



**SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

**SAHRC Submission- Response
to ISD Questionnaire Single
Human Rights Body**

June 2017



Questionnaire:

Single Human Rights Body (South African Commission for Human Rights and Equality)

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Executive Summary

The South African Human Rights Commission (SAHRC) supports efforts that will strengthen the promotion and protection of human rights to empower and entrench a human rights-centred democracy in South Africa. While the SAHRC does not believe there is currently an alarming duplication of efforts and resources among Chapter Nine Institutions, it does recognise the importance of pooling resources to achieve greater efficiency and more impactful social change.

One of the challenges experienced by the SAHRC is the extent of its reach and footprint across South Africa, despite spending approximately 65 percent of its budget on personnel. More personnel are needed and more offices need to be established across the country to reach the majority of vulnerable South Africans and to support them vindicate basic human rights. The SAHRC believes that a single human rights body, with necessary personnel and powers, will catalyse change more quickly and effectively than the current model has done. Ultimately, the oversight task of the National Assembly is rendered more efficient and effective, in turn enhancing the level of parliamentary oversight.

Introduction

One of the recommendations contained in the Report of the *ad hoc* Committee on the Review of Chapter Nine and Associated Institutions, was the establishment of a Single Human Rights Body to be named the South African Commission for Human Rights and Equality, into which the following Institutions Supporting Democracy should be incorporated-

- the National Youth Commission (now called the National Youth Development Agency) (NYDA); the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission) together with the Pan South African Language Board (PanSALB); the Commission for Gender Equality (CGE); and the South African Human Rights Commission.

According to the *ad hoc* Committee, amalgamating these institutions would simplify the oversight task of the National Assembly and in turn enhance the level of parliamentary oversight provided.

The *ad hoc* Committee was of the view that three main advantages inhere to the establishment of a Single Human Rights Body, namely:

1. The avoidance of duplication of effort
2. Administrative efficiency and more effective use of resources
3. Greater accessibility and promotion of public awareness of the Bill of Rights

Purpose of the Questionnaire

To solicit the views of all the Institutions Supporting Democracy (ISDs), and in particular those affected by the recommendation of the *ad hoc* Committee on the Review of Chapter Nine and Associated Institutions, to amalgamate CRL, SAHRC, CGE and PanSALB into a Single Human Rights Body (South African Commission for Human Rights and Equality).

Please take time and respond/make submissions on the following Questions:

NB: You are requested to cover in your response/submission all questions.

1. What is your understanding of the mandate of your Institution?

The SAHRC has the broadest mandate of the four proposed Chapter Nine institutions to be merged (the CRL, CGE, PanSALB and the SAHRC) . The SAHRC's mandate covers all areas of the Bill of Rights whereas other Chapter Nine institutions have specific mandates within the rights spectrum. The SAHRC derives its mandate from three avenues, namely constitutional, statutory and international. Brief overviews of these mandates are explained below.

1.1 Constitutional Mandate

The SAHRC is established under Chapter Nine of the Constitution of the Republic of South Africa, 1996 (the Constitution). It is one of the independent constitutional bodies created to support constitutional democracy and it is directed to exercise its power, duties and functions without fear, favour or prejudice. Under section 184 (1) of the Constitution, the SAHRC is specifically mandated to:

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

Furthermore, as regulated by national legislation, the Commission has the necessary powers to:

- Investigate and to report on the observance of human rights;
- Take steps to secure appropriate redress where human rights have been violated;
- Carry out research; and
- Educate.

1.2 Statutory Mandate

In giving effect to its constitutional mandate, the SAHRC's enabling legislation, the South African Human Rights Commission Act 40 of 2013, expands on the mandate and sets out the institution's powers, duties and functions. These are detailed under section 13 of the Act.

Furthermore, in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA), the SAHRC has an additional mandate to report on 'the extent to which unfair discrimination on the grounds of race, gender and disability persists in the Republic, the effects thereof and recommendations on how best to address the problems'. It should be noted that the SAHRC (along with the CGE) enjoys the right of appearance in Equality Courts in terms of section 20 of PEPUDA. Under section 32 PEPUDA, the SAHRC is also appointed as a member of the Equality Review Committee.

1.3 International Mandate

Accredited 'A' Status

The SAHRC is additionally guided by the Principles Relating to the Status of National Institutions (the Paris Principles) as adopted by the United Nations General Assembly Resolution 48/134 in 1993. The Paris Principles direct national human rights institutions (NHRIs) in their duties and responsibilities and provide for: the competencies and responsibilities of NHRIs; the composition and guarantees of independence of NHRIs; the methods of operation; and the quasi-judicial competencies of NHRIs. NHRIs that are compliant with the Paris Principles are recognised by the UN through its various structures and are regarded as an essential institution within a modern democratic State.

It should be noted that within the international and regional fora, there is an increasing recognition of NHRIs and the key role that these bodies play in transmitting independent information from the domestic front to supranational bodies. However, only one NHRI per country is recognised, subject to adherence and fulfilment of the Paris Principles, which require that the institution has a broad mandate on human rights. As such, the SAHRC is recognised as South Africa's

official NHRI and is accredited with the highest rank of, 'A' status level of compliance as conferred by the Global Alliance of National Human Rights Institutions (GANHRI).

Status with Treaty Bodies

At the treaty body level, the South African government has entered a declaration under Article 14(2) of the International Convention on the Elimination of All Forms of Racial Discrimination, confirming that 'the South African Human Rights Commission is the body within the Republic's national legal order, which shall be competent to receive and consider petitions from individuals or groups of individuals within the Republic's jurisdiction who claim to be victims of any of the rights set forth in the Convention.'

2. Identify the areas of overlap with other Institutions Supporting Democracy.

Human rights are, by their nature, inter-related and interdependent. The work of the SAHRC, given the breadth of its mandate, often overlaps with the work of other ISDs. The overlaps are most pronounced in the case of promotion, education, public outreach activities and the investigation of complaints. Indirect overlaps occur where ISDs embark on stakeholder maintenance strategies with the same stakeholders and issue public communications on similar matters.

The protection and promotion of gender, cultural and linguistic rights provide clear cases in point which are evident in complaints around equality and hate speech or complaints involving access to justice. In these and many other matters, complaints may rightly be taken to the CGE, the CRL or the SAHRC.

In the course of its work, the overlap of the SAHRC's broad mandate is manifest when it embarks on probes into systemic violations. Such probes require that the rights of women and cultural, religious and linguistic rights not be excised from the probe as to do so artificially limits the scope and outcomes of such hearings. Examples of mandate overlaps are detailed below:

2.1 Public Protector South Africa

An example of an overlap with the mandate of the Public Protector South Africa (PPSA) was apparent in the SAHRC investigative hearing on the delivery of learning materials to schools in 2014.

2.2 Commission for Gender Equality

An overlap with the mandate of the CGE was apparent in the SAHRC's consideration of the gendered impact of the right to access sufficient water and decent sanitation in its 2014 investigative hearings.

2.3 Religious and Linguistic Rights

The 2016 investigative hearing on the rights of Khoi and San people clearly overlapped with the mandate of the CRL Commission.

The SAHRC's Complaints Handling Procedures incorporate a referral system for complaints received. This enables the SAHRC to refer a complaint to another relevant Chapter Nine institution. Under the Procedures, referrals take place where the complaint could be dealt with more effectively or expeditiously by another organisation, institution, statutory body or institution created by the Constitution or any applicable legislation.

The SAHRC referred a total of 2053 complaints to other institutions in the 2015/16 financial year, 1634 cases in the 2014/15 financial year, 2262 cases in the 2013/14 financial year and 1396 cases in the 2012/13 financial year. These statistics demonstrate the areas of overlap with other ISDs and more significantly that members of the public appear to see the SAHRC, on the basis of its broad human rights mandate, as the appropriate body to which any human rights violation may be reported.

However, the SAHRC notes with concern that there have been instances where complainants have 'forum-shopped' and that Chapter Nine institutions have issued inconsistent findings. Such incidents are recognised and regulated in the judicial system to prevent forum shopping through the courts, but are unregulated within ISDs and impact on scarce resources of the ISDs.

3. Identify areas of collaboration with other ISDs, and provide examples.

The SAHRC has a collaborative relationship with ISDs through the Forum for Institutions Supporting Democracy (FISD) at the national and provincial level. The provincial FISDs collaborate on promotion, rights sensitisation and public outreach activities.

The list below provides some examples of areas of collaboration:

3.1 Complaints

The SAHRC receives and refers complaints to the CGE, the CRL Commission and the PPSA. The number of referrals to the NYDA has been insignificant. ISDs, depending on the subject matter, are invited to participate in national probes.

3.2 Advocacy and Outreach initiatives

The SAHRC frequently collaborates with the PPSA and the CGE during advocacy events and outreach activities. The PPSA, CGE, PanSALB and the CRL are included in major stakeholder events both provincially and at the national level. At the provincial level, the ISDs have established provincial forums, which meet regularly to explore activities and to play supportive roles, including material dissemination and complaint handling during public outreach interventions.

The SAHRC ensures that it includes information about the mandates of other ISDs in the course of public outreach and advocacy interventions. Anecdotally, the SAHRC is frequently requested by external stakeholders to speak to matters which fall within the ambit and mandate of other ISDs.

Concerns around the interface between the SAHRC, CGE and the CRL Commission were discussed in the context of equality during 2014, at an 'Equality Dialogue Roundtable' hosted by the SAHRC. The extract from the SAHRC report records the significance of the interaction between the three ISDs:

"The SAHRC has an overarching mandate derived from the Bill of Rights as well as regional and international treaty obligations. The CGE's mandate focuses on gender equality, which is also broad and cross-cutting. A general tendency for institutions dealing with issues of gender is to place greater emphasis on the promotion and protection of equality for women and the girls. This is not surprising given the

prevalence of patriarchy in society and its marginalisation of females. Given this reality, how do the CGE and the SAHRC interface in dealing not only with the right to equality and prevention of unfair discrimination but also with all the other rights and freedoms in the Bill of Rights in respect of women and girls? Rights of women and girls are not confined to section 9 of the Constitution. As generally marginalised groups, the rights of women and girls require additional attention to ensure that they are able to enjoy all their other rights and freedoms equally and without discrimination. In order to ensure this, the CGE and the SAHRC must develop and strengthen effective inter-Commission relations, and increase coordination at operational levels. The same challenges arise in the relations between the SAHRC and the CRL, and between the latter and the CGE. Cultural, religious and linguistic communities are integral parts of society and are intrinsic elements of the right to equality in South Africa. For the full realisation of the rights and obligations in respect of language, culture, tradition and practice, flowing from the Bill of Rights, as well as other regional and international laws that bind the Republic of South Africa, the strength of relationships and interrelated work must more closely be scrutinised and addressed.”¹

The norm articulated in specialised human rights instruments such as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), appear to recognise the challenge in separating out key rights. CEDAW therefore ‘expects national human rights institutions to ensure that their work is based on the principles of non-discrimination and of formal and substantive equality between men and women, and that women have easy access to all services for the protection of their rights,’ but does not expressly advocate a dedicated gender mechanism.

¹ Equality Roundtable Dialogue Report, 2014, p.11 at <https://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf>.

4. The Kader Asmal Report recommends the amalgamation of the CRL Rights Commission, PanSALB, SAHRC, and CGE into a Single Human Rights Body, do you agree/disagree, and please provide reasons.

ISDs have developed and strengthened considerably over the past 20 years. This period has provided important learnings for the SAHRC. In particular the SAHRC remains deeply concerned that the realisation of socio-economic rights continues to be beyond the reach of the majority of the country's most poor, vulnerable and marginalised people. As constitutional bodies, the ISDs have had limited capacity and authority with which to support our nascent democracy, strengthen rights based policies and implementation. The constraints referred to include resources; authority to issue binding findings; unclear terms and conditions of service for office bearers; and independence in respect of their funding.

The Commission has previously submitted to the Portfolio Committee on Justice and Correctional Services that there are two major lines of argument for amalgamation:

- i) the indivisibility of rights and resources on the one hand, and
- ii) the general trend internationally to amalgamate human rights bodies into one.

The most recent exception to this trend is Kenya where the 2010 Kenyan Constitution provides for the establishment of a Kenya National Human Rights and Equality Commission as similarly proposed in the Kader Asmal Report. However, the Kenyan Constitution also allows for the restructuring of the Kenyan Commission into separate commissions, should the Kenyan legislature create such restructuring through national legislation. Consequently, the Kenyan legislature elected to restructure the Kenyan Commission in 2011 into three related human rights commissions. These bodies consist of the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administrative Justice that was established through the enactment of the Commission on Administrative Justice Act of 2011.

From a resources perspective, it may be practical for all human rights institutions to work as one institution. The SAHRC supports the call made at the Speakers 2015

Workshop to explore the possibility of developing a single human rights body because of:

- Duplication of resources that occur nationally and are repeated provincially;
- The possibility of cost saving efficiencies;
- The possibility of more funds for programmatic interventions;
- The opportunity such a process provides to implement learnings over the past 20 years for the strengthening of rights protection through constitutional body reforms.

It is recommended in this regard that a specific and detailed study be conducted to establish the cost and effective impact of collaborative arrangements, together with the incidence of forum shopping, and the need to adopt comprehensive rights based approaches which more fully account for the rights of vulnerable groups.

The powers of the ISDs vary. The SAHRC, CGE and CRL may issue recommendations arising from their investigations into violations of human rights, for the remedying of violations or strengthening of policy and practise, but these recommendations are not of a binding nature. This approach differs from those of human rights bodies in Uganda and Ghana and warrants close consideration as an area in need of necessary reform. Such uniform binding powers would align the powers of ISDs and strengthen the work of an amalgamated body significantly.

The SAHRC has, over a period of time, invested its resources in probing a range of violations which are systemic in nature and impact on large numbers of people. These probes result in recommendations by the SAHRC for the remedying of a violation or strengthening of a policy or practice. However, the SAHRC recommendations are rarely complied with, nor is there any marked measure of accountability by parties to whom such remedial action is directed. The impact of such non-compliance and lack of accountability mean that the causes of violations are not fully addressed, and such violations recur in the future, impacting again on the public purse and on the resources of the ISDs. It is therefore critical that non-compliance with recommendations arising from SAHRC investigations and reports have consequences so that the executive and legislatures of every sphere of

government are held accountable for failure to deliver on their constitutional mandates and for non-cooperation with a constitutional body.

As previously noted, the Paris Principles require that a State has one, designated NHRI that participates at an international level. The African Commission on Human and Peoples Rights (African Commission) resolution granting NHRIs' observer status mirrors this condition of compliance with the Paris Principles.² African national institutions must comply with the Paris Principles to be accorded observer status with the African Commission.

“Decides to grant special observer status to any African national institution established in Africa and functioning according to internationally recognized norms and standards.

(a) that the following criteria for the status of affiliated institution shall apply:

...

4) that the national institution should conform to the Principles relating to the Status of National Institutions, also known as the Paris Principles, adopted by the General Assembly of the United Nations under Resolution 48/144 of 20th December 1993”.

The Global Alliance of National Human Rights Institutions (GANHRI) noted in its General Observations (adopted in May 2013), that where a state has more than one NHRI, the need for a single human rights body is encouraged³.

“The Sub-Committee acknowledges and encourages the trend towards a strong national human rights protection system in a State by having one consolidated and comprehensive national human rights institution”.

Consequently, the NHRI, as designated by law, reports to various UN bodies and has speaking rights at UN meetings based on its status as the NHRI. While the SAHRC works effectively at the UN level, the collective experience of other ISDs would result in more impactful and comprehensive engagements at the international and regional levels through an NHRI that is amalgamated with its sister ISDs.

² <http://www.achpr.org/sessions/24th/resolutions/31/>

³ <http://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20SCA%20General%20Observations.pdf>;
General Observation 6.6

The single Human Rights Commission should be supported by a single administration with specialised directorates focusing on specific human rights. Such a model permits effective integration, wider reach and ease of access for the public and other stakeholders. A coordinated approach to human rights protection, monitoring and promotion through a central body mitigates against duplication, improves capacity and capabilities, and provides clarity for members of the public who seek redress.

However, it must also be noted that despite the potential benefits, amalgamation may come at the cost of the specialisation, which has grown within the various institutions and which could be useful where certain rights require more attention than others in a particular context.

5. What do you suggest as a road map to achieve the amalgamation of the suggested ISDs?

In moving towards an amalgamation of the identified ISDs, consultation with ISDs and other stakeholders, comparative research, and evaluative processes would be vital. Perception surveys, benchmarks and analytics should be documented to inform decisions around amalgamation.

In addition to the above, specific recommended actions would include:

- An in-depth study and mapping of the operations of the respective institutions in terms of their strategic objectives and performance plans over a period of five years;
- The creation of a nerve centre to coordinate transitions and provide support to ISDs;
- A determination of the theory of change as established in the strategic mandate of the concerned institutions;
- Budget spending and allocations over a five year period;
- Human resources risk, needs and impact assessment, including an assessment of the organogram, staff utility and functions of the relevant secretariat of these institutions;

- Consultation with Office Bearers and staff of each ISD, to include consultations with key stakeholders;
- An independent dedicated focus on the terms and conditions of service of Office Bearers who have not had consistent terms and conditions of service developed, or remuneration reviews in the 20 year period;
- Accessibility of ISDs at local level;
- Transition projections and costing;
- Service Level Agreements, buildings and assets, evaluations, projections and plans;
- Legislative audits – to include the identification of reforms to the Constitution and to statutes. Such an audit will be required in respect of terms and conditions of service for Office Bearers, terms and conditions of service for personnel, codes, benefits and most significantly reforms required in respect of their powers;
- Amended legislation to make provision for transitional arrangements;
- Amalgamation; and
- Advocacy and awareness of the amalgamation: Planning and costing

6. What do you suggest to be done in the interim and in the long-term?

In the interim, there should be greater collaboration and cooperation among ISDs. Such collaboration and cooperation should include:

- Improve and enhance complaints management systems for ISDs allowing greater effectiveness, human resource and time savings, improved collaboration, and fewer delays occasioned by burdensome collaboration procedures and referral systems;
- Provide ISDs with toll free call centres;
- Pooling resources to conduct systemic investigations where mandates overlap;

- Ensuring the institutions are located in the same vicinity;
- The creation of satellite offices for ISDs to expand reach;
- An assessment of the labour considerations;
- The impact on office bearers;
- A cost-benefit analysis and feasibility study on the establishment of a single human rights body;
- The establishment of a committee of members of the affected institutions to carry out an empirical analysis of the anticipated impact;
- Structured engagements between ISDs to develop, implement, monitor, evaluate and report on interim plans; and
- Compulsory quarterly meetings between ISDs and OISD, FOSAD, the NCOP and SALGA to allow for timely engagement around non-compliance and non-cooperation with ISDs. Such meetings would allow the parties to use alternative dispute resolution mechanisms to secure compliance with recommendations arising from investigations and hearings by ISDs.

The SAHRC has also previously supported the idea of a 'human rights campus' where all ISDs are placed in one precinct. The establishment of such a campus would enable a closer working relationship with regular structured meetings and engagements. In addition, a campus would improve accessibility for members of the public.

In the long term, a gradual amalgamation of functions should take place. Such amalgamation should be based on the merger of ISDs with similar mandates. A phased merging of the CRL together with the PanSALB is one example. To achieve this, the following activities need to be undertaken:

- A constitutional amendment to reflect the proposed amalgamation of institutions;
- Legislative amendments to reflect the constitutional changes; and

- The implementation of recommendations as applicable in the labour and budgetary assessments conducted in the short-term planning stage.

7. What is the likely impact of amalgamation in strengthening constitutional democracy?

The SAHRC envisages the increased access to financial and human resources for the single human rights body to effectively carry out the mammoth task of human rights protection, promotion and monitoring. In addition, the quality of work by the amalgamated body will be more cohesive, consistent and deepened. This strength is likely to support the State orient its policies and practice to one that translates rights assertion to a reality for the South African public. Ultimately, the approach will potentially increase the visibility of the important work that the various ISDs already undertake and better enable them to serve the South African public.

Gender mainstreaming is a mandate of the UN and this approach ensures that while gender equality receives a primary focus within the envisaged single human rights body (with the dedication of a well-staffed directorate and Commissioner), gender impacts will also be integrated in other divisions of the single human rights body resulting in greater impact to society.

The UN's disability mainstreaming mandate should also be taken into account in the monitoring and protection of other human rights. The SAHRC is well placed to undertake this function. As recommended in the Kader Asmal Report, a focus area commissioner on disabled persons should be appointed.⁴ The SAHRC has implemented this recommendation since 2009 and will be able to ensure, for example, that there is an intersection between gender and disability rights.

However, certain ISDs such as the NYDA should, on the basis of their very mandate, not be amalgamated. The NYDA serves to achieve promotion; monitoring; support programs, including of a financial nature; together with the advancement of development and sustainability for the youth who constitute a specifically defined group. The work of the NYDA therefore is directed to broad needs arising from poverty and inequality for a number of people between the ages 14-35. This work, while of as much significance as that of other ISDs, requires a dedicated focus which

⁴ P. 173 of the 2006 Kader Asmal Report.

resonates with the broad context of South Africa's development needs. The NYDA explains its mandate as one to be seen through the lens of the gravity of challenges South Africa is faced with and which, "require multi-pronged efforts, that simultaneously promote the development of sustainable livelihoods, reduce poverty, inequality and prioritise the development of policies which create an enabling environment for youth development"⁵.

In addition, parliamentary oversight would be more effective if a single human rights body is established. It would also present an opportunity for the single human rights body to report to different portfolio committees in Parliament as opposed to the current model of the SAHRC primarily reporting to the Portfolio Committee on Justice.

Accessibility by members of the public at a single institution to protect their rights is an important objective. The practice of referring people who are often vulnerable when they approach one Chapter Nine institution to another Chapter Nine institution that are perceived to be in a better position to assist a complainant is disconcerting and costly both for the victim and institutions concerned. It can discourage victims from pursuing redress in the face of a cumbersome bureaucracy and it is important to consider the possibility of a 'one stop shop' for human rights protection in South Africa.

8. How does the recommendation of a Single Human Rights Body find expression in the National Development Plan (NDP).

The NDP is founded on the notion of capabilities based on political freedoms and human rights. The NDP further envisages South Africa playing a leading role in continental development, economic integration and human rights. To achieve this, engagement with social formations and CSOs are priorities in the NDP. These are important approaches that the possibility of a single human rights body supports.

Development cannot be separated from human rights protection in the context of South Africa where social inequality is on the rise. Promotion of human rights is also crucial for development as it enables people to know what rights to claim from the state with respect to development processes.

⁵ www.nyda.gov.za

The inter-related nature of rights could potentially mean that an amalgamated human rights body is able to more effectively promote the rights of vulnerable groups to catalyse and strengthen development.

The protection of cultural and linguistic heritage will be seen from a human rights lens which ultimately advances the ideals of the NDP and the Constitution about freeing the potential of each person.

The necessity to frame gender issues from a broad human rights perspective and in the context of women's development is important. Furthermore, the NDP recognises the indivisibility of rights by stating for example the provision of 'inclusive education that enables everyone to participate effectively in a free society.'

In the SAHRC's experience, human rights violations often occur as a result of poor planning and lack of adequate infrastructure. Consequently, the rights of vulnerable groups such as women, children, persons with disabilities should be prioritised in development planning and should not be seen as secondary to economic development.

Education provides knowledge and skills that people with disabilities can use to exercise a range of other human rights, such as the right to political participation, the right to work, the right to live independently and contribute to the community, the right to participate in cultural life, and the right to raise a family. The concept of the indivisibility of rights and the impact of the realisation and protection of a particular human right has on the realisation of other rights is one that should be embraced through the development of a single human rights body.

9. If you disagree with amalgamation, as per Question 4, please provide suggestions as to how to deal with the following:

The SAHRC is in agreement with amalgamation, on the basis of the submissions made herein.

Closing Date: 02 June 2017

Email Responses to the OISD for the attention of Ms Gcobisa Silwana at oisd@parliament.gov.za