



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

**National Human Rights Institution Report to the United Nations Committee on the
Economic, Social and Cultural Rights**

*For consideration during the 61st pre-sessional working group adoption of a List of Issues
regarding the South African Government's Initial State Report under the International
Covenant on Economic, Social and Cultural Rights*

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Introduction

1. The South African Human Rights Commission (SAHRC), welcomes the South African government's initial State Report (State Report) under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to the Committee on Economic, Social and Cultural Rights (CESCR).¹ Despite signing the ICESCR in 1994, the South African government's formal ratification of the Covenant in 2015, affirmed its commitment to uphold its socio-economic rights in the country.
2. At the outset, the SAHRC commends the South African government for its widespread public consultation in the drafting of the initial State Report and for submitting to the CESCR timeously. Noting that the South African government is scheduled to appear before the CESCR in 2018, the SAHRC hereby submits a national human rights institution (NHRI) report for the Committee's consideration in the adoption of a list of issues (LOI) during the 61st pre-sessional working group in October 2017. In adhering to the Committee's guidelines, the SAHRC's report highlights the salient aspects of the State report which require further clarity / information from the South African government. The report further provides factors the Committee may wish to consider for the LOI and information that may be requested of the South African government.
3. The SAHRC submits its NHRI Report within its constitutional, statutory and international mandate as an 'A' status NHRI. The SAHRC further points out that the institution shall be submitting a comprehensive NHRI report prior to the 2018 State review session.

¹ South African Government Initial State Report under the International Covenant on Economic, Social and Cultural Rights (April 2017) Committee on Economic, Social and Cultural Rights E/C.12/ZAF/1 (South African ICESCR State Report (2017)).

PART ONE: General Framework for the Protection of Economic, Social and Cultural Rights

Ratification of international instruments

4. The SAHRC notes government's ratification of the ICESCR more than 20 years after the Covenant was signed. However, the SAHRC is concerned that government entered a declaration indicating that it will only give progressive effect to the right to education, as provided for in Article 13 (2)(a) and Article 14 of the Covenant, within the framework of its National Education Policy and available resources.² The SAHRC believes that the declaration entered by the South African government limits the justiciability of the right to education in terms of the principle of progressive realisation.

5. Despite ratification of the ICESCR, the government has not ratified the Optional Protocol to the ICESCR (OP-ICESCR). The SAHRC notes that failure to ratify the optional protocol denies South Africans access to effective remedies for the violation of the ICESCR where domestic remedies have been exhausted.³ The SAHRC highlights that accession to the OP-ICESCR would complement South Africa's domestic protection and the obligations it has already acceded to under other regional human rights treaties.⁴

Government priorities

6. The SAHRC welcomes the development of the National Development Plan (NDP) to attain socio-economic equality in South Africa and notes the identification of 14 priority outcomes for the government in terms of the NDP. However, the SAHRC points out that the priority outcomes are not entirely aligned to all the listed socio-economic rights in the Constitution. Although the right to food and water is protected under section 27 of the Constitution, the SAHRC notes that these are not featured in the 14 priority outcomes listed in the State report. The SAHRC is concerned that a failure to specifically identify the priority socio-economic rights listed under section 184 (3) of the

² C.N.23.2015.TREATIES-IV.3 (Depositary Notification).

³ F Viljoen & N Orago 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its Importance and Implications' (2014) 17 *PER* <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812014000600010>.

⁴ *Ibid*; the authors note that South Africa's acceptance of the jurisdiction of the African Court of Human and People's Rights also means it has accepted judicial adjudication of socio-economic rights.

Constitution (which is monitored by the SAHRC), may affect the budgetary allocation for the realisation of these rights.

Disaggregation of data

7. The SAHRC notes the data provided by the government showing the disparity in income levels of racial groups in South Africa. However, it further notes that there is a lack of statistical and qualitative information on poverty and inequality in South Africa. Statistical information that is provided is not disaggregated by race and gender per province, which would ensure that all data is analysed according to the needs of vulnerable groups in specific areas in the country.

Institutions supporting democracy

8. The SAHRC recognises the establishment of independent constitutional bodies (chapter nine institutions⁵), such as the SAHRC, which are mandated to monitor the progressive realisation of rights. However, the SAHRC notes with concern the lack of allocation of adequate resources in order for these institutions to fully exercise its mandate. It should be noted that the SAHRC has raised these concerns with the South African Parliament as well as several treaty bodies, highlighting that the lack of adequate financial resources impedes the effective execution institution of its constitutional, human rights mandate.⁶

Freedom of Expression and Press Freedom

9. The SAHRC recognises the importance of press freedom as acknowledged in the State Report. However, the SAHRC is concerned that the current Prevention and Combatting of Hate Crimes and Hate Speech Bill which is due to be tabled before Parliament, may have a negative impact on the right to freedom of expression. It should be noted that during the consultation on the draft Bill, the SAHRC as well as several civil society organisations submitted comments to the Department of Justice and Correctional Services, calling for a revision of the Bill.⁷

⁵ Other constitutional bodies to support democracy include: The Commission for Gender Equality (CGE); Public Protector; and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission).

⁶ See the SAHRC's submission for South Africa's 3rd Universal Periodic Review, para 3.1 <https://www.upr-info.org/sites/default/files/document/south_africa/session_27_-_may_2017/sahrc_upr27_zaf_e_main.pdf>.

⁷ Examples of media reports in relation to the Bill include <<http://www.genderjustice.org.za/article/hate-crimes-hate-speech-bill-good-bad-unspeakable/>>; <<https://mg.co.za/article/2017-01-24-hate-speech-add-on-compromises-hate-crimes-bill>>.

10. The SAHRC also notes that the Protection of State Information Bill that was passed by Parliament is awaiting presidential assent. The status of the Bill remains unclear with conflicting reports on whether the President intends to accede to the legislation or whether it will undergo further parliamentary revision to address the constitutional concerns that have been raised.⁸ However, the SAHRC believes that the Bill, in its current form, will impact greatly on freedom in reporting on matters which the legislation deems to fall within the parameters of national security, and ultimately, freedom of speech.

Remedies

11. The SAHRC acknowledges the recognition of the right of access to information and the enactment of the Promotion of Access to Information Act, 2 of 2000 (PAIA), as an effective remedy for the violation of rights. However, the SAHRC is concerned by the unsatisfactory compliance with PAIA obligations by government institutions.⁹ An annual report reflecting the status of PAIA requests¹⁰, illustrates that during the period August 2015 to July 2016, 46 percent of information requests sent to various public entities were denied.¹¹ Furthermore, there is heavy reliance on the grounds of refusals in PAIA and applicants are increasingly relying on the courts to seek redress.¹² The SAHRC notes that the failure of government to comply with access to information requests within the required time periods, the over-reliance on the grounds of exemption in PAIA, the failure to comply with mandatory disclosure requirements of information, and the failure by public departments to rely on the public interest ground for disclosure in PAIA, have weakened the effectiveness of the legislation.

⁸ Last media reports on the status of the Bill remain unclear. See <<http://www.sabc.co.za/news/a/b69a25004a41a0338934cba53d9712f0/Newundefinedlawsundefinedwontundefinedc ontraveneundefinedfreedomundefinedofundefinedexpression:undefinedZuma-20151810>>.

⁹ The SAHRC currently receives reports on PAIA on the status of compliance from various public institutions. The latest SAHRC PAIA report to be tabled before Parliament in September 2017 shows that only 29 of 43 national departments comply with their PAIA report submission to the SAHRC and only 48 of 278 municipalities comply with the submission of their PAIA reports.

¹⁰ The annual PAIA report is compiled by a network of non-governmental organisations.

¹¹ Access to Information Network *Shadow Report 2016* (2016) <[http://foip.saha.org.za/uploads/images/CERShadowReport2016Final%20\(1\).pdf](http://foip.saha.org.za/uploads/images/CERShadowReport2016Final%20(1).pdf)>.

¹² Ibid.

12. The Committee may wish to request in the LOI:

- 12.1. Information on the possible withdrawal of the declaration entered under Articles 13 and 14 of the ICESCR.
- 12.2. Information on government's plan for the ratification of the OP-ICESCR.
- 12.3. Information on government's plan for prioritising delivery and realisation of the right to food and water, noting that the right to food is also the only socio-economic right in South Africa without an applicable law to give effect to this right.
- 12.4. Information on the breakdown of the statistical data presented in the State Report disaggregated by province.
- 12.5. Information on improving the financial resource allocation to chapter nine institutions, such as the SAHRC.
- 12.6. Information on addressing the constitutional concerns about the Prevention and Combatting of Hate Crimes and Hate Speech Bill as well as the Protection of State Information Bill.
- 12.7. Information on improving the status of government compliance with PAIA should be requested, including whether there are any plans for the amendment of PAIA to improve the effectiveness of the right of access to information.

PART TWO: General Provisions of the Covenant

Article 1: The Right to Self-Determination

- 15. The SAHRC acknowledges the State's efforts to advance the right to self-determination through the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission), the Traditional Leadership and Governance Framework Act, 2003 and the Restitution of

Land Rights Act, 1994.¹³ However, the SAHRC notes the absence of reference to the 2005 Country Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Noting the lower socio-economic and marginalised status confronting South Africa's recognised indigenous communities, the Special Rapporteur made a number of recommendations to the government, including: i) that indigenous communities be constitutionally recognised and that legal institutions maintaining reference to apartheid-era classification as 'Coloured' be removed; ii) the maintenance of a national register of officially recognised indigenous communities, and statutory recognition of their associations and chieftaincies; iii) ratification of the Indigenous and Tribal People's Convention, 1989¹⁴; and, iv) that the restitution of land claims by indigenous communities not be limited by the cut-off date of 1913, conducting a systemic needs and lands rights assessment of indigenous communities, and the acceleration of the land restitution process.¹⁵

16. While the Traditional and Khoi-San Leadership Bill [B23-2015] provides for the recognition of traditional and Khoi-San communities and leaders, this draft legislation has been criticised by members of civil society for combining the needs of traditional and Khoi-San communities and reinforcing historical apartheid geography and leadership.¹⁶ The government has been further criticised by civil society for failing to engage in substantive and meaningful consultation with affected communities during the legislative drafting process.¹⁷
17. With respect to land restitution, the SAHRC recognises the thousands of land claims settled by the government in the form of cash payments. However, the SAHRC has noted with concern that of the 63 455 land restitution claims lodged by the 1998

¹³ *South African ICESCR State Report* (2017) paras 39-40.

¹⁴ No. 169.

¹⁵ Commission on Human Rights *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Persons, Rodolfo Stavenhagen: Mission to South Africa* (2005).

¹⁶ Civil society organisations have highlighted that while it is important that Khoi San communities are statutorily recognised, enforcement of the Bill will have the adverse impact on people who live in the former apartheid homelands, and rather than advancing customary law in line with the Constitution, instead reinforces apartheid-era notions of tribalism, divided citizenship, imposed identities, and hierarchical leadership structures. Additionally, traditional communities may be denied various legal rights to public participation, particularly with respect to mineral rights, infrastructure and development. See Land & Accountability Research Centre *Notes on the Traditional and Khoi-San Leadership Bill [B23-2015]* (2016)

¹⁷ See, for example, GroundUp *Hearings on Khoi San Bill held with no translation into Khoi and San languages* (2006).

deadline, only 162 cases involved the restitution of land.¹⁸ Challenges impeding land restitution include: i) insufficient budget; ii) slow pace of settlement of claims; iii) inadequate resource capacity within institutions tasked with investigating and managing claims; and iv) high volume of cases before the Land Claims Court. In its 2013 Report into the systemic challenges affecting the land restitution process in South Africa (SAHRC Land Restitution Report), the SAHRC highlighted its concern with the systematic failures regarding restitution processes and the inability for claimants to obtain certainty regarding the status of their claims. The Government's conflation of restitution claims with development objectives and the re-opening of the claim process for those who did not meet the initial deadline, were added causes for concern.¹⁹

18. The Committee may wish to request in the LOI:

- 18.1. Information regarding the status of implementation of the recommendations of the 2005 Country Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in South Africa.
- 18.2. Information regarding the measures undertaken to address the concerns raised with respect to the Traditional and Khoi-San Leadership Bill.
- 18.3. Information regarding the measures undertaken to address the challenges highlighted in the SAHRC Land Restitution Report.

Article 2 – The progressive realisation of the rights in the Covenant and non-discrimination

Progressive realisation

- 19. The SAHRC notes the State's establishment of the Department of Planning, Monitoring and Evaluation (DPME) in an effort to ensure the progressive realisation of the rights enshrined in the Covenant. However, it remains unclear whether, i) any directives or

¹⁸ South African Human Rights Commission *Report of the SAHRC Investigative Hearing: Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa* (2013).

¹⁹ *Ibid.*

recommendations issued by the DPME are binding; and ii) whether such directions or recommendations are expeditiously and effectively complied with by relevant government departments.²⁰

20. The SAHRC further notes that government appears to understand progressive realisation as entailing, i) a reasonableness test, ii) a budgetary assessment and iii) a monitoring and evaluation process. However, there have been conflicting judgments by the South African Constitutional Court regarding the meaning of 'progressive realisation'.²¹ It is unclear how Government as a whole understands this concept, and how it is incorporated into the mandate of the DPME and implementation of socio-economic policies by various government departments.

21. The Committee may wish to request in the LOI:

21.1. Information on the nature and effectiveness of directives or recommendations issued by the DPME.

21.2. The measures put in place by the State to ensure that the public service is sensitised to deliver on its responsibilities with regard to socio-economic rights in a developing state like South Africa.

21.3. Information on relevant government departments' understanding of the obligation to 'progressively realise' the rights in the Covenant

21.4. Information on how the notion of 'progressive realisation' is incorporated by way of appropriate indicators into the activities of the DPME and the implementation of various socio-economic policies by relevant departments.

²⁰ *South African ICESCR State Report (2017)* para 43.

²¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 45 endorsed the analysis of 'progressive realisation' in CESCR *General Comment No 3: The Nature of States Parties' Obligations* (1990) para 9, while *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 40 seemingly endorsed a more procedural understanding of 'progressive realisation' as entailing an obligation on government to continually review and revise its socio-economic policies.

21.5. An account of measures in place to ensure the public service is able discharge its responsibilities in respect of socio economic rights.

Non-discrimination and the equal enjoyment of Covenant rights

22. The SAHRC notes that approximately 600,000 children with disabilities have no access to education, or receive quality education due to a lack of reasonable accommodation made for such children.²² This amounts to the discriminatory denial of the right to education (Article 13) to children on the ground of disability. Although government's success in improving enrolment rates for children with disabilities are noted,²³ the large numbers of children who have disabilities appear to have been omitted in the report.
23. Whereas the government acknowledges the rights of prisoners to enjoy the highest attainable standard of health (Article 12),²⁴ a recent High Court decision highlighted the infringement of various economic, social and cultural rights at the Pollsmoor Remand Detention Facility.²⁵ The State Report has not addressed the amount of progress made in complying with the structural interdict remedy ordered by the Court. The conditions at these and other prisons as reported in the media amount to the discriminatory denial of various Covenant rights on the basis of detention status.
24. The SAHRC notes that the State Report has not addressed persistent discrimination and violence faced by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons based on their sexual orientation, gender identity and expression (SOGIE). Cases of 'corrective rape', which can lead to the contraction of HIV/AIDS as well as other health consequences, violates victims' enjoyment of the Article 12 right to the

²² Civil society organisations have urged the South African Parliamentary Portfolio Committee on Basic Education to release accurate data on in- and out-of-school children (including disaggregated data showing, for example, disability), to take steps to ensure that special schools are 'no-fee schools', and to take steps and report regarding reasonable accommodation measures adopted for disabled children. Human Rights Watch *Presentation to Portfolio Committee on Basic Education* (8-03-2016). See also Section 27 *Left in the Dark: Failure to Provide Access to Quality Education to Blind and Partially Sighted Learners in South Africa* (2015) and Human Rights Watch *Complicit in Exclusion: South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities* (2015).

²³ *South African ICESCR State Report* (2017) para 146.

²⁴ *Ibid* para 133.

²⁵ *Sonke Gender Justice v Government of the Republic of South Africa* WCD 23-02-2017 case no 34087/15 paras 80-84.

highest attainable standard of health²⁶ and amounts to the discriminatory denial of this right on the basis of sexual orientation. Although the Prevention of Hate Crimes and Hate Speech Bill²⁷ seeks to combat such hate crimes, no disaggregated data on crimes of this nature exists.

25. Although the State Report correctly sets out the comprehensive equality framework prevalent in South Africa, it fails to mention that Chapter 5 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) has not yet come into effect, 17 years since the passage of PEPUDA. This Chapter imposes duties on the public and private sectors of society to promote equality. If operational, the chapter would facilitate the promotion of equality in the enjoyment of the Covenant's rights.

26. The Committee may wish to request in the LOI:

26.1. Information on enrolment rates at schools for children with disabilities, as well as the steps taken to ensure that special schools are 'no-fee schools' and to reasonably accommodate children with disabilities in schools.

26.2. Information on steps taken to remediate the violation of various Covenant rights in prisons and other detention facilities, including guidelines in place to ensure compliance with minimum standards if any, and effectiveness of the Judicial Inspectorate of Prisons in respect of resources to conduct oversight inspections of prisons.

26.3. Information on steps taken to provide disaggregated data on hate crimes and to protect the Covenant rights of vulnerable groups such as the LGBTI community.

26.4. Information on steps taken to ensure the operationalisation of Chapter 5 of PEPUDA.

²⁶ K Thomas *Homophobia, Injustice and 'Corrective Rape' in Post-Apartheid South Africa* (2013) 3; P Strudwick 'Crisis in South Africa: The Shocking Practice of "Corrective Rape" - Aimed at "Curing" Lesbians"' (4-01-2014) *The Independent*; K Nandipha "'Corrective rape": Lesbians at the Mercy of Powerless Men' (15-07-2013) *Mail & Guardian*.

²⁷ *South African ICESCR State Report* (2017) para 53.

Article 3 - Gender Equality (Measures taken to eliminate discrimination against women)

27. The SAHRC recognises the impact Gender Based Violence (GBV) has on the enjoyment of human rights. Within the context of the ICESCR, the SAHRC notes the impact GBV may have under article 10, which guarantees the protection of the family, and article 12 regarding the right to the highest attainable standard of health. Noting that the government has reported on its efforts to address GBV after it has occurred,²⁸ the SAHRC recommends that a more collaborative effort is required to institute measures addressing the prevalence of GBV. Furthermore, information regarding steps taken to protect children and women with disabilities from GBV should be made available.
28. The SAHRC highlights that women, particularly from poor, rural communities, often bear a disproportionate burden in respect of accessing water and other socio-economic resources. A lack of safe toilets, sanitation and water in informal settlements and rural areas, forces women and girls to walk long distances to gather water, or to relieve themselves. This, in conjunction with the absence of proper lighting or safe transport, exposes women and girls to violence, including rape.²⁹ While the State Report refers to rape care centres and sexual offences courts,³⁰ the SAHRC notes that it omits reference to measures aimed at preventing rape and other forms of GBV linked to accessing economic, social and cultural rights.
29. 'Ukuthwala' is a traditional practice which involves the 'carrying off of a girl' by a man's family for the purpose of entering into negotiations with the girl's family with a view to entering into a customary marriage.³¹ Traditionally, the practice does not include violence or rape, although the meaning of 'consent' – and whether the ability to consent

²⁸ Ibid para 59.

²⁹ South African Human Rights Commission *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa* (2014) 7, 61-62; Social Justice Coalition *Report of the Khayelitsha 'Mshengu' Toilet Social Audit* (2013) 7, 17.

³⁰ *South African ICESCR State Report* (2017) paras 60-61.

³¹ For an article based on community engagement regarding the custom of *ukuthwala*, see L Mwambene & H Kruise 'The Thin Edge of the Wedge: ukuthwala, alienation and consent' (2017) 33 *South African Journal on Human Rights* 25-45.

rests with the girl or her family – remains uncertain.³² The traditional form of *ukuthwala* can also be used as a means by which two consenting individuals can force their families to accept their relationship through culturally legitimised customary marriage. In addition, communities that practice *ukuthwala* value the custom for leading to longevity of marriages, and preventing girls from having children out of wedlock.³³ However, South Africa's Department of Justice and Correctional Services notes that the abuse of this practice 'increasingly involves the kidnapping, rape and forced marriage of minor girls as young as twelve years'.³⁴ Forced marriage prevents women and girls from enjoying the Covenant rights on an equal basis with men, and violates Article 10, which stipulates that free consent is a prerequisite for marriage. While the State Report notes the judicial striking down of various discriminatory laws and customary practices,³⁵ it fails to address the persistence of the abuse of *ukuthwala* in South Africa, the practice of *ukuthwala* where girls are under the age of consent, or do not personally consent to the marriage, and measures taken to end the abuse of this customary practice.

30. Women's representation in the workforce, particularly at senior levels, has a direct impact on their income, and thus correlates to the equal enjoyment of various Covenant rights, including those set out in Articles 6, 7, 11 and 12. The SAHRC notes the government's commitment in the State Report to ensure female representation at the middle and senior levels of the public sector.³⁶ However, the State Report does not indicate what proportion of women are represented at these levels or at the top management level of the public sector, and similarly fails to indicate whether women are sufficiently represented at senior and top management levels in the private sector. The SAHRC further highlights the statistics issued by the Commission for Employment Equity which indicates that males are significantly over-represented at the top management level in both the public (69.2 percent) and private (79.3 percent) sectors.³⁷

³² Ibid 42-43.

³³ Ibid 41.

³⁴ Department of Justice and Constitutional Development *What is Ukuthwala?* (2015) <http://www.justice.gov.za/brochure/ukuthwala/2015-Ukuthwala_leaflet-Eng.pdf>; South African Law Reform Commission *Revision Discussion Paper 138 Project 138: The Practice of ukuthwala* (2015). See the High Court judgment in *Jezile v S and Others* 2015 (2) SACR 452 (WCC), where the defendant and his family were under the impression that they were carrying out this custom, but the under-age girl ran away and lay charges of rape. He was convicted of rape and human trafficking, and sentenced to 22 years of imprisonment.

³⁵ *South African ICESCR State Report* (2017) para 58.

³⁶ Ibid para 57.

³⁷ Commission for Employment Equity *Annual Report 2016/17* (2017) 14.

Male over-representation also occurs at the senior management level in the public and private sectors.³⁸

31. While the SAHRC recognises the efforts by certain government departments and institutions³⁹ to apply gender budgeting as part of a Gender Mainstreaming strategy,⁴⁰ it notes that the State Report omits reference to gender budgeting in the allocation of resources to realise the rights under the Covenant. The SAHRC emphasises that gender responsive budgeting aims to allocate resources in a manner that is equally responsive to the needs of women and men, and is especially significant in the context of economic, social and cultural rights given the disproportionate burdens that poverty impose on women in the socio-economic sphere.

32. The Committee may wish to request in the LOI:

- 32.1. Information on steps taken to prevent the phenomenon of GBV from occurring.
- 32.2. Information on steps taken to protect children and women with disabilities from GBV.
- 32.3. Information on steps taken to provide adequate and safe access to socio-economic goods, especially water and dignified sanitation facilities in informal settlements and rural areas, in an effort to prevent sexual violence.
- 32.4. Information on steps taken to end the abuse of the customary practice of *ukuthwala* or its practice in a form that does not require consent of a girl prior to entering into a customary marriage.
- 32.5. Information on steps taken to increase female representation at the top and senior management levels in the public and private sector.

³⁸ Ibid 18.

³⁹ Financial and Fiscal Commission *Policy Brief: Gender Budgeting: Translating Government Gender Equality Commitments into Reality* (2012).

⁴⁰ Department of Justice and Constitutional Development *Gender Responsive Budgeting Guidelines* (2005).

32.6. Information on any steps taken to incorporate gender responsive budgeting practices in the allocation of resources towards the realisation of the rights enshrined in the Covenant.

Article 6: The Right to Work

33. Despite the efforts made by the government to generate jobs and employment, the SAHRC notes that one-quarter of South Africans are unemployed (36 percent using the extended definition).⁴¹ The State Report does not provide this information, disaggregated by gender, age, race and location.

34. The SAHRC highlights that approximately 5.3 percent of South Africans live on farm areas and of those that work on farms, 65 percent earn 1600 Rand (US\$120) per month or less.⁴² Despite the poor working conditions and wages, the State Report does not address the plight of farm dwellers and labourers in South Africa.

35. The SAHRC notes that the State Report fails to address the challenges faced by sex workers and the failure by the government to either regulate or decriminalise sex work.⁴³ In addition, while the informal sector contributes about 5% to South Africa's gross domestic product, the State Report does not make any reference to the informal sector.⁴⁴

36. The SAHRC further notes that State Report does not address the need for technical and vocational training centres and the fact that there has been widespread closure of such institutions over the past two decades.⁴⁵

⁴¹ Statistics South Africa *Quarterly Labour Force Survey – QLFS Q4: 2016* (2017) <<http://www.statssa.gov.za/?p=9561>>.

⁴² M Visser & S Ferrer (ILO) *Farm Workers' Living Conditions in South Africa: Key Trends, Emergent Issues and Underlying Structural Problems* (2015).

⁴³ Commission for Gender Equality *Decriminalising Sex Work in South Africa* (2013) <<http://www.cge.org.za/wp-content/uploads/2014/05/CEG-Decr.pdf>>.

⁴⁴ C Skinner *Informal Sector Employment: Policy Reflections* (2016) <<https://www.africancentreforcities.net/wp-content/uploads/2016/12/REDI-input-Skinner-final.pdf>>.

⁴⁵ RJ Balfour *Education in a New South Africa: Crisis and Change* (2015).

37. The Committee may wish to request in the LOI:

- 37.1. Updated information on unemployment in South Africa, disaggregated by gender, race, age and location.
- 37.2. Statistics on the number of technical and vocational training centres as well as options for further education and training for matriculants (high school graduates) that do not attend a tertiary institution.
- 37.3. Detailed information on the informal sector's contribution to South African economy, with information on the steps that the State is taking to protect informal traders.
- 37.4. Updated information on the state of employment for farm labourers and their families, along with information on access to services.
- 37.5. Information on steps taken to ensure the protection of sex workers from violence and abuse.

Article 7: The Right to Just and Favourable Conditions of Work

38. The government's intervention to address South Africa's wage levels, high unemployment rate, high levels of poverty and increasing inequality, through the introduction of a national minimum wage is welcomed. The SAHRC also welcomes the government's recognition that it is women in particular who are 'most vulnerable to unemployment, earn the lowest wages in the most vulnerable sectors, and who dominate the care-work and unpaid sectors',⁴⁶ leading to household power imbalances between men and women and increasing the chances of intimate partner violence.⁴⁷

⁴⁶ National Economic Development and Labour Council (NEDLAC) Task Team *A National Minimum Wage for South Africa* (2016) 7.

⁴⁷ Ibid.

39. While South Africa is yet to implement a national minimum wage, provision has been made for wage minima in specific sectors of the economy that comprise of vulnerable workers, namely, forestry, agriculture, contract cleaning, children in the performance of advertising, artistic and cultural activities (under fifteen years of age), taxi operators, civil engineering, learnerships, private security, domestic workers, wholesale and retail, and hospitality. There has been a demonstrable relationship between the enforcement of sectoral minimum wages and the reduction in poverty. However, research produced by the Department of Labour also demonstrates that full compliance with the minimum wage is not sufficient to completely eradicate poverty. Additionally, non-compliance with existing legal minimum wages remains high.⁴⁸
40. Despite the prohibition of child labour as articulated in the Basic Conditions of Employment Act, 1997⁴⁹, the SAHRC notes with concern the high numbers of children are forced to work as a result of dire poverty and in support of their families. The SAHRC notes further reports that children continue to engage in work in the informal and agricultural sectors.⁵⁰ Through implementation of the Child Labour Programme of Action, government has committed to take steps to eliminate the worst forms of child labour by the end of 2016.⁵¹ However, the SAHRC is concerned that the government has not attained this objective and that child labour remains prevalent.
41. Unfair discrimination in the workplace on the grounds of race, gender, disability, HIV status, sexual orientation and gender identity, language, religion and culture remains pervasive in South Africa. Contemporary forms of discrimination reinforce barriers to entry and discriminatory practices within the workplace.⁵²
42. With respect to the rights of farm workers and security of tenure, the SAHRC notes the enactment of the Extension of Security of Tenure Act, 1997 (ESTA).⁵³ Various inquiries

⁴⁸ Department of Labour & Development Policy Research Unit, University of Cape Town *Addressing the Plight of Vulnerable Workers: The Role of Sectoral Determinations* (2010).

⁴⁹ *South African ICESCR State Report* (2017) para 74.

⁵⁰ See, for example, ENCA *Child Protection Week to Focus on Child Labour on Farms* (27-05-2016).

⁵¹ Department of Labour *The National Child Labour Programme of Action for South Africa 2008-2012*; Department of Labour *The National Child Labour Programme of Action for South Africa 2013-2017*. See also Parliamentary Monitoring Group *Child Labour Programme of Action: Department of Labour Progress Report* (2010).

⁵² South African Human Rights Commission *National Hearing on Unfair Discrimination in the Workplace, 2016* (report forthcoming).

⁵³ *South African ICESCR State Report* (2017) para 75.

hosted by the SAHRC into the rights of farm workers since the enactment of the legislation, have highlighted non-compliance with the provisions of ESTA, inadequate data reflecting the number of legal and illegal evictions of farm workers, and limited access to government services and adequate housing in farming communities.⁵⁴

43. The Committee may wish to request in the LOI:

- 43.1. Information regarding the enforcement of compliance with existing wage minima and sectoral determinations.
- 43.2. Information on the implementation of a basic minimum wage in South Africa.
- 43.3. Information regarding measures undertaken to alleviate the burden of growing poverty and inequality, beyond the intervention of a national minimum wage.
- 43.4. Information regarding the status of implementation of the Child Labour Programme of Action, and the impact thereof.
- 43.5. Information regarding measures undertaken to address contemporary forms of discrimination in the workplace.
- 43.6. Information regarding the status of the implementation of recommendations emanating from the SAHRC's 2003, 2008 and 2015 reports on the rights of farmworkers.

⁵⁴ South African Human Rights Commission *Inquiry into Human Rights Violations in Farming Communities* (2003); South African Human Rights Commission *Progress made in terms of Land Tenure, Safety and Labour Relations in Farming Communities since 2003* (2008); South African Human Rights Commission *Safety and Security Challenges in Farming Communities* (2015).

Article 9: The right to social security

44. The SAHRC notes the advancement of social security to everyone in South Africa, including permanent residents that are not citizens.⁵⁵ Currently, more than 16 million South Africans receive social grants.⁵⁶ However, the SAHRC notes with concern the omission from the State Report, of any reference to the recent Constitutional Court matter concerning the South African Social Assistance Agency (SASSA) and the implications of social assistance payment processes on grant recipients, particularly with respect to the privacy of personal data.⁵⁷
45. Currently, there is no social assistance provision for unemployed South Africans between the ages of 18 to 59 years and who have no means of support. As at the first quarter of 2017, South Africa's unemployment rate stands at 27.7 percent, reportedly the highest unemployment rate observed since September 2003.⁵⁸ In the absence of adequate social support, many South Africans are forced to enter the unprotected, informal labour economy, which in turn, exacerbates the existing vulnerabilities of women and children. This negatively impacts on the ability to attain access to associated socio-economic rights such as education, health care, housing and food.
46. The SAHRC notes with concern the inadequacy of interventions to support child-headed households. In the main, such children remain dependent on the ability of mandated adult persons to access the foster care grant.⁵⁹ The SAHRC acknowledges the complexities of addressing the phenomenon of child-headed households in sub-Saharan Africa, are driven by high levels of labour migration, poverty, the impact of HIV/AIDS, political instability and conflict, and that these factors often force children to migrate in search of asylum.⁶⁰ However, such children may not satisfy the requirements to qualify for a foster child grant in South Africa. The SAHRC further notes the commitment made by the government during 2013, to identify child-headed households in the country to ensure the provision of basic needs by the state.⁶¹

⁵⁵ *Khosa & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC).

⁵⁶ Department of Social Development *Annual Report for the year ended 31 March 2015* (2015).

⁵⁷ *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency and Others* 2015 (6) BCLR 653 (CC); *The Black Sash v Minister for Social Development & Others* 2017 (3) SA 335 (CC).

⁵⁸ Statistics South Africa *Quarter Labour Force Survey – QLFS Q1:2017* (2017).

⁵⁹ *South African ICESCR State Report* (2017) para 82.

⁶⁰ Human Sciences Research Council *Guiding the Care of Child-headed Households* (2015).

⁶¹ Department of Social Development *Child Headed Households to be Identified for Assistance* (2013).

47. **The Committee may wish to request in the LOI:**

- 47.1. Information regarding the measures undertaken to ensure that social grant recipients' personal data is protected and to address the challenges identified by the Constitutional Court pertaining to the payment process of social grants.
- 47.2. Information regarding the measures undertaken to assist unemployed individuals between the ages of 18 to 59 years and who do not qualify for social assistance.
- 47.3. Information regarding the progress made in identifying child-headed households and social assistance provided by the government.

Article 11: The right to an adequate standard of living, including adequate food, clothing and housing

48. The SAHRC highlights the absence of an official rights-based index to measure the standard of living of South Africans, particularly with reference to the indicators and benchmarks drawn from the various rights enunciated in the Covenant and the South African Constitution. This is further demonstrated by the limited indicators provided in the State Report.⁶²
49. In relation to the right to adequate housing, the SAHRC remains concerned about the frequency and extent of illegal evictions; and government's failure to mention this trend in the State Report. In this regard, the SAHRC highlights that in 2013, the institution released a report on *Access to Housing, Local Governance and Service Delivery*.⁶³ The report found common factors in many eviction complaints,⁶⁴ including, *inter alia*, i) the excessive use of force when conducting evictions;⁶⁵ ii) the use of inadequately trained independent contractors; a lack of appropriate legal processes and sufficient notice; iii)

⁶² *South African ICESCR State Report* (2017) para 113 (graph).

⁶³ South African Human Rights Commission *Access to Justice, Service Delivery and Local Governance* (2013) <<http://www.sahrc.org.za/construction-site/home/21/files/Access%20to%20Housing%202015.pdf>>.

⁶⁴ *Ibid* 15-16.

⁶⁵ For a recent instance of violence, see Socio-Economic Rights Institute of South Africa 'SERI Represents Informal Settlement Resident who was Shot 4 Times during Eviction in Damages Claim' (4 August 2017) *SERI* <<http://seri-sa.org/index.php/latest-news/689-litigation-update-mngomezulu-trial-concludes-in-durban-4-august-2017>>.

a disregard for the safety and well-being of children and other vulnerable groups; iv) the use of derogatory or racist language by those tasked with executing the eviction order; v) the failure by local municipalities to provide alternative accommodation or implement appropriate emergency housing plans as required by the South African Constitutional Court;⁶⁶ and, vi) in some instances, the eviction of large numbers of people from city buildings or informal settlements.⁶⁷

50. Government notes that approximately 20 million people have been provided with access to a 'fixed asset', amongst which are dwellings emanating from housing subsidies.⁶⁸ However, section 10A of the Housing Act 107 of 1997 prohibits the sale of subsidised housing for a period of eight years from acquisition, unless it is first offered to the relevant provincial housing department. This restricts the mobility of those who acquire such property, and further leads to illegal sales without the requisite title deed.⁶⁹ The SAHRC notes with concern that the State Report failed to address this issue.
51. The SAHRC remains concerned regarding the lack of coordination between different spheres of government and departments in the delivery of housing. The SAHRC has learned from multiple stakeholders that a key challenge arises in respect of the connection of bulk infrastructure and services to new housing developments.⁷⁰ The problem of non-functioning infrastructure at provincial and local levels, should therefore also be addressed in the State Report.

⁶⁶ The Constitutional Court first elucidated the obligation to provide alternative accommodation where people are evicted from privately owned buildings in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC). Judgment by the Constitutional Court on the question as to whether alternative accommodation may force women and men to live in separate dormitories, and lock families out of such dormitories during the day, is currently pending in the matter of *Dladla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg*.

⁶⁷ Recently, hundreds of occupiers in Johannesburg's inner city have been left homeless after being evicted from buildings under the leadership of new Johannesburg mayor, Herman Mashaba. See, for example, GroundUp *Red Ants Turf Residents out of Johannesburg Building* (19-07-2017) <<https://www.dailymaverick.co.za/article/2017-07-19-groundup-red-ants-turf-residents-out-of-johannesburg-building/#.WZBZ4VEjFPY>>. 'Red Ants' refers to a security company.

⁶⁸ *South African ICESCR State Report* (2017) para 99.

⁶⁹ *South African Human Rights Commission Access to Justice, Service Delivery and Local Governance* (2013) 34.

⁷⁰ *Ibid* 59.

52. The SAHRC notes that the State Report further omits reference to any information on current statistics regarding homelessness and informal ‘backyard dwellers’ in South Africa,⁷¹ or measures to address the plight of these vulnerable persons.
53. A recent legal development that is omitted from the State Report is the judgment by the South African Constitutional Court in the matter of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*.⁷² In this case, the Constitutional Court declared that judicial oversight in the granting of emoluments attachment orders (EAO) for the benefit of private creditors, is a necessary prerequisite. The Court further highlighted the egregious impact of EAOs on debtors, and how EAOs threaten the livelihood and dignity of low-income earners who are a distinctly socio-economically vulnerable and marginalised group in South African society.⁷³ Subsequently, the Courts of Law Amendment Act 7 of 2017 was enacted to amend certain legislation in order to assist socio-economically vulnerable persons who fall into a ‘debt trap’ and are therefore impeded from enjoying sufficient levels of their socio-economic rights.⁷⁴
54. Whereas government notes various policies in place to ensure food security and the realisation of the right to food,⁷⁵ the State Report fails to mention that legislation has not been promulgated in relation to the right to food and that, as mentioned previously, the right to food is not featured in the 14 NDP priority outcomes listed in the State report. Furthermore, the State Report does not address or expand on the fact that approximately 14 million people in the country are food insecure and go hungry on a daily basis.⁷⁶

⁷¹ Ibid 43.

⁷² *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC).

⁷³ Ibid.

⁷⁴ Department of Justice and Constitutional Development *Memorandum on Objects of the Courts of Law Amendment Bill* (2016) para 1.

⁷⁵ *South African ICESCR State Report* (2017) paras 105-106.

⁷⁶ South African Food Sovereignty Campaign ‘Open Letter to Food Producers, Minister of Finance and Trade and Industry’ (15-04-2016) SAFSC <<http://www.safsc.org.za/open-letter-to-food-producers-minister-of-finance-and-trade-and-industry-15-april-2016/>>.

55. While the State Report provides a concise national overview of access to adequate water and dignified sanitation facilities,⁷⁷ it fails to disaggregate data regarding access to water at provincial and local levels. However, the SAHRC's investigations indicate that when data is disaggregated, it emerges that many rural and peri-urban communities lack access to water or sanitation.⁷⁸

56. The Committee may wish to request in the LOI:

56.1. Information on steps taken to develop an index to measure the standard of living of South Africans.

56.2. Information on trends in evictions, and steps taken to address rights violations during eviction and to provide adequate alternative accommodation.

56.3. Information on the sale of subsidised housing, and the restrictions on mobility of those who own subsidised housing.

56.4. Information on steps taken to ensure coordination between different spheres and departments of government, as well as information on non-functioning bulk and other infrastructure in relation to housing.

56.5. Information regarding current levels of homelessness and 'backyard dwellers', and on steps taken to address the plight of such persons.

56.6. Information regarding recent developments relating to Emolument Attachment Orders, related legislative developments and the impact of current regulation on socio-economically vulnerable groups.

56.7. Information on steps taken to promulgate legislation in relation to the right to food, as well as on steps taken to urgently address hunger.

⁷⁷ *South African ICESCR State Report (2017)* paras 109-110.

⁷⁸ *South African Human Rights Commission Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa (2014)* 14.

56.8. Disaggregated data regarding access to water and sanitation, by province, district, race, gender and housing typology.

Article 12: Right to Health

57. While the State Report provides a comprehensive overview of the legislative framework on the right to health, the barriers of access to healthcare for marginalised and vulnerable individuals and groups are not canvassed in the report. Women and girls in particular, who are victims of gender-based violence, have to endure long waiting periods before accessing health assistance.⁷⁹ Where health assistance is provided, these victims are often treated by health care workers who do not have specialised skills to fully assist and have been alleged as being insensitive, judgemental and abusive.⁸⁰
58. The SAHRC has observed that treatment of LGBTI people is characterised by subtle or explicit homo-prejudiced or hetero-normative attitudes. As a result, many LGBTI people fear seeking medical treatment or are refused medical treatment by health care workers.⁸¹
59. The SAHRC notes that the State Report omits reference to reproductive rights. However, the Department of Health has acknowledged that gender inequalities in society denies women the right to make decisions about their sexual and reproductive lives. This in turn makes women more vulnerable to unwanted pregnancies, sexual and gender based violence and sexually transmitted infections.⁸²

⁷⁹ L Vetten & T Jacobs *Towards Developing and Strengthening a Comprehensive Response to the Health Care Needs of Rape Survivors* (2008) <<http://shukumisa.org.za/wp-content/uploads/2011/02/Health-services-to-rape-survivors.pdf>>.

⁸⁰ T Bannister 'Equal Access to Health Care Services for Survivors of Gender-Based Violence: A South African Perspective' (2014) 12 *The Equal Rights Review* <<http://www.equalrightstrust.org/ertdocumentbank/Equal%20Access%20to%20Health%20Care%20Services%20for%20Survivors%20of%20Gender%20Based%20Violence%20A%20South%20African%20Perspective.pdf>>.

⁸¹ South African Human Rights Commission *Public Inquiry: Access to Health Care Services* (2008) <<https://www.sahrc.org.za/home/21/files/Health%20Report.pdf>>.

⁸² Department of Health *Sexual and Reproductive Health and Rights: Reviewing the Evidence* (2011) <<http://www.agenda.org.za/wp-content/uploads/2012/09/SRHR-Fulfilling-our-Commitments.pdf>>.

60. The SAHRC notes that the State Report does not address issues related to termination of pregnancy in South Africa. Despite termination of pregnancy being legal in the country, many pregnant women choose to have illegal abortions due to a lack of access to facilities, long waiting periods and fear of ill-treatment or stigma.⁸³ The SAHRC is concerned that there are numerous unqualified operators who claim to be 'abortion doctors'. Advertisements for these services promise a painless, safe and cheap service and are often placed on lampposts in close proximity to schools and high traffic areas.
61. An assessment of the prevalence of non-communicable diseases (NCD), such as diabetes, cancer and hypertension, is an essential indicator of a strong health system and is rarely mentioned in the State Report. The SAHRC however highlights that NCD is specifically recognised as a priority in the National Development Plan. The South African Medical Journal estimates that the accumulated loss to the country's GDP, due to NCDs between the period 2006 to 2015 averaged approximately US\$1.8 billion.⁸⁴ Thus, NCDs arguably have a severe impact on the productivity of South Africa's workforce, place a burden on its health system and impacts on the lives of children who may lose their parents prematurely.
62. The SAHRC notes that there is insufficient focus in the State Report on needs of mental health patients. The relocation of patients from Life Esidimeni⁸⁵ and the subsequent death of several patients in 2016, is a symptom of a much larger problem. This illustrates the need for additional 'special needs housing' facilities, as well as institutional funding and capacity.⁸⁶ Further, there is a need for a coordination of non-

⁸³ R Jacobs & N Hornsby 'Why Aren't Women getting Safe Abortions?' (2014) 104 *South African Medical Journal* <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742014001200014>.

⁸⁴ K Hofman 'Non-communicable Diseases in South Africa: A Challenge to Economic Development' (2014) 104 *South African Medical Journal* <<http://www.samj.org.za/index.php/samj/article/view/8727/6218>>.

⁸⁵ Between March and December 2016, 94 mental health care users / patients died in 16 non-governmental organisations (NGO) and 3 hospitals. The patients had been transferred to the NGOs from Life Esidimeni Hospital due to a deinstitutionalisation of mental health care users' policy being rolled by the Gauteng provincial department of health. Subsequent investigation by the Health Ombudsman found that none of the 27 NGOs to which patients were transferred operated under valid licenses, that most NGOs lacked appropriate infrastructure, among several other findings. See MW Makgoba 'The Report into the Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province. No Guns: 94+ Silent Deaths and Still Counting' (December 2016) *PMG* <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170215finalreport.pdf>>.

⁸⁶ South African Human Rights Commission *Creating an Enabling Environment for the Realisation of the Right to Adequate Housing for Persons with Special Needs: Expediting the Special Needs Housing Policy and Programme* (2017) <<https://www.sahrc.org.za/home/21/files/SAHRC%20Research%20Policy%20brief%202016-2017%20--The%20Right%20to%20Adequate%20Housing%2031%20March%202017%20-v3.pdf>>.

governmental organisations that provide such services to the State and people and capital funding to assist with the development or renovation of such facilities.

63. The SAHRC notes that the State Report does not address the issues of regular medication (drug) stock outs in peri-urban and / or rural areas in South Africa, which impacts on the health of thousands of patients. While the National Health Department is attempting to install a national software system that will link healthcare facilities with drug depots and suppliers, medication stock-outs continues to be a challenge in 8 of the 9 provinces. Stock outs are mainly due to a shortage of pharmacists, protracted labour disputes, poor management, corruption, and poor communication between suppliers, depots and facilities.⁸⁷
64. There is a lack of information in the report on the transparency around the pricing of essential drugs in South Africa, such as anti-retroviral treatment medication and the patents held by large drug companies, which prohibits access to essential drugs either in original or generic form, to those most in need.⁸⁸

65. The Committee may wish to request in the LOI:

- 65.1. Information on access to health care for marginalised and vulnerable groups.
- 65.2. Information on the up-scaling of awareness programmes on reproductive rights.
- 65.3. Information on the number and distribution of termination of pregnancy facilities.
- 65.4. Information on education and awareness initiatives around the termination of pregnancy services and provision of contraception services, especially among adolescents.
- 65.5. Information on government efforts to close illegal abortion 'clinics' and ensure that those carrying out activities professing to offer termination of pregnancy services without the requisite medical qualifications are prosecuted.

⁸⁷ C Bateman 'Drug Stock-outs: Inept Supply-chain Management and Corruption' (2013) 103 *South African Medical Journal* <<http://samj.org.za/index.php/samj/article/view/7332/5356>>.

⁸⁸ FXB Centre for Health and Human Rights 'How Access to Medicines is a Human Rights Issue' (2017) *Harvard University* <<https://www.hhrguide.org/2017/06/09/access-to-medicines-and-human-rights/>>.

- 65.6. Information on plans for decreasing the burden of disease of NCDs.
- 65.7. Information on the reasonable accommodation for mental health patients, either independently or in special need homes.
- 65.8. Information on nationwide medication stock outs.
- 65.9. Information on the adoption and implementation of legislation that facilitates licences for access to essential medicines.

Articles 13 and 14 – The Right to Education

- 66. While South Africa boasts universal access to basic education, the State Report does not address the plight of non-national and undocumented learners, who continue to face challenges in accessing education. In 2017, the Eastern Cape Department of Education took a decision that funding for schools for quintiles 1 to 3 would be based on the learner numbers where valid South African identity, passport and permit numbers have been captured.⁸⁹ In March 2017, a school in Gauteng issued a letter that threatened to take immigrant pupils without valid paperwork to the police.⁹⁰ While these matters have been dealt with expeditiously, the SAHRC notes that such cases occur frequently and are widespread.
- 67. The SAHRC acknowledges steps taken towards the improvement of school infrastructure.⁹¹ However, serious challenges in relation to the implementation of norms and standards for school infrastructure remain, including, *inter alia*, i) the slow rollout of the Accelerated School Infrastructure Delivery Initiative (ASIDI) programme; ii) the existence of mud schools, and, iii) a lack of access to learning and teaching support materials. The SAHRC specifically points out that during the 2015 / 2016 financial year, there was severe underspending of the ASIDI despite the critical need for infrastructure

⁸⁹ Legal Resources Centre 'Case Launched to Protect Right to Education for Undocumented Children' (3-05-2017) LRC <<http://lrc.org.za/lrcarchive/press-releases/3725-press-release-case-launched-to-protect-right-to-education-for-undocumented-children>>.

⁹⁰ 'Human Rights Lawyers are Urging the Department of Basic Education to Issue a Directive Instructing All Schools to Immediately Stop the Practice of Discriminating Against Foreign and Undocumented Children by Refusing Access and by Charging Higher Fees' (2-03 2017) *The Sowetan Live*.

⁹¹ *South African ICESCR State Report* (2017) para 154.

development.⁹² Due to consistent underspending, budget allocations have been decreased and the Department of Basic Education (DBE) has failed to meet any of its ASIDI targets. The SAHRC further highlights that by November 2016, all schools that were built of inappropriate materials ought to have been eradicated, and that all schools ought to have been supplied with water, sanitation and electricity. However, the government failed to achieve these objectives.⁹³

68. The SAHRC notes that the State Report does not address the disproportionate impact of a lack of infrastructure, especially water and sanitation, on girls.⁹⁴
69. Despite the country's high school enrolment rates, the quality of education received remains of great concern. Using the Annual National Assessment (ANA) for 2013, (noting its limitations), statistics indicate that only one-third of Grade 6 learners reached 50 percent (adequacy threshold) for mathematics in 2014 while 77 percent and 42 percent of Grade 6 learners reached 50 percent or higher on home language and first additional language examinations. Only 3 percent of Grade 9 reached the 50 percent mathematics threshold while only 48 percent reached 50 percent on the home language examination threshold.⁹⁵ South Africa's performance on the Southern and East African Consortium for Monitoring Educational Quality (SACMEQ) tests and the Trends in International Mathematics and Science Study (TIMSS) Assessments were also reportedly poor.⁹⁶
70. Furthermore, the SAHRC notes that the State Report does not address the issue of corporal punishment in schools, which despite its prohibition, is still practiced in schools. In 2014, it was reported that 12.4 percent of all learners experienced some form of corporal punishment nationally, while provincially, nearly one-quarter of all

⁹² Equal Education 'EE is disappointed at the underspending of ASISI grant and condemns the acceptance of failure by DBE' *EE* (14-09-2016) <<https://euaeducation.org.za/2016/09/14/equal-education-ee-is-disappointed-at-the-underspending-of-the-accelerated-schools-infrastructure-delivery-initiative-asidi-grant-and-condemns-the-acceptance-of-failure-by-the-department-of-basic/>>.

⁹³ Parliamentary Monitoring Group *Infrastructure and Rationalisation: Provincial Education Departments Reporting System Review*, Presentation to the Basic Education Portfolio Committee (7-03-2017).

⁹⁴ South African Human Rights Commission *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa* (2014) <<https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20%282%29.pdf>>.

⁹⁵ S Franklin & D McLaren (Studies in Poverty and Inequality Institute) *Realising the Right to Basic Education in South Africa: An Analysis of the Content, Policy Effort, Resource Allocation and Enjoyment of the Constitutional Right to Basic Education* (2015).

⁹⁶ *Ibid.*

learners in KwaZulu-Natal and the Eastern Cape experienced some form of corporal punishment in the same year.⁹⁷

71. The SAHRC acknowledges efforts by the DBE to retain learners in the education system.⁹⁸ However, in 2014, the drop-out rate for learners aged 14 to 18 years was 9.8 percent, with female learners making up 10.1 percent of the total drop-out.⁹⁹ The SAHRC is therefore concerned that the government's current retention strategies may not be fully effective.
72. The SAHRC notes that the State Report does not delve into detail on the right to education at a tertiary level and only addresses equity targets and the financial accessibility of Higher Education.

73. The Committee may wish to request in the LOI:

- 73.1. Information on steps taken to ensure that undocumented learners have unrestricted access to education.
- 73.2. Revised targets and timeframes in relation to norms and standards, with penalties for failure to comply.
- 73.3. Revised information on the number of girls missing school annually, disaggregated by province and race.
- 73.4. Information on a national plan of action to improve the quality of education with timeframes.
- 73.5. Information on new, potentially effective school retention strategies, particularly for older children and girls.
- 73.6. Information on disparities in quality between historically advantaged and disadvantaged tertiary institutions; the acceptability and appropriateness of teaching and learning

⁹⁷ Ibid 8.

⁹⁸ *South African ICESCR State Report (2017)* para 155.

⁹⁹ Ibid para 157.

content and methodology and the link between poverty and the ability to access tertiary education in South Africa.

Conclusion

74. The SAHRC acknowledges the tremendous constitutional and legislative advances made by the South African government, particularly in the field of socio-economic rights. The ratification of the ICESCR strengthens the human rights framework in South Africa and further develops the country's international human rights reporting obligations. Noting that the Committee will be hosting the pre-sessional working group, the SAHRC avails itself to engage with the Committee and provide further insight, if required, on the realisation of socio-economic rights in South Africa.

75. The SAHRC wishes the Committee well in its preparations ahead of the session.
