



Centre for
**CONSTITUTIONAL
RIGHTS**

Human Rights

Report Card 2019

**THE RESPECT,
PROTECTION,
PROMOTION AND
FULFILMENT OF RIGHTS
IN THE BILL OF RIGHTS
DURING 2018**

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While the Centre for Constitutional Rights (CFCR) strives to provide complete and accurate information, the Centre does not assume any liability whatsoever for the accuracy and completeness of the information contained herein. To the best of the CFR's knowledge, the information contained herein is accurate and reliable as of date of publication.

Methodology

The Centre for Constitutional Rights (CFCR) has for the past 10 years annually presented a Human Rights Report Card in terms of which, realisation of human rights in South Africa is measured.

The Report awards grades on a scale of A to E - A representing excellent, and E representing poor. The Report assesses decisions by courts, legislation, repeated incident occurrences (or a specific incident which shocks the conscience of the nation), as well as the reports compiled by well-established, trustworthy and competent bodies such as Freedom House, the United Nations (UN) and Statistics South Africa (Stats SA). The CFRC's Panel of Advisors (made up of eminent individuals who have distinguished themselves in the fields of law and/or politics) grade the various sections, whereupon the Centre aggregates the grades to reach a final grade. The Report further serves as a baseline from which future trends in human rights violations may be identified. The Report is a snapshot in time - 2018 - and is the result of engagement with South Africa's current affairs on a continuous basis.



Report Card 2019 Grades

We have once again awarded the following grades to reflect realisation of human rights in South Africa during 2018:

A = Excellent;

B = Good;

C = Average;

D = Poor; and

E = Very Poor.

At the same time, the +, = and - signs are used to indicate whether a tendency to realise relevant rights is improving, deteriorating or remaining the same.

Equality **E =**

Human Dignity **C -**

Life **E =**

Freedom and Security of the Person **D =**

Slavery, Servitude and Forced Labour **C =**

Privacy **C -**

Freedom of Religion, Belief and Opinion **B =**

Freedom of Expression **B -**

Freedom of Assembly, Demonstration,
Picket and Petition **B =**

Freedom of Association **A =**

Political Rights **A =**

Citizenship **B =**

Freedom of Movement and Residence **C =**

Freedom of Trade, Occupation
and Profession **C =**



Labour Relations **C =**

Environment **C =**

Property **D -**

Housing **B -**

Healthcare, Food, Water
and Social Security **C -**

Children **C =**

Education **E =**

Language and Culture **D -**

Cultural, Religious and
Linguistic Communities **C -**

Access to Information **D =**

Just Administrative Action **C =**

Access to Courts **B -**

Arrested, Detained and
Accused Persons **D -**



Introduction

The Year 2018



The year 2018 got off to a dramatic start, with the resignation of embattled former President Jacob Zuma on 14 February 2018. The governing party's leader, Cyril Ramaphosa, was subsequently appointed as the new State President.

South Africans felt hopeful that the Zuma-era, marred by corruption and maladministration, would finally come to an end and that a new path in the fight against corruption would be forged. In President Ramaphosa's maiden State of the Nation Address (SONA 2018) he called for unity among South Africa's diverse cultures and to move beyond an era of weak leadership and distrust in public institutions. He accentuated that the State would take active measures to stabilise State-Owned Enterprises (SOEs) and that the "tide of corruption" in public institutions would be turned around. The need to urgently address leadership issues at the National Prosecuting Authority (NPA), as well as the stability of the South African Revenue Service (SARS) was emphasised. President Ramaphosa also reiterated that - guided by the outcomes of the ANC's 54th National conference - land redistribution programmes would be accelerated, and this would include expropriation without compensation. It was stressed by the President that expropriation without compensation should be implemented in a way that "increases agricultural production, improves food security and ensure that the land is returned to those from whom it was taken under colonialism and apartheid." Lastly, President Ramaphosa announced the decision to implement universal health coverage through National Health Insurance (NHI).

The State's attempt to fight corruption and restore credibility of public institutions; the question of expropriation without compensation; and reform of South Africa's dire healthcare system dominated developments in 2018. These provide a lens through which to reflect on the year.

The fight against corruption and attempts at restoring credibility

It is critical to be reminded of the impact of corruption on the exercise of human rights, as well as the State's constitutional duty to fight corruption. One cannot view corruption and maladministration in isolation. Section 7(2) of the Constitution obliges the State to "respect, protect, promote and fulfil the rights in the Bill of Rights" and as the Constitutional Court held in the matter of *Glenister v President of the Republic of South Africa and Others* - "...corruption and organised crime have a deleterious impact on any number of rights...the state's positive duties under section 7(2) is an obligation to prevent and combat these specific social ills." Corruption threatens our constitutional order and the State's attempts to fight corruption therefore need to be closely monitored.



Critical to the fight against corruption in 2018 was the establishment of the Judicial Commission of Inquiry into State Capture, Corruption and Fraud in the Public Sector including Organs of State (State Capture Commission), on 25 January 2018. The North Gauteng High Court found in December 2017 that the former Public Protector's remedial action, as per her 2016 *State of Capture* report, was binding. The report directed the President to appoint a Commission of Inquiry in terms of section 84 of the Constitution, headed by a Judge selected by the Chief Justice, to investigate the matters identified in the report.

Deputy Chief Justice Zondo was appointed as the Chairperson of the State Capture Commission and terms of reference for the Commission were published on 25 January 2018. The Commission's mandate involves inquiring into, and making findings and recommendations relating to the Public Protector's *State of Capture* report. This includes:

- Whether any appointments of members of the National Executive or functionaries were disclosed to the Gupta family, or any other unauthorised person before such appointments were formally made;
- The nature and extent of corruption in the awarding of contracts to companies by public entities; and
- Mr Zuma's role in the alleged offers of Cabinet positions by the Gupta family to Mr Mcebisi Jonas and Ms Vytjie Mentor.

The Commission must file a report with recommendations to the President and has the power to refer matters for prosecution or further investigation, where appropriate. Regulations published in February 2018 provide the Commission with wide investigative powers. The amended regulations specifically provided that a self-incriminating answer of a witness would not be admissible as evidence against such person in a criminal proceeding brought against that person, unless in the case of perjury.

Several high-profile figures gave evidence before the State Capture Commission in 2018. These included current Minister of Public

Enterprises, Mr Pravin Gordhan, Ms Barbara Hogan and Mr Mcebi Jonas. Mr Gordhan's testimony in November 2018 highlighted specific issues during his tenure as Minister of Finance where he found former President Zuma to have a particular "personal interest in transactional matters which were subject to due diligence, affordability and feasibility", such as the Nuclear, the PetroSA/Engen and Denel Asia deals. Mr Gordhan also held that in his opinion the capture of the Hawks (the Directorate for Priority Crimes) under General Ntsemeza was central to the State capture project. He suggested that the Commission should investigate the activities of the Energy Security Cabinet Sub-committee (ESCS) - chaired by Former President Zuma in 2014 - in progressing the Nuclear deal. In January 2019, former Chief Operating Officer of Bosasa Operations (Pty) Ltd, Mr Angelo Agrizzi, gave damning evidence on the extent of corruption of State tenders awarded to Bosasa during his tenure. At time of publication, the Commission was still hearing evidence. Witnesses still to be called include Eskom Board Chairperson, Mr Jabu Mabuza, and former Minister of Finance, Trevor Manuel.

The appointment of Mr Pravin Gordhan as Minister of Public Enterprises in February 2018 was followed by a strong commitment to clean up SOEs, in line with the President's SONA 2018 message. Swift changes were made, including the appointment of Interim Boards at troubled SOEs - Denel, Transnet, SA Express Airways - and the appointment of Mr Phakamani Hadebe as the Group Chief Executive of Eskom, following the appointment of a new Board at Eskom in January 2018. The Boards were given a specific mandate by the Minister to reinstall an ethical culture, to investigate any allegations of corruption and to recover any misappropriated funds.

There was also an announcement of lifestyle audits for Members of the Executive and civil servants, to strengthen the fight against corruption. According to media reports, in September 2018 the President announced the establishment of a task team to develop a sustainable model for such lifestyle audits. To date of publication there appear to be no further developments.

In December 2018, Cabinet announced the approval of a *National Guide for the Appointment of Persons to Boards of State and State-controlled Institutions* (National Guide for Appointments). The guidelines include qualifying principles for Board appointments and limit multiple memberships to Boards. They further require a disclosure of interest in the appointment process, and the term of office of non-executive members would also be limited. If implemented uniformly, with appropriate consequences, the proposed lifestyle audits and the National Guide for Appointments would enhance transparency and give effect to the constitutional values of public administration, as per section 195 of the Constitution.

However, the above action must be viewed against the backdrop of the Auditor-General's (AG) *2017-18 Consolidated General Report on National and Provincial Audit Outcomes*. The Report, released in November 2018, worryingly revealed that fruitless and wasteful expenditure has increased by over 200% from the previous year, to R2.5 billion. Critically, at national level, there was a regression in audit outcomes: the number of clean audits decreased to 23% of all audited outcomes, compared 30% in the previous financial year. The AG held that this was a recurring pattern in the last four years and was largely due to the disregarding

of audit recommendations made by his Office. Of the 16 SOEs audited by the AG, R1.9 billion in irregular expenditure was disclosed. The irregular expenditure of SOEs not audited (as their financial statements and audits were delayed at time of the AG's report), amounted to R28.4 billion. Eskom alone was responsible for R19.6 billion. Further, almost a third of State departments had legal claims against them, in excess of 10% of their following year's budget. The AG indicated that this is not budgeted for - this means that successful claims are directly paid from funds intended for service delivery.

These failures directly impact on the State's constitutional obligation to give effect to socio-economic rights, such as access to housing, education and healthcare. The AG also called for the urgent intervention in provincial departments of health and education. These departments, together with public works, received the poorest audit results. Considering these highly concerning findings, especially relating to health and education, the welfare of the most vulnerable in society is at stake.

There has been a serious drive to provide the AG with more teeth in light of this recurring pattern. In November 2018, following public participation, the *Public Audit Amendment Act 5 of 2018* (PAA Act), was signed into law. The PAA Act empowers the AG to refer suspected material irregularities arising from audits to the relevant body for further investigation. It further empowers the AG to take remedial action, despite concerns raised during public participation that recovery of losses by the AG impacts on the AG's constitutional mandate.

Revelations pertaining to the extent of corruption reached new heights in 2018 with the release investigative report into the looting of VBS Mutual Bank, titled *VBS Mutual Bank - The Great Bank Heist*. The report revealed that R1.84 billion was stolen by the Bank's directors, politicians and senior executives. It detailed how banking systems were manipulated to create fictitious deposits in favour of Vele Investments Ltd, the largest shareholder in the Bank, and how public officials were bribed to attract large deposits from municipalities and state entities. This was all done at the expense of the bank's depositors, who were mainly burial societies and stokvels. The report listed 53 natural and juristic persons who benefited directly and indirectly from the large-scale looting. Both criminal and civil proceedings were recommended.

Serious concerns have been raised about investigations into corruption and the lack of attempts to recover stolen money. This not only relates to investigation by the Hawks into State capture-related matters and the looting of VBS Bank, but also the investigation into the corporate scandal involving Steinhoff International Holdings NV (Steinhoff). At a feedback session in Parliament in August 2018, frustration was voiced at the slow pace at which the Hawks investigated State capture-related matters. The lack of financial investigators within the Hawks appear to be a critical hindrance in fulfilling its mandate. The Hawks indicated that they had to contract outside forensic firms to assist in such complex investigations.

Resources and skilled investigators and prosecutors are integral to fighting corruption. Worryingly, the *Annual Report National Director of Public Prosecutions (NDPP) 2017/2018* revealed the need for R153 million to fill 244 critical vacancies in 2018/19 alone.

However, an important turning point in restoring the credibility of the National Prosecuting Authority (NPA) was the appointment of a new NDPP, Advocate Shamila Batohi.

In August 2018, the Constitutional Court set aside the settlement agreement between former President Zuma and the former NDPP Advocate Nxasana, in terms of which his tenure as NDPP was terminated and he was offered R17.3 million. The Court held that the manner the offer came about seriously infringed the constitutional independence of the NDPP and the consequential appointment of Advocate Shaun Abrahams was therefore also invalid. The President was ordered to appoint a new NDPP within 90 days of the order.

The appointment of the NDPP is constitutionally within the sole prerogative of the President in terms of section 179(1)(a) of the Constitution. Since the establishment of the Office of the NPA, no former President has involved the public in this process. The appointment process has been a glaring hindrance in transparency and in the past there have been calls for constitutional amendments. Heeding this, President Ramaphosa appointed an advisory panel consisting of various experts - including representatives of the South African Human Rights Commission (SAHRC) and the AG - to assist him. The panel invited civil society and interested persons to nominate candidates. Following interviews, the panel recommended five candidates to the President, who made the final decision in terms of the Constitution. The interview process was open to the public and it gave effect to transparency and accountability. Advocate Batohi, on the announcement of her appointment, emphasised the importance of upholding the Rule of Law and reinstating the independence of the NPA. Strong governance and ethical leadership is critical to reinstate the independence of the NPA.

The President also suspended Deputy Director of Public Prosecutions, Advocate Jiba, and Advocate Mrwebi, the Special Director of Public Prosecutions in October 2018, following a decision to institute inquiries into their fitness to hold office. The pair is embroiled in controversy, among others, the manner they dealt with high-profile cases such as that of former crime intelligence head, Richard Mdluli. The Commission of Inquiry is headed by former Justice Yvonne Mokgoro, and at date of publication the Commission is still underway.

Another welcome development in reinstating credibility and accountability was the establishment of the commission of inquiry into tax administration and governance in SARS, in May 2018. The Commission was led by Judge Nugent and considered the turnabout events at SARS, spanning from 1 April 2014 to 31 March 2018. An interim report was released in September 2018, which urged the President to immediately remove the Commissioner of SARS, Mr Tom Moyane, in order to prevent further damage to SARS. The report emphasised overwhelming evidence pointing to Mr Moyane's reckless mismanagement of SARS and the ensuing culture of fear, distrust and suspicion. The President immediately acted on the recommendation. Mr Moyane then unsuccessfully challenged his removal via both the Constitutional Court and the North Gauteng High Court. The Constitutional Court dismissed the request for access and the North Gauteng High Court scathingly held that Mr Moyane's selfish interest cannot be weighed up against the national interest in stabilising SARS. The final report submitted by the Nugent Commission recommended measures to

enhance governance at SARS, such as a more transparent process for appointing the SARS Commissioner, which should include a vetting process by an a-political panel.

Finally, the President also appointed a commission of inquiry into the allegations of impropriety regarding the Public Investment Corporation (PIC) in October 2018. The PIC manages nearly R2 trillion in assets, mostly in relation to the government pension fund. Worryingly, there have been reports of improprieties related to investments and the conduct of its office-bearers in the last two years. The PIC Commission is led by Justice Lex Mpati, the former President of the SCA. Its mandate includes investigating whether any PIC Director or employee misused their position for personal gain, and whether discriminatory practices were followed relating to remuneration and performance awards. The Commission then has to make recommendations on governance structures to the President. At date of publication, the PIC Commission is still ongoing.

It is vital to restore credibility in the governance of State institutions and there have been positive steps taken in 2018. However, the extent of corruption reported, the overwhelming debt of SOEs and the slow pace of criminal investigations and attempts to recover stolen money, are major obstacles. This will ultimately impact the most vulnerable in society, as it directly influences the State's ability to realise socio-economic rights.

The expropriation without compensation debate

The expropriation without compensation debate and the question of whether the property clause in the Constitution should be amended was a major theme in 2018, as provided in more detail in the property section of this Report Card.

In SONA 2018, the President emphasised that expropriation without compensation should be undertaken in a manner that *"increases agricultural production, improves food security and ensures that the land is returned to those from whom it was taken under colonialism and apartheid."* It has to be emphasised that the amended ANC Motion adopted by Parliament in February 2018, was critically different to the initial EFF Motion, which called for expropriation without compensation to enable custodianship (i.e. nationalisation).

The public hearings into the review of section 25 of the Constitution saw the Joint Constitutional Review Committee (JCRC) receive an unprecedented number of written submissions (630609). Those who argued against a potential amendment highlighted that section 25 of the Constitution does not need to be amended to allow for land reform as the Constitution provides for "just and equitable" compensation, which seeks to facilitate a balance between competing interests. It was highlighted by many that the problem lies with lack of political will and an adequate legal framework to give effect to the land reform. Further, urgent attention needs to be given to the recommendations made in the Report by the High Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Changes (High Level Panel Report). The drive for expropriation without compensation also has to be viewed against the consistent lack of funds available to facilitate land reform, as well as the lack of reliable data on land

audits, in specific the extent of agricultural land in South Africa and how much State-owned land can be used for land reform.

The report adopted by the JCRC recommending that section 25 of the Constitution be amended to make “explicit that which is implicit in the Constitution” with regards to expropriation without compensation, was tainted with controversy relating to the use of an external service provider who summarised the findings of the written submissions. The exact wording of the proposed Bill amending section 25 of the Constitution is yet to be seen. It is highly unlikely that this technical task will be completed before the 2019 general elections. In light of these major developments in 2018, property rights are in a precarious position.

The drive for national health insurance

Another major development in 2018 was the vigour with which the draft *National Health Insurance Bill, 2018* (NHI Bill) - the governing party’s solution to universal health coverage - was introduced in June 2018. The NHI Bill provides for the establishment of a single health financing system, the NHI Fund, which would be the single purchaser and financier of the population’s personal health services. All South African citizens, permanent citizens and their dependants will be obliged to register as NHI Fund beneficiaries at accredited public/private health care establishments to qualify

for free “quality health service benefits”.

The proposed NHI Fund is fundamentally flawed, as it fails to provide any detail about costing, NHI implementation plans or healthcare benefits to be provided. This information is essential in order to evaluate the feasibility of this ambitious proposal. A March 2017 report by the Davis Tax Committee estimated that a R256 billion per annum funding increase was needed (assuming a 3.5% GDP growth) and that there would be a R72 billion shortfall by 2025. The Davis Tax Committee emphasised that it would be unsustainable in the current economic climate. However, despite these clear warning signals, the proposal is still being enthusiastically pursued.

The dire state of provincial healthcare facilities as recorded in this report and the critical vacancies of staff in these facilities, require an urgent intervention by the State. The status of the right to access to healthcare and the wellbeing of the most vulnerable in society hangs on a thread.

Other Considerations

In general, the fulfilment of rights by the State must also be viewed against the extreme disparity in economic wealth and high unemployment rate in South Africa. Shocking statistics indicate that



65% of children in South Africa, for instance, live below the “upper bound” poverty line (with a per capita income below R1 138).

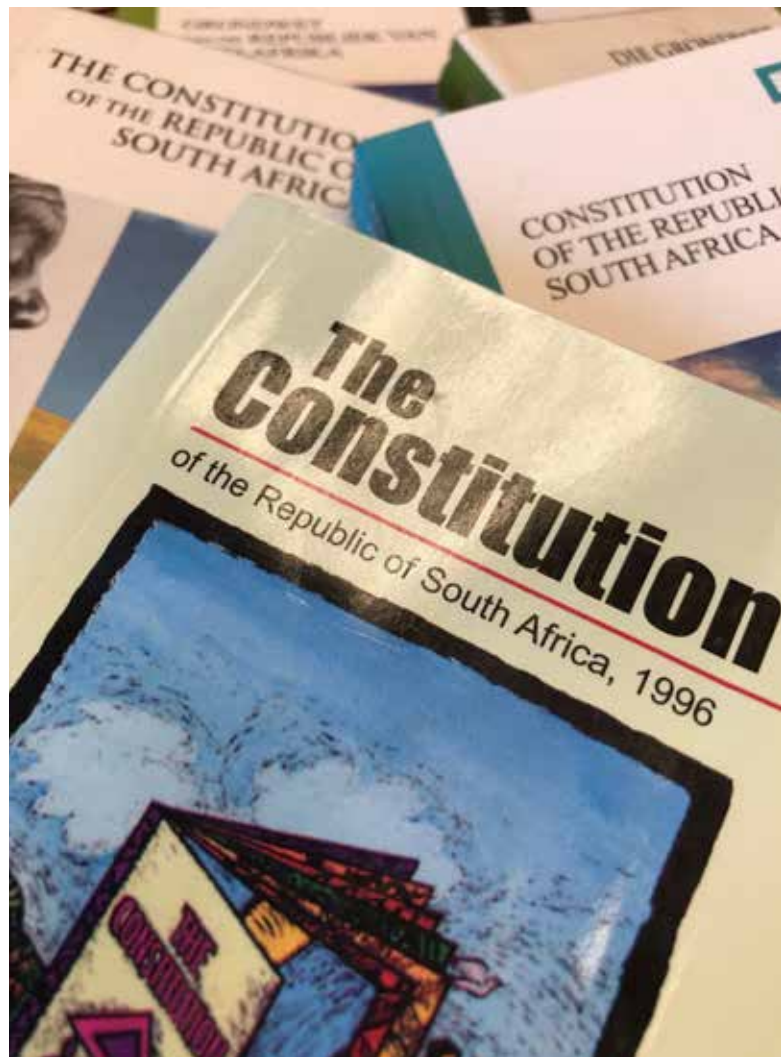
Much more needs to be done to address these socio-economic disparities and the focus should be on addressing these forms of inequality. The findings by the SAHRC in their *Equality Report 2017/18* also held that the *Employment Equity Act 55 of 1998* (EE Act) should be amended to target specific groups on the basis of need, taking into account social and economic indicators. The State’s attempt to amend the EE Act to introduce sectoral numerical targets of people from “designated groups” within all occupation levels is a far cry from this urgent nuanced approach needed to address inequality in South Africa.

The question of education in the language of one’s choice in terms of section 29(2) of the Constitution still remains a contentious issue - both in the basic education sector and at tertiary education institutions. The upcoming hearing of the review of Stellenbosch University Language Policy by the Constitutional Court in 2019 in the matter of *Gelyke Kanse and Others v the Chairman of the Senate of Stellenbosch University and Others* will provide an important constitutional analysis of this right and the State’s duty to promote multi-lingualism.

Finally, the right to freedom of expression, which is vital for political and social debate in a democracy was well-exercised by a strong independent media. However, proposals such as the *Prevention and Combatting of Hate Crimes and Hate Speech Bill* [B9-2018], which provides for the statutory criminal offence of hate speech, pose a potential serious threat to the right to freedom of expression and require close monitoring in 2019.

Key Drivers

- Exorbitant fruitless and wasteful expenditure by State departments and SOEs, highlighted by the AG, are a critical hindrance in ensuring the most vulnerable in society have access to housing, education and health.
- Attempts to restore credibility of State institutions and SOEs and the various commissions of inquiry established to investigate maladministration and corruption are a positive trend in 2018. However, the slow pace of criminal proceedings, which appear to be directly related to lack of resources and skills, is highly concerning. The extent of corruption reported directly impacts on the State’s duty to promote and protect rights in the Bill of Rights.
- Uncertainty regarding proposed amendments to the property clause in the Constitution to provide for expropriation without compensation creates tension and arguably stifles investment confidence in South Africa pending legal certainty. This proposal adds to policy uncertainty impacting on property rights, as detailed further in the Report Card.
- The dire state of provincial departments of healthcare and education as detailed by the AG’s report is highly concerning and will contribute to further inequality in South Africa. The proposed NHI Fund does not address these urgent issues and is fundamentally flawed.
- The State’s attempts to amend the EE Act to provide for sectoral numerical targets of people from “designated groups” in all occupational levels indicates the failure to acknowledge true inequality indicators that urgently need to be addressed.



Future Trends

The outcomes of the various commissions of inquiry in 2019 and the President’s action in this instance will be a key driver. With the new NDPP, there is confidence that the credibility of the NPA will be restored but realistically, this will take time. A critical factor to monitor in 2019 would be the NPA’s commitment to prosecute State capture-related matters and those involved with the looting of VBS Bank. It is important for the public to regain confidence in the criminal justice system - not only relating to corruption in the public sector but also in the private sector.

Another key driver to monitor in 2019 would be extent the State departments and SOEs comply with the AG’s Report and strengthen their governance loopholes. This will be a direct measure of the State’s intention to adhere to accountability and transparency.

The wording of the proposed amendment to section 25 of the Constitution, which is currently being drafted by an *ad hoc* committee of Parliament, is a major upcoming development. It will impact the extent the property clause is at risk and could result in possible court challenges.

Overall, the State’s attempt to address the slow pace of economic growth and high rate of unemployment in South Africa would also be a major driver, as there is urgent need to address the ever-expanding gap in economic wealth. Lastly, the upcoming 2019 general election is a major event and should be closely monitored.



Equality

(section 9)



2018 Grade E =

2019 Grade E =

Equality continues to be contentious in a society characterised by severe poverty and inequality. South Africa remains the world's most unequal society, according to the World Bank. The constitutional value of equality is a difficult concept to grasp. It is important to distinguish between formal and substantive equality. Formal equality requires the law to treat everyone in the same situation similarly, whereas substantive equality recognises that to achieve an equal society, the actual social and economic circumstances of an individual must be considered. The equality provision in the Constitution includes both, and the implementation of the latter at times creates tension, for example, in the way that employment equity measures are implemented. Discrimination by private individuals remains a real threat to equality, as is evidenced by the marked increase in matters of racial discrimination that find themselves before the Equality Court. For the period under review, the grading for this right remains the same (E =), which indicates a very poor State fulfilment of the right, specifically in relation to substantive equality. This poor fulfilment is evidenced by high rates of socio-economic inequality and this is where the State's focus in terms of legislation and policy should lie.

Freedom from Unfair Discrimination

The Constitution explicitly proscribes unfair discrimination on a number of grounds, including race, religion and gender. The obligation to refrain from unfairly discriminating lies not only with the State, but also with private individuals.

REPORTS:

- According to the Human Rights Watch *World Report 2019*, xenophobic violence on foreign nationals in the country has resulted in virtually no convictions, and authorities have seemed reluctant to even publicly acknowledge xenophobia. There has been no decisive action to combat it, including ensuring proper South African Police Service (SAPS) investigations. In addition, the State has yet to provide a mechanism for justice and accountability for xenophobic crimes.

JUDGMENTS:

- In May 2018, the Constitutional Court in *Rustenburg Platinum Mine v SAEWA obo Bester and Others*, held that the



use of the words “swart man” in reference to a co-employee, were derogatory and racist in the context used, and justified the sanction of dismissal. The Court found that both parties accepted that the use of the words is not racist *per se*, but importantly that the context would dictate whether they were derogatory and racist. The Court importantly held that the employee's defence was never that the term “swart man” was not used in a derogatory manner but rather that he did not use this term at all. On the evidence of several witnesses the use of the words was confirmed, and the Court held that the Labour Appeal Court's finding was therefore not based on the correct evidence before it.

- In August 2018, the Western Cape High Court in *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham N.O. and Others, Esau v Esau and Others*, declared that the State is obliged in terms of section 7(2) of the Constitution, to enact legislation to recognise and regulate marriages solemnised in terms of Islamic tenants (Muslim marriages). The crux of the matter was that the non-recognition and non-regulation of Muslim marriages violated the rights of women and children, especially the rights to equality, dignity, access to Courts and the best interests of the child. The failure to provide legal recognition was in direct conflict with section 9(3) of the Constitution on the basis that Muslim women, who are historically a vulnerable group, were being unfairly discriminated against on the basis of religion, marital status, gender and sex. The Court emphasised that one should not compare the situation of Muslim women to women married in terms of other religious rites, as it loses sight of the historical systemic violation of the rights of Muslim women, evidenced by various court cases. The Court highlighted that despite piecemeal litigation, which attempted to provide more legal protection to women on dissolution of Muslim marriages, they still find themselves in a vulnerable position, and it would be a reasonable measure of the State to enact legislation to provide legal certainty in this context. The President, Cabinet

and Parliament were given 24 months to rectify this situation. However, in October 2018, the State indicated that they would be appealing the judgment.

LEGISLATION/PROPOSED LEGISLATION

AND STATE INITIATIVES:

- The draft *National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (2016 - 2021)* was published for public comment in 2016. In October 2018, following a workshop on the draft NAP, a final revised NAP was to be tabled to stakeholders following which, it would have been sent to the Cabinet for final approval. The NAP's aim is to provide a comprehensive policy framework to address racism, racial discrimination, xenophobia and related intolerance in the public and private domain.

GENERAL:

- The *South African Human Rights Commission (SAHRC) Annual Report 2018* says that the highest number of complaints received by the SAHRC in the 2017/18 financial year related to infringements of the right to equality. The Commission said the majority of complaints related to alleged discrimination on the basis of race, disability, and ethnic or social origin.

Gender Equality

Women and girls continue to be victims of gender-based violence, which is at times, fatal. Unacceptably high rates of femicide colour the experience of women in South Africa. This is despite the existence of comprehensive and progressive laws and policy to counter threats to the safety, security and livelihoods of women and members of the Lesbian, Gay, Bisexual, Transgender, Queer/Questioning and Intersex (LGBTQI+) community, against whom the true rates of violence are unknown due to poor reporting, and the absence of a guarantee of safety thereafter. Further, although there is a strong legislative framework that seeks to empower women in the workplace, it still appears that women are overlooked at the top management level, particularly in the private sector.

REPORTS:

- South Africa maintained its position at 19/144 globally on the *Global Gender Gap Index 2018* of the World Economic Forum's (WEF) *Global Gender Gap Report 2018*. The country came in 3/33 in sub-Saharan Africa. South Africa was ranked first (together with 33 other countries) globally in health and 17th in political empowerment, up one position from 2017. It remained in the bottom half when ranked for education and economic opportunities.

- According to the *Department of Women (DoW) Annual Report 2017/18*, the Department received R206.1 million for the 2017/18 financial year, including R78.3 million earmarked for the Commission for Gender Equality (CGE). In comparison, in the 2016/17 financial year, the Department received R196.9 million.

- According to the Human Rights Watch *World Report 2019*, violence against women, including rape and domestic violence, remains widespread and underreported in South Africa. Further research findings, published in August 2017 by the Centre for the Study of Violence and Reconciliation

(CSVR) and Oxfam South Africa, show that one in five women older than 18 has experienced physical violence, and three women die at the hands of their partner every day.

- According to the International Parliamentary Union (IPU), as at 1 November 2018, South Africa ranked 10/193 countries for participation of women in Parliament, down from 9th in the previous period. South Africa has 42.7% women in Parliament, compared to the global average of 24%.

- According to the *Commission for Employment Equity (CEE) Annual Report 2017 - 2018*, the national Economically Active Participation (EAP) of women is measured at 45.3%. This is used as the guideline to assist employers determine the degree of representation of women in their organisations. The national EAP for males is 44.7%. The Report states that at top management level, men occupy 77.1% of the positions, while women are at only 22.9%, compared to the respective EAPS. At senior management level, men are better represented than women, at 66.2% and 33.8%, respectively. This is a miniscule improvement from the 2016/17 period, where men were 66.7% represented and women were at 33.3%.

JUDGMENTS:

- In October 2018, the Constitutional Court in *Holomisa v Holomisa and Another*, declared section 7(3) of the *Divorce Act 70 of 1979* constitutionally invalid. It unfairly excluded women married out of community of property in terms of the *Transkei Marriage Act 21 of 1978* from protection under the *Divorce Act*. The Court emphasised that there was no rational reason - in terms of section 9(1) of the Constitution - why a distinction was drawn between women married out of community of property living in the Transkei and those in the same position living in the rest of South Africa. The matter raised more procedural questions on direct access to the Constitutional Court and spoke to the "tangled nest of post-apartheid legislation", which, despite being well intended, failed to protect all South Africans.

LEGISLATION/PROPOSED LEGISLATION:

- In April 2018, public comments were sought for the *Recognition of Customary Marriages Amendment Bill, 2018*. The Bill was published in response to the Constitutional Court's findings in November 2017, in *Ramuhovhi and Others v President of the Republic of South Africa and Others*. The *Recognition of Customary Marriages Act 120 of 1998* (RCMA) was declared unconstitutional, as it unfairly discriminated against women in polygamous marriages entered into before the commencement of the RCMA on the basis of gender, race and ethnic or social origin. The Court gave Parliament 24 months to correct the defect. To date, there has been no further development regarding the Bill.

GENERAL:

- In September 2018, the University of Cape Town (UCT) launched a new policy to end discrimination based on sexual orientation via the launch of the *UCT Inclusivity Policy for Sexual Orientation*. This Policy contains the minimum standards and guidelines in relation to the diversity and fluidity of sexual orientation.

- In October 2018, after a lengthy battle, the Southern Synod

of the Uniting Reformed Church in Southern Africa (URCSA) announced that it will now permit marriage between members of the LGBTQI+ community and the ordainment of any such members to the ministry, should they so wish.

- Discrimination against members of the LGBTQI+ community is prolific, although underreported. The discrimination affects people of all ages and in some cases, is institutionalised in public spaces such as schools. For example, in October 2018, media reports exposed an infringement of the dignity and equality of LGBTQI+ learners in the Eastern Cape. The provincial Education Department allegedly instructed principals to compile a database of all of concerned learners. The information was to be used in a non-discrimination programme. Unfortunately, due to the nature of discrimination, such databases could very well result in the abuse of such individuals.

- Violence against the LGBTQI+ community has continued at a concerning rate, with consistent reports of homophobic attacks reported in the media. The attacks against members of the LGBTQI+ community range from slurs, physical abuse (such as corrective rape and assault), to fatal attacks.

- South Africa's first *Workplace Equality Index* (SAWEI), measuring all levels of LGBTQI+ equality and diversity in the workplace, was launched in May 2018 by the South African LGBT+ Management Forum. The SAWEI is a short survey seeking to benchmark and recognise the employers that are most inclusive towards lesbian, gay, bisexual and transgender employees in South Africa.

Equality Before the Law

Although there is a constitutional guarantee of equality before the law, laws and policies that appear to be neutral in application do not necessarily translate to neutral application in practice. There is a need for the consistent review of legislation to ensure alignment with modern legal developments, so as to adequately protect those most vulnerable in our society.

JUDGMENTS:

- In June 2018, the Constitutional Court in *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others*, confirmed the South Gauteng High Court decision declaring section 18 of the *Criminal Procedure Act* 51 of 1977 (CPA) to be unconstitutional and invalid. This section provided that the right to institute a prosecution for all sexual offences other than rape or compelled rape is limited to a period of 20 years from the time the offence was committed. It was argued that there was no rational basis for distinguishing rape or compelled rape from other forms of sexual offences, considering that the harm they cause is the same. The Court found that this section was out of touch with developments regarding the application of prescription in relation to sexual offences.

- In October 2018, the Constitutional Court delivered a judgment in the matter of *Rahube v Rahube and Others*, which concerned an application for confirmation of an order of constitutional invalidity made by the Pretoria High Court. The court order declared section 2(1) of the *Upgrading of Land Tenure Rights Act* 112 of 1991 (Upgrading Act) unconstitutional and invalid insofar as it automatically converts land tenure rights into rights of ownership of property, without



providing other occupants or affected parties an opportunity to make submissions. Ms Rahube submitted that section 2(1) of the Upgrading Act was constitutionally invalid because it violated her constitutional rights of equality, property and just administrative action. She submitted that the Upgrading Act failed to protect women because it upgraded the Certificates and Deeds of Grant, which were only issued to men during apartheid. This amounted to discrimination on the basis of gender. She argued that the Upgrading Act violated her right to property because it deprived those with a legitimate claim to the property but with no Certificate or Deed of Grant from exercising their property rights.

Equality of Outcomes | Employment Equity

Section 9(2) of the Constitution gives effect to substantive equality and provides that measures may be taken to advance persons or categories of persons disadvantaged by unfair discrimination. The practical application of this provision often creates tension, particularly due to its implementation.

REPORTS:

- According to the *CEE Annual Report 2017 - 2018*, persons with disabilities are extremely under-represented in the workplace, making up only 1.3% of the workforce at top management level, and 1.3% at the professionally-qualified level. The same Report from 2016/17 stated that persons with disabilities made up 1.1% of the workforce at top management level and 1.3% at the professionally-qualified level. The Report states that in 2001, designated employers reported that only 1% of their total employees were persons with disabilities across all occupational levels of their organisations, compared to 1.3% in 2017. This is an insignificant increase, considering the lapsed period. It must be noted that the Statistics South Africa (Stats SA) EAP figure, which is used as the benchmark for analysis of the degree of under-representation of people from designated groups, remains unavailable for persons with disabilities. Therefore, it remains difficult to measure compliance regarding the percentage of persons with disabilities in the workforce.
- According to the above Report, 67.7% of top management workforce (in both private and government sector overall) was white, compared to 58.1% in 2016/17. 14.3% was African, compared to 22.1% in 2016/17; 9.4% was Indian, compared to 10%; 5.1% was coloured, compared to 7.7%; and 3.4% was foreign, when compared to 1.4% in 2016/17. However, the same Report notes that if one compares these statistics to those of 2001, the white population at top management level has decreased by 20%, whilst at senior management level, it has decreased by 24.9%. There seems to be a positive trend towards equitable representation in the private sector at the professionally-qualified level. The African population represents 42.2%, while the white population was at 36.5%.
- The World Bank tracks the GINI coefficient, a measure of inequality in a society, with 0 being an equal society and 1 being an extremely unequal society. South Africa has remained a consistently unequal society. According to the World Bank's *South Africa Economic Update*, published in 2018, which focused on jobs and inequality, South Africa's GINI coefficient in 2015 (most recently available data) was

0.63 - the highest globally. The report also states that inequality in the country has worsened since 1994, despite a decline in poverty.

- The BEE.economics survey by 27four Investment Managers (Transformation in South African Asset Management), which measures transformation (with reference to access, diversity and gender) in the asset management sector, says that of the R5 trillion industry assets, only R490.3 billion - or 10% - are managed by black firms. Women make up 49% of 563 employees employed in the industry, according to the survey. 18% of all portfolio managers are women.
- According to the SAHRC's 2017/18 *Equality Report*, Government has been harshly criticised for its failure to address inequality and poverty. The VAT increase that came into effect on 1 April 2018 was highlighted as a threat to the human rights of the poor. The Report states that poverty in South Africa has increased over the years, but income and wealth inequality remain amongst the highest in the world. The SAHRC found that government's programme of radical socio-economic transformation is necessary and should focus on addressing the extreme concentration of income and wealth in the top deciles of society. Tailored policies should aim to address economic inequality. The Report also recommends that the *Employment Equity Act 55 of 1998 (EEA)* should be amended to target specific groups on the basis of need, taking into account social and economic indicators. The Report also requires certain State departments to report back on these recommendations within a specific timeframe. At date of publication there was no clear feedback from the State departments.
- In February 2018, the Institute for Justice and Reconciliation (IJR) released a paper on the evidence relating to their report, titled *Social cohesion among South Africans, and between South Africans and foreigners: Evidence from the South African Reconciliation Barometer Survey 2017*. The paper indicated that 46% of South Africans felt that inequality (with reference to the margin between rich and poor) has worsened since 1994. It also highlights that inequality is not only experienced in economic outcomes but also in relation to opportunities, power relations and access to certain resources.

JUDGMENTS:

- In July 2018, the Constitutional Court in *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others*, found a policy adopted by the Minister regulating the Master's powers to appoint trustees under the *Insolvency Act 24 of 1936*, to be irrational. The Court found that although the policy attempted to target persons who were disadvantaged by unfair discrimination for transformation purposes, it did not appear from the evidence that the policy was likely to transform the industry.

LEGISLATION/PROPOSED LEGISLATION:

- In September 2018, the Department of Labour (DoL) published the *Employment Equity Amendment Bill, 2018* for public comment. The Bill proposes to amend the EEA to provide the Minister of Labour with the power to establish sectoral numerical targets for the purpose of "ensuring

equitable representation” of “suitably qualified people” from “designated groups” (black South Africans, women and persons with disabilities) at all occupational levels in the workforce. The Bill also implements section 53 of the Act, relating to conditions that have to be met regarding “equitable representation” concerning State contracts. The Bill appears to be largely in response to annual reports by the CEE on the lack of “equitable representation” of certain “designated groups”, especially at the middle-to-upper levels in the private sector. The proposal of sectoral numerical targets, however, will not necessarily give effect to substantive equality, as is urgently needed. It does not address deeper disadvantage caused by social and economic factors and is not the nuanced approach needed to address inequality in South Africa. There are also fears that this proposal codifies targets that essentially become quotas, which is a concept outlawed by the EEA and is unconstitutional.

- In September 2018, the Minister of Mineral Resources published the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2018* (2018 Mining Charter). The 2018 Mining Charter intends to transform the Mining and Minerals Industry in terms of ownership and mineral beneficiation. It also seeks to give effect to the *Mineral and Petroleum Resources Development Act 28 of 2002* (MPRDA), which calls for transformation in the sector. The 2018 Mining Charter followed a long engagement process with industry stakeholders after the Chamber of

Mines SA (now the Mineral Council of SA) brought an urgent interdict to prevent the implementation of the 2017 Mining Charter, pending its review. The parties agreed to postpone the judicial review and to set aside the 2017 Mining Charter after intervention by the President. The 2018 Mining Charter provides that a mining holder must increase its Black Economic Empowerment (BEE) Shareholding from the minimum of 26% to 30% once, or progressively within a five-year transitional period. The 2018 Mining Charter’s effective date is 27 September 2018 and the Charter provides for various transitional arrangements for compliance with its targets.

- Following consistent calls for swift transformation for both women and black legal practitioners across the country, the *Legal Practice Amendment Act 16 of 2017* was passed in January 2018. It establishes the South African Legal Practice Council (LPC), which governs all legal practitioners with the aim of transforming the legal profession. In October 2018, regulations were published to manage the election of legal practitioners for the LPC, and concerns were raised about the composition of the LPC. The regulations require the LPC to consist of the four black women attorneys, three black male attorneys, one white woman attorney and two white male attorneys - each with the highest number of votes in their respective categories. Regarding the six advocates on the LPC, two must be black women, two black male, one white woman and one white male - each with the highest number of votes in their respective categories.





Human Dignity

(section 10)



2018 Grade C =

2019 Grade C -

Human dignity is a core right upon which the enjoyment of all other rights in the Bill of Rights is dependant. Human dignity must be upheld by both private persons in their interactions, as well as by the State. It is an intersectional and correlative right. It is difficult to see how people can enjoy human dignity to the full in light of the extent of poverty, the high crime rate, high unemployment rate and the lack of access to essential services, as is evident throughout the Report. One significant failure by the State to uphold this right was the manner in which the State treated mental healthcare patients in the Life Esidimeni saga, which was arbitrated in 2018. Considering these factors, the State's fulfilment of this right has deteriorated, as is indicated in a C - grading.

REPORTS:

- According to the South African Social Security Agency (SASSA) Annual Report 2017/18, the provision of social grants to the indigent has been the most effective means of poverty alleviation for millions of beneficiaries, with 17.5 million grants being paid monthly. This took place despite the obstacles presented by the relationship between SASSA and

Cash Paymaster Services (CPS), as well as the failure to meet the court-ordered deadlines for the transfer of payment services. Further, from April 2006 to March 2018, the total number of social grants increased from 12 015 059 to 17 509 995. The growth of social grants over this period amounted to 46%.

- According to the SASSA Annual Report 2017/18, at the end of March 2018, the grants in payment increased by 1.8% from the previous period. The Child Support Grant recipient figures remained the highest, with more than 12.5 million grants, followed by the Old Age Grant at just over 3.3 million.

ARBITRATION AWARDS:

- In March 2018, the former Deputy Chief Justice (DCJ) Dikgang Moseneke handed down the arbitration award in the Life Esidimeni arbitration proceedings. These related to the death of 144 mental healthcare users, and the exposure of 1 418 mental healthcare users to trauma. The core issue to be determined was the nature and extent of equitable redress and included compensation to the mental healthcare users and their families. Former DCJ Moseneke held that the claimants could never be barred from relying on the Constitution where a legal remedy is unavailable for such rights violations under common law. Further, there had been a pervasive reckless violation of constitutional rights, including the right to dignity; the right not to be tortured and not to be treated in a cruel, inhuman or degrading way. The State was ordered, in addition to common law damages, to pay R1 million compensation for constitutional damages to each of the claimants.





Life

(section 11)



2018 Grade E =

2019 Grade E =

The right to life is an unqualified right, inextricably tied to the right to dignity. The right to life has both a positive and negative obligation. The positive obligation requires the State to put in place active measures to protect everyone from any threats to their life. The negative obligation requires the State and persons to refrain from any conduct that threatens a person's life. Although there are strong legislative and policy frameworks, these do not translate into the everyday lives of people in South Africa. For the period under review, the infant mortality rate has decreased, possibly as a result of more effective State initiatives, as well as improvement in the mother-to-child HIV transmission rate. However, these positives are overshadowed by the high murder rates reported by SAPS. Therefore, State initiatives to protect the right to life remain ineffective, resulting in a very poor grade (E =).

REPORTS:

- According to the Stats SA *Mid-year Population Estimates 2018*, life expectancy at birth for 2018 is estimated at 61.1 years for males and 67.3 years for females, compared to 61.2 and 66.7 respectively in 2017.
- The 2018 infant mortality rate (IMR) for South Africa is estimated at 36.4 per 1 000 live births compared to 32.8 per 1 000 live births in 2017, according to the Stats SA *Mid-year Population Estimates 2018*.
- In January 2018 it was reported that the lives of patients with kidney problems were at risk at Charlotte Maxeke Academic Hospital in Johannesburg, as a result of a shortage of purified water for dialysis machines.

REPORTS [HIV/AIDS]:

- According to the Stats SA *Mid-year Population Estimates 2018*, the estimated overall human immunodeficiency virus (HIV) prevalence rate is approximately 13.1% among the South African population, which represents an increase from the 2017 figure of 12.9%. The total number of people living with HIV was estimated at approximately 7.52 million in 2018. For adults aged 15 to 49 years, an estimated 19% of the population is HIV-positive.
- According to AVERT, a global HIV and AIDS monitoring charity, in 2017 there were 110 000 AIDS-related deaths in South Africa. There were also 270 000 new HIV infections.
- Approximately one-fifth of South African women in their



reproductive years (ages 15 to 49) are HIV-positive. HIV prevalence among the youth aged 15 to 24 has declined over time, from 6.7% in 2002, to 5.5% in 2018.

- According to the *Department of Health (DoH) 2017/18 Annual Report*, a study by the Medical Research Council (MRC) on South Africa's Prevention of Mother-to-Child Transmission (PMTCT) Programme has saved approximately 80 000 to 85 000 newborn babies from early HIV infection per year, since 2010.

REPORTS [CRIME]:

- According to the *SAPS Annual Report 2017/2018*, the police recorded a total of 20 336 murders, up from 19 016 in 2016/17, a 6.9% increase.
- According to the *SAPS Crime Situation in RSA Twelve Months 01 April 2017 to 31 March 2018 (2017/18 Crime Stats)*, an average of 57 people were killed in South Africa every day - 400 per week; 1 760 per month; and 20 500 murdered per year. Nyanga continues to lead in murder cases, with 308 murders reported in the area - up from 281 in the financial year before. SAPS admitted that they released skewed crime rates initially - but that the error did not affect the number of crimes recorded. However, it did make the increase in the crime rates look smaller (crime rates are reflected as the number of crimes per 100 000 citizens over a given period).
- According to the 2017/18 Crime Stats, 85 police officers were murdered (both while on and off duty). This is two more officers than the 83 during 2016/17.
- According to the 2017/18 Crime Stats, taxi-related violence contributed more than 200 killings to the national murder rate. Out of 237 taxi-related murders, Gauteng was the highest contributor with 110, followed by the Western Cape with 45 and the Eastern Cape with 39.
- The same report stated that farm murders contributed 62 murders. The highest contributing province was Gauteng with 12, followed by North West and Limpopo with nine each.



Freedom and Security of the Person

(section 12)

2018 Grade D =

2019 Grade D =

This right seeks to protect individuals - including children and other vulnerable persons - in our society from all sources of violence, be it from the State or from other private actors. The high crime statistics in our country reflect the lack of institutional capacity, as well as the political will to ensure the safety of all people in South Africa. The right has a second component, which guarantees psychological and bodily integrity (including reproductive autonomy). Considering the reports of an increase in sexual offences and crimes against women, an apparent inadequate effort on the part of the State in protecting this right is highlighted. This is compounded by unacceptably high rates of violence by police actors, earning the State a consistently poor grading in this respect, of D =.

REPORTS:

- The *Department of Justice and Constitutional Development (DoJ&CD) Annual Report 2017 - 2018* announced a conviction rate of 72.7%.
- The same Report states that the roll-out of Sexual Offences Courts continued in the year under review, with an additional 17 courtrooms being adapted in line with the sexual offences model. This has brought the total number of courtrooms adapted to 75, an increase from 58 in the previous period.
- According to the *SAPS Annual Report 2017/2018*, 785 persons escaped from police custody in 2017/18, compared to the 905 in 2016/17.
- In 2017/18, 50 680 sexual offences were recorded by SAPS, up from 50 253 in 2016/17. However, the Institute for Security Studies (ISS) maintains these figures cannot be taken as an accurate measure of the extent or trend of the offences. This is largely due to underreporting by the victims of sexual offences.
- According to the *SAPS Annual Report 2017/2018*, 40 035 cases of rape were reported, an increase of 8.2% from the previous period, where 39 828 cases were reported.
- *Out of the shadows: Shining light on the response to child sexual abuse and exploitation* is a 40-country benchmarking index, which examines how countries are responding to the threat of sexual violence against children. The index places South Africa at number 15 out of 40 countries, with a score of 56.1 (where 100 is the best environment for children, considering among others, the legal framework, environment and government commitment and capacity).



South Africa has a comprehensive system of training and guidance for frontline support workers who respond to cases of sexual violence against children. The Department of Basic Education (DBE) issues guidelines for teaching professionals, and there are similar programmes for medical, social and psychiatric workers. The country provides protections against the procurement of minors for sexual services and the visual depiction of minors engaging in sexual activities, having signed into law the *Prevention and Combating of Trafficking in Persons Act 7* of 2013.

- According to the 2017/18 Crime Stats, there were 22 261 incidents of house robbery recorded. The robbery with aggravating circumstances rate decreased from 251 in 2016/17, to 243 in 2017/18.
- According to the 2017/18 Crime Stats, 973 gang-related crimes were committed countrywide. Of these, an overwhelming 808 took place in the Western Cape, with the Eastern Cape coming in at second place with 87. They are followed by the Free State with 46, and Gauteng with 14.
- The *Stats SA Crime against Women in South Africa* report has revealed that almost as many men and women believe it was acceptable to hit a woman. The report - released in July 2018 - showed that 3.3% of men and 2.3% of women found it was acceptable for a man to hit a woman.
- The *Independent Police Investigative Directorate (IPID) Annual Report 2017/18* states that a total of 5 651 cases were reported to the IPID during the period under review, down from 7 014 in the previous period.
- According to the Report, investigations led to 234 disciplinary convictions and 99 criminal convictions for misconduct by members of the SAPS.
- The *IPID Annual Report 2017/18* states that during the reporting period members of the SAPS and Municipal Police Service (MPS) were responsible for:
 - 201 deaths in police custody;

- 436 deaths as a result of police action;
- 677 complaints of the discharge of an official firearm;
- 105 rapes by a police officer (102 by SAPS, three by MPS);
- nine rapes in police custody;
- 217 cases of torture (216 by SAPS, one by MPS);
- 3 661 cases of assault; and
- 124 cases of corruption (121 by SAPS, three by MPS).

• The same Report states the IPID investigated 5 524 cases that involved SAPS members and 118 cases involving the MPS on various criminal offences. The remaining nine cases involved civilians.

• In addition, the same Report provides that in terms of deaths as a result of police action, deaths in police custody contributed to 32% of cases reported against members of the SAPS and MPS, down from 43% in the previous period, while deaths as a result of police brutality contributed to 68%, up from 57% in the previous period.

• According to the *Annual Report National Director Public Prosecutions (NDPP) 2017/2018*, high conviction rates were maintained, and improved on, in all court forums. All courts managed to obtain 317 475 convictions with a 94.7% conviction rate. High Courts maintained a 91.7% rate, with 890 convictions. The regional courts maintained a rate of 81%, with 24 976 convictions, and the district courts achieved a conviction rate of 96.1%, with 291 609 convictions. The conviction rate in sexual offences improved to 72.8%.

• According to the 2017/18 Crime Stats, 2.1 million serious crimes were reported in the period. This is a decrease from the 2.2 million in the previous period.

- Between April 2017 and March 2018, there were 50 108 reported cases of sexual offences, an increase from 49 660 in the previous year. This marks a 0.9% increase.
- There were 43 540 reported crimes against children between April 2017 and March 2018, compared to 44 252 in the previous period.
- There were 177 620 reported crimes against women in 2017/18. This is a 2.4% increase, from 173 405 in the previous period.

JUDGMENTS:

• In December 2018, the Equality Court in *Social Justice Coalition and Others v Minister of Police and Others*, found that the system of allocation of police resources to poor black and coloured areas, particularly in the Western Cape and KwaZulu-Natal, was unfairly discriminatory. The system used reported crime statistics to allocate resources, ignoring a plethora of other socio-economic factors, which resulted in the over-allocation of police resources to affluent areas with a lower crime rate, to the detriment of poorer areas in need. The system was found to discriminate unfairly against poor black and coloured areas based on race and poverty.

LEGISLATION/PROPOSED LEGISLATION:

• The *Choice on Termination of Pregnancy Amendment Bill* [B34-2017], a Private Member's Bill introduced by the African Christian Democratic Party (ACDP) in December 2017 was

rejected by the National Assembly in September 2018. The Bill proposed to amend the *Choice on Termination of Pregnancy Act* 92 of 1996, to delete certain circumstances in which a pregnancy may be terminated, for instance where there is "a risk or injury to the foetus" after 20 weeks of gestation. Furthermore, the Bill proposed that both a social worker and a medical practitioner must be of the view that the pregnancy would affect the social circumstances of the woman significantly when the pregnancy is being terminated. With the proposed amendments the right of a woman to bodily and psychological integrity in terms of section 12(2) of the Constitution came into play and the Bill was rejected on the basis that it was not practical and would place a huge financial burden on the DoH.

• The *Customary Initiation Bill* [B7-2018] was introduced in Parliament in April 2018 to provide for the effective regulation of customary initiation practices. Despite this, at least 34 young men were reported as dead after the close of the 2018 initiation season in the Eastern Cape, Western Cape and the North West. At least 14 initiates died in July during the winter initiation season. As far as could be determined, no prosecutions took place in any of the cases.

GENERAL:

• In July 2018, the South African Health News Service, via Health-e News, created a Survivor's Support Service - an online map directory of all Thuthuzela Care Centres, hospitals, clinics and shelters for survivors of sexual abuse. The map is hosted on Health-e News website. The map allows users to find locations of relevant facilities by searching for a city, town or address.

• In August 2018, women and non-gender conforming people from across South Africa participated in *#TheTotalShutdown* protest marches against gender-based violence (GBV). This led to the convening of the National Summit against GBV and Femicide in November 2018, where the Presidency was presented with a Memorandum of Demands from the movement. This prompted the government to release the *Declaration of the Presidential Summit Against GBV and Femicide*, through which the government committed to working to implement legislative and other frameworks to address GBV and femicide in the country.

• In November 2018, in a historic trial, 11 South African National Defence Force (SANDF) soldiers charged under the *Prevention of Combating and Torture of Persons Act* 13 of 2013 were found guilty of assaulting a 17-year-old Congolese citizen whilst deployed in the Democratic Republic of Congo. It is the first time the SANDF has made use of the Act, which initially charged 16 soldiers, five of whom were later acquitted.

• Following an outcry from residents that population growth and spatial development in the area necessitated the establishment of another police station, Nyanga, a township in Cape Town, also known for being the country's murder capital, received its second police station in December 2018.

• The SAPS has re-established the specialised Anti-Gang Unit, which was closed down in 2003. Following a successful roll-out in problem areas in the Cape Flats during 2018, the programme is set to be rolled out nationally in 2019.



Slavery, Servitude and Forced Labour

(section 13)



2018 Grade C -

2019 Grade C =

South Africa's international obligation to protect people from human trafficking, which is known as the modern-day form of slavery, is given effect to in the *Prevention and Combatting of Trafficking of Persons Act 13 of 2013*. This Act provides measures to protect and assist victims of trafficking. Modern day slavery essentially involves recruitment, control and use of people for their bodies and labour. Due to threats such as violence, they cannot refuse or leave their situations. It comes in various forms, such as sexual trafficking and forced labour. Due to the nature of economic migration, accurate and reliable reporting of trafficking is problematic in South Africa. Much more should be done on the part of the State in identifying such cases, however in the period under review, it appears more trafficking cases were investigated and prosecuted. Therefore, on a balance, the grading remains the same and the trend shows no improvement at C =.

REPORTS:

- According to the United States (US) Department of State's *Trafficking in Persons (TIP) Report 2018*, South Africa is on the Tier 2 Watchlist. This consists of countries whose governments do not fully meet the *Trafficking Victims Protection Act's (TVPA)* minimum standards but are making significant efforts to bring themselves into compliance with those standards. Further, the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing and there is a failure to provide evidence of corresponding efforts to combat severe forms of trafficking in persons from the previous year.
- The same Report notes South Africa is a source of transit, and a destination country for men, women, and children subjected to forced labour and sex trafficking. South African children were recruited from poor, rural areas to urban centres, such as Johannesburg, Cape Town, Durban, and Bloemfontein, where girls were subjected to sex trafficking and domestic servitude and boys are forced to work in street vending, food service, begging, criminal activities, and agriculture.
- The TIP Report also states that the South African government demonstrated significant efforts during the reporting period by investigating 82 potential trafficking cases, prosecuting 23 potential traffickers, and convicting eight traffickers, two under the *Prevention and Combatting of Trafficking in Persons Act 7 of 2013 (PACOTIP)*. The government also arrested several low-level officials for complicity in cross-border



trafficking. The SAPS finalised standard operating procedures for implementation of PACOTIP and the government trained front-line responders on its provisions. The government identified significantly more victims over the previous reporting period and referred them to care, upgrading 12 of 14 shelters to provide comprehensive psycho-social assistance to victims.

- The Department of Priority Crime Investigation (DPCI) investigated 82 potential trafficking cases and collaborated closely with the National Prosecuting Authority (NPA) to compile evidence and build cases. The NPA initiated prosecutions of 23 cases compared to six cases in the previous year, and it obtained convictions of eight traffickers, compared to 11 traffickers convicted in 2016. The NPA sentenced two traffickers to terms of imprisonment; one trafficker received two consecutive life sentences and the other trafficker received 25 years imprisonment. The NPA convicted six additional traffickers.
- The recently released *Global Slavery Index 2018* from the Walk Free Foundation makes for sobering reading and ranks South Africa 110/167 countries. This is an alarmingly low position on the Index. The Index estimates that in 2018, there were 155 000 people living in modern-day slavery in South Africa with 2.80/1000 people potentially affected. The government was given a B grading by the Index. This indicates that the State has introduced a response to slavery and has a criminal justice framework criminalising some forms of slavery. The highest available rating is AAA, which indicates a comprehensive response from government to all forms of modern slavery and an effective reintegration and victim support. South Africa has not identified all the forms of modern-day slavery and in turn, has not responded adequately.



Privacy

(section 14)



2018 Grade C =

2019 Grade C -

The protection of this right is hampered by the failure of the State to successfully implement all chapters of the *Protection of Personal Information Act 4 of 2013 (POPI Act)*, which provides conditions for processing of personal information. This failure has a domino effect, as the Information Regulator cannot exercise all its functions, such as the enforcement of penalties. It also creates further opportunity for abuse of personal information. These factors and the extent of data breaches indicate that the State's performance in terms of the protection of the people's privacy is poor and has the potential to further decline. Therefore the State's protection of this right has been recorded as average but deteriorating, at C -.

JUDGMENTS/PENDING APPLICATIONS:

- In July 2018, the *Right2Know* campaign and Privacy International (PI) applied to intervene as *amici curiae* (friends of the court) in the constitutional challenge to the *Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002 (RICA)*.

The constitutional challenge was launched by amaBhungane Centre for Investigative Journalism in April 2017. To date the application is yet to be heard by the North Gauteng High Court. In essence, it is contended that there are fundamental flaws in RICA, specifically in the overbroad manner RICA regulates surveillance activities and the failure to regulate certain State monitoring.

- In September 2018, the Constitutional Court, in the matter of *Minister of Justice and Constitutional Development and Others v Gareth Prince and Others; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others* confirmed that the criminalisation of the possession, use and cultivation of cannabis under the auspices of the *Drugs and Drug Trafficking Act 140 of 1992* and the *Medicines and Related Substances Control Act 101 of 1965* by an adult in private was unconstitutional, to the extent that it infringed on the individual's right to privacy. The case was a confirmation of a previous order of the Western Cape High Court, with the exception that the Constitutional Court removed the words "purchase" from the Western Cape High Court's order. The Constitutional Court extended a period of 24 months to the Legislature to cure the impugned provisions and in the interim, read into the Drugs Act and the Medicines Act, to reflect the judgment and prevent the arrest of individuals for the private use, possession and cultivation of cannabis.



LEGISLATION/PROPOSED LEGISLATION:

- In December 2018, regulations in terms of section 112(2) of the POPI Act were published. This Act provides, for instance, for the manner in which a party can object to the processing of personal information and the duties of Information Officers. The POPI Act further stipulates the conditions for lawful processing of personal information that public and private bodies must adhere to. It was already enacted in 2013 but most of the Act is yet to commence. The Information Regulator (IR), established in December 2016, is empowered to monitor and enforce compliance with the Act but its operations are hampered by the delay in the commencement of the POPI Act. However, despite not being fully operational, the IR has received over 242 complaints from the public relating to the unlawful processing of personal information and access to information.

GENERAL:

- In April 2018, the Chairperson of the IR wrote to Facebook after various media reports of data breaches by Facebook. The data of 59777 South Africans was potentially shared with a data firm, Cambridge Analytica. The IR noted that although key sections of the POPI Act were not yet in operation - which would have required Facebook to put security measures in place to protect the personal information of its users - the IR still requested answers from Facebook on how the alleged data breach occurred. The IR further asked Facebook to contact all South Africans affected by the data breach, and to state what steps it was taking to ensure users' data remains safe. Facebook said that 59777 Facebook users in SA were "potentially impacted" by the data breach via their friendships with 33 users of a personality quiz app.

- In May 2018, Professor Jane Duncan, a media and information expert based at the University of Johannesburg, released a new book titled *Stopping the Spies: Constructing and Resisting the Surveillance State in South Africa*. In the book she says that the police and the State Security Agency (SSA) are increasingly heavy abusers of the RICA system - using it to obtain cellphone records of private citizens unlawfully.

- In May 2018, it was revealed that 934 000 records containing sensitive personal information of nearly one million people who pay traffic fines online in South Africa were leaked publicly. The information was released by Tefo Mohapi, of iAfrikan, a publication that explores how science, technology and innovation impact South Africa, and an Australian cybersecurity researcher named Troy Hunt.

- Hackers using state-of-the-art technology stole and defrauded South Africans out of R250 million in a single year, according to the SA Banking Risk Information Centre (SABRIC) when releasing the latest digital banking crime statistics in October 2018. It revealed that in 2017, cyber-criminals were involved in 13 438 online, mobile and internet banking attacks. Between January and August 2018, cybercriminals stole more than R23.5 million through mobile banking hacks, R89.3 million in online banking attacks, and R70.1 million through banking app breaches.

- In January 2019, the Inspector-General of Intelligence confirmed that an investigation into the alleged use of State resources to spy on prominent South Africans of behalf of the Gupta family was under way, despite intimidation.





Freedom of Religion, Belief and Opinion

(section 15)



2018 Grade **A =**

2019 Grade **B =**

This right is generally enjoyed in South Africa. However, due to reports of the abuse of individuals by certain religious leaders, there has been a concerted investigation into the possible regulation of religion, particularly churches, in the country. In 2018, the Portfolio Committee on Women in the Presidency supported this proposed regulation. This, considered with the divisive matter concerning the discipline of children according to scriptural and moral conviction, as well as the efforts by the Department of Home Affairs (DHA) to permit certain employees to refuse to officiate same-sex unions, can be perceived as interference in individuals' right to exercise this right. These factors have justified a downgrading of this right, to B =.

GENERAL:

- In October 2018, the Portfolio Committee on Women in the Presidency proposed that legislation was needed to regulate churches operating outside the law. This proposal followed a briefing by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission) on the commercialisation of religion and the abuse and exploitation of people's belief systems. The Committee dismissed the peer-review mechanism as proposed by the CRL Rights Commission and recommended a more rigorous system be devised. This announcement was met with strong opposition from the ACDP, who stated in a media release of 31 October 2018 that any such proposed intervention must occur within constitutional prescripts, with due regard to the right to freedom of religion of all South Africans.
- In November 2018, the CRL Rights Commission announced a national summit of all religious and church leaders to be held on 13 February 2019, to chart a legal and constitutional framework for the management of religious groups who abuse and violate the human rights of their members. The Summit was attended by over 800 delegates, mostly from the Christian church. The task team that lead the meeting will be supported by members of the religious community in a bid to implement a broad-based and consultative process at local, provincial and national levels to develop solutions by and for the religious community. The Summit appears to have resulted in a consensus towards a greater level of accountability in the form of some kind of self-regulation or a Code of Conduct to which religious organisations will subscribe. This will remove the likelihood of State intervention.

LEGISLATION/PROPOSED LEGISLATION:

- In May 2018, the *Civil Union Amendment Bill* [B11-2018]



was introduced in the National Assembly. The Bill's objective is to repeal section 6 of the *Civil Union Act* 17 of 2006, which allowed a marriage officer to inform the Minister that he or she objects to solemnise a civil union between persons of the same sex on the ground of conscience, religion and belief. The Bill was passed by the National Assembly on 6 December 2018 and has been sent to the National Council of Provinces (NCOP) for concurrence.

AWAITING JUDGMENT:

- In November 2018, the Constitutional Court heard the appeal of the October 2017 High Court judgment in *YG v S*. The matter concerned the finding that the common law defence of reasonable chastisement against a charge of common law assault is unconstitutional and no longer applies in our law. Freedom of Religion SA (FORSA) took the matter on appeal and argued for the right of parents to act according to their moral and scriptural convictions in determining what would be in the best interests of their children.



Freedom of Expression

(section 16)



2018 Grade **B +**

2019 Grade **B -**

The freedom of the press, in particular, is generally unhindered in South Africa. The rigorous investigations by the Fourth Estate brought to light the extent of corruption and maladministration at SOEs. This, in turn, has greatly assisted the commissions of inquiry, which are tasked with investigating these matters. In the period under review, the courts have been faced with multiple cases of hate speech, and 2018 saw the first prison sentence being handed down for hate speech, under the common law offence of *crimen injuria*. The proposed introduction of the statutory offence of hate speech by the *Prevention and Combatting of Hate Crimes and Hate Speech Bill [B9-2018]* is a potential threat to the right to freedom of expression. The Bill's offence of hate speech is far removed from hate speech as understood in terms of the Constitution and seriously infringes upon the right to freedom of expression. This cannot be justified as a reasonable limitation to the right. Considering these developments, the State's duty to protect this right has been downgraded to B -.

REPORTS:

- Reporters Without Borders ranked South Africa 28/180 countries in their 2018 *World Press Freedom Index*, three positions higher than in 2017.
- Freedom House, in its *Attacks on the Record: The State of Global Press Freedom, 2017-2018* special report, highlighted the power of journalism in South Africa. In particular, the release of the #GuptaLeaks in 2018, was cited as influencing the resignation of former President Jacob Zuma in February 2018.
- The World Economic Forum (WEF) *Global Competitiveness Report (GCR) 2018* ranks South Africa 26/140 globally for press freedom.
- According to a report launched by the Right2Know Campaign in June 2018, entitled *Spooked - Surveillance of Journalists in SA*, surveillance legislation in South Africa has failed in several ways to protect journalists' communications. The report compares a range of case studies of journalists who appear to have been spied on, including Jacques Pauw and the SABC 8. It unpacks what happened, how it happened, and which parties appear to be responsible. "Its aim is to give journalists a better picture of the threats they might face so



that they can better defend themselves and to rally the broader public to ensure an end to these surveillance abuses and the bad policies that enable them."

JUDGMENTS:

- The Randburg Magistrate's Court found Ms Vicki Momberg guilty of four counts of *crimen injuria* in March 2018, after she was recorded using the *k-word* 48 times after a smash-and-grab, whilst addressing police officers. Momberg was sentenced to three years in prison with one year suspended, on condition that she is not found guilty of the same offence within the next three years. She is the first person to be found guilty and sentenced for racist conduct. At time of writing, Momberg was appealing both her conviction and sentence.
- In April 2018, the Johannesburg High Court in the matter of *Qwelane v South African Human Rights Commission, In Re: South African Human Rights Commission v Qwelane and Others; Qwelane v Minister of Justice and Correctional Services and Others* granted Mr Qwelane leave to appeal a 2017 judgment to the Supreme Court of Appeal (SCA). The High Court found that a column published in 2008 against the LGBTQI+ community amounted to hate speech in terms of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (the Equality Act). Mr Qwelane's constitutional challenge to the hate speech prohibition in the Equality Act was found to be without merit. On leave to appeal the High Court found that it would be in the interests of justice for the SCA to provide certainty on the Equality Act proceedings and the constitutional challenge to the Equality Act. At time of publication, it appears that the matter has not yet been set down in the SCA.
- In June 2018, the SCA declared section 1(2) of the *Intimidation Act 72 of 1982* unconstitutional in the matter of *Moyo v the Minister of Justice and Constitutional Development and Others; Sonti v the Minister of Justice and Correctional Services and Others*. It was argued by the appellants that this provision criminalised various forms of expression protected in terms of section 16(1) of the Constitution. Judge Mbha found that the provision was incorporated from the *Internal Security Amendment Act 79 of 1976*. It was even controversial under apartheid as it was not limited to serious threats of unlawful conduct. Judge Mbha further found that section 1(2) of the *Intimidation Act 72 of 1982* failed to distinguish between "true threats" and "political hyperbole" and was a

serious and unjustifiable infringement on the right to freedom of expression.

- In early 2018, the film *Inxeba/The Wound*, about male circumcision in the Xhosa culture, was released in South Africa and classified X18 (from 16LS) by the Film and Publication Board Appeals Tribunal. X18 is the same rating given to hardcore pornography, effectively removing the film from South African cinemas. The reclassification was then challenged by the filmmakers. In June 2018, the North Gauteng High Court in *Indigenous Film Distribution (Pty) Ltd and Another v Film and Publication Appeal Tribunal and Others*, found that the Tribunal lacked jurisdiction to reclassify the film and set the decision aside. It was argued by the producers that unless the content of the film fell within the narrow scope of expression prohibited in terms of section 16(2) of the Constitution, it is constitutionally protected. Further, they had a right to distribute it and the public had a right to watch the film, unless there was proper statutory basis for censorship.

- In September 2018, the Constitutional Court in *Duncanmec (Pty)Ltd v Gaylard, J.N.O. and Others*, had to determine whether the conduct of employees singing a struggle song in isiZulu, which translates to “Climb on top of the roof and tell them that my mother is rejoicing when we hit the boer”, constituted racism. The Court also had to determine whether the arbitration award - which overturned the decision of the employer to dismiss the employees - was unreasonable. The Court found that the word “boer” is not an offensive racist term but agreed with the arbitrator that the song was inappropriate as it “can be offensive and cause hurt to those who hear it”. The Court furthermore found the arbitration award was reasonable, as the arbitrator weighed competing interests. The reinstatement of the employees came with a final warning and limited compensation.

- In October 2018, the Equality Court in *South African Human Rights Commission v Khumalo* found Mr Khumalo guilty of hate speech in terms of section 10(1) of the Equality Act, after calling on Facebook for the country to be cleansed of white people. Mr Khumalo was interdicted from repeating the utterances, to remove all references thereto from any social media and to publish a written apology to all South Africans. The Equality Court also referred the matter to the NDPP.

- In December 2018, the SCA in *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies*, was faced with the interpretation of hate speech by the Equality Court. The issue concerned statements made by Mr Masuku on two separate occasions that were perceived to propagate hatred and violence towards Jewish people. The Equality Court found that most Jewish people regard themselves as Zionists and that the statements were not only hurtful but also harmful in terms of section 10(1) of the Equality Act. The SCA however, focused on the constitutional boundaries of freedom of expression in terms of section 16 of the Constitution. The SCA held that during the hearing counsel disavowed reliance on the Equality Act and that Mr Masuku’s statements did not transgress the constitutional boundaries of freedom of expression. Therefore the appeal was upheld. The SCA indirectly questioned the wider scope of the hate speech

prohibition in section 10(1) of the Equality Act, even though the constitutionality of section 10(1) of the Equality Act was not challenged in this matter. It is unclear at date of publication whether the matter will be appealed to the Constitutional Court, as there had been concerns on the SCA’s direct reliance on the Constitution and not on the Equality Act’s provisions.

PROPOSED LEGISLATION:

- In April 2018, the *Prevention and Combating of Hate Crimes and Hate Speech Bill* [B9-2018] was introduced in the National Assembly. The Bill aims to criminalise the offence of hate speech and hate crimes. In terms of the proposed Bill, it is possible for a person on first conviction of the offence of hate speech to be imprisoned for three years, and five years on a subsequent conviction. The Bill is much-improved from the 2016 version published by the Department of Justice and Correctional Services (DoJ&CS) in relation to the parameters of the offence of hate speech. However, serious concerns remain about the proposed statutory criminal offence of hate speech, which does not fall within the narrow category of hate speech as understood in terms of the Constitution. The proposed hate speech offence therefore infringes on the right to freedom of expression. This infringement is an overbroad and unreasonable limitation, especially since no thresholds are built into the offence, as well as the fact that it is not limited only to expression of a public nature. There are current legislative measures that regulate hate speech and no pressing societal need has been indicated for these additional criminal measures. The Bill was open for public comment until 15 February 2019 and at date of publication was under consideration by the Portfolio Committee on Justice and Correctional Services.

- The *Cybercrimes and Cybersecurity Bill* [B6-2017], which was introduced in the National Assembly on 21 February 2017, was further amended in February 2018 following public participation and stakeholder submissions. The Bill seeks to address the increase in cybercrimes and cybersecurity breaches. The chapter on “malicious communications”, and specifically the offence of a “data message which is harmful” raised serious concerns regarding the right to freedom of expression, due to it being overly broad and vague. However, the subsequent amendments made to the Bill addressed these concerns and specifically, the offence of a “data message which is harmful” was removed in the latest version of the Bill. The latest version of the Bill [B6b-2017] was passed by the National Assembly on 27 November 2018 and sent to the NCOP for concurrence.

GENERAL:

- The South African Broadcasting Corporation (SABC) continued to struggle both financially and ethically throughout the reporting period. After the Cabinet reshuffle of November 2018, allegations of ministerial overreach on the part of new Minister of Communications, Telecommunications and Postal Services concerning the SABC led to a mass resignation of the non-executive members of the Board. The SABC began 2019 without a Board, with debt of over R650 million. This is concerning, as for many who live in South Africa, the SABC is their only source of information. With 2019 being an election year, this state of affairs is even more concerning as its functions are imperative to the informed exercise of voters’ rights.



Freedom of Assembly, Demonstration, Picket and Petition

(section 17)

2018 Grade B =

2019 Grade B =

The right to freedom of assembly plays a central role in a responsive democracy and the right has historical significance in South Africa. However, the surge in service delivery protests is highly concerning, as it is often coupled with violence and damage to resources. This speaks directly to the failure of the State, and in specific, local government, to provide essential basic services to disadvantaged communities. Although it may appear that this right is robustly exercised from the prevalence of demonstrations, the available protest data in South Africa may not necessarily indicate efficient State action in this regard (by way of law and/or policy). The grading of this right has remained unchanged at B =.

REPORTS:

- According to Municipal IQ: Municipal Data and Intelligence (which measures service delivery protests), 2018 had 24% more protests than 2014, the previous record-holder, with 237 major service delivery protests. 2018 recorded 64 more service delivery protests than 2017's 173 protests.
- According to Municipal IQ, between 2004 and 2018, Gauteng was the major site for service delivery protests - on average accounting for 24% of protests over this period and reaching 34% in 2017. However, in 2018 the Eastern Cape far

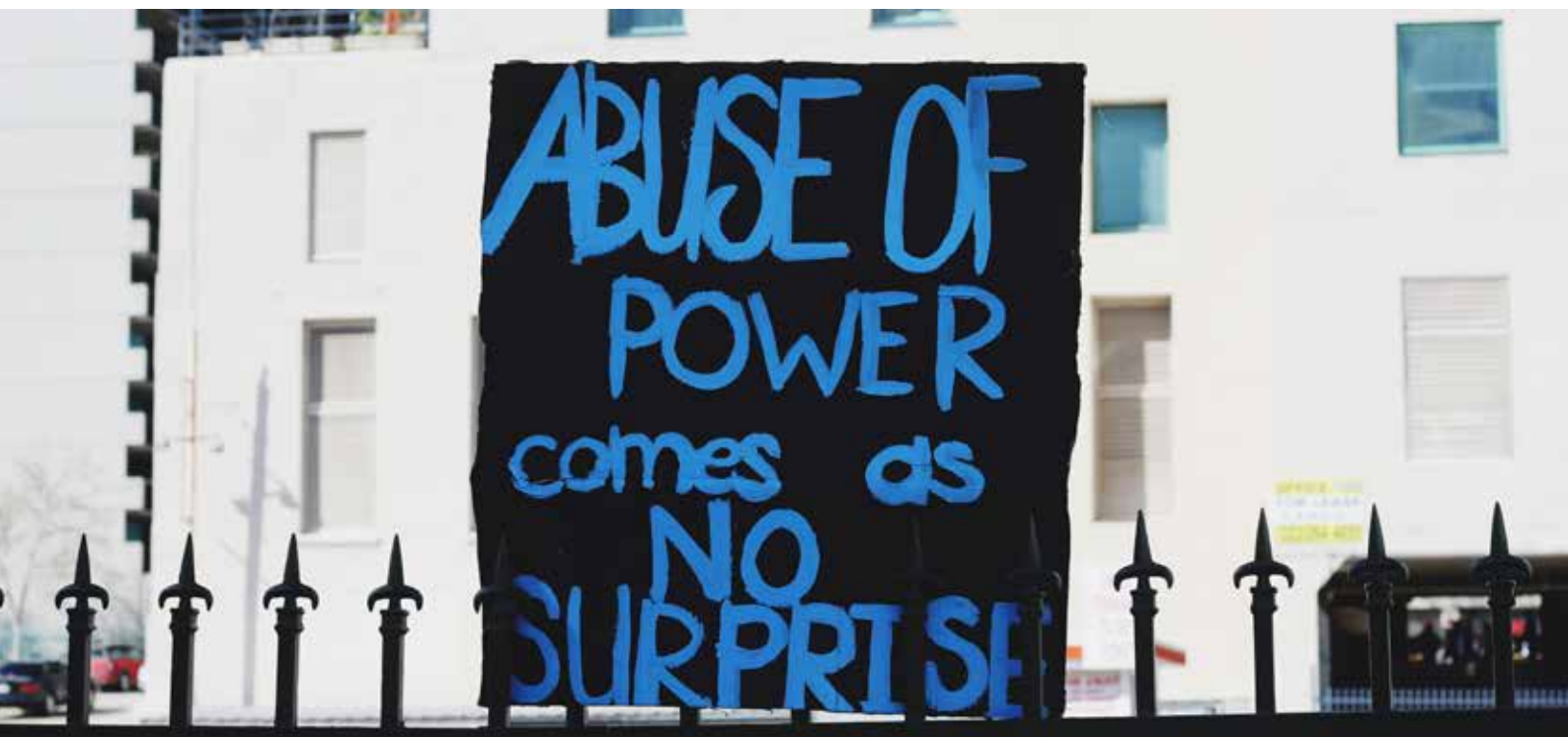
outstripped Gauteng as the most protest-afflicted province for the year, followed by the Western Cape.

JUDGMENTS:

- In November 2018, the Constitutional Court in *Mlungwana and Others v S and Another*, confirmed the Western Cape High Court order declaring section 12(1)(a) of the *Regulation of Gatherings Act* 205 of 1995 unconstitutional and invalid, to the extent that it makes failure to give notice of a gathering of more than 15 people, a criminal offence. The Constitutional Court held that anything that would prevent people from peacefully assembling would limit section 17 of the Constitution. On determining whether the limitation to the right to freedom of assembly was reasonable, the Court held that the nature and extent of the limitation was severe, especially since less restrictive means, such as administrative fines, could be applied.

GENERAL:

- The Essential Services Committee was established in terms of the *Labour Relations Act* 66 of 1995 to assess and determine whether the interruption of a service is detrimental to the health or safety of any part of the population. This Committee determined in December 2018 that school managers and support staff are not essential services, effectively upholding their right to strike. It declared a small group of services provided at boarding schools to be essential, in order to protect learners in the event of industrial action. Only boarding house parents, sanatorium services and security at boarding schools have been designated essential services.





Freedom of Association

(section 18)

2018 Grade A =

2019 Grade A =

Freedom of association is largely a negative right, requiring the State to refrain from restricting individuals' social relationships. It is also a correlative right, as it enables the enjoyment of a number of other rights. One such freedom is political freedom, and the association with others of like-minded political conviction, to interact and mobilise. This right is generally enjoyed in South Africa, other than concerns over the political killings in KwaZulu-Natal, which appeared to be politically motivated. Therefore, the grading remains unchanged at A =.

- The Moerane Commission of Inquiry into political killings in KwaZulu-Natal was established in response to a spate of murders that appeared to be politically-motivated. The

Commission was tasked with investigating the underlying causes of the killings and making recommendations to prevent them from continuing. The Commission's report was released in September 2018, after a year of hearings. Despite multiple testimonies and incriminating affidavits, the report did not recommend any prosecutions. Among the recommendations were that political parties should take responsibility for the violent competition between their members for political positions and power, and that the State should depoliticise and professionalise the public service, including the security and intelligence sector. It also recommended the establishment of an inter-ministerial task team in the security cluster to review the workings of the security agencies, and that properly-qualified personnel should be recruited.





Political Rights

(section 19)

2018 Grade A =

2019 Grade A =

The constitutional guarantee of political rights provides individuals with various rights, which are crucial to a representative and participatory democracy. Political rights are largely enjoyed by eligible citizens. Legislative amendments in early 2019 will provide more transparency regarding political party funding and will allow for more informed political choice in the future. These positive developments reflect that the right is well exercised in South Africa but considering the further extension on ensuring all voters' addresses are recorded, grading of this right remains the same at A =.

REPORTS:

- According to the *Electoral Commission Annual Report 2018*, the Commission saw an increase in the number of registered political parties to 563, including 245 contesting in national elections.
- The same Report states that in the reporting period, 552 574 new voters were registered and that the voter turn-out in by-elections had increased.
- The Independent Electoral Commission (IEC) also reported that 1.2 million addresses were recorded in line with the 2015 Constitutional Court judgment of *Kham and Others v Electoral Commission and Another*. The Court required the IEC to record sufficient information regarding voters' addresses to ensure that the voter, at time of registration, ordinarily resides in that voting district.

JUDGMENTS:

- In June 2018, the Constitutional Court in *My Vote Counts NPC v the Minister of Justice and Correctional Services and Another* confirmed the Western Cape High Court finding regarding the *Promotion of Access to Information Act 2 of 2000 (PAIA)*. The Court found PAIA unconstitutional and invalid to the extent that it fails to provide for the reasonable disclosure of information on the private funding of political parties and independent candidates. The Court held that for every citizen to make a free political choice in terms of section 19 of the Constitution, access to "relevant and important information" about the political parties must be provided. Parliament was given 18 months to amend PAIA and to take other reasonable measures to provide for such reasonable access.
- In November 2018, the Constitutional Court in *Electoral Commission of South Africa v Speaker of National Assembly and Others*, further suspended the declaration of invalidity of the 2016 order in *Electoral Commission v Mhlope and Others (Mhlope judgment)*. The *Mhlope* judgment declared the



Commission's failure to record all available voters' addresses on the National Common Voters' Roll to be contrary to section 1(c) of the Constitution. The *Mhlope* judgment gave the Commission until 30 June 2018, by when the Commission had to obtain and record all addresses that were "reasonably available" as at 17 December 2003 on the National Common Voters' Roll. Despite good progress having been made, the Commission was unable to comply with the *Mhlope* judgment. On granting a further extension, the Constitutional Court considered whether it would be "just and equitable to do so" against the importance of the right of every South African citizen to make free political choices and to participate in free, fair and regular elections. The extension was granted until 30 November 2019.

LEGISLATION:

- In January 2019, the President signed into law the *Political Party Funding Act 6 of 2018*. The Act provides and regulates the public and private funding of political parties and regulates the disclosure of donations. It further provides for the establishment of a Represented Political Party Fund and a Multi-Party Democracy Fund. The Multi-Party Democracy Fund is established for the purpose of funding represented political parties from private resources. The Electoral Commission may allocate funds from these funds to a represented political party, in accordance with a prescribed formula. The Act will come into operation only on a date to be proclaimed by the President. This is unlikely to happen before the general elections of May 2019.

GENERAL:

- According to the IEC, more than 2.7 million voters visited voting stations during Voter Registration Weekend on 10 and 11 March 2018.
- The IEC held an additional voter registration weekend in January 2019, in preparation for the 2019 national elections. 700 000 new voters participated, and this pushed the number of voters on the Voters' Roll to 26.7 million voters. Of the 700 000 new voters, 81% were part of the youth and 52% were women.



Citizenship

(section 20)



2018 Grade A =

2019 Grade B =

The majority of South Africans enjoy this right unencumbered. However, due to gaps in law and policy, an inexcusable number of children cannot obtain birth certificates if one or both parents are unavailable, or if they are of a foreign nationality. The courts have been instrumental in decreasing the incidents of statelessness. However, due to the high volumes of unlawful migrants entering South Africa daily, many children are born stateless and are likely to remain so. The Department of Home Affairs (DHA) has failed to fulfil its obligation to uphold this right, as is seen via multiple court cases where civil society organisations had to approach the courts on behalf of unregistered minors to seeking birth certificates. The apparent reluctance to remedy this gap, as well as the move towards denying birth certificates to children born to non-South Africans altogether, resulted in a drop in grading to B =.

REPORTS:

- According to the *DHA Annual Report 2017 - 2018*, the DHA rolled out the fully digital processing of smart ID cards and passports to a further five offices, bringing the total to 184 offices. A total of 2 864 111 smart ID cards were issued, with more than nine million since inception in 2013.

JUDGMENTS:

- In July 2018, the Pretoria High Court, in *Xiuguo and Another v the Director-General of the Department of Home Affairs and Another*, the Court ordered the Department to register the birth of a child of a South African man and his Chinese life partner (an asylum-seeker), whose stay in the country had become unlawful. The child was born in 2013, and Home Affairs officials told the parents that his birth would not be registered, due to the mother's illegal status. The Court found this policy to contradict the *Citizenship Act 88 of 1995*, which grants automatic citizenship to children born in or outside the country to parents of whom one is South African.
- In November 2018, the SCA dismissed the Minister of Home Affairs' appeal in *Minister of Home Affairs v Ali*. The appeal related to the Western Cape High Court judgment that held that children born in South Africa to foreign parents are entitled to apply for citizenship. The children were unable to obtain citizenship in terms of the *Citizenship Amendment Act 17 of 2000*. The Minister interpreted section 4(3) of the Act to exclude them and failed to promulgate the necessary forms to apply for citizenship. The Minister interpreted the section to mean that only children born after it was enacted on 1 January



2013 could apply and therefore the children in question (born before 1 January 2013 and who have attained the age of majority after the enactment of the section) could not apply. The SCA found the Minister's attitude in delaying with the promulgation of the forms to be a further attempt to aggravate the children's applications, and that it infringed on their constitutional rights. The Minister was ordered to promulgate regulations in respect of applications for citizenship by naturalisation within one year of the SCA order, and in the interim, to accept applications on affidavit.

PROPOSED LEGISLATION:

- In October 2018, the DHA published new *Draft Regulations on the Registration of Births and Deaths, 2018* for public comment. The Draft Regulations propose that foreign children be issued with a "confirmation of birth notice", which must then be presented to their embassy in order to obtain a birth certificate from their country of origin. Civil society organisations have raised serious concern on the impact of this proposal on children of refugees and asylum-seekers, whose parents cannot approach their embassies. They maintain that the proposal infringes on the child's right to a name and nationalisation in terms of the Constitution. The closing date for submissions was 16 November 2018 and at date of publication, the DHA still appears to be considering the submissions.

GENERAL:

- In January 2019, there were media reports of 37 children being denied access to schooling in the Eastern Cape by the Department of Basic Education (DBE) because they do not have birth certificates. The children are South Africans and non-nationals between the ages of six and 17, and have different reasons furnished by the DHA for the failure to be registered. Some of the children were removed from school or denied admission as long ago as 2014. Most have been denied the opportunity to attend school since 2015. In February 2019, it appeared that the DBE Eastern Cape allowed these children to attend school despite not having birth certificates, pending a court application. The DBE also undertook to assist these learners to apply for birth certificates.



Freedom of Movement and Residence

(section 21)



2018 Grade B =

2019 Grade C =

This right guarantees the free movement of individuals who are lawfully in South Africa. It further allows the free selection of a place of residence, while limiting the interference of the State on the exercise of these freedoms. The slow pace of Home Affairs in reopening Refugee Reception Offices - despite court orders to that effect having been granted - has a direct impact on the access to socio-economic rights of a vulnerable group of people living in the country. This has influenced the downgrade from B in the previous period, to C.

REPORTS:

- According to the *DHA Annual Report 2017-2018*, 850977 of 876284 (97.11%) machine-readable passports were issued within 13 working days in the reporting period. This is up from a 95.4% issue rate during 2016/17.
- The United Nations High Commissioner for Refugees (UNHCR) *Global Trends - Forced Displacement in 2017* report (most recent data available for global statistics) states that South Africa is host to refugees from multiple African countries. This includes an estimated 27000 Somalians and 26000 refugees from the Democratic Republic of Congo (DRC).
- According to the UNHCR report, South Africa voluntarily contributed US \$38 363 to the UN Human Rights programme in 2017. The number of asylum-seekers dropped by nearly 900000 in just one year. South Africa moved down to fourth in the world, behind Germany, the US and Turkey for the size of its asylum-seeker population, which was recorded at 218300 in the latest report, down from 1.1 million in 2015.

JUDGMENTS:

- In October 2018, the Constitutional Court in *Ahmed and Others v Minister of Home Affairs and Another*, declared *Immigration Directive 21* of 2015 (the Directive), inconsistent with the *Immigration Act 13* of 2002 and with the *Immigration Regulations*, and set it aside. The Directive imposed a blanket ban on asylum-seekers from applying for visas, without provision for an exemption application in terms of the *Immigration Act*. It also prohibited asylum-seekers from applying for a permanent residence permit while inside South Africa. The Constitutional Court held that the constricted interpretation of the *Immigration Act* would mean that an unsuccessful asylum-seeker, denied asylum in terms of the *Refugees Act 130* of 1998, is barred from applying to be lawfully present in South Africa in terms of the requirements of the *Immigration Act*. Asylum-seekers must be allowed to apply for visas or permits under the *Immigration Act* if they meet the requirements in terms of the *Immigration Act* and be allowed to apply to the Minister for an exemption from the application



requirement that such an application must be made outside South African borders.

LEGISLATION/PROPOSED LEGISLATION:

- The *Border Management Authority Bill* [B9-2016], which was introduced in the National Assembly in May 2016, was at date of publication under the consideration of the NCOP. The Bill proposes the establishment of a Border Management Authority (BMA), with the aim of integrating and co-ordinating border management, currently under the control of various State departments. The functions of the BMA would include facilitating and managing the movement of persons within this border law enforcement area, as well as collection of revenue within the border law enforcement area and at ports of entry. Treasury has raised serious concerns on the collection of revenue function and has reiterated that the functions of the BMA should be kept separate from the functions and powers of the South African Revenue Services (SARS).
- The *Refugee Amendment Act 11* of 2017 was assented to in 2017, but the date of commencement has yet to be announced. It provides that asylum-seekers may be offered shelter and assistance by the UNHCR, pending the outcome of their application for refugee status.
- In June 2018, the DHA published the draft *Refugees Regulations, 2018* and draft *Rules of the Standing Committee for Refugee Affairs* for public comment. The Regulations provide for aspects such as the factors the Refugee Status Determination Officer must consider on verifying the authenticity of a marriage on receiving an application for asylum. The draft Regulations also provide what actions will indicate that a refugee must re-avail himself or herself to the protection of his or her country of origin, which will then disqualify them from further refugee status.

GENERAL:

- The Port Elizabeth Refugee Reception Office was closed by the DHA in 2011 and remained closed until October 2018, when all its functions were restored by the Minister of Home Affairs. The Reception Office was closed for almost seven years, despite a 2015 order by the SCA to reopen it by 1 July 2015.
- In a similar vein, the Cape Town Refugee Reception Office has been closed for about six years. This, despite a 2017 judgment - *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* - where the SCA set aside a 2012 decision by the Director-General (DG) of the DHA to close the Cape Town Refugee Reception Office. The DG was ordered to open the Office by March 2018, yet to date, it has not done so. The Department states that funding and the premises' location are delaying the opening of the Office. This forces asylum-seekers to travel long distances to Durban, Musina and Port Elizabeth for processing.



Freedom of Trade, Occupation and Profession

(section 22)



2018 Grade C =

2019 Grade C =

The right to freedom of trade, occupation and profession plays a vital role in guaranteeing the free engagement of economic activities, which is made possible under various statutes. The National Development Plan 2030 (NDP) emphasises the need to create a more empowering environment for small business enterprises. It is crucial for the State to remove red tape. In general, the right is largely enjoyed, but access to essential services, and to an extent, the internet, affects the enjoyment of this right. On balance, State initiatives to create access remain stagnant at C =.

REPORTS:

- According to the PricewaterhouseCoopers (PwC) *Global Economic Crime and Fraud Survey 2018*, economic crime

is harming businesses throughout the world. South African organisations report the highest instances of economic crime worldwide. The Survey findings showed that the reported instances of economic crime reported in South Africa (out of 282 respondents) were at 77%, followed by Kenya at 75%, and France at 71%. It found that half of the top 10 countries were in Africa. 49% of organisations globally reported that they had experienced economic crime in the past two years.

- According to the *Department of Small Business Development (DSBD) Annual Report 2017/18*, the Department (established in 2014 to enhance the development of Small, Medium and Micro-sized Enterprises) allocates 57.8% of their annual budget to the Small Enterprise Development Agency (SEDA), which has the largest network for small enterprise development in South Africa.

- According to the *WEF GCR 2018*, South Africa's competitiveness is restricted by the workforce's lack of digital and critical thinking skills, which speaks to the lack of access to the internet.





Labour Relations

(section 23)



2018 Grade C =

2019 Grade C =

The right to fair labour practices, which encompasses various rights, is an important tool to ensure a balance in the working relationship between employers and employees. During the year under review, the passing of *National Minimum Wage Act 9 of 2018* was an important development. The Act aims to protect workers from unreasonably low wages. However, there are concerns on the impact, considering South Africa's slow economic growth and high unemployment rate, plus fears of job losses in certain industries. From a worker's rights perspective, there have been positive developments. However, the implementation of proposed legislation such as the *National Minimum Wage Act* will undoubtedly affect labour relations. The grading therefore, remains unchanged at C =.



REPORTS:

- According to the WEF *GCR 2018*, South Africa dropped a few places in its overall ranking on the *Global Competitiveness Index*, namely 67/140 compared to its previous ranking of 61/137. The Index measures national competitiveness and looks at institutions, policies and other factors. South Africa's ability to implement competitive policy influences its labour relations. Despite its new position, South Africa remains one of the leading nations in sub-Saharan Africa, second only to Mauritius.
- The *Report* states that in terms of hiring and firing practices, South Africa ranks 110/140. It further noted that the country ranks very high - 25/140 - for workers' rights. South Africa also came in at 58/140 for the participation of women in the labour force.
- According to the Stats SA *Gross Domestic Product Statistical Release* for the third quarter of 2018, the South African economy grew by 2.2% quarter-on-quarter, signifying an end to the recession. The manufacturing industry and the transport, storage and communication industries, were the largest contributors to growth.
- The World Bank's *Global Economic Prospects* (GEP) report from January 2019, indicated that South Africa's real GDP growth will expand by 1.3% in 2019.
- The Stats SA *Quarterly Labour Force Survey* (QLFS) for the 3rd quarter of 2018 states that South Africa's unemployment rate increased by 0.3 of a percentage point, from 27.2% to 27.5% in Q3 of 2018. The unemployment rate has fluctuated

between the 20% and 30% band for the last 10 years. Year on year, this means that the unemployment rate has been stagnant with a margin of 0.2% between the two periods. Furthermore, South Africa's working population between the ages of 15 and 64 years, is 38 million people. This leaves at least 6.2 million people unemployed.

- Trade union UASA's (formerly United Association of South Africa) 17th *South African Employment Report* indicates that the number of unemployed had increased from six million people, to 9.6 million people, between 2001 and 2018 (expanded definition included - people who want to work but have given up looking for work). In addition, South Africa is the only country in the world which has had a 20% plus unemployment rate for over two decades.
- The Heritage Foundation's *2019 Index of Economic Freedom* ranks South Africa at 102/180 and classifies the country as "mostly unfree" in terms of economic freedom. The score has declined from 77/180 in the 2018 Index, causing the country to drop out of the status of "moderately free" for the first time since the Index's inception in 1995. The decline is attributed to poor judicial effectiveness, low government integrity and the uncertainty surrounding property rights.

PENDING APPLICATIONS:

- In May 2018, a landmark settlement was reached between African Rainbow Minerals, Anglo American SA, AngloGold Ashanti, Gold Fields, Harmony, Sibanye-Stillwater and the attorneys representing the claimants in a silicosis and tuberculosis class action litigation. The agreement accordingly

will provide compensation to workers who suffered from silicosis and/or tuberculosis, who worked in certain mines from 12 March 1965 to date. It is recognised as the first class-action settlement in South Africa, but it still requires approval from the South Gauteng High Court. On 8 December 2018, the South Gauteng High Court set out the process in terms of which members of the settling classes and any interested parties should show cause why the settlement should not be made an Order of the Court. A further hearing has been scheduled for May 2019, in terms of which the fairness and reasonableness of the settlement will be determined.

LEGISLATION/PROPOSED LEGISLATION:

- In November 2018, the President signed into law the *National Minimum Wage Act 9 of 2018*. The Act provides for a National Minimum Wage, aiming to protect workers from unreasonably low wages and exploitation. The Act applies to all workers and their employers, except members of the SANDF, the National Intelligence Agency (NIA) and the South African Secret Services. The Act also established the National Minimum Wage Commission, which must review the National Minimum Wage and report to the Minister of Labour annually on the impact of the National Minimum Wage. Schedule 1 to the Act provides that the National Minimum Wage is R20 for each ordinary hour worked, with the exceptions that domestic workers' wage will be R15 per ordinary hour and farm workers R18 per hour, from a date to be proclaimed by the President.
- In November 2018, the President signed into law the *Labour Relations Amendment Act 8 of 2018*. The Act amends the *Basic Conditions of Employment Act 75 of 1995*, to provide

for "parental leave" of 10 consecutive days to be taken on the birth of a child, which would now make it possible for fathers to effectively take paternity leave. The Act also makes it possible for an adoptive parent of a child below the age of two to take adoption leave of 10 consecutive weeks. A parent in a surrogate motherhood agreement is entitled to take "commissioning parental leave" if the Act's conditions are met. The Act addresses this historical inequality between women and men and promotes shared parenting responsibility.

- In December 2018 the *Regulations to the National Minimum Wage Act, 2018* were published, providing for the application of exemption from paying the National Minimum Wage and the legal effect thereof. It also establishes an online National Minimum Wage Exemption System, which is administered by the Department of Labour (DoL).

GENERAL:

- In May 2018, Parliament's Select Committee on Land and Mineral Resources called for harsher consequences for mining companies that neglect workers' health and safety. The Committee said Sibanye-Stillwater should face the full extent of the law if it is found to have neglected measures to avert fatalities that occurred during 2018.
- In July 2018, the government offered families of the slain Marikana mine workers a R100 million settlement for general damages, six years after the massacre. The Socio-Economic Rights Institute (SERI) represents the 320 claimants, who have sued for loss of support and emotional shock.





Environment

(section 24)



2018 Grade C +

2019 Grade C =

This is the only right in the Bill of Rights that expressly requires fulfilment for the benefit of future generations. South Africa is bound to act consistently and visibly to mitigate the damage done by harmful environmental practices, not least of which is coal mining. In this regard, the courts have been instrumental in reinforcing the commitment to sustainable alternative energy sources and continue to require transparency and accountability from both State and private actors. In the period under review there have been positive developments, such as the Department of Energy's (DoE) updated Integrated Resource Plan (IRP), which maps the direction for the adoption of renewable energy sources. However, the impact of this Plan is heavily reliant on the implementation thereof, which at the moment, is slow. On a balance of these factors, the protection and the State's fulfilment of this right remains unchanged (=) from the year before, which was recorded at C+.

REPORTS:

- The *Annual Report NDPP 2017/2018* reflects a 96.3% conviction rate, whilst the dedicated focus on rhino and related matters resulted in a 93.1% conviction rate.
- The *National Environmental Compliance and Enforcement Report 2017-18* (NECER) states that there has been a decrease in the number of criminal dockets registered, from 1527 in 2016/17, to 1257 in 2017/18.
- The total number of admission of guilt fines (J534s) issued has slightly decreased, from 1010 for 2016/17, to 872 in 2017/18, a decrease of 13.7%.
- The number of criminal dockets handed to the NPA has generally increased, from 293 in 2015/16, to 416 in 2016/17 and 446 in 2017/18.
- The NECER shows that the total number of arrests made by Environmental Management Inspectors (EMIs) has slightly decreased, from 1092 in 2016/17, to 926 in 2017/18. In addition, the number of convictions reported have decreased from 76 in 2016/17, to 53 in 2017/18, showing a 30% decrease.
- In total, there are 2973 EMIs designated across the country, comprising 2640 national and provincial EMIs, and 333 municipal EMIs.



- According to the NECER, there has been a fluctuation in the reporting of certain types of incidents:
 - a significant decrease in reports on illegal activities, from 106 in 2016/17, to 68 in 2017/18;
 - a significant increase in spillages, from six in 2016/17, to 112 in 2017/18; and
 - a substantial decrease in reports of contraventions relating to imports and exports, from 208 in 2016/17, to 88 in 2017/18.
- According to the NECER, there were 653 reported incidents of illegal hunting of rhinoceros in a national park in the 2017/18 period, up from 588 in the 2016/17 period.
- 508 rhinoceros were poached in 2018, compared to 1028 rhinoceros in 2017.
- According to the *Department of Environmental Affairs (DEA) Annual Performance Plan 2018/19*, over 70% of South Africa's surface has been intensely affected by a variety of soil erosion. Over 0.7 million hectares of land is degraded and left bare by soil erosion (sheet and gully erosion).
- The same Plan states that South Africa has over the years implemented a strategy on expanding its conservation area towards levels that will ensure adequate protection of biodiversity. Land equating to a minimum of 0.5% of South Africa's total land area is added to the protected area network annually. However, the current protected area network is still inadequate for sustaining biodiversity and ecological processes. This is largely due to the fact that only 22% of terrestrial ecosystem types are well-protected and 35% completely unprotected.
- According to the *Climate Action Tracker (CAT)*, the South African government released a draft of its updated IRP 2018 for comment in August 2018, setting out a new direction in energy sector planning. The Plan includes a shift from coal, increased adoption of renewables and gas, and an end to the expansion of nuclear power. If adopted, this Plan will signify a major shift in energy policy, in a coal-dominated country like South Africa. The Plan also seeks to increase renewables-based power generation from solar and gas by 2030.

- The CAT also found South Africa to have made highly insufficient progress towards meeting its obligations under the *Paris Agreement* that was signed by South Africa in 2016.
- According to the *Climate Change Performance Index 2019*, South Africa ranked 39 out of 60 countries. This is up from 48th, the previous year. South Africa was rated very low in terms of renewable energy, as well as regarding greenhouse gas emissions, which remained very high. Over the past five years, South Africa managed to quickly reduce energy use per capita, resulting in a medium rating for the energy use category. The national climate policy efforts were rated as being low, due to the absence of a clear emissions reduction strategy and subsidising coal usage.

- According to a Greenpeace Africa analysis of data produced by the European Space Agency's Sentinel 5P satellite between 1 June and 31 August 2018, Eskom must shut down power stations if it cannot afford to comply with environmental regulations. It identifies Mpumalanga as the world's largest air-pollution hotspot. The biggest contributor to pollution in the province is Eskom, which has 12 coal-fired power stations. The power utility has been accused of failing to comply with air quality legislation. In July 2018, Eskom indicated that it could meet the stricter pollution emissions standards, but that the taxpayers will have to pay for it - in cash and millions of litres of water. This follows proposed changes to key pollution legislation by the DEA. These changes will significantly affect the date for industries, including Eskom, to meet emissions targets.

JUDGMENTS:

- In May 2018, the Pretoria High Court in *Treasure the Karoo Action Group and Another v the Minister of Mineral Resources and Others*, dismissed the application to set aside the *Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002 Regulations for Petroleum Exploration and Production*, made by the Minister of Mineral Resources on 3 June 2015. These Regulations provide for the regulation of hydraulic fracturing (fracking). The High Court emphasised that the matter did not concern the merits of fracking but was solely focused on whether the Minister of Mineral Resources was deprived of the power to make the Regulations. The applicants contended that after the 2008 amendment to the MPRDA, the Minister was barred from making Regulations that included extensive environmental regulation. The High Court, however, found that the *National Environmental Management Act 107 of 1998* recognises co-operative governance, and that the Regulations at issue cover the technical aspects of control and regulation of fracking and are not about the management of the environmental aspects of fracking.
- In September 2018, the Cape Town High Court in *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others*, ruled the Department of Agriculture, Forestry and Fisheries' (DAFF) total allowable catch for West Coast Rock Lobster unconstitutional. The cap on the amount of lobster to be fished threatened the sustainability of the lobster (as it was too high and not in line with section 24 of the Constitution), as numbers had declined drastically over the years due to over-fishing.

- In November 2018, the Pretoria High Court set aside the written permission of the Ministers of Environmental Affairs and Mineral Resources given to Atha Africa Ventures to mine in the Mabola Protected Environment in *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others*. The matter concerned proposed coal mining activities in a protected wetland area. The wetland area was granted special recognition in terms of the *National Environmental Management: Protected Areas Act 57 of 2003 (NEMPA)*. Due to this, both Ministers, in addition to the consideration of various other legislation, had to provide specific written permission for the mining activities in terms of NEMPA. The applicants raised 13 grounds of review, including that the decision in terms of NEMPA lacked transparency, that there had to be exceptional circumstances to allow mining in a protected area and that the Ministers overlooked the "cautionary principles" in NEMPA. The High Court agreed that the decision lacked transparency and that the Ministers did not adopt a cautionary approach in considering the management of acid mine drainage post closure and that they failed to apply their minds independently to the matter. The High Court granted a punitive cost order against both Ministers and the MEC for Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga.

LEGISLATION/PROPOSED LEGISLATION:

- On 14 March 2018, public hearings were held on the *Draft Carbon Tax Bill [B46-2018]* by the Standing Committee on Finance and the Portfolio Committee on Environmental Affairs. The Bill proposes the imposition of a tax on the carbon dioxide (CO₂) equivalent of greenhouse gas emissions. The Bill is at date of publication under consideration by the Finance Standing Committee.

GENERAL:

- In October 2018, Cabinet approved a network of 20 new Marine Protected Areas (MPAs) that are representative of South Africa's rich coastal and ocean biodiversity. This will increase protection of the ocean around South Africa from 0.4% to 5%. The new areas will advance ocean protection by approximately 50 000 km², an area two and half times the size of the Kruger National Park. According to the South African National Biodiversity Institute (SANBI), this is far short of the global target of at least 10% protection of the oceans by 2020 - to which South Africa has committed as a UN member.
- In November 2018, South Africa joined the International Energy Agency (IEA) as an association member. The country will collaborate with the IEA in achieving its aim to provide affordable, accessible and clean energy.
- A joint operation led by the SANDF to help limit illegal marine activities was launched in the Western Cape in November 2018. The SANDF started visibility patrols on land with armoured protected carriers, and on sea with South African Navy (SAN) Patrol Vessels. The operation is aimed at the protection of marine resources from poachers and to prevent any boats and divers in the area from going out to the sea to conduct illegal activities.



Property

(section 25)



2018 Grade D =

2019 Grade D -

In 2018, the debate around the proposed amendment to section 25 of the Constitution dominated the political and social landscape, and the political rhetoric often overshadowed the discussion. Although the Constitution provides for a delicate balance between the protection of property rights and ensuring more equitable access to property through land reform, the slow pace of land reform, together with extensive reports of corruption, has created tension. The uncertainty and political rhetoric relating to the proposed constitutional amendments, coupled with policy uncertainty related to other proposed legislation, has created fear and a loss of investor confidence in South Africa. In light of these developments, the State does not instil confidence that the delicate balance of property rights will be maintained. Hence the downgrade to D -.

REVIEW OF PROPOSED AMENDMENT TO SECTION 25 OF THE CONSTITUTION AND RELATED ASPECTS:

- In the President's SONA on 16 February 2018, he emphasised that "expropriation without compensation" should be implemented in line with the ANC's 54th National Conference resolution. On 27 February 2018, Parliament's Joint Constitutional Review Committee (JCRC) was given the mandate by the National Assembly and the NCOP to review section 25 of the Constitution, to make it possible for the State to expropriate land without compensation. The motion adopted on 27 February 2018 referred to the SONA and that expropriation without compensation should be implemented in a manner that "increases agricultural production, improves food security and ensures that the land is returned to those from whom it was taken under colonialism and apartheid and undertake a process of consultation to determine the modalities

of the governing party resolution." The Committee's initial deadline to report back to Parliament was 30 August 2018. This date was later extended.

- The JCRC organised public hearings in all provinces, from 26 June 2018 to 4 August 2018. They further issued a call on 13 April 2018 for written public submissions on the review of section 25 of the Constitution, which had to be submitted by 15 June 2018.

- In terms of a Report by the JCRC titled *Report on Emerging Trends from Public Submissions on the Review of Section 25 of the Constitution: Trends* dated 22 August 2018, of 149 886 submissions (analysed to date of the report), 60 157 indicated that section 25 of the Constitution must be reviewed, 89 327 that section 25 should not be reviewed and 402 were undecided. This trend showed that 59.6% thought the Constitution should not be reviewed, whereas 40.14% thought it should and only 0.27% were undecided. The Report, however, emphasised that the total number of submissions still had to be determined. The Report furthermore noted that those not in favour of a constitutional amendment were essentially of the view that the Constitution in its current form already allows for expropriation without compensation. There were fears of threats to food security and fear of loss of investments and donors. Those in favour of a constitutional amendment in terms of the Report were of the view that the Constitution in its current form is an impediment to land reform.

- The JCRC requested an extension on the date to report back to Parliament, and a further round of oral presentations was scheduled for 25 and 26 October 2018.

- On 15 November 2018, a final Report was adopted by the JCRC on the review of section 25 of the Constitution, with a vote of 12 in favour and four against. Leading up to the 15 November 2018 meeting, there appears to have been concerns raised by Committee Members at an earlier meeting on 1 November 2018 about the manner in which an initial report was compiled by the external service provider.



- The final Report of 15 November 2018 adopted by the JCRC indicated that 630 609 written submissions were received but only 449 522 were valid and analysed. It appears that 181 087 submissions were regarded as unrelated, duplicates and blanks. 65% of the valid submissions were opposed to a constitutional amendment and 34% were in favour of an amendment. However, the majority of participants at the public hearings felt section 25 of the Constitution had to be amended. There was no consensus on the nature of the amendment and how this should be done. The Report recommended that “Section 25 of the Constitution must be amended to make explicit that which is implicit in the Constitution, with regards to expropriation of land without compensation, as a legitimate option for Land Reform.” The Report furthermore held that Parliament must urgently establish a mechanism to give effect to such an amendment and that such a *Constitutional Amendment Bill* must be passed before the end of the 5th Democratic Parliament.

- Following the release of the JCRC Report of 15 November 2018, which had to be adopted by both houses in Parliament, AfriForum urgently applied to the Western Cape High Court to interdict the Committee from submitting the Report to the National Assembly and NCOP pending a review of the decision. On 30 November 2018, the Western Cape High Court in *AfriForum NPC v the Chairperson of the Joint Constitutional Review Committee of the Parliament of the Republic of South Africa*, held that AfriForum failed to satisfy the requirements for an urgent interdict and dismissed the urgent application. The second part of AfriForum’s application, which relates to the review of the decision, will be enrolled on the normal court roll and be heard later in 2019. The crux of AfriForum’s review application is centred around the manner in which written submissions were considered by the service provider appointed by the Committee to capture the submissions. It was alleged that the Report was flawed and therefore the Committee could not simply adopt the Report.

- On 4 December 2018, the majority of the National Assembly voted in favour of the JCRC’s Report of 15 November. On 5 December the NCOP also voted in favour of the Report. A motion was passed to establish an *ad hoc* committee to draft the proposed amendment. The draft Bill will be introduced following the procedure in section 74 of the Constitution, relating to a Constitutional Amendment Bill and the Committee was given until 31 March 2019 to complete their work.

- Following the decision of Parliament on 5 December 2018, media reports on 6 December 2018 reported that Agri SA and other civil society organisations have indicated that they will approach the Court if section 25 of the Constitution is amended.

LEGISLATION/PROPOSED LEGISLATION:

- The *Protection of Investment Act* (PIA) 22 of 2015, which was signed into law on 13 December 2015, commenced on 13 July 2018. PIA provides for protection of investors and their investments and it affirms the Republic’s sovereign right to regulate investments in the public interest. During public hearings in 2015, serious concerns were raised by both the American Chamber of Commerce and the EU Chamber of Commerce that it does not provide sufficient protection to

investors and that the *Promotion and Protection of Investment Bill* [B18-2015] (which was later signed into law as the PIA) adds to uncertainty in doing business in South Africa. Further concerns raised also emphasised that the Act is not in line with international law as there is no compulsory recourse to international arbitration before an international tribunal. The Act also provides the South African government with the right to take regulatory measures, whereas investment treaties protect foreign investors from adverse effects to the extent that it results in expropriation, for instance. On 13 July 2018, *Regulations on Mediation Rules in terms of PIA* were also published, which apply in the instance where government action has breached the protection afforded to the investors.

- The *Extension of Security of Tenure Amendment Act 2* of 2018 was signed into law on 20 November 2018. The Act amends the *Extension of Security of Tenure Act 62* of 1997, to provide for the establishment and operation of the Land Rights Management Board. It also provides for the legal representation of occupiers and it further regulates the eviction of farmworkers by enforcing alternative resolution mechanisms. One of the functions of the Land Rights Management Board is to assist in the creation and maintenance of a database of occupiers, land rights disputes and their resolutions, as well as evictions.

- The *Private Security Industry Regulation Amendment Bill* [B27-2012], which will require foreign owners of security firms to sell 51% of their shares to South Africans, is still awaiting Presidential assent. The Bill was sent to the President in March 2014 and at date of publication of this report the Bill has still not been assented to. The Bill raised serious concerns in that it does not sufficiently protect the rights of foreign investors in the security industry in South Africa. Uncertainty regarding this Bill adds to policy uncertainty for foreign investors.

- The *Mineral and Petroleum Resources Development Amendment Bill* [B15-2013] was sent back to Parliament in January 2015 as the President had four reservations. The reservations included the manner public participation was conducted in the NCOP and lack of consultation with the National House of Traditional Leaders (NHTL). The Bill was further deliberated and passed by the National Assembly and it was sent to the NCOP in November 2016 for concurrence. The latest development on the Bill, at date of publication, was that NCOP officials met on 2 August 2018. The Parliamentary Law Advisor was to draw up a final list of proposed amendments to be sent to the provinces for their final mandate.

- The *Preservation and Development of Agricultural Land Framework Draft Bill* (X-2015) published by the DAFF in 2015 was revised in 2016. The Bill provides for the regulation of the subdivision, re-zoning and protection of agricultural land. A contentious clause of the Bill provided that the Department is the custodian of all agricultural land for the benefit of all people. Concerns were raised by stakeholders that this will end the freehold ownership of agricultural land, which could seriously compromise food security, which the Bill aims to protect. The 2016 revision of the Bill, described as the *Draft Preservation and Development of Agricultural Land Bill, 2016* appeared to exclude the contentious clause. It reiterates previous Bill’s aim of promoting the preservation and sustainable development of

agricultural land in South Africa. At date of publication, the current status of the Bill is unclear, since it was revised. There appear to be concerns about the roles of different spheres of government in the revised version.

- The draft *Regulation of Agricultural Land Holdings Bill* [BX-2017] published by the Department of Rural Development and Land Reform (DRDLR) in March 2017, saw no further development in 2018. The Bill places a maximum ceiling of 12 000 hectares on agricultural land ownership and seeks to restrict foreigners to leases of between 30 to 50 years instead of ownership. Serious concerns have been raised on the vagueness of the Bill and wide discretionary power of the Minister, especially relating to lack of detail on the criteria that will be taken into account to determine the categories of ceiling for agricultural land holding in each district. This Bill also creates policy uncertainty for investors. On 14 May 2018, it was reported that the Minister of Rural Development and Land Reform stated that the Bill will be “key to fast tracking land-reform” in South Africa but to date the Bill has not been tabled in Parliament.

- The *Communal Property Associations Amendment Bill* [B12-2017] introduced in the National Assembly in April 2017,

was passed by both houses in Parliament on 4 December 2018 and sent to the President to assent. The Bill amends the *Communal Property Associations Act* 28 of 1996 and provides specifically for the Communal Property Associations Office and the appointment of the Registrar of the Communal Property Associations Office.

- The *Restitution of Land Rights Amendment Bill* [B19-2017], introduced on 16 August 2017 in the National Assembly, lapsed on 11 January 2019. The Bill proposed an amendment to the *Restitution of Land Rights Act* 22 of 1994, to extend the date for lodging a claim for restitution, which in terms of the Act had to be lodged by no later than 31 December 1998. The Bill stated that deserving persons and dispossessed communities did not participate in the process, as the window of opportunity for lodging a claim was too short.

- The *Expropriation Bill* [B4D-2015] introduced in the National Assembly in February 2015 was sent back to the President in February 2017, due to substantive and procedural concerns, which included inadequate public participation. The Bill was withdrawn in August 2018 on the basis that it was overtaken by the JCRC’s work considering a proposed amendment to the Constitution in order to allow for expropriation without



compensation. In an NCOP Committee Meeting of 28 August 2018, it became apparent that the Committee was of the view that it might cause parallel public hearings and the Bill, which did not propose expropriation without compensation, would create confusion. The NCOP Committee forwarded a recommendation report to reject the Bill and on 4 September 2018 the Bill was rejected in the National Assembly in terms of the Joint Rules of Parliament.

- In December 2018, the Minister of Public works published the draft *Expropriation Bill* [B-2019], for public comment. This version of the *Expropriation Bill* specifically provides that under certain circumstances it may be “just and equitable” for “nil compensation” to be paid, where land is expropriated in the public interest. It lists five such instances: where the land is occupied by a labour tenant; where the land is held for speculative purposes; where the land is owned by a state-owned corporation or other state-owned entity (SOE); where the owner of the land has abandoned the land or where the market value of the land is equivalent to, or less than, the present value of direct State investment. At time of writing, the Bill was still being considered by the public for comment.

JUDGMENTS:

- In April 2018, the Randburg Land Claims Court in *Mazizini Community and Others v Minister for Rural Development and Land Reform and Others*, emphasised its displeasure with the Commission for Restitution of Land Rights in the Eastern Cape, regarding the three competing land claims being adjudicated on. The three competing land claims were all lodged with the Commission before the deadline of 31 December 1998 but despite these competing land claims, the Commission only referred one claim to the Land Claims Court in February 2008. Judgment was handed down in March 2010 in favour of the claimant. However, this judgment was later rescinded by the SCA due to fact that there were competing land claims. The matter was referred back to the Land Claims Court for adjudication. The Land Claims Court emphasised it was “extremely disquieting” that the present land claims were only being adjudicated 20 years after they were lodged. The third plaintiff’s claim was settled and the Court held that both the first and second plaintiffs were dispossessed of rights in terms of section 2(1)(d) of the *Restitution of Land Rights Act* 22 of 1994 and restored land in terms of a draft Order prepared between the parties. The Minister of Rural Development and Others applied for leave to appeal the judgment, but it was dismissed by the Land Claims Court in August 2018.

- In August 2018, the Pretoria High Court in *Ngomane and Others v the City of Johannesburg Metropolitan Municipality and Another*, ordered the Metro Police to pay a group of homeless people compensation for confiscating their belongings in a clean-up operation. Among the confiscated goods were identity documents and educational qualifications.

- In November 2018, the SCA in *Community of Grootkraal v Botha N.O. and Others*, declared that the Community of Grootkraal have a right - in the form of a public servitude - to use and occupy certain areas of the property for the purpose of a church and related community activities. The Community consists of Karoo families who have lived and worked on the farms in the valley known as Grootkraal-Kombuys for 200

years. The SCA held that the onus was on the respondents to show that the origin of the custom and practice was unlawful, and the Community’s claim cannot be disregarded on the basis that the rights they claim came into existence at an unspecified time between 1800 and 1850. Furthermore, the SCA found that although there is no precise evidence as to when the Community used the property to build a church and conduct church services, the fact that successive owners of the property did not prevent the church from operation, is an indication that it occurred lawfully.

REPORTS:

- According to the *DRDLR Annual Report 2017/2018*, the Commission for Restitution of Land Rights finalised 865 land claims for the period under review. This is only a slight improvement of the 804 that were settled in the 2016/17 period. The Report also stated that 155 791 hectares have been acquired, with 10% allocated to people living and/or working on farms.

- The *2018 International Property Rights Index* (IPRI), which measures the strength of physical property rights, intellectual property rights and the legal/political environment in 125 countries, ranked South Africa 37/125 countries concerning property rights. In the 2017 IPRI Index, South Africa was ranked 27th in property rights. South Africa’s score declined by 0.65 from 7.00 in 2017 to 6.35 in 2018. This is the largest decline by any country measured in the Index.

- South Africa has a ranking of 97/140 for the protection of property rights on the WEF’s GCR 2018, a significant drop from 76/138 in 2017/18. It is also ranked 83/140 for the quality of land administration.

GENERAL:

- The government has acquired 8.2 million hectares of land for its reform programme since 1994, but 93% of the claimants have opted for monetary compensation. This is according to Land Reform Minister, Maite Nkoana-Mashabane during Parliamentary Question Time in May 2018. The government spent R39.2 billion on the process.

- In May 2018, 40 families who were forcefully removed from their land during apartheid had two hectares of land in Rondebosch, Cape Town, handed back to them, after beginning the restitution process in 2001 and in 2008.

- According to media reports of 5 August 2018, the DRDLR had identified 139 farms across the country, which would serve as a test case for land expropriation. This news apparently followed after a two-day lekgotla of the governing party’s National Executive Committee (NEC). Details of the farms were not available and further uncertainty was created with AfriForum publishing a list of farms on their website on 13 August 2018, which were apparently identified by the DRDLR as test cases. However, the authenticity of the list was denied by the DRDLR spokesperson. To date there have been no further developments.

- In September 2018, the Presidency announced that an Advisory Panel on Land Reform to support the Inter-Ministerial Committee (IMC) on Land Reform was appointed

by the President. The Panel will advise the IMC on various policy matters relating to land reform, such as restitution, redistribution, tenure security and agricultural support. The Panel consists of 10 members of various professional and academic backgrounds related to agricultural economy and land policy. According to the Presidency, the Advisory Panel hosted a Colloquium in Boksburg from 7 to 8 December 2018. The aim was to formulate policy proposals, which will inform the final report to be submitted to the Presidency in March 2019. At the Colloquium, it was highlighted that land reform policies will not be effective without an efficient land administration framework and land governance system. A further gap highlighted was the need for a private land acquisition strategy to be developed to fast-track redistribution.

- In November 2018, the Land Claims Court ordered the Amathole District Municipality to transfer the remainder of a R55 million land claim pay-out that was earmarked for the development of nine villages to the villagers of the Keiskammahoek area. The nine villages were awarded a R102 million settlement after a successful land claim in 2002. Some of the pay-out was compensation for over 1 000 families who were dispossessed of their homes under apartheid. The remaining R55 million was set aside for development projects and was left in the care of the Municipality to facilitate the

implementation of projects to benefit the community. The Municipality was also instructed to provide the villagers with detailed reports of the use of the finances.

- According to media reports of 24 January 2019, a report by the Special Investigating Unit (SIU) was given to the President in March 2018. Their seven-year investigation into the land reform programme has shown extensive fraud and corruption. The SIU recommended that 42 people, including various government officials, be prosecuted for fraud and corruption. The Report appears not to be publicly available and was obtained from media houses by means of a request in terms of PAIA.

- In an agreement signed between the uMgungundlovu Community in KwaZulu-Natal, Sun International and the DRDLR, the community will get back 700 hectares of land on the KwaZulu-Natal Wild Coast, a 28.4% shareholding in the Resort, a cash pay-out, and monthly rental sum for the land the Resort is built upon. The families of the community were forcibly removed 37 years ago following a contract between the Transkei homeland government and hotel magnate Sol Kerzner. The community later lodged a land claim that was accepted as valid.





Housing

(section 26)



2018 Grade B =

2019 Grade B -

The steady movement of economic migrants from rural and peri-urban areas into metropolises seeking employment has put a strain on provincial housing budgets and capacity. In order to address this issue, the State needs to increase the budget for rural development, as the housing backlog also leads to an increase in housing protests. The State's failure to address this intersectional socio-economic problem effectively, maladministration and corruption in the Department of Human Settlements (DHS) has led to the negative trend on the B grading.

REPORTS:

- According to Stats SA *General Household Survey (GHS) 2017*, released in June 2018, slightly over four-fifths (80.1%) of South African households lived in formal dwellings in 2017, followed by 13.6% in informal dwellings, and 5.5% in traditional dwellings. 13.6% of South African households were living in RDP or state-subsidised dwellings. Some residents raised concerns about the quality of subsidised houses, and 10.2% said that the walls were weak or very weak, while 9.9% regarded the roofs of their dwellings as weak or very weak.

- According to the *DHS Annual Report 2017-2018*, a total of 370 999 homes were handed over to qualifying members of society. 67 548 houses were upgraded in partnership with provinces and municipalities.

- According to the above report, the DHS issued 81 929 pre- and post-1994 title deeds against a target of 327 300.

- According to the Fire Protection Association of South Africa (FPASA), for the 2016/2017 municipal reporting period, there were 5 283 informal dwelling fires recorded by municipalities and reported to the FPASA. The loss due to the fires is valued at R179 513 324, as reported by municipalities across South Africa.

- In June 2018, the Johannesburg City Council proposed to put 71 buildings to tender for redevelopment by private property developers. The private developers would provide affordable accommodation in the inner city. The developers would also be required to reserve 20% of the development for low-income earners, with rent capped at R900 per month - excluding utilities. In November 2018, SERI produced a practice note entitled *“Inner City Federation: Fighting for Decent Housing in Inner-City Johannesburg”* that documents the struggle of the Inner City Federation. This coalition of tenants and unlawful occupiers from over 40 buildings in inner-city Johannesburg



was launched in response to the above, to advocate for better housing and basic services and challenge the stigma associated with low-income residents in inner-city Johannesburg.

JUDGMENTS:

- On 12 September 2018, the Johannesburg High Court in *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another* held that a Court must determine whether a reserve price should be set on all the facts placed before it by both the creditor and debtor, when granting an order that a property is especially executable. In this matter Legal Aid argued that a reasonable reserve price should be set by a Court so that a debtor is not left with a debt after his or her home has been sold in execution. The High Court emphasised that this oversight role is to ensure a “just and equitable outcome”. It is in line with section 1 of the Constitution and would give effect to section 26 of the Constitution, by ensuring that all relevant circumstances are considered in a process that could lead to the eviction of a debtor from his or her primary home. This reserve price to be determined by the Court is only applicable in the sale in execution of the primary home of a debtor and only if the debtor is a natural person.

- In November 2018, the Constitutional Court in *Awardien and Others v Registrar of Deeds and Others*, was faced with the lawfulness of the termination of instalment sale agreements for subsidised housing, which was heard on appeal from the Western Cape High Court. The Court distilled the issues to be determined. Firstly, the legal effect of the late recording of an instalment sale agreement in terms of the *Alienation of Land Act 68 of 1981*. Secondly, whether a section 129(1) Notice in terms of the *National Credit Act* must indicate the amount

that a creditor alleges is owed by a debtor. The applicants in the matter were all beneficiaries/purchasers of homes under a state-subsidised housing programme, which was administered by the Cape Town Housing Company (Pty) Ltd. The instalment sale agreements, which had to be recorded with the Registrar of Deeds within 90 days of concluding the agreements in terms of the *Alienation of Land Act 68 of 1981*, were only recorded 10 years after the agreements were concluded and the applicants had occupied the houses. The Constitutional Court held that Cape Town Housing Company Pty (Ltd) was - due to its failure to record the agreements - barred from accepting payments and therefore the applicants could not have been in breach of the agreements when they received their section 129(1) Notice, as they were only then made aware that the instalment sale agreements were recorded. The Court set aside the cancellation of the instalment sale agreements. The Court was also highly critical of the fact that the DHS, being responsible for government’s housing subsidy and ensuring access to adequate housing, withdrew from the application. The Court held the Department is the only entity that could have provided the Court with information on the conditions for such financial arrangements and their constitutional implications.

LEGISLATION/PROPOSED LEGISLATION:

- In April 2018, the comment period closed for the *City of Johannesburg Inclusionary Housing Incentives, Regulations and Mechanisms* policy. This policy stipulated at least 20% of units in all residential developments over 10 units are to be set aside for what is called inclusionary housing. These units would be available to residents with a total household income of not more than R7000, and the rent plus levies may not exceed R2100 per month, or 30% of the household income. That excludes the cost of utilities like electricity.





Healthcare, Food, Water and Social Security

(section 27)

2018 Grade C =

2019 Grade C -

Healthcare

The right to healthcare requires the State to take positive measures within its available resources to give effect to this right progressively. In this regard, State initiatives such as the roll-out of TB screening in correctional services and controlled mines are positive, coupled with reports of fewer infants being infected with HIV. The year under review saw the publication of the *National Health Insurance Bill, 2018* for public comment. The Bill has raised serious concerns on its feasibility, considering the financial burden and the lack of results in the NHI-pilot projects. The extent of maladministration reported in provincial hospitals and the failure to fill critical vacancies have hampered access to the right. The negative trend on the grading for this period is also influenced by the state of water security for the most vulnerable, as well as the absence of adequate drought preparation systems.

REPORTS:

- According to the *Department of Health (DoH) Annual Report 2017/2018*, the *MomConnect* programme was launched in August 2014 to improve access to early antenatal services and to empower pregnant women with relevant health knowledge. Pregnant women register via their mobile phones to receive weekly messages appropriate to their stage of pregnancy. The number of pregnant women and mothers registered with *MomConnect* doubled from 917 053 in the 2016/17 financial year, to 1 888 918 in the 2017/18 financial year. A total of 1 549 complaints and 14 337 compliments have been registered and resolved since its inception. At the end of March 2018, a total of 818 688 pregnant women and mothers were receiving health-promotion messages.
- With regard to the extensive TB screening campaign run by the DoH in the reporting period per the above report, specific

annual targets were set for TB screening in correctional services and controlled mines. These services are implemented through a service level agreement by sub sub-recipients (SSRs) of Global Funding. This funding allowed SSRs to conduct routine TB screening of inmates in 98% of correctional service points in 2017/18. 97% of inmates diagnosed with TB were started on TB treatment in correctional centres, and 80% of community members diagnosed with TB were also started on TB treatment in this year.

- The 2018 infant mortality rate (IMR) for South Africa is estimated at 36.4 per 1 000 live births according to the *Stats SA Mid-year Population Estimates 2018*, compared to 32.8 per 1 000 live births in 2017. According to the same report, life expectancy at birth for 2018 is estimated at 61.1 years for males and 67.3 years for females, compared to 2017's 61.2 and 66.7 respectively.
- In May 2018, the Treatment Action Campaign (TAC) released a report on the State of the Provincial Healthcare system. The report's findings in relation to Gauteng emphasised the critical shortage of human resources, a finding that is supported by national DoH data released in February 2017. The data indicated that there were over 73 237 funded posts in Gauteng alone, of which only 60 343 were filled. This led to a shortfall of 6 100 vacant posts. From the TAC's own investigation at 24 facilities in Gauteng, 50% of these were classified as not having enough staff.
- In June 2018, the Office of Health Standards Compliance (OHSC) published their annual inspection report for public health-sector health establishments for 2016/17. The OHSC inspected 696 facilities during the period of review. It was



emphasised that of the seven categories inspected, the aspect of *Leadership and Corporate Governance* scored the lowest, at 44%. It was specifically noted under this category that this, amongst others, involved lack of governance structures, lack of disclosure of financial interests of managers and failure of documentation evidencing delegation of authority for financial, human resource and other management control processes.

- According to the *DoH Annual Report 2017/2018*, the DoH is working with the DoJ&CD to address litigation and medical negligence. The *Declaration of Medico-Legal Summit of March 2015* outlines three solutions, namely, the Medical (Patient Safety), Administrative and Legal Solutions. The Medical Solution (Patient Safety) is aimed at, among others, reducing the incidences of the negligence, medical malpractice or unethical behaviour and adverse events, through uniform implementation of Clinical Governance Protocols and Standard Operating Procedures (SOPs). The Administrative Solution strives to ensure among others, proper record-keeping that will minimise the loss or theft of medical records and proper communication with patients and members of the public. The Legal Solution looks at various legal interventions, including but not limited to mediation; contingency fees; the common law rule of “once and for all”; and the periodic or staggered payment, instead of a lump sum payment.

REPORTS [HIV/AIDS]:

- According to the *Stats SA Mid-year Population Estimates 2018*, the estimated HIV prevalence rate is at approximately 13.1% among the South African population, which represents an increase from the 2017 figure of 12.6%. The total number of people living with HIV is estimated at approximately 7.52 million in 2018, up from 7.06 million in 2017. For adults aged 15 to 49 years, an estimated 19% of the population is HIV-positive.

- According to the *DoH Annual Report 2017/2018*, prevention is the mainstay of efforts to combat HIV and AIDS. Since the HIV Counselling and Testing (HCT) campaign was introduced in 2010, over 44 million people have been tested. For the 2017/18 financial year, a total of 13 872 315 people were tested for HIV, exceeding the annual target of 10 million.

- The DoH states that medical male circumcision (MMC) is one of the Department’s HIV prevention intervention mechanisms. During 2017/18, a total of 539 892 MMCs were performed (this includes MMC data from partners).

- The DoH continued to provide Integrated School Health Programme (ISHP) services, which contributed to the health and wellbeing of learners by screening for health barriers to learning. 387 574 Grade 1 learners (33%) and 193 438 Grade 8 learners (21%) were screened from April 2017 to March 2018. A total of 4 339 875 learners have been screened since inception of the programme in 2012, and 504 803 learners have been identified with various health barriers to learning and referred for intervention.

- According to the DoH, at the end of March 2018, there were 4 189 070 people remaining on antiretroviral therapy (ART).

- According to the *DoH Annual Report 2017/2018*, programme data shows that fewer infants are being infected with HIV. In 2017/18, a polymerase chain reaction (PCR) test done at around 10 weeks showed a mere 0.95% positivity rate for babies born to HIV-positive women.

- According to the above Report, safety concerns have forced the DoH to delay its plans to provide HIV patients with Dolutegravir, a cheaper and more tolerable alternative to one of the components currently used in the three-drug cocktail taken by most State patients. The development is not only bad news for patients, but also throws a spanner in the works of the State’s plans to increase the number of HIV patients on treatment from 3.9 million, to over six million by 2020-21.

JUDGMENTS:

- In December 2018, the Johannesburg High Court certified (recognised) the groups of persons in the proposed class action relating to the listeriosis outbreak caused by the ingestion of contaminated food products, originating from a meat processing facility in Polokwane. The matter of *Mantha Welhemina Ngobeni and Nine Others v Tiger Brands and Two Others* will, according to the 3 December 2018 order, be conducted in two stages. The first stage involves a declarator in respect of liability towards the classes. In the second stage, only those who did not opt out shall be bound by the class action against the respondents.

LEGISLATION/PROPOSED LEGISLATION:

- In May 2018, the Minister of Health published the draft *Control of Tobacco Products and Electronic Delivery Systems Bill* [X-2018], which provides for the control over smoking and regulates the sale and advocating of tobacco products and electronic delivery systems. The preamble of the Bill reiterates the harmful effect of smoking on the health of smokers and non-smokers. The Bill will repeal the whole *Tobacco Products Control Amendment Act* 63 of 2008.

- In May 2018, the *State Liability Amendment Bill* [B16-2018] was introduced in Parliament. The Bill proposes to amend the *State Liability Act* 20 of 1957, to provide for structured settlements of claims against the State resulting from wrongful medical treatments. The Bill provides specifically for periodic payments to be made for future medical costs and future loss of earnings. The Bill attempts to address the strain on the budget of provincial hospitals in relation to the uptake in medico-legal claims, by providing for structured payments instead of lump sum payments. Public hearings on the Bill followed in October 2018. Civil society organisations such as Section 27 raised concerns that this proposal will require substantial resources to ensure provincial hospitals are able to administer such periodic payments, and the attention should rather be afforded to training competent medical staff. To date there have been no further deliberations on the Bill.

- In June 2018, the Minister of Health published the *National Health Insurance Bill, 2018*. The Bill aims to revolutionise healthcare provision in South Africa by replacing the current two-tiered healthcare financing with the establishment of the NHI fund, which will be the single purchaser and financier of the population’s personal health services. The NHI, according to the NHI Bill, is envisioned to be rolled out in three phases

spanning over 14 years, with the first phase extending from 2012 to 2017. The second phase is accordingly from 2017 to 2022. The final phase is from 2022 to 2026. Serious concerns were raised: about the anticipated costs of the NHI, lack of crucial detail, and evidence of the pilot projects being successful. In media reports of 6 December 2018, it was speculated that the Cabinet has not approved the contentious Bill for submission but according to the presidential spokesperson it will be finalised in 2019.

GENERAL:

- As of March 2018, patients with chronic illnesses in Alexandra, north of Johannesburg, no longer have to queue to get their medication thanks to the launch of Africa's first ATM pharmacy by the Gauteng Department of Health.
- A March 2018 study of 122 nursing malpractice cases entitled, *Investigation into the factors contributing to malpractice litigation in nursing practice within the private healthcare sector of Gauteng* has raised red flags about the number of civil claims at private hospitals in the country that are quietly settled. Civil claims settlements due to nursing malpractice are a growing problem, according to Professor Ethelwynn Stellenberg from Stellenbosch University's Faculty of Medicine and Health Sciences. In all, nursing malpractice affected the quality of life of 69% of the victims, with 43% requiring additional surgery and 25% left with disabilities.
- In May 2018, there were reports of massive protests at the Charlotte Maxeke Academic Hospital, which led to an intervention by the SAHRC. According to a June 2018 media statement, the SAHRC initiated an investigation into the Hospital, following reports of a shortage of radiation oncologists and a delay in healthcare services to 500 cancer patients who were awaiting radiation treatment. It appears submissions were made to the SAHRC but a final report detailing the outcomes could not be found at date of publication.
- South Africa made history in June 2018 when the DoH announced that all drug-resistant tuberculosis (DR-TB) patients will be eligible to receive the new medicine, Bedaquiline. Previous medicine had the side effect of causing deafness in patients.

Food

South Africa remains a food-secure country - despite the drought and other agricultural threats such as avian flu. However, because of poverty and stark inequality, over 20% of the population lives below the poverty line, putting them at risk of going hungry.

REPORTS:

- According to the Stats SA *General Household Survey 2017*, access to food decreased from 23.6% in 2010, to 21.3% in 2017. In the same reporting period, the percentage of people who were at risk of going hungry decreased from 29.1% to 24.7%. Between 2002 and 2017, the percentage of households that experienced hunger decreased from 24.2% to 10.4%, while the percentage of individuals who experienced hunger decreased from 29.3% to 12.1%.
- Seven million children in South Africa live below the food

poverty line, meaning that these children go hungry, according to the annual *South African Child Gauge 2018*, released in November 2018.

- According to the *DAFF Annual Report 2017/18*, 2 138 273 households benefitted from food security initiatives over the past four financial years (2014/15 to 2017/18).

GENERAL:

- In March 2018, the South African Institute of Environmental Health (SAIEH) revealed that South Africa has just one environmental health practitioner per 30 000 people. This is three times fewer than the ratio recommended by the World Health Organisation (WHO), leaving the food production industry to self-regulate to a large extent. This is in the wake of the listeriosis outbreak, which killed over 200 people and infected more than 1 000 individuals, including children. In October 2018, the National Institute for Communicable Diseases (NICD) announced that the outbreak of listeriosis was over.
- In October 2018, the SAHRC held closed public hearings and submissions for an inquiry into allegations that counterfeit or expired food is sold in informal shops. This inquiry was set to release a preliminary inquiry in January 2019.

Water and Sanitation

Severe drought conditions in the provinces of the Western Cape, Northern Cape and Eastern Cape placed great pressure on the water supply to people in the affected areas and threatened food security. Urgent State initiatives taken to address this crisis involved the provisional allocation of R6 billion in the 2018/19 Budget for public infrastructure investment and drought relief. The drought crisis has, however, highlighted the urgent need for national and provincial government to work together effectively and cooperatively in addressing such a crisis.

REPORTS:

- According to the *Department of Water and Sanitation (DWS) Annual Report 2017/18*, South Africa is an arid country. It is one of the 30 driest countries in the world and has been experiencing a drought since 2014. As of February 2019, the provincial dam levels were 58% in Eastern Cape, 70% in the Free State, 94% in Gauteng, 55% in KwaZulu-Natal, 60% in Limpopo, 69% in Mpumalanga, 58% in the North West, 47% in the Western Cape, and 67% in the Northern Cape.
- The same Report states that a *National Water and Sanitation Master Plan* was developed and tabled before Cabinet in the reporting period. The aim: to help better articulate the necessary steps to ensure the aversion of a water and sanitation crisis and mitigate the impact of this natural drought, as well as to re-engineer the provision of water and sanitation services.
- The above Report also states that 8 313 instances of bucket sanitation were eradicated in the Northern Cape and Free State. Only 126 of the planned 10 032 rural households were served due to the lack of bulk infrastructure to connect the sanitation systems.
- According to the *DWS Annual Report 2017/18*, at 14 May

2018, the national average of the 215 dams in the summer rainfall region was higher in comparison to the same period in the previous financial year.

- According to the above Report, there are 5511 registered dams in the country, 94% of which are small.
- Furthermore, the Report states that 14.13 million m³ was delivered to smallholder farmers as part of targeted rural development initiatives in the reporting period.
- In the 2017/18 period, the DWS provided 465 water harvesting tanks for household productive uses - such as livestock watering and food production - compared to 807 in the previous period.
- According to the WEF GCR 2018, 20.1% of South Africa's population is exposed to unsafe drinking water and the country only ranks 93/140 for reliability of water supply.
- Stats SA's GHS 2017 states that 88.6% of households had access to piped water in 2017, whereas only 74.2% of households in Eastern Cape, and 74.7% of households in Limpopo enjoyed such access. Access to water in dwellings, off-site, or on-site, was most common in Nelson Mandela Bay (100%), the City of Cape Town (99.3%) and the City of Johannesburg (98.4%).
- The Stats SA GHS 2017 further revealed that, nationally, 63.9% of households rated the quality of water-related

services they received as 'good'. However, satisfaction has been decreasing steadily since 2005, when 76.4% of users rated the services as good.

- A further 26.8% accessed water on site, while 13.3% relied on communal taps and 2.4% relied on neighbours' taps. Although generally households' access to water is improving, 3.7% of households still had to fetch water from rivers, streams, stagnant water pools and dams, wells and springs in 2017. This is, however, much lower than the 9.5% of households that had to access water from these sources in 2002.
- Through the efforts of government, support agencies and existing stakeholders, an additional 20.5% of households in South Africa have access to improved sanitation since 2012. Most households in the Western Cape (94.1%) and Gauteng (90.1%) had the highest access to improved sanitation in the country, while Mpumalanga and Limpopo had the lowest at 67.6% and 58.9% respectively. Nationally, the percentage of households without sanitation, or who used the bucket toilet system, decreased from 12.6% to 3.1% between 2002 and 2017.

GENERAL:

- In June 2018, the villagers of Mmangweni in the Eastern Cape, together with the Legal Resources Centre (LRC), entered into a court-ordered agreement with the OR Tambo District Municipality, initiated by the Mthatha High Court. The Municipality was ordered to deliver ten 5 000-litre water tanks within 15 days, and to refill each tank on a weekly basis.



- The R3 billion Giyani Bulk Water Project, which was meant to supply water to over 55 villages in Limpopo, was stalled in 2018 due to the cash crisis at the DWS. Limpopo-based construction company, Khato Civils, retrenched nearly 1 000 employees in October 2018 due to the DWS' failure to pay. The project was launched in 2014 with the aim of addressing water shortages in Giyani but the cost ballooned to R3 billion, from just over R500 million. Only five communities have so far been connected. In January 2019, the DWS indicated that it was finalising the funding for the project, with over R70 million still being owed to the construction company.

- In November 2018, Finance Minister Mboweni issued a notice effectively halting the allocation of R3.7 billion meant to provide water, sanitation and improve the lives of township residents, due to almost 100 municipalities' failure to spend the money. The money was allocated as part of the Municipality Infrastructure Grant (MIG), which aims to eradicate infrastructure backlogs in poor communities to ensure basic services such as water, sanitation, roads and community lighting.



Social Security

Social grants continue to be the last line of defence for a large percentage of the indigent population, with over 17.5 million grants having been paid during the period under review. The transfer of grant payments from CPS to the South African Post Office (SAPO) in October 2018, was marred by technical difficulties and resulted in the non-payment of up to 8% of grants, threatening this right.

REPORTS:

- The biggest contributor to poverty alleviation over the past decade was the expansion of social grants. According to the *SASSA Annual Report 2017/18*, grants increased by 1.8%, compared to the 2016/17 financial year, with 2.1 million new grant applications processed in 2017/18.
- SASSA was allocated R7.2 billion to carry out its mandate over the 2017/18 period. The Annual Report also revealed R1.7 billion in irregular expenditure.
- The Child Support Grant has the highest number of beneficiaries, at 12 269 084 grants, followed by the Old Age Grant, at 3 423 337.
- According to the *SASSA Annual Report 2017/18*, at the end of the financial year, SASSA paid 17 509 995 social grants, compared to 17 200 525 in the previous period. Despite the increase, the set target of 17 523 737 was not met.
- 573 196 Social Relief of Distress payments were made to individuals and households to rescue them from destitution, undue hardship and disasters, at a cost of R546 million.
- Between April 2006 and March 2018, the total number of social grants increased from 12 015 059 to 17 509 995. The growth of social grants over this period amounted to 46%.
- The *SASSA Annual Report 2017/18* demonstrated that SASSA was highly effective in targeting the poor for social assistance, with a coverage rate of 90% of eligible citizens - rated among the best coverage in the world.

JUDGMENTS:

- The role that the former Minister of Social Development, Bathabile Dlamini, played in the social grant payment crisis in 2016/17, came under sharp focus in the Constitutional Court judgment of *Black Sash Trust v Minister of Social Development and Others (Freedom under Law intervening)*, delivered on 27 September 2018. The Court considered the inquiry report compiled by retired Judge President Ngoepe. He had to investigate the Minister's role and responsibility in establishing parallel decision-making and communication processes, and why the appointment of these individuals was not disclosed by the Minister to the Court. The Ngoepe Report found that the Minister misled the Court. The Court held that the Minister allowed parallel processes to be established knowing that withholding information about the appointment of such individuals from the Court would lead her to being held personally liable for the social grant payment crisis. The Court held that her conduct was grossly negligent and reckless. The Minister's argument that she should not be held personally liable for the legal costs on the basis of the principle of separation of powers was dismissed. The Court held that the rights of ordinary people who are dependent on these social grants were affected by her conduct. The Court held the Minister personally liable for 20% of the applicants' legal costs and a copy of the Inquiry Report and the judgment had to be sent to the NDPP for consideration of whether the Minister lied under oath and whether she should be prosecuted for perjury.



Children

(section 28)



2018 Grade C =

2019 Grade C =

The Constitution provides a range of protective measures for children but also recognises that children are themselves bearers of rights and not simply extensions of their parents. Children in South Africa remain particularly vulnerable. In light of the extensive reports about crime against children, it is apparent that these crimes are mostly committed by their caregivers. South Africa has advanced legislative measures to protect children from harm but lack of implementation greatly impacts the grading of the State's commitment to uphold children's rights. The mandate in this regard must be closely monitored, as the State's enforcement and fulfilment is unvaried (C with an equal trend).

REPORTS:

- According to the *South African Child Gauge 2018*, there were 19.6 million children in South Africa in 2017. 14% of children (2.8 million) are orphans who have lost either their mother, father or both parents; 21% of children do not live with either of their biological parents; and 0.3% of children live in child-only households.
- According to the *South African Child Gauge 2018*, better access to ART has been cited as the reason fewer children have been found to be orphaned.
- The same report states that in 2017, 80% of children living in child-only households had a living father and 88% had a living mother. Only 5% were double orphans.
- The *South African Child Gauge 2018* states that in 2017, 57% of children were living in urban areas and 79% of children lived in formal housing. Just 1.6 million children lived in backyard dwellings and shacks in informal settlements, and one in six children (18%) lived in overcrowded households.
- According to the *South African Child Gauge 2018*, in 2017, over half of children (65%) lived below the "upper bound" poverty line (with a per capita income below R1 138 per month) and 30% lived in households where no adults were employed.
- The *KidsRights Index* is an annual global index, which ranks how countries adhere to and are equipped to improve children's rights. It comprises a ranking for all UN Member States that have ratified the UN *Convention on the Rights of the Child* (CRC) and for which sufficient data is available (182 countries). In 2018, South Africa ranked 103 on the Index, down from 84 in the previous year - a significant drop. The Index considers five categories, namely: the right to life, the



right to health, the right to education, the right to protection, as well as an enabling environment for child rights. The Index says that South Africa needs to bring its domestic legislation more in line with the UN CRC.

- According to *Stats SA Mid-year Population Estimates 2018*, there were 36.4 infant deaths per 1 000 live births, an increase from 32.8 per 1 000 live births in 2017.

Crimes against Children

- According to the *SAPS Annual Report 2017/2018*, a decrease of 0.7% for crimes against children was recorded, from 43 842 reported crimes in 2016/2017, to 43 540 reported crimes in 2017/2018.
- According to the *Department of Correctional Services (DCS) Annual Report 2017/18*, the number of children in remand detention stood at 110 at the end of the previous reporting period. The average number of children in prison (remand and sentenced) was 222 at the end of March 2018, compared to 220 at the end of March 2017. Children comprised less than 0.2% of the overall inmate population by March 2018.
- According to the *South African Child Gauge 2018*, three in four murders of children aged 0 to 4 years old occurred in the context of abuse by a caregiver at home.

Nutrition

- According to the *South African Child Gauge 2018*, 2.3 million children (12%) lived in households where child hunger was reported in 2017. There was a significant drop in reported child hunger, from 30% of children in 2002, to 16% in 2006. Since then, the rate has remained in the same

range. This means that although social grants, feeding schemes and other efforts have been made, many households remain vulnerable to food insecurity.

- According to the *South African Child Gauge 2018*, 27% of children under five years (1.58 million children) are stunted, and those who are at the greatest risk of being stunted are the 1.9 million children under six years of age who live below the food poverty line.

- The same report states that more than 820 000 children below five years old are reported to have experienced child hunger, signalling a risk of under-nutrition. Young children are particularly vulnerable to prolonged lack of food, which increases their risk of stunted growth.

- The *South African Child Gauge 2018* also states that in 2017, 70% of children had access to drinking water on site, while children's access to adequate toilet facilities rose to 78%.

JUDGMENTS:

- In September 2018, the SCA in *Centre for Child Law and Others v Media 24 Limited and Others*, declared section 154(3) of the *Criminal Procedure Act 51 of 1977* constitutionally invalid, to the extent that it does not protect children as victims of crime. This is the case insofar as protection of their identity is not maintained once they reach adulthood. The matter was heard on appeal from the North Gauteng High Court and involved the balancing of the rights of children against the right to freedom of expression. It was contended

by the appellants that the 'best interests of the child provision' in terms of section 28(2) of the Constitution should be the paramount consideration. The SCA held that the constitutional rights of dignity and privacy also have to be factored in with the interests of the child, which continues even when the child attains adulthood. It would be logical to extend the protection, as the victim of a crime cannot change the fact of his or her victimhood. Parliament was given 24 months to rectify the defect and the Constitutional Court has yet to confirm the constitutional invalidity.

PROPOSED LEGISLATION:

- The *Children's Amendment Act 17 of 2016* was assented to in January 2017, but only commenced in January 2018. It establishes additional protection measures for children in ensuring early intervention to prevent abuse.

- In October 2018, the *Child Justice Amendment Bill* [B23B-2018] was introduced in Parliament. The Bill proposed to amend the *Child Justice Act 75 of 2008*, to increase the minimum age of criminal capacity of minors from 10 to 12 years and to regulate the decision to prosecute a child who is 12 years of age. There has been support for the Bill's intention to increase of the minimum age of criminal capacity, as that would also be in line with international standards. However, the Centre for Child Law has argued for it to be increased to 14 years. The Bill was passed by the National Assembly on 27 November 2018 and sent to the NCOP for consideration. At date of publication it was still under consideration by the NCOP.





Education

(section 29)



2018 Grade E -

2019 Grade E =

The Constitution provides an unqualified and immediately enforceable right against the State in relation to basic education, and a qualified right against the State in relation to higher education. The right to basic education has for years been severely hampered by the lack of adequate basic infrastructure failures, which has required court intervention. In the year under review there has been victory for the right to basic education in relation to the provision of school infrastructure, as the High Court removed legislative loopholes that made accountability impossible. The announcement of fully-subsidised higher education for poor and working class South African students and the realities of this announcement were significant developments in the field of higher education. Whilst there are legislative and juridical changes, the Departments responsible for implementation have yet to show improvement. Higher education is multi-faceted and without transparent and needs-based assistance, the right cannot be fully realised. As such, the grading remains very poor, for education at E =.

Basic Education

REPORTS:

- According to the *South African Child Gauge 2018*, many children in South Africa travel long distances to school. One in seven children (13%) live far (if a child has to travel more than 30 minutes to reach school, irrespective of mode of transportation) from their primary school. This increases to nearly one in five children (21%) in secondary school. Despite these barriers, South Africa has made significant strides in improving access to education, with a gross attendance rate of 98% in 2017.
- The *South African Child Gauge 2018* also states that access is increasing in the pre-school years, with 92% of five to six-year-olds attending some kind of educational institution or care facility. However, this does not necessarily translate into improved educational outcomes or progress through school. In 2017, 89% of 10 to 11-year-olds had completed Grade 3, while only 69% of 16 to 17-year-olds had completed Grade 9.
- Out of a total of 11.5 million children aged seven to 17 years, 254 000 were reported as not attending school in 2017.



Attendance rates for Coloured children remained slightly below the national average in 2017, at 95%.

- According to the *South African Child Gauge 2018*, the overall attendance rates tend to mask drop-out among older children. Analysis of attendance amongst discrete age groups shows a significant drop in attendance amongst children older than 15. This also coincides with the end of the compulsory schooling age.
- According to the Human Rights Watch *World Report 2018*, in October 2018 the SAHRC highlighted that half-a-million children with disabilities still do not have access to education, with 11 461 children with disabilities on waiting lists for school placements (up from over 5 500 in 2015). The SAHRC expressed concern that children with disabilities constantly experience barriers to the enjoyment of basic human rights, including the right to education, healthcare, and family care.
- The above Report states that despite the government's international and domestic obligations, many children with disabilities do not have equal access to primary or secondary education. When they do access schools, they face multiple forms of discrimination and barriers. They are turned away from mainstream schools, denied access to inclusive education, and referred instead to special schools by school

officials or medical staff simply because they have a disability. The referral system needlessly forces children to wait up to four years at care centres or at home for placement in a special school.

- The DBE's *Accelerated Schools Infrastructure Delivery Initiative* (ASIDI) is moving very slowly, according to the *DBE Annual Report 2017/18*. The Department only completed 12 out of the 115 targeted schools in 2017/18.
- The *DBE Annual Report 2017/18* shows that:
 - The Class of 2017 recorded the third highest enrolment of Grade 12 learners in the history of the basic education system in South Africa.
 - The total number of candidates who registered for the November 2017 NSC Examinations was 802 431. Of these, 629 155 were full-time candidates and 173 276 were part-time candidates. Of these, 534 484 full-time candidates and 117 223 part-time candidates wrote the 2017 NSC Examinations.
 - The following was achieved through the Accelerated Schools Infrastructure Delivery Initiative (ASIDI) between April 2017 and March 2018:
 - Replacement of inappropriate structures: a total of 12 schools were fully completed in 2017/18, with an additional 10 schools being sectionally completed;
 - Sanitation: a total of 54 practical Completion

Certificates were received for sanitation, of which 29 were for 2017/18, 22 for 2016/17, and three for 2015/16;

- Water: a total of 75 practical Completion Certificates were received for water, of which 43 were for 2017/18, 23 for 2016/17, four were for 2015/16, four were for 2014/15 and one was for 2013/14; and
- Electricity: a total of 67 Certificates of Compliance were received for electricity, of which 17 were for 2017/18, 45 for 2016/17, two for 2015/16, one was for 2014/15, one was for 2013/14, and one was for 2012/13.
- The National School Nutrition Programme (NSNP) benefited 9 247 359 learners in 21 277 schools in 2017 - well above the number of learners who can be considered as poor.
- More than 79% of the schools benefitted from the 'No Fee School' Programme during the reporting period, which translates to 9.7 million learners. The DBE has also made inroads in improving the roll-out of Information and Communications Technology (ICTs) in schools. Approximately 15 000 schools have access to broadband.

JUDGMENTS:

- In April 2018, the Polokwane High Court in *Komape and Others v Minister of Basic Education* dismissed the Komape family's claim for damages for emotional shock and grief,



following the drowning of their five-year-old son, Michael Komape, in a pit toilet at his school in Limpopo in 2014. The Court however found that the two minor siblings had suffered severe trauma and they were entitled to future medical expenses, which involved six sessions with a clinical psychologist. The Judge also dismissed the claim for a declaratory order that the State has breached their constitutional duties in ensuring a safe school and environment. The Court held that in this instance a structural interdict against the State would be more appropriate, as it would be the only means in terms of which the State would be compelled to take active steps to eradicate this systemic problem. The Court showed great displeasure with the State's failure to provide safe sanitation services, in light of the fact that money was allocated in the budget, but the money was unspent. The Court ordered the respondents to furnish it with a report on affidavit on how it will address these issues and to report back to the Court on its compliance.

- In June 2018, the Polokwane High Court in *School Governing Body, Makangwane Secondary School v Member of the Executive Council, Limpopo Department of Education and Others* ordered the respondents to deliver five temporary classrooms of sufficient quality, and sufficient numbers of desks, to the school. The respondents were also ordered to formulate and implement a fully-funded catch-up plan, which had to stipulate to what extent each child in each Grade had not been taught the curriculum due to the disruptions at the school in 2018. The respondents had to devise appropriate remedies, and report to the Court on affidavit.

- In July 2018, the Bisho High Court declared certain provisions of the Regulations relating to the *Minimum Uniform Norms and Standards for Public School Infrastructure* (Norms and Standards for Infrastructure) unconstitutional and invalid in *Equal Education and Another v Minister of Basic Education and Others*. At the heart of the matter was the fact that the Norms and Standards for Infrastructure provided a loophole for the DBE, in that the implementation thereof was subject to the cooperation of other governmental agencies and entities. The civil society organisation, Equal Education (EE) argued that the DBE could not be held responsible for basic school infrastructure, as the proverbial bucket could simply be passed on to another State entity. The Court held that the provision offends the constitutional value of accountability and it prevents the public from holding the government liable for carrying out its constitutional obligations.

LEGISLATION/PROPOSED LEGISLATION:

- In July 2018, the Gauteng Education Department published the *Draft Amendments to the Regulations Relating to the Admission of Learners to Public Schools, 2018* for public comment. The Draft Regulations propose three important amendments, which include the determination of admission policies by SGBs, the determination of feeder zones by the Head of the Education Department (HoD) in Gauteng and the capacity assessment of a public school. There are concerns that the proposed amendments may overturn the delicate partnership model in the public school system. The admission policies in terms of these proposed amendments have to be approved by the HoD on additional factors, such as the “needs of the broader community in which the school is located” without providing any clarification how this will be

determined. Furthermore, the HoD must be satisfied that the school's admission policy does not “unnecessarily exclude” a learner on aspects such as language and belief. At the date of publication, no further developments had taken place.

- In February 2018, the DBE published a draft *National Policy on the Prevention and Management of Learner Pregnancy in Schools* for public comment. The introduction of the Policy highlights that the rate of learner pregnancy has been a major social, systemic and fiscal challenge to the Basic Education Sector and national development in general. The Policy emphasises the need to provide accessible information on prevention, as well as sexual and reproductive healthcare. Civil Society organisations have raised concerns that the Policy focuses too much on the fiscal burden and too little on what measures will be applied to ensure learners return to school after having given birth and finish their schooling. At date of publication there has been no further development on the Policy.

- The draft *Basic Education Laws Amendment Bill* [X-2017] released on 13 October 2017 by the DBE, saw no further development in 2018. The Bill proposes to amend the *South African Schools Act* 84 of 1996 and the *Employment of Educators Act* 76 of 1998, to align it with developments in the education field. Public participation on the Bill closed on 10 January 2018. Serious concerns were raised about the undue limitation of the Bill on the decision-making powers of SGBs relating to the determination of public school's admission and language policies.

GENERAL:

- On 3 January 2019, the Minister of Basic Education announced the matric results of the 2018 class. The 2018 Matric Class achieved a pass rate of 78.2%, up from 75.1% in 2017. Gauteng performed the best, with 87.9%. Free State (87.5%), Western Cape (81.5%) and North West (81.1%) were the only other provinces to get above 80%. Limpopo was the only province to get below the 70% threshold, achieving 69.4% - but this was an improvement of 3.8% from the year before. The Eastern Cape achieved a 70.6% pass rate, the Northern Cape 73.3%, KwaZulu-Natal 76.2%, and Mpumalanga 79%.

- In April 2018, a strict new registration requirement by South African Council of Educators (SACE) was introduced. From 2019 onwards, the registration process will not allow people to become teachers without producing a clearance certificate.

- The DBE's History Ministerial Task Team, which conducted a feasibility study on a curriculum change to make history compulsory for all pupils, released its report in June 2018. This is to introduce a more Afrocentric teaching of the subject. The report recommended that all pupils from Grades 10 to matric learn history from 2023. The Task Team was reappointed in December 2018 to develop, amongst other duties, a new history curriculum for Grades 4 to 12, to screen textbooks to ensure their alignment with the new curriculum and to propose history teacher development programmes.

- According to Deputy Minister of Basic Education, Enver Surty, who was answering questions during Parliamentary

Question Time in November 2018, more than a third of State schools are still not connected to the internet. About 35.1% of government schools lack connectivity, depriving learners of about 8 000 administrative, communication and teaching resources accessible through the internet.

Higher Education and Training

REPORTS:

- According to the *Department of Higher Education and Training (DHET) Annual Report 2017/18*, a Departmental Bursary Scheme for Poor and Working-Class students in Universities was established. This follows the announcement by former President Zuma in 2017 of fully-subsidised higher education and training for poor and working class South African students, which would start with students in their first year of study at public universities. It will support 84 000 first-time students from families earning up to R350 000 per annum, as well as senior NSFAS qualifying students from families earning up to R122 000 per annum by means of grants.
- In February 2018, the Minister of Finance allocated R57 billion for fee-free higher education and training over the medium term in the 2018 Budget Review.
- The *DHET Annual Report 2017/18* also reported that the unaudited number of students who received NSFAS financial assistance amounted to 459 702, of which 258 348 students are at universities.
- According to the *DHET 2018/19 Annual Performance Plan (APP)*, 10 university and two TVET College student housing projects were initiated as part of the Department's Student Housing Infrastructure Programme.
- In February 2019, three KwaZulu-Natal universities, the University of Zululand, Durban University of Technology and Mangosuthu University of Technology shut down following violent protests by students. The protests were in demand of free and quality higher education, as well as against the requirement that students pay a lump sum ahead of registration for the academic year. One student died after being shot during the protests. Some students at the University of the Witwatersrand (Wits) also participated in protests, demanding better accommodation and the registration of students without payment of the registration fee.

LEGISLATION/PROPOSED LEGISLATION:

- In June 2018, the *National Qualifications Framework Amendment Bill [B20-2018]* was introduced in Parliament to amend the *National Qualifications Framework Act 67 of 2008*. The Bill provides for the verification of all qualifications and post-qualifications by the South African Qualifications Authority (SAQA). It proposes the establishment of a separate register of fraudulent and misrepresented qualifications specifically to address this surge of fraudulent and misrepresented qualifications. Public hearings on the Bill followed in September 2018. It was passed by the National Assembly on 27 November and was still at date of publication under consideration by the NCOP.



GENERAL:

- In January 2019, the DHET published guidelines on the *Bursary Scheme for Students at Public Universities, 2019*. It provides the scope and detail of the bursary scheme for poor and working-class students, and provides the implementation parameters for the bursary. The guidelines provide that the fully-subsidised bursary will only apply to South African citizens. Students must qualify as first-time entry students in 2018 and 2019, from families where the gross combined family income is R350 000. A student will only receive funding once all the criteria are met, a full financial assessment has been done and the student has signed the NSFAS Bursary agreement.
- In May 2018, Higher Education and Training Minister, Naledi Pandor, announced that government set aside R67 billion to fund the post-matric education system, including R33 billion for free higher education.
- In August 2018, during Parliamentary Question Time, Higher Education and Training Minister, Naledi Pandor, revealed that the damage caused by students during the #FeesMustFall movement cost universities more than R786 million over a period of three years. The annual breakdown was R492.4 million in 2015/2016, R237.7 million in 2016/2017 and R56.5 million in 2017/2018.



Language and Culture

(section 30)



2018 Grade D -

2019 Grade D -

The State is required to take active measures to promote and elevate the use of indigenous languages in South Africa, in terms of section 6 of the Constitution. The right to language and culture guarantees everyone the right to use the language and participate in the cultural life of their choice. Although there are some positive developments regarding the promotion of multi-lingualism, lack of political will hampers this goal. For the period under review, the use of Afrikaans at tertiary education institutions has been contentious. The Constitutional Court challenge of *Gelyke Kanse to Stellenbosch University's Language Policy* speaks directly to this issue, with specific reference to the context of the Western Cape. Therefore, the State's commitment to promote multi-lingualism and protect the right from infringement remains poor (D-).

REPORTS:

- According to the DBE's Annual Report 2017/18, only 1324 schools of the targeted 2630 schools have implemented the Incremental Introduction of African Languages (IIAL) policy to date. This policy was piloted in Grade 1 and 2 in 264 schools in 2014. It appears from progress reports presented to the DBE in March 2018 that the Western Cape, Northern Cape and Eastern Cape were lagging.

JUDGMENTS/PENDING APPLICATIONS:

- Following the Cape Town High Court judgment of 25 October 2017, in *Gelyke Kanse and Others v the Chairman of the Senate of Stellenbosch University and Others*, in which the Court dismissed the application to set aside the decision to adopt the 2016 Stellenbosch University (SU) Language Policy, *Gelyke Kanse* applied for leave to appeal to the Constitutional Court. *Gelyke Kanse* argued that the core issue is the constitutionality of the 2016 SU Language Policy. It was approved by the SU Council on 22 June 2016 and rejects equality of Afrikaans and English as mediums of instruction, and further fails to "meaningfully" develop Xhosa as a language of instruction. *Gelyke Kanse* further submits that the decision is contrary to the State's commitment to promote multi-lingualism and to take positive measures to elevate indigenous languages. This, especially in the Western Cape Province, where the majority language is Afrikaans, followed by Xhosa. The matter was initially set down to be heard on 13 September 2018, but on 10 September the Constitutional Court requested that the whole record be translated in English, following which the matter had to be re-enrolled. This would, unusually, be done at the expense of the Court.

At date of publication, the matter has not been heard in the Constitutional Court.

- In November 2018, in *Baleni and Others v Minister of Mineral Resources and Others*, the Pretoria High Court emphasised the importance of the link between African people and their land. The judgment concerned an area in the Wild Coast called uMgungundlovu, which also happens to be rich in titanium. The applicants and their ancestors have lived on the land for centuries and thus held informal rights to the land in terms of the *Interim Protection of Informal Land Rights Act 31 of 1996* (IPILRA). One of the respondents wanted to mine the titanium under the Xolobeni Mineral Sands Project and had been granted mining rights by the Minister of Mineral Resources. The activities would take up much of the land and displace a large contingent of the applicants who lived in and around the area. Apart from having lived there over generations, the applicants buried their dead on the land. They did not want the respondent to mine their ancestral land and affect their way of life, their economic stability and argued that the ecological damage would be irreparable. They argued that the practice and preservation of their culture was tied to the land. They also argued that no decision about mining could be made without the community decision-makers agreeing. The court ordered that the MPRDA and IPILRA must be read together to protect the rights of those who were previously unprotected. Further, the Minister could not grant mining rights without complying with the provisions of the IPILRA. The Minister was therefore bound to obtain the full and informed consent of the community before granting mining rights.

LEGISLATION/PROPOSED LEGISLATION:

- In February 2018, the DHET called for comments on the *Revised Language Policy for Higher Education and Training, 2017*, which proposes to replace the *Language Policy for Higher Education, 2002*. The preamble of the revised Policy emphasises the lack of action taken to promote multi-lingualism at institutions of Higher Education and Training and the fact that no effort has been made by the DBE and the DHET to develop partnerships to promote multi-lingualism. One of the proposed requirements in terms of the revised Policy is the requirement that Universities revise their language policies to give greater importance to the use of African languages for scholarships, teaching and learning, and administrative purposes. It is unclear at the date of publication when the revised Policy would be implemented.

PanSALB

- In October 2018, the Minister of Arts and Culture and the Portfolio Committee on Arts and Culture called for nominations for the Pan South African Language Board (PanSALB) Board. The Portfolio Committee conducted interviews in November 2018 and the public was asked to comment on the suitability of 25 shortlisted candidates on 20 November 2018. To date, no appointments to the PanSALB Board have been made.

- According to the *PanSALB Annual Report 2017-18*, they received 24 complaints regarding language rights violations, which were all resolved. A case management system was developed and approved and is currently in use by all provinces. Of the 24 cases received, only eight were concluded within three months from receipt. The Annual Report also specifically noted that there was a serious decline in linguistic complaints, accompanied by ineffective monitoring strategies. This was magnified by the fact that there was no Board giving direction in this regard. The Annual Report further mentioned that there were no standard penalty measures in place for language rights violations.

- The *PanSALB Annual Report 2017-18* noted that the *Revised Language Policy for Higher Education and Training, 2017* published by the DHET for comment in February 2018, only referred to higher education institutions and not to the DHET itself. PanSALB informed the DHET that it failed to indicate how to meet the requirements of the *Use of Official Languages Act 12 of 2012*, which required the DHET to develop their own language policy.

- The *PanSALB Annual Report 2017-18* also highlighted capacity constraints, with a 20% vacancy rate. The Senior Manager: Linguistic Human Rights position remained vacant for over 12 months. These aspects, coupled with the fact that PanSALB did not have a functioning Board, place great limitations on the effective functioning of the institution in acting and promoting multi-lingualism and reacting to linguistic rights infringements.

GENERAL:

- On 18 and 19 April 2018, the DBE held a National Reading Workshop with the purpose to strengthen the teaching of reading in African Languages. A *Draft National Framework for the Teaching of Reading in African languages* was developed in June 2018. It appears that this initiative follows the results from an international study, the *Progress in International Reading and Literacy Study (PIRLS)*, which showed that learner performance is much higher in English and Afrikaans, as compared to the African languages, in Grade 4 to 5. From a Portfolio Committee of Basic Education Report of 4 December 2018, it appears that the *National Framework for Reading Manuals for Nine African Languages* was developed in October 2018.

- South African Sign Language (SASL) was officially recognised as a home language in 2018 and became part of the overt curriculum and an examinable subject for the National Senior Certificate. According to a 5 March 2018 report by Umalusi titled, *Sign of the Times: The Quality of the Teaching and Assessment of South African Sign Language*, it was recommended that a panel of external moderators should be appointed for SASL Home Language moderation, and that such a panel should consist of one deaf SASL academic and two qualified SASL hearing professionals. Umlasi is the Council for Quality Assurance in General and Further Education and Training, responsible for qualifications on levels 1 to 4 of the National Qualifications Framework.





Cultural, Religious and Linguistic Communities

(section 31)



2018 Grade B =

2019 Grade C =

South Africa is a nation where cultural, linguistic and religious minorities generally enjoy their diversity. The CRL Rights Commission is tasked with ensuring the protection and advancement of these communities. Abuse in religious spaces, as well as the threat to the lives of young men who are circumcised in unregistered initiation schools, have comprised much of the work of the Commission in the year under review. Its work has resulted in the investigation of harmful conduct and the introduction of legislation to regulate areas where there are gaps. The slow pace in terms of the recognition of the Khoi-San has also contributed to the downgrade of the State's fulfilment of this right to a C.

JUDGMENTS:

- In June 2018, the SCA in *Gongqose and Others v Minister of Agriculture, Forestry and Others, Gongqose and S*, held that the exercise of a customary right of access to and use of marine resources is a valid defence against criminalised fishing. The appellants were three Eastern Cape traditional fishermen and members of the Hobeni community, who were caught fishing in a marine protected area. They proved that they were exercising customary rights of fishing in the tradition of their forebears.

LEGISLATION/PROPOSED LEGISLATION:

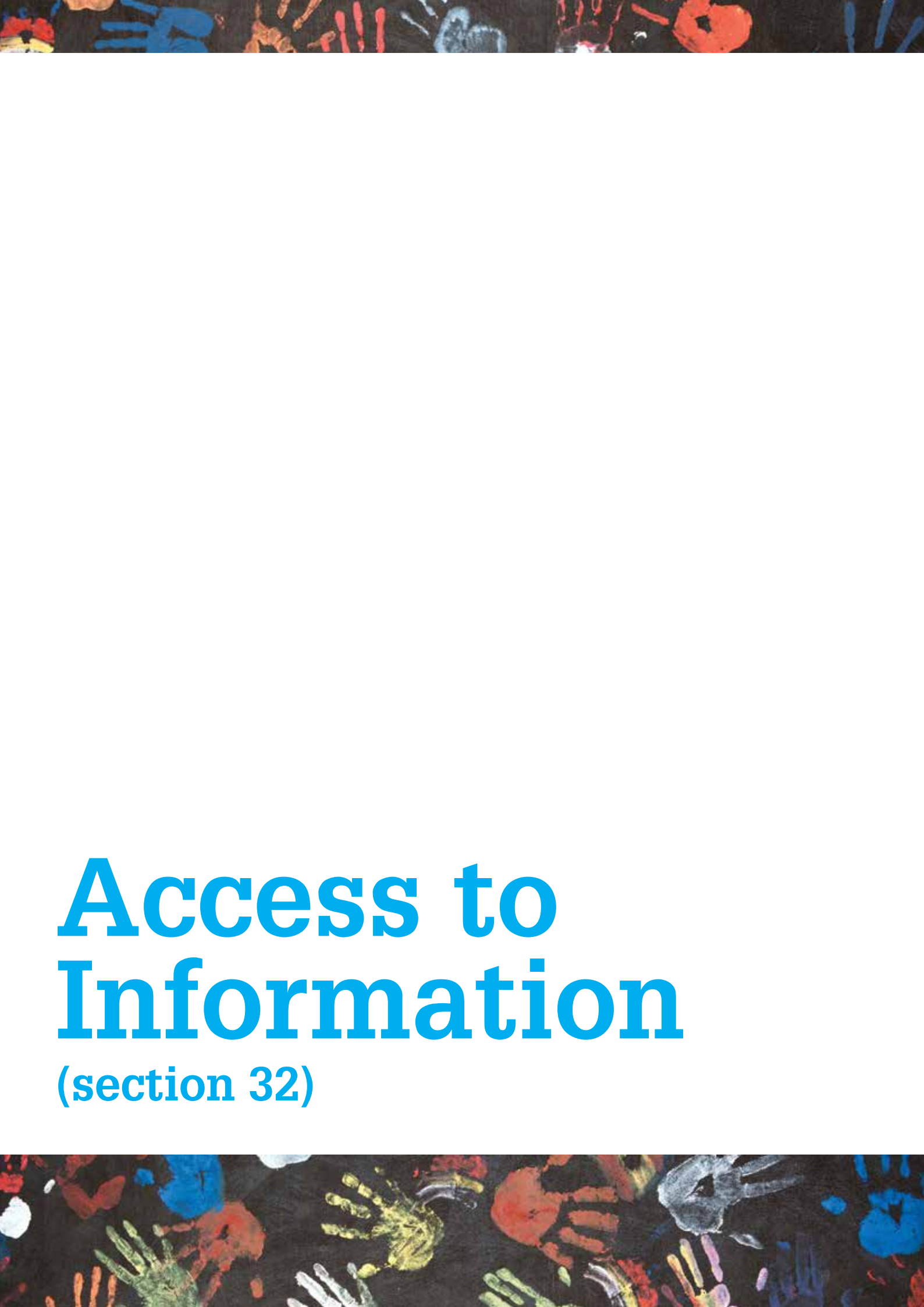
- In April 2018, the *Customary Initiation Bill* [B7-2018] was introduced in Parliament. The Bill aims to regulate the practice of customary initiation in South Africa due to the abuse of the practice, which has led to serious injuries and deaths. The Bill provides for the establishment of the National Initiation Oversight Committee and Provincial Initiation Coordinating Committees. The preamble recognises the right of communities to exercise their cultural rights but emphasises that this has to occur within the prescripts of the Constitution, which recognises the right to life and bodily integrity. In terms of the Bill, all initiation schools have to be registered and have to adhere to certain criteria. Public hearings on the Bill occurred in September 2018 and the Bill was passed by the National Assembly on 4 December 2018 and sent to the NCOP for further deliberation. At date of publication it was still under consideration of the NCOP.
- The *Traditional and Khoi-San Leadership Bill* [B23-2015] was introduced in the National Assembly in September 2015 and passed by the National Assembly on 7 November 2017. The Bill was amended by the NCOP on 10 January 2019 and sent back to the National Assembly. The Bill provides for the recognition of traditional and Khoi-San communities and provides for the establishment of kingship and queenship councils. There



was, however, concern raised that the Bill places traditional leadership and Khoi-San categories under one umbrella, and that traditional authority and Khoi-San leadership had to be separated. The NCOP Committee on Cooperative Governance and Traditional Affairs, however, responded that recognition to Khoi-San authority had to occur and that Chapter 12 of the Constitution on traditional leadership is broadly phrased to accommodate all indigenous customs.

GENERAL:

- In June 2018, the Tanu Baru Trust of Bo-Kaap in Cape Town challenged the auction of two pieces of land it regards as sacred at the historic Tana Baru cemetery burial site - the first Muslim cemetery in South Africa and home to the remains of some of Cape Town's most prominent early Muslim leaders. The community's efforts resulted in the auction being cancelled and their heritage protected.
- The SAHRC has released a report calling for the recognition of the rights of Khoi-San people, following a series of hearings between 2015 and 2017. South Africa stands as one of the few countries on the continent that has embarked on ambitious efforts aimed at redressing the problems of its indigenous peoples, including legislative, policy and judicial interventions. However, although some progress has been achieved, the delay and/or complete lack of effective implementation of policies and programmes designed to uplift indigenous peoples and facilitate the achievement of their rights remains highly concerning. More than a decade after the release of the above-mentioned reports, the majority of recommendations from the Special Rapporteur on Indigenous Peoples of South Africa and the Commission remain largely unfulfilled.
- In July 2018, 18 deaths were reported during the winter initiation season. A further 21 initiate deaths were reported during the December 2018 initiation season. This despite calls for more vigilance regarding unregistered initiation schools.



Access to Information

(section 32)

2018 Grade D =

2019 Grade D =

This right is regulated primarily via the *Promotion to Access to Information Act 2 of 2000 (PAIA)* and stipulates that everyone has the right to access to any information held by the State, as well as information held by a private actor that is required to protect or exercise other rights. Access to information is important for transparency and accountability, fundamental buttresses to our democracy. Where access to information is denied and inadequate (or no) reasons are furnished for denial of access, the foundational values of accountability and openness are infringed upon. The rate of response to PAIA requests suggests that government departments could be more transparent, and the proposed *Critical Infrastructure Protection Bill (B22-2017)* also raises concern. This right needs to be strongly protected to ensure transparency and accountability. However, considering South Africa's high scoring on the Freedom House *Freedom on the Net* report, the right's grading remains unchanged in general (D =), but should be closely monitored.



REPORTS:

- According to the Freedom House *Freedom on the Net 2018* report, South Africa is considered one of only 15/65 countries that are “free” with regard to internet freedom status, with a score of 25 (0 being most free, 100 least free). There has been no change from the previous year. The report notes that South Africans use the internet freely without any control on the part of the State.
- The *Freedom on the Net 2018* report states that South Africa is the freest in terms of internet freedom in sub-Saharan Africa. The same report indicates that while the South African government has not proactively restricted access to information and communications technologies (ICTs) or online content, a significant percentage of the population has obstacles to internet access and some have experienced violation of their user rights. A possible manner in which these violations could occur is data mining.

LEGISLATION/PROPOSED LEGISLATION:

- The *Protection of State Information Bill [B6 2010]*, which was sent to the President on 12 November 2013 has still not been assented to. The Bill, known as the Secrecy Bill, is highly controversial and could prevent the free flow of information and hide corruption at certain levels within the government. The Bill provides for the protection of sensitive

State information and provides for a system of classification, reclassification and declassification of State information. The Bill provides for espionage and related offences and imprisonment of minimum 15 years on making “top secret” State information available. This could seriously infringe upon access to information in the public interest. Although there has been no further development on the Bill since November 2013 and it might not be the current government’s intention to take any further steps, it should remain on the public’s radar, as it unlawfully infringes on the right to access to information.

- The Department of Telecommunications and Postal Services (DoC) will be finalising the draft *White Paper on Audio-Visual and Digital Content Policy for South Africa* in 2019. The DoC continues to renegotiate and ensure that the digital terrestrial broadcasting platform remains the most accessible platform by South Africans. The DoC indicated that it is committed to accelerating the implementation of the Broadcasting Digital Migration (BDM) Programme. During the period under review, a number of digital migration awareness campaigns were coordinated in the provinces. This led to the registration of 560 521 households to receive government-subsidised set-top boxes (STBs) and some 259 396 of the decoders were installed to qualifying television-owning households.

• In September 2017, the *Critical Infrastructure Protection Bill* [B22-2017] was introduced in the National Assembly. The Bill aims to repeal the contentious *National Key Points Act* 102 of 1980, which provided for the identification of certain buildings and locations as national key points, vital for national security by the Minister of Police. The Act provides that it is a crime to reveal information about the security measures of these National Key Points and stipulated harsh penalties. The Bill provides for the identification and declaration of infrastructure as critical infrastructure and it provides that information pertaining to security measures of such critical infrastructure remain confidential, subject to PAIA. Serious concerns have been raised by civil society organisations regarding the lack of transparency and the failure of the Bill to protect whistle-blowers who expose secret information in the public interest. Concerns have also been raised by the South African National Editors' Forum (SANEF) on the impact on the right to freedom of expression, as the Bill fails to address vetting of editorial staff of the Public Broadcaster, the SABC, that would likely be designated as "critical infrastructure". The Bill was passed by the National Assembly on 28 August 2018 and the NCOP proposed certain amendments and passed it on 4 December 2018, and returned it to the National Assembly for consideration.

GENERAL:

• The South African History Archive (SAHA) Freedom of Information Programme (FOIP) works towards creating awareness of the right to information, and empowering individuals and organisations to understand and utilise PAIA. According to the FOIP, during the year under review, there were 1298 requests for information to various departments of State. Only 198 were granted in full, with 148 granted in part. A further 515 deemed to have been refused after no response was forthcoming.





Just Administrative Action

(section 33)

2018 Grade C =

2019 Grade C =

This right guarantees access to administrative action - on the part of State functionaries and the courts - that is lawful, reasonable and procedurally fair. The courts remain the last port of call in this instance, reminding government departments of their obligations, as well as interrogating lower court judgments. In the year under review, the courts emphasised that some offices, such as Chapter 9 Institutions, have a higher duty when exercising administrative functions. While this right is on average, enjoyed, the process may not be easily accessible to the majority of South Africans due to lack of knowledge of the procedures to be followed when seeking administrative justice. Finances can also be a limiting factor when it comes to accessing the courts. The grading on the fulfilment of this right, therefore, remains the same as that of the previous period (C =).


JUDGMENTS:

- In February 2018, the Pretoria High Court in *ABSA Bank Limited and Others v the Public Protector and Others* set aside certain remedial actions of the Public Protector. These were as contained in her report of 19 June 2017, titled *Alleged Failure to Recover Misappropriated Funds*, which was taken on review in terms of several provisions of *Promotion of Administrative Justice Act 3 of 2000 (PAJA)*. The report held that the Government had failed to implement the CIEX Report, which dealt with alleged stolen State funds and that the Government had failed to recover R3.2 billion from Bankkorp Limited/ ABSA. One of the points raised by the applicants was that the process undertaken by the Public Protector in making her recommendations was procedurally unfair and contrary to PAJA and that the Public Protector was biased or reasonably biased. The core of this argument related to the fact that the Public Protector - after the publication of her provisional report - met with the President and the State Security Agency (SSA) without affording the same opportunity to ABSA and the South African Reserve Bank (SARB). Further, she did not allow ABSA and SARB to respond to these adverse findings. These meetings with the President were also not disclosed in her report. The High Court held that the Public Protector was subject to a higher standard when taking administrative action and that the process applied was not impartial. Therefore, there was a reasonable apprehension of bias. The High Court ordered the Public Protector to pay 15% of the legal costs in her personal capacity as a punitive cost order. The Public Protector subsequently applied for leave to appeal the High Court's finding that she was biased and the cost order against her in her personal capacity. The matter has been appealed to



the Constitutional Court, which to date of the publication has not been heard.

- In December 2018, the Pretoria High Court in *Democratic Alliance v President of the Republic of South Africa and Others; Economic Freedom Fighters v State Attorney* set aside the decision of the Presidency and the State Attorney to pay the private legal costs of former President Zuma. These costs were incurred whilst defending criminal prosecutions instituted against him in his personal capacity and related civil proceedings. The DA took the decision to pay for Mr Zuma's legal costs under review in terms of PAJA and in the alternative in terms of the principle of legality. The High Court found that the decision to pay Mr Zuma's private legal costs was not authorised in terms of either the *State Attorney Act 56 of 1957* nor Treasury regulations and it was therefore contrary to the principle of legality. The High Court ordered the State Attorney to provide a full account of all legal costs paid in this instance within three months of the order on oath to the Court and steps taken to recover these costs from Mr Zuma. According to media reports of 24 December 2018, the former President applied for leave to appeal the personal cost order.



Access to Courts

(section 34)

2018 Grade **B =**

2019 Grade **B -**

Inequality is a harsh reality of South African society and permeates all areas, including one's relationship with the justice system. The high costs of legal representation often leave access to the courts to the privileged, neglecting the majority who need help but cannot afford it. Legal Aid addresses this inequality and the proposed cuts to its budget will directly affect the access of the most vulnerable to legal representation. The failure of the NPA to prosecute multiple individuals for criminal conduct following evidence given in multiple commissions of inquiry is also a glaring problem in when one considers the functions of the justice system. The apparent regression of the *Traditional Courts Bill* [B1-2017] after a decade of deliberation is a marked departure from the constitutional spirit and purport, earning this right a downgrade via a negative outlook, to B -.

REPORTS:

- According to the WEF GCR 2018, South Africa is ranked 48/140 globally for judicial independence and 40/140 in terms of the efficiency of the legal framework in settling disputes.
- According to the *Legal Aid South Africa Integrated Annual Report 2017-2018*, 420061 Legal Aid matters were finalised, and the organisation provided legal representation and advice to 731856 people. Legal Aid also served a total of 426617 people through legal services provided in new criminal and civil matters and legal advice services and 305239 clients were provided with general legal advice.
- According to the *Legal Aid South Africa Integrated Annual Report 2017-2018*, the matters handled in the reporting period include 371202 criminal matters (87%) and 55415 civil matters (13%). Children were assisted in 16 350 matters.
- According to the above report, despite providing legal advice for over 700000 people annually, Legal Aid's budget is being cut by government by R503 million over the next three years. This will limit the organisation's ability to fulfil its constitutional mandate.

Conviction Rates

- According to the *DoJ&CD Annual Report 2017-2018*, the NPA secured the highest conviction rates in the last two decades. The NPA achieved a 91.7% conviction rate in the high courts against a target of 87%. However, according to the ISS, conviction rates as a measure of performance are

questionable. Prosecutors enjoy a wide discretion and as such, are likely to decline to prosecute cases that offer slim prospects of securing a conviction.

- In the regional courts, an 81% conviction rate was achieved, against a target of 74%.
- In the district courts, a 96.1% conviction rate was achieved, against a target of 88%.
- Organised crime prosecution achieved a conviction rate of 93.8% and the number of convictions (346) exceeded the annual target of 269 convictions.
- According to the *DoJ&CD Annual Report 2017-2018*, the Department increased focus on sexual offences and gender-based violence matters. An improved conviction rate in sexual offences of 72.7% was recorded - an all-time high. The Sexual Offences and Community Affairs Unit established 55 operational Thuthuzela Care Centres (TCC) in support of the victims of crime, particularly the victims of sexual offences, who are mainly women and children. A conviction rate of 74.5%, with 1899 convictions, was recorded in relation to TCC-reported cases.

Infrastructure

- The DOJ&CD continued with the roll-out of Sexual Offences Courts. According to its Annual Report, 17 more courtrooms were adapted in line with the sexual offences model, bringing the total number of courtrooms adapted to 75. Furthermore, six additional Small Claims Courts were established, bringing the total to 411.
- The Department also sought to increase access to justice services for marginalised communities. During 2017/18, magisterial districts were aligned with provincial and municipal boundaries in Kwa-Zulu Natal and the Eastern Cape and those changes will be finalised during 2018/19.
- The construction of the Mpumalanga High Court was finally completed in December 2018, three years behind schedule. There is yet to be an announcement concerning the date the court will be fully operational.

LEGISLATION/PROPOSED LEGISLATION:

- Public hearings were held in March 2018 on the *Traditional Courts Bill* [B1-2017], which was introduced in Parliament in January 2017. The Bill seeks to provide a uniform legislative framework for the functioning of Traditional Courts. It further recognises that customary law plays an integral part of dispute resolution in certain communities but that the Constitution at the same time recognises that everyone has the right to have a dispute resolved by application of law in a fair public hearing. The Bill is at date of publication still under consideration by the Portfolio Committee for Justice and Correctional Services and

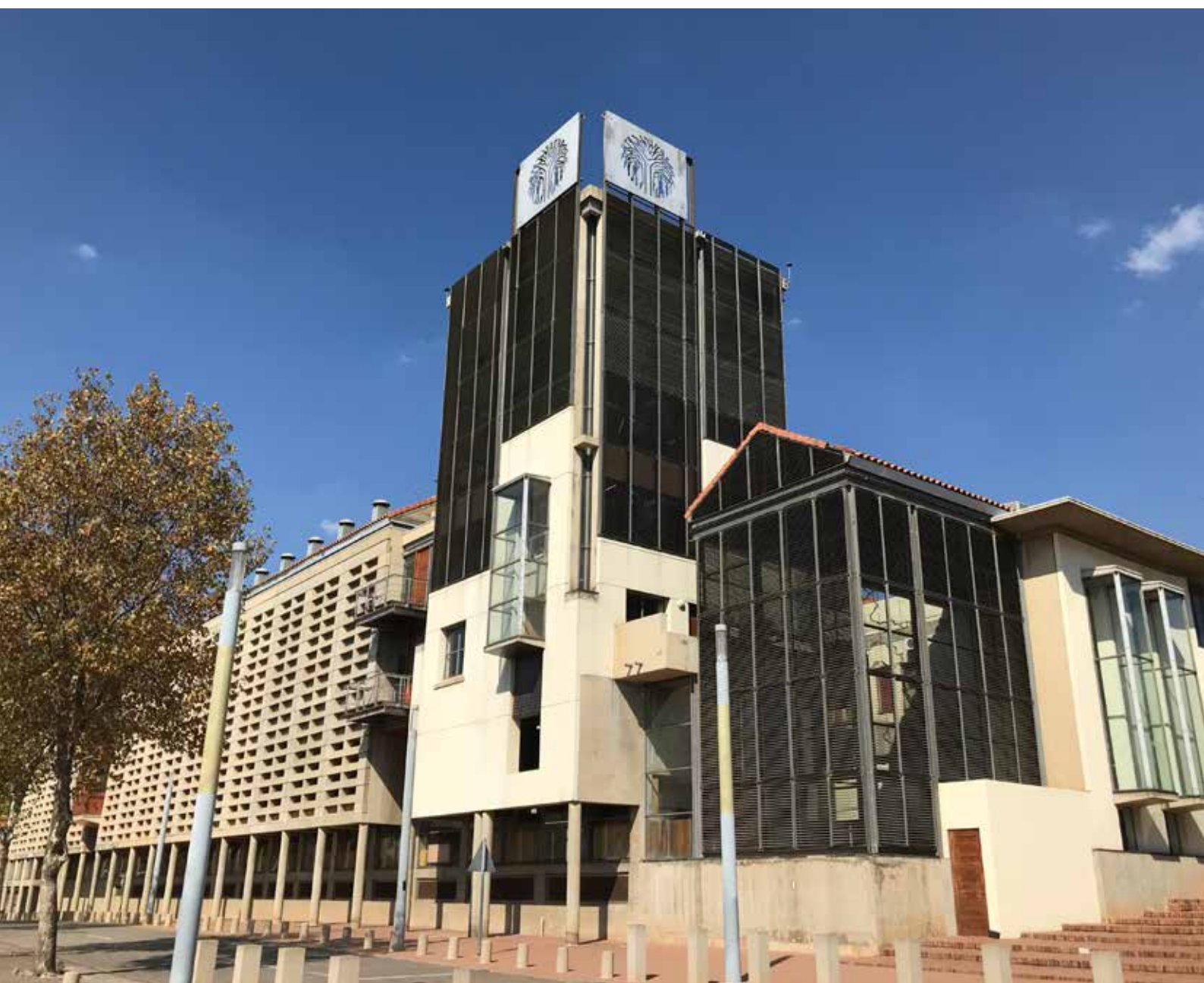
there has been discussion relating to the removal of the opt-out clause in the Bill. The State Legal Advisor, however, advised the Portfolio Committee during a meeting on 21 August 2018 that such removal may render the Bill unconstitutional.

GENERAL:

- Parliament and legal experts have expressed fears that the planned cuts to Legal Aid SA's budget - R503 million over the next three years - will have negative consequences for the poor and their ability to access justice.
- In May 2018, former NDPP Shaun Abrahams announced in Parliament that the NPA was set to prioritise prosecutions of those who were linked to the murders of activists against the apartheid regime stemming from the Truth and Reconciliation Commission (TRC). This follows the reopening of the inquest into the death apartheid activist, Ahmed Timol, during 2017.
- According to a GroundUp report from October 2018, the high cost of trial transcripts necessary to appeal convictions

has made access to justice for indigent people difficult. These costs need to be borne by the appellant and as a result, they often cannot carry on with an appeal. The cost of a transcribed record is between R18 000 and R100 000.

- The Office of the Chief Justice released the *Judiciary Annual Report 2017/18*, which marks the first time that the Judiciary, as an arm of the State, has, of its own accord, decided to release a report into its own performance. The Report includes a detailed assessment of the caseload management of the Court.
- The Judicial Service Commission (JSC) received an unprecedented 90 complaints against judges in the 2017/18 financial year, according to its Annual Report. CJ Mogoeng said the JSC's Judicial Conduct Committee had resolved 71 of the complaints, with the other 19 still pending. The Gauteng Division of the High Court and the Labour Court recorded the most complaints, at 32 and 11 respectively.





Arrested, Detained and Accused Persons

(section 35)



2018 Grade D =

2019 Grade D -

Overcrowding in prisons has been the root cause of multiple violations of the rights of detained persons. This right requires all affected individuals to be treated with human dignity - despite their relationship with the law. The rise in cases of torture by police actors, and deaths as a result of police conduct, are cause for concern. Extreme overcrowding in South African prisons has remained the *status quo* for some time. Furthermore, reports of poor nutrition violate the rights of prisoners to food and dignity. The future Legal Aid budget cuts by National Treasury will greatly affect the indigent when they find themselves at odds with the law. In turn, the budget cuts infringe upon the rights of accused persons - as granting legal protection to those who cannot afford it is enshrined in the Constitution - and will indirectly contribute adversely to the overcrowding issue. Therefore, the grading of the State's realisation of this right remains the same, but with a negative outlook, at D -.



REPORTS:

• The *IPID Annual Report 2017/18* states that during the year under review there were:

- 201 deaths in police custody;
- 436 deaths as a result of police action;
- 677 complaints of the discharge of an official firearm;
- 105 rapes by a police officer;
- nine rapes in police custody;
- 217 cases of torture;
- 3 661 cases of assault;
- 124 cases of corruption; and
- 69 cases of non-compliance with section 29 of the *IPID Act 1 of 2011*, which compels police to report alleged crimes to the IPID within 48 hours.

• According to the *DCS Annual Report 2017/18*:

- During the 2017/18 year, a total of 14 577 offenders were equipped with a variety of skills. Approximately 10 996 offenders accessed educational training through Adult Education Training and Further Education Training programmes. During this reporting period, out of 185 learners, 142 successfully passed Grade 12.
- Through a partnership with the DoH, the DCS is implementing the directive on Universal Test and Treat (UTT) for all HIV positive inmates so as to ensure improved health outcomes. Thus, the number of inmates initiated on ARV treatment during the current financial

year increased by 1 936, from 24 506 in 2016/17.

- During the year under review, correctional centres were on average overpopulated by 38%, while a number of individual centres were overpopulated in excess of 100%.

• According to the *World Prison Brief* database, South Africa's prison population at the end of March 2018 was recorded as being 164 129, while the official capacity stood at 118 723. This is 38.2% over capacity.

• According to the *DCS Annual Report 2017/18*, the DCS has 235 active correctional centres.

• The same Report states that overcrowding continued to be one of the challenges of the correctional service system. The average number of inmates within the DCS system was 160 583 - yet the approved bed space for the period was 118 723.

• According to the above Report, during 2017/18, the DCS had an annual average of 46 260 unsentenced inmates. Of these, 1 370 were female and 44 890 were male.

• The *DCS Annual Report 2017/18* states that during 2017/18, the number of remand detainees were 42 142 on 31 March

2018, constituting 28.2% of the inmate population.

- The same report states that 13 679 victims participated in the Restorative Justice Programmes, up from 9 886 in the previous period.

- According to the *Judicial Inspectorate for Correctional Services (JICS) Annual Report 2017/18*, which was able to visit 81 out of the country's 243 correctional centres during 2017/18, overcrowding remains the biggest problem. Prisons in the Eastern Cape are worst affected at 57% overcrowding, followed by Gauteng at 48% and the Western Cape at 45%.

- The *DCS Annual Report for 2017/18* says that Community Corrections (alternatives to imprisonment, namely correctional supervision and parole) have become a core component of the South African criminal justice system. They provide a useful and less costly alternative to incarceration. It similarly provides a shift in focus - from sanction and deterrence to rehabilitation and reintegration. During the 2017/18 financial year, DCS successfully placed 86 518 (82%) sentenced offenders on various correctional programmes.

JUDGMENTS:

- In June 2018, in *Participative Management Committee v Minister of Justice and Correctional Services*, the Johannesburg High Court held that the Johannesburg Correctional Centre, also known as 'Sun City', was violating the rights of inmates

by failing to provide three wholesome meals a day. The Court ordered that not more than 14 hours pass between supper and the following morning's breakfast. Despite this ruling in January 2019, prisoners have said that while they now receive three evenly-spaced meals a day, instead of a hot meal of meat and vegetables, they are given bread and a sachet of juice powder. They state that this violates the court order in the 2018 judgment.

GENERAL:

- In June 2018, at a Symposium hosted by Sonke Gender Justice, Constitutional Court Justice Edwin Cameron called for a comprehensive overhaul of the criminal justice system and for minimum sentencing to be scrapped, as the current system is failing to address the high statistics of violence and crime.

- As of June 2018, multinational security company G4S - which in 2015 was accused of torturing inmates at its private prison facility in Mangaung in the Free State - is mounting a defense against claims by 42 inmates (represented by the LRC) that they were subjected to electric shocks, forcibly injected with antipsychotic drugs and isolated for long periods at the prison. The matter was initiated by a request under PAIA for the investigation report by the DCS into the alleged abuse. The Centre for Applied Legal Studies at Wits University is challenging G4S over its attempts to prevent publication of a DCS report on the allegations.



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Abbreviations

- ACDP** African Christian Democratic Party
AIDS Acquired Immunodeficiency Syndrome
ANC African National Congress
ASIDI Accelerated Schools Infrastructure Delivery Initiative
BDM Broadcasting Digital Migration
BEE Black Economic Empowerment
BMA Border Management Authority
CAT Climate Action Tracker
CEE Commission for Employment Equity
CGE Commission for Gender Equality
CPA *Criminal Procedure Act 51 of 1977*
CPS Cash Paymaster Services
CRL Rights Commission Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
CSVR Centre for the Study of Violence and Reconciliation
DAFF Department of Agriculture, Forestry and Fisheries
DBE Department of Basic Education
DEA Department of Environmental Affairs
DCJ Deputy Chief Justice
DCS Department of Correctional Services
DHA Department of Home Affairs
DHET Department of Higher Education and Training
DHS Department of Human Settlements
DPCI Directorate for Priority Crime Investigation
DoC Department of Telecommunications and Postal Services
DoE Department of Energy
DoH Department of Health
DoJ&CD Department of Justice and Constitutional Development
DoJ&CS Department of Justice and Correctional Services
DoL Department of Labour
DoW Department of Women
DRDLR Department of Rural Development and Land Reform
DR-TB Drug-resistant tuberculosis
DSBD Department of Small Business Development
DWS Department of Water and Sanitation
EAP Economically Active Participation
EE Equal Education
EEA *Employment Equity Act 55 of 1998*
EMIs Environmental Management Inspectors
EU European Union
FOIP Freedom of Information Programme
FPASA Fire Protection Association of South Africa
GBV Gender-Based Violence
GCR Global Competitiveness Report
GHS General Household Survey
HIV Human Immunodeficiency Virus
HoD Head of Department
ICTs Information and Communications Technology
IEA International Energy Agency
IEC Independent Electoral Commission

IIAL Incremental Introduction of African Languages
IJR Institute for Justice and Reconciliation
IMC Inter-Ministerial Committee
IMR Infant mortality rate
IPID Independent Police Investigative Directorate
IPILRA *Interim Protection of Informal Land Rights Act 31 of 1996*
IPRI International Property Rights Index
IPU International Parliamentary Union
IR Information Regulator
IRP Integrated Resource Plan
ISHP Integrated School Health Programme
ISS Institute for Security Studies
JCRC Joint Constitutional Review Committee
JICS Judicial Inspectorate for Correctional Services
JSC Judicial Service Commission
LRC Legal Resources Centre
LGBTQI+ Lesbian Gay Bisexual Transgender Queer/Questioning and Intersex
LPC Legal Practice Council
MEC Member of the Executive Council
MIG Municipality Infrastructure Grant
MMC Medical Male Circumcision
MPAs Marine Protected Areas
MPRDA *Mineral and Petroleum Resources Development Act 28 of 2002*
MPS Municipal Police Service
MRC Medical Research Council
NCOP National Council of Provinces
NDP National Development Plan
NDPP National Director of Public Prosecutions
NEC National Executive Committee
NECER National Environmental Compliance and Enforcement Report
NEMPA *National Environmental Management: Protected Areas Act 57 of 2003*
NHTL National House of Traditional Leaders
NIA National Intelligence Agency
NICD National Institute for Communicable Diseases
NPA National Prosecuting Authority
NSNP National School Nutrition Programme
OHSC Office of Health Standards Compliance
PACOTIP *Prevention and Combating of Trafficking in Persons Act 7 of 2013*
PAIA *Promotion of Access to Information Act 2 of 2000*
PAJA *Promotion of Administrative Justice Act 3 of 2000*
PanSALB Pan South African Language Board
PCR Polymerase chain reaction
PI Privacy International
PIA *Protection of Investment Act 22 of 2015*
PIRLS Progress in International Reading and Literacy Study
POPI *Protection of Personal Information Act 4 of 2013*
PwC PricewaterhouseCoopers
QLFS Quarterly Labour Force Survey
RCMA *Recognition of Customary Marriages Act 120 of 1998*
RICA *Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002*
SABC South African Broadcasting Corporation
SABRIC South African Banking Risk Information Centre
SACE South African Council of Educators
SAHA South African History Archive
SAHRC South African Human Rights Commission
SAIEH South African Institute of Environmental Health

SAN South African Navy
SANBI South African National Biodiversity Institute
SANDF South African National Defence Force
SANEF South African National Editors' Forum
SAPO South African Post Office
SAPS South African Police Service
SAQA South African Qualifications Authority
SARB South African Reserve Bank
SARS South African Revenue Services
SASL South African Sign Language
SASSA South African Social Security Agency
SAWEI South African Workplace Equality Index
SCA Supreme Court of Appeal
SEDA Small Enterprise Development Agency
SERI Socio-Economic Rights Institute
SIU Special Investigating Unit
SOEs State-Owned Enterprises
SONA State of the Nation Address
SOPs Standard Operating Procedures
SSA State Security Agency
SSRS Sub sub-recipients
STATS SA Statistics South Africa
TAC Treatment Action Campaign
TCCs Thuthuzela Care Centres
TIP Trafficking in Persons
TVPA Trafficking of Victims Protection Act of 2000 (United States)
UASA United Association of South Africa
UCT University of Cape Town
ULTRA *Upgrading of Land Tenure Rights Act 112 of 1991*
UN United Nations
UNCRC United Nations *Convention on the Rights of the Child*
UNHCR United Nations High Commissioner for Refugees
URCSA Uniting Reformed Church in Southern Africa
US United States
VAT Value-added tax
WEF World Economic Forum
WHO World Health Organisation

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