



## **SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

### **Response to the Call for Inputs to the Report of the Secretary-General re. Human Rights Defenders**

*Submission to the UN Office of the High Commissioner for Human Rights*

*April 2018*

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#### **1. Introduction**

The South African Human Rights Commission (SAHRC) acknowledges receipt of the correspondence sent by the UN Office of the High Commissioner for Human Rights (OHCHR) on 22 March 2018, regarding the call for inputs to the Report of the Secretary-General re. Human Rights Defenders.

The SAHRC points out that the institution has specifically identified protection of human rights defenders as a critical area of concern and to this end, has undertaken a several activities aimed at raising awareness of this vulnerable group. In responding to the call, the submission below is structured in accordance with the guidelines as contained in the OHCHR request and where applicable, in line with the implementation of the 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms'.

#### **2. Mandate of the SAHRC**

The SAHRC is a constitutionally mandated independent state institution supporting constitutional democracy. It is mandated by section 184 of the Constitution of the Republic of South Africa, 1996 to promote respect for human rights and a culture of human rights, promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic. The powers and functions of the SAHRC are further set out in the South African Human Rights Commission Act, 40 of 2013. As a national human rights institution (NHRI), the SAHRC is additionally guided by the Principles Relating to the Status of National Institutions (the Paris Principles) as adopted by the UN General Assembly through Resolution 48/134 in 1993.

The SAHRC is obligated to monitor not only the attainment of human rights towards their full realisation in South Africa but also the government's duty to adhere to its regional and international obligations in the protection of human rights. Noting the role that human rights

defenders play in advocating for the realisation of human rights of those most vulnerable in our societies, it is with concern that the SAHRC notes the inconsistent approach of the South African government on matters pertaining to human rights defenders. The Constitution expressly provides for the rights to assembly, association, freedom of expression and access to justice, directly reflecting the UN Declaration on Human Rights Defenders.<sup>1</sup> The South African government bears similar obligations<sup>2</sup> in terms of the Cotonou Declaration,<sup>3</sup> which expresses concern about the various forms of serious human rights violations to which human rights defenders on the continent are exposed. The Cotonou Declaration further calls on NHRIs to give special attention to human rights defenders facing increased risk, and to effectively use its promotion and protection mandates to hold States accountable for violations committed against human rights defenders.<sup>4</sup>

### **3. Human rights defenders within the South African context**

The SAHRC understands that a human rights defender (HRD) may be defined to include anyone, who individually or in association with others, seeks to promote and to strive for the protection and realisation of human rights and fundamental freedoms. However, due to a lack of domestic legal definition as to who constitutes an HRD, there is a dearth of government information on the status of HRDs in South Africa. Moreover, the South African government has been inconsistent in its approach on matters pertaining to HRDs at an international level, thus creating uncertainty about its approach to HRDs broadly.

Unsustainable levels of poverty and inequality, compounded by widespread unemployment and inadequate access to basic services for many poor communities, continue to violate people's rights, resulting in persistent political, economic and social unrest within South Africa. Despite the rights and protections afforded in the South African Constitution, such as freedom of assembly, association, and the ability to actively participate in decision-making processes that shape their lives and promote good governance, HRDs frequently experience multiple violations of these rights. In addition, the disruption of peaceful human rights assemblies and excessive use of force by the police under the pretext of maintaining public order has become a frequent occurrence in the country. The SAHRC is aware of reports of threats and intimidation by political party actors and State authorities toward a number of human rights civil society organisations (CSOs) and those critical of the government in South Africa. Despite the establishment of various legal mechanisms that aim to facilitate community participation in public affairs, poor communities, in particular, are frequently excluded from decision-making processes that directly affect their daily lived

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<sup>1</sup> A/RES/53/144.

<sup>2</sup> ACHPR *Concluding Observations and Recommendations on the Combined Second Periodic Report under the African Charter on Human and People's Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa* (2016).

<sup>3</sup> ACHPR *Cotonou Declaration on strengthening and expanding the protection of all Human Rights Defenders in Africa*, adopted at the 2nd International Symposium on Human Rights Defenders in South Africa (Johannesburg), 27 March – 1 April 2017.

<sup>4</sup> *Ibid.*

experience, and subsequently confront repressive actions from both State and non-State actors, including the private sector. Moreover, when advocating for the promotion and protection of rights, HRDs experience difficulty in accessing relevant public information to which they are entitled, or face threats to their freedom of expression when highlighting violations.

The SAHRC also notes that women HRDs are more at risk of suffering certain forms of violence, prejudice, exclusion and repudiation, not always experienced by their male counterparts. Children are frequently involved in various forms of political and social resistance, either as political agents aiming to advance their human rights, or as members of affected communities confronting human rights violations. However, as a result of their activism, children have also been victims of excessive use of force by State police when claiming human rights.

### **3.1 Progress, achievements and challenges**

#### **a) SAHRC expert committee meetings**

The SAHRC is empowered<sup>5</sup> to meet with experts in academia, civil society organisations and partners, activists, Special Rapporteurs, and other NHRIs. Through such platforms, the SAHRC is able to engage on matters relating to the protection of HRDs in the course of its ongoing work. Some of these engagements are focussed to respond systemic issues encountered by HRDs in their work and include efforts to secure the State's ratification and implementation of the Optional Protocol to the Convention Against Torture (OPCAT) as well as broader issues in law enforcement that directly impact HRDs.

#### **b) SAHRC's protection mandate**

Where a HRD's rights are threatened or violated, the defender may lodge a complaint with the SAHRC's through any of its nine provincial offices. These complaints are dealt with in terms of the SAHRC's Complaints Handling Procedure. The SAHRC may use its powers as an NHRI to provide or facilitate the securing of appropriate remedies where a HRD brings a human rights violation to its attention. Invoking the protection mandate for appropriate relief may include the institution of legal proceedings on behalf of the HRD, facilitating Alternative Dispute Resolution processes for resolution of a complaint, or instituting litigation in respect of the violation in the name of the SAHRC.

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<sup>5</sup> Section 11 of the South African Human Rights Commission Act, 40 of 2013.

### **c) SAHRC's promotion mandate**

A dedicated advocacy and communications strategy is in place to advance awareness and education on human rights. These interventions include capacity building for HRDs in communities, the provision of promotional material for the purposes of advocacy, creating spaces for HRDs for advocacy, dialogue and debate on specific human rights concerns and conducting joint promotion of human rights activities in collaboration with HRDs.

### **d) SAHRC's monitoring mandate**

The SAHRC monitors and assesses the observance of human rights in South Africa. During 2017, the SAHRC conducted research into the protection of HRDs. The research brief<sup>6</sup> provides in-depth analyses of the rights violations experienced by HRDs and identifies opportunities where the legal framework could be strengthened to address current deficits. The SAHRC has accordingly directed recommendations to various State and non-State actors, which are aligned with the enforcement of the Declaration. Some of the key findings from the SAHRC research record violations of the rights to freedom of association, freedom of assembly, freedom of expression, public participation and free, prior and informed consent, NS access to information. Furthermore, the research addresses the role of non-State actors in protecting the rights of HRDs, and identifies the need for improved whistleblower protection. The SAHRC will continue to monitor the implementation of its recommendations.

### **e) Challenges**

General challenges experienced by the SAHRC include government non-responsiveness to requests for information issued by the SAHRC, a failure by relevant parties to implement SAHRC recommendations, and insufficient resources for the SAHRC to effectively promote good practice and facilitate capacity building.

## **3.2 Good practice and capacity building**

The SAHRC conducts targeted capacity building interventions for community based organisations both on specific areas of focus such as the Promotion of Access to Information Act 2 of 2000 (PAIA) and on specific human rights issues. Toolkits have been designed to support these interventions with a view to strengthen and advance the work of HRDs at ground level. Capacity building interventions on enabling legislation such as the PAIA are also provided to public officials to assist root-cause barriers impeding the work of HRDs, such as deficits in participation, consultation, transparency and accountability mechanisms, which legislation such as the PAIA are intended to prevent. Other focussed

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<sup>6</sup> SAHRC *The Status of Human Rights Defenders in South Africa* (2018) research brief has been finalised but not yet published.

areas of intervention to build capacity include facilitating the release of funding to HRDs, development of toolkits for business in respect of the rights of persons with disabilities,<sup>7</sup> and a country guide regarding business and human rights.<sup>8</sup> As a matter of course, the SAHRC includes HRD's in the large majority of its human rights work, through seminars, conferences, roundtable discussions and dialogues, supporting the exchange of information, conversation, consultation, lobbying and networking opportunities for the benefit of HRDs. The SAHRC has also actively involved HRDs in its work as an NHRI by including consultation with relevant HRDs in its submissions to supra-national bodies, thereby creating a space for the inclusion of the voices of HRDs.

### **3.3 Recommendations on measures relevant to promoting the Declaration and ensuring its implementation.**

Through its research on HRDs and monitoring work, the SAHRC has directed the following recommendations to State and non-State actors, which are aligned to the Declaration:

#### *Articles 6-8 of the Declaration*

- All government departments and organs of state should proactively disclose information that HRDs, civil society and the public can reasonably be expected to regard as relevant to their activities and public participation in general.
- Voluntary private sector oversight mechanisms should strongly encourage their members to proactively disclose information that may be relevant to the public at large, or HRDs and CSOs in particular.
- Communities should be consulted with by both State and non-State actors in all aspects concerning their living arrangements and living experiences, in a meaningful way, prior to the conclusion of development plans and agreements, in order to enhance transparency and accountability and to ensure that programmes and processes accommodate the needs of communities in a sustainable manner. Community representatives must reflect the demographics of the community concerned, with particular attention given to ensuring that marginalised groups such as women, people with disabilities and young people are represented.

#### *Articles 5 and 12 of the Declaration*

- The Minister of Cooperative Governance and Traditional Affairs should engage the relevant local governments throughout the country to include Regulation of Gatherings Act (RGA) training for their officials in order to ensure that the RGA is understood in the context of facilitating the right to freedom of assembly, as opposed to restricting its intended implementation, and to

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<sup>7</sup> SAHRC *Disability Toolkit: A Quick Reference Guide & Monitoring Framework for Employers* (2016) <<https://www.sahrc.org.za/home/21/files/20170524%20SAHRC%20Disability%20Monitoring%20Framework%20and%20guidelines%20Draft%205.pdf>>.

<sup>8</sup> SAHRC *Human Rights and Business Country Guide: South Africa* (2015) <<https://www.sahrc.org.za/home/21/files/Guide%20Final%20final.pdf%20March%2019.pdf>>.

ensure that communities are not unjustly denied the right to voice their concerns through protest action.

- The Minister of Police and the South African Police Service (SAPS) must ensure that the excessive and disproportionate use of force by law enforcement officials in the context of public protests in South Africa is halted through strengthening front-line supervision and officer accountability mechanisms so that public ordering policing is improved. As a matter of urgency, the Minister of Police must implement the recommendations of the National Development Plan and the White Paper on the Police aimed at achieving the vision of a professional, ethical and accountable SAPS.
- The DOJ&CD, together with the Department of Women (DOW) should take political, administrative and legislative measures to ensure that the environment in which women human rights defenders operate is enabling to the protection of their rights, including a response to religious and cultural norms that subjugate women in general and women human rights defenders in particular. When children are involved in protest action, the Ministry of Police and SAPS must ensure that the excessive and disproportionate use of force by law enforcement officials is halted.
- Political parties and executive structures, including Ministers involved in State security agencies, should ensure that none of their structures, members or supporters attempts to intimidate or prevent any organisation or group from exercising their rights of freedom of expression and association.
- The government, including the Department of Communications, should publicly condemn any instances that appear to attack freedom of the press and instances that encourage censorship through acts of violence and intimidation by members of the public.

#### *Article 9 of the Declaration*

- The Department of Correctional Services (DCS) needs to urgently address the issue of overcrowding in correctional centres across the country and increase its efforts to ensure that detainees are treated with humanity and dignity. All detainees must be able to access adequate food, health care and ventilation, and be housed in structures that are sanitary while awaiting trial.
- The SAPS should improve its data collection mechanisms to provide sufficient detail on the complaints, investigations, prosecutions and convictions in cases of torture and ill-treatment. The SAPS should strengthen its public complaints and internal disciplinary systems to reduce the levels of ill-treatment and brutality against the civilian population.
- All human rights defender-related killings must be thoroughly investigated, and perpetrators must be prosecuted and held accountable for the killings.

#### *Article 14 of the Declaration*

- The Department of Justice and Constitutional Development (DOJ&CD), together with the Office of the Public Protector and other Chapter 9 bodies, should investigate the establishment of a specialised unit tasked with protecting the rights of whistle-blowers. These institutions should also engage in an active campaign to promote the work of whistle-blowers to ensure that they feel protected by their communities.
- The South African government should prioritise the ratification of the Optional Protocol to the Convention Against Torture (OPCAT) and the establishment of a National Preventive Mechanism (NPM) to monitor places of deprivation of liberty, supported by the necessary resources to ensure its effectiveness.

#### **4. Conclusion**

As an NHRI, the SAHRC is acutely aware of the integral role HRDs play in supporting constitutional democracy and promoting human rights. The SAHRC will accordingly continue to strive to promote an enabling environment for HRDs. Moreover, the SAHRC will continue to advocate the implementation of protections for HRDs, in order to ensure that HRDs are able to continue their work aimed at the protection, promotion and fulfilment of human rights for all.

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