non-discrimination;
- adherence to the best interests of the child;
- the right to life, survival and development; and
- the right to participate.

The South African government submitted its combined second, third and fourth report to the committee in November 2014, as well as its initial report under the OPSC. In September 2016, the government appeared before the committee for its review under the UNCRC. Among the issues raised by the committee during the review included:

- the high prevalence of violence against children, including sexual violence and corporal punishment;
- harmful practices such as virginity testing and *ukuthwala*;
- children with disabilities and the prevalence of HIV/AIDS among children;
- indigenous and migrant/refugee children;
- access to the range of socio-economic rights; and
- the administration of juvenile justice.

Major concerns included the persistence of wide disparities in access to quality education, according to economic status, race and geography, bullying and violence in schools, as well as corporal punishment in the home. The committee was of the view that the resources and capacity of the Commission to promote and protect children's rights are insufficient, and that the South African government should remedy this situation and, among others, legally mandate the Commission to appoint a commissioner exclusively dedicated to the rights of the child.

In the CERD report on the recommendations of the committee to the South African government on race and culture, the committee does not address a critical issue in South Africa, namely, the high numbers of deaths of young boys during initiation rituals in terms of customary practice where circumcision is practised.¹⁰² Reliable national statistics on the number of boys who undergo initiation each year appear to be absent, as is the number who die or are mutilated as a result of traditional circumcision. According to Health Minister Aaron Motsoaledi, the main medical issues that can cause death in initiates are massive bleeding leading to hypovolemic shock (caused by the loss of over 20% of blood), infection, septicaemic shock, and dehydration from being denied drinking water, hypothermia from exposure to extreme weather, and low blood sugar from extreme food restriction. Poor circumcision technique can lead to genital amputation. In some cases, the cause of death is assault.

Initiation is most commonly practised in the Eastern Cape, Limpopo and Mpumalanga. Only the Eastern Cape was able to provide statistics on the number of initiation rituals practised in the province, and the number of deaths.¹⁰³ Having statistics on this issue is a key part of improving the health outcomes of traditional circumcision and gives the provinces indications of where intervention and more resources are needed during the season in which circumcision is practised. Although it seems to be the exception, there have been cases involving bogus

¹⁰² Faranaaz Parker, 'Deadly initiation: Govt lacks numbers on circumcision deaths', 9 June 2013. Available at: <https://mg.co.za/article/2013-06-09-initiation-carnage-circumcision-deaths-have-no-numbers-says-govt>.

¹⁰³ The Eastern Cape is the first province to introduce legislation regulating traditional circumcision in an attempt to curb deaths and genital mutilation taking place in the bush, providing that if the opening of an "illegal initiation school results in the injury or death of initiates, such person shall be charged with attempted murder or murder and, upon conviction, sentenced to not more than 25 years' imprisonment, depending on the number of initiates involved."

initiation schools in which children are routinely beaten and assaulted, some to the extent that they died. Some reported being denied food and water. Official records cannot shed light on the deaths that occur at illegal initiation schools or at those where the tradition is to manage complications and deaths “in the bush”.

In its engagement with both the CRC and the CERD, the Commission highlighted the challenges facing children in South Africa and that education of poor black children remains characterised by high drop-out rates, weak school infrastructure, shortage of education materials, poor quality of education and the inefficient usage of education resources. Children in rural areas are most adversely affected. A contributing factor is the destruction of schools during protest action around service delivery in poor communities.¹⁰⁴

The Commission also noted the challenges faced by learners with disabilities and the lack of resources to accommodate visually impaired learners with adequate learning materials. In its NHRI reports to both the CERD and the CRC, the Commission recommended that the South African government put measures in place to ensure that a minimum level of infrastructure relating to school buildings, access to water, electricity, basic electrical equipment, sufficient toilets for the number of children attending the school, fences and a library are provided to all schools throughout South Africa, and that these should also be provided for learners with disabilities.

In its engagements with the CERD and CRC, the Commission expressed its concern on the challenges faced by children of non-nationals in South Africa, including the registration of births, access to social/health services and the impact of xenophobic attacks on children. The Commission specifically noted that xenophobic attacks place children in a vulnerable position and often results in displacement and trauma. In its concluding observations, the CRC specifically recommended that the South African government develop and implement a protocol to protect such children from violence and abuse and expedite basic protection services such as registration of birth.

8.3.7 UN convention of the rights of persons with disabilities (UNCPRD) 2006

Discrimination on the basis of disability is one of the top five equality complaints reported to the Commission over the five-year review period. The Commission has conducted research on disability and equality and investigated a number of complaints made by disabled people with regard to special accommodation. 2016 marked the tenth anniversary of the adoption of the UNCPRD, which affirms that all persons, regardless of the type of disability, should enjoy all human rights and fundamental freedoms, including the rights to education, health, work, adequate living conditions, freedom of movement, freedom from exploitation and equal recognition before the law for persons with disabilities. The committee on the rights of people with disabilities (CRPD) monitors the implementation of the ICRPD and the mandate under article 8. South Africa has ratified both UNCPRD and its optional protocol and submitted its initial report in November 2014.

During 2016, the committee adopted two general comments: general comment no. 3 on women and girls with disabilities (article 6 of the UNCPRD), and general comment no. 4 on the right to inclusive education (article 24). General comment no. 3 notes that women with disabilities are at a heightened risk of violence, exploitation and abuse, and that harmful stereotypes which “infantilise women with disabilities” not only increase their vulnerability, but also affect their right to the full enjoyment of sexual and reproductive rights.

¹⁰⁴ SAHRC report on national investigative hearing into the impact of protest related action on the right to basic education.

In general comment no. 4 on the right to inclusive education (article 24), the committee notes that the right to inclusive education encompasses a transformation in culture, policy and practice to accommodate the differing requirements and identities of disabled students.

The committee defines inclusion as, “a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to provide students with the requisite equitable and participatory learning experience and environment”. To realise the right to inclusive education, the committee recommends that state parties promote availability, accessibility, acceptability, adaptability, and redefine budgets to develop inclusive education. The committee called on state parties to implement the following core rights with immediate effect:

- non-discrimination and the removal of barriers which impede access to inclusive education;
- reasonable accommodation to ensure inclusion in education for persons with disability; and
- guarantee compulsory, free primary education on the basis of inclusion to all children and youth with disabilities.

In July 2016, the HRC adopted a resolution on the role of the family in supporting the protection and promotion of human rights of persons with disabilities. Recognising that the family unit faces increasing vulnerabilities and pressures, and that single parent headed households, child headed households, families with members with disabilities and intergenerational households are particularly vulnerable to poverty and social exclusion, the resolution recommends that persons with disabilities and their family members should receive effective protection, support and assistance from states.

In the 2016 Life Esidimeni tragedy, 143 mental health care patients with mental health related disabilities (psychosocial and intellectual) died of gross neglect, starvation, dehydration, abuse and other deprivations, in 16 non-governmental organisations (NGOs) and three hospitals between June and December 2016. This was as a result of a decision of the Gauteng Provincial Department of Health (GPDoh), in line with its deinstitutionalisation policy and to save on costs, to terminate the contract of its service provider, Life Esidimeni Health Care Centre. Consequently, in December 2016, a collective of four UN special rapporteurs issued a formal call for the South African government to establish a “policy framework to guide its deinstitutionalisation process, inclusive of a plan of action with timelines and benchmarks, the redistribution of public funds from institutions to community services, and the development of adequate housing and community support for persons with disabilities, such as housing assistance, home and family support, and respite care”. The special rapporteurs supported deinstitutionalisation but cautioned that it could have fatal consequences if implemented without a human rights’ based plan, as evident in the Life Esidimeni tragedy.

The special rapporteurs also underscored the inter linkages of human rights and expressed the opinion that the transfer of persons with disabilities to unsuitable locations, without their consent and adequate support, “may result in further grave abuses to their right to physical and mental integrity, health and well-being, an adequate standard of living including adequate housing, and places them at risk of extreme poverty, homelessness and loss of dignity.” Furthermore, the special rapporteurs reminded the South African government that it has a duty to protect and guarantee the right to life of persons with disabilities, which extends to preventing abuses by non-state actors, and that persons with disabilities should not be obliged to live in particular living arrangements. It further emphasised that as a party to the UNCRPD, South Africa must respect the convention’s obligation to provide persons with disabilities with access to a range of community services to prevent isolation and segregation from the community. The Commission subsequently conducted research on the realisation of the right to housing for people with special needs in South Africa and made recommendations to the national housing department.¹⁰⁵

In its initial report to the committee on the rights of persons with disabilities, the South African government recognised the mandatory role of the SAHRC as an independent mechanism to promote, protect and monitor implementation of the convention. During 2015, the Commission submitted a business plan to government outlining its designated monitoring role and the cost involved. While there have been several meetings with relevant government departments during 2016 to discuss the proposal, there is a need for a swifter, targeted process to ensure that the state is adhering to its obligations under article 33(2) of the convention. The Commission recommended that priority be given to the establishment of the monitoring mechanism and that Parliament should encourage the government to expedite the process and ensure the allocation of financial resources.

8.3.8 International convention on the protection of the rights of all migrant workers and members of their families (ICRMW)

The convention protects the rights of workers and their families seeking employment in countries of which they are not nationals and establishes the minimum standards that state parties should apply in these instances, irrespective of migratory status. It recognises the rights of undocumented migrant workers who are frequently exploited and face serious human rights’ violations. In July 2016, the HRC passed the resolution on the protection of the human rights of migrants, as an expression of concern at the vulnerability of displaced migrants to danger and violence, and in particular women and children, girls and the disabled, who are particularly vulnerable to sexual and other forms of violence and exploitation. It called on member states to promote and protect the human rights and fundamental freedoms of all migrants, regardless of their migration status.

On 19 September 2016 the General Assembly of the UN called for a summit of heads of state and government on refugees and migration, to address the global phenomenon of the large and growing movements of refugees and migrants because of crises in their own countries.¹⁰⁶ The council called on states to promote and protect the human rights of all migrants, regardless of status. Member states expressed their determination to address the root causes of the refugee crisis, including “efforts aimed at early prevention of crisis situations based on preventive diplomacy”.

¹⁰⁵ SAHRC economic and social rights (ESR) research policy brief 2016-2017 on the right to housing (March 2017).

¹⁰⁶ UN summit on refugees and migrants: New York declaration.

The South African government released the Green Paper on international migration which proposes the proactive and strategic management of migration, in order to contribute to national priorities such as nation building and social cohesion, inclusive economic growth and national security. The Green Paper notes that South Africa is among the top five countries that have received the most individual asylum seekers and that 90% of these applicants are not refugees but are seeking work or business opportunities. The Commission has recommended that the Department of Home Affairs gives due consideration to the rights of children, rights of access to health and social services and statelessness during the next phase of the process, and strongly recommends that the government signs and ratifies the ICRMW.

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Conclusion

The purpose of this annual trends analysis report has been twofold. Firstly, to identify trends in human rights' violations in the country through the lens of complaints reported to the Commission over a five-year period from 2012/13 to 2016/17. Secondly, to provide an overview of interventions taken beyond reactive responses to complaints, with a view to securing wide policy and practical reforms for the sustained reduction of violations of rights. The aim of the Commission has been to use each of its operational arms to enhance and strengthen an understanding of the key human rights issues affecting the country, to support continued integration and to strengthen collective and co-ordinated responses in advocating and securing appropriate redress for systemic violations of human rights. It is hoped that the information will provide some point of reference for the interventions of other stakeholders, support and inform the work of human rights NGOs, civil society actors, policy makers, Chapter 9 institutions, NHRIs, and statutory bodies, and encourage further collaboration between the Commission and civil society to take forward both systemic and wide impact concerns.

An enormous amount of work has been accomplished by the Commission in the period reviewed, in particular given the resource constraints under which Chapter 9 institutions operate, with significant successes. The Commission's involvement in strategic impact litigation, together with other human rights' NGOs, has brought about ground breaking changes to discriminatory laws, policies, and practices, and protection from rights' violations. The Commission's work in the ECs has contributed significantly to the development of the jurisprudence on equality. Gains that may not have been as palpable when seen as consolidated efforts through the work of the provincial offices in the ECs and through ADRs have brought direct relief to a number of people and have contributed incrementally to the strengthening of the rights' framework and a landscape for the protection of rights. The Commission engages with a wide range of rights and has made tremendous strides in fulfilling its transformative mandate to promote and protect the rights of the people of South Africa. Its work has had a wider impact of building and strengthening other bodies advocating for human rights, and its role in responding to violations of human rights is an important part of the plethora of strategies to be commissioned in response to violations, particularly in developing countries and middle income transitioning democracies like South Africa.

The context of the work of the Commission is one of systemic racism, poverty, and inequality. These manifest on a structural level, through violations of and lack of access to basic human rights such as socio-economic rights, and through a lack of access to employment and other opportunities to achieve income equality. Civil and political rights' violations play out against this backdrop, with police brutality and killings during student protest action (#FeesMustFall), community service delivery protests and labour strikes (Marikana). Violence has become an inevitable reality in South Africa and is compounded by inadequate policing. Violence directed against vulnerable minorities such as African non-nationals and members of the LGBTIQ community are inadequately dealt with, and the protections needed for such vulnerable groups therefore beg responses that go beyond mere regulations.

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Equality is and has been consistently the most reported human rights' violation by a large margin, with significant increases year on year in equality related complaints. The right to equality is thus the most violated right in South Africa. Endemic inequality in South Africa results in the negation and violation of numerous other basic rights' guarantees within the Bill of Rights.¹⁰⁷ Violations of the right to equality on the grounds of race continue to be the highest reported ground of unfair discrimination by a huge margin, with a significant number of these complaints constituting race based hate speech. The Commission recognises the systemic and entrenched nature of racism in South Africa and is committed to resolving race based equality complaints in order to vindicate the rights of the victims of racial discrimination and give meaning to the founding values of non-racialism, equality and human dignity.

The right of freedom of expression is one of the cornerstones of a democratic society. However, the vitriolic levels of racist abuse and hate speech against mainly black African people in our society, now commonly expressed on social media, is a growing challenge. Given South Africa's past of institutionalised racism, a system of dehumanising and denigrating black people, there is a strong case to be made for protecting black people from further attacks on their humanity.¹⁰⁸

In 2016/17, the number of ESR related complaints increased dramatically to 75% of the total number of equality violations. Equality and ESR (health care, food, water, and social security) are now the top two rights' violations reported to the Commission in South Africa. It is not surprising that ESR complaints have increased significantly, given the high levels of poverty and inequality in South Africa. Lack of or inadequate access to socio-economic rights and service delivery affects the majority of people in South Africa. These problems can remain unresolved for years, and the increase in complaints could indicate an increase in public perception of the Commission as an effective body to approach to resolve these issues. If complaints classified as housing and education related are added, it becomes clear that, collectively, these socio-economic rights' violations represent some of the most pressing challenges facing South Africa. Housing and education related complaints have been a main focus of the Commission for a number of years, together with access to water and sanitation and health care services. Aside from racism, these constitute the majority of issues addressed through ADR and litigation and are a significant focus of investigative hearings and national hearings. The Commission's interventions and its ability to make recommendations to state departments to remedy these problems are a powerful method of ensuring justice for vulnerable people in situations that often appear intractable. The Commission's role in holding government to account is invaluable, and its role of monitoring an important part of the process. However, the protection of these rights warrants much closer attention and needs to be taken up widely at the level of scrutiny of policy and its implementation, and the needs of affected people themselves.

¹⁰⁷ Equality roundtable dialogue report 2014. Available here: <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf>

Research brief on race and inequality 2013-2017. Available here: www.sahrc.org.za/home/21/files/RESEARCH%20BRIEF%20ON%20RACE%20AND%20EQUALITY%20IN%20SOUTH%20AFRICA%202013%20TO%202017.pdf See also multi-sectoral dialogue on racism, which culminated in the Midrand declaration against racism, adopted on 15 March 2017.

¹⁰⁸ The government has taken steps to address hate crimes in South Africa, through the Prevention and Combating of Hate Crimes and Hate Speech Bill, 2016.

The regional and international human rights situation is not far removed from the domestic one. International and regional movements and responses resonate with concerns around rights identified as being of high concern in this report. In this regard a number of the new resolutions and comments proposed and adopted by the various international and regional committees on key issues of concern such as exploitation of children on social media, and the global summit of heads of state to deal with the growing crises of migrants displaced through civil war in their countries, are aligned to domestic concerns. International and regional human rights committees have made a number of recommendations for South Africa to improve protections for basic rights. It remains for national human rights institutions like the Commission to take forward these recommendations and to continue in collaboration with other stakeholders to monitor and report on complaints about human rights abuses in South Africa, and to hold the government accountable.

This analysis has highlighted several challenges and issues for concern that impact on the ability of the Commission to effectively carry out its mandate. The biggest challenge to Chapter 9 institutions is inadequate funding and resources. In their recommendations on human rights' issues in particular, international bodies have acknowledged this problem and called on government to increase funding to the Commission to fulfil its mandate. In its August 2016 review, the CERD "recognised the role of the SAHRC in combatting racial discrimination in the country and noted with concern that the institution does not have sufficient resources to effectively execute its mandate. It therefore recommended that the South African government provide the SAHRC with adequate financial resources and to implement the recommendations emanating from the institution's various investigative reports."

The Commission is committed to address concerns identified in this report, including:

- to continue to maximise its mandate and its access to a number of platforms to respond more effectively to the systemic issues that affect the poor, and to secure and sustain reforms for the protection of rights, with a focus on the top five rights' violations, which have remained consistent;
- to proactively engage with human rights NGOs, bodies charged with the protection of rights such as other NHRIs and Chapter 9 institutions, civil society, and other stakeholders, to share skills and expertise, resources and funding, and to challenge the rights' violations that flourish in a context of systemic inequality, poverty and unequal power distribution;
- to more persuasively hold applicable government authorities to account and to take responsibility for ensuring a culture of respect for human rights;
- to continue monitoring the implementation of the outcomes of the Commission's litigation, investigative and national hearings;
- to document and share best practice in respect of the protection of rights, and to increase learning and awareness of such practices with stakeholders, community based organisations and other Chapter 9 institutions in particular; and
- to assess the functionality of rights' protection mechanisms such as the ECs with a view to strengthening these mechanisms.

In conclusion, the work of the Commission in upholding its mandate to promote and protect human rights in South Africa is commendable, particularly in light of the significant challenges that face the country, including a contracted economy, systemic violations of civil rights such as police violence, equality rights' violations such as racial discrimination, and the consistent failure to provide adequate access to socio-economic rights, in the context of sustained racism, poverty and inequality. The implementation of the recommendations of this report will play a significant role in informing the short- to medium-term interventions of the Commission to advance the protection of rights and increase awareness and accountability. It is hoped that it will bring some level of purposive value to stakeholders as well.



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