



# **CIVIL AND POLITICAL RIGHTS**

**REPORT 2016/17**



CIVIL AND POLITICAL RIGHTS REPORT 2016/2017

**March 2017**

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# ABBREVIATIONS AND ACRONYMS

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>ACJHR</b>	African Court of Justice and Human Rights
<b>CALS</b>	Centre for Applied Legal Studies
<b>CERD</b>	Committee on the Elimination of Racial Discrimination
<b>CPR</b>	civil and political rights
<b>CRC</b>	Convention on the Rights of the Child
<b>CSO</b>	civil society organisation
<b>DCS</b>	Department of Correctional Services
<b>DHA</b>	Department of Home Affairs
<b>DHET</b>	Department of Higher Education and Training
<b>DOJCD</b>	Department of Justice and Constitutional Development
<b>DSD</b>	Department of Social Development
<b>ESR</b>	economic and social rights
<b>FISD</b>	Forum of Institutions Supporting Democracy
<b>HCWG</b>	Hate Crimes Working Group
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IEC</b>	Electoral Commission of South Africa
<b>IPID</b>	Independent Police Investigative Directorate
<b>JICS</b>	Office of the Judicial Inspectorate for Correctional Services
<b>JCPS</b>	Justice, Crime Prevention and Security Cluster
<b>LGBTI</b>	lesbian, gay, bisexual, transgender and intersex
<b>NGO</b>	non-governmental organisation
<b>NHRI</b>	National Human Rights Institution
<b>ODAC</b>	Open Democracy Advice Centre
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>OIGI</b>	Office of the Inspector-General of Intelligence
<b>OPCAT</b>	Optional Protocol to the Convention against Torture

<b>PAIA</b>	Promotion of Access to Information Act 2 of 2000
<b>PEPUDA</b>	Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000
<b>POP</b>	Public Order Police
<b>POPIA</b>	Protection of Personal Information Act 4 of 2013
<b>R2K</b>	Right2Know Campaign
<b>RICA</b>	Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002
<b>SABC</b>	South African Broadcasting Corporation
<b>SAHRC</b>	South African Human Rights Commission
<b>SALC</b>	South African Law Commission
<b>SAPS</b>	South African Police Service
<b>SERI</b>	Socio-Economic Rights Institute of South Africa
<b>SSA</b>	State Security Agency

The background of the page is a light gray color with a pattern of overlapping, semi-transparent hand silhouettes. The hands are raised in various positions, some with fingers spread, some with fingers curled, and some with palms facing forward or slightly to the side. The silhouettes are layered, creating a sense of depth and movement. The overall effect is one of collective action and solidarity.

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# LIST OF CIVIL AND POLITICAL RIGHTS IN THE SOUTH AFRICAN CONSTITUTION

## Section 9. Equality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

## Section 10. Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

## Section 11. Life

Everyone has the right to life.

## **Section 12. Freedom and security of the person**

- (1) Everyone has the right to freedom and security of the person, which includes the right—
- (a) not to be deprived of freedom arbitrarily or without just cause;
  - (b) not to be detained without trial;
  - (c) to be free from all forms of violence from either public or private sources;
  - (d) (not to be tortured in any way; and
  - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right—
- (a) to make decisions concerning reproduction;
  - (b) to security in and control over their body; and
  - (c) not to be subjected to medical or scientific experiments without their informed consent.

## **Section 13. Slavery, servitude and forced labour**

No one may be subjected to slavery, servitude or forced labour.

## **Section 14. Privacy**

Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

## **Section 16. Freedom of expression**

- (1) Everyone has the right to freedom of expression, which includes—
- (a) freedom of the press and other media;
  - (b) freedom to receive or impart information or ideas;
  - (c) freedom of artistic creativity; and
  - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to—
- (a) propaganda for war;
  - (b) incitement of imminent violence; or
  - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes
  - (d) incitement to cause harm.

## **Section 17. Assembly, demonstration, picket and petition**

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

## **Section 18. Freedom of association**

Everyone has the right to freedom of association.

## **Section 19. Political rights**

- (1) Every citizen is free to make political choices, which includes the right—
- (a) to form a political party;
  - (b) to participate in the activities of, or recruit members for, a political party; and
  - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right—
- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
  - (b) to stand for public office and, if elected, to hold office.

## Section 28. Children

- (1) Every child has the right—
  - (a) to a name and a nationality from birth;
  - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation;
  - (e) to be protected from exploitative labour practices;
  - (f) not to be required or permitted to perform work or provide services that—
    - (i) are inappropriate for a person of that child's age; or
    - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
  - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
    - (i) kept separately from detained persons over the age of 18 years; and
    - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
  - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
    - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

## **Section 32. Access to information**

- (1) Everyone has the right of access to—
  - (a) any information held by the state; and
  - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

## **Section 33. Just administrative action**

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must—
  - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
  - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  - (c) promote an efficient administration.

## **Section 34. Access to courts**

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

## **Section 35(1). Arrested persons**

Everyone who is arrested for allegedly committing an offence has the right—

- (a) to remain silent;
- (b) to be informed promptly—
  - (i) of the right to remain silent; and
  - (ii) of the consequences of not remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
- (d) to be brought before a court as soon as reasonably possible, but not later than—
  - (i) 48 hours after the arrest; or
  - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
- (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

## **Section 35(2). Detained persons**

Everyone who is detained, including every sentenced prisoner, has the right—

- (a) to be informed promptly of the reason for being detained;
- (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
- (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
- (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and to communicate with, and be visited by, that person's—
  - (i) spouse or partner;
  - (ii) next of kin;
  - (iii) chosen religious counsellor; and
  - (iv) chosen medical practitioner.

### **Section 35(3). Accused persons**

Every accused person has a right to a fair trial, which includes the right—

- (a) to be informed of the charge with sufficient detail to answer it;
- (b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial before an ordinary court;
- (d) to have their trial begin and conclude without unreasonable delay;
- (e) to be present when being tried;
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (o) of appeal to, or review by, a higher court.

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# EXECUTIVE SUMMARY

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

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

# Outline of report

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

## Methodology

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

## Findings of report

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

### ***Right to life and human dignity***

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

## **Life Esidimeni deaths**

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

## **Deaths by police officers or in correctional facilities**

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

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

## **Assisted dying**

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

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

## ***Freedom and security of the person***

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

### **Corporal punishment**

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

## ***Slavery, servitude and forced labour***

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

## **Human trafficking**

In South Africa human trafficking - forcing or manipulating a person against their will into sexual or labour exploitation, within their own country or across borders - remains a significant challenge. In 2016 the UN Human Rights Committee noted progress made with regard to combating trafficking in persons, referring to the Prevention and Combating of Trafficking in Persons Act 7 of 2013; however, expressed concern that South Africa lacks proper identification and referral mechanisms for victims of trafficking in persons. The Committee called on the government to continue its efforts to prevent and eradicate trafficking in persons, step up its efforts to identify and protect persons who may be vulnerable to human trafficking and establish a nationwide identification and referral system for victims of trafficking. The SAHRC has called on the government to do more to assist the victims of trafficking – usually children, women and migrant workers in the agriculture and fishing sectors – who are often fearful to engage with government authorities, and to provide more information regarding efforts to identify and protect groups of persons who may be vulnerable to trafficking.

## ***Right to privacy and access to information***

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

## **Challenges with accessing information through PAIA**

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

## **Communication surveillance practices**

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

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

## **Establishment of Information Regulator**

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

## **Appointment of Inspector-General of Intelligence**

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

## ***Freedom of expression and protection from unfair discrimination***

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

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

## **Prevention and Combating of Hate Crimes and Hate Speech Bill**

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

## **Hate crimes against LGBTI people**

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

## **Whistleblowing**

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

## **Media freedom and censorship**

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

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

## **Protest**

Section 17 of the Constitution protects the right of people to assemble, demonstrate, picket and present petitions in a peaceful and unarmed manner. This is often referred to as 'the right to protest'. In 2016 the UN Human Rights Committee expressed its concern about numerous reports of excessive and disproportionate use of force by law enforcement officials in the context of public protests in South Africa. The ACHPR also recently adopted a resolution which recognises the need



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

## **Student protests**

During 2016 perhaps the most visible of public protests were the Fees Must Fall student protests on university campuses across the country. In the past year the SAPS response escalated, and the SAHRC has condemned police heavy-handedness in dealing with protests as well as destructive protest-related action undertaken by students in some circumstances. According to the Socio-Economic Rights Institute of South Africa (SERI), university responses to student protest have often been characterised by urgent legal proceedings to obtain and enforce wide-ranging interdicts that prohibit protest by vaguely identified parties; however these practices have been found to be constitutionally suspect or clearly unlawful. In 2016 the SAHRC published a report on Transformation at Public Universities in South Africa, based on National Hearing convened in 2014 on transformation in institutions of higher learning in South Africa. The Commission made a number of findings and recommendations directed at the Department of Higher Education and Training (DHET) and universities, aimed at addressing historical inequalities and accelerating substantive transformation in the higher education sector.

## **Marikana Commission**

In 2016 the UN Human Rights Committee expressed concern about the slow pace of the investigation into the Marikana massacre, recommending *inter alia* that South Africa: expedite the work of the task team and panel of international experts established by the Ministry of Police in implementing the recommendations of the Marikana Commission of Inquiry; revise laws and policies regarding public order policing and the use of force; and prosecute and punish perpetrators of illegal killings and provide effective remedies to victims. The SAHRC is concerned that these recommendations have not been fully implemented by the South African government, particularly the prosecution of police officers implicated in the killings, and the settling of civil claims made by the families of those who were murdered in August 2012. As of March 2017 SAPS had apparently investigated and cleared 87 of its own members in relation to the killings at Marikana, in contravention of IPID's role in investigating the killings by SAPS officers.

## **Political rights**

Section 19 of the Constitution preserves the political rights of South Africans, which includes forming political parties and being a member of a political party, voting in elections and holding public office. While the Electoral Commission (IEC) is the independent body established by the

Constitution to promote and safeguard democracy in South Africa, and to ensure regular, free and fair elections at all levels of government, the SAHRC must also ensure that the political rights of South Africans are protected

## **Political party funding**

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

## **Political intimidation and violence**

In August 2016 South Africa held its fifth local government election. The SAHRC is concerned at evidence of political intimidation, violence and assassinations (particularly around the selection and finalisation of party lists) as a result of the local government election. At present there is confusion around how many political killings have taken place in the country, what constitutes a political killing, and who is responsible to monitor and investigate political killings. A comprehensive analysis of the criminal justice response to the problem of political killings is needed. The IEC and the Ministry of Police need to look into the issue of political violence more seriously, particularly ahead of the upcoming 2019 general election.

## ***Just administrative action***

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

## ***Access to courts***

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

## **Traditional Courts Bill**

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

## **International Criminal Court withdrawal**

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

## ***Arrested, detained and accused persons***

Section 35 of the Constitution contains the rights of arrested, detained and accused persons, while section 12 contains the right to freedom and security of the person. The state has responsibilities to protect the right to freedom and security of the person of all South Africans; however it has an extra responsibility to arrested, detained and accused persons who have been legitimately deprived of their freedom. Over the last four years, complaints relating to the rights of arrested, detained and accused persons have consistently formed part of the top five rights violations complaints lodged with the SAHRC. Most of these complaints are from inmates detained in correctional services facilities requesting assistance to secure copies of trial transcripts, as well as assistance with appeals against their convictions and/or sentences. A few complaints related to prison conditions. The SAHRC accepts very few of these complaints as most are referred to Legal Aid South Africa or to JICS.

## **Independence and capacity of JICS**

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

## **Overcrowding and poor conditions in correctional centres**

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

## **Children in the criminal justice system**

In South Africa the Child Justice Act 75 of 2008 deals with children in conflict with the law. The SAHRC has raised the issue of the overuse of prosecutorial or court-ordered diversion programmes for child offenders, due to a lack of funding for other community-based diversion options and restorative justice approaches as set out in the Act. The SAHRC has also expressed concern at the age of criminal capacity in South Africa, which is contrary to General Comment 10 of the UN Committee on the Rights of the Child (which deals with children's rights in juvenile justice). Currently the Child Justice Act sets the minimum age of criminal capacity at 10 years old, with the legal presumption that a child between 10 and 14 lacks criminal capacity. The SAHRC has recommended that the minimum age be raised to 14 years (with the removal of the legal presumption clause).

## **Monitoring of unlawful detention at Lindela**

The section 33 right to just administrative action and procedural fairness is a key issue under the right of detained persons, especially in relation to undocumented foreign nationals held at detention

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

## Conclusion and recommendations

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

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

The main issues of concern and recommendations are summarised below:

### Life Esidimeni deaths

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

## Deaths in state custody

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

## Assisted dying

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

## Corporal punishment

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

## Human trafficking

- The South African government – in particular the DOJCD, DSD, DHA and SAPS - needs to develop proper identification and referral mechanisms for victims of trafficking in persons, and needs to do more to assist the victims of trafficking – usually children, women and migrant workers in the agriculture and fishing sectors – who are often fearful to engage with government authorities. More awareness is needed amongst the general public and officials within the criminal justice system about the many ways in which human trafficking manifests in South Africa.

## Challenges with accessing information through PAIA

- Given the extremely poor compliance with PAIA by public bodies, there is the need for a third party dispute resolution process to be set up by the new Information Regulator. Capacity constraints within public bodies also need to be addressed to ensure that the obligations under PAIA can be met.
- Public bodies must be encouraged to broaden their categories of automatically available information, and all such information should be placed on their websites.

- All licences should include a condition requiring the licence holder to make a copy of its licence available on its website or to anyone on request. Further, the terms ‘trade secrets’ and ‘commercial information’ in PAIA should be clearly defined, to prevent their use as unsubstantiated excuses for failing to disclose records which should be publicly available.

### Communication surveillance practices

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

### Hate speech and hate crimes

- The DOJCD should remove the issue of hate speech from the Prevention and Combating of Hate Crimes and Hate Speech Bill, so that it deals only with the issue of hate crimes and is passed expeditiously in Parliament. The inclusion and expanded definition of hate speech in the Bill should be reconsidered. In line with CERD, the criminalisation of hate speech should be reserved only for serious cases, to be proven beyond reasonable doubt.
- The Equality Courts need to be strengthened and promoted so that people are aware of their recourse to access justice, and so that useful hate speech jurisprudence is developed. Infrastructural capacity around PEPUDA and the Equality Courts needs to be strengthened to guarantee the effective implementation of legislation.
- The development of a system which captures and stores disaggregated hate crimes and/or hate speech data needs to be prioritised, as does the training and sensitisation of government officials on these issues.

### Whistleblowing

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

### Media freedom and censorship

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

### Protest

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

## Student protests

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

## Marikana Commission

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

## Political party funding

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

## Political intimidation and violence

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

## Traditional Courts Bill

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

## International Criminal Court withdrawal

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

## Arrested, detained and accused persons

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

## Independence and capacity of JICS

- The role of JICS as an independent oversight body is crucial for the effective functioning of the criminal justice system as a whole, and the DCS in particular, and that JICS should be placed in this position through a review of the enabling legislation for the JICS, operational independence (the allocation of a budget separate from the DCS and allocating JICS power



to institute legal proceedings in its own name), and a clear mandate to refer cases to SAPS or the NPA in cases of criminal conduct by DCS officials. JICS should become a member of the Forum of Institutions Supporting Democracy (FISD).

- The South African government should ratify the Optional Protocol to the Convention against Torture (OPCAT) and establish a National Preventive Mechanism which encompasses the existing mandate of the JICS as well as other oversight bodies.

### Overcrowding and poor conditions in correctional centres

- The DCS needs to urgently address the issue of overcrowding in correctional centres across the country and increase its efforts to guarantee the rights of detainees to be treated with humanity and dignity. The number of awaiting trial prisoners or remand detainees is extremely high, often as a result of the actions of SAPS (who arrest large numbers of people unnecessarily) and the notoriously slow and inefficient criminal justice system.
- Restorative justice as an alternative to imprisonment needs to be properly understood and explored, with significant resources allocated to this initiative by the DOJCD.
- Other reasons for overcrowding – including the high number of prisoners awaiting trial; bottlenecks in the parole process; mandatory minimum sentencing; and the increase in life sentences – need to be seriously explored by DCS, DOJCD and the Minister of Justice and Correctional Services.
- Basic information and statistics on who is serving life sentences and why, and what their previous offence profiles are, should be provided by DCS as part of a process of life imprisonment reform in South Africa. It has been shown that harsher prison sentences are actually not as effective a deterrent as ‘surety of conviction’, the latter which is sorely lacking in South Africa.

### Children in the criminal justice system

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

### Monitoring of unlawful detention at Lindela

- The DHA must improve its efforts to ensure adequate living conditions in all immigration centres in the country. The SAPS should ensure that the detention of undocumented migrants at police stations which have been classified as immigration detention centres, comply with the minimum standards of detention, the provisions of the Immigration Act and the Tsoka court order.

- The DHA should cease all unlawful detentions at Lindela and other detention centres with immediate effect. Detention pending deportation should be applied only as a last resort, with special regard being given to the needs of particularly vulnerable persons. Detained undocumented migrants must be served with notices of deportation as provided by the Immigration Act and the accompanying regulations insofar as the time limits and procedure is concerned.
- The detention of unaccompanied minor children must be discontinued as a matter of urgency. Care must be taken when arresting and admitting persons at Lindela and other detention centres, including thorough screening to prevent the detention of unaccompanied minors.

# 1. INTRODUCTION

This report by the South African Human Rights Commission (SAHRC or the Commission) examines key developments around civil and political rights (CPR) in South Africa during 2016/2017. Over the past year the country has witnessed civil and political rights violations in relation to the following: use of excessive force during protests; overcrowding in correctional centres and violation of prisoners' rights; threats to media freedom; hate crimes against lesbian, gay, bisexual, transgender and intersex (LGBTI) people and foreign nationals; hate speech; privacy violations; censorship; political violence related to the local government elections; and the heavy-handed policing of Fees Must Fall student protests. There are also currently a number of highly politicised and contested legal developments underway in South Africa, relating to hate speech and hate crimes, privacy of personal information, establishment of the Information Regulator, traditional courts, protected disclosures (whistleblowing), correctional centre oversight, and immigration detention. These developments speak to the implementation of the protection and realisation of CPR and highlight the need for ongoing monitoring and to raise issues of concern for consideration by government departments (and follow up on previous recommendations).<sup>1</sup>

Civil and political rights can be monitored at a number of different levels:

- Rights: interdependency and interrelatedness between CPR (and economic and social rights), including tensions between CPR and limitations based on section 36 of the Constitution.<sup>2</sup>
- Law and policy: existing legislation and policy, as well as ongoing legislative developments and jurisprudence from the courts.
- Institutional: oversight and monitoring mechanisms in place, including issues of resources, capacity, independence etc.
- Organisational: level of involvement of the SAHRC, in terms of its mandate; specific role of different units and positions within the SAHRC e.g. the Research Unit, Legal Services Unit, Provincial Offices etc.
- Individual: complaints of rights violations made to the SAHRC and civil society organisations (CSOs); questions around the role of the state in people's lives.

The purpose of this report is to capture the current state of affairs with regards to CPR in South Africa and should be used as a reflection piece or gap analysis. It aims to:

- provide a snapshot of current developments in legislation, policy and jurisprudence around CPR issues in South Africa;
- highlight the work of the SAHRC on a number of CPR-related issues and projects;
- gather and monitor data and statistics related to CPR enjoyment in South Africa; and

<sup>1</sup> Where relevant, this report refers to recommendations made in previous SAHRC research outputs and investigative hearing reports.

<sup>2</sup> The test contained in the limitations clause in section 36 of the Constitution determines whether a right can be limited based on, among others, the importance of the right, the importance of the aim of the limitation and the manner it could otherwise be achieved.

- compile recommendations for state institutions, civil society and the SAHRC around key CPR issues.

Importantly, South Africa is a party to regional and international treaty instruments focusing on the protection and expansion of CPR, including the International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup> and the African Charter on Human and Peoples' Rights (ACHPR). Over the past 18 months the South African government participated in reporting processes under both these treaties in terms of its civil and political rights obligations. This has given the SAHRC an opportunity to engage in an analysis of the implementation of CPR in South Africa, and compliance with domestic, African and international human rights obligations.<sup>4</sup>

In August 2015 South Africa submitted its overdue Second Periodic Report under the ACHPR, which dealt with developments between 2002 and 2013.<sup>5</sup> In April 2016 the report was considered by the African Commission on Human and Peoples' Rights at its 58th Ordinary Session, with its concluding observations yet to be published. In November 2014, South Africa submitted its initial country report to the United Nations (UN) Human Rights Committee in terms of the ICCPR.<sup>6</sup> The long-awaited report, which was 14 years overdue,<sup>7</sup> provided the Committee the opportunity to engage with South Africa on the step it is taking to respect, protect, promote and fulfil the civil and political rights contained in the ICCPR and in the South African Constitution. The SAHRC stated that it was encouraged by the submissions, however it 'was concerned with the lengthy delay of the ICCPR report in particular, and the lack of priority afforded to upholding obligations under international human rights law'.<sup>8</sup>

In line with its constitutional mandate and obligations as an accredited National Human Rights Institution (NHRI) to the UN, the SAHRC participated in the reporting process under the ICCPR, submitting a list of issues to the Human Rights Committee in 2015,<sup>9</sup> and responding to South Africa's country report in early 2016.<sup>10</sup> The SAHRC noted particular concern around the following issues: the treatment of migrant workers and asylum seekers, and xenophobic violence; the high number of deaths occurring at the hands of South African law enforcement officials; discrimination and violence against women and LGBTI people; and racially motivated hate speech. The SAHRC further requested that the South African government explain the status of the ICCPR in the South African legal system, expressing concern that not enough is being done to promote awareness of the ICCPR amongst government officials, policymakers and parliamentarians. The SAHRC urged the Committee to call upon the government to provide further information about how the ICCPR has been domesticated, in particular regarding its use by the judiciary.<sup>11</sup>

3 In 2016 the ICCPR celebrated its 50th anniversary. Prof Christof Heyns, a South African academic, has been appointed to serve on the Human Rights Committee from 2017 to 2020.

4 This is dealt with in more detail in SAHRC 'Annual International and Regional Human Rights Report 2016' (March 2017).

5 Republic of South Africa 'Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa' (August 2015): [http://www.achpr.org/files/sessions/58th/state-reports/2nd-2002-2015/staterep2\\_southafrica\\_2003\\_2014\\_eng.pdf](http://www.achpr.org/files/sessions/58th/state-reports/2nd-2002-2015/staterep2_southafrica_2003_2014_eng.pdf)

6 Republic of South Africa 'Initial Report submitted to the United Nations Human Rights Committee in terms of the International Covenant on Civil and Political Rights' CCPR/C/ZAF/1 (26 November 2014).

7 In accordance with the ICCPR, South Africa was due to submit its initial country report in 2000, however it only submitted its report in 2014, together with country reports under the UN Committee on the Elimination of Racial Discrimination (CERD) and the Convention on the Rights of the Child (CRC).

8 SAHRC press statement (6 March 2016): <http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/368-the-sahrc-will-participate-at-the-166th-session-of-the-un-human-rights-committee-on-aouth-africa-s-implementation-of-the-international-covenant-on-civil-and-political-rights>

9 SAHRC 'List of Issues Report to the Human Rights Committee on South Africa's Implementation of the International Covenant on Civil and Political Rights' (17 April 2015).

10 SAHRC 'NHRI Report on the South African Government's state report and responses under the International Covenant on Civil and Political Reports' (March 2016). All the documentation relating to submissions, reports and concluding observations made during review of South Africa's country report to the ICCPR is available here: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1016&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1016&Lang=en)

11 Ibid 5.

In March 2016 the Human Rights Committee adopted concluding observations on South Africa's initial country report submitted under the ICCPR.<sup>12</sup> The Committee highlighted several challenges facing the oversight and monitoring mechanisms and institutions in South Africa. These include budget limitations, lack of institutional independence from government departments, and limited mandates and powers. The Committee recommended that South Africa should ensure that all oversight bodies are institutionally independent, adequately funded, and equipped with the powers and functions necessary to deal with complaints and investigations promptly and effectively, in order to hold authorities accountable and facilitate access by victims of human rights violations to an effective remedy.<sup>13</sup> The Committee's concluding observations will be discussed in section 2 of this report, and the report highlights a number of issues relating to oversight and monitoring mechanisms and institutions, including the Independent Police Investigative Directorate (IPID), Office of the Judicial Inspectorate for Correctional Services (JICS), Inspector-General of Intelligence, and the Information Regulator.

## 1.1. *The SAHRC and CPR*

This Civil and Political Rights report has been undertaken in terms of the Commission's broad mandate in terms of section 184 of the South African Constitution, to promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights. The SAHRC has the power to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate. In the past the SAHRC has focused its research around economic and social rights (ESR), in line with its clear mandate in terms of section 184(3) of the Constitution. However, over the years, the Commission has become aware of the need to conduct research and monitoring around CPR. In terms of the Commissioner's portfolios, these rights have been dealt with in various ways under equality, migration, access to justice, human rights and law enforcement, and the prevention of torture. While the SAHRC conceptualises all human rights as interdependent, interrelated and indivisible, this report will focus on CPR (and their intersections with ESR) and developments occurring in the 2016/2017 period.

The Commission has an overlapping mandate with other institutions established to support constitutional democracy, particularly around CPR issues. In 2010, following a consultation process with stakeholders and a report by Prof Kader Asmal to the National Assembly (on behalf of the ad hoc committee set up to review State institutions supporting constitutional democracy), the Office on Institutions Supporting Democracy (OISD) was established within the Office of the Speaker. The associated Forum for Institutions Supporting Democracy (FISD) is an important forum where issues of mutual interest can be discussed.<sup>14</sup>

Table 1 below shows the number of complaints lodged with the SAHRC in terms of civil and political rights in the last year. According to the SAHRC's latest trends analysis report, over the last four years the rights forming the subject of the majority of enquiries and complaints (referred to as the Top 5 Rights Violations) were: equality; labour relations; healthcare services, water, food and social

<sup>12</sup> UN Human Rights Committee 'Concluding Observations on the Initial Report of South Africa adopted on 23 March 2016' CCRPR/C/ZAF/CO/1 (27 April 2016).

<sup>13</sup> Ibid para 10.

<sup>14</sup> The FISD consists of Chapter 9 institutions and other statutory bodies, including the SAHRC, Auditor-General, Electoral Commission (IEC), Public Protector and the Public Service Commission. See Office on Institutions Supporting Democracy website: [http://www.parliament.gov.za/live/content.php?Category\\_ID=320](http://www.parliament.gov.za/live/content.php?Category_ID=320)

security; just administrative action; and arrested, detained and accused persons.<sup>15</sup> The Commission has classified these complaints as the top five rights violations, and three of these are CPR violations.

**Table 1: Categories and number of civil and political rights violations complaints made to the SAHRC in 2015/2016**

Category of civil and political right/s violation	Number of complaints (2015/2016)
Equality	749
Arrested, Detained and Accused Persons	409
Just Administrative Action	379
Human Dignity	244
Access to Information	150
Freedom of Expression	117
Freedom and Security of the Person	114
Privacy	49
Citizenship	41
Access To Courts, Independent Tribunals and Forums	33
Life	9
Assembly, Demonstration, Picket and Petition	6
Freedom of Association	5
Political Rights	2
Slavery, Servitude and Forced Labour	0

Over the past four years the overwhelming majority of complaints received by the SAHRC’s provincial offices relate to infringements of the right to equality on the basis of race, disability and ethnic or social origin. The number of race-related equality complaints per year has exceeded 200 over the past four years, culminating at 505 recorded in 2015/2016.<sup>16</sup> The SAHRC’s annual Equality Report provides in-depth monitoring and analysis on the right to equality in South Africa (particularly unfair discrimination on the basis of race, gender and disability) in terms of the Commission’s mandate under the **Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000** (PEPUDA).<sup>17</sup> The rights to human dignity and equality are fundamental values inherent to the interpretation and realisation of all rights, including CPR, and will therefore be discussed in relation to issues dealt with in this report.<sup>18</sup>

## 1.2. Methodology

This report is predominantly qualitative and desktop in nature. It draws on a number of sources of information, including:

- Qualitative and quantitative data that emerges from the Commission’s regular activities, including: investigative hearings, roundtable discussions and advocacy initiatives, research reports (including findings, hearings and trends analysis reports), enquiries and complaints from the SAHRC National and Provincial Offices.

<sup>15</sup> SAHRC ‘Annual Trends Analysis Report 2015/2016’ Draft Report (26 September 2016).

<sup>16</sup> Ibid.

<sup>17</sup> SAHRC ‘Annual Report on the State of Equality in South Africa 2016/17’ (March 2017).

<sup>18</sup> This report does not deal with labour rights as the Commission for Conciliation, Mediation and Arbitration (CCMA), Department of Labour, and Commission for Employment Equity have been established to consider the development of these rights. Similarly, the rights of linguistic, cultural and religious groups will not be examined, because of the overlapping jurisdiction with the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

- Annual reports, and other documents, available from key government departments, bodies and ministries.
- Research by academics and academic institutions as well as research and research reports or information collected by civil society organisations (CSOs), networks and campaigns.
- Interviews with members of CSOs working on related research and campaigns.
- Country reports and NHRI reports submitted to international and regional treaty bodies, as well as concluding observations.
- Submissions on proposed legislation, as well as findings from portfolio committees, ad hoc parliamentary inquiries, judicial commissions etc.
- Court cases and judgments in the lower courts and Constitutional Court.
- Media reports.

For this phase of the research no questionnaires were directed at specific government departments or agencies, nor were focus groups or in-depth interviews conducted with CSOs and other stakeholders. However this will possibly form part of the second phase of this research.

## 1.3. *Outline of report*

Section 1 provides the introduction, background and methodology of the report, as well as the mandate of the SAHRC in terms of civil and political rights (CPR). Section 2 provides a discussion on a number of key developments in South Africa around civil and political rights issues:

- **Section 2.1** covers the right to life and human dignity, and looks at the Life Esidimeni deaths; deaths in police custody, during police action or in correctional facilities; and assisted dying.
- **Section 2.2** covers freedom and security of the person, and looks specifically at the issue of corporal punishment in schools and in the home.
- **Section 2.3** covers slavery, servitude and forced labour, and looks at human trafficking in South Africa.
- **Section 2.4** covers the right to privacy and access to information, and looks at challenges with accessing information through PAIA; communication surveillance practices; establishment of the Information Regulator; and the appointment of the Inspector-General of Intelligence.
- **Section 2.5** covers freedom of expression and protection from unfair discrimination, and looks at the Prevention and Combating of Hate Crimes and Hate Speech Bill; hate crimes against LGBTI people, whistleblowing; and media freedom and censorship.
- **Section 2.6** covers protest, and looks at the student protests on university campuses and the Marikana Commission

- **Section 2.7** covers political rights, and looks at political party funding; and political intimidation and violence.
- **Section 2.8** covers just administrative action.
- **Section 2.9** covers access to courts, and looks at the Traditional Courts Bill; and the International Criminal Court (ICC) withdrawal.
- **Section 2.10** covers arrested, detained and accused persons, and looks at the independence and capacity of the Office of the Judicial Inspectorate for Correctional Services (JICS); overcrowding and poor conditions in correctional centres; children in the criminal justice system; and the monitoring of unlawful detention at Lindela Repatriation Centre.

Section 3 provides a brief conclusion to the report and outlines some recommendations and issues of concern for consideration by government departments and agencies. Section 4 contains the bibliography of references.



# 2. DISCUSSION OF KEY DEVELOPMENTS

This section discusses key issues and developments in South Africa around civil and political rights issues. These developments are related to events, law, policy and jurisprudence. In some cases the Commission has commented on the development itself, has an existing position or has intervened in the issue. While in other cases, the SAHRC has yet to comment or formulate a position.

## 2.1. *Right to life and human dignity*

The right to life is contained in section 11 of the Constitution, and places both positive and negative duties on the state to protect life. In the *Makwanyane* judgment (which abolished the death penalty) the Constitutional Court elaborated on the right to life as ‘not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity.’ The *Makwanyane* judgment also highlighted the inter-relationship between the right to life and the right to human dignity:<sup>19</sup>

The right to life, thus understood, incorporates the right to dignity. So the rights to dignity and to life are intertwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

The right to life may be limited in terms of the limitations clause in section 36 of the Constitution, however this would have to be ‘exceptionally compelling’.<sup>20</sup> The state has an added obligation to protect the right to life of those within its care or custody, for example in mental hospitals (or in NGOs undertaking this function), police stations, detention centres and correctional facilities. In 2016, the Office of the United Nations High Commissioner for Human Rights (OHCHR) announced that the UN Human Rights Committee had commenced its public discussion on the draft General Comment on Article 6 of the ICCPR on the right to life, which will give much-needed content to the right.<sup>21</sup>

### 2.1.1. *Life Esidimeni deaths*

The arbitrary death of people entering the healthcare system in South Africa has been a concern for a number of years. Most recently, this issue surfaced with the shocking discovery that 94 mentally ill patients had died between 23 March and 19 December 2016,<sup>22</sup> after the Gauteng Department of Health cancelled its longstanding contract with Life Healthcare Esidimeni and placed over 1 300

<sup>19</sup> *State v Makwanyane and Another* (CCT3/94) [1995] ZACC 3

<sup>20</sup> Republic of South Africa (note 5 above) 15.

<sup>21</sup> OHCHR ‘Human Rights Committee continues to discuss draft general comment on the right to life’ (2 November 2016): <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20817&LangID=E#sthash.Bdpw5AQZ.dpuf>

<sup>22</sup> In September 2016 the Gauteng MEC for Health made an announcement that 36 mentally ill patients had died, however the Health Ombud has since found that it is likely over 100 patients actually died.

patients in hospitals and NGOs during a so-called process of 'deinstitutionalisation'.<sup>23</sup> All of the 27 NGOs where the patients were relocated were unlicensed, under-resourced and had no capacity to take on mentally ill people. The discovery caused an outcry both nationally and internationally,<sup>24</sup> with the Minister of Health Aaron Motsoaledi commissioning the Health Ombud to investigate the deaths.

According to the Health Ombud's report published in February 2017, the implementation of the transfer process – known as the Gauteng Mental Health Marathon Project – was done in a rush and showed:<sup>25</sup>

a total disregard of the rights of the patients and their families, including but not limited to the right to human dignity; right to life; right to freedom and security of person; right to privacy, right to protection from an environment that is not harmful to their health or well-being, right to access quality health care services, sufficient food and water and right to an administrative action that is lawful, reasonable and procedurally fair.

The report also found prima facie evidence that certain government officials and NGOs involved violated the Constitution and contravened the National Health Act 61 of 2003 and the Mental Health Care Act 17 of 2002. Following the release of the Health Ombud's report, the Gauteng MEC of Health resigned from her position and Gauteng Premier David Makhura stated that he would fully and urgently implement the recommendations of the report. The report made 18 recommendations, a number of which have already been concluded while others are still in progress. Recommendation 9 is that Minister of Health should request the SAHRC 'to undertake a systematic and systemic review of human rights compliance and possible violations nationally related to mental health.' This medium-term recommendation requires a systematic and systemic review of mental health patients throughout the country. The Minister has subsequently requested the SAHRC to investigate whether psychiatric patients in other provinces have died as a result of being moved from institutions to NGOs.

The SAHRC has expressed 'its deep regret at the grave tragedy that unfolded following the transfer of patients from Life Esidimeni'.<sup>26</sup> In February 2017 the Commission was asked to explain its involvement in the matter to the Portfolio Committee on Justice and Correctional Services, detailing the correspondence it had with the Gauteng Department of Health and NGO Section 27. The SAHRC Chairperson presented to the Committee on the Commission's involvement in the Esidimeni case and its decision to monitor what was happening via correspondence with the Gauteng Department of Health.<sup>27</sup> He explained that the SAHRC did not have the capacity in terms of resources or skills to visit and monitor all the NGOs, and believed assurances by the Department that the patients were receiving good care. In terms of the request by the Minister of Health, the Commission is preparing to undertake an investigation into the systemic issues that led to the

23 Parliamentary Monitoring Group (PMG) 'Deaths of mentally ill patients in Gauteng: Health Ombud report and Minister's response' Portfolio Committee on Health meeting (15 February 2017).

24 OHCHR 'South Africa: UN experts shocked by death of at least 37 people in flawed relocation process from psychiatric hospitals' (2 December 2016): <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20981&LangID=E#sthash.RUBVJogy.dpuf>

25 Office of the Health Ombud 'The Report into the 'Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province' - No Guns: 94+ Silent Deaths and Still Counting' (1 February 2017) 2.

26 SAHRC 'SAHRC Response on Statement by the Democratic Alliance on Esidimeni Patient Transfers' Press statement (7 February 2017).

27 Parliamentary Monitoring Group (PMG) "Esidimeni" Complaint: SAHRC briefing' Meeting of the Portfolio Committee on Justice and Correctional Services (22 February 2017).

tragic situation, and would continue monitoring the Esidimeni situation as best it could, given its resource constraints.<sup>28</sup> The SAHRC will likely host an Investigative Hearing on key issues related to mental disability and access to healthcare services in South Africa, which would require a process of identifying some of the systemic issues and defining what the role of the SAHRC can and should play going forward.

## 2.1.2. Deaths by police officers or in correctional facilities

The use of deadly force when making an arrest is potentially a limitation to the right to life. The amended section 49(2) of the Criminal Procedure Act 51 of 1977 allows for the use of deadly force if a suspect poses a danger to the public and municipal police services.<sup>29</sup> After its finalisation of each investigation, IPID makes recommendations to the National Prosecuting Authority (NPA) based on the evidence, and the NPA then decides whether or not to institute criminal proceedings against the suspected officers. IPID also makes recommendations to the SAPS or municipal police services relating to disciplinary steps to be taken.

In 2015/2016 IPID reported that there was a total of 216 deaths in police custody, and 366 deaths as a result of police action.<sup>30</sup> According to IPID, deaths in custody are as a result of suicide (hanging), natural causes, injuries sustained prior to custody and injuries sustained in custody by an SAPS official.<sup>31</sup> Most deaths as a result of police action occurred during police operations, where suspects were shot with a firearm during the course of arrest, or during the course of a crime.<sup>32</sup> From 2014/2015 to 2015/2016, IPID reported a national 11 per cent decrease in the number of deaths in police custody, and an 8 per cent decrease in the number of deaths as a result of police action. Of the total of 582 deaths reported to IPID during 2015/2016, most occurred at the crime scene (296), in hospital or clinics (153) or in police cells (109).<sup>33</sup> However, an outlier in this trend was the Mpumalanga province, which saw a staggering 93 per cent increase in the number of deaths in police custody, and a 75 per cent increase in the number of deaths as a result of police action.<sup>34</sup> The SAHRC Mpumalanga office should consider meeting with IPID and the SAPS Mpumalanga Provincial Commissioner to discuss this concerning trend.

The investigation of deaths and allegations of torture or cruel, inhuman or degrading punishment in correctional centres is conducted by the **Judicial Inspectorate of Correctional Services (JICS)**, an independent office under the control of the Inspecting Judge (the incumbent is Justice Johann van der Westhuizen). The Correctional Services Act 111 of 1998 stipulates that the Department of Correctional Services (DCS) must report all deaths, instances of segregation, use of mechanical restraint and the use of force to the Inspecting Judge, who may carry out or instruct the National Commissioner of Police to conduct an enquiry into any death. The work of JICS is examined in more detail in section 2.10.1 of this report below. The JICS relies on the DCS to send it reports of unnatural deaths so that these can be analysed and feedback provided to stakeholders. The DCS

28 Ibid.

29 In terms of police oversight in South Africa, IPID is an investigation unit while the Civilian Secretariat for Police is focused on institutional and organisational issues.

30 IPID '2015/16 Annual Report' 51.

31 Ibid 55.

32 Ibid 58.

33 Ibid 59.

34 Ibid 52-23.

reported that the number of unnatural deaths in correctional and remand detention facilities in 2015/2016 was 62 (out of a population of 161 984), with the main causes attributed to suicide or overdose.<sup>35</sup> According to the latest JICS annual report, only 28 reports were received from DCS during 2015/2016 (all in the last week of March 2016) and therefore could not be analysed. According to JICS, 'the dysfunctional electronic system of submitting reports poses enormous challenges to conduct the task of analysing the unnatural death reports. The JICS liaised with the DCS to find solutions towards correcting the dysfunctional electronic system, however little progress has been made.'<sup>36</sup> The SAHRC recommends that the DCS urgently put in place measures to address this issue, as it affects the ability of JICS to perform its important oversight role.

### 2.1.3. Assisted dying

The SAHRC has received requests from CSOs in the past to clarify its position on assisted dying in South Africa. Assisted dying is an umbrella term that includes assisted suicide (doctor-assisted suicide by a patient) and euthanasia (termination of life by a doctor at the request of a patient). International law has not established a clear position on assisted dying, but it does not prevent its legalisation in countries, provided that safeguards are put in place to ensure that abuse or the violation of the right to life does not occur. While the SAHRC has not yet formulated a position around this contentious issue, it has been following recent attempts to decriminalise assisted dying in the South Africa courts.

In December 2016 the Supreme Court of Appeal (SCA) handed down a judgment in an appeal brought by the state against a favourable High Court judgment dealing with the question of assisted dying.<sup>37</sup> The case was brought by the terminally ill Robin Stransham-Ford, who had approached the High Court to request the legal sanction for a medical practitioner to end his life, or to enable him to end his life. According to DignitySA, a lobby group advocating for the legalisation of assisted dying in South Africa (and a supporter of the case), 'a person afflicted with a terminal illness should be allowed the option to end his or her life with assistance in order to preserve personal privacy and dignity as well as alleviate suffering.'<sup>38</sup> Stransham-Ford and DignitySA argued that a number of fundamental human rights are breached by criminalising assisted dying, including the right to human dignity, the right to life, and the right to freedom and security of the person.

On 30 April 2015 the Pretoria High Court granted him an order that would allow a doctor to assist him in dying without the threat of prosecution.<sup>39</sup> Unfortunately, Stransham-Ford passed away just hours before the order was made.<sup>40</sup> In his judgment Fabricius J made it clear that the relief ordered was case dependent and did not set a precedent that could be open to abuse. He recommended that the Minister of Health revisit a 1998 report published by the South African Law Commission (SALC), entitled Euthanasia and the Artificial Preservation of Life, which suggested a number of options and supported the development of the common law.<sup>41</sup> One of the proposals made by the

35 DCS 'Annual Report 2015/2016 Financial Year' (September 2016) 53. Encouragingly, according to JICS the DCS has been very successful in treating HIV and TB in correctional facilities, and in 2015/16 the number of deaths was 511 (down from 1 689 deaths in 2004/2005). See JICS 'Annual Report 2015/2016' (20 October 2016) 54.

36 JICS 'Annual Report 2015/2016' (20 October 2016) 31.

37 *Minister of Justice and Correctional Services v Estate Stransham-Ford* (531/2015) 2016 ZASCA 197 (6 December 2016).

38 DignitySA website: <http://www.dignitysa.org/blog/the-issue/>

39 *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP)

40 TF Hodgson 'Dying and the law: the Dignity SA case explained' GroundUp News (1 May 2015): [http://www.groundup.org.za/article/dying-and-law-dignity-sa-case-explained\\_2899/](http://www.groundup.org.za/article/dying-and-law-dignity-sa-case-explained_2899/)

41 South African Law Commission 'Euthanasia and the Artificial Preservation of Life' (November 1998): [http://salawreform.justice.gov.za/reports/r\\_prj86\\_euthen\\_1998nov.pdf](http://salawreform.justice.gov.za/reports/r_prj86_euthen_1998nov.pdf)

SALC was that a doctor be allowed to carry out a patient's request to die; however only if certain safeguards were met: that the patient had to be terminally ill, subject to extreme suffering but mentally competent; that a second independent medical practitioner would have to confirm the diagnosis; and the findings had to be recorded in writing.

In his judgment, Fabricius J expressed shock at a statement made by the Minister of Justice and Correctional Services that denied that the manner of death outlined by Stransham-Ford was not dignified, saying that it was 'natural' and that his assertions of indignity were his 'own subjective view'.<sup>42</sup> According to him, while the right to life is paramount and life is sacrosanct, with section 11 of the Constitution providing for this, 'this provision safeguards a person's right vis-à-vis the State and society' however cannot mean 'that an individual is obliged to live, no matter what the quality of his life is.'<sup>43</sup> According to Fabricius J, assisted dying is a topic 'that deserves broad discussion, but in the context of the Bill of Rights especially.'<sup>44</sup>

In 2016 the Minister of Justice and Correctional Services, Minister of Health and the Health Professions Council of South Africa (HPCSA) appealed the High Court judgment, arguing that it would have potential far-reaching implications in the absence of a legislative framework that regulates assisted dying. The Centre for Applied Legal Studies (CALs) was admitted as amicus curiae in the appeal, providing evidence from expert witnesses in jurisdictions which have legalised euthanasia and assisted dying and arguing that the absence of a right to assisted dying can amount to torture or cruel and unusual punishment.<sup>45</sup> However the SCA found that Stransham-Ford's cause of action ceased to exist when he passed away, and that more generally the circumstances of the case were such that it was inappropriate for the High Court to engage in a reconsideration of the common law in relation to the crimes of murder and culpable homicide.<sup>46</sup> Assisted dying therefore remains illegal and prosecutable in South Africa. However in addition to supporters of assisted dying, like DignitySA and CALs, other individuals are speaking out in favour of reviewing South Africa's laws on assisted dying. For example, in 2016 Archbishop Emeritus Desmond Tutu came out publically as a supporter of assisted dying, stating that he would like it as an option and calling on South Africa to revisit its laws 'which are not aligned to a constitution that espouses the human right to dignity'.<sup>47</sup>

42 *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP) para 1.

43 *Ibid* para 23.

44 *Ibid* para 21.

45 CALs 'CALs supports legal recognition of assisted dying' Press statement (1 March 2016): <https://www.wits.ac.za/news/sources/cals-news/2016/cals-supports-legal-recognition-of-assisted-dying.html#sthash.9uip11wy.dpuf>

46 *Minister of Justice and Correctional Services v Estate Stransham-Ford* (531/2015) 2016 ZASCA 197 (6 December 2016) para 5. Other groups have advocated for more resources to be allocated to long-term and palliative care, which is seen as a solution to suffering due to terminal illness.

47 Desmond Tutu 'Desmond Tutu: a dignified death is our right – I am in favour of assisted dying' *The Guardian* (12 July 2014).

## 2.2. Freedom and security of the person

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

### 2.2.1. Corporal punishment

While corporal punishment in schools is prohibited in terms of the **South African Schools Act 84 of 1996**, it remains a sad reality in South Africa. In February 2016 the death of eight year old Nthabiseng Mtambo in the Free State province made the news. She had been beaten on her head with a hosepipe by her Grade 3 teacher for not doing her homework.<sup>48</sup> The SAHRC has called on the National Department of Basic Education to expedite the establishment of a national protocol to enforce the statutory prohibition of corporal punishment in schools, address the shortcomings in the current legislative and policy frameworks, and provide for the prosecution of teachers and educators who continue to administer corporal punishment.<sup>49</sup>

However, while corporal punishment in institutional settings is prohibited it is still permitted in the private sphere (in the home), as no amendment has been passed in terms of the **Children's Act 38 of 2005** (enacted in 2007).<sup>50</sup> In January 2016 the SAHRC published an Investigative Report on a complaint lodged against the Joshua Generation Church in 2013, in terms of the church's religious doctrine that requires the use of corporal punishment against children.<sup>51</sup> The complainants alleged that the church promotes the dangerous idea that corporal punishment is not harmful, and is in fact beneficial, to the child. The church argued that in terms of section 36 of the Constitution the teachings of corporal punishment are a constitutionally acceptable limitation of children's rights to equality, human dignity, freedom and security of the person and protection from maltreatment, neglect, abuse or degradation.<sup>52</sup>

The SAHRC examined international, regional and South African law and considered whether the church's conduct amounted to a violation of the right of children to be protected from maltreatment, neglect, abuse or degradation in terms of the Constitution; whether the promotion of corporal punishment is inconsistent with the standard of the best interest of the child under section 28(2) of the Constitution; and whether the conduct of the respondent amounted to a violation of the rights to equality, human dignity and freedom and security of the person. In its report the SAHRC made the following findings: corporal punishment in any form is inconsistent with constitutional values and violates the provisions of international and regional human rights standards; corporal punishment amounts to a violation of the right of every child to be protected from maltreatment, neglect, abuse or degradation, and violates children's rights to freedom and security of the person; and corporal punishment or chastisement amounts to a violation of the right to equality and human

48 S Röhrs 'Twenty years on, corporal punishment in schools is alive and well' *Daily Maverick* (14 March 2016).

49 SAHRC (note 10 above) 22-23.

50 In 2007 Parliament removed clause 139 from the Children's Amendment Bill, which sought to prohibit all forms of violence against children, including corporal punishment in the home. The understanding was that a later amendment would deal with this issue (after further investigation into the matter), however this amendment has not yet been introduced. *Ibid* 21.

51 SAHRC 'Investigative Report in the matter between Complainants and Joshua Generation Church' (January 2016).

52 *Ibid* 44.

dignity. The SAHRC found that even light corporal punishment violates the best interest of the child in the Constitution, and should be criminalised.<sup>53</sup>

The SAHRC made specific recommendations to the church, to desist from using and advocating for corporal punishment as a means of disciplining children, as well as a number of broader recommendations:

- That Cabinet should direct the Department of Social Development (DSD) to initiate amendments to the Children's Act in order to give effect to the prohibition of corporal punishment in the home, to provide for children's access to justice, and to provide for appropriate remedies and penalties against offenders.
- The DSD should develop policies and programmes to promote alternative forms of non-violent parenting, as well as plan and budget for the inclusion of non-violent parenting courses in order for South Africa to meet its international human rights obligations in terms of the UN Convention on the Rights of the Child.
- A copy of the report be given to the Department of Justice and Constitutional Development (DOJCD) in order to inform advocacy campaigns, placing greater emphasis on children's rights to be free from violence in their homes.<sup>54</sup>

In January and March 2016 public consultations were held on the DSD's draft Child Care and Protection Policy (which underpins planned amendments to the Children's Act), with other government departments, CSOs and social workers also supporting a ban on corporal punishment in the home.<sup>55</sup> The SAHRC continues to monitor the implementation of the prohibition on corporal punishment in schools and the process to prohibit corporal punishment in the home.

## **2.3. Slavery, servitude and forced labour**

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

### **2.3.1. Human trafficking**

In South Africa human trafficking - forcing or manipulating a person against their will into sexual or labour exploitation, within their own country or across borders - remains a significant challenge.<sup>56</sup> In 2016 the UN Human Rights Committee noted progress made with regard to combating trafficking in persons, referring to the 2013 Prevention and Combating of Trafficking in Persons Act 7 of 2013 passed in South Africa (coming into operation in August 2015)<sup>57</sup>; however, expressed concern that South Africa lacks proper identification and referral mechanisms for victims of trafficking in persons. The Committee called on the government to continue its efforts to prevent and eradicate trafficking in persons, step up its efforts to identify and protect persons who may be vulnerable to human trafficking and establish a nationwide identification and referral system for victims of

<sup>53</sup> Ibid 56-58.

<sup>54</sup> Ibid 59-60.

<sup>55</sup> S Röhrs 'Twenty years on, corporal punishment in schools is alive and well' *Daily Maverick* (14 March 2016).

<sup>56</sup> LexisNexis 'About Human Trafficking': <http://www.lexisnexis.co.za/ruleoflaw/about-human-trafficking.aspx#HumantraffickinginSouthAfrica>

<sup>57</sup> The comprehensive Act creates a specific offence criminalising trafficking in persons, as well as focuses on redress and compensation for the victims of human trafficking. Prior to this there was no specific legislation governing human trafficking in South Africa.

trafficking. It also noted with concern, allegations that migrant workers employed through labour brokers' services in the mining industry are victims of exploitative labour conditions, and recommended that the government take measures to outlaw and hold responsible labour brokers involved in the exploitation of workers in violation.<sup>58</sup>

In March 2017, a man was sentenced to 20 years in prison after being convicted of four charges in contravention of the Prevention and Combating of Trafficking in Persons Act – the first time a conviction has occurred since the Act came into force.<sup>59</sup> The SAHRC has called on the government to do more to assist the victims of trafficking – usually children, women and migrant workers in the agriculture and fishing sectors – who are often fearful to engage with government authorities, and to provide more information regarding efforts to identify and protect groups of persons who may be vulnerable to trafficking.<sup>60</sup> There is still the need for awareness amongst the general public and officials in the criminal justice system about the many ways in which human trafficking manifests in South Africa.<sup>61</sup>

## **2.4. Right to privacy and access to information**

The right to privacy contained in section 14 of the Constitution is foundational to other rights, including freedom of expression, freedom of association, and the right to dignity. According to the South African government, 'privacy is a valuable aspect of a person's personality, for that reason the definition of personal information is as wide as possible, including amongst others, everything from race, gender, marital status, sexual orientation, religion, language, employment history, email and telephone number, location and biometric information. It can also include personal opinions, views and preferences of a person.'<sup>62</sup> The government views the balancing of competing interests regarding privacy as a delicate one, particularly as they relate to 'the administering of national social programmes, maintaining law and order, and protecting the rights, freedoms and interests of others, including the commercial interests of industry sectors'.<sup>63</sup> See section 2.4.3 of this report below for more on the protection of personal information in South Africa.

In January 2017, Parliament's Standing Committee on Finance held a hearing on privacy concerns raised by the President in relation to amendments to the Financial Intelligence Centre Act 38 of 2001 (FICA) - legislation introduced to fight financial crimes such as money laundering and tax evasion – that would provide for warrantless searches. However in a number of expert legal opinions submitted to the committee, including a submission by the Council for the Advancement of the South African Constitution (CASAC), it was clarified that section 45B(1C) of the Bill (which provides for warrantless searches) is not unconstitutional. While warrantless searches do limit the constitutional right to privacy, as provided for in section 14 of the Constitution, this right may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in terms of section 36 of the Constitution. In February 2017 the National Assembly passed the Bill, supported by all political parties. However the President has yet to sign the Bill into law.

<sup>58</sup> UN Human Rights Committee (note 12 above) para 33.

<sup>59</sup> N Shange 'Guilty verdict in Rosettenville "child pimp" case' *Times Live* (28 February 2017).

<sup>60</sup> SAHRC (note 10 above) 16.

<sup>61</sup> M van der Merwe 'The Human Trafficking Act: Is it doing the job?' *Daily Maverick* (16 March 2017).

<sup>62</sup> Republic of South Africa (note 5 above) 54.

<sup>63</sup> *Ibid* 51.



## 2.4.1. Challenges with accessing information through PAIA

The right of access to information is provided under section 32 of the Constitution. According to the South African government, 'the right of access to information is a key that can be used to unlock access to other socio-economic rights and help ensure accountability of government to the people. This right can be as much about public service delivery as any other socio-economic right'.<sup>64</sup>

The **Promotion of Access to Information Act 2 of 2000 (PAIA)** gives effect to the right of access to information, and the SAHRC has a specific mandate in terms of PAIA to monitor compliance with its implementation, to provide training and to promote awareness of the Act. This will become the function of the Information Regulator once it has been properly established (see section 2.4.3 of this report below). In the past the SAHRC has raised a number of challenges with PAIA, including very poor compliance by public bodies (particularly municipalities) and the lack of adequate resolution mechanisms. Currently, disputes around requests for information from public bodies can only be resolved through an internal appeals process, which does not allow for third party review, and disputes regarding requests for information from private bodies can only be resolved in court.<sup>65</sup>

The 2016 Access to Information (ATI) Network Shadow Report (which was compiled using statistics derived from 369 PAIA requests made by members of the network between August 2015 and July 2016) highlights ongoing challenges with accessing information through PAIA. The report found that a concerning 46 per cent of information requests to public bodies were denied in full, either actively or as a result of the request being ignored (deemed refusal) while 10 of the 15 requests for information submitted to private bodies were denied in full.<sup>66</sup> The report contains the following recommendations:

- Public bodies must be encouraged to broaden their categories of automatically available information, and all such information should be placed on their websites. Capacity constraints within public bodies also need to be addressed to ensure that the obligations under PAIA can be met.
- All licences should include a condition requiring the licence holder to make a copy of its licence available on its website or to anyone on request.
- The terms 'trade secrets' and 'commercial information' in PAIA should be clearly defined, to prevent their use as unsubstantiated excuses for failing to disclose records which should be publicly available.<sup>67</sup>

## 2.4.2. Communication surveillance practices

While the state has the responsibility to ensure the safety and security of all people living in South Africa, this responsibility must be used carefully to ensure that any state or non-state surveillance is lawful and non-arbitrary. Internationally there are fears that 'privacy is dead', and in South

<sup>64</sup> Ibid.

<sup>65</sup> SAHRC (note 10 above) 25.

<sup>66</sup> ATI Network 'Shadow Report 2016' (February 2017) 2.

<sup>67</sup> CALS 'New report reveals shocking failure to uphold right of access to information' Media release (24 February 2017).

Africa there are growing concerns around the rise of a surveillance and intelligence-driven state.<sup>68</sup> The country has come under scrutiny, both internationally and domestically, for its problematic communication surveillance practices. In March 2016 the UN Human Rights Committee expressed concern at the country's main communications surveillance law, the **Regulation of Interception of Communications and Provision of Communication-related Information Act (RICA) 70 of 2002**, which allows law enforcement, intelligence agencies and the military to intercept communications with the permission of a judge. The Committee expressed concern at the effectively unregulated surveillance that takes place outside the law and the vague grounds needed for issuing warrants authorising the interception of communications.<sup>69</sup> Concerns around the constitutionality of RICA - particularly around its lack of accountability, transparency and safeguards - have also been voiced over the past year by CSOs, including the Right2Know Campaign (R2K).<sup>70</sup> Research has shown that activists, union leaders and community leaders in South Africa are monitored, spied on and harassed by the SSA and the Crime Intelligence Division of the SAPS, which 'violates the right to privacy... and have a chilling effect on the freedom to campaign, which is enshrined in other constitutional rights.'<sup>71</sup>

The potential widespread powers RICA gives to the state to monitor private communications between individuals has not been considered by the SAHRC; however recent concerns around the State Security Agency (SSA) and the communications surveillance of SABC employees, which has contributed to self-censorship and impacted freedom of expression at the organisation, has put privacy issues on the public agenda.

### 2.4.3. Establishment of Information Regulator

The importance of privacy of personal information hit the headlines recently with the uncovering of dubious practices by Cash Paymaster Services (CPS) and its parent company Net1, who were found to be using the social grant payment system to make deductions from beneficiaries for products peddled by its subsidiary companies.<sup>72</sup>

In 2013 the **Protection of Personal Information Act 4 of 2013 (POPIA)** was established to give effect to the constitutional right to privacy by: safeguarding personal information; regulating the manner in which personal information may be processed by establishing conditions that prescribe the minimum threshold requirements for the lawful processing of personal information; providing people with rights and remedies to protect their personal information from processing that is not in accordance with the Act; and establishing voluntary and compulsory measures. This includes the establishment of an Information Regulator to ensure respect for and to promote, enforce and fulfil the rights protected by POPIA. The Information Regulator is an independent body established in terms of section 39 of POPIA and is empowered to monitor and enforce compliance by public and private bodies with the provisions of POPIA and PAIA.<sup>73</sup> To date only some sections of POPIA have come into operation and the bulk of the Act will only come into force when the Information Regulator is fully operational.

68 See J Duncan *The Rise of the Securocrats: The Case of South Africa* (2014); D McKinley 'New Terrains of Privacy in South Africa' Right2Know Campaign and the Media Policy & Democracy Project (December 2016); R2K 'Supplementary Submission to SABC Inquiry: Concerns of Communications Surveillance and State Security Abuses at the Public Broadcaster' (16 January 2017).

69 UN Human Rights Committee (note 12 above).

70 R2K 'Memorandum to Department of Justice: Demands to Stand Against Surveillance and Fix RICA!' (26 April 2016).

71 R2K 'Big Brother Exposed: Stories of South Africa's intelligence structures monitoring and harassing activist movements' (April 2015).

72 E Torkelson 'There's a problem with the CPS grant payment system that Minister Bathabile Dlamini isn't talking about' *Huffington Post* (7 March 2017).

73 Information Regulator website: <http://www.justice.gov.za/inforeg>

In December 2016 a long-awaited step in the protection of the right to privacy and the right of access to information in South Africa was taken with the appointment of South Africa's first Information Regulator. The Information Regulator consists of five members and is based in Gauteng, with Advocate Pansy Tlakula as its chairperson. According to the ATI Network, the appointment of the Information Regulator 'bodes well for improved compliance with PAIA and increased transparency and openness.'<sup>74</sup> In terms of section 114(4) of POPIA, the Information Regulator takes over the function of enforcing PAIA from the SAHRC, and the SAHRC and the Information Regulator are engaging on how to operationalise this process. In terms of POPIA, the Information Regulator will approve legally enforceable codes of conduct for the processing of personal information for different sectors, monitor and enforce complaints, handle complaints and conduct education and research.<sup>75</sup> It is hoped that the Regulator will become fully operational within one or two years, and in a position to table POPIA regulations in Parliament before the end of 2017.<sup>76</sup>

#### 2.4.4. Appointment of Inspector-General of Intelligence

Importantly, in November 2016 Parliament's Joint Standing Committee on Intelligence finally recommended the appointment of a new **Inspector-General of Intelligence**, Prof Setlhomamaru Isaac Dintwe, after the position had been vacant for almost 18 months. The Inspector-General of Intelligence is appointed in terms of the Intelligence Services Oversight Act 40 of 1994 to carry out civilian oversight of the intelligence services in South Africa.<sup>77</sup> The Inspector-General has the functional responsibility of monitoring and reviewing the intelligence and counter intelligence activities of the services, and must ensure that the conduct of the activities by the services is in accordance with the Constitution and the rule of law, and upheld both with integrity and impartiality. This includes monitoring and reviewing activities and operations of the designated services that account for the greatest possibility of compromising individual rights and freedom, such as the authorisation of targets for investigation, preparation of warrant affidavits, execution of warrants and the use of intrusive powers of investigation.

The Office of the Inspector-General of Intelligence (OIGI) has yet to be set up and there is a considerable backlog of potentially highly politically sensitive investigations which will need to be dealt with expeditiously, as well an investigation into the scope of operations and activities of the State Security Agency at the SABC.<sup>78</sup> Importantly, the Inspector-General is expected to monitor and review the use of intrusive techniques which may impinge upon peoples' human rights and which may be deemed to constitute unreasonable or unnecessary exercise of powers.<sup>79</sup> The SAHRC will monitor the establishment of the OIGI and its work, particularly as it relates to protecting community leaders and activists fighting for constitutional rights and the rule of law.

<sup>74</sup> ATI Network 'Shadow Report 2016' (February 2017) 2.

<sup>75</sup> Republic of South Africa (note 5 above) 54.

<sup>76</sup> P Tlakula 'Briefing on the Work of the Information Regulator' (Cape Town, 13 February 2017).

<sup>77</sup> The designated Intelligence Services include the State Security Agency (SSA), South African Secret Service (SASS), intelligence division of the South African Police Services (SAPS) and the intelligence division of the South African National Defence Force (SANDF).

<sup>78</sup> R2K 'Supplementary Submission to SABC Inquiry: Concerns of Communications Surveillance and State Security Abuses at the Public Broadcaster' (16 January 2017).

<sup>79</sup> OIGI website: <http://www.oigi.gov.za/>

## 2.5. Freedom of expression and protection from unfair discrimination

Section 16(1) of the Constitution states that everyone has the right to freedom of expression (which include freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, and academic freedom). However the right to freedom of expression does not extend to propaganda for war, incitement of imminent violence, or 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.' Therefore an important issue is the tension between ensuring the right to freedom of expression, with the responsibilities and outcomes that come from exercising this right.

Over the past four years the overwhelming majority of complaints received by the SAHRC's provincial offices relate to infringements of the right to equality on the basis of race, disability and ethnic or social origin. Approximately 68 per cent of all equality-based complaints relate to allegations of racial discrimination, and the number of race-related equality complaints per year has exceeded 200 over the past four years (with a high of 505 recorded in the past year).<sup>80</sup> In February 2017 the SAHRC held a National Hearing on racism and social media, in response to the high number of complaints received on this issue. The SAHRC called on relevant government departments, regulatory bodies, CSOs, researchers, academics, media entities and social commentators to contribute toward awareness-raising on issues pertaining to racism and racial discrimination in the country. It is envisioned that the investigative hearing will contribute to developing a more comprehensive understanding of the manner in which racism manifests in South Africa, and provide structured guidelines on how to respond to these varied issues in the advancement of substantive equality.<sup>81</sup> The aim of the hearing is 'to arrive at an understanding of what constitutes racism in the context of social media and who should be held accountable.'<sup>82</sup>

The SAHRC is the custodian of Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000 (PEPUDA), which has made hate speech illegal since 2000. The SAHRC's annual equality report provides in-depth monitoring and analysis of the right to equality in South Africa in terms of the Commission's mandate under PEPUDA.<sup>83</sup> While many complaints relate to unfair discrimination on the basis of race, gender and disability, hate speech remains an endemic challenge. Unfortunately, despite two decades of protective constitutional provision, the limited Equality Courts jurisprudence has not fleshed out hate speech adequately and there are currently very limited categories or guidelines available.<sup>84</sup> Importantly, in March 2017 the case brought by the SAHRC against Jon Qwelane for hate speech was finally heard, almost nine years after Qwelane wrote his highly controversial *Sunday Sun* column entitled 'Call me names, but gay is not okay'. The SAHRC received 350 complaints relating to the column (the highest number recorded for a single incident), and argued in court that the column was harmful and hurtful towards the LGBTI community. Qwelane refused to apologise for his statements and argued that his column did not incite violence or harm. He was found guilty of hate speech in April 2011 by the Johannesburg

<sup>80</sup> SAHRC (note 15 above).

<sup>81</sup> SAHRC 'Comments on the Draft Prevention and Combating of Hate Crimes and Hate Speech Bill' Submission to the Department of Justice and Correctional Services (January 2017) 5.

<sup>82</sup> T Matthews 'Social media is a racist's sanctuary' *The Star* (13 February 2017).

<sup>83</sup> SAHRC (note 17 above).

<sup>84</sup> *Ibid.*

Equality Court and ordered to pay R100 000 to the SAHRC and issue an apology to the LGBTI community, however this judgment was withdrawn in September 2011 on procedural grounds (Qwelane was unable to attend the hearing as he was serving as South Africa's ambassador to Uganda).<sup>85</sup> In 2014 Qwelane launched his current legal challenge to declare sections 10 and 11 of PEPUA inconsistent with the Constitution as they infringe on his right to freedom of expression. Judgment in the case is still pending.

## 2.5.1. Prevention and Combating of Hate Crimes and Hate Speech Bill

In October 2016 the DOJCD published the much anticipated **Prevention and Combating of Hate Crimes and Hate Speech Bill, 2016** for public comment. The SAHRC welcomed the Bill as an opportunity for the Commission and other stakeholders to actively engage the draft legislation with a view to strengthen human rights protection and promotion.<sup>86</sup> In January 2017 the SAHRC submitted written comments noting with concern, however, that the Bill addresses both hate crimes and hate speech in a single piece of legislation. According to the SAHRC, 'whilst indeed inter-related, ... hate crimes and hate speech are two distinct phenomena which require different response mechanisms in addressing or curtailing its prevalence.'<sup>87</sup> A number of concerns about the Bill, particularly in relation to its broad scope, have been raised by CSOs and professional bodies as well as the Hate Crimes Working Group (HCWG), a multi-sectoral network of CSOs undertaking advocacy and reform initiatives related to hate crimes.<sup>88</sup> The HCWG was involved in the initial development of the Bill but has expressed concern over the inclusion and broad interpretation of hate speech in the Bill.<sup>89</sup> Importantly, PEPUA already addresses hate speech through the Equality Courts. The decision to include hate speech into the Bill was in reaction to a spate of highly publicised and criticised incidents of racism on social media in late 2015, and had not been discussed before. The expanded definition of hate speech considers insulting speech that intends to ridicule a person or group of persons as a criminal offence, punishable by a fine or prison sentence. The SAHRC has recommended that further definition about what constitutes 'insulting' and 'ridicule' is needed.<sup>90</sup>

There is a concern that criminal sanction for hate speech would have a potentially chilling effect on the right to freedom of expression.<sup>91</sup> The SAHRC stated in its submission on the Bill that while it recognises that the Constitution allows for the limitation of the right to freedom of expression - where such expression advocates hatred based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm - the Commission also believes 'that freedom of the press and other media, information, ideas, artistic creativity, academia and research, are also essential components in the development of a culture of human rights, transparency and accountability in South Africa's nascent democracy.'<sup>92</sup> In terms of the proposal to establish criminal offences for hate speech, the SAHRC recommends that, in line with General Comment 35 of the UN Committee on

<sup>85</sup> C Collison 'Free expression or hate speech, and what it means for the Jon Qwelanes' *Mail and Guardian* (26 August 2016).

<sup>86</sup> SAHRC (note 81 above).

<sup>87</sup> *Ibid* 5.

<sup>88</sup> For example, a coalition of comedians and satirists filed submissions arguing that the Bill's hate speech provisions are unconstitutional. See D Milo 'Comedians fight bill that will limit the freedoms that keep us laughing' *Business Day* (21 February 2017). PEN-SA, which represents writers, editors and translators, expressed deep concern at how the Bill threatens and criminalises freedom of expression. M Thamm 'False remedy: Hate Speech Bill - alarm at dangers and pitfalls as first deadline closes' *Daily Maverick* (30 January 2017).

<sup>89</sup> Hate Crimes Working Group website: <http://hcwg.org.za>

<sup>90</sup> SAHRC (note 81 above) 12.

<sup>91</sup> C Collison 'Hate speech is not a hate crime' *Mail and Guardian* (2 November 2016).

<sup>92</sup> SAHRC (note 81 above) 6.

the Elimination of Racial Discrimination (CERD) and recommendations made by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the criminalisation of hate speech 'should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, the nature and extent of the impact on targeted persons and groups'.<sup>93</sup>

The HCWG is particularly concerned that the inclusion of the controversial hate speech issue will compromise the passage of the hate crimes legislation, which has taken 10 years to get to this point. According to the HCWG, PEPUDA should rather be improved to deal more adequately with hate speech (possibly updated to include the increasing role that social media platforms now plays in people's lives) and Equality Courts strengthened to empower people to protect their rights in this manner.<sup>94</sup> There has been the suggestion that extending the use of PEPUDA, in a more strategic and systemic manner, is a more effective legal strategy than criminalising hate speech (beyond a narrow definition).<sup>95</sup> Indeed, the SAHRC has emphasised the need for infrastructural capacity to be strengthened to guarantee the effective implementation of legislation, as well as the need for adequate resourcing for the development of a system which captures and stores disaggregated hate crimes and/or hate speech data and facilitates the training of officials.<sup>96</sup>

## 2.5.2. Hate crimes against LGBTI people

As highlighted above, most of the concerns raised with the Prevention and Combating of Hate Crimes and Hate Speech Bill by the SAHRC and other stakeholders relate to the inclusion of hate speech into the legislation (with a broad definition and criminal sanction attached). The SAHRC has welcomed the Bill and recognised the sustained activism of a variety of civil society actors in advocating for the development of legislation to address hate crimes and ensuing violence against vulnerable and marginalised groups in South Africa.<sup>97</sup> Because hate crimes statistics are not adequately disaggregated, 'there is limited data on the prevalence of LGBT discrimination and hate crimes in South Africa which can be used to inform services, interventions and advocacy.'<sup>98</sup> This has negative implications for the creation of an effective plan to address systemic and violent crimes based on LGBTI and gender discrimination.<sup>99</sup>

According to the South African government, LGBTI persons are often the victims of hate crimes and therefore the DOJCD established a National Task Team (NTT) in 2011 to develop a National Intervention Strategy (NIS) on LGBTI issues, with the aim to address so-called 'corrective rape' and other forms of violence against the LGBTI community. The SAHRC is a member of the NTT and supported the launch of government's LGBTI programme in 2014. The SAHRC has recommended that the government ring-fence adequate budget to ensure that the vision of the LGBTI programme is realised, and that discrimination against LGBTI persons is eradicated.<sup>100</sup> In particular, the SAHRC has echoed calls by the NIS for government to prioritise the creation and maintenance of an

93 Ibid 8.

94 C Collison 'Hate speech is not a hate crime' *Mail and Guardian* (2 November 2016); M Clayton (2017) 'Hate speech add-on compromises hate crimes Bill' *Mail and Guardian* (25 January 2017).

95 C Albertyn 'Memorandum to SAHRC: Comments on Racism and Social Media' (2017).

96 SAHRC (note 81 above) 14.

97 Ibid 5.

98 OUT LGBT Well-being 'Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa, 2016' Research initiative of the Love Not Hate Campaign (2016) 1.

99 SAHRC (note 17 above).

100 SAHRC (note 10 above) 12.

effective database capturing the details of crimes committed against women and LGBTI individuals. At present the lack of disaggregated data reduces policy effectiveness, and does not allow for progress towards the protection of the rights of women and LGBTI individuals to be monitored, or the sensitisation of officials who constitute the criminal justice system.<sup>101</sup> Current levels of confidence in the justice system are very low and non-reporting is a significant concern, with a recent study finding that very few incidents of discrimination, many of which are of a very serious nature, are reported to police.<sup>102</sup>

In 2016 the HCWG approached the SAHRC to assist in collecting hate crime data across five provinces (Gauteng, Limpopo, Western Cape, Eastern Cape, and KwaZulu-Natal). Over the past few years the HCWG has collaboratively developed the Hate and Bias Crime Monitoring Form to gather hate crimes data across several categories, including nationality, sexual orientation, gender identity, race and ethnicity.<sup>103</sup> This is being done in order to ensure the systematic collation of hate crime data; to increase government's awareness of the types of hate crimes; to improve policy and strategies for addressing hate crimes; to monitor the extent of hate crimes across different sectors; and to improve judicial response to hate crimes. There are a number of challenges related to the collection of hate crimes data, including challenges related to the actual form, organisational and institutional challenges, and factors related to the victims. The HCWG's work is crucial in dealing with these challenges going forward.

### 2.5.3. Whistleblowing

In South Africa the Protected Disclosures Act 26 of 2000 encourages individuals to report corruption, malpractice and other crimes.<sup>104</sup> Unfortunately, research has shown that progress around protected disclosures or whistleblowing 'has not merely halted in the current context, but that in fact South Africa appears increasingly hostile to whistleblowing activities. It is not just legislative provisions that may require review, but other broader environmental recommendations are also needed in order to properly enable whistleblowing.'<sup>105</sup> The Open Democracy Advice Centre (ODAC), an NGO working on open government and transparency, has recommended that a Code of Good Practice be developed to give guidance to organisations on how best to fulfil their responsibilities in terms of the Protected Disclosures Act, publishing its own Code in 2016 to assist organisations in developing their own whistleblowing policies.<sup>106</sup>

It is important for the SAHRC to monitor the status of protected disclosures on an ongoing basis, not least as it is on the list of bodies to which a disclosure can be made in terms of the recent **Protected Disclosures Amendment Bill, 2015** gazetted by the Minister of Justice and Correctional Services. The Bill seeks to criminalise intentional false disclosures that result in harm. However this move has been criticised by organisations like ODAC, as it places the burden of ascertaining the correctness of disclosed information on whistleblowers, thereby discouraging disclosure. The number of whistleblowers is dropping because the law does not properly protect them, which is the

101 SAHRC (note 81 above) 5.

102 OUT LGBT Well-being (note 98 above) 13.

103 Hate & Bias Crime Monitoring Form available at <https://hcwg.org.za/hate-bias-crime-monitoring-form/>

104 Open Democracy Advice Centre (ODAC) 'Code of Good Practice on Whistleblowing' (2016).

105 G Razzano 'Empowering our Whistleblowers' Research commissioned by Right2Know Campaign, Amubhungane, Corruption Watch, Greenpeace, Section27 and ODAC (2014).

106 ODAC 'Code of Good Practice on Whistleblowing' (2016).

main purpose of the Bill.<sup>107</sup> At a meeting held in November 2016 the Portfolio Committee on Justice and Correctional Services controversially voted to retain the criminalisation of false disclosures in the Bill.

## 2.5.4. Media freedom and censorship

Over the past year, there have been a number of concerns raised around media freedom, freedom of expression and censorship in South Africa.<sup>108</sup> The role of the South African Broadcasting Corporation (SABC) as the country's public broadcaster – to provide a platform and a voice to all in the country to participate in South Africa's democracy – has come under extreme scrutiny, with the parliamentary ad hoc committee on the SABC Board Inquiry making a number of damning findings against the SABC Board, Minister of Communications and others. The lack of proper oversight institutions and mechanisms remains a challenge for the SABC, and the SAHRC hope that the recommendations of the ad hoc committee will be implemented.

In September 2016 the SCA handed down a judgment in an appeal from the Western Cape High Court brought by Primedia Broadcasting, R2K, ODAC and the South African National Editors' Forum (SANEF) against the Speaker of the National Assembly and the Minister of State Security, in relation to the incident at the 2015 State of the Nation Address (SONA) where a telecommunication signal jamming device (signal jammer) was used and the broadcast feed cut to prevent journalists from showing the scenes of 'grave disorder' in Parliament. While the Speaker professed ignorance of the device, and the Minister stated that the disruption when the sitting commenced was an accident, the SCA decided it was important to rule on the matter, finding that the State Security Agency's use of a signal jammer was unconstitutional and unlawful, and that it was unconstitutional for Parliament to censor the broadcast feed.<sup>109</sup> The judgment was welcomed by R2K and ODAC 'as a vindication of the right for ordinary South Africans to have a Parliament that is open and transparent.'<sup>110</sup>

In March 2015 the Film and Publications Board (FPB) released its draft online regulation policy, which would give the FPB greater authority to regulate online content so that it can combat harmful online content (such as racism and hate speech, and in particular protect children from child pornography). In response to the proposed regulations, R2K mounted a campaign against the FPB's attempt to censor the internet and curtail the rights to freedom of expression and access to information in the Constitution.<sup>111</sup> After public consultations, the FPB amended its regulations and the Minister of Communications published the **Films and Publications Amendment Bill, 2015** in order to make the legislation applicable to online content. R2K has criticised the proposed new regulations and Bill for their overbroad and vague definitions, which could create space for misinterpretation and overreach. The organisation argues that the requirement to register with the FPB and pre-classify content is a form of censorship that violates the constitutional rights to freedom of expression and access to information.<sup>112</sup> R2K also argues that certain provisions in the Bill could lead to invasion

<sup>107</sup> Parliamentary Monitoring Group 'Protected Disclosures Amendment Bill: deliberations' Meeting of the Justice and Correctional Services (8 November 2016).

<sup>108</sup> For example, in early 2017 allegations resurfaced again against the SABC in terms of its refusal to broadcast the Project Spear documentary it commissioned in 2012 (which looks at apartheid-era loans to ABSA and other allegations of state looting) and its attempts to gag the filmmaker from distributing the film or using the footage. G Nicolson 'ABSA, SABC and the documentary that never aired' *Daily Maverick* (15 January 2017).

<sup>109</sup> *Primedia Broadcasting and Others v Speaker of the National Assembly and Others* 2017 (1) SA 572 (SCA) (29 September 2016).

<sup>110</sup> R2K and ODAC 'R2K & ODAC welcome SCA's ruling on signal jamming and open Parliament' Press statement (29 September 2016).

<sup>111</sup> R2K 'Stop the Film and Publications Board's attempt to censor the Internet!' Press statement (10 March 2015).

<sup>112</sup> R2K 'Briefing: What's wrong with the FPB censorship Bill and FPB's online regulations' (25 May 2016). R2K refers to the Constitutional Court's finding that 'the free flow of constitutionally protected expression is the rule and administrative prior classification should be the exception', in *Print Media South Africa and Another v Minister of Home Affairs and Another* (CCT 113/11) [2012] ZACC 22.



of privacy and threaten legitimate sexual expression, referring to the stipulation that distributors of adult content keep registers of all instances where access was granted to a user (whose name, address and age must be noted in a register). The organisation argues that 'this information could easily fall into the wrong hands, and adults should have the right to remain anonymous when it comes to legitimate sexual expression', particularly in a country like South Africa where 'there is a great deal of homophobic and anti-LGBTI sentiment'.<sup>113</sup>

The issue of freedom of expression and access to information on the internet has received much attention at the regional and international level in 2016. Both the UN Human Rights Council and the ACHPR adopted resolutions on the promotion, protection and enjoyment of the right to freedom of information and expression on the internet. The ACHPR condemned the use of hate speech on the internet, however highlighted the critical importance of clear and comprehensive principles that ought to be established to guide the promotion and protection of human rights in the online environment. It called on state parties to take legislative and other measures to guarantee, respect and protect citizens' rights to freedom of information and expression through access to internet services.<sup>114</sup> In its resolution, the Human Rights Council states that it was 'deeply concerned' at human rights violations and abuses committed against persons exercising their human rights and fundamental freedoms on the internet (and by the impunity for these violations and abuses); as well as by measures aiming to or that intentionally prevent or disrupt access to or dissemination of information online, in violation of international human rights law.<sup>115</sup>

The SAHRC notes with concern that, during the deliberations on the UN Human Rights Council resolution, the South African government supported proposed amendments by China and Russia (which sought to remove references relating to the right to freedom of expression). The proposed amendments were rejected and the Council adopted the resolution.<sup>116</sup>

## 2.6. Protest

Section 17 of the Constitution protects the right of people to assemble, demonstrate, picket and present petitions in a peaceful and unarmed manner. Often referred to as 'the right to protest', this right is 'recognized as [an] essential form of democratic expression rather than viewing it as a threat to democracy'.<sup>117</sup> In 2016 the UN Human Rights Committee expressed its concern about numerous reports of excessive and disproportionate use of force by law enforcement officials in the context of public protests in South Africa.<sup>118</sup> The ACHPR also recently adopted a resolution which recognises the need to develop guidelines on policing and assemblies in Africa, expressing concern over the persistence of police violence during assemblies in Africa.<sup>119</sup>

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113 Ibid.

114 ACHPR 'Resolution on the Right to Freedom of Information and Expression on the Internet in Africa' ACHPR/Res. 362(LIX) 2016 (4 November 2016): <http://www.achpr.org/sessions/59th/resolutions/362/>

115 UN Human Rights Council 'The promotion, protection and enjoyment of human rights on the Internet' A/HRC/32/L.20 (27 June 2016): <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/131/89/PDF/G1613189.pdf?OpenElement>

116 SAHRC (note 4 above).

117 J Duncan *Protest Nation: The Right to Protest in South Africa* (2016) 3.

118 UN Human Rights Council (note 12 above) para 26.

119 SAHRC (note 4 above). The ACHPR mandated the UN Special Rapporteur on Human Rights Defenders in Africa, the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa to develop the Guidelines on Policing and Assemblies in Africa, including tools to facilitate its effective implementation.

So-called service delivery protests, focused on socio-economic rights and local governance issues, still occur each year in South Africa.<sup>120</sup> However, these protests have decreased over the years, with protest statistics continuing to be a controversial political issue in the country.<sup>121</sup> Interestingly, the two rights violations with the least complaints lodged with the SAHRC over the past four years are the right to assembly, demonstration, picket and petition; and freedom of association. While the SAHRC's recent trends analysis report notes that the low incidence of reporting on protest action may signal more awareness and adherence to the **Regulation of Gatherings Act 205 of 1993**,<sup>122</sup> protest action, expression and association remain important rights around which awareness initiatives and public mobilisation for consensus are required, including by the Commission.<sup>123</sup> The work of the newly formed civil society Right2Protest project, located at CALS, and other initiatives are therefore to be supported.<sup>124</sup> However the SAHRC has expressed concern at the destruction of property during protests, particularly incidents in Vuwani and Mpumalanga in which schools were burnt down and learners prevented from attending school.<sup>125</sup>

## 2.6.1. Student protests

During 2016, perhaps the most visible of public protests were the Fees Must Fall student protests on university campuses across the country. According to a recent legal opinion on university protests, written by the Socio-Economic Rights Institute of South Africa (SERI) and commissioned by CASAC:<sup>126</sup>

The Constitution protects a range of rights that are engaged in protest action. Most obviously, there is the right to assemble, demonstrate, picket and present petitions, so long as the protestors are peaceful and unarmed. However, student protest, and Universities' responses to it, also implicate a range of other constitutional protections, including: the right to freedom of expression, the right to freedom of association, the right to bodily integrity and the rights of arrested and detained persons.

In its submission to the UN Human Rights Committee in 2016, the SAHRC expressed concern on the response by the SAPS to the Fees Must Fall student protests that took place in October 2015 around the proposed increase in university fees. At the time the SAHRC stated that although not a pattern, it was 'nonetheless worried that from time to time, the SAPS utilises violent means to control the crowd of student protestors.'<sup>127</sup> In 2016 these protests and the SAPS response escalated, and the SAHRC has condemned police heavy-handedness in dealing with protests as well as destructive protest-related action undertaken by students in some circumstances.<sup>128</sup> University responses to student protest have often been characterised by urgent legal proceedings to obtain and enforce

120 SAHRC 'Investigative Hearing Report: Access to Housing, Local Governance and Service Delivery' (November 2015).

121 Researchers have recently warned that data from the comprehensive Incident Registration Information System (IRIS) database, which is maintained by the SAPS, is often misunderstood and misrepresented by academics, the media, police chiefs and politicians doing protest analysis. They argue that the data needs to be treated critically and with care, and that only about 43 per cent of incidents recorded on IRIS between 1997 and 2013 were in fact protests. P Alexander, C Runciman & B Maruping 'The use and abuse of police data in protest analysis South Africa's Incident Registration Information System (IRIS )' *South African Crime Quarterly* 58 (December 2016) 9.

122 SAHRC (note 15 above).

123 Ibid.

124 M Matandela & S Naidoo 'Op-Ed: Demand the right to protest' *Daily Maverick* (24 January 2017).

125 M Nsibirwa 'Schools should be treated as sacred spaces' *The New Age* (12 May 2016).

126 SERI 'Legal Opinion to the Council for the Advancement of the South African Constitution (CASAC) in re: Restraint of Protest on or Near University Campuses' (22 December 2016).

127 SAHRC (note 10 above) 26.

128 SAHRC (note 17 above). In 2014 former Commissioner Danny Titus signed a Memorandum of Understanding (MOU) with the SAPS in which it was agreed the SAHRC would provide ongoing training on human rights sensitivity to SAPS officials. The MOU is currently being revisited and the SAHRC is exploring different mechanisms to infuse human rights principles into police training, particularly for Public Order Police (POP) officers.

wide-ranging interdicts that prohibit protest by vaguely identified parties; however these practices have been found to be constitutionally suspect or clearly unlawful.<sup>129</sup>

In December 2016, the SAHRC published a report on Transformation at Public Universities in South Africa, based on National Hearing convened in 2014 on transformation in institutions of higher learning in South Africa.<sup>130</sup> The Commission made a number of findings and recommendations directed at the Department of Higher Education and Training (DHET) and universities, aimed at addressing historical inequalities and accelerating substantive transformation in the higher education sector.<sup>131</sup> While the SAHRC acknowledges the urgent need to make tertiary education financially accessible to all; it believes that this should not be approached in a fragmented way, rather models which are adopted should be sustainable and address systemic challenges which continue to hinder the attainment of substantive transformation in higher education.<sup>132</sup> The SAHRC welcomes the establishment of the Commission of Inquiry into Higher Education and Training (Fees Commission) by the President in January 2016, as well as other initiatives aimed at transforming higher education in the country. When the Fees Commission has concluded its work at the end of June 2017 the SAHRC will be following its recommendations closely in order to inform the Commission's position on higher education funding.

## 2.6.2. Marikana Commission

In 2016 the UN Human Rights Committee expressed concern about the slow pace of the investigation into the Marikana massacre, recommending *inter alia* that South Africa: expedite the work of the task team and panel of international experts established by the Ministry of Police in implementing the recommendations of the Marikana Commission of Inquiry; revise laws and policies regarding public order policing and the use of force, including lethal force by law enforcement officials; ensure that all policing laws, policies and guidelines are consistent with the ICCPR; take all measures necessary to prevent law enforcement and security forces from using excessive force or using lethal weapons in situations that do not warrant recourse to such force; ensure that independent and impartial investigations are launched into all incidents involving the use of firearms and allegations of excessive use of force by law enforcement officers, as well as the potential liability of the Lonmin Mining Company for the Marikana incident; prosecute and punish perpetrators of illegal killings; and provide effective remedies to victims.<sup>133</sup>

The SAHRC is concerned that these recommendations have not been fully implemented by the South African government, particularly the prosecution of police officers implicated in the killings, and the settling of civil claims made by the families of those who were murdered in August 2012.<sup>134</sup> As of March 2017 SAPS had apparently investigated and cleared 87 of its own members in relation to the killings at Marikana, in contravention of IPID's role in investigating the killings by SAPS officers.<sup>135</sup>

129 SERI (note 126 above) 34.

130 SAHRC 'Transformation at Public Universities in South Africa' Report (December 2016).

131 *Ibid* ix.

132 SAHRC (note 17 above).

133 UN Human Rights Committee (note 12 above) paras 26-27.

134 M Merten 'Marikana Massacre: Police absolve 87 of their own' *Daily Maverick* (15 March 2017).

135 *Ibid*.

## 2.7. Political rights

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

### 2.7.1. Political party funding

The SAHRC has stressed the importance of the right of access to information to the right to vote in South Africa.<sup>136</sup> In its report to the UN Committee on Human Rights in 2016, the SAHRC discussed the campaign by NGO My Vote Counts (MVC) pushing for the reform of the electoral system and seeking to compel political parties to disclose information regarding their sources of private funding (through legislation and other measures).<sup>137</sup> In 2015 MVC launched an application in the Constitutional Court seeking to impose on Parliament the obligation to enact legislation to regulate private political party funding. However this application was dismissed in September 2015, with the majority of the Court finding that MVC should use PAIA to access this information, and if PAIA does not allow for this access then it should challenge the constitutionality of PAIA.<sup>138</sup> Importantly, the minority judgment found that Parliament has failed to fulfil its constitutional obligation to enact national legislation to give effect to the right of access to information as required by section 32(2) of the Constitution, to the extent that 'information about the private funding of political parties registered for elections for any legislative body established under the Constitution is reasonably required for the effective exercise of the right to vote in those elections' and 'no national legislation currently requires that this information be publicly accessible.'<sup>139</sup>

Therefore in July 2016, MVC launched a case in the Western Cape High Court for an order declaring that PAIA is invalid and unconstitutional because it fails to make provision for the continuous and systematic recording and disclosure of information regarding the private funding of political parties and independent ward candidates. MVC argues that the right of access to information and the right to vote are undeniably and inextricably interconnected, and that the right to vote and make political choices is the right to cast an informed vote and make informed political choices.<sup>140</sup> The SAHRC will be monitoring the case going forward.

### 2.7.2. Political intimidation and violence

In August 2016 South Africa held its fifth local government election. Although the holding of free and fair elections is the mandate of the IEC, the SAHRC must also ensure that the political rights of South Africans are protected. The SAHRC is concerned at evidence of political intimidation, violence and assassinations (particularly around the selection and finalisation of party lists) as a result

<sup>136</sup> SAHRC (note 10 above) 6.

<sup>137</sup> Ibid.

<sup>138</sup> *My Vote Counts v Speaker of the National Assembly* [2015] ZACC 3.

<sup>139</sup> Ibid para 120.

<sup>140</sup> My Vote Counts 'MVC Statement on Launching of Litigation' Press release (26 July 2016): <http://www.myvotecounts.org.za/2016/07/my-vote-counts-launches-new-court-case-on-private-political-party-funding/>

of the local government election.<sup>141</sup> In May 2016 it was reported that at least five murders believed to be political killings had occurred, while in the past five years there have been at least 55 (47 of which took place in KwaZulu-Natal, the country's political killing hotspot).<sup>142</sup> In December 2016 an African National Congress (ANC) ward councillor in KwaZulu-Natal was murdered (the third ANC councillor murdered since the local government elections), while an Inkatha Freedom Party (IFP) ward committee member and chairman of a branch in Empangeni was shot dead at his home.<sup>143</sup>

These political killings are most often carried out by professional hitmen after intimidation has failed, so that threats of intimidation when reported should be taken seriously by political parties and police officers. Intimidation has an impact on 'the degree to which people in South Africa, most notably in poorer communities, feel free to openly support or even engage with political parties that are not dominant in the areas in which they live.'<sup>144</sup> In May 2016 the Durban High Court convicted two ANC councillors of murder following their assassination of Thuli Ndlovu, a leader in the Abahlali baseMjondolo movement fighting against housing corruption in KwaNdengezi in KwaZulu-Natal.<sup>145</sup> However most political murders remain unsolved, and it is often very difficult to prove this as a motive.

There have been calls for a comprehensive analysis of the criminal justice response to the problem of political killings, including the standardised data collection of possible political killings in the country and the monitoring of specific provinces and areas (in order to understand the factors contributing to the continuing status of these areas as hotspots for political killings).<sup>146</sup> At present there is confusion around how many political killings have taken place in the country, what constitutes a political killing, and who is responsible to monitor and investigate political killings.<sup>147</sup> In June 2016 the Minister of Police noted 'with serious concern the incidents of killings particularly where political figures are victims or where the killings are being linked to the upcoming local government.' He announced that a multi-disciplinary task team comprising SAPS members from different units (including Crime Intelligence, Detectives, Directorate for Priority Crime Investigation, and Forensics) had been established to investigate the killings, and would receive 'priority attention'.<sup>148</sup> However, it is unclear what has happened to this task team after its establishment. As independent researcher and violence monitor Mary de Haas has argued: 'The worst problem is a lack of political will to investigate these murders. There is no lack of people willing to testify, but no one is joining the dots. And no one is asking the hard questions about where the ultimate culpability lies.'<sup>149</sup>

According to a 2014 report on political intimidation, 'the experience of the 2009 elections implies that, if there is increased competition by political parties for the votes of poorer South Africans, there is likely to be an increase in acts of political intimidation.'<sup>150</sup> In South Africa there is currently a shift from the primary political contestation being intra-party (within the ANC) to being more inter-party again. In the past the ANC/IFP and IFP/National Freedom Party (NFP) fault line for political killings was the most significant, but this could now include the Democratic Alliance (DA) and the Economic

141 For a killing to be 'political' it must 'be motivated by or connected to contestation or rivalry, either regarding access to political power, or conflict over the way in which the individual targeted (or a group aligned with that individual), is exercising his or her political power.' D Bruce 'Political killings in South Africa: The ultimate intimidation' Institute for Security Studies Policy Brief 64 (October 2014) 2.

142 M Letsoalo 'Killings signal the start of the battle for power' *Mail and Guardian* (27 May 2016).

143 SA Local Government Information Centre 'The SA Local Government Briefing' No. 1/2017 (27 January 2017).

144 Community Agency for Social Enquiry (CASE) 'Just singing and dancing? Intimidation and the manipulation of voters and the electoral process in the build-up to the 2014 elections' (April 2014) 4: <http://www.case.org.za/images/docs/intimidation-in-elections.pdf>

145 T Pillay 'Durban councillors found guilty for hit on activist' *Sunday Times* (20 May 2016).

146 Bruce (note 141 above) 5.

147 N Moore 'Op-Ed: In search of a political murder' *Daily Maverick* (20 October 2016).

148 Police Ministry 'Police move to counter rising killings linked to politics' Media statement (5 June 2016).

149 Moore (note 147 above).

150 CASE (note 144 above) 2.

Freedom Fighters (EFF).<sup>151</sup> The IEC and the Ministry of Police need to look into the issue of political violence more seriously, particularly ahead of the upcoming 2019 general election. Further, the SAHRC provincial offices should be alerted to this ongoing issue (particularly in KwaZulu-Natal, Mpumalanga and the North West).

## 2.8. Just administrative action

According to section 33 of the Constitution, everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Complaints to the SAHRC relating to just administrative action are in the top five rights violations. Table 2 below shows the number of just administrative action complaints recorded by SAHRC provincial offices in 2015/2016.

**Table 2: Number of complaints made to the SAHRC in respect of just administrative action in 2015/2016**

Province	Total complaints 2015/2016
Gauteng	104
Eastern Cape	101
Western Cape	80
Mpumalanga	44
North West	26
Kwazulu-Natal	11
Northern Cape	7
Free State	3
Limpopo	3
<b>National</b>	<b>379</b>

Approximately 379 of total complaints received by the Commission related to alleged violations of the right to just administrative action. These complaints are mostly around decisions taken by government departments, such as the Department of Home Affairs (DHA) and DSD, or to alleged maladministration by state institutions. The complaints are generally referred to other institutions for resolution, particularly the Office of the Public Protector, which in terms of the Constitution has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.

## 2.9. Access to courts

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

<sup>151</sup> Email correspondence with David Bruce (28 February 2017).

## 2.9.1. Traditional Courts Bill

In January 2017, the revised Traditional Courts Bill was welcomed by CSOs, many of which had previously campaigned against the Bill, which led to provinces opposing it in the National Council of Provinces (NCOP). The new Bill addresses concerns raised in respect of the two previous Bills introduced into Parliament in 2008 and 2012, in relation to the role of women, the right to opt out, and the entrenchment of apartheid tribal boundaries.<sup>152</sup> The SAHRC closely monitored the progress of the Bill and previously engaged Parliament on both the 2008 and 2012 versions, welcoming the re-drafted 2017 version of the Bill.

However, concerns have been raised by the SAHRC and other organisations about enforcement of the Bill 'given the context of the unequal power relations in rural areas, and government's abject failure to enforce existing checks and balances on the power of traditional leaders.'<sup>153</sup> For example, the Land Accountability Research Centre (LARC) based at the University of Cape Town has welcomed the fact that the Bill 'acknowledges the entrenched inequality and patriarchy that suffuses power relations in rural areas', however states that it 'fails to provide women and minorities with concrete and accessible remedies where abuse takes place'.<sup>154</sup> LARC identified a number of problems with the current Bill, including: the procedural review process (which does not deal with the merits of a decision of requires a lawyer), the right to opt-out (which can be de facto ignored or refused by the court), and insufficient penalties for traditional leaders who breach the proposed Code of Conduct.<sup>155</sup>

The SAHRC has also expressed concern that the provisions in the Bill may not give effect to the *audi alterem partem* principle, as a party may unilaterally make representations to a traditional court in the absence of the other party (who has decided to opt-out). Despite the clause which stresses that a person may not be intimidated, manipulated, threatened or denigrated for exercising his or her decision to opt-out, the SAHRC cautions that allowing a party to make representations without the other party present may result in an unequal, biased and prejudiced perspective.<sup>156</sup> This is further exacerbated by the fact that traditional courts are open, public processes which could result in unintended consequence of ostracising or imposing 'social sanction' on the opted-out party, especially if the latter is from an already marginalised group.

The SAHRC has recommended that any form of counselling, assistance or guidance to an aggrieved party, ought to be conducted in a private setting or alternate traditional sittings which safeguards the rights of all parties to the proceedings.<sup>157</sup> The SAHRC further recommends that:

- additional measure be put in place to ensure that the Commission for Gender Equality (CGE) is able to fulfil its proposed role to report on the participation of women and the promotion of gender equality in traditional courts;
- a robust public education and awareness initiative on the Constitution (and the Bill) be undertaken;

<sup>152</sup> Statement by the Minister of Justice and Correctional Services, Hon TM Masutha (23 January 2017): [http://www.justice.gov.za/m\\_speeches/2017/20170123-TradCourtsBill-Briefing.html#sthash.TisJUhcndpuf](http://www.justice.gov.za/m_speeches/2017/20170123-TradCourtsBill-Briefing.html#sthash.TisJUhcndpuf)

<sup>153</sup> A Claassens 'Improved Traditional Courts Bill (TCB) needs enforcement mechanisms' *Sunday Times* (29 January 2017).

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> SAHRC 'Submission on the Traditional Courts Bill [B1-2017]' Submitted to the Portfolio Committee on Justice and Correctional Services (15 March 2017).

<sup>157</sup> *Ibid.* 3.

- safeguards are factored into the Bill to fully protect the rights of the child and give effect to the primacy of the best interest principle; and
- consideration be given to the possible interpretation of an order to ‘perform a form of service’ (as stipulated in the Bill) as forced compulsory labour, which is contrary to section 13 of the Constitution.<sup>158</sup>

The SAHRC has encouraged Parliament to engage in a comprehensive public engagement process with affected communities, and has availed itself for further engagement with the Portfolio Committee on Justice and Correctional Services in this regard.

## 2.9.2. International Criminal Court withdrawal

In October 2016, South Africa controversially decided to withdraw from the Rome Statute of the International Criminal Court, following ‘conflicting international law obligations, which had to be interpreted within the realm of hard diplomatic realities’ when it took a decision not to arrest Sudanese President Omar al-Bashir when he was in South Africa in June 2015.<sup>159</sup> In 2009 and 2010, the International Criminal Court (ICC) had issued warrants for al-Bashir’s arrest on charges including crimes against humanity, war crimes and genocide. In early 2016, the SCA upheld an appeal from the High Court, finding that South Africa had been inconsistent with its own law by not arresting al-Bashir when he was in the country.<sup>160</sup> The SCA found that:<sup>161</sup>

when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of State immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made.

The SAHRC has followed South Africa’s decision to withdraw from the ICC with concern. In July 2016, the Commission wrote to the Minister of International Relations and Cooperation offering to assist the South African government to ensure that its international relations policy reflects the ideals of the South African Constitution. Unfortunately, this meeting did not take place. In October 2016, the government submitted official withdrawal notices to the UN Secretary-General and Parliament, with the latter requested to approve the withdrawal and consider the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill, 2016 (ICC Repeal Bill). The SAHRC immediately issued a statement noting with concern South Africa’s decision to withdraw from the ICC, stating that ratifying the Rome Statute was a reaffirmation of the country’s constitutional commitment to human rights and the rule of law and was ‘a tacit recognition that human rights extend beyond geopolitical boundaries and interests, and that a collective commitment is required to uphold these rights’.<sup>162</sup> In the Commission’s view, ‘in the absence of a viable alternative mechanism for

<sup>158</sup> Ibid.

<sup>159</sup> Department of International Relations and Cooperation ‘Opening Statement by Ms Maite Nkoana-Mashabane, Minister of International Relations and Cooperation, delivered at the General Debate of the Fourteenth Meeting of the Assembly of States Parties of the International Criminal Court’ (The Hague, 18-26 November 2015).

<sup>160</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA).

<sup>161</sup> SAHRC ‘Submission on the Implementation of the Rome Statute of the International Criminal Court Repeal Bill [B 23-2016]’ Submission to the Portfolio Committee on Justice and Correctional Services (8 March 2017) 4.

<sup>162</sup> SAHRC ‘South African Human Rights Commission expresses concern at South Africa’s withdrawal from the International Criminal Court’ Press statement (22 October 16).



holding African perpetrators of human rights violations and international crimes accountable for their actions, an exit from the ICC will not bode well for the rule of law, a principle to which South Africa has committed.<sup>163</sup>

The SAHRC emphasised the absence of regional courts with criminal jurisdiction, and that 'the ICC provides justice internationally for those affected by egregious human rights violations, crimes against humanity, and for victims of genocide.'<sup>164</sup> Indeed, the African Court of Human and People's Rights does not do enough to ensure accountability, as its jurisdiction does not extend to criminal prosecutions. Further, despite the adoption of the African Union's Malabo Protocol, providing for an international criminal section of the African Court of Justice and Human Rights (ACJHR) and envisaging an African regional criminal court, this Protocol has not been ratified and the ACJHR is yet to be established.<sup>165</sup> Moreover, the Protocol grants immunity to sitting heads of states and other senior state officials which ensures that perpetrators of international crimes in government will not be held accountable for their actions, for as long as they remain in power.<sup>166</sup>

Other organisations have expressed their concern at South Africa's decision. In November 2016, Amnesty International stated that it is 'dismayed by South Africa's initiative to withdraw from the Rome Statute and has called on the government to reconsider its decision.'<sup>167</sup> The organisation said that while it disagreed with the legal reasons provided by the government for refusing to cooperate with the ICC and arrest Omar Al Bashir, it concurs with South Africa about the benefit of providing for clearer procedures to be applied under Article 97 and the need to establish a judicial process to rule on the legality of requests when consultations fail to resolve disputes.<sup>168</sup> A recent briefing note by the International Commission of Jurists (ICJ) and a number of leading South African judges argues that, while the ICC is problematic, South Africa should remain and work from within to transform the system.<sup>169</sup>

In its submission on the ICC Repeal Bill, the SAHRC noted how the Bill does not recognise South Africa's international responsibility for the promotion and protection of human rights. The Commission recommended that Parliament should exercise its oversight responsibility and halt the government's proposed withdrawal from the ICC, by not passing the Bill before it.

In March 2017, the government withdrew the ICC Repeal Bill following a High Court judgment which found that the decision to withdraw from the ICC was unconstitutional and invalid, as the decision needed to be approved by Parliament.<sup>170</sup> The SAHRC has welcomed this decision, however has stated that, in future should Parliament agree with the decision to withdraw from the ICC, the legislature should safeguard South Africa's international responsibility towards the protection of human rights, access to justice and respect for international law by ensuring that the government is given a mandate to urgently ratify the Malabo Protocol for the creation of a criminal jurisdiction for the ACJHR.<sup>171</sup>

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163 Ibid.

164 Ibid.

165 Amnesty International 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court' (2016) 5.

166 SAHRC (note 161 above) 3.

167 Amnesty International 'International Criminal Court: Recommendations to the 15<sup>th</sup> Session of the Assembly of States Parties (16 to 24 November 2016)' (November 2016) 9.

168 Ibid. The consultation process in Article 97 provides for a dialogue between the state party and the ICC when problems arise in relation to any request for cooperation, including arrest and surrender.

169 International Commission of Jurists 'South Africa should not withdraw from the International Criminal Court' Briefing submitted to the Portfolio Committee on Justice and Correctional Services' (March 2017).

170 *Mail and Guardian* 'South Africa revokes ICC withdrawal' (8 March 2017).

171 SAHRC (note 161 above) 7.

## 2.10. Arrested, detained and accused persons

This section considers the rights contained in section 35 (the rights of arrested, detained and accused persons) and section 12 (the right to freedom and security of the person) of the Constitution. The state has responsibilities to protect the right to freedom and security of the person of all South Africans; however it has an extra responsibility to arrested, detained and accused persons who have been legitimately deprived of their freedom. Although the Constitution allows for the limitation of certain rights of those in the criminal justice system, people are still entitled to human rights, particularly the right to dignity.

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. In 2015/2016 a total of 409 complaints relating to the rights of arrested, detained and accused persons were made, constituting the third highest type of complaint lodged with the Commission. Importantly, most of these complaints are from inmates detained in correctional services facilities requesting assistance to secure copies of trial transcripts, as well as assistance with appeals against their convictions and/or sentences. A few complaints related to prison conditions. Table 3 below shows the number of complaints from the different SAHRC provincial offices in respect of arrested, detained and accused persons. The SAHRC accepts very few of these complaints as most are referred to Legal Aid South Africa (Legal Aid SA) or to the Judicial Inspectorate for Correctional Services (JICS), depending on the nature of the complaint.<sup>172</sup> There is clearly a need for awareness-raising and advocacy about the respective roles of the SAHRC, Legal Aid SA and JICS in respect of arrested, detained and accused persons.

**Table 3: Number of complaints made to the SAHRC in respect of arrested, detained and accused persons in 2015/2016**

Province	Total complaints 2015/2016 (number of accepted complaints)
Eastern Cape	53 (0)
Free State	99 (0)
Gauteng	49 (11)
Kwazulu-Natal	55 (1)
Limpopo	44 (3)
Mpumalanga	9 (1)
Northern Cape	9 (2)
North West	16 (2)
Western Cape	75 (7)
<b>National</b>	<b>409 (27)</b>

According to a recent assessment of the state of South Africa's correctional system, while there have been notable improvements over the past decade 'serious and persistent challenges' remain, most

<sup>172</sup> SAHRC (note 15 above).

critical of which is 'impunity for human rights violations' and the lack of action taken by the DCS in this regard.<sup>173</sup>

## 2.10.1. Independence and capacity of JICS

As discussed in section 2.1.2 of this report, the work of JICS in monitoring correctional and detention centres in South Africa is extremely important. However, JICS has suffered from a number of challenges to fulfilling its mandate. According to its latest Annual Report, between 1 September 2015 and 31 March 2016 JICS was without an Inspecting Judge, and when the new Judge started he was faced with a team 'frustrated and discouraged by staff shortage and a multitude of administrative and financial obstacles and what they regarded as a lack of responsiveness from the Department of Correctional Services to their requests, reports and recommendations... sitting for far too long with draft reports and unanswered queries on serious incidents of apparent violence, torture and even murder.'<sup>174</sup> According to JICS, 'the limited number of inspections, investigations, enquiries and research reports from JICS is largely due to capacity and budget constraints. The move to expand and establish JICS offices in all 9 provinces will create awareness and increase the public profile of the JICS. However, to achieve its mandate and realise the effectiveness of JICS, a substantial increase in the budget is necessary.'<sup>175</sup> During 2015/2016, JICS was severely constrained by capacity shortages and had only had four inspectors to conduct investigations and inspections at the 243 correctional centres in the country.<sup>176</sup>

In September 2016 the SAHRC was requested to brief the Parliament on the work, impact and independence of JICS, as well as its relationship with the SAHRC.<sup>177</sup> The SAHRC stressed that the role of JICS as an independent oversight body is crucial for the effective functioning of the criminal justice system as a whole, and the DCS in particular, and that JICS should be placed in a position to be both reactive (responding to conditions of detention in correctional centres and treatment) and proactive (allowing for a system of unannounced visits to correctional centres and own accord investigations). The SAHRC made the following recommendations:

- A review of the enabling legislation for the JICS should be taken, as well as a review of the existing framework, systems, processes, as well as perceptions of the JICS by different stakeholders.
- The appointment of the Inspecting Judge should not be a unilateral decision by the President, and should be appointed in a manner similar to other judges.
- In terms of independence, the JICS budget should be separate from the DCS, and JICS should have its own legal personality which sets out that it has standing in law. JICS should have power to institute legal proceedings in its own name and a clear mandate to refer cases to SAPS or the NPA in cases of criminal conduct by DCS officials. A full consideration of authority, powers and infrastructure necessary to support independence should be undertaken.

173 L. Muntingh 'Ten years after the Jali Commission: Assessing the state of South Africa's prisons' (2016) 35 *South African Crime Quarterly* (December 2016) 1.

174 JICS 'Annual Report 2015/2016' (20 October 2016) 12-13.

175 *Ibid* 119.

176 *Ibid* 106.

177 SAHRC 'The Impact of the Judicial Inspectorate of Correctional Services' Presentation to the Portfolio Committee on Justice and Correctional Services (21 September 2016).

- As JICS has previously reported on a lack of responsiveness from DCS in relation to complaints or request for information, JICS should be given greater investigative and enforcement powers and be equipped with powers of subpoena, search and seizure (similar to that of the SAHRC).
- JICS should have greater recourse to Parliament to report instances where the DCS fails to comply with requests, Parliament should exercise its oversight on the Department.
- JICS recommendations should be made enforceable.
- The SAHRC should be regularly requested to accompany the JICS when it investigates contentious complaints, particularly those referred by the SAHRC.
- The systematic information sharing of reports and other such information should be provided by the JICS to the SAHRC to enable its own monitoring, reporting and investigation or other recommendations. JICS is not a member of the FISD group, and should be included.
- JICS should monitor all places of detention, including those where children who are in conflict with the law are placed, and those serving as repatriation centres (like Lindela).<sup>178</sup>
- The South African government should ratify the Optional Protocol to the Convention against Torture (OPCAT) and establish a National Preventive Mechanism which encompasses the existing mandate of the JICS as well as other oversight bodies.

A number of CSOs working on prison reform have also called for JICS to be independent and empowered in a manner similar to the Public Protector or IPID.<sup>179</sup> They argue that DCS does not operate within a human rights framework, lacks imagination and creativity when dealing with issues, operates on the basis of military rank, works in silos from DOJCD and other departments, and has too much power over JICS (as JICS receives its budget from the DCS and is administratively and operationally linked to the Department).<sup>180</sup> In January 2017 Sonke Gender Justice and Lawyers for Human Rights (LHR) announced that they had launched an application in the Western Cape High Court seeking a declaration of constitutional invalidity, to be remedied by Parliament within a certain time period. They argue that unless the Correctional Services Act is rendered constitutionally compliant – with JICS given sufficient financial, institutional and operational independence to fulfil its functions - thousands of inmates are left without effective recourse when their human rights are violated. The litigation follows years of engagement with the Portfolio Committee for Justice and Correctional Services, which the organisations argue unfortunately did not yield any legislative reform.<sup>181</sup>

<sup>178</sup> Ibid.

<sup>179</sup> Interview with Clare Ballard, Lawyers for Human Rights (LHR) and Ariane Nevin, Sonke Gender Justice (Johannesburg, 13 February 2017).

<sup>180</sup> Ibid.

<sup>181</sup> Sonke Gender Justice and Lawyers for Human Rights (LHR) 'Sonke Gender Justice and Lawyers for Human Rights Challenge the Lack of Independence of the Judicial Inspectorate' Press statement (31 January 2017).

## 2.10.2. Overcrowding and poor conditions in correctional centres

The SAHRC has expressed concern at conditions in correctional centres, particularly regarding overcrowding, and the South African government's lack of a concrete response as to how it plans to improve conditions and address the dramatic increase in overcrowding (approximately 95 per cent over 13 years).<sup>182</sup> In its submission under the ICCPR, the Commission referred to the report prepared by Constitutional Court Edwin Justice Cameron on Pollsmoor Correctional Centre in the Western Cape, which highlighted the 'unsanitary conditions, sickness, emaciate physical appearance of detainees, and overall deplorable living conditions' he found there and the fact that the centre was at 300 per cent capacity. The SAHRC recommended that the government report on what steps it is taking to address the issue of overcrowding in correctional centres across the country.<sup>183</sup> The UN Human Rights Committee has also expressed concern over the poor conditions of detention at prisons, particularly overcrowding, dilapidated infrastructure, unsanitary conditions, inadequate food, lack of exercise, poor ventilation and limited access to health services. It recommended that the South African government increase efforts to guarantee the rights of detainees to be treated with humanity and dignity and that alternate measures are introduced to reduce overcrowding.<sup>184</sup>

According to the DCS, at the end of 2015/2016 there was a total inmate population of 161 984, with approved bed space of 119 134.<sup>185</sup> The percentage overcrowding in correctional centres and remand detention facilities in excess of approved capacity was 34 per cent in 2015/2016 (an increase of 3 per cent). According to the DCS it is still faced with the challenge of overcrowding in its correctional facilities, however this is due to the increased number of offenders and 'more successful prosecutions which in turn impact on population levels within correctional centres.'<sup>186</sup> According to the DCS, the percentage of inmates injured as a result of reported assaults in correctional and remand detention facilities in 2015/2016 was around 5 per cent (8 801/161 984), with the main reasons given as 'the high levels of gang activity and frustration amongst inmates due to overcrowding.'<sup>187</sup>

However, this does not tell the full story, due in part to the fact that the DCS does not provide disaggregated data on what sentences people are in prison for, types of offences committed, how many are violent offenders (rape and murder) etc. Further, restorative justice is not properly understood and is not being followed, as there are no proper guidelines, and controversial past judgments ordering restorative justice 'give restorative justice a bad name'.<sup>188</sup> Other reasons for overcrowding include: high number of prisoners awaiting trial; bottlenecks in the parole process; mandatory minimum sentencing; and the increase in life sentences.

In 1995, approximately 400 prisoners were serving life imprisonment in South Africa. In 2016 there were over 18 000, an increase of 4 400 per cent (and fast approaching a situation where one out of every five sentenced prisoners is serving life).<sup>189</sup> The Minister of Justice and Correctional Services has the final say on whether 'lifers' get parole or not. However, there are virtually no statistics

182 SAHRC (note 10 above) 15.

183 Ibid 16.

184 UN Human Rights Committee (note 12 above) para 31.

185 DCS 'Annual Report 2015/2016 Financial Year' 30.

186 Ibid 57.

187 Ibid 52.

188 Ballard and Nevin (note 179 above).

189 L Muntingh 'Op-Ed: Rethinking life imprisonment' *Daily Maverick* (2 March 2017).

available on who is serving life and why, and what their previous offence profiles are and related information. In the absence of this basic information 'it is extremely difficult to make sensible and palatable recommendations regarding life imprisonment reform.'<sup>190</sup> According to Muntingh, 'mandatory minimum sentences legislation created an extremely blunt instrument, based on little fact, and which has had no proven impact on violent crime rates.'<sup>191</sup> According to CSOs working on this issue, harsher prison sentences are actually not as effective a deterrent as 'surety of conviction', the latter which is sorely lacking in South Africa.<sup>192</sup> The SAHRC welcomes the recent formation of the DCS Lifers Task Team to deal with the backlog backlogs of lifers' consideration for parole, and hopes it will contribute to ameliorating the current situation.

In terms of awaiting trial prisoners in South Africa, also known as remand detainees, an extremely high number of people are being held on remand, and those on remand stay for too long before being acquitted or convicted. According to Muntingh, of the roughly 155 000 prisoners in South Africa in 2016, approximately one third were awaiting trial on any one day (with half of those on remand there for three months or longer).<sup>193</sup> The 2014 White Paper on Remand Detention Management in South Africa is a progressive policy that describes in detail the management of remand detainees, their rights and responsibilities, as well as cooperation between different government departments around remand detention. However, in reality the size of the remand population and duration of custody (before being acquitted or convicted) is dependent on other stakeholders besides the DCS, specifically the SAPS (who arrest large numbers of people unnecessarily) and the notoriously slow and inefficient criminal justice system. This leads to severe overcrowding (above 175 per cent occupancy) in the large metropolitan remand detention facilities such as Johannesburg, Durban Westville and Pollsmoor.<sup>194</sup> While many arrests occur, there are actually very few prosecutions taking place. Many people are sitting in jail and not getting bail, and will in fact not actually get prosecuted.

While overcrowding may largely be a problem created outside of the control of DCS, rights violations - such as assaults by correctional services officials, inter-prisoner violence, access to healthcare and other support services - are very much within the control of DCS. However, the DCS has 'an almost allergic reaction to external criticism, oversight and accountability' and 'gross human rights violations continue to occur and may even be increasing' in correctional centres, which is cause for concern for the SAHRC.<sup>195</sup>

### 2.10.3. Children in the criminal justice system

In South Africa the Children's Act deals with children in need of care, while the **Child Justice Act 75 of 2008** (which commenced in 2010) deals with children in conflict with the law. The SAHRC has raised the issue of the overuse of prosecutorial or court-ordered diversion programmes for child offenders, due to a lack of funding for other community-based diversion options and restorative justice approaches as set out in the Child Justice Act. The SAHRC recommended that the government allocate adequate funding to community-based programmes for children, and

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190 Ibid.

191 Ibid.

192 Ballard and Nevin (note 179 above).

193 Muntingh (note 177 above) 37.

194 Ibid.

195 Ibid 42.

report on measures taken to ensure children in conflict with the law are placed separately from children in need of care.<sup>196</sup> The SAHRC has also expressed concern at the age of criminal capacity in South Africa, which is contrary to General Comment 10 of the UN Committee on the Rights of the Child (which deals with children's rights in juvenile justice).<sup>197</sup> Currently the Child Justice Act sets the minimum age of criminal capacity at 10 years old, with the legal presumption that a child between 10 and 14 lacks criminal capacity (referred to as the *doli incapax* presumption). The Child Justice Act specifically states that the minimum age of criminal capacity should be reviewed and submitted to Parliament within five years of the passing of the Act. The SAHRC has recommended that the minimum age be raised to 14 years (with the removal of the legal presumption clause).<sup>198</sup>

In September 2016 the Portfolio Committee on Justice and Correctional Services and the Select Committee on Security and Justice were briefed by the DOJCD on its review of the age of criminal capacity. Important to the functioning of the Child Justice Act is that the procedural mechanisms and practices associated with the criminal capacity assessment process uphold the rights of children in conflict with the law.<sup>199</sup> According to the DOJCD, there is a shortage of mental health practitioners (psychologists and psychiatrists) and social workers to conduct assessments, as well as challenges with the forensic mental health assessment of criminal capacity in children, with different standards being used to make assessments.<sup>200</sup> The DOJCD recommended that the minimum age be raised to 12 years (with legal presumption for children aged between 12 and 14 years), and that the Child Justice Act be amended to remove the requirement of establishing the criminal capacity of children older than 12 but under 14 years for purposes of diversion programmes.<sup>201</sup>

In a statement issued by Parliament it was made clear that the Committees want greater consultation and certain gaps to be addressed before a Bill is developed to this effect.<sup>202</sup> In February 2017 the DOJCD presented to Parliament proposed amendments to the Child Justice Act regulations in order to bring them in line with the Judicial Matters Amendment Act 14 of 2014.

The amendments address concerns regarding the competency and capacity of the existing category of competent persons to evaluate the criminal capacity of children.<sup>203</sup>

## 2.10.4. Monitoring of unlawful detention at Lindela

The section 33 right to just administrative action and procedural fairness is a key issue under the right of detained persons, especially in relation to undocumented foreign nationals held at detention centres.

In August 2014 the South Gauteng High Court handed down a judgment in a case brought by the SAHRC regarding the detention of foreign nationals for over 120 days without a warrant at the

196 DCS (note 185 above) 18.

197 International law recommends that the minimum age for criminal capacity should not be below 12 years.

198 SAHRC (note 10 above) 19.

199 Ml Schoeman 'Determining the age of criminal capacity: Acting in the best interest of children in conflict with the law' (September 2016) 57 *South African Crime Quarterly*.

200 DOJCD 'Briefing by the DOJCD on the review of the age of criminal capacity' Presentation to the Joint Meeting of the Select Committee on Security and Justice and the Portfolio Committee on Justice and Correctional Services (7 September 2016).

201 Ibid.

202 Parliament of South Africa 'Parliament on review of age of criminal capacity: Joint Justice Committees want consultation on age of criminal capacity' Press statement (7 September 2016): <http://www.gov.za/speeches/joint-justice-committees-want-consultation-age-criminal-capacity-7-sep-2016-0000>

203 The amendment to Regulation 13 prescribes a form for the evaluation of the criminal capacity of a child, which is essentially a court order directing the competent person to evaluate the child and report on the evaluation (listing five elements of the development of a child which the presiding officer must consider). The amendment to Regulation 31 prescribes forms to be used as accreditation certificates for the accreditation of diversion programs and diversion service providers, with the power to grant accreditation now delegated from the Minister of Social Development to MECs. DOJCD 'Amendments to the Regulations relating to Child Justice' Presentation to the Portfolio Committee on Justice and Correctional Services (14 February 2017).

Lindela Repatriation Centre, a detention centre for undocumented foreign nationals run by Bosasa (Pty) Ltd on behalf of the DHA. Tsoka J found this practice to be unconstitutional and unlawful, and directed the Minister of Home Affairs to provide the SAHRC with a written report on steps taken to comply with the order, and to allow the SAHRC to monitor Lindela on a regular basis.<sup>204</sup> Since then the Commission has set up a monitoring and oversight project and made a number of findings and recommendations arising out of the weekly investigative visits conducted by the SAHRC's Legal Services Unit. In 2016 the UN Human Rights Committee noted with concern the overcrowding and a lack of hygiene and medical services at the Lindela Repatriation Centre, recommending that the government strengthen its efforts to ensure adequate living conditions in all immigration centres, and recommending that detention pending deportation is applied as a last resort only, with special regard being given to the needs of particularly vulnerable persons.<sup>205</sup>

The SAHRC has unrestricted access to the Lindela facility, officials and detainees and has focused its monitoring work on the issue of the unlawful detention of undocumented migrants.<sup>206</sup> Despite the unambiguous ruling of Tsoka J on the proper interpretation of section 34 of the Immigration Act 13 of 2002, (which deals with the detention period), the SAHRC has observed the ongoing and unlawful detention of people in excess of 120 days (the maximum legal period of detention) from the date of initial arrest.<sup>207</sup>

In its September 2016 report to the DHA, the SAHRC highlighted the good relationship it had established with the DHA, and that this relationship be preserved and encouraged. The Commission made the following observations:

- Endemic arrest and detention of unaccompanied minors at police stations (whether classified as places of detention or not) and Lindela;
- Continued unlawful detention of undocumented migrants for periods longer than prescribed by the law;
- Lack of or inadequate conflict management frameworks at the facility, including an isolation cell which had been used for detainees considered to be contravening the rules and regulations of the facility;
- Insufficient provision of access to adequate healthcare as well as concerns relating the general cleanliness of the facility, and interruptions to the water supply;
- Non-responsiveness to the SAHRC's requests for information, which hinders the fulfilment of the Commission's constitutional and legislative mandate;
- Persistent allegations of corruption, bribery and physical assault and/or the use of force by Bosasa security officials;

<sup>204</sup> *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others* (41571/12) [2014] ZAGPJHC 198.

<sup>205</sup> UN Human Rights Committee (note 12 above) para 32.

<sup>206</sup> SAHRC 'Report on Lindela Monitoring and Oversight Project: January – August 2016' (September 2016).

<sup>207</sup> In terms of section 34 of the Immigration Act, the 30 day detention period commences when the person is arrested and detained or when the initial 48 hour period lapses (immigration officers or police officers must verify and confirm the status of a person within 48 hours, either issuing a notice of deportation or releasing the person). The period includes the period of detention prior to the person arriving at Lindela, which means that the detention of undocumented migrants in places of detention before arriving at Lindela should be considered when calculating the detention period. *Ibid* 20-23.



- General lack of awareness of the right to make submissions, as well as inadequate access to free legal representation and a lack of interpretation/translation services (therefore access to information in a language understood by detainees is limited);
- No provision for an independent complaints mechanism at Lindela.

In light of these observations, the SAHRC has made comprehensive recommendations to the DHA and Bosasa, as well as other government entities (including the DOJCD, the Department of Health, DSD and SAPS).<sup>208</sup> A summary of these recommendations is outlined below:

- All unlawful detentions at Lindela must cease with immediate effect.
- The detention of unaccompanied minors must be discontinued as a matter of urgency. Care must be taken when arresting and admitting persons at Lindela including thorough screening to prevent the detention of unaccompanied minors.
- The DHA and Bosasa are urged to cooperate with the SAHRC in all its efforts to fulfil its constitutional mandate, including the provision of timely and accurate information in response to enquiries by the Commission.
- The stakeholder framework set up by the SAHRC following the court judgment needs to be broadened to include CSOs already engaged, but also other government departments who should actively participate and engage on issues of collective interest and responsibility.
- The DHA is a key stakeholder in ensuring the continued training and capacitation of the medical staff at Lindela. The clinic is understaffed and attends to huge numbers at Lindela without thorough examinations, and with a lack of sensitisation to treat detainees with dignity.<sup>209</sup>
- The SAPS should ensure that the detention of undocumented migrants at police stations which have been classified as immigration detention centres, comply with the minimum standards of detention, the provisions of the Immigration Act and the abovementioned court order.
- Detained undocumented migrants must be served with notices of deportation as provided by the Immigration Act and the accompanying Regulations insofar as the time limits and procedure is concerned.<sup>210</sup>

In December 2016 the DHA responded to the SAHRC's report with a number of action steps being taken to deal with issues raised by the Commission. These are being closely monitored by the SAHRC.

The SAHRC is also monitoring ongoing litigation by LHR, in which the organisation has sought confirmation from the Constitutional Court of an order of constitutional invalidity made by the

<sup>208</sup> Ibid 72-77.

<sup>209</sup> In April 2016 the SAHRC received a proposal from Médecins Sans Frontières (MSF) - an international, independent, medical humanitarian organisation - to conduct an ongoing assessment and mentoring/capacitation of the medical staff at Lindela in order to improve access to healthcare services. MSF 'Project Document: Protection of Health Rights for Undocumented Migrants in South Africa' (April 2016).

<sup>210</sup> SAHRC (note 206 above) 8-10.

Pretoria High Court declaring section 34(1)(b) and (d) of the Immigration Act unconstitutional and invalid.<sup>211</sup> The LHR's application relates to the procedures and safeguards governing the detention of people suspected of being undocumented migrants under section 34(1) of the Act. The organisation has argued that these should afford a detained person the automatic right to appear before a court within 48 hours, for the court to confirm the lawfulness of their detention. If successful, all detainees will benefit from judicial oversight to challenge the lawfulness of their detention.

A key issue highlighted by the SAHRC to the DHA is that of the widespread detention of undocumented migrants at police stations across the country for extensive periods without being properly documented in terms of the Immigration Act, prior to them being arrested and transferred to Lindela for deportation. Many police stations have now been determined as detention centres in terms of the Immigration Act, and a number of Lindela detainees have alleged that human rights violations are pervasive in police stations as they do not receive the same attention as Lindela. Often the detention period at police stations is not considered when the person arrives at Lindela, a similar situation observed with persons released from correctional facilities (whom upon release are made to wait for a month before they are collected for deportation by immigration officers).<sup>212</sup> The SAHRC has therefore adapted its comprehensive immigration detention monitoring framework into draft guidelines, which once published can be used by SAHRC provincial offices to monitor immigration detention at designated police stations throughout the country.<sup>213</sup>

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211 *Lawyers for Human Rights v Minister of Home Affairs and Others* CCT 38/16.

212 SAHRC (note 206 above) 71.

213 SAHRC 'Draft Guidelines for Immigration Detention Monitoring by the South African Human Rights Commission' (10 November 2016).

# 3. CONCLUSION AND RECOMMENDATIONS

This report has attempted to capture the current state of affairs with regards to civil and political rights in South Africa, by providing a snapshot of current developments in legislation, policy and jurisprudence around a number of CPR issues. These developments relate to the implementation of CPR in the country, particularly to the enforcement and oversight of the following rights: right to life and human dignity; freedom and security of the person; freedom from slavery and forced labour; right to privacy and access to information; freedom of expression and protection from unfair discrimination; right to protest; political rights; just administrative action; access to courts; and the rights of arrested, detained and accused persons.

While the South African government has pledged itself to the protection and realisation of CPR in terms of domestic, regional and international law, challenges remain in terms of implementation and political will. The SAHRC is concerned that the crucial oversight and monitoring mechanisms and institutions in place to protect CPR in South Africa are not able to fulfil their role due to budget limitations, lack of institutional independence from government departments, and limited mandates and powers. Further, the SAHRC is concerned that new legislation and policy being developed is rolling back some of the gains made in implementing CPR, and do not comply with South Africa's Constitution or regional and international human rights law. An important recommendation from this report is that the South African government needs to be clear about the status of the ICCPR in the South African legal system, and that much more needs to be done to promote awareness of the ICCPR and other international and regional human rights law amongst government officials, policymakers and parliamentarians.

## 3.1. *Issues of concern*

This report has raised a number of issues of concern and recommendations for consideration by the South African government, including specific national departments, ministries and agencies. The main issues are summarised below (in terms of the rights affected and issues addressed in the report).

### 3.1.1. **Right to life and human dignity**

#### Life Esidimeni deaths

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

## Deaths in state custody

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

## Assisted dying

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

## **3.1.2. Freedom and security of the person**

### Corporal punishment

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

## **3.1.3. Slavery, servitude and forced labour**

### Human trafficking

- The South African government – in particular the DOJCD, DSD, DHA and SAPS - needs to develop proper identification and referral mechanisms for victims of trafficking in persons, and needs to do more to assist the victims of trafficking – usually children, women and migrant workers in the agriculture and fishing sectors – who are often fearful to engage with government authorities. More awareness is needed amongst the general public and officials within the criminal justice system about the many ways in which human trafficking manifests in South Africa.

### **3.1.4. Right to privacy and access to information**

#### Challenges with accessing information through PAIA

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

#### Communication surveillance practices

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

### **3.1.5. Freedom expression and protection from unfair discrimination**

#### Hate speech and hate crimes

- The DOJCD should remove the issue of hate speech from the Prevention and Combating of Hate Crimes and Hate Speech Bill, so that it deals only with the issue of hate crimes and is passed expeditiously in Parliament. The inclusion and expanded definition of hate speech in the Bill should be reconsidered. In line with CERD, the criminalisation of hate speech should be reserved only for serious cases, to be proven beyond reasonable doubt.
- The Equality Courts need to be strengthened and promoted so that people are aware of their recourse to access justice, and so that useful hate speech jurisprudence is developed. Infrastructural capacity around PEPUDA and the Equality Courts needs to be strengthened to guarantee the effective implementation of legislation.
- The development of a system which captures and stores disaggregated hate crimes and/or hate speech data needs to be prioritised, as does the training and sensitisation of government officials on these issues.

## Whistleblowing

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

## Media freedom and censorship

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

### 3.1.6. Protest

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

#### Student protests

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

#### Marikana Commission

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

### 3.1.7. Political rights

#### Political party funding

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

#### Political intimidation and violence

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

### **3.1.8. Access to courts**

#### **Traditional Courts Bill**

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

#### **International Criminal Court withdrawal**

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

### **3.1.9. Arrested, detained and accused persons**

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

#### **Independence and capacity of JICS**

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

#### **Overcrowding and poor conditions in correctional centres**

- The DCS needs to urgently address the issue of overcrowding in correctional centres across the country and increase its efforts to guarantee the rights of detainees to be treated with humanity and dignity. The number of awaiting trial prisoners or remand detainees is extremely high, often as a result of the actions of SAPS (who arrest large numbers of people unnecessarily) and the notoriously slow and inefficient criminal justice system.
- Restorative justice as an alternative to imprisonment needs to be properly understood and explored, with significant resources allocated to this initiative by the DOJCD.
- Other reasons for overcrowding – including the high number of prisoners awaiting trial; bottlenecks in the parole process; mandatory minimum sentencing; and the increase in life

sentences – need to be seriously explored by DCS, DOJCD and the Minister of Justice and Correctional Services.

- Basic information and statistics on who is serving life sentences and why, and what their previous offence profiles are, should be provided by DCS as part of a process of life imprisonment reform in South Africa. It has been shown that harsher prison sentences are actually not as effective a deterrent as ‘surety of conviction’, the latter which is sorely lacking in South Africa.

### Children in the criminal justice system

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

### Monitoring of unlawful detention at Lindela

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



The background of the entire page is a light gray, semi-transparent graphic consisting of several stylized human hands raised in the air. The hands are positioned at various heights and angles, creating a sense of collective action or protest. The overall aesthetic is clean and modern, with a focus on the central text.

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