



south african
**human
rights**
commission



REPORT ON THE
STATE OF
HUMAN RIGHTS
IN SOUTH AFRICA
2019



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CHAPTER ONE: INTRODUCTION

1. Introduction

Through section 184 of the Constitution of the Republic of South Africa (Constitution), the South African Human Rights Commission (SAHRC or Commission) is mandated to promote, protect, monitor and assess the observance of human rights in South Africa.

This report covers the period from January to December 2019. In looking at the different human rights issues, four cross-cutting themes were identified as being of particular importance and therefore require attention. These themes are poverty, unemployment, inequality and violence. Aspects of the Sustainable Development Goals (SDGs) also receive attention in the report.

2. Mandate of the Commission

In terms of section 184(1)(c) of the Constitution, the Commission is required to ‘monitor and assess the observance of human rights in the Republic’. There is no requirement that the Commission generate monitoring data, but rather a reliance of the monitoring can be on sources from State and non-State actors. However, the Commission may highlight matters that come to its attention based on its own work.

Section 184(3) of the Constitution states that “[e]ach year, the South African Human Rights Commission must require relevant organs of State to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment”. Once the Commission receives this information, it can use it as part of its monitoring efforts. The information may be ideal for comparative purposes to establish whether there is progress or retrogression in the realisation of human rights.

The powers in the Constitution are further elaborated upon through legislation, especially the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act). In terms of section 13(1)(a) of the SAHRC Act, the Commission is competent and obliged to ‘make recommendations to organs of State at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights’ and to ‘undertake

such studies for reporting on or relating to human rights as it considers advisable in the performance of its functions or to further the objects of the Commission'. The Commission is further obliged to "review government policies relating to human rights and may make recommendations".¹

The Commission makes "recommendations" or "directives". Research reports contain recommendations that are intended to be advisory, while "directives" are contained in and arise from investigative and hearing reports. These are meant to be binding. Despite their non-binding nature, it is mandatory that organs of State report to the SAHRC regarding steps taken or that they intend to take to address the Commission's recommendations.² Recommendations, albeit advisory in nature, cannot be "disregarded willy nilly".³

3. Methodology

This report is primarily qualitative, with relevant quantitative data incorporated, especially about economic and social rights. The report examines qualitative and quantitative data that emerged from the Commission's activities and also from information obtained from State and non-State actors.

The Commission secured information from organs of State regarding the measures taken toward the realisation of the rights to health and education, in particular. The information about the measures taken was obtained through an analysis of planning and policy documents, questionnaires, meetings and research interviews with officials and representatives of organs of State.

4. Structure of the Report

First, the realisation of economic and social rights will be monitored and assessed in a chapter reflecting the overarching themes of poverty and unemployment. Second, the right to equality is monitored and assessed under a chapter addressing the theme of inequality. Finally, civil and political rights are monitored and assessed in a chapter on violence. International and regional developments are incorporated throughout the report.

1 Section 13(1)(b) of the SAHRC Act.

2 Section 181(3) of the Constitution; section 4(2) of the SAHRC Act.

3 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) para 74.



CHAPTER TWO: POVERTY AND UNEMPLOYMENT

1. Introduction

Although poverty is traditionally measured in absolute or relative monetary terms, and is considered an economic, social or political problem, poverty is a human experience that greatly affects the dignity, capabilities and freedom of people. Poverty limits the ability of people to claim their human rights, and can lead to “social isolation, low educational attainment, poor health, and vulnerability to crime”.⁴ As such, the need to address poverty as a systemic societal issue is paramount if sustainable growth and development are to be achieved.

Despite the implementation of myriad policies and programmes since 1994, the level of poverty has not changed to a great extent. Some programmes, such as the implementation of social grants, have had a greater impact on poverty than others. Whether through inappropriate policy responses or a lack of implementation of legislation, policies and programmes, the failure of the State to address South Africa’s high levels of poverty continues to have a direct impact on other human rights.

It has been argued that poverty itself is a human rights violation and that it has the consequence of associated rights violations.⁵ The former refers to the diminished dignity and capabilities of people in poverty. The latter speaks to deprivations and the myriad impacts on the enjoyment of other rights that are limited by poverty. Poverty continues to limit people’s ability to purchase basic commodities vital to their survival, health and wellbeing, such as nutritious food, water and shelter. Importantly, people living in poverty are often marginalised, exploited, stigmatised and socially excluded.⁶

According to Statistics South Africa (Stats SA), unemployment was at 29.1 per cent as of 31 December 2019.⁷ At the beginning of 2019, the unemployment rate was 27.6 per cent, while the unemployment rate using the expanded definition was 38 per cent. The increase in the level of unemployment means that many South Africans are unable to realise their socio-economic rights. The state of affairs has serious ramifications for the country in terms of the realisation of human rights.

4 A Jansen, M Moses, S Mujuta & D Yu ‘Measurements and determinants of multifaceted poverty in South Africa (2015) 32 *Development Southern Africa* 151.

5 Centre for Economic and Social Rights *Human Rights Insights* (2009) 1, 3.

6 *Ibid* 2.

7 Statistics South Africa ‘Quarterly Labour Force Survey: Quarter 1’ (2019) 7.

This chapter seeks to provide an overview of poverty in South Africa, and examines the link between poverty and the rights to health care and education, using populated indicators from various sources. The data used in this report is the latest verified data and may not fall strictly within the ambit of the period of study for this report.

2. Programmes to Address Poverty and Unemployment

In 2015, the Sustainable Development Goals (SDGs) were adopted by 170 countries as a replacement for the Millennium Development Goals. In drafting this report, the South African Human Rights Commission (Commission) aimed to initiate a process of populating some indicators for the SDGs to ensure their implementation, particularly from a rights-based approach. Specific to this chapter is goal number one, which aims to “end poverty in all its forms everywhere”.⁸ While this process will attempt to provide data and information on most of the targets articulated under this goal, it is important to note that data collection will depend on the availability of credible data, whether in quantitative or qualitative form.

In its 2011 diagnostic report, South Africa’s National Development Plan (NDP) listed the primary challenges facing the country. These included, amongst others:

- A large number of non-working people
- Poor quality of education for black learners
- A healthcare system that is of poor quality and cannot meet the demands of the population
- Uneven and poor quality of the provision of public services.

One of the main aims of the NDP is to “reduce the proportion of households with a monthly income below R419 per person (in 2009 prices) from 39 per cent to zero”⁹ by 2030 (progress in this respect is discussed below). It further aims to increase employment, improve the quality of education and health care, reduce carbon emissions, ensure access to food, water and social security and realise a food trade surplus.

In 2004, the South African government launched the Expanded Public Works Programme (EPWP). The EPWP aimed to draw significant numbers of unemployed people into production work and skill such workers while working to assist them to move out of poverty.¹⁰ Although spear-headed by the Department of Labour, the EPWP included various State departments and spheres of government by utilising “public sector budgets to alleviate unemployment by creating temporary, productive employment opportunities coupled with training”.¹¹ The State aimed to create at least one million new jobs over the first five years of its implementation.

In 2017, it was reported that the EPWP had created 6.5 million jobs since its inception, throughout different phases. Phase one attempted to create one million jobs, which was achieved ahead of the target date,¹² while phase two attempted to create 4.5 million jobs, of which just over 3 million

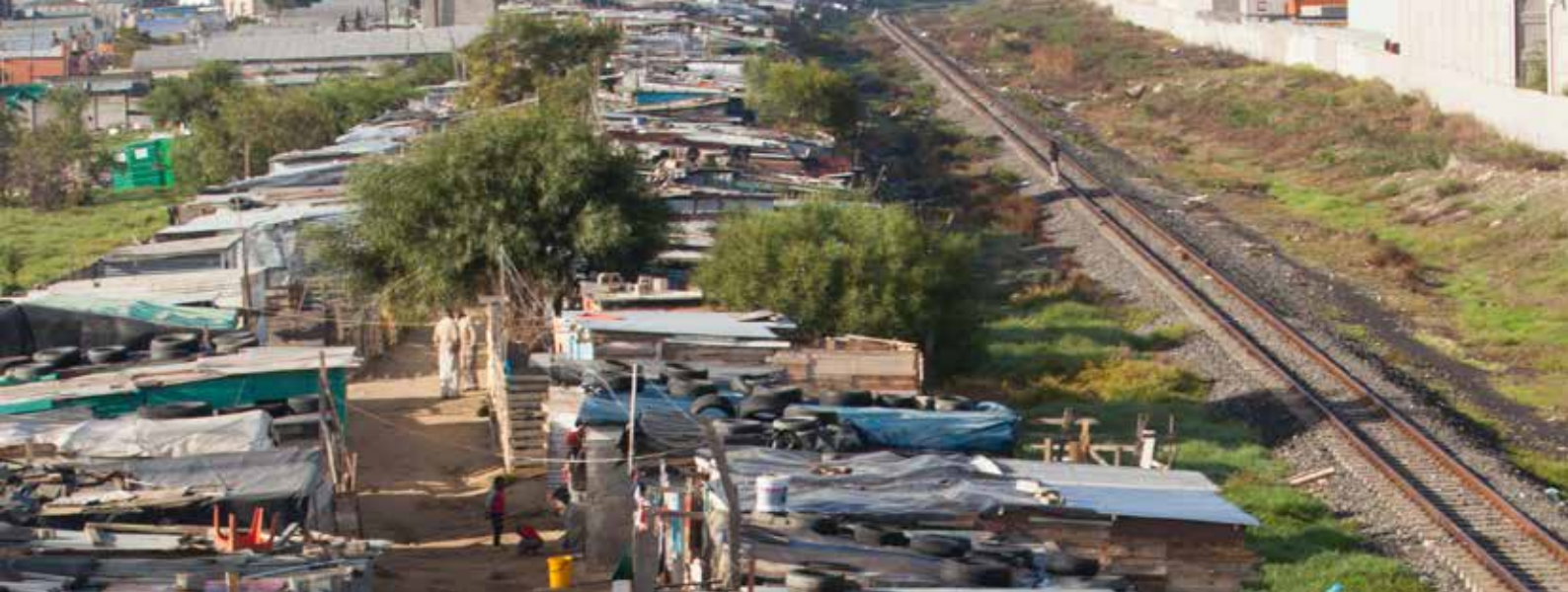
8 UN General Assembly *Transforming our World: the 2030 Agenda for Sustainable Development* (2015) A/RES/70/1; <https://sustainabledevelopment.un.org/sdg1>.

9 National Planning Commission *National Development Plan* (2012) 34.

10 ZE Mfusi & KK Govender ‘Alleviating Poverty in in South Africa – A Theoretical Overview of the Expanded Public Works Programme’ (2017) 6 *Journal of Economics* 118, 120.

11 *Ibid.*

12 Department of Public Works ‘EPWP Phase 2 Performance’ (2014) epwp.gov.za/documents/Summit/2014/Day%20One%2027%20November%202014/03_Mr_H_EPWP_Phase_2_Performance.pdf.



were created.¹³ In its 2019 briefing to Public Works and Infrastructure portfolio committee, the Department of Public Works indicated that 73 per cent of its target of the creation of 4 389 615 jobs for phase three of the EPWP had been achieved. While impact of the current phase on poverty alleviation was unknown, previous studies indicated that income from employment created through the EPWP “not only reduced poverty but was also a form of economic stimulus, targeted directly at the poor”.¹⁴ Studies on the impact of the current EPWP on poverty will be monitored by the Commission.

In January 2019, South Africa’s first ever national minimum wage regulations came into effect, which stipulates that certain categories of workers earn at least R20 per hour or R3500 per month.¹⁵ According to the Congress of South African Trade Unions (COSATU), the minimum wage will benefit over 6 million workers in South Africa.¹⁶ At present, there are no statistics to indicate the success of the regulation but the Commission will continue to monitor the impact thereof.

South Africa has a comprehensive social grants system, with over 17 million beneficiaries. It is heralded by the State as one of the major success stories as a poverty-alleviation tool. Table 1 illustrates the take-up rates for all social grants between 2006 and 2019. There is abundant data that illustrates the positive impact that social grants have had on both South Africa’s poverty rates and the lives of poor people.¹⁷ According to Satumba, Bayat and Mohamed, in their 2017 article on ‘The Impact of Social Grants on Poverty Reduction in South Africa,’ “grants are well targeted (as they are means tested) and have significantly reduced poverty levels amongst the poor and vulnerable individuals.”¹⁸ Results indicate that social grants have had a significant impact on the level of poverty in households in the poorest provinces, namely the Eastern Cape (-21%), Limpopo (-17%), KwaZulu-Natal (-14%) and the North West (-14%) provinces. The impact was not as great in the Western Cape and Gauteng. Such grants also assisted female-headed households (-17%) and households in rural areas (21%) to a great extent. It was Black African (-13%) and Coloured households (-7%) that benefitted the most from grants. However, it is prudent to point out that these households were not necessarily lifted out of poverty, but grants did assist in poverty reduction.¹⁹

13 Expanded Public Works Programme: Phase 2: overview by Department of Public Works (17 June 2013): <https://pmg.org.za/committee-meeting/16047/>.

14 Ibid.

15 <http://www.treasury.gov.za/publications/other/NMW%20Report%20Draft%20CoP%20FINAL.PDF>.

16 L Omarjee ‘Everything you need to know about the national minimum wage’ (1-01-2019) *Fin24*.

17 See for example: T Satumba, A Bayat & S Mohamed ‘The Impact of Social Grants on Poverty Reduction in South Africa’ (2017) 8 *Journal of Economics* 33-49 and The International Bank for Reconstruction and Development / The World Bank *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018).

18 Satumba, Bayat & Mohamed (note 13 above).

19 Ibid.

Table 1: Uptake for All Grants, 2006 – 2019²⁰

Grant type	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12
Old age	2,195,018	2,229,550	2,390,543	2,546,657	2,678,554	2,750,857
War Veteran	2,340	1,924	1,500	1,216	958	753
Disability	1,422,808	1,408,456	1,286,883	1,264,477	1,200,898	1,198,131
Grant in Aid	31,918	37,343	46,069	53,237	58,413	66,493
Care Dependency	98,631	102,292	107,065	110,731	112,185	114,993
Foster Child	400,503	454,199	474,759	510,760	512,874	536,747
Child Support	7,863,841	8,189,975	8,765,354	9,570,287	10,371,950	10,927,731
Total	12,015,059	12,423,739	13,072,173	14,057,365	14,935,832	15,595,705
Annual Growth		3.40%	5.22%	7.54%	6.25%	4.42%

Grant type	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19
Old age	2,873,197	2,969,933	3,086,851	3,194,087	3,302,202	3,423,337	3,553,317
War Veteran	587	429	326	245	176	134	92
Disability	1,164,192	1,120,419	1,112,663	1,085,541	1,067,176	1,061,866	1,048,255
Grant in Aid	73,719	83,059	113,087	137,806	164,349	192,091	221,989
Care Dependency	120,268	120,632	126,777	131,040	144,952	147,467	150,001
Foster Child	532,159	512,055	499,774	470,015	440,295	416,016	386,019
Child Support	11,341,988	11,125,946	11,703,165	11,972,900	12,081,375	12,269,084	12,452,072
Total	16,106,110	15,932,473	16,642,643	16,991,634	17,200,525	17,509,995	17,811,745
Annual Growth	3.27%	-1.08%	4.46%	2.10%	1.23%	1.80%	1.72%

Other studies have indicated that social grants reduce hunger and lead to better nutrition, increased school attendance and greater labour market participation.²¹ Furthermore, the social grants have been used primarily for improving the well-being of the beneficiaries, particularly the child support grant (CSG), which is often used for school uniforms and supplies. However, the amount of the grants is meagre, particularly the CSG, which is consistently below the Food Poverty Line (FPL). Furthermore, the grants are not linked to sustainable exit strategies such as skills training, education or employment. This means that in the long-term, the social security system will not be sustainable and will not restoring the dignity of the beneficiaries.



20 South African Social Security Agency Annual Report 2018/19 pg 26 http://pmg-assets.s3-website-eu-west-1.amazonaws.com/SASSA_A-REPORT_20182019_WEB.pdf.

21 C Chagunda 'The South African Social Grant System: A Positive Effect on Poverty Alleviation and Unforeseen Socio-Cultural Consequences' (2019) *Gender and Behaviour* 17(4).

3. An Overview of Poverty in South Africa

3.1 Poverty

“Poverty is a diverse and dynamic concept, and although there is no universal definition, it generally refers to deprivations suffered in monetary or non-monetary terms.”²² As mentioned previously, poverty is often narrowly measured in absolute or relative monetary terms. Most international development agencies use an absolute monetary value to measure poverty. For example, Stats SA, in its 2019 SDG Baseline Report, uses as an indicator of poverty, the proportion of households with per capita consumption or income below the international poverty line of US\$1.9.²³

In its most recent Poverty Trends Report,²⁴ Stats SA used three poverty lines for the analysis of poverty in South Africa for a specific period using a cost-of-basic-needs approach. A cost-of-basic-needs approach estimates the cost of food of a specific calorie count and adds to that the costs of non-food essentials such as clothing and shelter.²⁵ The FPL is a Rand value below, which becomes difficult for an individual to purchase and consume sufficient food for their health and wellbeing, while the Lower-Bound Poverty Line (LBPL) and Upper-Bound Poverty Line (UBPL) use the FPL as a base but include a monetary provision for non-food essentials.

Shifting discourse²⁶ on poverty has promoted the need for a broader measure of poverty, such as a relative, subjective or multidimensional measure. A relative measure of poverty would entail the identification of a proportion of the poorest population in a country using a relative poverty line.²⁷ In a subjective approach, an individual can be asked to assess if they feel poor relative to a sample group.²⁸ A multidimensional process would involve an assessment of income and ownership using indicators as a composite index. Given the dynamic nature of poverty in South Africa, future poverty assessments may require a multidimensional assessment approach, which may allow for more apt policy development and implementation.

In reporting on poverty in its Poverty Trends Report, Stats SA used three commonly-used poverty lines, the FPL, LBPL and UBPL.²⁹ Table 2 indicates the values of each of these poverty lines from 2006 to 2017. The Poverty Trends Report uses poverty lines and figures from 2006, 2009, 2011 and 2015 to indicate longitudinal trends.

22 A Jansen, M Moses, S Mujuta & D Yu ‘Measurements and determinants of multifaceted poverty in South Africa (2015) 32 *Development Southern Africa* 151.

23 Statistics South Africa *Sustainable Development Goals: Baseline Report 2019* (2019) 22.

24 Statistics South Africa *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015* (2017).

25 J Houghton & SR Khandker *Handbook on Poverty and Inequality* (2009), The International Bank for Reconstruction and Development / The World Bank *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) 39.

26 See for example: A Jansen, M Moses, S Mujuta & D Yu ‘Measurements and determinants of multifaceted poverty in South Africa (2015) 32 *Development Southern Africa*, R Nishimwe-Niyimbanira ‘Income poverty versus multidimensional poverty: Empirical insight from Qwaqwa’ (2019) *African Journal of Science, Technology, Innovation and Development* and MM Azeem, AW Mugeru & S Schilizzi ‘Vulnerability to Multi-Dimensional Poverty: An Empirical Comparison of Alternative Measurement Approaches (2018) *The Journal of Development Studies* 45(9).

27 T Fransman & D Yu ‘Multidimensional poverty in South Africa in 2001–16’ (2019) 36 *Development Southern Africa* 51.

28 Ibid 51.

29 Statistics South Africa (note 21 above) 8.

Table 2: Inflation-Adjusted Poverty Lines used by Statistics South Africa in ZAR, 2016-2017³⁰

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
FPL	219	237	274	318	320	335	366	386	417	441	498	531
LBPL	370	396	447	456	466	501	541	572	613	647	714	758
UBPL	575	613	682	709	733	779	834	883	942	992	1077	1138

According to Stats SA, although poverty across all poverty lines decreased between 2006 and 2011 along all poverty lines, it had increased again by 2015.

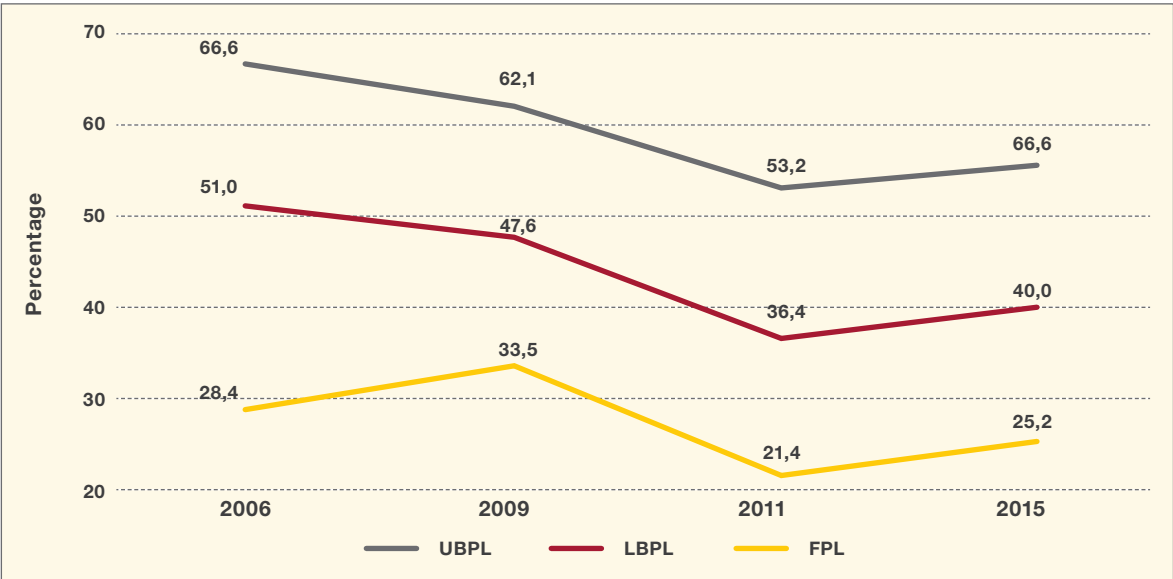


Figure 1: Poverty Headcounts in South Africa for FPL, LBPL and UBPL, 2006, 2011 and 2015³¹

The FPL headcount increased from 28 per cent to 34 per cent between 2006 and 2009, before decreasing greatly to 21 per cent in 2011. It then increased again to 25 per cent in 2015, making the overall gains between 2009 and 2011 somewhat irrelevant. The LBPL headcount decreased from 51 per cent in 2006 to 36 per cent in 2011, and although it increased again to 40 per cent by 2015, the overall trend has been positive. Similarly, the UBPL headcount decreased from 67 per cent in 2006 to 52 per cent in 2011, and although it increased to 56 per cent by 2015, the gains made in relation to a reduction in poverty have been substantial.

It must be noted, however, that despite the gains made in poverty alleviation, the level of poverty in South Africa remains unacceptably high. Essentially, one-quarter of all South Africans live on less than R441 per month, while over half the country’s population survives on less than R992 per month. It is difficult to compare the level of poverty in South Africa to other countries using their respective poverty lines, as the cost of living varies per country. Using the World Bank’s benchmarks of less than US\$1.90 per day and less than US\$3.20 per day, we see that South Africa’s poverty level is

³⁰ Ibid.

³¹ Ibid 15.

much higher than Brazil, Russia, India and China (BRICS countries) but comparable to or lower than most Southern African Development Community (SADC) countries.

Just under half of Black Africans live below the LBPL poverty line, as do 42 per cent of all women. This is an increase from 2011 from 43 per cent and 38 per cent respectively.³² Rural areas are consistently poorer than urban areas, for all poverty lines. Using the LBPL, 25 per cent of all urban dwellers live in poverty, while the same is true for 65 per cent of rural dwellers.³³

Figure 2 indicates that the Eastern Cape and Limpopo are the poorest provinces in South Africa, followed closely by KwaZulu-Natal and the North West. Furthermore, over half of all residents of Mpumalanga, the Northern Cape and the Free State live in poverty. Gauteng and the Western Cape are the least poor provinces. These results indicate that provinces with large rural proportions have higher rates of poverty than provinces with large metropolitan areas. In addition, rural areas suffer from deeper poverty compared to urban areas.³⁴

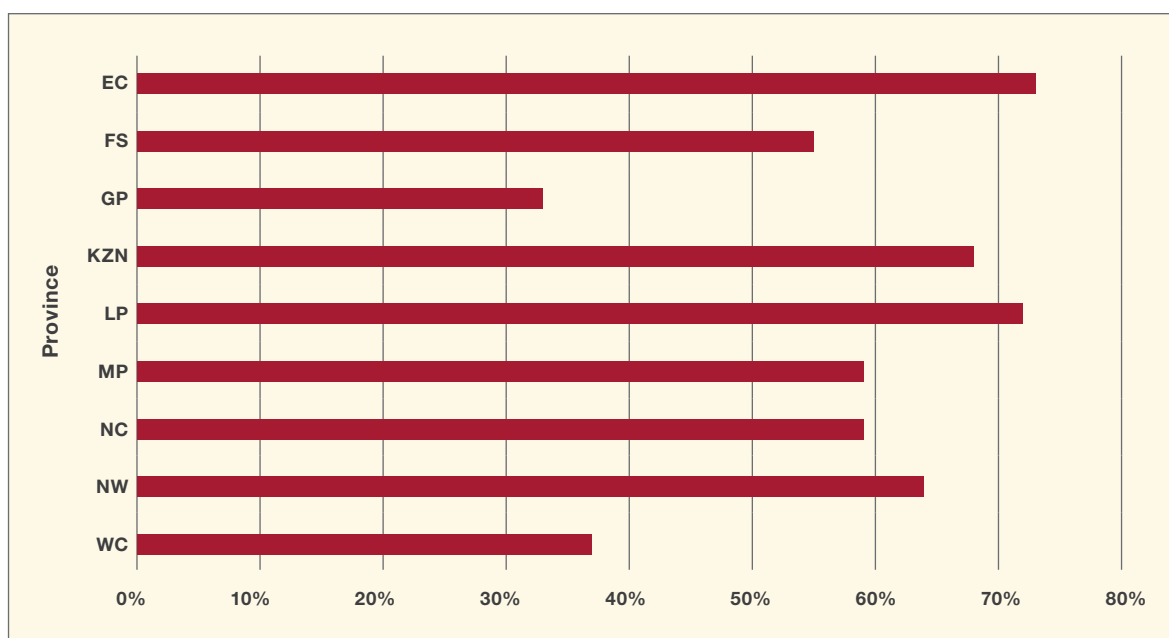


Figure 2: Poverty Headcount per Province, 2015³⁵

The Stats SA Poverty Trends Report presented baseline findings on poverty-related SDG targets. In addition to the proportion of people in South Africa living below the LBPL, the poverty gap, which is an indicator of the pervasiveness of poverty is 17 per cent. Multidimensional poverty is an index comprising a person’s access to health, education, living standards and economic activity as a measure of poverty. Multidimensional poverty in 2015 was 7 per cent, which indicates the positive impact of free basic education, health care services and social grants on the standard of living of people.

32 Statistics South Africa *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015* (2017).

33 The International Bank for Reconstruction and Development / The World Bank *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) 7.

34 Ibid 10.

35 Statistics South Africa *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015* (2017) 64.

4. Health Care Outcomes Using Poverty-Related Indicators

Poverty continues to affect the health of individuals and communities through, for example, poor eating habits and a lack of access to potable water and safe sanitation facilities. This leads to a high rate of non-communicable diseases, infectious diseases (such as diarrhoea) and malnutrition and stunting in infants and toddlers. Poverty further affects the life expectancy and well-being of individuals. As the Organisation for Economic Cooperation and Development (OECD) and World Health Organisation (WHO) stated, “the poor suffer worse health and die younger. The poor in South Africa have higher than the average child and maternal mortality, higher levels of disease, limited access to health care and social protection, and gender inequality disadvantages further the health of poor women and girls.”⁴¹

Despite the large proportion of South Africa’s annual budget allocated to health care (R222 billion for the 2019/2020 financial year – approximately 12 per cent of the budget), and the significant level of monitoring that occurs around the right by civil society organisations, such as Section 27 and the Treatment Action Campaign, and quasi-State institutions, there are serious and systemic failures within the department, which are highlighted in this section.

4.1 Access to Healthcare

According to the Stats SA General Household Survey, 72 per cent of all households in South Africa make use of public health care facilities, including clinics, hospitals and other medical facilities.⁴² Under one-quarter of households in South Africa have one or more members who belong to a medical scheme, while just 16.4 per cent of individuals belong to a medical aid scheme.⁴³ These statistics indicate the need for a National Health Insurance scheme (NHI). A NHI will enable consistent access to medical care that is of the same quality at all facilities. As the interviewed representative at the Department of Planning, Monitoring and Evaluation (DPME) explained:

So the 78-year-old granny in the most far-land rural area of South Africa or in an informal settlement who has a health 10 need, who has a condition, who does not have medical aid like me, an able-bodied 40-something-year-old who is employed, that granny will have a chance to use the same health facility that I am able to access today. We are going to have very few people dying from avoidable diseases just because they could not access health facilities. We are going to have very few cases of ambulances that drop off patients at private sector facilities told to take the patient to the public sector, this person is not covered, take them to the public sector. We are going to have enhanced access to medical specialists in the country who currently the bulk of the population cannot afford, we are going to have much better-improved health outcomes across the country not just in the rich provinces where the bulk of the people are able to afford cover and so forth so I think through NHI health will become a right, truly so as envisaged in section 27 of the constitution and the Bill of Rights health will become a right under [the] NHI.⁴⁴

41 OECD *Poverty and Health* (2003) http://www.who.int/tobacco/research/economics/publications/oezd_dac_pov_health.pdf.

42 Statistics South Africa General Household Survey (2018) 25-26.

43 Ibid 23.

44 SAHRC *Research Interview with DPME: Health Cluster* (31-01-2019).

Approximately 80 per cent of households that used public health care facilities were either satisfied or very satisfied with the service that they received. This is down from 85 per cent in 2010.⁴⁵

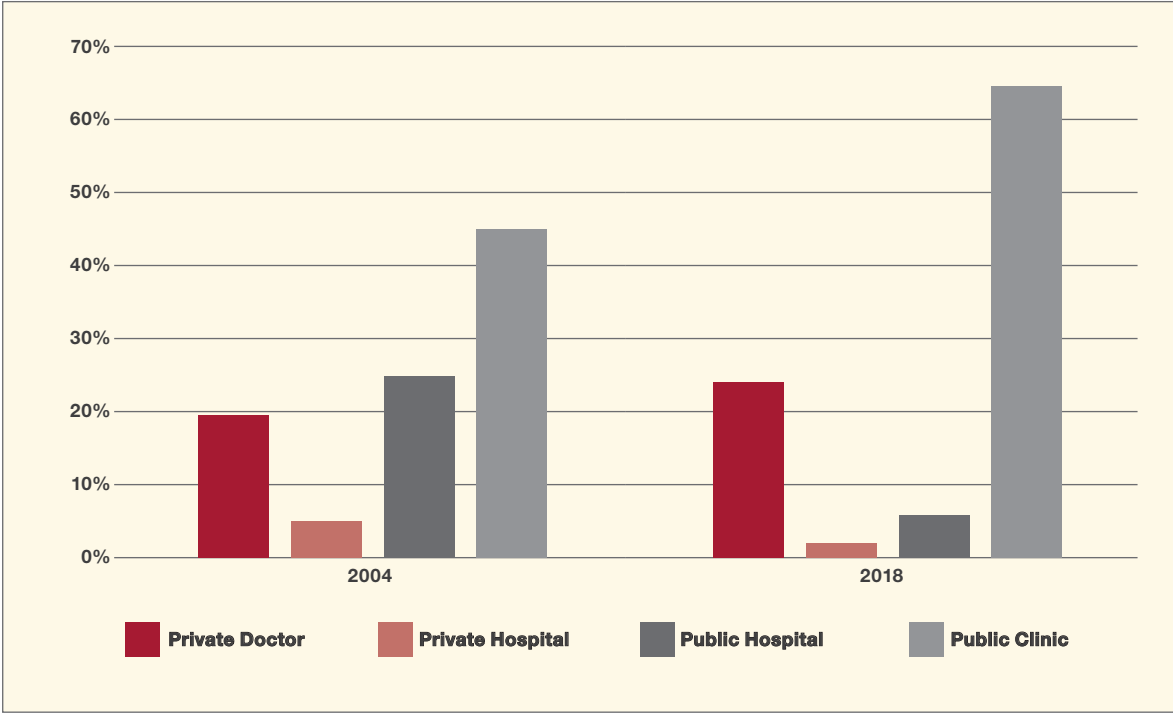


Figure 3: Percentage Use of Different Healthcare Facilities When Users Fall Ill or Are Injured, 2004, 2018⁴⁶

The findings above indicate that the use of public clinics and private doctors has increased meaningfully since 2004. The use of public clinics increased from 45 per cent in 2004 to 65 per cent in 2018, while the use of private doctors increased from 21 per cent to 24 per cent during the same period. There was a concomitant decrease in the use of public hospitals from 25 per cent in 2004 to 6 per cent in 2018 and a decrease in the use of private hospitals from 5 per cent in 2004 to 2 per cent in 2018. This indicates a decreased burden on secondary and tertiary facilities as more healthcare users are utilising primary facilities. In addition, in 2016, South Africans indicated that they used their nearest health care facility 93 per cent of the time.⁴⁷ These are encouraging statistics as they indicate increasing confidence in primary health care (PHC) facilities, which makes health care more accessible and removes an undue burden on secondary and tertiary facilities.

45 Statistics South Africa *General Household Survey* (2018) 25.

46 Ibid 24.

47 B Weyss, D Webster & H Selebalo (Studies in Poverty and Inequality Institute) *Monitoring the Right of Access to Health Care in South Africa Working Paper 17* (2017) 45.

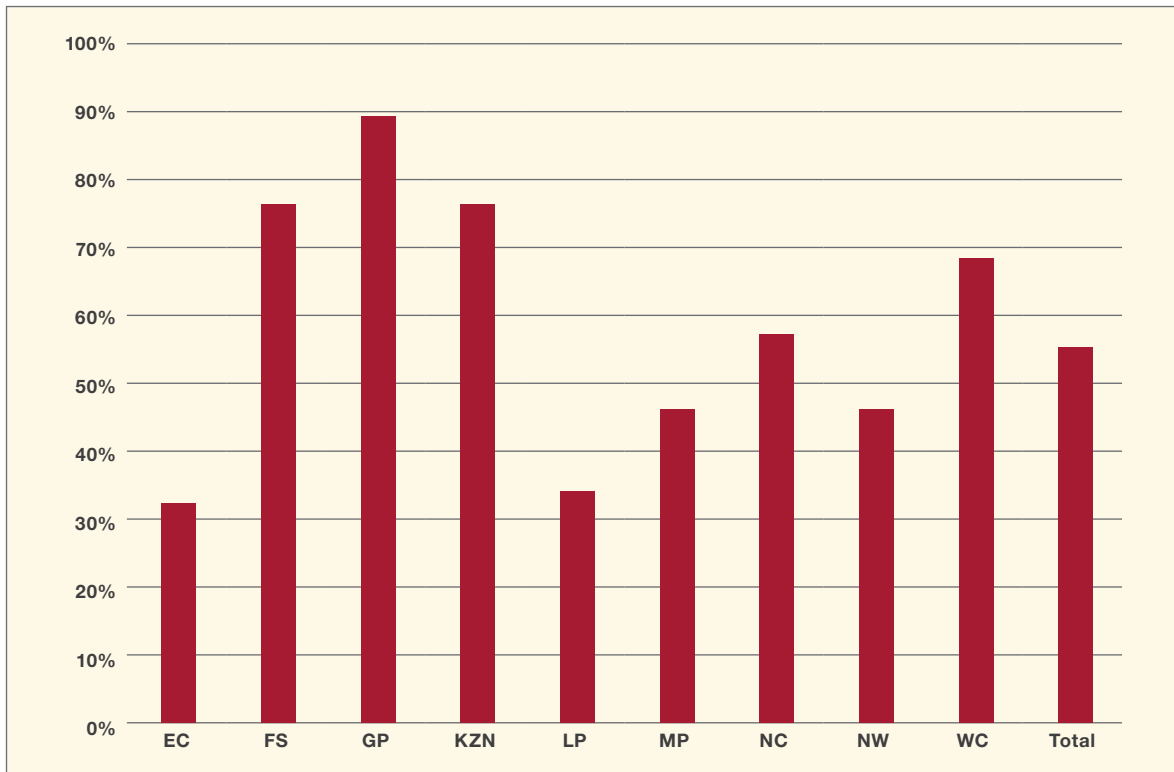


Figure 4: Percentage of Clinics that Obtained “Ideal” Status, 2018/2019⁴⁸

According to the Health Systems Trust (HST), in 2013, the Department of Health (DoH) initiated the Ideal Clinic Initiative to improve the quality of care at these facilities and reduce deficiencies in the primary healthcare (PHC) system.⁴⁹ Figure 4 indicates the proportion of clinics that have been awarded ‘ideal’ status, per province. Just under 90 per cent of clinics in Gauteng have been declared ideal, while over three-quarters of clinics in KwaZulu-Natal and the Free State have achieved the same. On average, half of all clinics in the country have achieved ideal status, however, it is concerning that only around one-third of all clinics in the Eastern Cape and Limpopo are ideal, especially given that these are two of the poorest provinces in the country.

Figure 5 indicates that the majority of South Africans take either less than 15 minutes or between 15 and 29 minutes to reach the nearest health care facility. The proportion of commuters that require between 30 and 89 minutes or more than 90 minutes to reach their nearest health care facility has decreased greatly between 2009 and 2016. However, disaggregated information on the areas where lengthy travel to reach the nearest health care facility is required, to ascertain if there is an impact on the access to health care services for the most impoverished in the country.

⁴⁸ Ibid.

⁴⁹ R Steinhöbel, K Jamaloodien & N Massyn ‘Service capacity and access in N Massyn, P Barron, C Day, N Ndlovu & A Padarath (eds) *District Health Barometer 2018/19* (2020) Health Systems Trust 176.

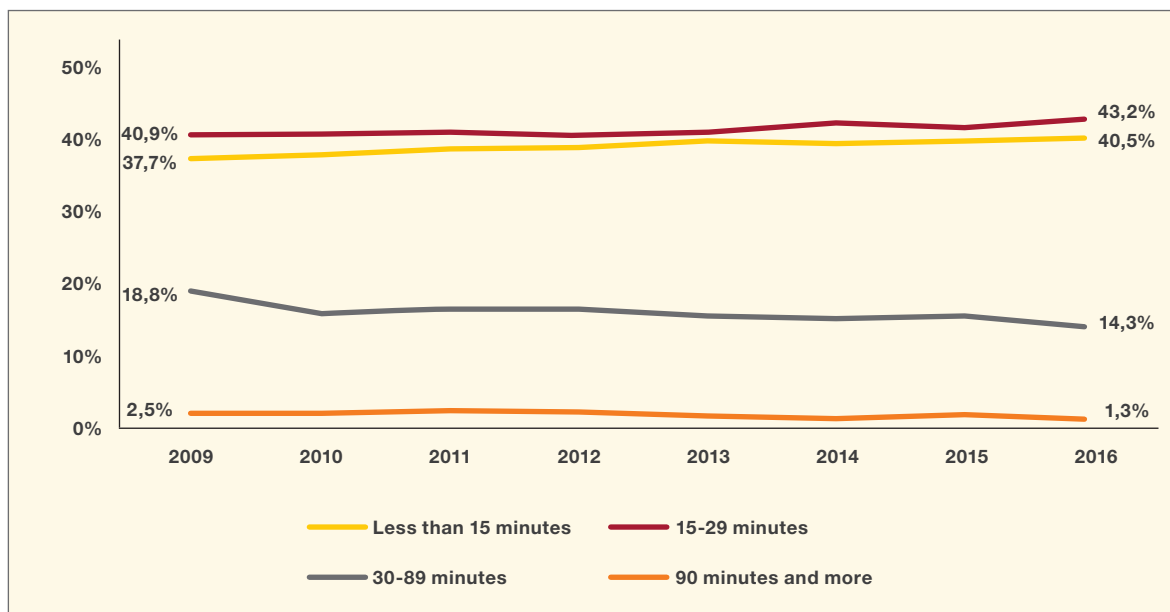


Figure 5: Travel Time to Nearest Healthcare Facility, 2009 - 2016⁵⁰

4.2 Mortality rates

The WHO defines maternal mortality as “the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes”.⁵¹ The Maternal Mortality Ratio (MMR) represents the number of deaths per 100 000 live births.

Figure 6 indicates that South Africa showed a sharp increase in MMR between 2008 and 2012 before declining somewhat steadily thereafter, as illustrated by Figure 6. The decrease in the MMR is mainly due to a decrease in non-pregnancy-related infections, such as tuberculosis, pneumonia, meningitis and malaria.⁵² And the success of the control of HIV transmission can be attributed to increased treatment resulting in the prevention of mother-to-child transmission (PMTCT) and access to anti-retroviral medication.⁵³

When pregnant women with HIV are put on [antiretroviral] treatment, it prevents HIV from multiplying in their bodies, and therefore “ensures that they are less likely to die due to complications of having the virus during birth.”⁵⁴

50 B Weyss, D Webster & H Selebal (Studies in Poverty and Inequality Institute) *Monitoring the Right of Access to Health Care in South Africa Working Paper 17* (2017) 45.

51 <https://www.who.int/healthinfo/statistics/indmaternalmortality/en/>.

52 J Moodley & R Pattinson ‘Improvements in maternal mortality in South Africa’ (2018) 3 *SAMJ* 4 5.

53 Ibid 5.

54 P Philane & M Malan ‘Giving birth has become less dangerous in South Africa’ (28-03-2018) *Bhekisisa Centre for Health Journalism*.

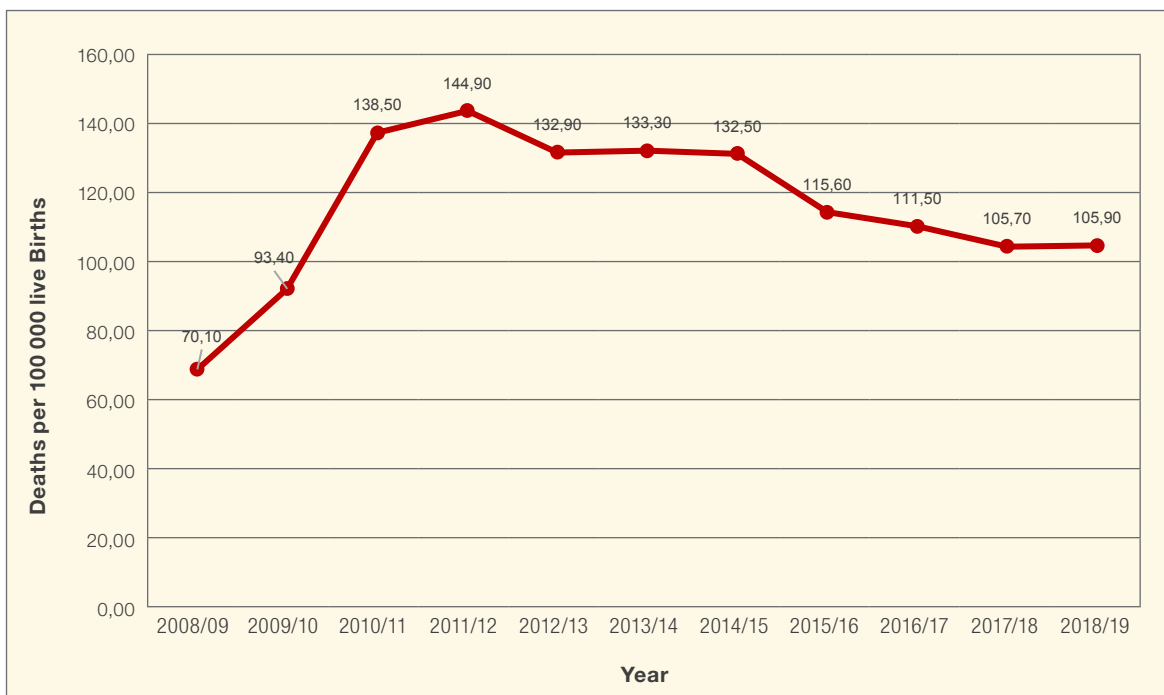


Figure 6: National Maternal Mortality Rates, 2008-2019

The DoH, in its response to a questionnaire from the Commission, indicated that the main reasons for the high MMR included non-pregnancy-related infections, obstetric haemorrhage, hypertensive disorders in pregnancy, pregnancy-related sepsis and medical and surgical conditions. However, Weiner *et al* have argued that while the MMR rate due to HIV and haemorrhage has decreased, deaths due to hypertension increased by 15 per cent between 2011 and 2016 and is the number one cause of maternal deaths during this period.⁵⁵ Clearly, an appropriate policy response coupled with effective implementation is required to deal with the impact of hypertensive disorders if South Africa is to achieve the SDG target 3.1. – to reduce the maternal mortality ratio from 138 per 100 000 live births in 2015 to below 70 deaths per 100 000 live births by 2030.

Like with many other statistics, however, the MMR varies widely according to province, and the poorer outlying provinces have the worst rates (see Table 3). In 2019, the Free State had an MMR of 168.3 deaths per 100 000 live births, while the MMR for the North West, Limpopo and the Eastern Cape are 137.4 and 111.6 and 106.1 respectively.⁵⁶ Furthermore, official statistics do not capture the deaths of women who do not access health facilities.

⁵⁵ R Weiner, L Chauke, A Erzse, C Mnyani, M Wilkinson, M Ramogale-Zungu, S Masilela & K Hofman 'Development of Quality Standards may enhance the implementation of clinical practice guidelines in South Africa, which should result in high-quality, evidence-based, and cost-effective care in the country' in T Moeti, & A Padarath (eds) *South African Health Review* (2019) 147.

⁵⁶ Note that MMR rates in Gauteng are consistently high due the number of births, consistent reporting and migration.

Table 3: Maternal Mortality Ratio and Neonatal Mortality Rate, per Province, 2018/2019⁵⁷

Province	Maternal Mortality Ratio (per 100 000 live births)	Neonatal Mortality Rate (per 1000 live births)
Eastern Cape	106.1	12.5
Free State	168.3	16.8
Gauteng	122.8	13.0
KwaZulu-Natal	88.4	11.5
Limpopo	111.6	13.2
Mpumalanga	92.4	11.5
Northern Cape	71.3	10.6
North West	137.4	11.7
Western Cape	66.8	8.9
Total	105.9	12.1

The 2019 revised Medium Term Strategic Framework target for MMR was less than 100, while the SDG requires a target of 70 by 2030. At present, only the four provinces meet the 2019 target and only the Western Cape has met the SDG. Ongoing analysis of the causes of high rates of MMR will be required with positive interventions, especially in rural and outlying areas, if the SDG is to be met. Furthermore, it is unlikely that the NDP target will be met.

A neonatal mortality rate (NMR) is a measure of deaths per 1000 live births and is the death of an infant within the first 28 days of life.⁵⁸ According to the HST, in the 2018/2019 financial year, the country achieved an NMR of 12.1 deaths per 1000 live births. While achievements of a decrease in the NMR have been variable, the overall trend has been downward over the last decade. Again, it is important to note that different provinces have varying rates and in this case, the Eastern Cape, Limpopo and Free State provinces have a particularly high NMR.⁵⁹ Furthermore, there is some discrepancy in the NMR reported. In 2016, the South Africa Demographic and Health Survey (SADHS) conducted by Stats SA reported a NMR of 21 per 1000 live births – significantly higher than the rate reported by the HST.⁶⁰

According to the DoH, the main causes of neonatal mortality included birth asphyxia, infections, severe prematurity and severe congenital disorders prematurity (often resulting in low birth weight). Other studies have also identified labour-related events, a lack of adequate oxygen supply to the foetus and infections as causes of the NMR.⁶¹

57 N McKerrow 'Reproductive, maternal, newborn and child health' in N Massyn, P Barron, C Day, N Ndlovu & A Padarath (eds) *District Health Barometer 2018/19* (2020) Health Systems Trust 19.

58 Ibid 26.

59 Note that NMR rates in Gauteng are consistently high due the number of births, consistent reporting and migration.

60 National Department of Health, Statistics South Africa, South African Medical Research Council, and ICF *South Africa Demographic and Health Survey 2016* (2019) 118.

61 NR Rhoda, S Velaphi, GS Gebhardt, S Kauchali & P Barron 'Reducing neonatal deaths in South Africa: Progress and challenges' (2018) 3 *SAMJ* 9, 10.

The DoH indicated that various data systems and committees have been constituted to address maternal, neonatal and infant mortalities. For example, the Perinatal Problem Identification Programme and the Maternal Morbidity and Mortality Audit System were constituted to identify the causes and preventions of neonatal and maternal mortalities and to improve sub-standard care. Furthermore, mortalities and other committees have been developed to oversee the implementation of maternal and child health services.

Table 4 indicates solutions to some of the causes of neonatal mortality, including the provision of steroids for preterm labour, improve labour and delivery management, PMTCT and so forth. These have already been implemented by the DoH. Ongoing monitoring of the effective implementation thereof is essential for reducing mortality rates.

Table 4: Percentage of Lives Saved Using the ‘Lives Saved Tool’⁶²

The LIST newborn interventions	Lives saved, %
Antenatal corticosteroids for preterm labour	12
Labour and delivery management	10
Prevention of mother-to-child transmission of HIV	9
Oral rehydrate solution	9
Handwashing with soap	7
Case management of severe neonatal infection	7
Water connection in the home	5
Antiretroviral treatment	4
Pneumococcal vaccine	4
Therapeutic feeding for severe wasting	4
Treatment of injuries	4

SDG 3.2. required that by 2030, countries must end preventable deaths of newborns and children under 5 years of age, with all countries aiming to reduce neonatal mortality to at least as low as 12 per 1000 live births. Nationally, South Africa is on track to meet this goal. However, greater attention to individual provinces is required to ensure that the goal is universally met.

For the 2019/2019 financial year, 82 per cent of children under one were immunised. In addition, like with other statistics presented in this report, immunisation cover for provinces is varied. Despite the increase in immunisation rates over the last decade, greater awareness around immunisation and greater outreach are required to increase the rate in the North West, Limpopo, Eastern Cape and Free State provinces to bring their rates to the 90 per cent global target.

⁶² Ibid 13.

4.3 Pregnancy

According to Stats SA, 0.1 per cent of births were from mothers aged ten to twelve years old and 9.4 per cent were from mothers aged between fifteen and nineteen.⁶³ According to 2017 statistics, the national pregnancy rate for girls under 18 years has declined steadily between 2012 and 2017, from 7.7 per cent to 6.8 per cent.⁶⁴ However, four provinces have under-18 pregnancy rates above the national average, namely Northern Cape (9.5 per cent), Eastern Cape (8.6 per cent), KwaZulu-Natal (8.5 per cent) and Mpumalanga (7.7 per cent). In contrast, the DPME has indicated that teenage pregnancy is currently increasing to exceed 13 per cent despite a target of 8 per cent.⁶⁵

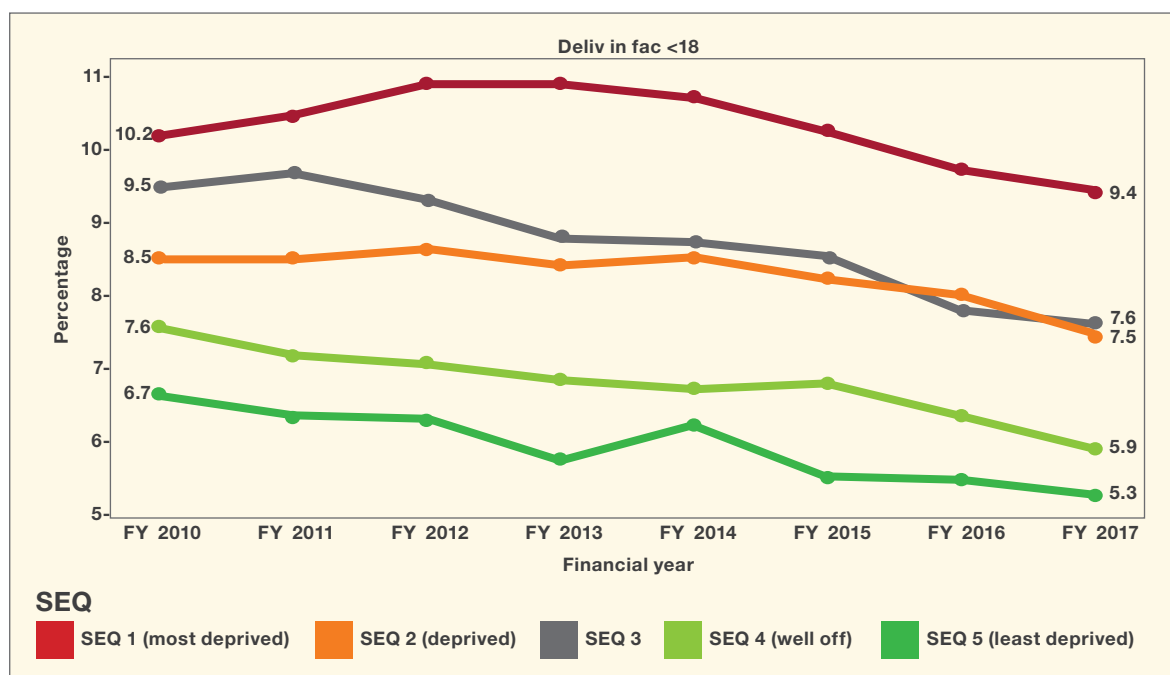


Figure 7: Proportion of Under-18 Pregnancies per Socio-Economic Quintile, 2010 - 2017⁶⁶

Additionally concerning is the high rate of under-18 pregnancies in the poorest socio-economic quintiles, as illustrated in Figure 7, which indicates that the most deprived quintile has an under-18 pregnancy proportion of 9.4 per cent compared to 5.3 per cent for the least deprived quintile. Following an investigation into the cause of high rates of teenage pregnancy in such areas, targeted interventions to mitigate such causes are required.

Pregnancies to mothers under the age of eighteen are not just medically dangerous for the mother and child due to sexually transmitted diseases (STI) and childbirth complications,⁶⁷ but are also a social problem. These mothers tend to have worse economic outcomes than mothers who delay their first pregnancy.⁶⁸ As such, greater awareness of the availability and use of contraceptives is required nationally as is education and awareness on the prevention of STIs. This is not to say a person's self-determination is removed, but that they have access to choice and resources.

63 Statistics South Africa 'Recorded live births' (2018) 19: <http://www.statssa.gov.za/publications/P0305/P03052018.pdf>.

64 R Pattinson 'Delivery' in N Massyn, A Padarath, N Peer & C Day (eds) *District Health Barometer 2016/17* (2017) Health Systems Trust 52.

65 SAHRC *Research Interview with DPME: Health Cluster* (31-01-2019).

66 R Pattinson 'Delivery' in N Massyn, A Padarath, N Peer & C Day (eds) *District Health Barometer 2016/17* (2017) Health Systems Trust 55.

67 World Health Organisation 'Adolescent Pregnancy' (2020): <https://www.who.int/news-room/fact-sheets/detail/adolescent-pregnancy>.

68 N Branson & T Byker 'Causes and consequences of teen childbearing: Evidence from a reproductive health intervention in South Africa' (2018) *Journal of Health Economics* 57 221.

4.4 Burden of disease

Figure 8 indicates the proportion of South Africans that suffer from specific groups of diseases, where group 1 represents communicable diseases, excluding HIV and TB, group 2 represents HIV and TB, group 3 represents non-communicable diseases (NCD) and group 4 represents injuries. For the first two groups, we see an overall decline between 2008 and 2014. However, there is a distinct and somewhat significant increase in the proportion of people in groups 3 and 4, particularly those with NCDs.

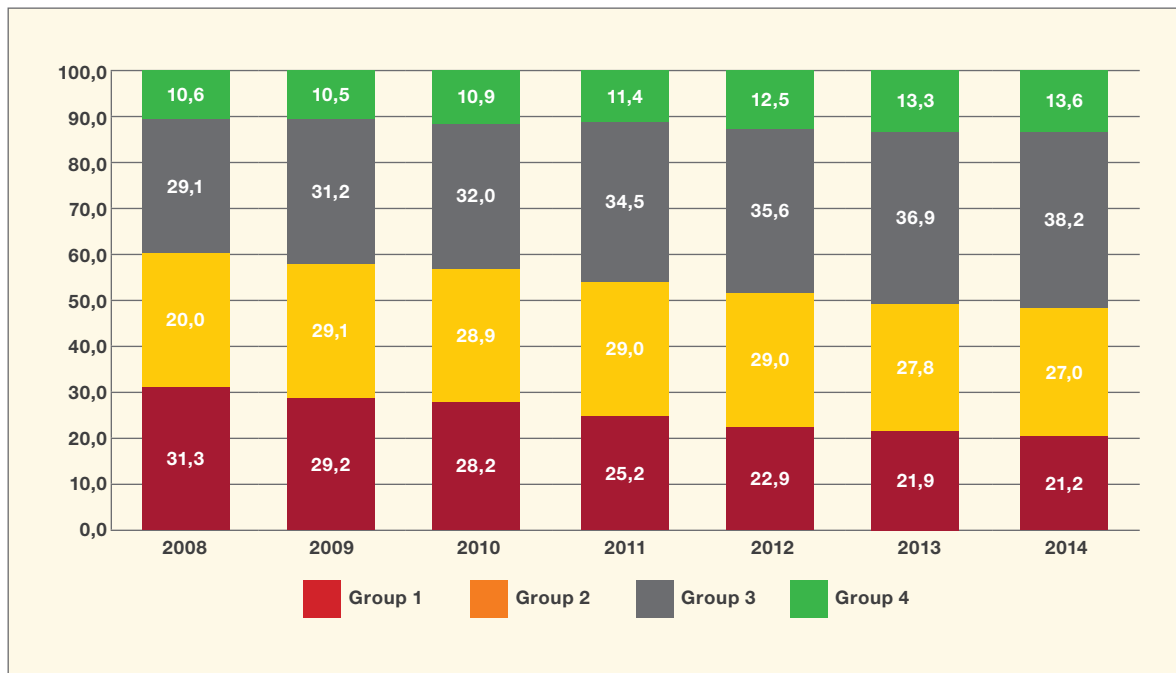


Figure 8: Burden of Disease, 2008 – 2014⁶⁹

South Africa has seen a steady increase in diabetes diagnoses since 2008.⁷⁰ While the prevalence of cardiovascular disease and hypertension has decreased, they both cause a high proportion of natural deaths (including communicable and non-communicable).⁷¹ The high prevalence of NCDs is often related to the poor diet of South Africans, which often leads to malnutrition, obesity and stunting in children. As explained by the DPME:

[There is a] challenge in this country of malnutrition and malnutrition takes two forms. There is obesity which is [an] excess of nutrition, there is malnutrition as in under nutrition, in both ways we are not doing well, our surveys are finding that the country it is not performing well or indicators of nutrition, especially where obesity, anaemia amongst others.⁷²

The DPME official indicates that one of the major causes of NCDs is an influx of and consumption of processed food and states that to address dietary issues, there are myriad State departments that need to work together to solve issues associated with access to nutritious food.

69 B Weyss, D Webster & H Selebalo (Studies in Poverty and Inequality Institute) *Monitoring the Right of Access to Health Care in South Africa Working Paper 17* (2017) 67.

70 B Weyss, D Webster & H Selebalo (Studies in Poverty and Inequality Institute) *Monitoring the Right of Access to Health Care in South Africa Working Paper 17* (2017) 72.

71 Statistics South Africa Mortality and causes of death in South Africa, 2016: *Findings from death notification* (2018) 33.

72 SAHRC *Research Interview with DPME: Health Cluster* (31-01-2019).

The above information is supported by findings of the Health Systems Trust, which indicates that apart from overweight and obesity (which decreased between 2008 and 2018), rates of other NCDs increased steadily over the same period.⁷³

4.5 Facilities management

There are two ongoing issues concerning the management of public health care facilities. Firstly, there are high staff vacancy rates, particularly in rural and outlying areas. This was confirmed by the DPME who indicated that filling vacant posts has been a major challenge for the DoH, mainly due to budget constraints. However, due to the President's stimulus package in 2018, 5362 additional posts have been established, most of which would be allocated to the North West province.

Secondly, there is an issue of delegation of authority. The Commission's 'Health Inquiry' report in 2009 highlighted the problem of long waiting times for the appointment of staff and procurement of equipment through provincial departments, as management at health care facilities did not have the necessary authority to undertake such functions.⁷⁴ The DoH acknowledged the problem then, but this has not yet been resolved in many facilities. The DPME agreed, stating that the lack of delegation is still a big problem for procurement and human resources. This leads to greater problems with unspent allocated budgets, which were then returned to National Treasury or rolled over to the following financial year.⁷⁵

5. Basic education outcomes using poverty-related indicators

Educational reform in post-1994 South Africa was meant to act as a pathway out of poverty for many learners and their families. However, while South Africa has achieved a high school-enrolment rate, issues around the poor quality of education, inferior infrastructure in poorer outlying schools and a lack of access to learning and teaching support materials (LTSM) remain persistent challenges in the education system.

As is the case with other economic and social rights, education and poverty in South Africa are intrinsically linked. Education plays a significant role in poverty reduction and the lack of access to quality education significantly limits one's ability to break the cycle of poverty by improving opportunities to gain employment or to generate an income. Likewise, living in poverty affects one's ability to access education as poorer learners generally have access to education of poorer quality than wealthier learners.⁷⁶ Furthermore, poor learners face additional difficulties such as a lack of access to food, uniforms and learning materials. It is important to note that the effectiveness of strategies to provide quality education to the population does not depend on the country's level of poverty as we have seen much success in countries like Botswana, which have staggering levels of poverty but have succeeded in providing quality education to the majority of the population over a sustained period.⁷⁷

Generally, the more educated a household head is, the lower the level of poverty experienced in that household. Statistics South Africa's 2017 Poverty Trends Report indicated that over 70 per cent of

73 A Cois, AP Kengne 'Non-communicable diseases' in N Massyn, A Padarath, N Peer & C Day (eds) *District Health Barometer 2016/17* (2017) Health Systems Trust.

74 SAHRC *Public Inquiry: Access to Health Care Services* (2009) 34.

75 SAHRC *Research Interview with DPME: Health Cluster* (31-01-2019).

76 S van der Berg 'The Two-Way Street Between Poverty and Education' (2018) *Project Rise*.

77 See for example: UNICEF *Why are Sustainable Development Goals Relevant for Botswana* (2015).

households headed by individuals with no education were living in poverty, compared to the less than 7 per cent of households that were headed by an individual with a higher degree.⁷⁸

Research by the Commission has illustrated the link between schools in rural provinces, poverty, and the lack of access to basic infrastructure and LTSM.⁷⁹ Usually, schools in the rural provinces are regarded as poor, and experience the most challenges in respect of access to water and sanitation, and to LTSM.

This section on the right to basic education aims to provide an analysis of the impact of poverty on the right to education and vice versa, with a specific focus on access, norms and standards, access to LTSM and access to poverty-alleviation strategies, all of which serve to entrench existing levels of poverty when not adequately addressed.

5.1 Access to Basic Education

Figure 9 illustrates the impact of poverty on educational attainment. Poverty levels are lower depending on the level of education attained by an individual. This is true for levels of educational attainment. However, there has been a general decline in poverty for all levels of educational attainment since 2006. Over three-quarters of individuals with no education experience lived below the UBPL, while over two-thirds of those that had some primary or secondary education lived below the UBPL. The same was true for 58 per cent of individuals with some secondary education and 36 per cent of those with a matric qualification. In contrast, only 8 per cent of individuals with a post-matric qualification lived below the UBPL. This shows a clear correlation between educational attainment and wealth.

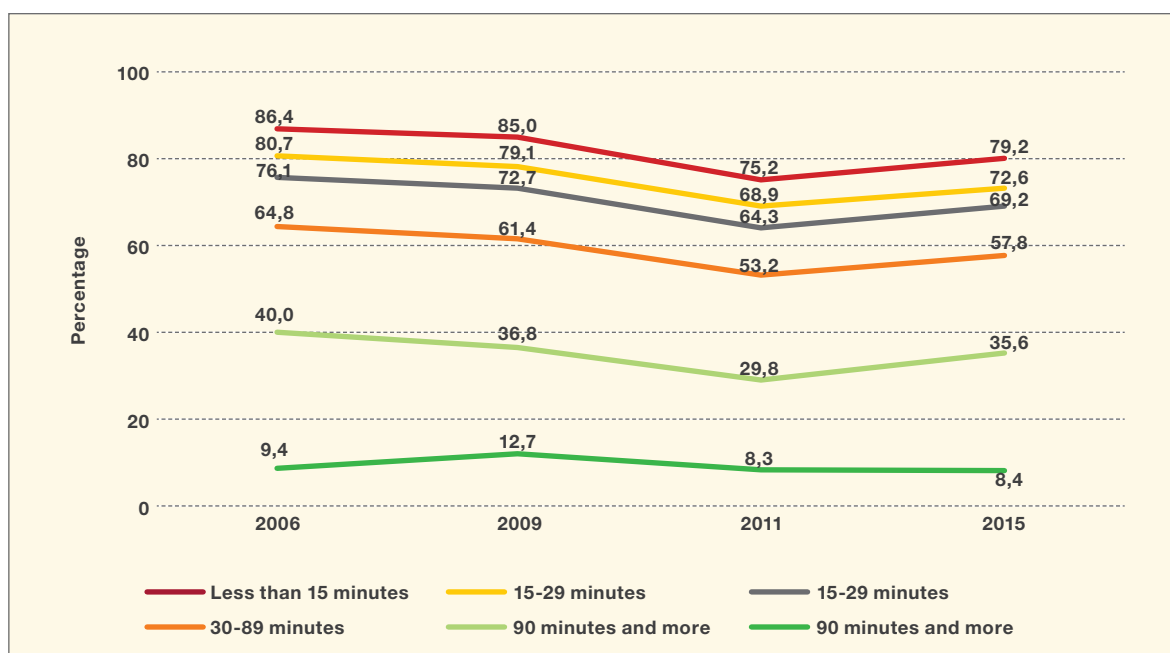


Figure 9: Poverty Levels by Educational Level Attained for Individuals >18 Years, 2006 – 2015

⁷⁸ Statistics South Africa *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015* (2017) 90.

⁷⁹ See for example: SAHRC *Monitoring the Implementation of the Commission's Recommendations from its 2014 Report on Access to Water and Sanitation* (2018) and SAHRC *Hearing Report: Delivery of Primary Learning Materials to Schools* (2014).

These findings were corroborated by a World Bank report on poverty and inequality in South Africa. The report states that “[u]nemployment, followed by education (years of schooling) are consistently the top two contributors to multidimensional poverty in South Africa, highlighting the importance of job creation and education in reducing multidimensional poverty in South Africa”.⁸⁰

In 2018, South Africa noted an almost 100 per cent enrolment rate of learners of school-going age.⁸¹ However, school enrolment rates often mask the drop rates, particularly for learners aged fifteen and above, when compulsory schooling ends.⁸² School dropouts have consistently concerned the Commission, the State and civil society organisations, as the myriad efforts to retain learners have not had much success. Although drop rates are declining, the year-on-year changes in dropout figures are not significant.

According to Hall, around 99% of children in each age year from 7 to 14 are reported to be attending an educational institution. The attendance rate drops to 98% for 15-year-olds, 96% for 16-year-olds, 92% for 17-year-olds and 83% for 18-year-olds.⁸³

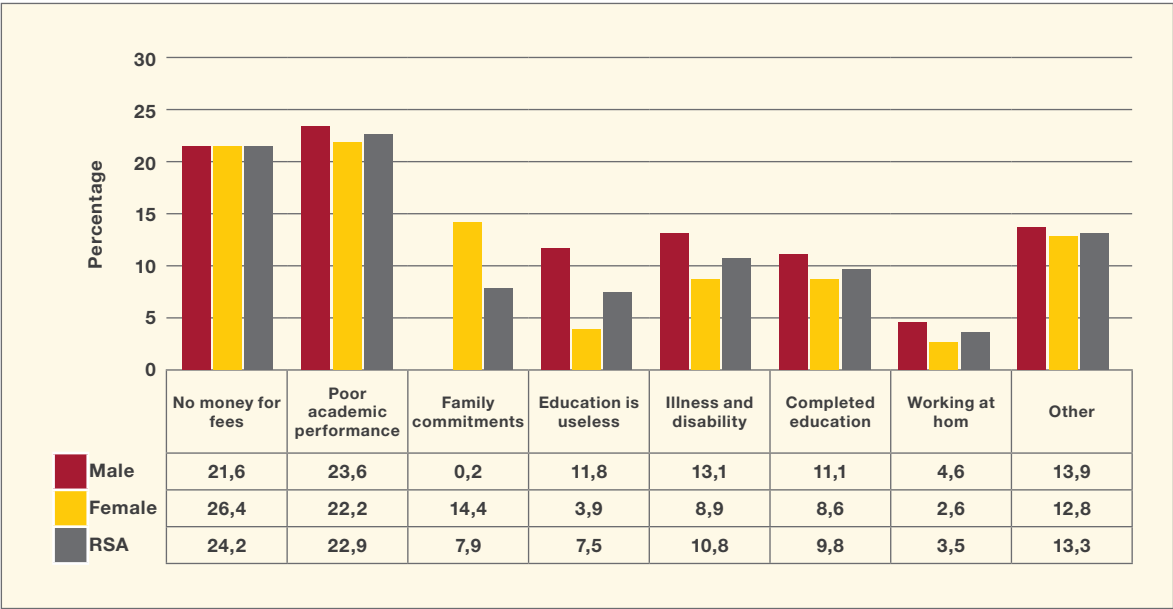


Figure 10: Reasons for Learners 7 to 18 Years Not Attending an Educational Institution. 2018⁸⁴

The main reasons indicated for learners, aged between 7 and 18, for not attending an educational institution included no money for fees, poor academic performance and a perception that education was useless (particularly for male learners) (see Figure 10). Particularly for females, family commitments

80 The International Bank for Reconstruction and Development / The World Bank *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) xx.
 81 Statistics South Africa (note 39 above) 12.
 82 K Hall ‘Children’s access to education’ in M Shung-King, L Lake, D Sanders & M Hendricks (eds) (2019) *South African Child Gauge 2019*. Cape Town: Children’s Institute, University of Cape Town 240.
 83 Ibid.
 84 Statistics South Africa (note 39 above) 15.

were a reason for not attending an educational institution. The fact that 22 per cent⁸⁵ of learners were not attending an educational institution in 2018 because of a lack of fees is extremely concerning, given the provisions that the Department of Basic Education (DBE) has made to proclaim ‘no-fee’ schools and ensure that those that cannot afford to pay school fees do not have to. It is either that schools are forcing learners to pay fees or the learners are leaving school, refusing to apply for fee exemptions. Further investigations by the Commission on this issue are required.

The National School Feeding Scheme (NSFS) plays an essential role in ensuring that learners have at least one nutritious meal per day and assist homes that live in poverty. Figure 11 indicates a substantial increase in the proportion of learners with access to the NSFS, particularly in the poorer provinces like the Eastern Cape, Limpopo and Mpumalanga. The rate of meal provision in the Western Cape is concerning, which is just 57 per cent, while the national average is 77 per cent. Gauteng is also concerning, although this may be due to the number of quintile five schools in the provinces. Further investigations may be required.

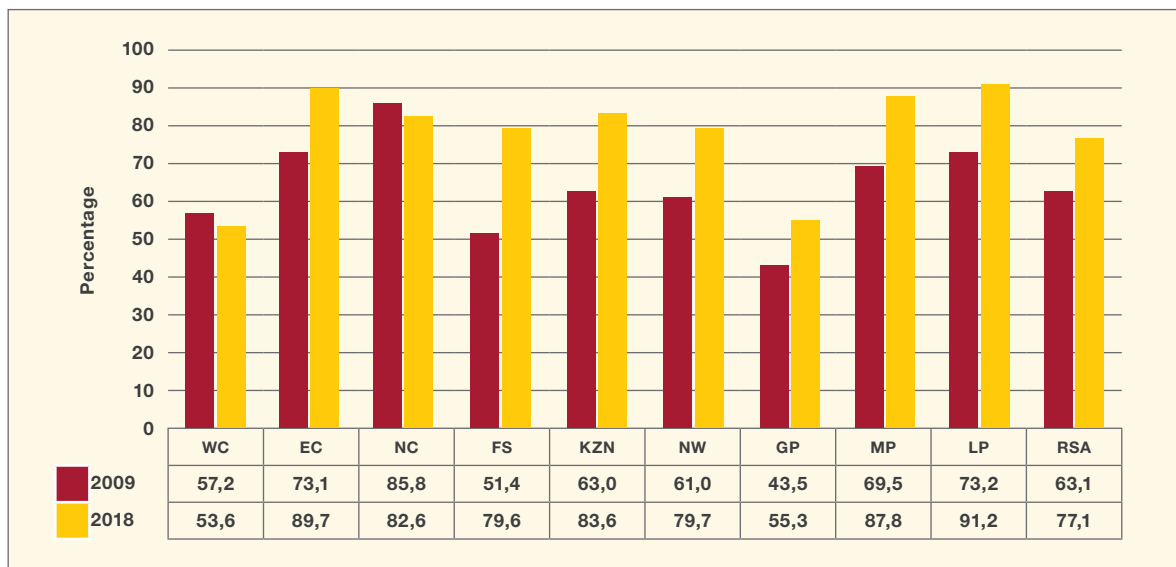


Figure 11: Proportion of Learners in Public School with Access to the NSNP, 2009 and 2018⁸⁶

There remains a question of whether the meals provided by the NSFS are nutritious (adequate and appropriate) for growing children. According to the Studies in Poverty and Inequality Institute (SPII), 72 per cent of all schools that provide meals to learners provide a protein daily and 73 per cent do not miss feeding days. However, only 54 per cent provide fruit or vegetable in their daily meal. This figure is just 24 per cent in the Free State. Worryingly, only 48 per cent of schools do not miss a feeding day in the Eastern Cape. This is concerning because, as illustrated above, the Eastern Cape is one of the poorest provinces in the country and often the meal that learners receive at school is their only meal of the day.

85 Note that in DBE *Response to SAHRC Questionnaire: Basic Education* (2018) the DBE reported to the Commission that for children aged 7-15 years, no attendance due to no money for fees constituted 7.5 per cent, whereas this reason for non-attendance for children between 16 and 18 years was reported as 25.1 per cent.

86 Statistics South Africa (note 39 above 17).

5.2 Norms and Standards

Information provided by the DBE to the Commission in 2019 illustrates the state of provision of acceptable sanitation facilities to public schools in South Africa.⁸⁷ According to Table 5, 37 per cent of all public schools in South Africa have just pit latrines serving as sanitation facilities (unacceptable sanitation) and 29 per cent now have acceptable sanitation but without demolished pit latrines.

In the Free State and North West provinces, 70 per cent and 76 per cent of all schools respectively do not have access to acceptable sanitation. This applies to 51 per cent of all schools in the Eastern Cape and 48 per cent of all schools in KwaZulu-Natal. Over half of all schools in Limpopo and KwaZulu-Natal have not demolished the unsafe pit latrines, while one-quarter of all schools in Mpumalanga and the North West have undemolished pit latrines, which pose a health and safety risk to learners at those schools.

Table 5: Public Schools with Pit Latrines in Use or Unused (but not demolished), per province, 2018

Province	Number of schools	PIT LATRINES			
		Schools with pit latrines ONLY (unacceptable sanitation)	Schools with pit latrines only (unacceptable sanitation) (%)	School with combination of proper sanitation but pits not demolished	School with combination of proper sanitation but pits not demolished (%)
Eastern Cape	3157	1598	51%	323	10%
Free State	223	156	70%	42	19%
Gauteng	747	0	0%	5	1%
KwaZulu-Natal	2842	1365	48%	1477	52%
Limpopo	1360	507	37%	853	63%
Mpumalanga	1111	127	11%	278	25%
North West	192	145	76%	47	24%
Northern Cape	373	0	0%	15	4%
Western Cape	656	0	0%	0	0%
TOTAL	10661	3898	37%	3040	29%

It is important to note that in its Concluding Observations in response to South Africa's International Covenant on Economic, Social and Cultural Rights (ICESCR) country report, the Committee on Economic, Social and Cultural Rights (CESCR) noted its concern about the poor state of public school infrastructure, the number of schools that have no or limited access to water, sanitation facilities and electricity, due both to budgetary cuts and, in some cases, to mismanagement of funds, high school dropout rates, the practice of charging fees in the form of voluntary contributions in no-fee schools, and at discriminatory effects of fee exemptions in fee-paying schools. Furthermore, it is concerned at the lack of guidance on the role and responsibility of private sector actors in education and that despite the efforts of the State party, the attendance of children from low-income families in early education remains low.⁸⁸

⁸⁷ DBE *Sanitation Intervention and the Eradication of Pit Latrines* (2018) 3.

⁸⁸ Committee on Economic, Social and Cultural Rights *Concluding Observations E/C.12/ZAF/CO/1* (12 October 2018).

In late 2013, the Minister of Basic Education approved regulations on Minimum Norms and Standards for Public School Infrastructure (Norms and Standards).⁸⁹ These regulations specified *inter alia* how schools should be built and how existing schools should be upgraded and to what standard. The Minister of the DBE also undertook to, within three years, eliminate or upgrade mud schools and all schools made of ‘other’ materials such as wood, metal and asbestos. Furthermore, within seven years, all schools should have a regular and appropriate water supply, electricity, sanitation facilities and electronic connectivity, and all schools should comply with safety and security standards. Despite these assurances by the Minister of the DBE, the evidence above indicates that poor sanitation facilities still exist and that there are schools without a regular supply of water and electricity.

In June 2018, Section 27 applied on behalf of Makangwane Secondary School in Limpopo to compel the DBE to provide the school with mobile classrooms and furniture by 16 June 2018.⁹⁰ The lack of appropriate infrastructure was affecting access to basic education at the school, where classes were held irregularly. On 22 January 2018, a corrugated iron roof blew off one of the buildings, injuring several learners. The judge in the case declared that the failure by the DBE, for more than a decade, to take swift appropriate action to address the unsafe conditions at the school and to provide adequate infrastructure was unlawful and unconstitutional.

In a case in the Eastern Cape, brought against the Minister of Education by Equal Education, an amendment to the Norms and Standards was argued for to close a loophole that states that the DBE is responsible for the provision and upgrading of specific parts of school infrastructure but excluding parts that are the responsibility of other State departments or agencies such as Eskom or the Department of Public Works.⁹¹ Furthermore, the provision that required the upgrading of schools made ‘entirely’ of inappropriate materials was unlawful. Equal Education cited Amatolaville Primary School as a co-applicant.

The court ruled in Equal Education’s favour, finding that the Minister of the DBE’s argument that the DBE’s “efforts are hamstrung by the lack of adequate resources, budget and reliance on other State organs” is inconsistent with the Constitution.⁹² In relation to the wording in the norms and standards that requires the upgrading of schools made ‘entirely’ of inappropriate materials, the Court found that it should rather read:

[A]ll schools and classrooms built substantially from mud as well as those built substantially from materials such as asbestos, metal and wood, must within a period of three years from the date of publication of the Regulations be replaced by structures which accord with the Regulations, the National Building Regulations.⁹³

This echoes many of the concerns raised above in this report and the Commission will be monitoring the State’s adherence to the CESCR’s recommendations.

89 South African Schools Act, 84 of 1996 Regulations Relating to Minimum Norms and Standards for Public School Infrastructure.

90 *School Governing Body of Makangwane Secondary School v the MEC of the Executive Council of the Limpopo Department of Education and Others* Case no 3158/2018 (1 February 2019).

91 *Equal Education and Another v Minister of Basic Education and Others* 2019 (1) SA 421 (ECB).

92 *Ibid* 209.

93 *Ibid* (emphasis added).



5.3 Education and unemployment

As explained previously in this report, the link between education and unemployment is inextricable.

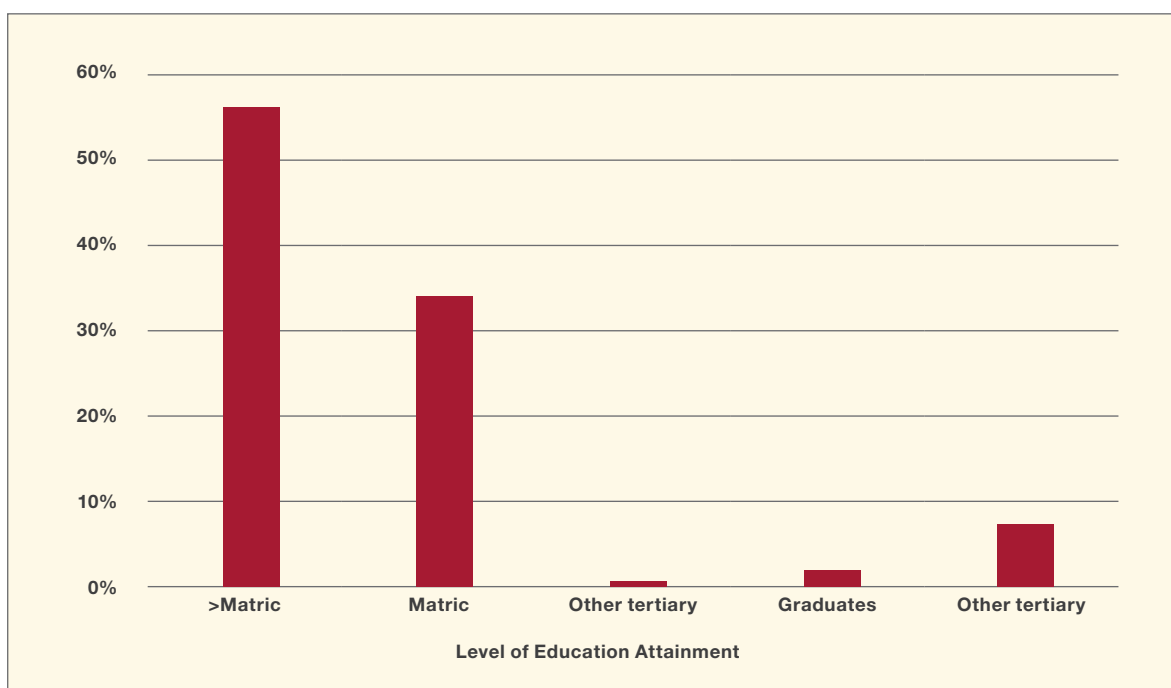


Figure 12: Unemployment Level and Educational Attainment, 2019⁹⁴

According to Stats SA's Labour Force Survey, individuals with less than a matric qualification have an unemployment rate of over 50 per cent, while those with tertiary qualifications have an unemployment rate of under 10 per cent.⁹⁵ In a study conducted by the World Bank, it was found that:

In 1995, those with post-secondary education were 34 per cent more likely to participate in the labour market than those with no education. In 2015, this probability increased to 48 per cent. Similarly, people with secondary education have increased their probability to participate from 7 per cent in 1995 to 23 per cent in 2015.⁹⁶

⁹⁴ Statistics South Africa *Quarterly Labour Force Survey: Quarter 4: 2018* (2019) 7.

⁹⁵ Ibid 7.

⁹⁶ The International Bank for Reconstruction and Development / The World Bank *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) 81.



CHAPTER THREE: INEQUALITY

1. Introduction

South Africa remains one of the most unequal countries in the world,⁹⁷ while equality-related complaints consistently constitute the highest number of complaints received by the Commission. Having devoted the 2017/18 Equality Report to the under-researched question of vertical economic inequality, this chapter will revert to predominantly focusing on status (horizontal) inequality. First, the relevant legal and policy framework is set out. Thereafter, developments about the right to the equal protection and benefit of the law; the prohibition of unfair discrimination; hate speech; and systemic inequality in the enjoyment of the right to access adequate health care services, the right to basic education, and the right of access to justice, are reported.

2. Legal and policy framework

2.1 International and regional framework

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD) constitute the main human rights instruments that the State is obliged to implement in the context of equality. The principle of non-discrimination similarly permeates the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹⁸ In addition, relevant UN Committees⁹⁹ interpret these conventions, issue general comments regarding the rights and obligations enshrined in the conventions, and review South Africa's compliance with its international obligations to issue concomitant concluding observations. At a global policy level, the Sustainable Development Goals seek to build on the Millennium Development

97 See generally The World Bank *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) and SAHRC *Equality Report 2017/18: Achieving Substantive Economic Equality through Rights-based Radical Socio-economic Transformation* (2018).

98 Article 2(2) of the ICESCR provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

99 Committee on the Elimination of Racial Discrimination (CERD); Committee on the Elimination of Discrimination Against Women; Committee on the Rights of Persons with Disabilities (CRPD), Committee on Economic, Social and Cultural Rights (CESCR).

Goals and enshrine the global community's commitment to pursue certain pertinent development goals to achieve greater socio-economic justice.¹⁰⁰ Significantly, SDG 10 aims to reduce inequalities within and amongst countries.

At the regional level, the African Charter on Human and Peoples' Rights (ACHPR) explicitly prohibits unfair discrimination, while equality before the law and equal benefit and protection of the law are provided for in Article 3. Special protective measures for the aged and people with disabilities are provided for in Article 18(4). South Africa has also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), which provides for the protection of women and girl-children, as well as for the eradication of discrimination against women. At a regional policy level, Agenda 2063 expounds the transformative agenda for Africa's sustainable development, with non-discrimination being a key theme that characterises the attainment of various transformation objectives.

2.2 Domestic framework

At the domestic level, the Constitution makes the achievement of equality a foundational value of the Republic of South Africa, while section 9 of the Constitution guarantees the right to equality. The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) is the national legislation mandated by section 9(4) of the Constitution. The National Development Plan (NDP) is a key policy initiative which sets out the government's plans to eliminate poverty and reduce inequality by 2030. As a signatory to the Durban Declaration, South Africa was required to enact the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances (NAP), which was approved by Cabinet and deposited with the United Nations in 2019.

3. Equality before the law

The right to equality, guaranteed in section 9 of the Constitution, includes the right to equal protection and benefit of the law.¹⁰¹ Since the advent of democracy, the government has made steady progress in abolishing discriminatory apartheid-era legislation and policy and replacing these with new statutes and policies that align with constitutional values. However, certain legislative and policy gaps remain, which threaten the right of everyone to equal protection and benefit of the law.

3.1 Race and ethnicity

In South Africa, race categorisation is used by the government to measure advancement in terms of special measures such as those implemented in the employment equity and Broad-Based Black Economic Empowerment contexts. However, race categorisations, which correspond to classifications used by the apartheid government, do not take ethnic origin into account. Whereas race and ethnicity are related, ethnicity encompasses additional characteristics related to culture, language and region of origin. The use of apartheid-era race classifications to measure progress in advancing previously and currently disadvantaged people reinforces racial division and largely overlooks socio-economic status as a significant cause of inequality before the law. Indigenous peoples, whose ethnicity forms a crucial part of their identity and culture, have often expressed a sense of marginalisation and exclusion from democratic South Africa. The Commission has noted that the definition of 'indigenous people' in the South African context is controversial, in that it may refer both to the Khoi-San community as well as Nguni, Sotho, Tswana, Venda and Tsonga-speakers.¹⁰²

¹⁰⁰ UN General Assembly *Transforming our World: the 2030 Agenda for Sustainable Development* (2015) A/RES/70/1.

¹⁰¹ S 9(1) of the Constitution.

¹⁰² SAHRC *Report on the National Hearing Relating to the Human Rights Situation of the Khoi-San in South Africa* (2018) 8.



Government should ensure that indigenous peoples are legally recognised and benefit equally from the rights enshrined in the Constitution. Both formal recognition, as well as the opportunity to self-identify, are necessary to align with the right to equality before the law. The UN Committee on the Elimination of Racial Discrimination (CERD) has accordingly called on State parties to recognise indigenous cultures and ensure the equal enjoyment of the rights of indigenous peoples.¹⁰³ In addition, various international treaty bodies have noted that the restoration of land is essential to ensuring that indigenous peoples benefit from the law on an equal basis as non-indigenous peoples.¹⁰⁴

The signing into law of the Traditional and Khoi San Leadership Act in November 2019 constitutes a notable milestone in the official recognition of the Khoi-San people. For the first time in a century, the Khoi-San people enjoy legal recognition, thereby moving closer to the equal enjoyment and benefit of the law, including the rights guaranteed in the Bill of Rights. The Act provides that Khoi-San people may voluntarily prove their affiliation to a particular Khoi-San community and leader, and membership to a Khoi-San community is thus not predicated on geographic location. At the same time, qualifying for recognition as a Khoi-San community may be onerous to the extent that a community must show a “proven history of [the] existence of the community from a particular point in time up to the present”.¹⁰⁵ Given the displacement and dispossession of Khoi-San communities and land, evidentiary difficulties may be experienced in seeking recognition as a Khoi-San community. The Act also treats Khoi-San leaders differently from African traditional leaders. The Act simultaneously grants further

103 CERD *General Recommendation 23: Indigenous Peoples* (1997) para 4(a)-(b). See also CESCR *General Comment 21: Right of everyone to take part in cultural life* (art. 15, para. 1 (a), of the *International Covenant on Economic, Social and Cultural Rights*) (2009) para 23: ‘a first and important step towards the elimination of discrimination, whether direct or indirect, is for States to recognize the existence of diverse cultural identities of individuals and communities on their territories’.

104 CERD *General Recommendation 23: Indigenous Peoples* (1997) para 3:

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.

105 Clause 5 of the Traditional and Khoi San Leadership Bill.

recognition to traditional leaders, thereby expanding current constitutional and statutory recognition of customary law and practice. Whereas Khoi-San leaders enjoy jurisdiction over members on a basis of voluntary association, certain Civil Society Organisations (CSOs) have criticised the Act as entrusting traditional leaders with jurisdiction over land and everyone who resides in such geographic areas of jurisdiction.¹⁰⁶

Although the NCOP amended the Bill to provide for the support of the majority of community members present at a meeting where a leader has agreed with, for example, a mining company, there is a significant risk that the more comprehensive protection of informal rights in land under the Interim Protection of Informal Land Rights Act, 31 of 1996 (IPILRA) will be eroded. This would constitute a serious setback for indigenous groups' right to consent to mining, as elaborated by the Constitutional Court in the judgment of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*¹⁰⁷ and in the High Court judgment of *Baleni and Others v Minister of Mineral Resources and Others*¹⁰⁸ (dealing with the Xolobeni community and controversial mining operations in that area). Furthermore, it will lead to the unequal protection and benefit of the law by those who reside under traditional leaders in the former homeland areas, as opposed to other communities who enjoy informal rights on the land.

3.2 Gender

In 2018, the UN Committee on Economic, Social and Cultural Rights (CESCR) issued Concluding Observations that included a recommendation to the State to facilitate the recognition of marriages concluded according to the tenets of Islam (Muslim marriages).¹⁰⁹ Section 15(3)(b) of the Constitution explicitly states that any legislation that recognises marriages concluded under a system of religious or family law must be consistent with other provisions of the Constitution, including the right and foundational value of equality. Section 8(d) of PEPUDA prohibits "any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child".

In *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 (Women's Legal Centre Trust)*¹¹⁰, the High Court held that the rights to equality, dignity, access to justice and the best interests of the child were all violated by the State's failure to comprehensively regulate Muslim marriages. The Court concluded that "the only reasonable means of fulfilling the section 7(2) duty is through the enactment of legislation".¹¹¹ The Court thus made a declaratory order to the effect that "the State is obliged by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in sections 9, 10, 15, 28, 31 and 34 of the Constitution by preparing, initiating, introducing, enacting and bringing into operation, diligently and without delay as required by section 237 of the Constitution legislation to recognise marriages solemnised in accordance with the tenets of *Sharia* law ('Muslim marriages') as valid marriages and to regulate the consequences of such recognition".¹¹² It was further declared that the President and Cabinet had failed in fulfilling the aforementioned obligations, and that such conduct was invalid.

106 LARC *Submission on the Traditional and Khoi-San Leadership Bill, 2015* (2018).

107 *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41.

108 *Baleni and Others v Minister of Mineral Resources and Others* [2019] 1 All SA 358 (GP).

109 Committee on Economic, Social and Cultural Rights *Concluding Observations* E/C.12/ZAF/CO/1 (12 October 2018) paras 52-53.

110 2018 (6) SA 598 (WCC). The SAHRC was cited as Eight Respondent.

111 Paras 179-181, 183.

112 Para 252 Order 1.

The President, Cabinet and Parliament were accordingly ordered to rectify the defect within 24 months of the date of the judgment, failing which the Divorce Act, 70 of 1979 would apply under certain circumstances.¹¹³

3.3 Disability

Articles 5 and 12 of the UN Convention on the Rights of Persons with Disabilities guarantee the right to equal protection and benefit of the law, and equal recognition before the law, respectively. To enjoy the equal benefit of the law, it follows that people with disabilities' legal capacity must be recognised by all aspects of the law. As noted by the UN Committee on the Rights of Persons with Disabilities (CRPD), "the right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others".¹¹⁴

The Mental Health Care Act, 17 of 2002 constitutes one of the primary statutes that deny persons with mental and intellectual disabilities legal capacity, thus violating the State's obligations to international law in addition to the guarantee of equality before the law in section 9(1) of the Constitution.¹¹⁵ The CRPD accordingly recommended that the State abolish this and similar laws, while training relevant officials regarding the legal capacity enjoyed by all persons, including persons with disabilities, as well as regarding good practice in supported decision-making. In its response to the Committee's List of Issues, the State noted that the South African Law Commission's Report on Assisted-Decision Making has been finalised and is currently under Executive consideration. The State further indicated that it planned to repeal Chapter 8 of the Mental Health Care Act, which deals with care and administration, once legislation providing for supported decision-making is passed.

3.4 Unfair discrimination

The Constitution and PEPUDA prohibit direct and indirect unfair discrimination on various grounds.¹¹⁶ In addition to generally prohibiting unfair discrimination,¹¹⁷ PEPUDA furthermore aims to prohibit specific forms of structural and systemic discrimination on the grounds of race, gender and disability.¹¹⁸ Various international and regional human rights treaties similarly emphasise the equal enjoyment of rights without discrimination on any recognised grounds.¹¹⁹ The Sustainable Development Goals are likewise premised on the fundamental principle of 'leaving no one behind',¹²⁰ whereas SDG 10 (reduce inequality within and among countries) Target 10.3 aims to "[e]nsure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard".

113 Para 252 Orders 2, 3, 5.

114 CRPD *General Comment No 1: Equal Recognition before the Law* (2014) para 8. Cf D Bilchitz 'Dignity, fundamental rights and legal capacity: moving beyond the paradigm set by the General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities' (2016) 32 SAJHR 410-437.

115 Similarly, the Choice on Termination of Pregnancy Act, 92 of 1996 and Sterilisation Act, 44 of 1998, deny the legal capacity of persons with mental or intellectual disabilities. See Committee on the Rights of Persons with Disabilities *Concluding Observations CRPD/C/ZAF/CO/1* (21 September 2018) paras 32-33.

116 S 9(2) and (3) of the Constitution; ss 6-9 of PEPUDA.

117 S 6 of PEPUDA.

118 *Ibid* ss 7-9.

119 Art 2 of the UDHR, art 2(1) of the ICCPR, art 2(2) of the ICESCR, art 1(1) of the ICERD, art 2(1) of the Convention on the Rights of the Child (CRC), arts 1 and 2 of the CEDAW, art 4(1) of the CRPD, art 2 of the ACHPR, art 3 of the African Charter on the Rights and Welfare of the Child (ACRWC), art 2(1) of the ACHPR Protocol on Women's Rights.

120 UN General Assembly *Transforming our World: the 2030 Agenda for Sustainable Development* (2015) A/RES/70/1.

Section 28(2) of PEPUDA – which is yet to be brought into operation – obliges the Commission to annually assess the “extent to which unfair discrimination on the grounds of race, gender and disability persist in the Republic, the effects thereof and recommendations on how best to address the problems”. Although the provision remains inoperative, the Commission reports in terms thereof to promote equality. The Commission will continue to adopt a broad approach to the interpretation of ‘race’ to include ethnic or social origin, and to the interpretation of ‘gender’ to include non-binary gender identities.

4. Policy developments

On 28 February 2019, Cabinet approved the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP). The approval of the NAP constitutes a milestone in ensuring that South African society participates in the elimination of various forms of unfair discrimination, thereby building a more socially cohesive country. The NAP arose from the Durban Declaration and Programme of Action (Durban Declaration) following the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The NAP aims to raise awareness among all sectors of society, both public and private, regarding the values of equality and dignity, non-discrimination and tolerance.

5. Judicial developments

Several judicial decisions during the period under review have further enhanced the law on equality and efforts to eliminate unfair discrimination. For example, in *Moosa NO and Others v Minister of Justice and Correctional Services and Others*,¹²¹ the Constitutional Court declared a provision of the Wills Act, 7 of 1953 unconstitutional for violating, inter alia, the right to equality. The impugned provision only accommodated ‘surviving spouses’ who had been in monogamous unions, thereby constituting unfair discrimination against Muslim women in polygamous marriages. The Court referred to Article 2(f) of the CEDAW, which enjoins State Parties to take measures to abolish all laws, regulations, customs and practices that discriminate against women.

*Gaum and Others v Van Rensburg NO and Others*¹²² concerned a decision taken by the General Synod of the Dutch Reform Church in 2016, which revoked a decision made in 2015 that recognised same-sex marriage based on love and fidelity, that Ministers could but were not obliged to officiate same-sex marriages, and further removed the requirement of celibacy for gay and lesbian persons to be ordained as Ministers. The Court recognised that the case concerned a ‘conflict’ between the right to freedom of religion and the right not to be unfairly discriminated against. The Court found that the LGBTQI+ community suffered prejudice historically and currently. Furthermore, the Court recognised established jurisprudence that whether or not a classification was unfair depended on context and that the Church had offered no argument to demonstrate that its impugned decision furthered equality or that in the relevant context the exclusion of LGBTQI+ individuals was justifiable, reasonable or fair.¹²³

A seminal judgment in respect of unfair discrimination was delivered by the High Court in the case of *Social Justice Coalition and Others v Minister of Police and Others*.¹²⁴ The case dealt with the alleged unfair and disproportionate allocation of police resources between wealthy and poor areas

121 *Moosa NO and Others v Minister of Justice and Correctional Services and Others* 2018 (5) SA 13 (CC).

122 *Gaum and Others v Van Rensburg NO and Others* (40819/17) [2019] ZAGPPHC 52 (8 March 2019).

123 *Ibid* paras 81-82.

124 *Social Justice Coalition and Others v Minister of Police and Others* (EC03/2016) [2018] ZAWCHC 181 (14 December 2018).

in the Western Cape. Importantly, the Court recognised that unfair discrimination can be indirect where differentiation appears to be neutral but has the effect of discriminating on a listed or unlisted ground.¹²⁵ The question that fell to be determined by the Court was whether the system used by the South African Police Services to allocate human resources discriminated against Black and poor people.¹²⁶ Crucially, the Court had to establish whether poverty constituted an unlisted ground according to the definition of prohibited grounds for discrimination set out in PEPUDA.¹²⁷ The Court set a new precedent by holding that poverty does indeed constitute a ground for unfair discrimination.¹²⁸ This constitutes a significant judicial development, especially considering the intricate relationship between race and poverty in South Africa. It will hold significant implications in respect of various issues, including alleged discrimination based on socio-economic status in the financial sector and in the implementation of special measures implemented to advance persons disadvantaged by unfair discrimination.¹²⁹

6. SAHRC complaints, monitoring, investigations and litigation

This section provides an overview of key developments in respect of equality-based complaints received by the Commission, investigations accordingly launched by the Commission and litigation in which the Commission was involved.

SDG 10 Target 10.3 aims to ensure equality of opportunity and outcome through, amongst other measures, eliminating discrimination. The related indicator 10.3.1 measures the “[p]roportion of population reporting having personally felt discriminated against or harassed within the previous 12 months based on a ground of discrimination prohibited under international human rights law”. The Commission can adapt the indicator to show the proportion of total complaints received by it that was based on discrimination.

The table below breaks down the equality complaints received by the Commission over the past three financial years:

Table 6: Equality Complaints Received by the Commission Over the Past Three Financial Years

Financial Year	Complaints per financial year	Equality complaints per financial year	%
2015/2016	4663	749	16
2016/2017	5012	705	14
2017/2018	5144	747	14.5

¹²⁵ Ibid para 36.

¹²⁶ Ibid para 54.

¹²⁷ Ibid para 57.

¹²⁸ *Social Justice Coalition and Others v Minister of Police and Others* (EC03/2016) [2018] ZAWCHC 181 (14 December 2018) para 65.

¹²⁹ Section 9(2) of the Constitution.

Furthermore, of the total 747 equality-related complaints received in 2017/18, the grounds for discrimination are as follows:

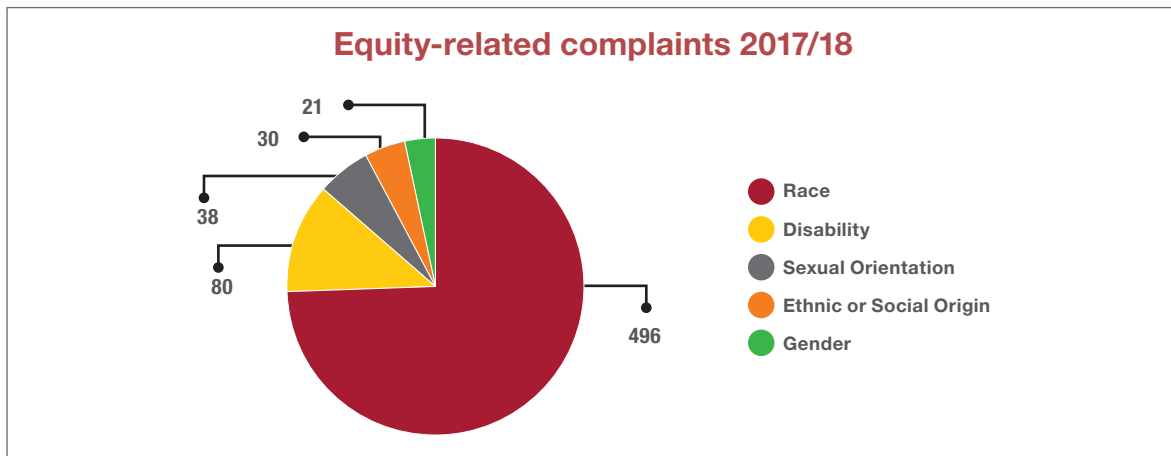


Figure 13: Equity-related complaints 2017/18

Preliminary statistics show that the Commission received 783 equality-based complaints in 2018/19, the grounds of which are as follows:

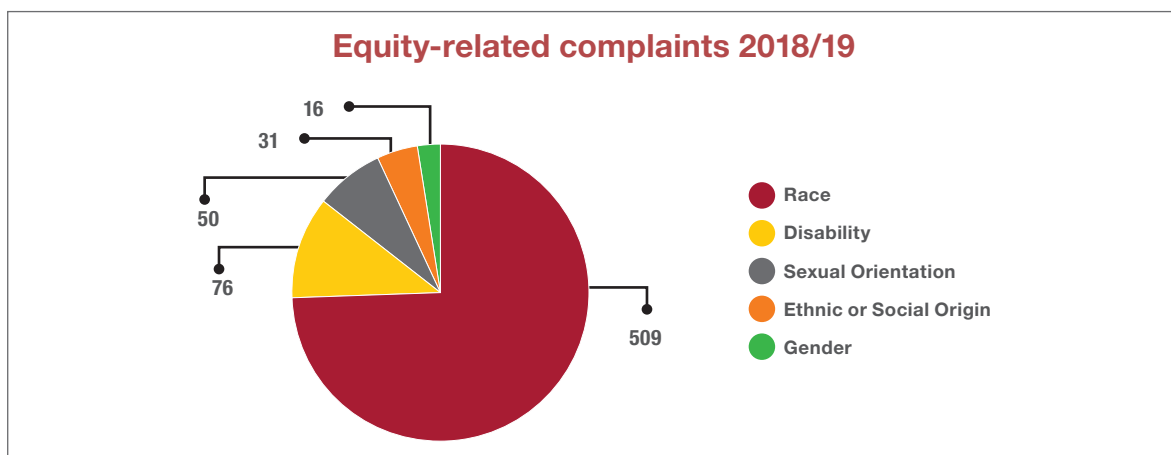


Figure 14: Equity-related complaints 2018/19

a) Systemic discrimination

According to Statistics South Africa, although there has been a decline in earning inequality between race groups, race remains a persistent factor in fostering inequality.¹³⁰ However, according to the World Bank, class or socio-economic status is said to predict 55 per cent of inequality of opportunity for South Africans, whereas race predicts 31 per cent.¹³¹ Given the legacy of apartheid policy and legislation, and the continuing persistence of structural inequality, race and class or socio-economic status are inextricably linked in the South African context. Growing inequality between racial groups may point to the increasing importance of socio-economic status in addition to race in leading to inequality of opportunity and outcome. In *Truworths Ltd and Others v Minister of Trade and Industry and Another*,¹³² the Western Cape High Court held that regulations

¹³⁰ Statistics South Africa *Inequality trends in South Africa: A multidimensional diagnostic of inequality* (2019) 6 <http://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf>.

¹³¹ The World Bank Group *An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa* (2018) 23.

¹³² *Truworths Ltd and Others v Minister of Trade and Industry and Another* 2018 (3) SA 558 (WCC).

promulgated under the National Credit Act 34 of 2005, requiring applicants to provide three month's bank statements or financial statements discriminated against the less privileged and fell afoul of section 14(2) and (3) of PEPUDA. The potential use of PEPUDA and related legislation to challenge structural inequality in novel ways has been fortified by the recognition of poverty as a prohibited ground for discrimination.¹³³

Monitoring carried out by SAHRC Provincial Offices has revealed that police cells are often in an uninhabitable condition without functioning toilets or hot water – yet non-nationals can be detained here for months due to delays on the part of the Department of Home Affairs. Monitoring further revealed a stark contrast between State facilities for older persons and people with disabilities that largely house Black persons and are under-resourced, compared to privately funded facilities that largely house White persons.¹³⁴

b) Racial tension amongst vulnerable groups

The Commission's *Report into Inequality in Eldorado Park and Surrounding Areas and School Disruption at Klipspruit West Secondary School*¹³⁵ demonstrates the complex nature of racial discrimination in contemporary South African society, where racial tensions are seemingly escalating between vulnerable race groups. The protests in Eldorado Park were allegedly spurred by dissatisfaction with slow service delivery and land reform, and against the appointment of a Black African principal at Klipspruit West Secondary School. According to the community, the appointment reinforced the perception of forced integration in the Coloured community, as well as underscoring the lack of equal job opportunities provided for Coloured persons. Submissions further alleged that the appointment procedure for the principal was flawed and improperly influenced.¹³⁶ The Commission observed that many members of the Coloured community view the rigid implementation of affirmative action as perpetuating their disadvantage as a current and historical racial minority suffering from poverty and inequality.¹³⁷ Nevertheless, the Commission found that the rejection of the appointment of an African school principal was 'racially motivated' and thus unconstitutional and inconsistent with section 7 of PEPUDA,¹³⁸ while further finding the existence of racial tension within the broader community.

Affirmative action or special measures in various contexts, including employment equity practices that may amount to rigid implementation of 'targets' and the exclusive consideration of national demographics, may also continue to prejudice socio-economically and politically vulnerable minority groups.¹³⁹ The Commission is in the process of probing similar allegations of the erosive effects of employment equity practices on social cohesion in the Western Cape.¹⁴⁰ The Commission has also observed through its monitoring activities that in certain areas, community members regard African police officers as outsiders who have jobs at their expense.¹⁴¹

133 *Social Justice Coalition and Others v Minister of Police and Others* (EC03/2016) [2018] ZAWCHC 181 (14 December 2018).

134 SAHRC *State of Human Rights in the Northern Cape (2020)*; SAHRC *State of Human Rights in the Free State (2020)*.

135 SAHRC *Report into Inequality in Eldorado Park and Surrounding Areas and School Disruption at Klipspruit West Secondary School* (2018).

136 *Ibid* 13-18.

137 *Ibid* 51.

138 *Ibid* 46.

139 SAHRC *Equality Report 2017/18: Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa* (2018).

140 *V Cruywagen* 'SAHRC probing if Employment Equity Act damaging cohesion between black, coloured people' (4-03-2019) IOL.

141 SAHRC *State of Human Rights in the Northern Cape (2020)*.

c) Business and human rights

Section 8(2) of the Constitution provides that “a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”. The constitutional prohibition against unfair discrimination, as well as PEPUDA, similarly apply to all persons, including business actors. The Commission has noted an increase in instances where business and human rights interfaced, at times leading to tensions in the public. One such instance was when clothing-retail company *H&M* had an advert that portrayed a black child in a hoodie which stated ‘coolest monkey in the jungle’. The Commission, in its efforts to collaborate with CSOs and businesses to develop a culture of human rights and respect for equality and diversity, intervened and proposed various measures to assist *H&M* to rectify its mistakes.¹⁴²

i) Gender and sexual orientation

SDG 5 (Achieve gender equality and empower all women and girls) Target 5.1 aims to “[e]nd all forms of discrimination against all women and girls everywhere”. Related indicator 5.1.1 measures “[w]hether or not legal frameworks are in place to promote, enforce and monitor equality and non-discrimination on the basis of sex”. Both the Constitution and PEPUDA prohibit unfair discrimination by the State or any person on the bases of, amongst other grounds, gender or sexual orientation.¹⁴³ Discrimination on either of these two grounds is presumed to be unfair, unless it can be proven that it was fair.¹⁴⁴ PEPUDA further includes a specific provision prohibiting unfair discrimination on the ground of gender, which narrowly conceptualises ‘gender’ and gender identity in a binary fashion that is only applicable to ‘women’.¹⁴⁵ Given the recent increase in complaints alleging unfair discrimination on the ground of sexual orientation received by the Commission, significant cases of unfair discrimination on this ground will be highlighted.

The CGE possesses the primary constitutional mandate to monitor and promote gender rights. However, as an A-status NHRI in terms of the Paris Principles, the Commission engaged closely with the UN CESCR in its initial review of South Africa. In its NHRI Report to the Committee, the Commission highlighted that the abuse of traditional practices such as *ukuthwala* unfairly discriminated against women on the ground of gender. However, the Commission pointed out that traditionally such practices do not constitute rape, although the meaning of consent in this context remains unclear.¹⁴⁶ The Commission accordingly recommended to the CESCR that it requests information from the State on steps taken to prevent the *abuse* of this traditional practice,¹⁴⁷ bearing in mind the cultural rights afforded to everyone under section 31 of the Constitution to the extent that the exercise of this right does not conflict with any other rights in the Bill of Rights. However, the CESCR views the allowance of virginity testing in terms of the Children’s Act, 38 of 2005 as well as the practice of *ukuthwala* (where a lack of consent on the part of a girl constitutes human trafficking) as

142 SAHRC *Media statement: SAHRC Provides Feedback on Progress by H&M on Diversity and Inclusiveness Programme* (8-10-2018).

143 S 9(3) and (4) of the Constitution; see further ss 6, 8, 13(2)(a) and the definition of ‘prohibited grounds’ in PEPUDA.

144 S 14 of PEPUDA.

145 S 8 of PEPUDA.

146 SAHRC *National Human Rights Institution Report to the United Nations Committee on the Economic, Social and Cultural Rights* (2017) para 29. See further SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* (2017) 20-21.

147 SAHRC *National Human Rights Institution Report to the United Nations Committee on the Economic, Social and Cultural Rights* (2017) para 32.4.

harmful practices. The Committee accordingly recommended the complete prohibition of these practices.¹⁴⁸

In respect of the right not to be unfairly discriminated against on the ground of sexual orientation, and LGBTQI+ rights more broadly, the Commission concluded a Conciliation Agreement with author Gretha Wiid in July 2018. The Commission had received 77 complaints at the time, alleging that certain publications by Ms Wiid, which were written from a Christian perspective, infringed the rights of the LGBTQI+ community. In particular, the publications insinuated that being homosexual was a result of parental abuse or neglect, a practice that should be eschewed, depraved or worthy of censure. The Commission balanced Ms Wiid's right to religious freedom and to practise her religion, as well as her right to freedom of expression, against the equality rights of the LGBTQI+ community. The Commission and Ms Wiid accordingly recognised that in exercising religious or freedom of expression rights, no one may unfairly discriminate against the LGBTQI+ community. It was agreed that the publications would be revised, and that previous editions would not be distributed. It was further agreed that the topic of LGBTQI+ rights or sexual orientation would not be addressed by Ms Wiid in any workshops she may facilitate in the future.¹⁴⁹

Monitoring undertaken by SAHRC Provincial Offices reveals that many holding cells are inappropriate for people who face discrimination based on their sexual orientation and gender identity, and that police require further sensitisation training in this regard.

ii) *Disability*

PEPUDA specifically prohibits unfair discrimination on the ground of disability.¹⁵⁰ Nevertheless, people with disabilities continue to be discriminated against in all aspects of life in South Africa, including the economic and social spheres.¹⁵¹ In 2017, the Commission received a complaint from an older person with a visual impairment, alleging that she was denied entry into a Woolworths coffee shop because she was accompanied by a guide dog. Such conduct by any person would constitute the denial of a supporting facility necessary for a person with a disability to function in society, in contravention of section 9(a) of PEPUDA. Upon closer engagement with the complaint, the Commission established that this problem was not isolated to that particular instance. The Commission accordingly mediated a settlement agreement between Guide-Dogs Association South African and Woolworths Proprietary Limited. Amongst other measures, it was agreed that Woolworths would review its policies and procedures to ensure that such gave effect to the rights of persons with disabilities, increase awareness amongst all staff regarding the rights of persons with disabilities, conduct and enhance training for all staff regarding the rights of persons with disabilities, and display signage in all stores and coffee shops reflecting the internationally recognised symbol for the use of guide, service and autism support staff and that Woolworths would conduct a due diligence exercise to ensure compliance with this aspect of the agreement. A SAHRC Provincial Office received a complaint of similar conduct by another business in 2019.¹⁵²

148 Committee on Economic, Social and Cultural Rights *Concluding Observations* E/C.12/ZAF/CO/1 (12 October 2018) paras 54-55.

149 SAHRC *Gretha Wiid and SAHRC Conciliation Agreement* (18 July 2018).

150 Section 9 of PEPUDA.

151 SAHRC *Equality Report 2017/18: Achieving substantive economic equality through a rights-based radical socio-economic transformation in South Africa* (2018) 19; SAHRC *Report: National Hearing on Unfair Discrimination in the Workplace* (2017); *Research Brief on Disability and Equality in South Africa 2013-2017* (2017).

152 SAHRC *State of Human Rights in KwaZulu-Natal* (2020).

A failure to provide reasonable accommodation¹⁵³ for persons with disabilities constitutes unfair discrimination in terms of section 9(c) of PEPUDA as well as the CRPD. Structural discrimination experienced by people with disabilities often relates to society's poor understanding of what reasonable accommodation demands.¹⁵⁴ For example, the SAHRC Free State Provincial Office received a complaint regarding a driving school that allegedly does not accept deaf students. The SAHRC Eastern Cape Provincial Office received a complaint that is not based on unfair discrimination, but nevertheless points to the failure of police vehicles to accommodate people with disabilities. SAHRC Provincial Office monitoring activities of, amongst others, facilities for people with disabilities revealed that one such facility did not have an emergency evacuation plan in place. Since the facility cares for people with serious physical disabilities, including quadriplegic persons, this finding is of great concern to the Commission and the SAHRC Free State Provincial Office has accordingly launched its own-initiative investigation of the matter.

c) Hate speech

In addition to the prohibition of unfair discrimination contained in the Constitution and PEPUDA, the Constitution excludes from the ambit of protection of the right to freedom of expression, "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".¹⁵⁵ The exclusion of certain forms of harmful expression from the scope of the right to freedom of expression underscores the balance that needs to be struck between two fundamental rights, namely free expression and equality. The value of human dignity informs both these rights.

The constitutional exclusion of hate speech from protection under the right to freedom of expression is given effect by section 10 of PEPUDA, which is more widely framed than the constitutional definition thereof:

10 Prohibition of hate speech

(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.

The Supreme Court of Appeal declared section 10 of PEPUDA unconstitutional in *Qwelane v South African Human Rights Commission and Another*.¹⁵⁶ Confirmation proceedings will be heard by the Constitutional Court on 17 May 2020.

153 Art 2 of the CRPD:

'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

154 Committee on the Rights of Persons with Disabilities *Concluding Observations* CRPD/C/ZAF/CO/1 (21 September 2018) paras 8-9.

155 S 16(2)(c) of the Constitution.

156 2020 (2) SA 124 (SCA).

7. Legislative developments

The Prevention and Combating of Hate Crimes and Hate Speech Bill [B9-2018] lapsed in terms of National Assembly Rule 333(2) in May 2019, but was later revived by a National Assembly motion in October 2019.¹⁵⁷ The Commission had made submissions on the revised version of the Bill earlier in 2019. The Commission underscored the fact that the current exception to the offence of hate speech provided for in clause 4(2)(d)¹⁵⁸ seems to accord more weight to religious freedom than the inherent dignity and right to equality of persons who suffer from patterns of discrimination and persecution, such as the LGBTQI+ community. In terms of section 31 of the Constitution, members of cultural and religious communities may only practise their culture or religion to the extent that the exercise of this right does not conflict with the other rights in the Bill of Rights. Continued discrimination based on LGBTQI+ status fundamentally violates the rights to equality and dignity of members of such communities. The Commission accordingly recommended the further revision of this exemption to give greater weight to equality and dignity rights, or to remove the exception in its entirety.¹⁵⁹

8. Judicial developments

Various Equality Courts made pronouncements regarding hate speech during 2018. However, the declaration of constitutional invalidity of section 10 of PEPUDA by the Supreme Court of Appeal in *Qwelane* constitutes the most important development in this context.

i) *SAHRC v Khumalo*

The Commission instituted proceedings in the Equality Court against Velaphi Khumalo, who posted a serious racial slur against white people on social media in January 2016 calling for the cleansing of whites and to act 'as Hitler did to the Jews'. The Equality Court observed that section 10 of PEPUDA should be purposively interpreted in terms of section 16 of the Constitution, which both guarantees the right to freedom of expression while excluding from that protection harmful expression such as hate speech. This led the court to conclude that for expression to constitute hate speech, it must be hurtful *and* harmful or incite harm *and* promote propagate hatred for it to be in line with the Constitution. The court ultimately held that Khumalo had perpetrated hate speech.¹⁶⁰

ii) *Masuku and Another v SAHRC obo South African Jewish Board of Deputies*

The Supreme Court of Appeal (SCA) overturned the earlier Equality Court judgment that had found in the Commission's favour that certain statements made by Masuku constituted hate speech. The Commission had instituted legal proceedings after making a preliminary finding that statements regarding threatened retaliation by COSATU against Jews who supported the Palestinian occupation constituted hate speech on the ground of religion. The SCA stated that it is open to doubt whether section 10 of PEPUDA can be justified under the constitutional limitations clause because section 16(2) of the Constitution provides 'an internal

¹⁵⁷ Parliamentary Monitoring Group 'Bill history' PMG <<https://pmg.org.za/bill/779/>>.

¹⁵⁸ Cl 4(2)(d) exempts 'the bona fide interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings, to the extent that such interpretation and proselytisation does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a)' from the offence of hate speech.

¹⁵⁹ SAHRC *Prevention and Combating of Hate Crimes and Hate Speech Bill* [B9-2018]: *Submission to the Portfolio Committee on Justice and Correctional Services* (15-02-2019) 4.

¹⁶⁰ *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ).

limitations clause'.¹⁶¹ The SCA went on to determine whether the impugned statements constituted hate speech. In doing so, the Court disregarded the principle of subsidiarity, which holds that where a statute gives effect to constitutional provisions, including remedies, the statute, and not the Constitution, should be relied on.¹⁶² The SCA discussed section 16 of the Constitution and did not consider the right to equality, which PEPUDA aims to give effect to. The Court further ignored the fact that PEPUDA explicitly aims to prohibit hate speech as defined in section 16(2) of the Constitution,¹⁶³ and that without reliance on PEPUDA, no prohibition of hate speech exists in law.¹⁶⁴ The Commission has accordingly lodged an application for leave to appeal with the Constitutional Court. The matter will be held in abeyance until after the confirmation proceedings before the Constitutional Court in the Qwelane matter.

iii) *Mona v Harry Leicester and Others*

In the matter of *Mona v Harry Leicester and Others*,¹⁶⁵ the Commission instituted legal proceedings in the Equality Court on behalf of Mona after the farmers for whom he worked repeatedly called him a 'kaffir', forced him to consume faecal matter from a sewerage main hole on the premises, and submerged him into the sewerage main hole. The Court followed the injunction of PEPUDA to interpret any dispute in its context, by setting out the history of South Africa's racist past.¹⁶⁶ The Court found the utterance of the word 'kaffir' to constitute hate speech under section 10 of PEPUDA, noting that the use of the word 'is calculated to deliver the harshest and most hurtful blow of projecting African people as the lowest beings of superlatively moronic proportions'.¹⁶⁷ The Court accordingly held that there can be no doubt that the use of this word constitutes hate speech. The Court further found that the conduct of the respondents was 'barbaric' in nature and constituted a gross violation of Mona's dignity as well as amounting to harassment as prohibited under section 11 of PEPUDA. The court ordered the respondents to issue an unconditional apology to Mona, and further to attend a programme on race relations for three months at the Commission. Finally, the Court ordered the respondents to pay damages in the amount of R200,000 for the impairment of his dignity and for causing him pain, and emotional and psychological suffering.

iv) *Qwelane v South African Human Rights Commission and Another*

In *Qwelane v South African Human Rights Commission and Another*, the Supreme Court of Appeal declared section 10 of PEPUDA unconstitutional. The Court did so based on the vague standard for hate speech set by section 10, which differs from the exclusion of hate speech in section 16(2) of the Constitution. The Court held that the section 10 standard was 'barely intelligible', and further that the reference to 'hurtful' was vague and that to prohibit

161 *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies* 2019 (2) SA 194 (SCA) paras 13-14.

162 This is a well-established principle in our law and was confirmed in various Constitutional Court judgments, including *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 22 and *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* 2016 (2) SA 1 (CC) para 59.

163 Section 2(b)(v) of PEPUDA states that one of the Act's objects is to prohibit advocacy of hatred as contemplated in section 16(2)(c) of the Constitution.

164 Because section 16(2) of the Constitution does not 'prohibit' hate speech – it is merely definitional.

165 *Mona v Harry Leicester and Others* Case no Eq1/2018 (EqC).

166 *Ibid* paras 42-44.

167 *Ibid* para 75.

words with a hurtful effect was 'going too far'.¹⁶⁸ The Court further held that section 10 was not capable of being interpreted conjunctively i.e with 'and' read between subsections (a) and (c). The Court opined that the State was justified in extending the prohibition of hate speech to include the ground of sexual orientation.¹⁶⁹ The Court accordingly dismissed the Commission's complaint against Qwelane, and ordered that section 10(1) of PEPUDA reads as follows:

No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.

The matter was heard by the Constitutional Court on 17 May.

9. Complaints and investigations

The Commission continues to receive numerous complaints alleging hate speech. Given that hate speech is prohibited on the same grounds as the prohibition of unfair discrimination, complaints often overlap in that both phenomena give rise to violations of the right to equality as well as the right to human dignity enshrined in section 10 of the Constitution. Although the majority of such complaints allege the use of terms such as 'kaffir', some also concern hurtful and harmful utterances on the ground of disability, specifically albinism.

In the 2018/19 financial year, the Commission finalised several complex investigations, the complaints for some of which were received some years ago. In the matter of *Wendy Khan on behalf of the South African Jewish Board of Deputies (SAJBD) v Marius Llewellyn Fransman, Former Chairperson of the African National Congress (ANC), Western Cape*,¹⁷⁰ the SAHRC Western Cape Provincial Office investigated various statements made by the respondent, including a radio interview in which he accused the Democratic Alliance (DA) government of providing tenders to members of the Jewish community to the prejudice of the Muslim community. The Commission found that the statements could not be reasonably construed to demonstrate a clear intention to be hurtful, harmful or to promote hatred against the Jewish community, and therefore did not amount to hate speech. However, the Commission found the right to dignity had been infringed.

In another matter, various SAHRC Provincial Offices had received complaints regarding diverse statements made by Julius Malema, leader of the Economic Freedom Fighters (EFF). Certain complaints alleged that the following statement by Malema incited violence against White people and further constituted hate speech under PEPUDA:

They found peaceful Africans here. They killed them. They slaughtered them like animals. We are not calling for the slaughtering of White people, at least for now. What we are calling for is the peaceful occupation of the land and we don't owe anyone an apology for that...

The Commission investigated the matter with due regard to the injunction stipulated in PEPUDA to take into account the context of any dispute when applying the provisions of the Act.¹⁷¹ The Commission accordingly examined the context of the speech in which the impugned statement was made. The speech addressed the highly emotive issue of land, noting that land is central to Black identity.

168 *Qwelane v South African Human Rights Commission and Another* 2020 (2) SA 124 (SCA) para 69.

169 *Ibid* paras 59-60.

170 File Ref No: WC/1213/0911.

171 Section 3(3) of PEPUDA; see further *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] ZACC 13 para 48; *SARS v CCMA* 2017 (1) SA 549 (CC); *Duncanmec (Pty) Limited v Gaylard NO and Others* 2018 (6) SA 335 (CC).

Malema questioned why White people's 'peace' and privilege could not be disturbed, whereas Black people have never known peace. He then states that White people disturbed Black people's peace, and makes the impugned statement at this stage of the speech. The Commission objectively determined that the statement means that whereas peaceful Black Africans were killed like animals by White colonists, Malema is not calling for the killing of White people now. What he is calling for is the peaceful occupation of land. Whereas Malema's portrayal of White people's historic culpability in land dispossession may be offensive to White people, it remains true that White colonists occupied indigenous South African land through both violent and non-violent means. Furthermore, it is notable that Malema speaks of White people's historic, and not current, conduct.

The Commission further examined the impugned statement in the broader context of South African society. The historical context in which the statement is made is one of unjust land dispossession by White colonists and the apartheid government. Reference to the 'slaughtering' of people is first made in expressing an opinion as to the actions of colonists. The social context in which the statement is made is one of continued landlessness, poverty and inequality, giving rise to anger and frustration by the Black majority. The statement should thus be read bearing in mind the Supreme Court of Appeal's caution that vulnerable groups must be able to express anger and pain through robust speech and further noting the special protection afforded to political expression, including the highly politicised issue of land redistribution.¹⁷² The factual context of the statement shows that the subject of the statement was not perpetrating harm against White people, but the highly emotive and contested issue of land reform. The statement calls for the 'peaceful' occupation of land. Furthermore, Malema explicitly states that he is not calling for the slaughter of White people. Malema expanded the factual context by subsequently stating that 'not under my leadership will I call for the slaughter of white people, even though I cannot guarantee what will happen after me'.¹⁷³

A determination of hate speech, in this case, hinged on whether the addition of 'at least for now' to the statement that Malema is 'not calling for the slaughter of white people' can be reasonably construed to demonstrate a clear intention to incite harm at some indeterminate time in the future. Moreover, to the extent that it is alleged that the statement constitutes incitement to violence, it is not 'imminent' as per the language of section 16(2)(b) of the Constitution, or foreseen at the time when the utterances are made. Ultimately, viewed in its context, the statement deals with the subject matter of land dispossession and redistribution, and is not aimed at inciting harm to White people. The Commission accordingly concluded that the statement in this context does not amount to hate speech.¹⁷⁴

10. Systemic inequality in the enjoyment of rights

Section 9(2) of the Constitution guarantees to everyone the full and equal enjoyment of all rights. Despite the constitutional right to equality and the guarantee of non-discrimination in the enjoyment of rights set out in international human rights treaties,¹⁷⁵ inequality persists in the enjoyment of most of the rights enshrined in the Bill of Rights and international instruments. For purposes of this report, inequality in access to health care services, inequality in basic education, and inequality in access

172 *Hotz and Others v University of Cape Town* 2017 (2) SA 485 (SCA) para 67; *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) paras 122-123; *S v Mamabolo* 2001 (3) SA 409 (CC) para 37.

173 Huffington Post 'Malema: 'We Have Not Called For The Killing Of White People... At Least For Now'' (12-06-2018) *Huffington Post* <https://www.huffingtonpost.co.za/2018/06/12/malema-we-have-not-called-for-the-killing-of-white-people-at-least-for-now_a_23456601/>.

174 See further SAHRC *Findings regarding certain statements made by Mr Julius Malema and another member of the Economic Freedom Fighters* (March 2019).

175 Art 2 of the ICESCR; art 2 of the ICCPR.

to justice will be monitored and assessed. These rights are accorded to ‘everyone’, thereby squarely implicating the right to equality.¹⁷⁶

10.1 Inequality in access to health care services

Section 27(1)(a) of the Constitution guarantees everyone the right of access to health care services (including reproductive health care services), whereas Article 12 of the ICESCR recognises ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.¹⁷⁷ Promoting health is a key outcome envisaged by the NDP.¹⁷⁸ SDG 3 likewise provides for good health and well-being, with concomitant indicators closely reflecting Article 12 of the ICESCR. Given the persistent legacy of apartheid and concomitant patterns of structural inequality and poverty in South Africa, it is unsurprising that access to health care services and good health outcomes are grossly unequal in South Africa.¹⁷⁹ In addition to complaints regarding long waiting times, non-functioning equipment, a shortage of specialists and medicine stock-outs, the Commission received complaints alleging that a baby was referred and turned away from two hospitals, ultimately passing away. Another complaint alleged that a child was refused medical treatment, exacerbating the child’s ill health.¹⁸⁰

South Africa has a two-tiered health system comprised of public and private health care services. Medical schemes that cover the costs of private health care services are and continue to be unaffordable to the majority of the population.¹⁸¹ The poor already bear a disproportionate burden of ill health caused by communicable diseases, whereas instances of non-communicable diseases are similarly increasing amongst this socio-economically vulnerable group.¹⁸² According to Stats SA, 16.4 per cent of South Africans are covered by a medical aid scheme,¹⁸³ while the World Bank estimates that the private sector is responsible for 51.8 per cent of total health expenditure, thereby illustrating inequality in expenditure and service between the rich and poor.¹⁸⁴ Statistics show that of the approximately 16 per cent of the population covered by private health care, 72.4 per cent of White individuals and 48.9 per cent of Indians and Asians were members of a medical aid scheme, whereas only approximately 17.1 per cent of Coloured people and 9.9 per cent of Black Africans enjoyed coverage.¹⁸⁵

The Competition Commission’s report on its Health Market Inquiry demonstrates that costs of private health care are rising and that the private health care sector is neither efficient nor competitive, and that there is a lack of accountability in that no benchmarks or standards to measure the quality of health

176 In *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) para 42, the Constitutional Court recognised that ‘[e]quality in respect of access to socio-economic rights is implicit in the reference to “everyone” being entitled to have access to such rights...’.

177 A stronger affirmation of the right to the highest attainable standard of health, as opposed to its formulation in the South African Constitution, can also be found in Art 25 of the CRPD and Art 16 of the ACHPR.

178 National Planning Commission *National Development Plan* (2012) ch 10.

179 *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) para 31; *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) para 95.

180 SAHRC *State of Human Rights in KwaZulu-Natal* (2020).

181 Department of Health *National Health Insurance Policy* (2017) 14.

182 D McIntyre ‘What can be done to address health inequalities?’ (12-02-2018) *News 24*.

183 Stats SA *General Household Survey* (2018) 26.

184 World Bank Group *Republic of South Africa Systematic Country Diagnostic: An Incomplete Transition - Overcoming the Legacy of Exclusion in South Africa* (2018) 60.

185 Stats SA *General Household Survey* (2018) 27.

care outcomes. Consumers are left uninformed and unempowered.¹⁸⁶ High acceptability perceptions of the private health care system (92.6 per cent of private facility users were ‘very satisfied’ compared to 53.8 per cent of public facility users)¹⁸⁷ may therefore point to adaptive preferences as opposed to informed opinions based on objective quality and affordability in the private sector. This does not detract from the urgent need to improve the quality of public health care services.¹⁸⁸ One indicator of poor quality in the health care sector is the estimated cost of medical negligence claims, which stood at R70 billion in 2018 based on claims submitted, not all of which will be paid. In 2018 across all nine provinces, approximately R1.2 billion had already been paid out.¹⁸⁹ This points to the need to strengthen both health information systems, monitoring systems and accountability measures to ensure quality health provision and a reduction in scarce resources being spent on litigation.¹⁹⁰

A determinant of inequality in access to health care services is geographic location, both between provinces as well as between rural and urban areas.¹⁹¹ Imbalances between health care facilities available within and amongst provinces can be ascribed to the equitable share system of allocation of funds to provinces, which leaves particular allocations between health and other sectors to the discretion of provincial governments. This leads to disparate outcomes in the public health sector. For example, according to data received from the Department of Health (DoH), the average ambulance response time is 28 minutes in the Western Cape, but approximately three hours in the Northern Cape. At the same time, the proportion of complaints relating to patients care was higher in the Western Cape (38 per cent) than in the Northern Cape (30 per cent), whereas complaints based on staff attitude were the highest in the Northern Cape (46 per cent) compared to any other province, and a national average of 26 per cent. Challenges in achieving parity between urban and rural areas also persist. One way in which rural residents may access health care services is through internet connectivity. According to the DoH, all hospitals are connected via fixed lines, whereas only 50 per cent of Primary Healthcare Facilities are connected to the internet, mostly through 3G, LTE and VSAT connections. Infrastructure remains problematic.¹⁹²

Vulnerable groups face systemic discrimination in accessing health care services.¹⁹³ These include people with disabilities, older persons, children and women. The DoH has contributed to the development of the Disability Rights Machinery, which is hosted by the Department for Women, Youth and Persons with Disabilities. The DoH further collaborated with the Department of Basic Education to develop the DBE’s Screening, Identification, Assessment and Support (SIAS) policy and to develop guidelines for children with severe to profound intellectual disabilities. Various departments and State agencies like Stats SA in turn contributed to the DoH’s Framework and Strategy for Disability and Rehabilitation Services in South Africa. Additionally, the DoH works closely with the Department of Social Development to ensure that older persons in registered Residential Care Facilities have their health needs met. Indigent older persons are entitled to free health care, which is provided

186 Competition Commission *Health Market Inquiry: Final Findings and Recommendations Report* (2019) 31-37.

187 Stats SA *General Household Survey* (2018) 25.

188 National Planning Commission *National Development Plan* (2012) 336; D McIntyre & J Ataguba *Access to quality health care in South Africa: Is the health sector contributing to addressing the inequality challenge?* (2016) 23.

189 SAHRC *Research Interview with DPME: Health Cluster* (31-01-2019).

190 Ibid.

191 Committee on the Rights of Persons with Disabilities *Concluding Observations CRPD/C/ZAF/CO/1* (21 September 2018) para 42(a); Committee on Economic, Social and Cultural Rights *Concluding Observations E/C.12/ZAF/CO/1* (12 October 2018) paras 63, 64(b).

192 DoH *Response to SAHRC Questionnaire: Health* (2019).

193 For a comprehensive investigation that includes discrimination faced by vulnerable groups in the public health care system, see SAHRC *Public Inquiry: Access to Health Care Services* (2009) 47-54, 60-62.

at residential facilities where frailty prevents access to Primary Healthcare Facilities. However, this varies amongst provinces and is subject to the availability of resources.¹⁹⁴

The DPME has noted that three different government departments (DoH, DBE and the Department of Social Development) have diverse policies on adolescent reproductive-related health, yet according to the DPME, teenage pregnancy is increasing to around 13 per cent whereas the target was 8 per cent.¹⁹⁵ The CESCR has observed that only 7 per cent of health facilities offer abortion services (often based on the invocation of conscientious objections by medical staff), thus severely hampering access to such services, especially for women residing in rural areas.¹⁹⁶ Awareness should similarly be raised about the sexual and reproductive rights enjoyed by people with disabilities, and such information should likewise be made available to people with disabilities in accessible formats.¹⁹⁷ The latter is in line with SDG 3 Target 7, which aims to '[b]y 2030, ensure universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes'. Moreover, in its National Investigative Hearing into the Status of Mental Health Care in South Africa, the Commission found that numerous human rights issues may be ascribed to the 'prolonged and systemic neglect of mental health at the level of policy implementation'. Underinvestment by the government in mental health care, a focus on hospitalised care rather than primary health care, and neglect of children and the youth with intellectual and psychosocial disabilities were also found to be reasons for rights infringements.¹⁹⁸



194 DoH *Response to SAHRC Questionnaire: Health* (2019).

195 SAHRC *Research Interview with DPME: Health Cluster* (31-01-2019).

196 Committee on Economic, Social and Cultural Rights *Concluding Observations E/C.12/ZAF/CO/1* (12 October 2018) paras 66-67.

197 Committee on the Rights of Persons with Disabilities *Concluding Observations CRPD/C/ZAF/CO/1* (21 September 2018) paras 42-43.

198 SAHRC *Report on the National Investigative Hearing into the Status of Mental Health Care in South Africa* (2019)

Stigma prejudices the right to equality of the LGBTQI+ community and sex workers in respect of HIV and other sexual health-related treatments.¹⁹⁹ However, the Department of Health is a member of the South African National Aids Council (SANAC) which consists of 18 sectors of which the LGBTQI+ sector is an active member. The government is thus working through SANAC to reduce stigma in this respect.²⁰⁰ The DoH provides sensitisation training, outreach service provision at high transmission areas (HTAs), as well as collaboration with implementing partners to provide outreach and mobile services for sex workers.²⁰¹

In addition to falling victim to xenophobia in various aspects of life in South Africa, non-nationals face discrimination in the public health care system. The Minister of Health reportedly stated in November 2018 that foreign nationals place a burden on the health care system, which causes infections to go uncontrolled when non-nationals are admitted in large numbers. According to civil society actors, the denial of access to health care services is commonly experienced by foreign nationals. Confusion was created early in 2019 when an unauthorised circular from the national DoH was sent to provinces, instructing that foreign nationals be charged full fees. The circular was subsequently withdrawn, with the Deputy Director General of Health confirming that all persons should be charged according to a means-tested fee schedule.²⁰² The DoH has again confirmed to the Commission that South African identity documents are not required to access health care services. The DoH has further stated that the National Strategic Plan (NSP) 2017 – 2022 aims to cover all key and vulnerable groups, and includes a national sensitisation curriculum that is being updated.²⁰³

The National Health Insurance (NHI) scheme envisaged in the NDP attempts to gradually move towards the goal of universal health coverage and thereby provide equitable access to health care regardless of wealth or geographic location. It is estimated that the NHI will be incrementally implemented over the next 15 years. The private sector is one interest group that will likely challenge the establishment of an NHI Fund, which will purchase health care goods and services from both the public and private health sectors. This is because the private health care sector will no longer be able to charge exorbitant prices under the NHI. The costing of the NHI both in the short- and long-term has been incorporated into the policy development process, and is to a large extent dependent on economic growth to avoid significant adjustments to tax policies.²⁰⁴ Although the NHI and universal health coverage ultimately aim to achieve equality in the enjoyment of the right to health, the NHI Fund will purchase services from the private sector where provincial services are inadequate. The financial management and governance structure introduced by the NHI will have to be carefully considered and effectively implemented to avoid additional layers of bureaucracy, mismanagement and corruption.²⁰⁵ The NHI, which focuses on primary health care, will also be constrained by the fiscal environment in determining which health care packages will be provided for users. Furthermore, the NHI will not address the social determinants that cause unequal enjoyment

199 Stats SA *General Household Survey* (2017) 25; D McIntyre & J Ataguba *Access to quality health care in South Africa: Is the health sector contributing to addressing the inequality challenge?* (2016) 21; Committee on Economic, Social and Cultural Rights *Concluding Observations E/C.12/ZAF/CO/1* (12 October 2018) paras 32-33.

200 SAHRC *Research Interview with DPME: Health Cluster* (31-01-2019).

201 DoH *Response to SAHRC Questionnaire: Health* (2019).

202 C Kgosana, K Child & B Fuzile 'Crossed wires over free care for foreigners at state hospitals: Gauteng directive to hospitals hastily withdrawn by health department' (3-03-2019) *Times Live*.

203 DoH *Response to SAHRC Questionnaire: Health* (2019).

204 *Ibid*.

205 L Rispeil 'South Africa's universal health care plan falls short of fixing an ailing system' (28-06-2018) *The Conversation*.

of the right to health. Ultimately, universal health coverage must form part of a comprehensive and coordinated government strategy aimed at achieving substantive economic equality.²⁰⁶

10.2 Inequality in basic education

During the period 2018 - 2019, the Commission has sought to monitor and assess the observance of human rights of learners with special needs and that of undocumented children.

10.2.1 Learners with special needs

Section 29(1)(a) of the Constitution guarantees 'everyone' the right to basic education, including adult basic education. The ICESCR²⁰⁷ and the Convention on the Rights of Person with Disabilities likewise guarantee the right to education without discrimination on any prohibited ground.²⁰⁸ At the policy level, the NDP recognises the need for and long-term benefits of an inclusive education system for people with disabilities.²⁰⁹ Congruently, SDG 4 aims to [e]nsure inclusive and equitable quality education and promote lifelong learning opportunities for all. Target 4.1 aims to '[b]y 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes'. Target 4.5 aims to '[b]y 2030, eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations'.

In August 2015, the Commission co-launched the Human Rights Watch report entitled *Complicit in Exclusion - South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities*,²¹⁰ in which it was found that the government has failed to implement its policies or comply with international obligations in respect of providing inclusive education. The violation of the right to basic education includes approximately half a million out-of-school children with disabilities, as well as inadequate provision of special needs Learning and Teaching Support Material (LTSM).²¹¹ Relevant recommendations made in the report have not all been addressed by the government, although some progress has been made.²¹² Certain similar recommendations were made by the CRPD in its recent review of South Africa.²¹³

The DBE reported in 2018 that 597,593 children with disabilities remain outside of the school system.²¹⁴ According to the DBE's 2019 response, only three provinces provided data on the number of children with special needs that remain out of school, totaling just 774 children.²¹⁵ These

206 SAHRC *Equality Report 2017/18: Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa* (2018).

207 Art 13 of the ICESCR.

208 Art 24(2) of the Convention on the Rights of Persons with Disabilities.

209 National Planning Commission *National Development Plan* (2012) 304.

210 See: <https://www.hrw.org/report/2015/08/18/complicit-exclusion/south-africas-failure-guarantee-inclusive-education-children>.

211 Department of Basic Education *Report on the Implementation of Education White Paper 6 on Inclusive Education: An Overview for the Period 2013-2015* (2016) 7; Human Rights Watch *Complicit in Exclusion: South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities* (2015) 80; S Khumalo & T Fish Hodgson 'The Right to Basic Education for Children with Disabilities' in F Veriava, A Thom & T Fish Hodgson (SECTION27) *Basic Education Rights Handbook* (2017) 117.

212 For example, R72 million was allocated towards a new Conditional Grant for Learners with Profound Intellectual Disabilities, which was introduced in 2017/18. Under expenditure of R22.7 million was recorded. DBE *Annual Report 2017/18* (2018) 140.

213 Committee on the Rights of Persons with Disabilities *Concluding Observations CRPD/C/ZAF/CO/1* (21 September 2018) paras 40-41.

214 DBE *Response to SAHRC Questionnaire: Basic Education* (2018).

215 DBE *Response to SAHRC Questionnaire: Basic Education* (2019).



numbers also differ from estimates of Stats SA.²¹⁶ It, therefore, appears that the DBE is not able to effectively identify children and people with disabilities, and can accordingly not cater for their inclusion. Various SAHRC Provincial Offices have received complaints alleging that children with special needs remain out of school for over five years after their original assessment, or remain out of school without an assessment due to a lack of assistance by the DBE.²¹⁷ However, the DBE further reported that its collaboration with the Department of Social Development and the South African Social Security Agency has been effective, and resulted in the establishment of a protocol according to which children aged five to 18 who have identity numbers and receive a social grant, should be in school. The DBE is also engaging disability formations to identify out-of-school children. Where children with disabilities are in the schooling system, 585 ordinary schools are full-service schools, whereas 20 511 ordinary schools that are not full-service schools reasonably accommodate learners with special needs.²¹⁸

The DBE reported to the Commission that the primary reason for non-attendance of school for children between the ages of seven and 15 is a disability, at 27.8 per cent in 2017 and 24.5 per cent in 2018. The main reason for non-attendance by children between the ages of 16 and 18 is no money or fees charged.²¹⁹ It is notable that currently, special needs schools are all fee-charging schools, which

216 Stats SA estimates that 28 per cent of children with disabilities are out of school, based on the UN recommended measure. Stats SA Community Survey 2016: Profiling socio economic status and living arrangement of persons with disabilities in South Africa (2018) xxi.

217 SAHRC *State of Human Rights in the Eastern Cape* (2020); SAHRC *State of Human Rights in the Northern Cape* (2020); SAHRC *State of Human Rights in the Free State* (2020); SAHRC *State of Human Rights in KwaZulu-Natal* (2020).

218 DBE *Response to SAHRC Questionnaire: Basic Education* (2019).

219 DBE *Response to SAHRC Questionnaire: Basic Education* (2018); DBE *Response to SAHRC Questionnaire: Basic Education* (2019).

is highly inequitable, especially given the overlap between poverty and disability.²²⁰ The government indicated to the CESCR during its review that special needs schools will be adapted to become no-fee schools where appropriate.²²¹ However, it is not clear to what extent the DBE is aware of this commitment, or whether any concrete action has yet been taken in this regard.

The DBE further reported in 2018 that it is in the process of implementing a settlement court order in the matter of *South African National Council for the Blind & Others v Minister of Basic Education & Others*,²²² which includes a recognition of the constitutional rights of children with disabilities to have access to appropriate LTSM as an element of the right enshrined in section 29(1)(a) of the Constitution, the right not to be discriminated against on any ground, the right to human dignity and the paramountcy of the best interests of the child.²²³ The government respondents accordingly agreed to audit schools for the blind and full-service schools, to replicate and deliver copies of braille textbooks for which master copies exist, to create such textbooks where master copies do not exist, and to continue meeting through the auspices of the Braille Advisory Committee. In its 2019 response, the DBE noted that challenges have been encountered in that no bids were received in response to an original or subsequently revised call for tenders. An audit revealed that all 23 schools for the blind have braille production facilities on site. Furthermore, South African Sign Language was implemented into the National Senior Certificate in 2018.²²⁴

The DBE also reported that 80 per cent of schools have received training in terms of the Policy on Screening, Identification, Assessment and Support (SIAS). However, there appears to be some disparity and thus inequity in the number of therapists and similar specialists appointed in different provinces. In addition, the budget to implement the Regulations for Minimum Norms and Standards for Public Schools Infrastructure is for all public schools, with no ring-fenced allocations for full-service schools to ensure the expeditious rollout of a truly inclusive education system. According to the DBE, all schools should adhere to the principle of universal design.²²⁵ However, all schools should be accessible to children with varied disabilities, and not be limited to ensuring access for children with physical disabilities. The DBE further reports that strengthening of SIAS, as well as the introduction of the Conditional Grant for Learners with Severe and Profound Intellectual Disabilities, constitute emergency measures aimed to address the over half a million school children who remain excluded from the schooling system.²²⁶

The unreliability of data is a key issue in monitoring the plight of out-of-school children with disabilities.²²⁷ If children are not properly screened to identify a disability, it is difficult to understand how the government has arrived at its estimate of out-of-school children. Whereas White Paper 6 aims to roll out inclusive education, staff are still not skilled in operating full-service schools and children with disabilities remain segregated both at full-service schools and in special needs schools. It is further uncertain whether full-service schools that are no-fee schools are accommodating children with

220 Stats SA *Community Survey 2016: Profiling socio economic status and living arrangement of persons with disabilities in South Africa* (2018) xxii shows that according to the UN measure approximately 40 per cent of people with disabilities is of low socio-economic status, with the Black African group the most vulnerable.

221 Committee on Economic, Social and Cultural Rights *Concluding Observations E/C.12/ZAF/CO/1* (12 October 2018) para 72.

222 *South African National Council for the Blind & Others v Minister of Basic Education & Others* Case no 72622/17 (September 2018).

223 Section 28 of the Constitution.

224 DBE *Response to SAHRC Questionnaire: Basic Education* (2019).

225 DBE *Response to SAHRC Questionnaire: Basic Education* (2018).

226 DBE *Response to SAHRC Questionnaire: Basic Education* (2018).

227 Research interview conducted with Tim Fish Hodgson, International Commission of Jurists, on 16 November 2018. The Commission expresses its gratitude to the ICJ and Mr Hodgson for his time and insight.



varied disabilities free of charge. To attend special needs schools, additional resources are required for hostels and other costs associated with education. Ultimately, the government has committed to creating an inclusive education system, which is the most economically sustainable option in the long term. White Paper 6,²²⁸ which falls away in 2021, should thus urgently be adapted to become binding legislation to hold the government accountable for the numerous commitments it has made to provide an inclusive education system.

In a research interview conducted with the DPME,²²⁹ it emerged that whereas special needs education is not monitored on an independent basis by the DPME, the DBE nevertheless reports to the DPME on this issue. Furthermore, in the judgment of *Minister of Basic Education v Basic Education for All*,²³⁰ the Supreme Court of Appeal declared that the National DBE, as well as a provincial Department of Education, had violated learners' rights to basic education, equality and dignity in 'failing to provide all of them with every prescribed textbook before the commencement of the teaching of the courses for which they were prescribed'. The DPME accordingly confirmed that following this judgment, the target for delivery of LTSM had been revised to constitute 100 per cent. However, the DPME lacks the human resources necessary to comprehensively verify data provided by the DBE. It is accordingly important for National Treasury to fully fund a School Monitoring Survey, for the delivery of LTSM and other issues to be effectively monitored.

10.2.2 Undocumented children

In addition to the severe challenges faced in the education system by children with disabilities, children who are undocumented for various reasons face obstacles in enrolling and remaining in school. Whereas South African children, foreign national children and stateless children may all encounter similar problems, the vast majority of undocumented learners are poor, Black children who live in rural areas. Moreover, the inability of undocumented learners to access basic education is exacerbated in the case of migrant children, given the legal uncertainty that arises under the Immigration Act, 13 of 2002.²³¹ The CESCR recently expressed its concern 'that about 30 percent of undocumented child migrants, refugee and asylum-seeking children are not in formal education'.²³²

Section 44 of the South African Immigration Act provides:

44. Organs of State

When possible, any organ of State shall endeavour to ascertain the status or citizenship of the persons receiving its services and shall report to the Director-General any illegal foreigner, or any person whose status or citizenship could not be ascertained, provided that such requirement shall not prevent the rendering of services to which illegal foreigners and foreigners are *entitled under the Constitution* or any law.²³³

Paradoxically, section 39 of the same Act stipulates:

39. Learning institutions

228 DBE *White Paper 6 on Inclusive Education* (2001).

229 SAHRC *Research Interview with DPME: Education Cluster* (18-01-2019).

230 *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

231 The Act prohibits the provision of training to certain foreigners in section 39, but also provides in section 44 that constitutionally guaranteed services should not be denied to foreigners.

232 Committee on Economic, Social and Cultural Rights *Concluding Observations E/C.12/ZAF/CO/1* (12 October 2018) para 72.

233 Emphasis added.

(1) No learning institution shall knowingly provide training or instruction to -

(a) an illegal foreigner;

(b) a foreigner whose status does not authorise him or her to receive such training or instruction by such person; or

(c) a foreigner on terms or conditions or in a capacity different from those contemplated in such foreigner's status.

(2) If an illegal foreigner is found on any premises where instruction or training is provided, it shall be presumed that such foreigner was receiving instruction or training from, or allowed to receive instruction or training by, the person who has control over such premises, unless prima facie evidence to the contrary is adduced.

The Eastern Cape High Court delivered a seminal judgment in 2019, which declared unconstitutional clauses 15 and 21 of the Admission Policy for Ordinary Public Schools. These provisions had hampered access to basic education for undocumented children. The court held that the admission policy violated the right to basic education, the principle that the best interests of the child are paramount, human dignity and equality. The court further held that the Immigration Act was capable of being interpreted in a manner that did not violate these rights.²³⁴ Even though this is a provincial decision, the DBE subsequently issued a national circular reflecting the judgment.²³⁵ Anecdotal evidence available to the Commission has shown that undocumented children are still being denied a basic education in certain instances.

11. Inequality in access to justice

Section 34 of the Constitution provides that '[e]veryone 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'. The NDP similarly envisages access to justice, noting that access to justice in rural and farming communities constitutes a pressing priority.²³⁶ SDG 16 aims to '[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels' while Target 16.3 specifically aims to '[p]romote the rule of law at the national and international levels and ensure equal access to justice for all'.

The need to ensure greater equality in access to justice, improve court performance, and address the needs of vulnerable groups led to the establishment of specialised courts at the High Court and regional court levels.²³⁷ However, poor and vulnerable groups, including Black people, women, indigenous communities,²³⁸ foreign nationals, people with disabilities, children and those who live in rural areas continue to be impacted by inequality in accessing justice through courts and other tribunals. The CRPD recently expressed its concern at '[t]he barriers, including physical and legislative, that prevent the effective participation of all persons with disabilities, especially women and children, persons with psychosocial and/or intellectual disabilities, blind and deaf persons, in accessing the justice system, due to lack of procedural accommodations, including accessibility,

234 *Center for Child Law v Department of Basic Education* Case no 2840/2017 (EC).

235 Minister of Basic Education *Circular 1 of 2020: Admission of Learners to Public Schools* (2020).

236 National Planning Commission *National Development Plan* (2012) 401.

237 DOJ&CD *Report on the Re-establishment of Sexual Offences Courts* (2013).

238 SAHRC *Report on the National Hearing Relating to the Human Rights Situation of the Khoi-San in South Africa* (2018) 72-73.

in the judicial system'.²³⁹ It should also be noted that the Committee on the Elimination of Racial Discrimination has recognised the establishment of Equality Courts in South Africa but expressed concern over its underutilisation due to a lack of public awareness of its purpose and function.²⁴⁰ Other specialised courts that also focus on ensuring equal access to justice for vulnerable groups face other constraints in functioning optimally.

Equality Courts are established under PEPUDA to create an easy civil process through which equality-related complaints of discrimination, hate speech or harassment can be adjudicated. The simplified procedures used in Equality Courts, together with the broad scope of remedies introduced by PEPUDA, evince the intention to utilise Equality Courts to promote access to justice where violations of the right to equality had occurred. The Commission has monitored the utilisation of Equality Courts in previous years.²⁴¹ During the period 2012/13 to 2015/16, the Commission took 185 cases to Equality Courts across the country.²⁴² In 2015/16, the Department of Justice recorded 558 cases reported to the Equality Courts throughout the country. In 2016/17, this number decreased by 14 per cent and 480 cases were recorded. During both periods, unfair discrimination and hate speech comprised the highest number complaints.²⁴³

Of significant concern is the drastic drop in utilisation of Equality Courts reported by the DOJ&CD in 2017/18, during which 'nationally, there was a decrease of 50.8% in Equality Court matters reported, compared to those reported in the previous financial year'.²⁴⁴ Only 236 cases were registered during the 2017/18 financial year. Unfair discrimination matters numbered highest at 107, followed by hate speech matters at 83.²⁴⁵ Statistics regarding cases decided, those withdrawn, settled, or referred are not available in respect of Equality Courts in the 2017/18 Annual Report. During 2018/19, the number of cases registered with Equality Courts increased by 100.4 per cent to 473 cases, 54.5 per cent of which constituted unfair discrimination, and 29.6 per cent of which were hate speech cases.²⁴⁶ Besides under-utilisation, a practical challenge is that no consolidated list of presiding judges, that will be of use to poor litigants as well as legal practitioners attempting to assist them, appears to be easily available. Although this might seem like a small practical detail, it has major implications for vulnerable litigants who either appear before presiding officers who have not received the requisite training, or are referred to different courts until a designated presiding officer is identified and available. For poor and vulnerable litigants, transportation costs can constitute a significant barrier to access to justice.

The DOJ&CD indicated in its response to the Commission's questionnaire that public education and awareness campaigns about these and other specialised courts should be intensified. In 2016, a collaborative effort between the Department, the SAHRC, the Commission for Gender Equality, Legal Aid SA, the National Prosecuting Authority, SAPS, the LGBTQI sector and various Traditional Houses was successful in popularising the Equality Courts. According to the DOJ&CD, if such an effort can be coordinated to take place annually, utilisations statistics would improve significantly.²⁴⁷

239 Committee on the Rights of Persons with Disabilities *Concluding Observations* CRPD/C/ZAF/CO/1 (21 September 2018) paras 24-25.

240 Committee on the Elimination of Racial Discrimination *Concluding Observations* CERD/C/ZAF/CO/4-8 (August 2016) para 29.

241 SAHRC *Equality Report 2012: Commentaries on Equality, Race, Gender, Disability and LGBTI Issues* (2012).

242 SAHRC *Annual Trends Analysis Report 2015/16* (2017) 51.

243 DOJ&CD *Annual Report 2016/17* (2017) 41.

244 DOJ&CD *Annual Report 2017/18* (2018) 33.

245 *Ibid* 34.

246 DOJ&CD *Annual Report 2018/19* (2019) 44-45.

247 DOJ&CD *Response to SAHRC Questionnaire: Access to Justice* (2020); see further SAJEI *Response to SAHRC Questionnaire: Access to Justice* (2018).

Information regarding training and designation of Equality Court judges and clerks, and Equality Court precedents should also ideally be widely disseminated. This will further complement the recommendations issued by the Committee on the Elimination of Racial Discrimination, which requested South Africa to report, in its next review, on progress made in the usage and public awareness of Equality Courts.

Children's Courts and Maintenance Court do not appear to be under-utilised. However, delays in the finalisation of matters before Children's Courts can be ascribed to various factors, including:

- a) *Budget constraints experienced by the Department of Social Development for the required advertisements in local newspapers in foster care cases;*
- b) *Receipt of the Clearance Certificates (Form 30s) from the Registrar of the National Child Protection Register in relation to registration on the National Child Protection Register in adoption and foster care cases;*
- c) *Delays in the receipt of mediation reports from the Office of the Family Advocate due to capacity constraints in the Office of the Family Advocate;*
- d) *Delays in the receipt of reports from social workers, psychologists;*
- e) *Parties not attending court appearances;*
- f) *Lack of accommodation in child and youth care centres²⁴⁸*

The DOJ&CD further responded that delays in finalising Maintenance Court matters can be attributed to untraceable respondents, the non-attendance by respondents and the failure of respondents to provide requisite information such as financials. The functionality of Maintenance Courts can moreover be improved by addressing shortcomings including a lack of dedicated Magistrates, the failure to appoint Maintenance Officers and Maintenance Investigators, the absence of a proper Information Technology (IT) system, and inconsistent or non-standardised processes, and the absence of continuous monitoring.

12. Conclusion

Inequality, unfair discrimination and hate speech persist in South Africa. A coordinated response is required to root out structural inequalities and thereby lay the foundation for the attainment of a society based on freedom, dignity and equality. As a first step, reliable and disaggregated data is required to monitor and assess developments. New patterns of inequality should also be identified and addressed as they arise.

²⁴⁸ DOJ&CD Response to SAHRC Questionnaire: Children's Courts (2018).



CHAPTER FOUR: VIOLENCE

1. Introduction

There is a strong relationship between poverty, unemployment and inequality, and incidents of social and physical violence, exclusion and discrimination that arise therefrom. This chapter provides an overview of significant civil and political rights developments for the 2018/2019 financial year, focusing on key issues of concern for the SAHRC, including the 2019 national elections, challenges confronting human rights defenders, gender-based violence and the conditions of arrested and detained persons. The chapter will also report on the SAHRC's interventions with respect thereto.

2. Legal and policy framework

South Africa is a party to regional and international human rights instruments focusing on the protection and expansion of civil and political rights, including the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the African Charter on Human and Peoples' Rights (African Charter). Several supranational bodies have consistently raised concern over the high levels of violence in South Africa and have subsequently issued recommendations to the government to ameliorate this phenomenon.²⁴⁹ The UN Human Rights Committee in particular has raised concerns on matters of racism and xenophobia; gender-based violence; remedies for victims of torture; excessive and disproportionate use of force by law enforcement officials; violence, torture, ill-treatment and deaths in custody; prison conditions; human trafficking and labour exploitation; immigration detention; and juvenile justice, amongst others.²⁵⁰

At a global policy level, SDG 16 aims to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. In particular, institutions of governance must seek to end all forms of violence, especially against women and children. The aspirations set out in Articles 3 and 6 of Agenda 2063 envision

249 For example, during the 2017 Universal Periodic Review (UPR) process, as well as treaty body reviews, the African Commission on Human and Peoples Rights; and the African Committee of Experts on the Rights and Welfare of the Child.

250 Concluding Observations on the Initial Report of South Africa, Human Rights Committee, 27 April 2016, CCPR/C/ZAF/CO/1 (HRC Concluding Observations 2016)

'[a]n Africa of good governance, democracy, respect for human rights, justice and the rule of law' and '[a]n Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children', respectively. The National Development Plan, 2030, reiterates this aspect of the global and regional development agenda by aiming to build safer communities by strengthening the criminal justice system; making the police service professional, and demilitarising the police service. The NDP further seeks to establish South Africa as a capable and developmental State, committed to good governance and fighting corruption.²⁵¹

Importantly, the Constitution protects the rights to equality, dignity, life, freedom and security of the person (including the absence of arbitrary detention and torture), freedom of expression, freedom of association, freedom of assembly, and the right to make political choices. The Constitution further protects children's rights, access to justice, and just administrative action.²⁵² These rights will be referenced throughout the sections below.

3. National and Provincial Elections held in 2019

In terms of section 190 of the Constitution, the Independent Electoral Commission is mandated to manage national, provincial and municipal elections; ensure that these elections are free and fair, and declare elections results. The powers of the IEC are further supplemented and regulated by the Electoral Commission Act, 1996 and the Electoral Act, 1998.

The SDGs, and SDG 16 in particular, envision a significant role for National Human Rights Institutions (NHRIs) such as the SAHRC to play in democratic governance and monitoring State accountability in accordance with its domestic, regional and international obligations. This includes elections monitoring. The right to vote is not only core to sustaining democracy and socio-economic development, but serves as a core right that facilitates access to civil, political, social, economic and cultural rights articulated in the Constitution. NHRIs thus have a duty to ensure that the body politic of the country is aware that exercising the right to vote extends beyond voting once every five years of an election cycle, and that it is inextricably linked to the enjoyment of all human rights.

In execution of its domestic mandate and recognition of its international commitments, the SAHRC resolved to monitor the freeness and fairness of South Africa's 2019 National and Provincial elections held on 8 May 2019, in accordance with section 19 of the Constitution.

3.1 SAHRC Interventions

3.1.1 Elections monitoring

The SAHRC deployed 44 accredited observers, including members of staff and Commissioners, to observe elections throughout the country in all nine provinces, and to develop recommendations that aim to ensure that all South Africans are adequately equipped to exercise the right to vote in national, provincial and municipal elections.

As an accredited domestic observer, selected SAHRC staff received the requisite 2019 IEC observer training and guidelines. Persons accredited as observers were obliged to cooperate with the IEC and commit themselves to subscribing to the IEC's Code of Conduct for Election Observers. The SAHRC was further guided by the Southern African Development Community (SADC) Principles and Guidelines Governing Democratic Elections. A monitoring framework was subsequently developed,

²⁵¹ National Development Plan, 2030.

²⁵² Constitution, sections 9-34.



which, in addition to elements for observers to consider as provided for by the IEC and the SADC, also emphasised a rights-based approach to elections monitoring. This included an assessment of the appropriateness of the locations of voting stations, and the adequacy and accessibility of their facilities. It further included adequate consideration for elderly people, expectant mothers and people with disabilities.

The SAHRC's observations confirm that the 2019 National and Provincial Elections were generally free, fair and credible. However, the SAHRC highlights the following concerns, largely regarding the low number of registered first-time voters and general voter education; administration of the elections at several voting stations; accessibility and facilities at voting stations; and isolated incidents of violent disruptions or disruptions as a result of weather conditions.

a) First-time voters

While the SAHRC notes the steady increase in registered voters over the past two decades, from 18.17 million in 1999 to 26.74 million in 2019, the SAHRC is concerned about the low number of registered first-time voters (namely those between the ages of 18 and 19 years old). According to statistics released by the IEC, as of 19 April 2019, a total number of 349 956 first-time voters had registered to vote, constituting a mere 1,3% of the total number of registered voters.²⁵³ Worryingly, only 18,5% of first-time voters eligible to vote registered to be counted on the certified voters' roll.²⁵⁴ Between the ages of 20 - 29 years old, while significantly higher, only 53,7% of eligible voters registered to vote.²⁵⁵ Together, the total number of eligible voters in these two age

²⁵³ <https://www.elections.org.za/content/Voters-Roll/Registration-statistics/>

²⁵⁴ According to statistics provided by the IEC, there are 1,843,831 eligible first-time voters.

²⁵⁵ According to statistics provided by the IEC, in this age demographic, there are 9, 871, 020 eligible voters.

demographics represents roughly one-third of South Africans who are eligible to vote. This is in comparison to an average of approximately 90% of South Africans above the age of 40 who are eligible to vote had registered to vote in the 2019 National and Provincial Elections.

The IEC reports that although the number of registered voters grew by approximately 275 000 from 2011 when adjusting for population growth, there has been a decline in voter registration by young people.²⁵⁶ This notwithstanding, in total, two-thirds of South Africa's eligible voting population cast their votes in the national and provincial elections.²⁵⁷

In consistency with the continent as a whole, South Africa is a youthful population, with more than half (approximately 58%) of its population under the age of 30.²⁵⁸ Eligible voters (20 – 29 years old) thus constitute the single largest voting age group of the voting age population. Although young people have the power to determine the outcome of elections, it is apparent that more voter education is required amongst South Africa's youth on the importance of the right to vote and to register timely for them to exercise the right during national and provincial elections.

In terms of the Electoral Commission Act, 1996, the IEC has to promote voter education to strengthen constitutional democracy and promote democratic electoral processes. The IEC is further mandated by the Electoral Act of 1998 to accredit persons to provide voter education. The SAHRC notes the various outreach programmes implemented by the IEC to encourage voter participation, and that the IEC is aware of the apparent apathy amongst young people to participate in elections. This is despite the active engagement of young people in voicing their concerns on a wide range of socio-political issues through social media and protest action.

Programmes such as the "Schools Democracy Week" hosted by the IEC together with the Department of Basic Education aim to educate young people on the processes of voter registration and voting during elections. These initiatives further seek to entrench constitutional values, and promote active citizenship and participatory democracy amongst all South Africans.²⁵⁹ Despite these laudable interventions, however, it appears that more is required to encourage young South Africans to participate in electoral processes.

In light of the low participation of youth in the 2019 elections, the SAHRC and the IEC co-hosted a dialogue on youth participation in the country's political space and the challenges they are confronted with when doing so, emphasising the importance of young people as human rights and democracy defenders, and what would be required to improve youth voter participation in future elections. The dialogue provided a platform for youth aged 18 - 29 to engage directly with constitutional bodies such as the SAHRC and IEC, with a broader objective of ensuring that matters affecting the youth in post-apartheid South Africa are recognised and contribute toward fostering a culture of human rights.

The dialogue discussions centred on the importance of voter participation for the legitimacy of the elections. However, active youth participation in the electoral process, and not only on voting day, is essential to sustaining democracy in the country. Moreover, it is important that issues affecting the youth (as identified by young people themselves), such as unemployment, violence, poverty,

256 <https://www.elections.org.za/content/About-Us/News/Electoral-Commission-and-Department-for-Basic-Education-Launch-the-2018-Schools--Democracy-Week/>

257 <https://www.elections.org.za/NPEDashboard/app/dashboard.html>

258 StatsSA, Mid-year population estimates, 2018, <http://www.statssa.gov.za/publications/P0302/P03022018.pdf>

259 <https://www.elections.org.za/content/About-Us/News/Electoral-Commission-and-Department-for-Basic-Education-Launch-the-2018-Schools--Democracy-Week/>

and a lack of access to socio-economic resources, are adequately prioritised in the political environment to ensure continued voter participation. Urgent and time-bound interventions from the government and private sector to address current political, economic and social challenges are also required. A failure to do so may result in continued voter apathy amongst young people.

b) General voter education

There appears to be a general lack of knowledge regarding permissible behaviour on election day. For example, SAHRC observers noted the practice of some younger voters taking photographs of their ballot papers whilst in the voting booth. This continued despite the intervention of the SAPS officials working together with IEC officials, thus disrupting the voting process.

The SAHRC is further concerned about the apparent lack of voter education amongst elderly persons. In some instances, elderly people either needed assistance when casting their vote and some did not know how to vote at all. Others insisted on having their ballot paper stamped on the back and front, or having the ink mark on their right thumbs instead of the left, causing some disruptions. Elderly persons also appeared to be uncertain as to the roles and identification of IEC officials and party agents when requiring assistance.

Media representatives also appeared to be disruptive while reporting on the elections. At one polling station, for example, an apparent media representative was observed interviewing and taking photographs of elderly voters inside the voting station while they were placing their ballots into the box. This caused some interruptions and delays in the voting process. It was also observed that the 'journalist' did not have a name tag or any form of identification, causing further confusion.

c) Administration of the elections

The SAHRC agrees with the broader public opinion that the elections were generally well-administered. IEC officials were respectful and all accredited participants, including party agents and elections observers, provided the necessary assistance when required. The following issues were identified that hampered smooth operations on election day, and which may require further consideration by the IEC.

- **Ineffective scanning machines:** As was widely reported in the media during the elections, SAHRC observers noted that at many voting stations, "zip-zip" scanners were not working effectively, or in some instances, not working at all. This resulted in some people voting without going through the necessary first step of the IEC's three-tiered verification process.²⁶⁰ In other instances, SAHRC observers noted that IEC officials resorted to using their cellular telephones to verify voters through text messaging. Worryingly, this situation also led to voters waiting for lengthy periods while waiting for scanning machines, and in some cases, voters were turned away from voting stations and instructed to vote elsewhere.
- **Section 24A forms:** In terms of section 24A of the Electoral Act, 1998, a person whose name does not appear on the certified voters' roll in a specified district, but who can prove that they applied to register to vote within the registration period, will still be allowed to vote in another district. This is allowed provided that the person completes a sworn affidavit provided by the IEC, in accordance with the requirements of section 24A.

²⁶⁰ The IEC's verification process includes scanning a citizen's bar-coded identity document to confirm voter registration, manually checking the voter's name against the registered voters' roll and inking the voter's thumbnail.

The SAHRC notes the encouragement by the IEC, political parties and other interested parties who highlighted to voters that they are not limited to exercising their right to vote only in the district in which they were registered, in accordance with section 24A. However, a large proportion of the SAHRC's observers recorded that as a result of many voters voting outside of their registered districts, there was a shortage of section 24A forms. This caused voters to wait for lengthy periods (over two hours at some polling stations) while forms were replaced. In some cases, forms were not replaced or were not made available at all, and voters were instructed to exercise their right to vote elsewhere.

- **Voting materials:** SAHRC observers recorded a shortage of voting materials, especially ink pens. At times, SAHRC observers had to provide pens to IEC officials. Late delivery of voting materials also led to some polling stations being delayed in opening their doors to voters on time, while other voting stations ran out of ballot papers.
- **IEC officials and resource capacity:** One of the bigger concerns SAHRC observers raised related to the apparent lack of IEC resource capacity, particularly concerning its staff. As a result, IEC officials appeared overworked with insufficient time to rest. While most IEC officials were observed to be professional and knowledgeable, conducting their duties efficiently and transparently, at some voting stations IEC officials appeared to lack the necessary training to make pertinent decisions or to adequately assist voters. Worryingly, according to many SAHRC observers, IEC officials appeared to be exhausted toward to end of elections day, which later impacted on counting of votes and relying on observers and party agents to assist in vital decision-making processes that require independence.
- **Role of party agents and elections observers:** In many instances, SAHRC observers found party agents performing the function of IEC officials. For example, due to staff shortages, IEC officials relied on party agents or election observers for direction, particularly when a dispute arose. In other instances, there were insufficient stickers available for party agents, so it was not apparent who was a party agent, election observer, or IEC official. Consequently, there appeared to be confusion as to the different roles and responsibilities of these various actors amongst voters. There also appeared to be confusion between party agents and IEC officials as to how matters ought to proceed when various objections arose.

The SAHRC is also concerned about the late timing of the IEC training offered to observers before elections, especially in the provinces. In some instances, invitations for SAHRC observers to attend IEC provincial training were only received one week before the scheduled date for elections.

- **Voter secrecy:** On some occasions, SAHRC observers witnessed a non-IEC official assisting voters to cast their vote inside the polling booth. This appeared to happen especially amongst elderly voters.

d) Accessibility and facilities at voting stations

Many of the voting stations visited by SAHRC observers were accommodating to voters with disabilities, the elderly and pregnant women. However, some voting stations were not as accommodating to people with disabilities. This was evidenced by the absence of ramps in some buildings, especially schools where classrooms were used for voting. If ramps were present they were very steep, making them user-unfriendly for people using wheelchairs. One SAHRC observer noted an IEC official physically carrying a person with disabilities up the stairs to a classroom to vote. In instances where tents were used, they were erected above ground level without necessary ramps. Braille materials to cast both the national and provincial votes were also found to be insufficient. Many elderly voters were left to queue for long hours and were not provided seating. When this was witnessed, SAHRC observers intervened requesting seating for elderly voters.

e) Disruptions

The SAHRC notes a limited number of reported incidents that disrupted the smooth administration of the National and Provincial Elections but is satisfied that these were adequately attended to by the IEC and the South African Police Service (SAPS). These disruptions were due largely to poor weather conditions and incidents of service delivery protests, which resulted in voting stations either opening late or being relocated. In such cases, voting hours were extended by the IEC.²⁶¹

In the KwaZulu-Natal (KZN) region, which was also identified as a 'hotspot' in light of various reports of spurts of civil and political unrest, the SAHRC notes that the SAPS addressed all reported incidents of disruption. The SAPS reports that in KZN, 27 incidents were reported at voting stations. A total of 9356 SAPS members were deployed on elections day, with an additional number of 51058 support agencies deployed. Approximately 25 arrests of suspects that allegedly violated the Electoral Act of 1998 were made in the region. According to the SAPS, all incidents that had a direct impact on the elections were swiftly attended to, including protest action, criminal activity and other social issues.

3.2 Legislative and Judicial Developments

On 22 January 2019, the President signed into law the Political Party Funding Act, 2018.²⁶² The Act provides for the regulation of public and private funding of political parties, including the prohibition of certain donations made directly to political parties, regulating the disclosure of accepted donations and outlining the duties of political parties concerning funding. The enactment of the legislation, in line with global standards, was the result of numerous campaigns from civil society organisations advocating for great political transparency to curb corruption and sustain the integrity of the country's democracy.²⁶³

261 <https://www.dailymaverick.co.za/article/2019-05-09-iec-extremely-pleased-with-smooth-election-but-not-everyones-happy/>; <https://www.dailysun.co.za/News/iec-to-extend-voting-hours-at-troubled-voting-stations-20190508>

262 Act 6 of 2018.

263 Swart, M. (2018) "Why South Africa's new political party funding bill is good news for democracy", *The Conversation*, available at: <http://theconversation.com/why-south-africas-new-political-party-funding-bill-is-good-news-for-democracy-99034>

3.3 SAHRC Recommendations

The SAHRC recommendations were as follows:

- Improved resource allocation, specifically during election periods, to ensure that the IEC is adequately equipped with sufficient staff and voting materials, including ink pens, ballots (including braille) and section 24A forms.
- Continuous training for IEC officials, and presiding officers, in particular, to ensure independent decision-making when objections arise.
- Continuous and improved voter education, including the importance of voting for democracy, voting procedures, roles and responsibilities of all actors involved in the elections process (such as IEC officials, party agents and independent observers), particularly amongst the youth and elderly segments of the voting population.
- Improved accessibility and adequate facilities at polling stations, to accommodate people with disabilities, elderly people, and pregnant women, including adequate water and sanitation facilities.

4. The Status of Human Rights Defenders

In 2018, the SAHRC released its first report, documenting the status of human rights defenders (HRDs) in South Africa.²⁶⁴ Since the release of the report, the SAHRC has initiated several interventions to give effect to the recommendations contained therein, and as per its domestic, regional and international obligations. In particular, in 2018, the SAHRC participated in the 13th International Conference of the Global Alliance of National Human Rights Institutions, which took place in Marrakech, Morocco. After the conclusion of the conference, delegates signed a declaration entitled “Expanding civic space and promoting and protecting human rights defenders, with a specific focus on women: The role of national human rights institutions” (Marrakech Declaration). As per the Marrakech Declaration, respective NHRIs committed to ensuring that they contribute towards creating an enabling environment for HRDs to effectively do their work, especially women and human rights defenders; monitor civic space and any threats to it; further explore how to protect human rights defenders; and develop effective communication on human rights and the promotion of positive narratives.

In February 2019, the SAHRC, together with the International Commission of Jurists (ICJ) hosted the first Summit in the African region that sought to strengthen the relationship between NHRIs and HRDs since the adoption of the Marrakech Declaration. The Summit brought together NHRIs and HRDs from nine countries in the Southern African Development Community (SADC) sub-region. Recommendations emanating therefrom included a need for stronger collaboration between HRDs in SADC countries; greater awareness of regional and international human rights mechanisms; and a need for stronger relationships between HRDs and NHRIs with respect to the protection and advancement of their rights. All SAHRC interventions about HRDs have been framed in accordance with these recommendations.

264 <https://www.sahrc.org.za/home/21/files/Human%20Rights%20Defenders%20Publication.pdf>

4.1 SAHRC Interventions

Thabiso Emanuel Zulu / Minister of Police & Others

In November 2019, the SAHRC received a complaint from Thabiso Emanuel Zulu over threats to his life after he became a whistleblower in various tender irregularities in KwaZulu-Natal. The Public Protector's office had issued a report on the imminent threat to Zulu's life and recommended that the Minister of Police provide protection to him. This request was not complied with by the Minister of Police. Despite numerous attempts by the SAHRC to engage with the Minister to seek clarity on the issue, no information was forthcoming. On 22 January 2020, the SAHRC resolved to move an urgent application to obtain an order instructing the Minister of Police to provide protection to Zulu. The SAHRC approached the court to seek an order that Zulu's matter be heard on an urgent basis, that Zulu be provided with protection at State expense as per the State Security Agency's recommendations and the SAPS Criminal Intelligence Threat and Risk Assessment, and that the SAHRC be provided the said assessment report to ensure that appropriate protection is offered. On 26 March 2020, the Gauteng Division of the High Court of South Africa subsequently ordered that the State provide Zulu in accordance with the Witness Protection Act, 1998, and the associated assessment within fourteen days.

Freedom of Assembly for Labour Activists in South Africa

In November 2019, the SAHRC and CIVICUS, a global alliance of civil society organisations and activists committed to strengthening citizen action and civil society throughout the world, co-hosted a series of consultations with activists who have experienced the curtailing of their rights, particularly the right to freedom of assembly, as a consequence of their activism.

In 2017, the #EndOutsourcing protest movements at the University of Cape Town, University of Pretoria, University of Venda, University of the Western Cape (UWC) and Nelson Mandela University highlighted that outsourced workers were being systematically taken advantage of in their casual work employment contracts. At the University of Cape Town and the University of Witwatersrand, workers were granted amnesty and consequently insourced and reinstated to their employment. However, at UWC, 143 workers were allegedly dismissed for protesting peacefully and have since been campaigning for their rights to peaceful assembly to be upheld. These workers have allegedly continued to face violations of the right to the peaceful assembly from university management and their employer, in contravention of the provisions set out in the Constitution.

Freedom of assembly and peaceful protest has long played a role in shaping the trajectory of South Africa's democracy, providing significant insight into the needs and frustrations of the country's majority. Through the dialogue, the SAHRC sought to emphasise the need for improved partnerships between all stakeholders, including civil society and national government in developing and enforcing policy and legislation that creates and maintains a safe and enabling environment in which HRDs can operate and contribute to the promotion and protection of civil, political, economic, social and cultural rights.

Through the discussions, activists expressed that the #EndOutsourcing campaign led by university students and workers was important to highlight the precarious nature of contract work and the lack of sustainable income for workers in South Africa's public universities. However, engaging in protest action also left some workers vulnerable to various forms of victimisation by their employers. Coupled with the presence of State police and private security, many workers felt that they were exposed to an environment of fear and intimidation. Moreover, once the issues raised by students regarding accessible and quality tertiary education were met, some workers felt that their specific issues were neglected. The consultative workshop thus presented an opportunity for student and worker activists

to reiterate the hardships experienced by contract workers, and that although South Africa has progressive labour laws, contract workers lack sufficient protections to benefit from these laws. Importantly, participants highlighted the need to safeguard the right to freedom of assembly and to closely monitor proposed amendments to the Regulation of Gatherings Act, especially as activists urge the government to effectively address the challenges presented by poverty, unemployment and inequality.

Challenges confronting Women Human Rights Defenders in South Africa

Throughout Women's month in August 2019, South Africans expressed outrage at the scourge of gender-based violence (GBV) and femicide gripping the country's landscape. Protests demanding that the government urgently address GBV were held across the country following the brutal murder of university student Uyinene Mrwetyana. However, this is not the first time that South Africans, and especially women, have highlighted the dangers associated with being a woman in South Africa. In its report entitled '*Unpacking the gaps and challenges in addressing gender-based violence in South Africa*' (2018), the SAHRC made several recommendations that sought to promote the adoption of reforms for the strengthening of measures to prevent GBV and all forms of discrimination against women and girls. These measures included a gender mainstreaming approach to budgeting, policy making and standard setting in both public and private entities.

It is against this background that in February 2020, the SAHRC, CIVICUS and the Human Rights Institute of South Africa (HURISA), co-hosted a workshop to deeper understand the structural barriers confronting women human rights defenders. The SAHRC's Status of Human Rights Defenders report addressed the nuanced and multifaceted manner in which the State has failed to protect HRDs in South Africa, including women HRDs.²⁶⁵ The report highlights that women HRDs are more at risk of suffering certain forms of violence, prejudice, exclusion and repudiation, not experienced by their male counterparts. This is often because women HRDs are perceived as challenging accepted socio-cultural norms, traditions, perceptions and stereotypes about their femininity, sexual orientation, and work to increase the respect for the role and status of women in society. The environment in which women HRDs operate in many countries, including South Africa, is reportedly characterised by arbitrary arrests and detention, forced disappearances, threats, intimidation, torture and inhumane and degrading treatment because of their activities. Women HRDs work on a diverse range of issues such as the equitable distribution of resources and wealth, health and the environment.

Flowing from the report, the SAHRC recommended that Department of Justice and Constitutional Development (DOJ&CD), together with the Department of Women (DOW) should take political, administrative and legislative measures to ensure that the environment in which women HRDs operate is enabling to the protection of their rights, including a response to religious and cultural norms that subjugate women in general and women HRDs in particular. The SAHRC recommended further that the South African government, and the DOW in particular, should publicly affirm the legitimacy of the work of women HRDs, denounce attacks against women HRDs and affirm the commitment of the government to protect the work of women HRDs.²⁶⁶ These recommendations are reflective of the objectives of the International Covenant for Civil and Political Rights, 1966 (ICCPR) and regular guidelines published by the UN on the right to freedom of assembly, which encourage State police to exercise maximum restraint when regulating civilian protest action.

265 SAHRC, *The Status of Human Rights Defenders in South Africa*, 2018.

266 SAHRC, *The Status of Human Rights Defenders in South Africa*, 2018.



The SAHRC continues to demonstrate its commitment to holding the State accountable for the advancement of human rights, and moreover, those that have a disproportionate impact on the lives of women and girls. In February 2019, the SAHRC participated in a workshop convened by the Africa Reproductive Rights Initiative (ARRI), which brought together representatives of over 30 organizations from 13 African countries working across a wide set of sectors and disciplines in Kigali, Rwanda to discuss the changing landscape of sexual and reproductive health rights (SRHR) in Africa and reflect on the challenges and opportunities that exist in relation to closing civic space for SRHR organisations, service providers and human rights defenders, maternal health, adolescents sexual and reproductive health and rights, and SRHR in conflict and emergency settings. Consequently, the SAHRC and other NHRIs committed to, *inter alia*, building internal capacity on SRHR to enable the effective deployment of their mandates towards the respect, protection and fulfilment of SRHR in their contexts; incorporate SRHR issues in preparation of Alternative Reports to regional and global human rights mechanisms; and work with other actors including SRHR advocates and organizations; and to defend the human rights space and ensure restrictive laws and policies that hinder SRHR work are repealed.

The workshop thus served as an opportunity to capture the reflections of women HRDs for inclusion in a civil society shadow report on the progress of the domestic implementation of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) for submission in September 2020; informed advocacy for the United Nations Commission on the Status of Women (CSW) that was held in New York in March 2020, which focused on States' implementation of the Beijing Declaration over the past 25 years, including realising gender equality and the empowerment of all women and girls; and informed recommendations to be considered by relevant government departments on matters about women human rights defenders.

During the deliberations, participants expressed concern that while the South African government frequently reports to regional and international bodies concerning women and girls, there does not appear to be sufficient consultation with rural communities. As a result of insufficient consultation, there appears to be a lack of understanding or a conflation of issues; for example, the practice of

ukuthwala vis-à-vis human trafficking. Moreover, as was highlighted in the SAHRC HRD report, the violations affecting women and girls are not well-documented by State authorities, and relevant statistics are not sufficiently disaggregated to monitor the adequacy of interventions for vulnerable groups. Access to information for women HRDs, including advocacy surrounding recommendations emanating from regional and international bodies, is severely lacking; while data protection for women human rights defenders is also of major concern.

Concerns were raised regarding the financial resources, mental health and well-being of women HRDs, especially concerning how women HRDs are treated by State authorities. Women HRDs who are also migrants to South Africa endure an added layer of vulnerability, and often have to encounter xenophobic attitudes from State officials. Participants, therefore, called for the development of legislation with the specific aim of protecting human rights defenders, and women human rights defenders in particular.

4.2 Legislative and Judicial Developments

In 2017, an alliance of civil society organisations including the Right2Know Campaign and the Legal Resources Centre challenged various sections of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (RICA) as violating the constitutional right to privacy, with significant implications for journalists, lawyers and their sources. According to the civil society organisations, RICA lacked the necessary protections to ensure that its surveillance provisions did not unjustifiably encroach on the right to privacy. In 2019, the South Gauteng High Court declared certain provisions of the RICA to be inconsistent with the Constitution, to the extent that they fail to adequately address circumstances where a subject of surveillance is a lawyer or journalist. The matter has subsequently been referred to the Constitutional Court, specifically as it relates to post-surveillance notification to affected subjects and the gathering of citizens' metadata. The Constitutional Court judgment is pending.²⁶⁷

Concern has also been raised regarding proposed amendments to the laws regulating the treatment of refugees in South Africa. In particular, the proposed Refugee Amendment Act places severe restrictions on the political rights of refugees, by stating that refugees can lose their status should they participate in political campaigns without the permission of the relevant Minister.²⁶⁸

With respect to GBV, the SAHRC notes the landmark judgment handed down by the Constitutional Court in the matters of *Tshabala v S; Ntuli v S*.²⁶⁹, wherein the Constitutional Court extended the doctrine of common purpose to extend to rape. The doctrine of common purpose deals with crimes committed by groups. In dismissing the argument that the doctrine should not apply to the crime of rape, the Constitutional Court found that the law must be developed robustly to advance the fight against GBV. The judgment highlighted that by excluding the crime of rape from the doctrine of common purpose, gender inequality is perpetuated and discrimination is promoted, thus reinforcing systems of patriarchy that have no place in South African society. Moreover, the court reiterated that rape is not a crime purely about sex, but is also a product of systems of patriarchy and rape culture.²⁷⁰

267 See: www.r2k.org.za

268 Hobden, C. (2020) "South Africa takes fresh steps to restrict rights of refugees" (2020).

269 CCT 323/18; CCT 609/19 [2019] ZACC 48.

270 <https://www.wits.ac.za/news/sources/cals-news/2019/con-court-rules-common-purpose-applies-in-rape-cases.html>

5. Arrested and detained persons

Section 35 of the Constitution protects the rights of arrested, detained and accused persons and section 12 provides for the right to freedom and security of the person. 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 with only a few complaints related to prison conditions. While these complaints generally fall outside of the SAHRC's protection mandate and are referred to bodies better suited to address the complaint, such as the Judicial Inspectorate for Correctional Services or Legal Aid South Africa, through its monitoring mandate the SAHRC aims to promote a culture of human rights through several interventions discussed below.

5.1 SAHRC Interventions

Optional Protocol to the UN Convention Against Torture

After South Africa ratified the Optional Protocol to the UN Convention Against Torture in 2019 and established the NPM housed at the SAHRC, some observations have been made that impact on the dignity of individuals and groups that are in detention and under the care of the State.

Through the NPM's monitoring activities of various State institutions, including police stations and correctional centres, the following observations have been made: Undocumented foreign nationals detained at police stations for more than 30 days; general overcrowding; lack of resources allocated to assist at the stations' Victim Empowerment Rooms; unhygienic detention cells, blankets and beds; need to repair infrastructure; unsanitary ablution facilities, blocked toilets and inadequate access to hot water; dysfunctional security equipment such as body scanners and monitors; shortage of professional staff such as doctors, nurses, psychologists, and psychiatrists; and a lack of resources for detention centre officials at many detention centres, such as uniform renewal.²⁷¹

SAHRC / SAPS Memorandum of Understanding

In terms of the SAHRC SAPS Memorandum of Understanding (MOU), the SAHRC has committed to assisting the SAPS in developing human rights training curricula, present human rights lectures and conduct joint outreach activities, which will ultimately seek to achieve a human rights-based approach to policing.²⁷²

In line with the SAHRC work pertaining to HRDs, in September 2019 the SAHRC and SAPS hosted its inaugural annual lecture entitled '*Our Heritage: Dignity in Democracy*', with an emphasis on section 17 of the Constitution, namely the right for everyone, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. Where protest action violates other rights, including those to basic education and access to health care services, the Commission condemns such action for exceeding the bounds of section 17 of the Constitution.²⁷³ Nevertheless, the underlying causes of such protest action merit further scrutiny.

271 Separate NPM report documenting monitoring activities and subsequent recommendations, forthcoming.

272 <https://sahrc.org.za/index.php/sahrc-media/news-2/item/1651-media-statement-sahrc-and-saps-re-commit-to-memorandum-of-understanding-in-relation-to-policing-focused-on-and-protecting-human-rights>

273 SAHRC *National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa* (2016).

At the same time, the SAHRC has highlighted the criminalisation of protest action by citizens seeking to advance human rights and hold the government accountable for delivering on its obligations. Protestors demanding the delivery of housing, education, and basic services such as water, sanitation and electricity are reportedly confronted by the police with water cannons, tear gas, stun grenades, and rubber bullets in an attempt to quell protests that become violent.²⁷⁴

The lecture, delivered by Christof Heyns who is a member of the United Nations Human Rights Committee and whose recent work focuses on the right of peaceful assembly in an international context, emphasised the importance of freedom of assembly and the right to protest as valid forms of democratic expression and foundational elements to sustaining South Africa's constitutional democracy. Technology, such as the use of drones to assist the police in monitoring protest action, ought to be used to protect and promote human rights. This is of more importance in light of the country's apartheid past and any limitation of these rights must be adequately justified in terms of the Constitution's limitation clause. As such, the State must ensure that peaceful and unarmed gatherings are handled with tolerance and empathy to avoid provoking confrontation that may result in violence.

5.2 Legislative and Judicial Developments

In 2018, transgender activist Jade September, supported by a host of civil society organisations, challenged the Department of Correctional Services for denying her the dignity of expressing her gender identity and for limiting her rights to equality and freedom of expression in State-run detention and prison facilities. September alleged that as a transgender woman, she was subjected to misgendering, harassment, verbal abuse and inhumane treatment in prison facilities, resulting from a host of discriminatory practices coupled with a general lack of awareness on the part of officials located within the Department of Correctional Facilities.²⁷⁵ In 2019, the Equality Court found that the Department had violated September's dignity on numerous counts, particularly as it related to her gender identity. Importantly, the Court held that until such time that September had undergone gender reassignment treatment, she would be allowed to remain in a single cell in a male prison, with the freedom to express her gender identity safely in accordance with that Department's hygiene protocols.²⁷⁶

274 Right2Know Campaign, R2K Statement: We are concerned over the shrinking space for dissent in South Africa! (2017); See also: SAHRC, Civil and Political Rights Report (2017) and SAHRC, Investigative Hearing Report: Access to Housing, Local Governance and Service Delivery (2015).

275 <https://www.genderdynamix.org.za/post/gender-dynamix-press-release-trans-prisoners-rights-to-gender-identity-and-expression-in-september>

276 *September v Subramoney N.O. & Others* EC10/2016.



CHAPTER FIVE: CONCLUSION

In line with the Commission's monitoring mandate outlined in section 184 of the Constitution, this report has sought to comprehensively monitor and assess the observance of human rights in South Africa. Given the limited resources at the Commission's disposal, the report has been informed by the work of civil society stakeholders, relevant State departments, judicial developments, regional and international human rights bodies, and the Commission's various interventions that seek to promote the protection and advancement of human rights in South Africa.

The Commission has accordingly observed some progress in the government's progressive realisation of the right of access to health care services, and has made advisory recommendations where challenges remain. The right to a basic education, which is theoretically 'immediately realisable', further continues to be violated through skewed resource distribution and other factors. Vulnerable groups – especially on the bases of race, ethnicity, gender and disability – continue not to enjoy the benefit and protection of the law on an equal basis as others. Unfair discrimination on the grounds of race, gender and sexual orientation, and disability persist. Furthermore, hate speech continues to the detriment of social cohesion, and in a context of considerable legal uncertainty. Systemic patterns of discrimination, moreover the ability of vulnerable groups to enjoy the rights to health care, basic education and access to justice on a comparable basis as those who do not face structural discrimination. Civil and political rights are prejudiced by, amongst others, the persistence of trafficking in persons, and inadequate training in respect of important legislation such as the Regulation of Gatherings Act. However, Parliament's approval for the ratification of OPCAT marks a significant milestone for those deprived of their liberty.

It is hoped that the information and advisory recommendations contained herein contribute toward the establishment of a society embedded with the values of dignity, equality and justice for all.







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