



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

**National Human Rights Institution Report regarding the South African Government's
Reply to the List of Issues**

*Submitted to the United Nations Committee on Economic, Social and Cultural Rights
For consideration at the 64th Session, 24 September – 12 October 2018*

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Introduction

1. The South African Human Rights Commission (SAHRC/Commission) welcomes the South African government's reply to the Committee on Economic, Social and Cultural Rights (Committee) List of Issues (LoI). The SAHRC commends the government for submitting a detailed response, however, it notes with concern the delay in submission of the State's responses to the Committee which in turn, afforded the SAHRC limited time to assess the State response and develop a National Human Rights Institution (NHRI) report. Notwithstanding, the SAHRC appreciates the opportunity to submit a NHRI report supplementing information provided in the State's responses. Where applicable, the SAHRC's NHRI responses provide recommendations that the Committee may wish to consider during its review of the South African government.
2. The SAHRC's responses to the State's LoI report is the second NHRI report contribution by the Commission and may be read together with its initial NHRI report to the Committee, which was submitted in August 2017.¹ For ease of reference, the SAHRC's second report cites the issues raised in the Committee's LoI report and cross references to the State responses.

South Africa's National Human Rights Institution

3. The SAHRC is mandated by Section 184 of the Constitution of the Republic of South Africa to:
 - (a) Promote, respect for human rights and a culture of human rights;
 - (b) Promote the protection, development and attainment of human rights; and
 - (c) Monitor and assess the observance of human rights in the Republic.
4. Section 13(1)(b)(vi) of the South African Human Rights Commission Act, 40 of 2013 specifically mandates the SAHRC to monitor the implementation of, and compliance with, international and regional human rights instruments.²
5. As a NHRI, the SAHRC is additionally guided by the Paris Principles adopted by the United Nations General Assembly in 1993.³ The SAHRC therefore submits its second NHRI Report to the Committee within its constitutional, statutory and international mandate as an 'A' status NHRI.

¹ Available at:

https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT_CESCR_IFL_ZAF_28910_E.pdf

² See section 13(1)(b)(vi) of the Human Rights Commission Act, 40 of 2013

³ UN General Assembly Resolution 48/134 on National Institutions for the promotion and protection of human rights (1993).

A. Issues relating to the general provisions of the Covenant (arts. 1-5)

General provisions of the Covenant

Issue 2:

Please provide information on any measures, especially legislative measures, to officially recognize indigenous peoples, and to remove the classification of indigenous people who are currently classified as Coloured. Please provide information on statistical data on indigenous peoples in the State Party, including their numbers and distribution across the territory as well as statistical data relating to their enjoyment of economic, social and cultural rights, in particular in the areas of employment, social security, health and education.

6. The SAHRC notes the responses from the State in paras 2.1 to 2.6 in respect of indigenous peoples in South Africa. However, the SAHRC brings to the Committee's attention that between 2015 and 2017, the Commission conducted investigative hearings on the human rights of the Khoi and San people in South Africa.⁴ The hearings were hosted against a background of ongoing allegations of rights violations, including the inadequate recognition of the Khoi and San peoples as a distinct group, multiple forms of discrimination and marginalisation; a lack of land redistribution, access to basic services and equitable employment opportunities, and inadequate measures to protect and promote language and cultural rights.
7. The SAHRC notes that while the Khoi and San are a minority and constitute a small proportion of the country's population, their vulnerability is exacerbated by ongoing stigmatisation, a lack of recognition and marginalisation. Through its hearings, the SAHRC found that there is a degeneration of the distinct cultures, languages and traditional ways of life of the Khoi and San people. The SAHRC's hearings further found that the Khoi and San peoples require assistance to ensure equal access to employment opportunities, language recognition and allocation of land and service delivery.
8. As a result of colonisation and apartheid, the Khoi-San in South Africa became virtually invisible as a distinct group and were forcibly assimilated into other ethnic groups and classified as "Coloured". Notwithstanding the historic significance of the country's transition to a democracy founded on dignity, equality and freedom, the SAHRC has noted that the continued failure of the State to officially recognise the Khoi-San peoples in the current democratic dispensation has had an adverse effect on the right to dignity of this indigenous community. While the SAHRC notes the progress made by government to introduce legislation, namely, the Traditional and Khoi-San Leadership Bill, it is, however, concerned that the Bill has taken several years to finalise.

⁴ It should be noted that historically, the Khoi and San peoples are two distinct indigenous communities in South Africa. The term Khoi-San is used to denote both groups and is used interchangeably in this report.

9. The SAHRC notes the State's response in paragraph 2.6, and highlights that the government's use of apartheid-era racial classification for purposes of Employment Equity and Broad-Based Black Economic Empowerment legislation and policies, fails to take into account inequalities within crassly defined population groups. The current system of data disaggregation and classification therefore fails to respond to vulnerable groups such as ethnic minorities or the Khoi-San people. The SAHRC also draws the Committee's attention to the fact that the UN Committee on the Elimination of Racial Discrimination has, on two occasions, requested government to provide more comprehensive statistical demographic data that includes social and economic indicators, and accounts for indigenous groups and non-citizens.⁵ The SAHRC has recently made similar recommendations in order to ensure that vulnerable individuals and groups benefit from special measures and to prevent new patterns of inequality within disadvantaged groups (especially African, Coloured and indigenous groups) from arising.⁶

10. **SAHRC Recommendation to the Committee**

- a) The South African government should amend the Employment Equity Act to target more nuanced groups on the basis of need, and taking into account social and economic indicators. It is further recommended that government collaborates with Statistics South Africa to gather data disaggregated by ethnic origin, language, and disability, and that includes social and economic indicators.

Maximum available resources (art. 2 (1))

Issue 4:

Please provide information on the evolution over the past 10 years of:

(a) The proportion of people below the international poverty line and below the poverty line as defined at national level, and the levels of inequality, defined as the ratio between total income accruing to the richest decile of the population and the total income of the 40 per cent poorest in the population...

11. The SAHRC notes the responses provided by the State in para 4.2 that 'Statistics South Africa does not publish the income share of the top 10% richest households'. The SAHRC wishes to point out to the Committee that in addition to South Africa having one of the highest Gini coefficients in the world in terms of income inequality, gross wealth inequality is of equal if not greater concern. Research conducted for the Davis Tax Committee, and based on income tax data, shows that in addition to the top

⁵ CERD Concluding Observations of the Committee on the Elimination of Racial Discrimination: South Africa (2006) CERD/C/ ZAF/CO/3 paras 11, 13, 15; CERD Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa (2016) CERD/C/ZAF/CO/4-8 paras 6-7.

⁶ SAHRC *Equality Report 2017/18* (2018) 39-40.

10 percent of the population earning 60 percent of total income, the top 10 percent of the population owns 90-95 percent of wealth. The Gini coefficient for wealth inequality is accordingly estimated to be 0.95.⁷ The SAHRC has accordingly issued several recommendations aimed at aligning laws and policies in order to ensure that special measures in various contexts address radical inequality in South Africa.⁸

12. SAHRC Recommendation to the Committee

- a) The South African government should take cognisance of the recommendations made to government in the SAHRC's various annual Equality Reports, and in particular in its Equality Report 2017/18 which addresses economic inequality in depth.
- b) As per the recommendation by the Committee of Inquiry into a Comprehensive Social Security System in South Africa (Taylor Committee), the State should undertake feasibility studies on the provision of social protection for those aged between 18 and 59 years of age, who do not currently have access to any form of social security and ensure that such provisions, in some form, are made.

Non-discrimination (art. 2(2))

Issue 6:

Please specify the considerations that have led to the postponement of the entry into force of chapter 5 of the Promotion of Equality and Prevention of Unfair Discrimination Act since its adoption in 2000. Please also provide information on the steps taken to give effect to chapter 5.

13. The SAHRC notes the responses provided by the State in paras 6.1 and 6.2 regarding the promulgation of Chapter 5 of Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁹. The SAHRC underscores the importance of the legislation and its obligations on all members of society to promote equality, including the private sector. As pointed out to the Committee on the Rights of Persons with Disabilities during its initial review of South Africa in August 2017, Chapter 5 of PEPUDA also indirectly imposes a duty to reasonably accommodate persons with disabilities on all actors, including those excluded from the ambit of operation of other legislation such as the Employment Equity Act, No. 55 of 1998. In this regard, it should be noted that the SAHRC has received enquiries from judicial officers with disabilities, who are excluded from provisions in the Employment Equity Act.

⁷ R Daniels & T Augustine (Southern Africa Labour and Development Research Unit) *The Measurement and Distribution of Household Wealth in South Africa using the National Income Dynamics Study (NIDS) Wave 4* NIDS Discussion Paper 2016/10 (2016) 3; A Orthofer *Wealth Inequality in South Africa: Insights from Survey and Tax Data* REDI3x3 Working Paper 15 (2016) 23.

⁸ See generally SAHRC *Equality Report 2017/18* (2018).

⁹ The Promotion of Equality and Prevention of Unfair Discrimination Act, No.4 of 2000

14. The SAHRC considers it critical that the government advances towards the promulgation of Chapter 5 and the swift operationalisation of the PEPUDA in its entirety. The SAHRC is encouraged to discover in the State's responses that it has engaged with stakeholders regarding the review of PEPUDA. The SAHRC further notes the State's response that the proposed amendments to PEPUDA will be published for public comments in 'due course'. Given the passage of almost two decades since the promulgation of PEPUDA, the SAHRC is concerned about further delays in the operationalisation of Chapter 5.
15. The SAHRC also alerts the Committee to the fact that under section 32 of PEPUDA, provision is made for the establishment of the Equality Review Committee (ERC). The purpose of the ERC is to advise the Minister of Justice on the operation of PEPUDA and other laws relating to equality as well as the effectiveness of PEPUDA and other laws in achieving equality. While the ERC had in the past been constituted and had conducted meetings, the last meeting was in 2016. The ERC has since then remained un-constituted and inactive due to a number of critical vacancies in the ERC. There was a recent attempt by the State to re-constitute the ERC, however, this was unsuccessful.
16. The SAHRC draws the Committee's attention to the fact that the National Action Plan Against Racism, Xenophobia and Related Intolerance has yet to be finalised, despite having hosted the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (the Durban Conference) in 2001. The Conference adopted the Durban Declaration and Programme of Action which urges 'states to establish and implement without delay national policies and action plans to combat racism, racial discrimination, xenophobia and related intolerance, including their gender-based manifestations'. Although government is in the process of gathering data for finalisation of the National Action Plan, the delays in doing so should be explained.

17. SAHRC Recommendation to the Committee

- a) The State should provide clarity on the term 'due course' and provide clear time-frames on the release of the proposed amendments to PEPUDA, including the full operationalization of Chapter 5 and the concomitant allocation of additional resources to the SAHRC and Commission for Gender Equality in terms of Chapter 5.
- b) The State should recognise the integral role of the ERC as envisioned under PEPUDA and ensure its re-establishment and regular convening so that equality remains a priority on the national agenda.
- c) The State should act speedily to finalise the National Action Plan Against Racism, Xenophobia and Related Intolerance.

Issue 8:

Please provide information on the Refugees Amendment Bill, in particular the amendments to sections 22 (8) and 1 (b) of the Refugees Act No. 130 of 1998, in the light of the statement adopted on 24 February 2017 by the Committee on the duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights (E/C.12/2017/1). Please also provide information on the measures taken to reduce the stateless situation of children and indicate whether the State party considers reviewing the Births and Deaths Registration Act 1992 and the Immigration Act 2004 in that regard.

18. The SAHRC notes the responses by the State in para 8.1, that section 22(8) of the Refugee Amendment Bill does not introduce new measures but rather seeks to provide 'an open transparent process to give expression to section 11(h) of the principal act'. The SAHRC points out that during the consideration of the amendments, the institution submitted comments to Parliament, noting that the proposed amendments under sections 22(8) to 22(11) contained several provisions which may be considered unnecessarily restrictive to the right to work. The SAHRC argued that the proposed amendment places an asylum seeker in a position of vulnerability and reliant on others for assistance. The SAHRC further stated that this could be regarded as an infringement of the right to human dignity. Notwithstanding the SAHRC's concerns, the amendment Bill was signed into law in December 2017.
19. During June 2018, the Department of Home Affairs published the draft Refugee Regulation to further supplement the Refugee Amendment Act 2017. The SAHRC notes with concern that under regulation 6(3), the Standing Committee for Refugee Affairs is vested with the authority to determine the period and conditions of which an asylum seeker may work or study in the Republic; and, the sectors within which an asylum seeker is not permitted to work or study in the Republic, whilst awaiting the outcome of his or her application for asylum. In its comments on the draft Regulations, the SAHRC reiterated that the exclusion of asylum seekers / refugees persons from the employment market may expose them to vulnerable situations and illegal income generating activities in order to sustain themselves. The SAHRC further reminded the State of article 6 of the ICESCR and the obligation to recognise the right to work and take appropriate steps to realise the right.¹⁰ The SAHRC accordingly recommended the removal of the regulation noting the contradiction of the right to work as espoused under the ICESCR, the South African Constitution and case law. It is unclear whether these recommendations have been taken into account.
20. While para 8.2 of the State's responses details the information relating to the birth of children, the SAHRC points out that the registration of children born to a South African

¹⁰ Article 6 of ICESCR states that:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

father and an undocumented or absent mother remains restrictive. The SAHRC points out that biological fathers are often required to conduct DNA tests to prove that the child is theirs. Furthermore, the high costs of DNA testing have discouraged many fathers from undergoing the procedure which has subsequently resulted in many children not being registered. A further complication regarding DNA testing is that due to the State's limited capacity, it takes in excess of two years for a father to get the results. The SAHRC notes with concern that this phenomenon may adversely affect the rights of children, specifically, their rights to nationality; health care; education and social benefits. Furthermore, provision should be made for undocumented persons to obtain documentation later in life, since a parent's omission to register a birth will continue to have severe impacts on studying and work opportunities for South African citizens and foreigners throughout their lives.

21. **SAHRC Recommendation to the Committee**

- a) The South African government should urgently review legislation, regulations and policies related to refugees and asylum seekers and amend current unconstitutional provisions that impede refugees and asylum seekers from benefiting from basic socio-economic rights, including education and work, guaranteed to 'everyone' by the Constitution and the ICESCR.
- b) The South African government should furthermore introduce alternative measures to prove identity, given the severe challenges faced by both South African and non-South African undocumented persons in obtaining identity documents in order to access basic rights such as education as well as employment opportunities.
- c) The South African government should adopt cheaper alternatives to proving paternity or in instances where DNA testing is required, the State should bear the cost of the procedure.

B. Issues relating to the specific provisions of the Covenant (arts. 6-15)

Right to an adequate standard of living (art. 11)

Issue 23:

With regard to the right to housing, please provide information on:

(b) The implementation of the finance-linked individual subsidy programme to address the situation of people who are not eligible for houses under reconstruction and development programme or for commercial housing loans;

22. In para 23.3 of the State's responses, it is noted that the introduction of Finance Linked Individual Subsidy Programme (FLISP) is geared towards providing assistance to households who are unable to independently access mortgage finance to acquire residential property. However, the SAHRC notes that the response by the State does

not reveal whether the FLISP has achieved its intended objective of being an instrument to ensure that households who are not eligible for houses under reconstruction and development programme or for commercial housing loans acquire residential property. The SAHRC is of the view that FLISP has not been able to bridge the affordability gap due to a number of challenges such as applicant affordability (cost of the product; over-indebtedness), lack of affordable stock and the high cost of land. For instance, high levels of indebtedness of mine workers, (which is a common phenomenon), leads to mine workers being disqualified from accessing the FLISP, thereby leading to a mushrooming of informal settlements and backyard dwellers and the absence of security of tenure for such groups.¹¹

(c) The intentions of the State party regarding the issue of the illegal sale of subsidised housing without the requisite title deeds (owing to the restrictions imposed under section 10A of the Housing Act 107 of 1997);

23. The SAHRC commends the State for its reference in para 23.4 that it will seek to educate beneficiaries about the illegal sale of subsidised housing and associated challenges. The SAHRC has in the past recommended that the State, through the Department of Human Settlements, engage with residents occupying government subsidised housing to raise awareness of government's existing policies and obtain information about the challenges faced in this regard.¹² The SAHRC has further recommended to the State that it should develop appropriate policies to manage the ownership, sale and rental of government subsidised houses.¹³ The SAHRC therefore notes with concern that the State's response on this particular issue, has not adequately addressed the Committee's question and has failed to grapple with the root causes of the illegal sale of government subsidised houses.
24. The SAHRC informs the Committee that there are a number of factors to which the sale of state subsidised housing can be attributed. These include *inter alia* the fact that the majority of these houses are poorly situated, mostly in areas that are some distance away from economic activity and other crucial services such as healthcare facilities and schools. Research reveals that geographic location and space are huge determinants of a person's well-being.¹⁴ Thus, a nexus exists, particularly in the South African context, between the location of a person and the likelihood of obtaining employment.¹⁵ Currently in South Africa there is an asymmetry in the living conditions of residents in cities between those living in the 'core areas' and in 'peripheral areas'. Those in core areas enjoy, by design, more opportunities of access to education and a better quality of life, while those in the periphery have limited opportunities and

¹¹ South African Human Rights Commission *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa* (2018) 35.

¹² South African Human Rights Commission "Report on the SAHRC investigation into issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals"(2010) 43.

¹³ *Ibid.*

¹⁴ J Van Wyk 'Can SPLUMA play a role in transforming spatial injustice to spatial justice in South Africa' (2015) 28.

¹⁵ D Webster, Monitoring the Right of Access to Adequate Housing in South Africa, SPII Working Paper No 16 (2017), p. 8, available at: http://www.spil.org.za/wp-content/uploads/2018/02/Right-to-Housing_2017.pdf.

diminished quality of life.¹⁶ The Commission underscores the fact that cities in South Africa have remained relatively fragmented perpetuating the effects of the legacy of apartheid spatial geography.¹⁷

25. **SAHRC Recommendation to the Committee**

- a) The State should undertake a comprehensive study of the root causes of the illegal sale of subsidised housing without the requisite title deeds and adopt effective and appropriate measures to rid the problem of illegal selling of government subsidised housing.
- b) The State should adopt measures to expedite the allocation of title deeds of government subsidised housing to ensure security of tenure.
- c) Inner-city regeneration is essential to alleviate housing backlogs and allow for the provision of cheap, well-located housing. However, such a programme must be implemented using a rights-based approach to ensure that no illegal and unwarranted evictions are carried out and that security of tenure is ensured.

(d) The measures taken to ensure that evictions are carried out in accordance with relevant domestic laws and international human rights standards and statistical data on the numbers of evictions carried out and on the effected persons;

26. The SAHRC commends the State for adopting the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998¹⁸ (PIE), which seeks to ensure that evictions are carried out in accordance with international human rights standards and norms. However, the SAHRC notes that in para 23.5 of the State's responses, the information does not extensively address the measures taken to ensure that evictions are conducted in accordance with human rights standards and South African jurisprudence. As highlighted by the SAHRC in its initial NHRI report to the Committee, the institution has found several common factors in many eviction complaints, which include, *inter alia*, (i) excessive use of force during evictions; (ii) utilisation of inadequately trained independent contractors to carry out evictions; (iii) absence of appropriate legal processes and sufficient notice; and (iv) a disregard for the safety and well-being of children and other vulnerable groups.¹⁹ The SAHRC further notes with concern the State's statement in paragraph 23.5 that government does not keep statistics of evictions. Such statistics are important in order to determine the impact of land reform measures, including those aimed at creating security of tenure.

¹⁶ Gauteng City Region Observatory 'Uneven spaces: Core and periphery in the Gauteng City-Region' (2017) 16.

¹⁷ South African Human Rights Commission 'Access to housing, local governance and service delivery' (2015) 85.

¹⁸ Act 19 of 1998.

¹⁹ South African Human Rights Commission 'Access to housing, local governance and service delivery' (2015) 15 – 16. In 2014, the then Minister of Human Settlements, Ms Lindiwe Sisulu following an eviction of the community of Lwandle in Cape Town constituted a Ministerial Enquiry which made a number of recommendations amongst them that the South African Police Service must develop separate National Instructions to deal with evictions, taking into account the humanitarian aspects around evictions. Available at <http://www.dhs.gov.za/sites/default/files/documents/Lwandle%20Eviction%20Ministerial%20Enquiry%202014.pdf>

27. SAHRC Recommendation to the Committee

- a) The South African government should ensure that all parties involved in the eviction process execute evictions in accordance with the requirements articulated in law, giving due regard to the time of day and weather, and with due respect given to the dignity, right of access to information, and respect for property of all persons in affected communities.
- b) The State must ensure that appropriate, dignified alternative accommodation is provided, by the State, to all those evicted.
- c) The South African government should furthermore keep statistics of evictions and the impact of all land reform measures designed to create equitable access to land (including land for residential purposes) and security of tenure.

(e) The measures taken to address the situation of homeless people and backyard dwellers and the relevant statistical data;

28. In para 23.6 of the State's replies, it is noted that the government has developed a new national Special Needs Housing Programme (SNHP), which will provide capital funding to registered Not for Profit Organisations (NPOs) with proven institutional and financial management capacity to operate and maintain residential care facilities for the benefit of persons with special housing needs including homeless people, people with severe mental and physical disabilities, victims of various forms of abuse (especially women and girls) and older persons. A study conducted by the SAHRC in 2017, made a strong recommendation for the finalisation and adoption of the SNHP.²⁰ Notwithstanding these recommendations, the SNHP is yet to be formally adopted by the State.

29. SAHRC Recommendation to the Committee

- a) The South African government should finalise and expedite the adoption of the Special Needs Housing Policy.
- b) The relevant State department must develop a comprehensive implementation plan, following the adoption of the SNHP, which must be shared with the Commission and relevant civil society organisations for monitoring purposes.
- c) The implementation plan make provision for inter alia the training of staff at state and non-state facilities; the establishment of coordination desk for inter-departmental collaboration; a provincial mapping exercise of special-needs housing requirements and monitoring, management and oversight plans for the Departments of Health, Social Development and Correctional Services.
- d) The South African government should furthermore ensure that developments in respect of this important policy are widely publicised.

²⁰ 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', Economic and Social Rights Research Policy Brief 2016/2017 (2017).

Right to water and sanitation (art. 11 and 12)

Issue 24:

Please provide information on the obstacles the State party faces in improving access to safe drinkable water and adequate sanitation facilities, particularly in informal settlements and rural areas. Please also provide statistical data, disaggregated by locality (province/district), race and gender.

30. The SAHRC notes the State's responses in para 24.1 and points out that there has indeed been notable progress in the number of people who have access to water and sanitation in post-apartheid South Africa (see Annexure A: tables 24 and 25). However, it must be noted that a study conducted by Statistics South Africa in 2016 indicated that 89.8% of households in South Africa had access to piped water; with 44.4% of those households accessing water inside their dwelling; 1.9% from a neighbour; and 13.5% from a communal tap.²¹ Approximately 4% of households still access water from a natural water source, such as rivers and dams. With regards to sanitation, the survey found that 63.4% of households had access to a flush toilet connected to public sewerage system.²² However, the survey found that about 2.2% of households still use the bucket system and about 2.4% do not have access to sanitation.²³
31. Although the statistics indicate that the State is committed to providing access to safe potable water and adequate sanitation, the SAHRC has found that disaggregated data regarding access to water and sanitation reveals that many rural and peri-urban communities lack access to water or sanitation.²⁴ For instance, the highest water-provision backlogs fall within the poorest provinces in the country, including the Eastern Cape, Limpopo, KwaZulu-Natal and the North West.²⁵ Likewise, a high number of bucket toilets are located in the Free State and Eastern Cape provinces. The SAHRC further found poor quality or aging infrastructure; systemic failures in governance and budgeting; and the commodification of the right to water as some of the obstacles hindering the State from improving access to safe drinkable water and adequate sanitation in the country.²⁶
32. The SAHRC has further found that business actors in the extractive industries may diminish levels of enjoyment of the constitutionally guaranteed right of access to

²¹ Statistics South Africa 'The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data' (2016) 14.

²² Ibid 35.

²³ Ibid 35.

²⁴ South African Human Rights Commission, 'Right to Access Sufficient Water and Decent Sanitation in South Africa' (2014) 14.

²⁵ Statistics South Africa 'The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data' (2016) 17.

²⁶ South African Human Rights Commission, 'Right to Access Sufficient Water and Decent Sanitation in South Africa' (2014) 14. South African Human Rights Commission "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa" (2018) 35, the SAHRC also found that challenges exist around intergovernmental cooperation and mining affected communities' right of access to water and sanitation is impacted upon by aging infrastructure.

sufficient water. Where mining companies are granted Water Use Licences, access to information regarding water use and the quality of water following commercial activities should be made freely available by both government and business actors. Furthermore, the government must ensure that communities in water-scarce areas are afforded the right of access to sufficient water prior to business entities that operate for profit, through monitoring water use.²⁷

33. SAHRC Recommendation to the Committee

- a) The State should adopt measures to address the disproportionate enjoyment of access to water and sanitation.
- b) The State should ensure that human-induced pollution of water is curtailed which impacts adversely on the delivery of safe drinkable water.
- c) All service delivery projects and programmes must be conducted from a rights-based perspective ensuring engagement with communities, transparency and access to information.
- d) Communities and civil society organisations must be engaged around local budgets to allow for citizen-based monitoring of spending, targets and deviations.
- e) Contractors that do not fulfil their contractual requirements in terms of service delivery, must be blacklisted by the State and the Office of the Chief Procurement Officer and criminal charges must be brought against certain defaulters.
- f) The State must develop plans to attract and retain skilled professionals and managers within rural and outlying local government departments and ensure that such offices are closely monitored to ensure proper management and service delivery.
- g) The South African government must closely monitor water use by business enterprises, and must further ensure that communities affected by water-intensive commercial activities are guaranteed the right of access to sufficient water.
- h) The South African government must ensure that information regarding Water Use Licenses is freely available.

Right to physical and mental health (art. 12)

Issue 25:

Please provide information on health indicators and on access to health-care services, disaggregated by income group. Please also provide information on the steps taken or envisaged to expand the coverage of national health insurance and on the implementation of the 10-point plan (see E/C.12/ZAF/1, para. 121). Please further provide information on the measures taken to strengthen the community health worker programme, including target numbers and the treatment and working conditions of community health workers.

²⁷ South African Human Rights Commission *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa* (2018) 41.

34. The SAHRC notes para 25.2 of the State's response, that the government has adopted a new community healthcare worker policy and has 'put in place a process to implement the policy'. The SAHRC informs the Committee that several community healthcare workers have approached the institution, requesting assistance with the implementation of contracts relating to remuneration of these workers. The SAHRC is currently liaising with all relevant stakeholders to ensure that CHW are insourced by the Department of Health and are paid accordingly.

Right to education (arts. 13-14)

Issue 29:

Please provide information on the measures taken by the State party to:

a) address high drop-out rates, particularly after grade 8

35. The SAHRC notes the response by the State in para 29.1 and 29.2, that 96% of children complete primary school, and that drop-out rates increase significantly towards the end of secondary school. In respect of the latter, the SAHRC points out that there are several factors which contribute to the drop-out rate. These include for example, learner pregnancy (which affects the retention rates of girl learners); the dependency and impact of substance abuse; gangsterism; as well as the lure to enter into the labour market at an early age.
36. The SAHRC remains concerned over the high number of learners with disabilities who are not enrolled in school. In 2017, statistics released by the Department of Basic Education (DBE) indicated that approximately 11,461 learners with disabilities are on waiting lists for special needs schools, and there is a lack of credible data of all learners with disabilities currently outside of the school system.²⁸ It should be noted that the SAHRC is not aware of any special needs schools which fall into the "no fee" schools category. The SAHRC is furthermore concerned that school fees, together with associated costs such as transportation, boarding costs and fees for special assistants as well as long-waiting lists for special needs schools, all contribute towards the high drop-out rates for learners with disabilities.
37. The SAHRC is also of the view that the current position of the DBE in relation to undocumented learners also impacts on the realisation of universal access and contributes to drop-out rates of learners. While the National Admissions Policy provides for the *conditional admission* of undocumented learners, the SAHRC has found that in practice, this conditional admission is limited to a period of three months and that learners without documentation (including South African learners without birth

²⁸ It should be noted that in 2015, Human Rights Watch estimated that over 500 000 children with disabilities were excluded from the education system in South Africa. See, Human Rights Watch 'Complicit in Exclusion: South Africa's Failure to Guarantee Inclusive Education for Children with Disabilities' (2015)

certificates; stateless children; and migrant children in an irregular situation) are excluded from schools on a regular basis. This is despite the fact that gaps in the current legal system contribute to the inability of learners in obtaining the required documentation.²⁹

38. SAHRC Recommendation to the Committee

- a) The State should implement measures to address the retention rate of adolescent mothers, including the form of reasonable accommodation provided to adolescent parents of all genders.
- b) The State should provide information on what measures it shall undertake to mitigate against learner drop-out based on the dependence on substance abuse, gangsterism and early employment. State should put urgent measures in place, including the allocation of adequate resources to ensure that all learners with special needs are immediately able to access their right to a basic education.
- c) The State should immediately revise the list of “no fee” schools to ensure that special needs schools are included. In addition, measures should be taken to ensure that additional financial and practical barriers are addressed, including transportation and accommodation.
- d) The State should obtain and publish accurate data on the number of learners with disabilities currently not enrolled in school, on waiting lists, and those who have dropped out on an annual basis.
- e) The State should provide information on the measures being adopted to address the high levels of children with disabilities not enrolled in schools.
- f) The State should ensure that all undocumented learners are able to access a basic education, which includes receiving formal accreditation for the completion of their studies.

(b) Improve the quality of education, including the qualification of school teachers and learning materials

39. The SAHRC welcomes the initiatives introduced by the DBE aimed at improving the quality of education as set out in paras 29.4 to 29.8 of the State’s response, however it notes the absence of reference to learners with disabilities. Although the SAHRC is aware of the measures taken by the State to ensure that learners with disabilities, and those with sensory disabilities in particular, have access to Learning and Teaching Support Materials (LTSM), the institution remains concerned over the delay in providing access to all learners.

²⁹ The SAHRC remains concerned over the lack of mechanisms in place to ensure that undocumented learners in Grade 12 are able to write their final examinations and obtain formal accreditation for their studies- thus limiting their opportunities for employment and future progression. Although the SAHRC recognises that the DBE is currently undertaking a revision of the National Admissions Policy and is collaborating with both the Department of Home Affairs and Department of Social Development to address the challenges facing undocumented learners, the continued exclusion of such learners remains a serious concern in the country.

40. It should be noted that in 2014, the Commission released a Report on the Delivery of LTSM, which highlighted a concern over the lack of LTSM for learners with visual impediments in particular. Further, in 2015, the Supreme Court of Appeal (SCA) in *Minister of Basic Education v Basic Education for All*³⁰ confirmed that access to learning material forms part of the right to basic education, meaning that every learner has a right to receive a textbook, and that this must be done before the teaching of the curriculum is to commence. The SCA ruled that the failure to provide textbooks to learners in schools constituted a violation of the rights to a basic education, equality, dignity, the South African Schools Act and section 195 of the Constitution.³¹
41. The SAHRC notes in para 29.5 of the State's response, that a number of initiatives are underway to improve the number and quality of teachers. However, the SAHRC highlights that during 2017, several reports were released revealing, *inter alia*, that approximately 5000 teachers are either unqualified or under-qualified. Research also indicates that 10% of teachers are absent daily at most South African public schools, and close to 40% of teaching and learning time is lost as a result.³²
42. The SAHRC brings to the Committee's attention that, according to results in the, '2017 Progress in International Reading Literacy Study (PIRLS)', 78% of learners in Grade 4 cannot read for meaning.³³ The results further indicate that South Africa has the second highest gender gap in the world with regard to reading for meaning. In addition, the results reflect great disparity between the country's provinces as well as languages. The SAHRC, in collaboration with the UNICEF, commissioned a study on poverty and social exclusion (*Poverty traps and social exclusion among children in South Africa*) and identified that a crucial intervention to improve the quality of education is that all children should be able to read fluently in their mother tongue by the age of 10.
- 43. SAHRC Recommendation to the Committee**
- a) The State should report on measures taken to ensure that all learners with special needs have access to LTSM on an urgent and equitable basis.
- b) The State should report on the setting of professional standards for educators, with a focus on teacher performance, accountability and support for professional development. In addition, the State should provide information on the current status and measures taken to ensure that all teachers are equipped with the appropriate level of knowledge and qualification.
- c) The State should report on measures taken to improve reading for understanding, and particularly the measures taken to ensure that all learners are able to read and write fluently in their mother tongue by age 10. The State should ensure that regular testing is conducted to monitor progress; that attention is given to the development of African languages; and that measures are implemented to improve the ability of educators to teach reading in mother tongue languages.

³⁰ 2016 (4) SA 63 (SCA).

³¹ *Ibid* at para 46.

³² For information on these reports, see, <http://www.cde.org.za/wp-content/uploads/2017/08/CDE-Insight-Professional-Standards.pdf> and <http://www.hsrc.ac.za/en/hsrc-in-the-news/general/teachers-overworked>

³³ <http://timssandpirls.bc.edu/pirls2016/international-results/wp-content/uploads/structure/CompletePDF/P16-PIRLS-International-Results-in-Reading.pdf>

(f) Ensure inclusive education by the provision of reasonable accommodation and personal assistance for children with disabilities

44. While the SAHRC notes that progress has been made as set out in para 29.13 of the State's response, it highlights the fact that many learners with disabilities are placed in special needs schools rather than being provided with reasonable accommodation in ordinary schools, and that progress in the implementation of DBE's White Paper 6: Special Needs Education: Building an Inclusive Education and Training System, in South Africa appears to be slow. Furthermore, educators are not adequately trained to address special needs required by such learners, which exacerbates to difficulties experienced by special-needs learners.
45. In September 2017, the SAHRC launched a national probe investigating special needs and inclusive education, which broadly sought to understand the challenges and gaps in ensuring universal and quality access to a basic education. The probe included questions directed to the DBE around access to LTSM for learners with special needs, and visually impaired learners; steps taken to address the lack of universal access; resourcing of inclusive education, including budget allocation and the provision of adequate specialist support staff and services; standard of curriculum delivery; and scholar transport and safety for learners with disabilities. To date, the SAHRC has not received a response to the questions from the National DBE, and has received limited responses from provincial education departments.

46. SAHRC Recommendation to the Committee

The State should provide information on:

- a) Measures to ensure the implementation of the DBE's White Paper 6: Special Needs Education: Building an Inclusive Education and Training System, in South Africa, including measures to be taken to ensure adequate financial allocation for inclusive education at provincial level;
- b) Measures to be taken to improve the enrolment of learners with disabilities in ordinary and full service schools, including measures to prevent mainstream schools from rejecting learners with disabilities or imposing additional financial conditions for the enrolment of these learners;
- c) Measures that have been taken to ensure that learners with disabilities currently out of school will be enrolled in school on an urgent basis.
- d) The State should ensure that reporting on budget allocation and expenditure should clearly distinguish between special needs and inclusive education in order to promote transparency and ensure that stakeholders and the public can adequately monitor progressive realisation.

(g) Meet sanitary needs pertinent to girls, including water and sanitation facilities

47. The SAHRC notes that the provision of adequate water and sanitation in schools continue to be beset with challenges. In 2013, the DBE introduced Minimum Norms and Standards for School Infrastructure which sought to outline timeframes within which certain infrastructure targets were to be met, including the provision of water as well as the eradication of pit latrines in all schools by November 2016. The SAHRC notes with concern that these targets have, to date, not been met. Currently, there are approximately 5779 pit latrines in schools, whereas around 27 schools in the Eastern Cape had no access to sanitation facilities at all. To this end, the SAHRC informs the Committee of the tragic death of two 5 year old learners who died in January 2014 and March 2018, respectively, after falling into pit latrines at their schools. Subsequently, the President of South Africa initiated a rapid audit on all unsafe facilities within schools, with a particular focus on hazardous ablution facilities. The President accordingly directed the DBE to develop a plan as an emergency interim measure to address the challenges. The Commission has engaged with the DBE with a view of monitoring the situation but, to date, has not been provided with a copy of the aforementioned plan.

48. SAHRC Recommendation to the Committee

- a) The State should implement an emergency programme to combat water and sanitation backlogs in public schools, with a particular emphasis on schools in the Eastern Cape, KwaZulu Natal and Limpopo provinces.
- b) The State should urgently provide a road map for the urgent eradication of inappropriate sanitation facilities and the provision of adequate, safe and dignified water and sanitation facilities in all schools in South Africa. Such a road map must provide specific targets and timeframes.
- c) The Department of Planning, Monitoring and Evaluation should oversee this process, in collaboration with the Department of Basic Education, Department of Water and Sanitation, and National Treasury to ensure that all targets and timeframes are met.

Cultural Rights (art 15)

Issue 30:

Please provide information on the measures taken to provide education in indigenous languages, particularly the Khoi, Nama and San languages, and on indigenous culture in the public school system and in public institutions.

49. As cited in para 6 above, between 2015 and 2017 the SAHRC conducted a series of public hearings across South Africa, addressing the human rights situation of the Khoi and San Peoples in the country. The SAHRC noted the concerns raised by the Khoi and San Peoples that the existing school curricula does not take into account indigenous or traditional lifestyles, and therefore does not address the specific needs, ways of life or

cultures of indigenous or traditional peoples. The SAHRC brings to the Committee's attention that a number of local schools in the South Africa's Northern Cape Province, introduced an alternative education programme for indigenous children who were being taught iKhoi-San languages as well as isiXhosa at school. However, the SAHRC notes with concern the government's decision to discontinue this initiative.

50. It should be noted that in its report following the public hearings on the human rights of Khoi and San communities, the SAHRC issued several recommendations to the South African government. These include, *inter alia*, that the DBE together with Pan South African Language Board (PANSALB) should consult with the Khoi and San communities with a view of developing policies and projects to incorporate indigenous languages and cultures into the formal education system; that the DBE must further undertake capacity development initiatives in order to adequately train and capacitate local persons with knowledge of indigenous language and culture with the skills to be educators; the DBE in collaboration with other relevant departments must undertake a review of the national curriculum in order to accurately integrate the history, cultures and aspirations of the Khoi and San peoples of Southern Africa; and finally, that the Department of Higher Education and Training must collaborate with CoGTA and, in consultation with the Khoi-San, to consider developing specific vocational training programmes which are designed to address the skills needs and priorities of indigenous and traditional communities with a view of enhancing development and self-determination.

51. SAHRC Recommendation to the Committee

- a) The State should give effect to the recommendations issued by the SAHRC in its outcome report on the human rights situation of the Khoi and San people in South Africa.

52. Conclusion

The SAHRC wishes the Committee well in its first review of the South African government and avails itself to provide further information where required.

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