

**COMMUNITY LAW CENTRE
UNIVERSITY OF THE WESTERN CAPE**



**STAKEHOLDER SUBMISSIONS:
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Introduction

The Community Law Centre, forming part of the Law Faculty at the University of the Western Cape ('the Centre'), was established in 1990 with the aim of working to support the realisation of democratic values and human rights in South Africa. The Centre was founded on the belief that South Africa's constitutional regime must promote good governance, socio-economic development and the protection of the rights of vulnerable and disadvantaged groups. The Centre firmly believes that international oversight bodies are integral to the successful monitoring of state compliance in relation to the promotion and fulfillment of fundamental human rights and thus welcomes the opportunity to submit this report to the Universal Periodic Review.

The submissions are sub-divided into four categories:

1. Children's rights;
2. Socio-economic rights (general);
3. Good governance and challenges related to the realisation of socio-economic rights; and
4. Prison reform and torture.

The Centre's research is primarily focussed on these particular categories and thus the information presented in these submissions has been obtained directly. Where secondary sources have been used, they are acknowledged in footnotes. In relation to the section on torture, the Gender, Health and Justice Research Unit at the University of Cape Town endorses the recommendations of the Centre.¹

Children's Rights

1. South Africa has ratified the major treaties that give rise to the realisation of children's rights:
 - a) The Convention on the Rights of the Child (CRC); and
 - b) The African Charter on the Rights and Welfare of the Child (ACRWC).

¹ The Gender, Health and Justice Research Unit conducts progressive research in the area of women's rights, using interdisciplinary methods from various academic fields including law, the social sciences, and public health. Faced with staggering levels of violence against women in South Africa, the Unit is dedicated to improving access to health and justice services for survivors of gender-based violence.

2. South Africa has also, to a certain extent domesticated these treaties into national legislation, with the adoption of the Children's Act 38 of 2005 and the Child Justice Act 75 of 2008, respectively. These pieces of legislation are important landmarks in the establishment of a children's-rights orientated regulatory system as envisioned by both the CRC and ACRWC.
3. The Centre's primary concerns in relation to the interpretation and domestication of these treaties, however, relate to the right to education for children with disabilities, and state reporting.

The right to education for children with disabilities

4. Unfortunately, when it comes to the right to education for children with disabilities, these treaties, particularly in light of South Africa's ratification of the Convention on the Rights of Persons with Disabilities (CRPD), have not been domesticated fully nor interpreted with the necessary intention that these instruments intend to realise.
5. The international law framework that guides the interpretation of the realisation of the right to education for children with disabilities consists of the CRC, ACRWC and the CRPD. South Africa ratified the CRPD on 30 November 2007. However, it should be noted that, in an attempt to address the issue of the right to education for children with disabilities, the South African Department of Education published a policy for implementation called "White Paper 6: Special Needs Education: Building an Inclusive Education and Training System" in 2001.
6. Considering that this policy was adopted in 2001, the provisions of article 24 of the CRPD, which deals with education rights for persons with disabilities, have not been incorporated in this policy. With that, it has been argued that the 20 year plan adopted in White Paper 6 might, to a certain extent, be unconstitutional, as the right to basic education should not be subject to progressive realisation.²
7. The Centre recommends, therefore, that the Executive, under the auspices of the Department of Basic Education should investigate the domestication of the CRPD

² See Wakefield, L and Murungi, N "Domesticating international standards of education for children with intellectual disabilities: A case study of Kenya and South Africa" in Grobbellaar du Plessis, I & Van Reenen, T *Aspects of Disability Law in Africa* (2011) PULP 133-156.

in relation to the right to education for children with disabilities. This should be done in consultation with other relevant government departments and civil society to ensure that legislative development takes place to domesticate the CRPD correctly.

The lack of State Reporting under the CRC and ACRWC

8. In terms of article 44 of the CRC, State Parties to this treaty must submit a report on the implementation of the CRC in within two years of the entry into force of the treaty in that country and every five years thereafter. This report must be lodged with the Committee on the Rights of the Child (CRC Committee).
9. South Africa ratified the CRC on 16 June 1995. Therefore its initial report was due on 15 July 1997. South Africa lodged an initial report on 4 December 1997. Despite the government having drafted two subsequent reports, South Africa has yet to lodge these subsequent reports to the CRC Committee.
10. Unfortunately, these subsequent reports now contain out-of-date information on the current status of children in South Africa. It is recommended, therefore, that the government spend more time in drafting and submitting an accurate and comprehensive 4th report to the CRC Committee, which is due on 15 July 2012.

Socio-economic rights (general)

Right to access adequate housing for persons with special needs

11. There have been certain *ad hoc* attempts on the part of the government to develop specific special housing needs policies at provincial level (for example, in the Western Cape there is the ‘group home housing policy’) in order to meet the requirements of special needs groups. Such groups include, but are not limited to: the disabled, refugees, migrant workers, the elderly, orphan-headed households and women victim to domestic and gender-based violence.
12. Despite such attempts, there remains an unfortunate absence of special housing policy and directives at the national and provincial level.

13. This highlights the Centre's concern regarding the government's failure to domesticate the CRPD, a convention which would no doubt guide in the drafting of special housing needs, as well as the government's failure to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW).
14. The Centre recommends therefore, that in addition to ratifying and domesticating the CMW and CPRD respectively, that the government develop a national directive or national special needs housing policy as well as take increased measures to protect and provide redress to women at risk of or subjected to gender-based violence.

Ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol

15. Notably, South Africa has been providing for the realisation of socio-economic rights as it is required to by the Constitution and has indeed adopted legislative and budgetary measures in this regard.
16. The ratification of the ICESCR would not require any significant shift in budget allocations or resources. This point was indeed raised by the Centre in a paper written in response to the Department of Justice and Constitutional Development's request to the Centre to explain the government's obligations under the Convention.
17. Accordingly, it is recommended that the government ratify the ICESCR and its Optional Protocol as soon as possible.

The right to have access to adequate housing and the "Housing Demand Database"

18. For the purpose of creating a register of beneficiaries for distributing government housing structures, the Department of Human Settlements introduced the 'Housing Demand Database' (HDD) in 2009 to replace the 'waiting list system'.

19. The HDD has only been rolled out in three provinces namely; Gauteng, Western Cape and Limpopo. The delay in the roll-out delays significantly the allocation of housing to those most in need and who are entitled, by right, to receive it.
20. It is recommended therefore, that provinces and municipalities, who are responsible for the HDD, implement the roll-out of this list as soon as possible.

Good governance and challenges related to the realisation of socio-economic rights

Introduction

21. It is worth mentioning at the outset that the data upon which these submissions are based is, in part, unreliable. Various government reports give conflicting information, as do the Household Survey and South Africa's Millennium Development Report.³ In addition, it should be borne in mind that when 'services' are described as having been delivered, the quality of such services has become a grave cause for concern.⁴

Service Delivery and vulnerable communities

22. In 2001 South Africa adopted a policy of free basic services for the poor. Such services include *water supply, sanitation, refuse removal and electricity*. In general, the provision of these services has improved over the last four years. Notwithstanding these improvements, there remain important challenges in service delivery at local level.
23. Complex inter-governmental relations and insufficient monitoring and supervision of under-capacitated municipalities are evident⁵ as is the fact that delays in decisions about the upgrading of informal settlements result in vulnerable communities being unable to their right to access improved basic services.⁶

³ See South African human Rights Report (SAHRC), 22, 42.

⁴ See National Planning Commission Report 2010 and SAHRC report Chapters 2 and 5). For example, the Cape Town High Court (in *Beja and Others v Premier of the Western Cape and Others* 2011 (10) BCLR 1077) ruled earlier this year, that the erection of unenclosed toilets at the Mhakaza settlement to be a violation of the residents' constitutional rights to dignity.

⁵ SAHRC, 21.

⁶ In the Constitutional Court case of *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC), the Court stated that the delay by the Provincial Member of the Executive Council (MEC) in deciding whether to upgrade a particular informal settlement was found to be the most immediate reason for the dilemma and desperate plight of the residents, which included little or no access to sanitation and lighting.

Moreover, rural municipalities have not yet sufficiently ensured that vulnerable farm dwellers, who live on private land, have access to services.

24. Municipalities continue to shirk their duty to provide “emergency housing” to communities who face emergency circumstances, including the threat of eviction and homelessness.⁷
25. Greater clarity surrounding local government's responsibilities with respect to socio-economic rights, such as the right of access to housing is urgently needed. Funding and authority to provide housing should be devolved to those municipalities that have the required capacity.
26. Provincial governments should improve their monitoring and support capabilities, particularly with respect to under-capacitated municipalities. National and provincial governments should take joint responsibility for corrective action in those municipalities that fail to deliver basic services, such as access to basic water, sanitation and electricity to their communities.

Prison Reform and Torture

Domestication of the United Nations Convention against Torture

27. Despite the prohibition of torture in the Bill of Rights and the government's ratification of UNCAT on 10 December 1998, the act of torture has not been criminalised under South African law and other obligations have neither been fulfilled nor, where relevant, domesticated. Moreover, the government failed to provide a state report as it is obliged to under the UNCAT.
28. The domestication of UNCAT is of great importance to South African society, particularly vulnerable and marginalised communities and persons deprived of their liberty. This latter category encompasses a wide range of people in addition to those within the criminal justice system, such as: undocumented foreigners or

⁷ These duties are comprehensively outlined in National Housing Code. Chapter 12, National Housing Programme for Housing Assistance in Emergency Housing Circumstances (vol 4). See for example the case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA) which concerned the eviction of desperately poor people from a privately-owned building. The Supreme Court of Appeal found that it was the constitutional duty of the municipality to provide emergency temporary shelter, an important step towards fulfilling the progressive realisation of the right of access to adequate housing.

immigrants being transported or detained, those detained in military detention facilities, children in secure care or educational facilities and those confined in health care facilities for medical, psychiatric or rehabilitative reasons. Although incidences of “torture” are generally not officially recorded and reported on, departmental annual reports, research and media reports indicate that torture and other ill treatment remains a problem in custodial settings.

29. It is recommended that the government implement the following obligations under UNCAT: the adoption of effective legislation, administrative, judicial and other measures to prevent and punish acts of torture and ill treatment; the criminalisation of torture in domestic law; to refrain from returning or extraditing persons to another country where there may be tortured; extraditing or prosecuting perpetrators of torture; assisting other states to bring perpetrators of torture to book; educating its officials on the absolute prohibition of torture and ill treatment; regularly reviewing interrogation rules, instructions, methods, practices and arrangements of people deprived of their liberty; promptly investigating, by impartial authorities, any cases where there are reasonable grounds to suspect that torture may have taken place; ensuring that any individual who alleges to have been tortured has a right to complain and that such allegations will be promptly and impartially examined; protecting witnesses and victims of torture; enabling redress for victims of torture and ill treatment; ensuring that South Africa complies with its reporting obligations to the Committee against Torture.

Ratification of OPCAT

30. Although the South African government has signed this Protocol, it has yet to ratify it. Were it to do so, it would open itself up to a range of invaluable oversight mechanisms, vital to the prevention of torture in custodial settings. It is recommended therefore, that the government ratify this document as soon as possible.

Prison Reform – torture and safe custody

31. It is difficult to assess accurately the prevalence of torture in South Africa’s prison system. Governments do not readily admit that their officials have committed torture. Moreover, the Department of Correctional Services (DCS) does not

present statistics on allegations of torture or even confirmed cases in its annual reports; neither does the Judicial Inspectorate for Correctional Services (JICS). Part of the problem is that South Africa has not yet criminalised torture as required by Article 4 of the UNCAT and in the absence of the statutory crime of torture, no perpetrator can be prosecuted for having committed it.

32. In the absence of the statutory offence of torture, therefore, attention is paid to deaths in custody, reported assaults and a number of specific incidents.⁸ The number of reported assaults is high, and the number of complaints of assaults, much higher.⁹ The data indicates that the number of reported assaults declined drastically in 2007/8 but increased substantially in the following year; from 52/10 000 to 83/10 000. This is an unacceptably high level of violence directed at prisoners.
33. In addition, to date, DCS has also failed to report on the *McCallum* case: a matter involving a mass assault in 2005 at St Albans Prison which was communicated to the UN Human Rights Committee (HRC). The HRC found that McCallum's right to be free from torture, protected by Article 7 of the International Covenant on Civil and political Rights, had been violated. It required that the state was required to "provide the author with an effective remedy, including a thorough and effective investigation of the author's claims falling under article 7, prosecution of

⁸ These are reported in the DCS Annual Reports and the JICS Annual Reports. Apparent from these reports are the following observations:

- The deaths in detention centres were the result of aggravated assaults inflicted either as punishment or in retaliation. In these situations, it is concluded, that the officials regarded themselves above the law and inflicted severe physical injuries that ultimately led to the prisoners' deaths.
- Assaults are committed by groups of officials on single prisoners.
- In a number of the cases it was noted by the JICS that the assaults continued after the prisoner was subdued and/or the situation stabilised. This type of action goes well beyond what can be regarded as the lawful use of minimum force regulated by the Correctional Services Act.
- The most common weapon used by officials was a baton, but prisoners were also subjected to kicks, teargas and electroshock equipment.
- In a number of cases the deceased was denied prompt medical attention even though the Correctional Services Act is clear that any prisoner who has been subjected to the use of force must immediately undergo a medical examination.
- It is also apparent that when disciplinary action is taken against officials, this takes extremely long to finalise.
- Even though little information is provided on the charges against implicated DCS officials, it appears that these are lesser charges such as misconduct, disregarding security rules, negligence, falsifying registers and altering the scene of a crime.

⁹ Judicial Inspectorate for Correctional Services (JICS) recorded a total of 2189 complaints on assaults of official-on-inmate in 2009

those responsible and full reparation, including adequate compensation.’ It also stated that the state was under an obligation to prevent similar violations in the future.

34. It is recommended that the government finalise all ‘pending investigations’ against the alleged perpetrators of ‘torture’ and assault that have emerged in the past year, as well as the state’s progress in implementing the award in the McCallum case.