



South African Human Rights Commission (SAHRC)
NHRI written submission to the Universal Periodic Review (UPR) Mechanism
28 November 2011

Introduction

1. The SAHRC¹ is South Africa's "A" status NHRI and participated in the first UPR process, welcoming the conclusions and recommendations made². South Africa is yet to indicate whether it accepts or rejects the recommendations, and the SAHRC is not aware of any follow-up procedure having been undertaken. This submission seeks to evaluate progress made in respect of recommendations from the last review, in addition to highlighting further salient matters.

International obligations

Ratification

2. South Africa still needs to sign, ratify and domesticate the following international human rights instruments in order to strengthen its human rights framework:
 - 2.1. The SAHRC welcomes South Africa's May 2008 ratification of the CRPD and its Optional Protocol. South Africa still needs to designate an independent monitoring mechanism in terms of CRPD Article 33. This would greatly assist the country in determining progress that is being made in the realisation of the rights of persons with disabilities.
 - 2.2. Despite signing the ICESCR in 1994, previous UPR recommendation 7, engagement in a ratification campaign by civil society and repeated SAHRC reminders to government SAHRC, South Africa is yet to ratify this important international instrument. South Africa also needs to sign and ratify the new 2009 ICESCR Optional Protocol. Failing to ratify the ICESCR undermines the policy of the country reflected in its signing of the agreement that South Africa is willing to be held accountable at an international level.

¹ Please refer to Annexure 1 for all acronyms within this document

² Please refer to Annexure 2 for a list of all the conclusions and recommendations made

2.3. South Africa is yet to criminalise torture as required by CAT and recommended by UPR recommendation 2. The *Draft Combating of Torture Bill* remains after many years in draft format and is yet to be placed before Parliament. Incidents of torture are reported in the media and the 2010 *McCallum* matter³, in which the HRC made findings of torture against South Africa demonstrates the clear need for such legislation in order to combat impunity and hold perpetrators accountable. Despite internal progress, government is yet to ratify OPCAT and establish a NPM as per UPR recommendation 7.

2.4. South Africa needs to ratify the ICRMW in order to strengthen protection of the rights of migrant workers (See UPR Recommendation 9).

2.5. UPR Recommendation 8 to sign and ratify the CPED has also not been implemented.

2.6. The ratification by South Africa of the CRC-OPAC in September 2009 is welcomed.

Reporting

3. The UPR process needs to continue to encourage South Africa to comply with its international reporting obligations. Since the previous UPR process, South Africa has submitted its CEDAW report⁴. However, the following reports remain outstanding:
 - a) ICCPR Initial Report (since March 2000)
 - b) CRC 2nd and 3rd Periodic Reports (since 2002 and 2007. These Periodic reports must also now include the CRC-OPSC Initial Report (since July 2005) and the CRC-OPAC Initial Report (since 25 October 2011))
 - c) CAT 2nd Periodic Report (since December 2009)
 - d) CERD 4th Periodic Report (since January 2010)
 - e) CRPD Initial Report (since June 2010)

Domestic Concerns

Background: Poverty and Social Inequality

4. Divisions of wealth in South Africa continue to raise concerns, since the issue of widespread poverty underpins the vast majority of human rights challenges in the country. The position of women in rural areas is particularly grave, principally on account of the concentration of females in such areas, the absence of a framework to govern communal land where these women live, the type of work they tend to perform, and continuing challenges with service delivery in rural parts of the country.⁵

³ ICCPR Human Rights Committee Communication No. 1818/2008, available at <http://daccess-dds-ny.un.org/doc/UNDOC/DER/G10/462/07/PDF/G1046207.pdf?OpenElement>

⁴ The CEDAW Report covered the period 1998 – 2008. There were concerns that the State Report did not address previous recommendations of the CEDAW Committee or international commitments expressed in the Beijing Platform of Action, Additional concerns are set out in “Report to the CEDAW Committee on South Africa’s implementation of CEDAW 1998 – 2008”, compiled by Commission on Gender Equality 2008, view at <http://www.pmg.org.za/files/docs/100721report.pdf>

⁵ Available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=526:poverty-alleviation-strategies-in-south-africa-creating-dignified-living-for-women-through-social-justice-and-development&catid=59:gender-issues-discussion-papers&Itemid=267

The creation of the Department for Women, Children and Persons with Disabilities in 2009 served to focus poverty alleviation strategies on the most vulnerable groups in South Africa. The government has also taken the welcome step of launching the National Planning Commission (NPC) in 2010, which is tasked with a broad remit, involving developing long term strategies for development and growth in South Africa. As such, the NPC recognises that 'linkages between income poverty and deprivations in health care, education and social infrastructure are direct'⁶ and acknowledges the persisting and widespread inequalities in the country. The National Development Plan⁷, published in November 2011, is a comprehensive step forward in identifying key issues affecting South Africa's development, including the scourge of poverty and divisions in society, and proposing actions to tackle those obstacles. The plan is ambitious in its assertion that it is possible to eradicate poverty from South Africa by the year 2030, but the question remains as to whether the requisite resources exist to successfully enact the proposals.

Healthcare: maternal mortality

5. Current trends suggest that maternal mortality is increasing in South Africa rather than decreasing⁸. This is in spite of government actively informing women of their right to free healthcare, resulting in 92% of women being able to access antenatal and delivery care.⁹ Further, in recognition of the challenges HIV poses during pregnancy, and to help limit mother-to-child transmission, government has committed to providing health worker counselling and testing as part of all antenatal care¹⁰. However, the SAHRC has determined that inequalities between private and public healthcare expenditure, challenges around health infrastructure and management, communication gaps at the managerial level, staff shortages, lack of resources, and discriminatory attitudes towards vulnerable groups are limitations to the full implementation of the right to basic health care.¹¹ It is recommended that South Africa determine and address the causes of maternal mortality.

HIV/AIDS

6. South Africa must be acknowledged for the progress it has made in addressing HIV/AIDS, thereby giving effect to UPR recommendations 12, 13 and 14. However, there is no room for complacency. In April 2010, a new AIDS treatment policy and awareness campaign, the HCT Campaign, was launched. This aims to increase the integrated prevention strategy and to inform people of their status early, through the scaling up of HCT services.¹² Over the 15-month course of the campaign, 14 million people were counselled and over 13.5 million were tested for HIV, a six-fold increase in the number of people tested over the previous

⁶ Available at <http://www.npconline.co.za/pebble.asp?relid=123>

⁷ Available at

<http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf>

⁸ South African Human Rights Commission, *7th Report on Economic and Social Rights: Millennium Development Goals and the Progressive Realisation of Economic and Social Rights in South Africa*. Johannesburg (2010), 92

⁹ South African Human Rights Commission, *7th Report on Economic and Social Rights*. 92

¹⁰ Department of Health, www.doh.gov.za

¹¹ *Ibid.*

¹² Department of Health website <http://www.doh.gov.za/>

year.¹³ Of those tested, two million people were declared HIV positive and were referred for further support and care.

Whilst South Africa retains the highest number of people living with HIV and AIDS¹⁴, it also has the largest antiretroviral therapy programme in the world.¹⁵ However, access to treatment is still a challenge; at the end of 2009, an estimated 37% of infected people were receiving treatment for HIV, according to the latest WHO guidelines (2010).¹⁶ Although the number of people on ARV treatment increased significantly during the HCT campaign,¹⁷ there are still many, particularly those who are poor and living in rural areas, who still lack access to ARVs. South Africa must be encouraged to continue in its current efforts to address HIV/AIDS.

Access to water and sanitation

7. South Africa is still addressing a backlog in ensuring access to water and sanitation for all its citizens. This was highlighted recently in two matters the SAHRC investigated - *Makhaza*¹⁸ and *Moqhak*¹⁹. In both cases, the State had provided residents with unenclosed toilets as an interim measure. The SAHRC concluded that this violated their constitutional rights to dignity and privacy. It is recommended that South Africa adopt additional measures to ensure that all citizens have access to water and sanitation.
8. South Africa needs to be encouraged to urgently address the impact of acid mine drainage within a human rights framework that addresses the right of access to water and the human rights implications that will be caused due to the lack thereof.

Access to basic education

9. South Africa has done much to ensure access to education (UPR recommendation 15). The major challenge facing the country is the persistence of gross inequities permeating the education system. Poverty remains a significant barrier to education, with children in the poorest households nearly three times less likely to complete secondary schooling than children in the richest households. The quality of education in South Africa is not uniform, largely to the detriment of poor children. The challenges facing South Africa are complex and there is a dire need for a comprehensive monitoring and evaluation system to track progress and areas of concern so that South Africa's CRC international obligations in respect of education are fulfilled.

Education for children with disabilities

¹³ <http://www.sanacws.org.za/en/announcements/view/notice-from-the-sanac-women-sector-1>

¹⁴ Report on Global Epidemic released by UNAIDS, 2010

¹⁵ <http://www.avert.org/aidssouthafrica.htm>

¹⁶ WHO/UNAIDS/UNICEF (2010) 'Towards Universal Access: Scaling up priority HIV/AIDS interventions in the health sector'

¹⁷ Motsoaledi, A (2011, 31st May) 'How we're re-engineering the health system - Motsoaledi: Health Budget Vote Policy Speech presented at the National Assembly' politicsweb.co.za

¹⁸ <http://www.sahrc.org.za/home/21/files/Makhaza%20Finding%202010.pdf>

¹⁹ <http://www.sahrc.org.za/home/21/files/FS%20Open%20Toilet%20Finding.pdf>

10. It is estimated that 10% of children with disabilities do not attend school in South Africa.²⁰ In a recent case, the court ordered government²¹ to take reasonable measures to give effect to the right to basic education of severely and profoundly intellectually disabled children in the Western Cape. Currently, children who are severely and profoundly disabled are denied access to education in both mainstream and special schools. Only special care centres run by NGOs provide education services to these vulnerable children. The SAHRC urges government to comply with its CRPD obligations and ensure that all children with disabilities enjoy access to education.

Children and corporal punishment

11. South Africa has not taken steps to give effect to UPR recommendation 1. The SAHRC once again calls for South Africa's commitment not only to removing the defense of reasonable chastisement, but also to criminalizing corporal punishment with concomitant pledges towards raising awareness and providing the necessary resource to support parents in adopting positive and alternative forms of discipline.

Women and violence

12. UPR recommendations 2, 3, 4, 5, 6 and 11 addressed violence against women. There is still much that South Africa must do to ensure that women live in violence free homes and communities. The October 2011, reinstatement of the specialised Family Violence, Child Protection and Sexual Offences Unit (FCS) is welcomed; however South Africa needs to increase measures to protect and provide redress to women at risk of, or subjected to, gender-based violence, ensure that perpetrators are held accountable, provide ongoing training to police; prosecutors and the judiciary.

Asylum Seekers

13. Despite previous UPR recommendation 19, xenophobia remains a significant challenge for South Africa. In May 2008, a major national outbreak of xenophobic violence occurred. The *SAHRC Investigation into issues of Rule of Law, Justice and impunity arising out of the 2008 Public Violence against Non-Nationals* found that previous measures taken to address xenophobia had failed. Since such time, there have been renewed efforts, despite on-going reports of xenophobic violence.

Further to UPR recommendations 9 and 10, South Africa continues to require encouragement to ensure that the rights of migrants are respected by law enforcement officials, and that the procedure for recognition of the status of refugees and deportation of foreigners is strengthened, including ensuring the right to a hearing and compliance with the principle of non-refoulement.

²⁰ Statistics South Africa (2010) Selected development indicators – sourced from the General Household Survey, 2009

²¹ Legal Resources Centre (LRC) (6 November 2010) *Government challenged for failure to provide basic education to intellectually handicapped children*. Available at: <http://www.lrc.org.za/press-releases/1235-2010-06-11-government-challenged-for-failure-to-provide-basic-education-to-intellectually-handicapped-children> In relation to the case : Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Government of the Province of the Western Cape, Case no: 18678/2007, Western Cape High Court, Cape Town

The South African government should be encouraged to review its migration and asylum policies, fight impunity, eradicate corruption and foster social cohesion within communities, through raising awareness around non-nationals, in order to combat xenophobia.

Hate Crimes

14. South Africa still needs to give effect to its CERD recommendations and ensure that measures are taken to address hate crimes. South Africa has witnessed a concerning increase in hate crimes perpetrated not only on the basis of racial discrimination but also on the basis of nationality and sexual orientation²². There is an urgent need to ensure that hate crimes are addressed through legislation²³ and that measures are put in place to raise public awareness about these crimes and sensitise officials to handling them.

Access to Information

15. The SAHRC, media and civil society have expressed serious concern regarding the Protection of State Information Bill. It is the SAHRC's belief that South Africa's compliance with ICCPR Article 19 will be jeopardised, especially in the absence of public interest and public domain defences for the dissemination of information deemed to be sensitive.

Given the perceived inefficiencies in the implementation of PAIA and the persistence of corruption, even in spite of such advanced legislative frameworks as South Africa has adopted, the SAHRC has appealed to the South African government to commit to, implement and advance the objectives of the right of access to information entrenched in international and regional instruments, recognising that such a commitment is instrumental in eradicating the impact of poverty and equality and promoting basic human rights in South Africa. The SAHRC believes that the government needs to demonstrate such a commitment through the allocation of resources to strengthen existing access to information frameworks, and the facilitation of administrative change to engender a culture of transparency and information sharing.

Human Trafficking

16. In March 2010, the *Prevention and Combating of Trafficking in Persons Bill* was tabled in Parliament, in order to domesticate South Africa's international obligations and provide specific legislation criminalizing human trafficking.²⁴ The Bill provides for the prosecution of persons involved in trafficking, the prevention of trafficking, and provision of assistance to victims of trafficking. The Bill furthermore provides for the establishment of an intersectoral committee that would be charged with developing a national policy framework and public

²²The practice of so-called "corrective rape" in which men rape and even murder women in order to "correct" their sexual orientation. The Department of Justice and Constitutional Development has set up a National Task Team on LGBTI Issues, forming a partnership between government and civil society, which is mandated to develop a National Intervention Strategy on LGBTI-related crime.

²³ The *Draft Prohibition of Racism, Hate Speech, Xenophobia and Related Intolerance Bill* needs to be placed before Parliament

²⁴UN (2000) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational and Organised Crime.(the Palermo Protocol)

awareness programmes.²⁵ The SAHRC encourages Parliament to finalise the Bill and for the necessary resources to be allocated to the implementation of the legislation.

Traditional Cultural practices

Ukuthwala

17. The traditional cultural practice of *ukuthwala* (in which older men abduct young women for purposes of marriage) has been the subject of serious concern. The SAHRC has hosted seminars and conducted joint education and awareness activities with government to raise awareness about this harmful cultural practice. In January 2010, the CEDAW committee made a number of recommendations to South Africa which require follow up and implementation. The SAHRC considers that this practice should be condemned and discouraged in the strongest terms. It calls upon the government to follow the CEDAW recommendation²⁶ by enacting legislation to ensure that women, and particularly children, are protected from such ordeals.

Killing of “witches”

18. South Africa also needs to be encouraged to do more to eradicate the killing of “witches”, another harmful cultural practice that the CEDAW Committee addressed in its recommendations.²⁷

Polygamy

19. The practice of polygamous marriages has been subject to considerable debate in South Africa, with many positions and views articulated. The SAHRC calls upon the South African government to follow the CEDAW recommendation²⁸ thereby discouraging this practice, which disadvantages women.

20. Generally, South Africa needs to create more education and awareness raising initiatives and engage further with traditional leaders on traditional cultural practices generally.

²⁵ Republic of South Africa (29 January 2010) *Prevention and Combating of Trafficking in Persons Bill*. No. 32906, Available at: <<http://www.info.gov.za/view/DownloadFileAction?id=118892>> 7

²⁶ CEDAW report, para 21(b): The Committee urges the State party to... b) Address harmful practices, such as *Ukuthwala*, polygamy and the killing of “witches” and the practice of FGM amongst certain population, more vigorously

²⁷ *Ibid*

²⁸ *Ibid*

Annexure 1

Annexure 1: List of Acronyms

ARV	Antiretroviral drugs
AIDS	Acquired Immune Deficiency Syndrome
CAT	Convention against Torture
CERD	Committee on the Elimination of Racial Discrimination
CRC	Convention of the Rights of the Child
CRC-OPAC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
CRC-OPSC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
CRPD	Convention on the Rights of Persons with Disabilities
DoH	Department of Health
DSD	Department of Social Development
FCS	Family Violence, Child Protection and Sexual Offences Unit
HCT	HIV and AIDS Counselling and Testing
HIV	Human Immunodeficiency Virus
ICPED	International Convention on the Protection of All Persons from Enforced Disappearance
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICESCR	International Convention on Economic, Social, and Cultural Rights
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
NHRI	National Human Rights Institution
NPM	National Preventative Mechanism

OPCAT	Optional Protocol to the Convention against Torture
OPAC	Optional Protocol on Children in Armed Conflict
OPSC	Optional Protocol on the sale of children, child prostitution and child pornography
PAIA	Promotion of Access to Information Act
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
UPR	Universal Periodic Review

Annexure 2

Annexure 2: CONCLUSIONS AND/OR RECOMMENDATIONS

67. In the course of the discussion, the following recommendations were made to South Africa:

1. Recommended to South Africa to commit not only to removing the defence of reasonable chastisement but also to criminalizing corporal punishment with the concomitant pledges towards raising awareness and providing the necessary resource to support parents in adopting positive and alternative forms of discipline (Slovenia);
2. Recommended to South Africa to enact a legislation which would, in line with article 1 of the Convention against Torture, prevent and eliminate torture and combat impunity (Slovenia);
3. Recommended to South Africa to systematically and continuously integrate a gender perspective in the follow-up process to the UPR (Slovenia);
4. Recommended to take increased measures to protect and provide redress to women at risk of or subjected to gender-based violence (The Netherlands);
5. Recommended South Africa to follow up on the recommendation made by the Committee against Torture to adopt all necessary measures to prevent, combat and punish violence against women and children (Switzerland);
6. Recommended that concrete measures be taken to improve the handling by police of rape cases and to curb rates of violence, particularly against women and girls (Canada);
7. Recommended to South Africa to ratify the International Covenant on Economic, Social and Cultural Rights (Romania, Germany, Zimbabwe, Brazil) and the Optional Protocol to the Convention against Torture (Romania, Brazil and the United Kingdom) at the earliest opportunity (United Kingdom);
8. Recommended to South Africa to sign and ratify the International Convention on the Protection of All Persons from Enforced Disappearance (France);
9. Recommended follow-up to the recommendations of the Committee on the Elimination of Racial Discrimination and to ensure that the rights of migrants are respected, particularly by law enforcement officials (Canada);
10. Recommended that the mechanisms for supervising procedures be established or strengthened, including the procedure for recognition of the status of refugees and deportation of foreigners, with a view to ensuring the right to a hearing and thus close the door to possible abuses and complying with the principle of non-refoulement (Mexico);
11. Recommended the implementation of the South Africa Law Reform Commission's proposals on the Criminal Law Amendment Act 2007, with a view to supporting and prosecuting

complaints in court and to providing comprehensive State-funded post sexual assault medical care and treatment services (Canada);

12. Recommended South Africa to take measures to address inequities in access to HIV/AIDS treatment and support, particularly in rural areas (Canada);
13. While commending South African authorities for the policies adopted in the field of public health and the measures taken to fight HIV/AIDS, recommended to South Africa to increase its measures to eliminate the discriminatory barriers to access health services for people living with HIV/AIDS (Romania);
14. Recommended to South Africa to further intensify its efforts to decrease the HIV/AIDS prevalence in the context of its National Health Charter, with a special focus on teenagers (Algeria);
15. Recommended to South Africa to continue its efforts to promote and facilitate school attendance, particularly among children from economically disadvantaged families (Angola);
16. Recommended to South Africa to persevere in its efforts to promote the rights of education and to pay particular attention to continuing and disseminating the culture of human rights among young people as part of its educational and pedagogical programme (Tunisia);
17. Recommended to South Africa to maintain and intensify the efforts regarding the elimination of poverty and social inequality (Mauritania);
18. Recommended to South Africa to give special attention to the role of international cooperation for the enjoyment of economic, social and cultural rights and recommended South Africa to share its experience, programmes and plans in this field with other developing countries (Sudan);
19. Recommended that South Africa make available to the Human Rights Council, as an example of sharing best practices, some of its initiatives relating to combating racism and xenophobia as well as promoting tolerance and coexistence among ethnic and religious minorities (Jordan);
20. Recommended to South Africa to continue to promote and protect the right of all persons to equality without discrimination based on sexual orientation, at both the national and international levels (United Kingdom);
21. Recommended to South Africa to increase its efforts to provide mediation machinery to provide victims of discrimination on the basis of sexual orientation more accessible and rapid remedies (Belgium);
22. Recommended to make efforts on the sensitization in education to strengthen the prevention of these forms of discrimination (Belgium).

68. The response of South Africa to these recommendations will be included in the outcome report adopted by the Human Rights Council at its eighth session.

69. All conclusions and/or recommendations contained in this report reflect the position of the submitting State(s) and/or the State under review thereon. They should not be construed as endorsed by the Working Group as a whole.