



EXECUTIVE SUMMARY

**OF THE CIVIL AND
POLITICAL RIGHTS**

2016/2017

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This report by the South African Human Rights Commission (SAHRC or the Commission) examines key developments around civil and political rights (CPR) in South Africa during 2016/2017. Over the past year the country has witnessed civil and political rights violations in relation to the following: use of excessive force during protests; overcrowding in correctional centres and violation of prisoners' rights; threats to media freedom; hate crimes against lesbian, gay, bisexual, transgender and intersex (LGBTI) people and foreign nationals; hate speech; privacy violations; censorship; political violence related to the local government elections; and the heavy-handed policing of Fees Must Fall student protests. There are also currently a number of highly politicised and contested legal developments underway, relating to hate speech and hate crimes, privacy of personal information, the Information Regulator, traditional courts, protected disclosures (whistleblowing), correctional centre oversight, and immigration detention. These developments speak to the implementation of the protection and realisation of CPR and highlight the need for ongoing monitoring and to raise issues of concern for consideration by government departments (and follow up on previous recommendations).

Importantly, South Africa is a party to regional and international treaty instruments focusing on the protection and expansion of CPR, including the UN International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR). Over the past 18 months the South African government participated in reporting processes under both these treaties in terms of its civil and political rights obligations. This has given the SAHRC an opportunity to engage in an analysis of the implementation of CPR in South Africa, and compliance with domestic, African and international human rights obligations. In March 2016 the Human Rights Committee adopted concluding observations on South Africa's initial country report submitted under the ICCPR. The Committee highlighted several challenges facing the oversight and monitoring mechanisms and institutions in South Africa. These include budget limitations, lack of institutional independence from government departments, and limited mandates and powers.

Outline of report

Section 1 of this report provides the introduction, background and methodology of the report, as well as the mandate of the SAHRC in terms of CPR. Section 2 provides a discussion on a number of key developments in South Africa around civil and political rights issues as they relate to the following rights: right to life and human dignity, freedom and security of the person, freedom from slavery and forced labour, right to privacy and access to information, freedom of expression and protection from unfair discrimination, the right to protest, political rights, just administrative action, access to courts, and the rights of arrested, detained and accused persons. Section 3 provides a brief conclusion to the report and raises some recommendations and issues of concern for consideration by government departments, civil society organisations (CSOs) and the SAHRC. Section 4 contains the bibliography of references.

Methodology

This report is predominantly qualitative and desktop in nature, drawing on qualitative and quantitative data that emerges from the Commission's regular activities; annual reports and other documents from key government departments and bodies; academic research and reports by CSOs; country reports and NHRI reports submitted to international and regional treaty bodies, as well as concluding observations; submissions on proposed legislation as well as findings from portfolio committees, ad hoc parliamentary inquiries and judicial commissions; court cases and judgments in the lower courts and Constitutional Court; and media reports.

Findings of report

This report makes a number of findings around the implementation of CPR in South Africa, particularly as implementation relates to legislation and policy, as well as oversight and monitoring institutions and mechanisms, in place to protect and fulfil the rights contained in the Constitution of the Republic of South Africa, 1996. The SAHRC has played an active role in monitoring the implementation of CPR in South Africa, and has identified a number of key issues around CPR which are discussed in more detail in the report.

Right to life and human dignity

The right to life is contained in section 11 of the Constitution places both positive and negative duties on the state to protect life, while section 10 states that everyone has inherent dignity and the right to have their dignity respected and protected. The South African state has an added obligation to protect the right to life of those within its care or custody, for example in mental hospitals (or in NGOs undertaking this function), police stations, detention centres and correctional facilities.

Life Esidimeni deaths

In 2016 94 mentally ill patients died after the Gauteng Department of Health moved over 1 300 patients from the Life Healthcare Esidimeni facility to hospitals and NGOs. All of the 27 NGOs where the patients were relocated were unlicensed, under-resourced and had no capacity to take on mentally ill people. The Minister of Health commissioned the Health Ombud to investigate the deaths, with the latter finding that transfer process showed a disregard of the rights of the patients and their families, including the right to human dignity; right to life; right to freedom and security of person; right to privacy, right to protection from an environment that is not harmful to their health or well-being, right to access quality health care services, sufficient food and water and right to an administrative action that is lawful, reasonable and procedurally fair. In terms of a request by the Minister of Health, the SAHRC is preparing to undertake an investigation into the systemic issues that led to the tragic situation, and will continue monitoring the Esidimeni situation. The Commission will likely host an Investigative Hearing on key issues related to mental disability and access to healthcare services in South Africa, which would require a process of identifying some of the systemic issues and defining what the role of the SAHRC can and should play going forward.

Deaths by police officers or in correctional facilities

The Independent Police Investigative Directorate (IPID) is the independent body established to investigate any deaths as a result of police action or that occur in police custody, as well as to investigate complaints of brutality, criminality and misconduct against members of the South African Police Service (SAPS) and municipal police services. In 2015/2016 IPID reported that there was a total of 216 deaths in police custody, and 366 deaths as a result of police action. Deaths in custody are as a result of suicide, natural causes, injuries sustained prior to custody and injuries sustained in custody by an SAPS official. Most deaths as a result of police action occurred during police operations, where suspects were shot with a firearm during the course of arrest, or during the course of a crime. While IPID has reported a national decrease in the number of deaths in police custody and as a result of police action, the Mpumalanga province saw a staggering 93 per cent increase in the number of deaths in police custody, and a 75 per cent increase in the number of deaths as a result of police action.

The investigation of deaths and allegations of torture or cruel, inhuman or degrading punishment in correctional centres is conducted by the Judicial Inspectorate of Correctional Services (JICS), an independent office under the control of the Inspecting Judge. The JICS relies on the Department of Correctional Services (DCS) to send it reports of unnatural deaths so that these can be analysed and feedback provided to stakeholders, however the electronic system used to do this is currently dysfunctional, which affects the ability of JICS to perform its important oversight role.

Assisted dying

Assisted dying is an umbrella term that includes assisted suicide (doctor-assisted suicide by a patient) and euthanasia (termination of life by a doctor at the request of a patient). While the SAHRC has not yet formulated a position around this contentious issue, it has been following recent attempts to decriminalise assisted dying. In 2016 the Supreme Court of Appeal (SCA) handed down a judgment

in an appeal by the state against a High Court judgment in an assisted dying case brought by the terminally ill Robin Stransham-Ford. He argued that a number of fundamental human rights are breached by criminalising assisted dying, including the right to human dignity, the right to life, and the right to freedom and security of the person. However the SCA found that Stransham-Ford's cause of action ceased to exist when he had passed away just before the High Court order was made, and that more generally the circumstances of the case were such that it was inappropriate for the court to engage in a reconsideration of the common law in relation to the crimes of murder and culpable homicide. Assisted dying therefore remains illegal and prosecutable in South Africa, however there have been a number of calls made for a review of South Africa's laws on assisted dying.

Freedom and security of the person

Section 12 of the Constitution states that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence, from either public or private sources, and not to be treated or punished in a cruel, inhuman or degrading way.

Corporal punishment

Corporal punishment in schools is prohibited, however remains a sad reality in South Africa. The SAHRC has called on the National Department of Basic Education to expedite the establishment of a national protocol to enforce the statutory prohibition of corporal punishment in schools, address the shortcomings in the current legislative and policy frameworks, and provide for the prosecution of teachers and educators who continue to administer corporal punishment. While corporal punishment is still permitted in the private sphere (in the home), in 2016 the Commission published an Investigative Report on a complaint lodged against a church's religious doctrine that requires the use of corporal punishment against children. The SAHRC examined international, regional and South African law and made the following findings: corporal punishment in any form is inconsistent with constitutional values and violates the provisions of international and regional human rights standards; corporal punishment amounts to a violation of the right of every child to be protected from maltreatment, neglect, abuse or degradation, and violates children's rights to freedom and security of the person; and corporal punishment or chastisement amounts to a violation of the right to equality and human dignity. The SAHRC found that even light corporal punishment violates the best interest of the child in the Constitution, and should be criminalised. The SAHRC continues to monitor the implementation of the prohibition on corporal punishment in schools and the process to prohibit corporal punishment in the home.

Slavery, servitude and forced labour

In terms of section 13 of the Constitution, no one may be subjected to slavery, servitude or forced labour.

Human trafficking

In South Africa human trafficking - forcing or manipulating a person against their will into sexual or labour exploitation, within their own country or across borders - remains a significant challenge. In 2016 the UN Human Rights Committee noted progress made with regard to combating trafficking in persons, referring to the Prevention and Combating of Trafficking in Persons Act 7 of 2013; however, expressed concern that South Africa lacks proper identification and referral mechanisms for victims of trafficking in persons. The Committee called on the government to continue its efforts to prevent and eradicate trafficking in persons, step up its efforts to identify and protect persons who may be vulnerable to human trafficking and establish a nationwide identification and referral system for victims of trafficking. 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.

Right to privacy and access to information

The right to privacy contained in section 14 of the Constitution is foundational to other rights, including freedom of expression, freedom of association, and the right to dignity. The right of access to information is provided under section 32 of the Constitution.

Challenges with accessing information through PAIA

The Promotion of Access to Information Act 2 of 2000 (PAIA) gives effect to the right of access to information, and the SAHRC has a specific mandate in terms of PAIA to monitor compliance with its implementation, to provide training and to promote awareness of the Act. This will become the function of the Information Regulator once it has been properly established. In the past the SAHRC has raised a number of challenges with PAIA, including very poor compliance by public bodies (particularly municipalities) and the lack of adequate resolution mechanisms. Currently, disputes around requests for information from public bodies can only be resolved through an internal appeals process, which does not allow for third party review, and disputes regarding requests for information from private bodies can only be resolved in court. A recent report by the Access to Information (ATI) Network highlights ongoing challenges with accessing information through PAIA. The report found that a concerning 46 per cent of information requests to public bodies were denied in full, either actively or as a result of the request being ignored (deemed refusal), while 67 per cent of requests for information submitted to private bodies were denied in full.

Communication surveillance practices

In South Africa there are growing concerns around the rise of a surveillance and intelligence-driven state, and the country has come under scrutiny, both internationally and domestically, for its problematic communication surveillance practices. In March 2016 the UN Human Rights Committee expressed concern at the Regulation of Interception of Communications and Provision of Communication-related Information Act (RICA) 70 of 2002, which allows law enforcement,

intelligence agencies and the military to intercept communications with the permission of a judge. Concerns around the constitutionality of RICA - particularly around its lack of accountability, transparency and safeguards - have also been voiced over the past year by CSOs. Research has shown that activists, union leaders and community leaders in South Africa are monitored, spied on and harassed by the intelligence apparatus, which violates both the right to privacy and freedom of expression.

Establishment of Information Regulator

In 2013 the Protection of Personal Information Act 4 of 2013 (POPIA) was established to give effect to the constitutional right to privacy by safeguarding personal information and regulating the manner in which personal information may be processed. The Act establishes an independent body, the Information Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by POPIA. The Information Regulator is empowered to monitor and enforce compliance by public and private bodies with the provisions of POPIA and PAIA. In 2016 South Africa's first Information Regulator was appointed, with Advocate Pansy Tlakula as its chairperson. In terms of POPIA, the Information Regulator takes over the function of enforcing PAIA from the SAHRC, and the SAHRC and the Information Regulator are engaging on how to operationalise this process.

Appointment of Inspector-General of Intelligence

In 2016 the new Inspector-General of Intelligence, Prof Sethomamaru Isaac Dintwe, was appointed. The Inspector-General of Intelligence carries out civilian oversight of the intelligence services in South Africa, and must ensure that activities conducted by the services are in accordance with the Constitution and the rule of law. The Office of the Inspector-General of Intelligence (OIGI) has yet to be set up and there is a considerable backlog of potentially highly politically sensitive investigations which will need to be dealt with expeditiously. Importantly, the Inspector-General is expected to monitor and review the use of intrusive techniques which may impinge upon peoples' human rights and which may be deemed to constitute unreasonable or unnecessary exercise of powers. The SAHRC will monitor the establishment of the OIGI and its work, particularly as it relates to protecting community leaders and activists fighting for constitutional rights and the rule of law.

Freedom of expression and protection from unfair discrimination

Section 16(1) of the Constitution states that everyone has the right to freedom of expression (which include freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, and academic freedom). However the right to freedom of expression does not extend to propaganda for war, incitement of imminent violence, or 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.' The SAHRC is the custodian of the Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000 (PEPUDA). Unfortunately, despite two decades of protective constitutional provision, the limited Equality Courts jurisprudence has not fleshed out hate speech adequately and there are currently very limited categories or guidelines available. In February 2017 the SAHRC held

a National Hearing on racism and social media, in response to the high number of complaints received on this issue. In March 2017 the case brought by the SAHRC against Jon Qwelane for hate speech was finally heard. Judgment in the case is still pending.

Prevention and Combating of Hate Crimes and Hate Speech Bill

In 2016 the Department of Justice and Constitutional Development (DOJCD) published the much anticipated Prevention and Combating of Hate Crimes and Hate Speech Bill, 2016 for public comment. The SAHRC welcomed the Bill as an opportunity for the Commission and other stakeholders to actively engage the draft legislation with a view to strengthen human rights protection and promotion. However, the SAHRC noted with concern that the Bill addresses both hate crimes and hate speech in a single piece of legislation. A number of concerns about the Bill, particularly in relation to its broad scope, have also been raised by CSOs and professional bodies as well as the Hate Crimes Working Group (HCWG). These concerns include: the inclusion and broad definition and interpretation of hate speech in the Bill (and the potential of this to compromise the passage of the hate crimes legislation), the overlap with PEPUDA and Equality Courts, and the potentially chilling effect of the proposed criminal sanction for hate speech on freedom of expression. In terms of the proposal to establish criminal offences for hate speech, the SAHRC recommends that, in line with General Comment 35 of the UN Committee on the Elimination of Racial Discrimination (CERD) and recommendations made by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the criminalisation of hate speech 'should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, the nature and extent of the impact on targeted persons and groups'.

Hate crimes against LGBTI people

The SAHRC has welcomed the recent Bill dealing with hate crimes and the sustained activism of CSOs in advocating for the development of legislation to address hate crimes and ensuing violence against vulnerable and marginalised groups in South Africa. According to recent research, because hate crimes statistics are not adequately disaggregated, there is limited data on the prevalence of LGBT discrimination and hate crimes in South Africa which can be used to inform services, interventions and advocacy. This has negative implications for the creation of an effective plan to address systemic and violent crimes based on LGBTI and gender discrimination. The creation and maintenance of an effective database capturing the details of crimes committed against women and LGBTI individuals needs to be prioritised. Over the past few years the HCWG has collaboratively developed the Hate and Bias Crime Monitoring Form to gather hate crimes data across several categories, including nationality, sexual orientation, gender identity, race and ethnicity. This is being done in order to ensure the systematic collation of hate crime data; to increase government's awareness of the types of hate crimes; to improve policy and strategies for addressing hate crimes; to monitor the extent of hate crimes across different sectors; and to improve judicial response to hate crimes. In 2016 the HCWG approached the SAHRC to assist in collecting hate crime data across five provinces (Gauteng, Limpopo, Western Cape, Eastern Cape, and KwaZulu-Natal).

Whistleblowing

In South Africa the Protected Disclosures Act 26 of 2000 encourages individuals to report corruption, malpractice and other crimes. Unfortunately, according to the Open Democracy Advice Centre (ODAC), progress around protected disclosures or whistleblowing has halted and the current context in South Africa appears increasingly hostile to whistleblowing activities. It is important for the SAHRC to monitor the status of protected disclosures on an ongoing basis, not least as it is on the list of bodies to which a disclosure can be made in terms of the recent Protected Disclosures Amendment Bill. The Bill seeks to criminalise intentional false disclosures that result in harm; however this has been criticised by organisations like ODAC, as it places the burden of ascertaining the correctness of disclosed information on whistleblowers, thereby discouraging disclosure.

Media freedom and censorship

Over the past year, there have been a number of concerns raised around media freedom, freedom of expression and censorship in South Africa. The role of the South African Broadcasting Corporation (SABC) as the country's public broadcaster – to provide a platform and a voice to all in the country to participate in South Africa's democracy - has come under extreme scrutiny, with the parliamentary ad hoc committee on the SABC Board Inquiry making a number of damning findings against the SABC Board, Minister of Communications and others. In 2016 the SCA handed down a judgment in relation to the incident at the 2015 State of the Nation Address (SONA) where a telecommunication signal jamming device (signal jammer) was used and the broadcast feed cut to prevent journalists from showing the scenes of 'grave disorder' in Parliament. The SCA found that the State Security Agency's use of a signal jammer was unconstitutional and unlawful, and that it was unconstitutional for Parliament to censor the broadcast feed.

In 2016 the Film and Publications Board (FPB) released its draft online regulation policy, which would give the FPB greater authority to regulate online content. The Minister of Communications also published the Films and Publications Amendment Bill, 2015 in order to make the legislation applicable to online content. The Right to Know Campaign (R2K) and others have criticised the proposed new regulations and Bill, particularly the overbroad and vague definitions contained therein, as an attempt to censor the internet and curtail the rights to freedom of expression and access to information in the Constitution. The issue of freedom of expression and access to information on the internet has received much attention at the regional and international level in 2016. Both the UN Human Rights Council and the ACHPR recently adopted resolutions on the promotion, protection and enjoyment of the right to freedom of information and expression on the internet.

Protest

Section 17 of the Constitution protects the right of people to assemble, demonstrate, picket and present petitions in a peaceful and unarmed manner. This is often referred to as 'the right to

protest'. In 2016 the UN Human Rights Committee 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. So-called service delivery protests, focused on socio-economic rights and local governance issues, still occur each year in South Africa. However, these protests have decreased over the years, with protest statistics continuing to be a controversial political issue in the country. While the SAHRC's recent trends analysis report notes that the low incidence of reporting on protest action may signal more awareness and adherence to the Regulation of Gatherings Act 205 of 1993, protest action, expression and association remain important rights around which awareness initiatives and public mobilisation for consensus are required, including by the Commission.

Student protests

During 2016 perhaps the most visible of public protests were the Fees Must Fall student protests on university campuses across the country. In the past year the SAPS response escalated, and the SAHRC has condemned police heavy-handedness in dealing with protests as well as destructive protest-related action undertaken by students in some circumstances. According to the Socio-Economic Rights Institute of South Africa (SERI), university responses to student protest have often been characterised by urgent legal proceedings to obtain and enforce wide-ranging interdicts that prohibit protest by vaguely identified parties; however these practices have been found to be constitutionally suspect or clearly unlawful. In 2016 the SAHRC published a 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. The Commission made a number of findings and recommendations directed at the Department of Higher Education and Training (DHET) and universities, aimed at addressing historical inequalities and accelerating substantive transformation in the higher education sector.

Marikana Commission

In 2016 the UN Human Rights Committee expressed 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 in implementing the recommendations of the Marikana Commission of Inquiry; revise laws and policies regarding public order policing and the use of force; and prosecute and punish perpetrators of illegal killings and provide effective remedies to victims. The SAHRC is concerned that these recommendations 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. As of 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.

Political rights

Section 19 of the Constitution preserves the political rights of South Africans, which includes forming political parties and being a member of a political party, voting in elections and holding public office. While the Electoral Commission (IEC) is the independent body established by the Constitution to promote and safeguard democracy in South Africa, and to ensure regular, free and fair elections at all levels of government, the SAHRC must also ensure that the political rights of South Africans are protected

Political party funding

The SAHRC has stressed the importance of the right of access to information to the right to vote in South Africa. In its report to the UN Committee on Human Rights in 2016, the SAHRC discussed the campaign by NGO My Vote Counts (MVC) pushing for the reform of the electoral system and seeking to compel political parties to disclose information regarding their sources of private funding. The SAHRC is monitoring a recent case launched by MVC for an order declaring that PAIA is invalid and unconstitutional because it fails to make provision for the continuous and systematic recording and disclosure of information regarding the private funding of political parties and independent ward candidates.

Political intimidation and violence

In August 2016 South Africa held its fifth local government election. The SAHRC is concerned at evidence of political intimidation, violence and assassinations (particularly around the selection and finalisation of party lists) as a result of the local government election. At 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.

Just administrative action

According to section 33 of the Constitution, everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Complaints lodged with the SAHRC relating to just administrative action are in the top five rights violations. These complaints are mostly around decisions taken by government departments, such as the Department of Home Affairs (DHA) and the Department of Social Development (DSD), or to alleged maladministration by state institutions. The complaints are generally referred to other institutions for resolution, particularly the Office of the Public Protector, which in terms of the Constitution has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.

Access to courts

Section 34 of the Constitution states that ‘everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

Traditional Courts Bill

In 2017 the revised Traditional Courts Bill was published, addressing concerns raised in respect of the two previous Bills introduced into Parliament (in relation to the role of women, the right to opt out, and the entrenchment of apartheid tribal boundaries). The SAHRC and other organisations have raised concerns about enforcement of the new Bill in the context of the unequal power relations in rural areas and the often unchecked power of traditional leaders. The SAHRC has also expressed concern that a party may unilaterally make representations to a traditional court in the absence of the other party (who has decided to opt-out). Despite the clause which stresses that a person may not be intimidated, manipulated, threatened or denigrated for exercising his or her decision to opt-out, the SAHRC cautions that allowing a party to make representations without the other party present may result in an unequal, biased and prejudiced perspective. This is further exacerbated by the fact that traditional courts are open, public processes which could result in unintended consequence of ostracising or imposing ‘social sanction’ on the opted-out party, especially if the latter is from an already marginalised group. The SAHRC has encouraged Parliament to engage in a comprehensive public engagement process with affected communities.

International Criminal Court withdrawal

In 2016, South Africa controversially decided to withdraw from the Rome Statute of the International Criminal Court (ICC), following conflict around its decision not to arrest Sudanese President Omar al-Bashir when he was in South Africa in June 2015. The SAHRC has followed South Africa’s decision to withdraw from the ICC with concern, arguing that, in the absence of a viable alternative mechanism for holding African perpetrators of human rights violations and international crimes accountable for their actions, an exit from the ICC will not bode well for the rule of law, a principle to which South Africa has committed. In early 2017, the government withdrew the ICC Repeal Bill following a High Court judgment which found that the decision to withdraw from the ICC was unconstitutional and invalid, as the decision needed to be approved by Parliament. The SAHRC has welcomed this decision, and called on the South African government to ratify the Malabo Protocol for the creation of a criminal jurisdiction for the African Court of Justice and Human Rights (ACJHR).

Arrested, detained and accused persons

Section 35 of the Constitution contains the rights of arrested, detained and accused persons, while section 12 contains the right to freedom and security of the person. The state has responsibilities to protect the right to freedom and security of the person of all South Africans; however it has an extra responsibility to arrested, detained and accused persons who have been legitimately deprived of

their freedom. Over the last four 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 SAHRC. 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. A few complaints related to prison conditions. The SAHRC accepts very few of these complaints as most are referred to Legal Aid South Africa or to JICS.

Independence and capacity of JICS

JICS has suffered from a number of challenges to fulfilling its mandate, including administrative and financial obstacles, staff shortages and a lack of responsiveness from the DCS to their requests, reports and recommendations. The SAHRC has stressed that the role of JICS as an independent oversight body is crucial for the effective functioning of the criminal justice system as a whole, and the DCS in particular, and that JICS should be placed in a position to be both reactive (responding to conditions of detention in correctional centres and treatment) and proactive (allowing for a system of unannounced visits to correctional centres and own accord investigations). In early 2017 two CSOs launched an application seeking a declaration of constitutional invalidity, arguing that unless JICS is given sufficient financial, institutional and operational independence to fulfil its functions, thousands of inmates are left without effective recourse when their human rights are violated.

Overcrowding and poor conditions in correctional centres

The SAHRC has expressed concern at conditions in correctional centres, particularly regarding overcrowding, and the South African government's lack of a concrete response as to how it plans to improve conditions and address the dramatic increase in overcrowding. The UN Human Rights Committee has also expressed concern over the poor conditions of detention at prisons, particularly overcrowding, dilapidated infrastructure, unsanitary conditions, inadequate food, lack of exercise, poor ventilation and limited access to health services. Reasons for overcrowding include: high number of prisoners awaiting trial; bottlenecks in the parole process; mandatory minimum sentencing; the increase in life sentences; and lack of restorative justice. In terms of awaiting trial prisoners in South Africa, also known as remand detainees, an extremely high number of people are being held on remand, and those on remand stay for too long before being acquitted or convicted. While overcrowding may largely be a problem created outside of the control of DCS, rights violations - such as assaults by correctional services officials, inter-prisoner violence, access to healthcare and other support services - are very much within the control of DCS.

Children in the criminal justice system

In South Africa the Child Justice Act 75 of 2008 deals with children in conflict with the law. The SAHRC has raised the issue of the overuse of prosecutorial or court-ordered diversion programmes for child offenders, due to a lack of funding for other community-based diversion options and restorative justice approaches as set out in the Act. The SAHRC has also expressed concern at the age of criminal capacity in South Africa, which is contrary to General Comment 10 of the UN Committee on the Rights of the Child (which deals with children's rights in juvenile justice). Currently

the Child Justice Act sets the minimum age of criminal capacity at 10 years old, with the legal presumption that a child between 10 and 14 lacks criminal capacity. The SAHRC has recommended that the minimum age be raised to 14 years (with the removal of the legal presumption clause).

Monitoring of unlawful detention at Lindela

The section 33 right to just administrative action and procedural fairness is a key issue under the right of detained persons, especially in relation to undocumented foreign nationals held at detention centres. During 2016 the SAHRC continued to monitor the Lindela Repatriation Centre, a detention centre for undocumented foreign nationals, following an order handed down by the High Court in 2014. In 2016 the UN Human Rights Committee noted with concern the overcrowding and a lack of hygiene and medical services at Lindela, recommending that the Department of Home Affairs (DHA) strengthen its efforts to ensure adequate living conditions in all immigration centres, and recommending that detention pending deportation is applied as a last resort only, with special regard being given to the needs of particularly vulnerable persons. The SAHRC has expressed concern at the continued unlawful detention of undocumented migrants for periods longer than prescribed by the law, and the continued arrest and detention of unaccompanied minors at Lindela and police stations (whether classified as places of detention or not). The SAHRC is concerned at 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, a similar situation observed with persons released from correctional facilities. The SAHRC is monitoring ongoing litigation relating to the procedures and safeguards governing the detention of people suspected of being undocumented migrants. If this litigation is successful, all detainees will benefit from judicial oversight to challenge the lawfulness of their detention.

Conclusion and recommendations

While the South African government has pledged itself to the protection and realisation of CPR in terms of domestic, regional and international law, challenges remain in terms of implementation and political will. The SAHRC is concerned that the crucial oversight and monitoring mechanisms and institutions in place to protect CPR in South Africa are not able to fulfil their role due to budget limitations, lack of institutional independence from government departments, and limited mandates and powers. Further, the SAHRC is concerned that new legislation and policy being developed is rolling back some of the gains made in implementing CPR, and do not comply with South Africa's Constitution or regional and international human rights law.

An important recommendation from this report is that the South African government needs to be clear about the status of the ICCPR in the South African legal system, and that much more needs to be done to promote awareness of the ICCPR and other international and regional human rights law amongst government officials, policymakers and parliamentarians. The report has also raised a number of issues of concern for consideration by the South African government, including specific national departments, ministries and bodies.

The main issues of concern and recommendations are summarised below:

Life Esidimeni deaths

- The South African government must ensure that all parties involved in implementing the recommendations in the Health Ombud's report on the Life Esidimeni deaths are adequately resourced and capacitated to do so, including the SAHRC.

Deaths in state custody

- IPID must be properly resourced to undertake investigations into deaths at the hands of police officers, particularly those deaths as a result of the Marikana massacre in 2012.
- The SAHRC provincial offices, particularly in Mpumalanga, should meet with IPID and the SAPS Provincial Commissioners to discuss deaths in police custody or as a result of police action.
- JICS needs to be institutionally independent and better resourced in order to undertake its mandate to investigate deaths and allegations of torture or cruel, inhuman or degrading punishment in correctional centres. The DCS needs to urgently improve its reporting to JICS, as it affects the ability of the latter to perform its important oversight role.

Assisted dying

- The Minister of Health, through Parliament, should revisit the issue of the decriminalisation of assisted dying in light of recent litigation.

Corporal punishment

- The National Department of Basic Education should expedite the establishment of a national protocol to enforce the statutory prohibition of corporal punishment in schools, address the shortcomings in the current legislative and policy frameworks, and provide for the prosecution of teachers and educators who continue to administer corporal punishment.
- The DSD must expedite the process of amending the Children's Act in order to give effect to the prohibition of corporal punishment in the home, to provide for children's access to justice, and to provide for appropriate remedies and penalties against offenders.

Human trafficking

- The South African government – in particular the DOJCD, DSD, DHA and SAPS - needs to develop proper identification and referral mechanisms for victims of trafficking in persons, and needs 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. More awareness is needed amongst the general public and officials within the criminal justice system about the many ways in which human trafficking manifests in South Africa.

Challenges with accessing information through PAIA

- Given the extremely poor compliance with PAIA by public bodies, there is the need for a third party dispute resolution process to be set up by the new Information Regulator. Capacity constraints within public bodies also need to be addressed to ensure that the obligations under PAIA can be met.
- Public bodies must be encouraged to broaden their categories of automatically available information, and all such information should be placed on their websites.
- All licences should include a condition requiring the licence holder to make a copy of its licence available on its website or to anyone on request. Further, the terms 'trade secrets' and 'commercial information' in PAIA should be clearly defined, to prevent their use as unsubstantiated excuses for failing to disclose records which should be publicly available.

Communication surveillance practices

- The OIGI needs to be set up and functioning as a matter of urgency in order to fulfil its oversight and monitoring role.
- Once properly established, the OIGI should investigate the effects of RICA, which currently allows for law enforcement, intelligence agencies and the military to intercept communications with the permission of a judge.

Hate speech and hate crimes

- The DOJCD should remove the issue of hate speech from the Prevention and Combating of Hate Crimes and Hate Speech Bill, so that it deals only with the issue of hate crimes and is passed expeditiously in Parliament. The inclusion and expanded definition of hate

speech in the Bill should be reconsidered. In line with CERD, the criminalisation of hate speech should be reserved only for serious cases, to be proven beyond reasonable doubt.

- The Equality Courts need to be strengthened and promoted so that people are aware of their recourse to access justice, and so that useful hate speech jurisprudence is developed. Infrastructural capacity around PEPUDA and the Equality Courts needs to be strengthened to guarantee the effective implementation of legislation.
- The development of a system which captures and stores disaggregated hate crimes and/or hate speech data needs to be prioritised, as does the training and sensitisation of government officials on these issues.

Whistleblowing

- The Minister of Justice and Correctional Services, together with relevant Chapter 9 institutions, needs to undertake a concerted campaign promoting whistleblowing in the country. The environment at present is hostile to whistleblowers, and the criminalisation of false disclosures, as included in the recent Protected Disclosures Amendment Bill, in fact actively discourages disclosures.

Media freedom and censorship

- The Minister of Communications and the FPB should ensure that proposed regulations and amendments to legislation comply with regional and international human rights law relating to freedom of expression and access to information on the Internet.

Protest

- The Ministry of Police and SAPS must ensure that the excessive and disproportionate use of force by law enforcement officials in the context of public protests in South Africa is halted, and that public order policing is improved.

Student protests

- University responses to student protest characterised by urgent legal proceedings to obtain and enforce wide-ranging interdicts that prohibit protest by vaguely identified parties, should be avoided.

Marikana Commission

- The prosecution of police officers implicated in the Marikana deaths, and the settling of civil claims made by the families of those who were murdered in August 2012 needs to be a priority of the Ministry of Police, SAPS and IPID.

Political party funding

- The right of access to information is crucial to the right to vote in South Africa, and PAIA needs to be amended so that political parties are obliged to make information about their private funding publicly accessible.

Political intimidation and violence

- The IEC, Ministry of Police and DOJCD needs to look into the issue of political violence more seriously, particularly ahead of the upcoming 2019 general election. A comprehensive analysis of the criminal justice response to the problem of political killings needs to be undertaken, including standardised data collection on possible political killings in the country and monitoring of specific provinces and areas.

Traditional Courts Bill

- The DOJCD needs to take into account concerns around the Traditional Courts Bill, as they relate to the rights of those who choose to opt out of proceedings, the need for a robust public education and awareness initiative on the Constitution and the Bill, safeguards to fully protect the rights of children, and harsher penalties for traditional leaders who breach the proposed Code of Conduct.

International Criminal Court withdrawal

- The South African government should permanently withdraw its intention to leave the Court and remain in the ICC in line with its international human rights obligations, but should also ratify the Malabo Protocol for the creation of a criminal jurisdiction for the ACJHR.

Arrested, detained and accused persons

- There is a need for awareness-raising and advocacy about the respective roles of the SAHRC, Legal Aid SA and JICS in respect of arrested, detained and accused persons.

Independence and capacity of JICS

- The role of JICS as an independent oversight body is crucial for the effective functioning of the criminal justice system as a whole, and the DCS in particular, and that JICS should be placed in this position through a review of the enabling legislation for the JICS, operational independence (the allocation of a budget separate from the DCS and allocating JICS power to institute legal proceedings in its own name), and a clear mandate to refer cases to SAPS or the NPA in cases of criminal conduct by DCS officials. JICS should become a member of the Forum of Institutions Supporting Democracy (FISD).
- The South African government should ratify the Optional Protocol to the Convention against Torture (OPCAT) and establish a National Preventive Mechanism which encompasses the existing mandate of the JICS as well as other oversight bodies.

Overcrowding and poor conditions in correctional centres

- The DCS needs to urgently address the issue of overcrowding in correctional centres across the country and increase its efforts to guarantee the rights of detainees to be treated with humanity and dignity. The number of awaiting trial prisoners or remand detainees is extremely high, often as a result of the actions of SAPS (who arrest large numbers of people unnecessarily) and the notoriously slow and inefficient criminal justice system.

- Restorative justice as an alternative to imprisonment needs to be properly understood and explored, with significant resources allocated to this initiative by the DOJCD.
- Other reasons for overcrowding – including the high number of prisoners awaiting trial; bottlenecks in the parole process; mandatory minimum sentencing; and the increase in life sentences – need to be seriously explored by DCS, DOJCD and the Minister of Justice and Correctional Services.
- Basic information and statistics on who is serving life sentences and why, and what their previous offence profiles are, should be provided by DCS as part of a process of life imprisonment reform in South Africa. It has been shown that harsher prison sentences are actually not as effective a deterrent as ‘surety of conviction’, the latter which is sorely lacking in South Africa.

Children in the criminal justice system

- Prosecutorial or court-ordered diversion programmes for child offenders are currently over-used, due to a lack of funding for other community-based diversion options and restorative justice approaches as set out in the Child Justice Act. The South African government – in particular the NPA and DSD - should address this challenge and allocate adequate funding to community-based programmes for children, and report on measures taken to ensure children in conflict with the law are placed separately from children in need of care.
- The minimum age of criminal capacity should be raised to 14 years (with the removal of the legal presumption clause). The DOJCD needs to allocate more funding to employ mental health practitioners and social workers to conduct criminal capacity assessments.

Monitoring of unlawful detention at Lindela

- The DHA must improve its efforts to ensure adequate living conditions in all immigration centres in the country. The SAPS should ensure that the detention of undocumented migrants at police stations which have been classified as immigration detention centres, comply with the minimum standards of detention, the provisions of the Immigration Act and the Tsoka court order.
- The DHA should cease all unlawful detentions at Lindela and other detention centres with immediate effect. Detention pending deportation should be applied only as a last resort, with special regard being given to the needs of particularly vulnerable persons. Detained undocumented migrants must be served with notices of deportation as provided by the Immigration Act and the accompanying regulations insofar as the time limits and procedure is concerned.
- The detention of unaccompanied minor children must be discontinued as a matter of urgency. Care must be taken when arresting and admitting persons at Lindela and other detention centres, including thorough screening to prevent the detention of unaccompanied minors.



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