

Theme 1: Civil and Political Rights Submissions for consideration at the African Commission in April 2016.

Below are submissions compiled by civil society organisations who work to promote civil and political right in South Africa

1. Lawyers for Human Rights

With reference to paragraph par 13 – 14 and 22 of the GOSA state report (Equality)

The Government of South Africa does not recognise the status of stateless persons in South Africa. A stateless person is a person who is not recognised as a national by any country under the operation of its laws.¹ Stateless persons in South Africa are stateless for a variety of reasons including gaps in the nationality laws of different countries to which the person may have a legal link, lack of birth registration and deprivation of citizenship. Lawyers for Human Rights has produced an in-depth report on nationality and statelessness in South Africa documenting the occurrence and causes of statelessness and provides recommendations to end statelessness in South Africa². Currently there is no legal mechanism in the South African legislative framework to recognise the status and rights of stateless persons. The Immigration Act, 2002 (please cite the year etc as done with the birth and deaths act below) contains a provision which could provide permanent residence to stateless persons, but it is inconsistently applied, if at all, and is not regulated and is costly. The right to nationality is the right from which all other rights flow. Without nationality, there can be no equality. Stateless persons' rights are routinely discriminated against for their lack of documentation and status, thus making it impossible for them to enjoy the right to equality, the right to life and personal integrity, the right to dignity, prohibition of torture and slavery, the right to liberty and security of person, the right to freedom of conscience and religion, the right to freedom of association, the right to freedom of movement and he right to right to participate in government.

Paragraph 22 of the GOSA report addresses the *Bhe v Magistrate, Khayelitsha* case with regards to equality. However, the findings of this case are not being applied when it comes to the birth registration of children born to unmarried parents. Langa DCJ notes in this judgement that *"when section 9(3) prohibits unfair discrimination on the ground of "birth", it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not."*³ The Births and Deaths Registration Act, 1992 still differentiates between children born within and outside of marriage. The Regulations to this Act prevent unmarried fathers from registering the birth of their children when the mother is unavailable or undocumented, perpetuating the cycle of lack of documentation and leads to statelessness. LHR, in

¹ Definition of a stateless person in Article 1 of the 1951 UN Convention on the Status of Stateless Persons which is recognised as international customary law

² <http://www.lhr.org.za/publications/statelessness-and-nationality-south-africa>

³ 2005 (1) SA 563 (CC)

collaboration with the Institute for Statelessness and Inclusion has submitted a shadow report to the UN Convention on the Rights of the Child which explores this problem in more detail.⁴

The African Commission is urged to ask the GOSA:

What steps is the GOSA taking to ensure that the rights of stateless persons are protected in South Africa and to provide them with a pathway to nationality? When does the GOSA plan to fulfil the pledge they made in 2011 to sign the two UN Conventions on Statelessness in order to ensure the rights of stateless people?

On what basis does the GOSA discriminate unfairly against children born to unmarried parents in preventing their births from being registered when the mother is unavailable or undocumented.

Recommendation:

The GOVSA should adopt a statelessness determination procedure through which stateless persons may be identified, documented and afforded the rights to permanent residence, the right to work and a pathway to nationality from which flow all other rights.

The regulations to the Births and Deaths Registrations Act should be amended to allow the unmarried father to register the births of their children when the mother is unavailable or undocumented.

With reference to paragraph par 45 of the GOVSA state report (The right to dignity, prohibition of torture and slavery)

Stateless persons in South Africa routinely suffer arrest and detention for lack of status and documentation in South Africa. LHR's stateless clients are routinely arrested and even assaulted by police. Some are detained indefinitely, because no country will accept them for deportation as they are stateless.

The African Commission is urged to ask the GOSA:

How does the GOSA justify not providing status and identifying documentation to stateless persons in order to avoid repeated arrest, assault and detention?

⁴ Civil Society Submission on the right of every child to acquire a nationality under Article 7 CRC

Recommendation:

The GOSA should adopt a statelessness determination procedure through which stateless persons may be identified, documented and afforded the rights to permanent residence, the right to work and a pathway to nationality from which flow all other rights.

With reference to paragraph par 167 – 171 of the GOSA state report (Customary marriages)

Stateless persons in South Africa do not enjoy the rights afforded to married persons in customary or religious marriages. Stateless persons are largely undocumented by virtue of the fact that a stateless person is a person who is not recognised as a national by any state under the operation of its laws and is therefore not often issued with identifying documentation. In order to register a marriage or a customary, religious or civil union one needs to possess an identifying document issued by the country of nationality. Stateless persons are unable to register marriages as a result of this. Their unions are not recognised formally and all the rights and privileges which flow from a formally recognised marriages are likewise unrecognised.

The African Commission is urged to ask the GOSA:

When does the GOVSA plan to fulfil the pledge they made in 2011 to sign the two UN Conventions on Statelessness in order to ensure the rights of stateless people?

Recommendation:

The GOSA should adopt a statelessness determination procedure through which stateless persons may be identified, documented and afforded the right to formally enter into marriages.

With reference to paragraph par 221 of the GOSA state report (Right to participate in government)

The GOSA report speaks to the increase in number of registered voters. However, to be registered as a voter, one has to be registered as a South African citizen on the National Population Register. There is still a significant population of South African citizens whose

births have not been registered for various reasons. One of the reasons is that the regulations to the Births and Deaths Registration Act, 1992 prescribe a strict set of requirements for the late registration of a birth (after 30 days of the birth) which are impossible to fulfil for many South Africans as a result of their birth outside of a hospital or lack of parents' documentation or death certificates amongst others. The Department of Home Affairs has made it clear that the Late Registration of Birth Process will be ended completely in 2016. This would mean that no child or adult can be registered as a citizen after 30 days of the birth. Not only will this lead to mass statelessness, but it also prevents these people from participating in government which is their right as citizens.

The African Commission is urged to ask the GOSA:

On what basis does the GOSA discriminate against children and adults who have not been registered within 30 days of their births? How does the GOSA plan to facilitate the issuance of documentation to these persons?

Recommendation:

The GOSA should amend the regulations to the Births and Deaths Registrations Act to accommodate persons who have not been registered within 30 days of birth and introduce a discretion to register where applicants cannot meet each and every requirement, but nonetheless qualify for South African citizenship.

Freedom of Expression Institute

With reference to paragraph 15-19 (Prohibition of discrimination and the Right to Equality)

The state report omits the obstacles faced with the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act). We note that while the Act is enacted according to section 9 of the Constitution, section 10 of the equality Act needs to be fine-tuned to clarify what constitutes hate speech. Exchanges between people have in these past years reflected racist, sexist and other prejudicial sentiment, thus indicating that the envisioned nation that is, united in its diversity is still a goal not yet within reach.

There is an inconsistency that poses a potential interpretive challenge for equality courts. The Constitution in section 16 provides for freedom of expression, however limits it where such expression constitutes advocacy to hatred based on race, ethnicity, gender or religion specifically. The Equality Act on the other hand limits advocacy for hatred that is based on an array of prohibited grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. This suggests that the grounds covered by the Equality Act are wider than those provided in the Constitution. This issue will be addressed in the upcoming case where Mr Jon Qwelane will question the Constitutionality of the hate speech clause based on the fact

that sexual orientation is not necessarily listed in the freedom of expression clause as a prohibited ground.

Beyond the said technical differences between the Constitution and the Equality Act, is the broadness what is defined in the Equality Act, as hate speech. The Act describes hate speech as speech that demonstrates clear intention to harm, hurt, promote or propagate hatred based on the above stated prohibited grounds. In one Equality case, (Mdabe v Reid) it was questioned whether these factors must be read disjunctively or conjunctively. The court decided that these should be read disjunctively, meaning that our current jurisprudence permits judges to proclaim speech as 'hate speech' on the basis that it is harmful. It is recommended that the Equality Review Committee; a body designated by the Equality Act to oversee the implementation of the Equality Act should relook at the hate speech clause with the view of narrowing it to dangerous speech., so as not to extend to legitimate free speech.

The lack of clarity in the law of what hate speech really entails as well as the limited jurisprudence means that Equality courts still have to understand the South African context in which hate speech and free speech may be defined. In 2011 an Equality Court judge ruled that singing a struggle song which contained Zulu lyrics which can be translated to 'shoot the Boer' amounted to hate speech. The judgement has been criticized for not being easily enforceable as this song is still sung in some political gatherings. While the judges reasoning that the song threatened the minority white Afrikaners, a counter argument that the song has been sung for years yet never resulted in the murder of whites stands. In this regard, it is evident that hate speech jurisprudence is only developing.

The African Commission is urged to ask:

Since the inception of the Equality Act, what actions have the equality Review Committee done to ensure that free speech/ hate speech jurisprudence develops accordingly?

Recommendation:

The Equality Review committee must put clearer guidelines in terms of hate speech regulations and how to enforce them so that equality norms are upheld while not being used to limit freedom of expression.

With reference to paragraph 185 to 191 (Freedom of Information and expression)

Media Freedom

Freedom of expression has triumphed in a number of notable instances in South Africa. This is observed mainly through the media whose role in promoting an open democracy is indispensable. Mainstream media has been critical in representing diverse political viewpoints, from covering stories on an array of controversies which could have an effect on the public. The examples are plenty however for purposes of this brief report we highlight, coverage of the Public Protector's investigations of the President's expenditure, Parliamentary debates, live court hearings involving government officials and members of the ruling party.

Mainstream media has also been able to cover the statements by opposition political parties offering the public an opportunity to receive and engage with the various information, thus informing their right to vote.

One progressive victory in terms of access to information in 2016 has been the decision by the Gauteng High Court that live streaming would now be allowed in courts. The decision came after a case was brought forward by a media company called Combined artistic Productions who cover an investigative programme called Carte Blanche.

Despite these positives, community journalists do not have full ability to expose the issues going on in grassroots communities. In our interaction with the public, many feel that community radio and newspapers are state controlled therefore viable avenues to engage political discussions openly. In some instances, there is the suspicion of the community that government collaborates with multinational companies, particularly mines to avoid covering stories about the effect of these businesses on environmental rights.

The African Commission is urged to ask:

What is being done to ensure that the content on community radio encompasses the views of all people regardless of their conscience on certain matters?

Recommendation:

It is recommended that government works to revolutionise the way community media is run so that it can reflect the diverse views held by South Africans. There may be a need to task the South African Human Rights Commission to investigate the anomalies within the community media system.

With reference to paragraph 177

Submission 177 of the shadow state report is accurate in that there is low utilisation usage of PAIA. The South African Human Rights Commission reports that only 5% of municipalities are fulfil their PAIA obligations.

The African Commission is urged to ask :

What is being done to ensure that local authorities comply with PAIA, particularly voluntary disclosure of information?

Recommendation:

The state must take consideration of the SAHRC findings on compliance of PAIA and begin to implement the recommendations in this report.⁵ The 2008-2012 report recommends;

a) *Inclusion of PAIA within strategic plans of institutions;*

⁵ <http://www.sahrc.org.za/home/21/files/Consolidated%20PAIA%20Audit%20Report%202012.doc2.pdf>

- b) *Appointment of Deputy Information Officers;*
- c) *Allocation of budgets for PAIA administration;*
- d) *Basic training of all personnel; including frontline officials on PAIA and the development of internal training manuals is a key tool to facilitate this process;*
- e) *Development of systems to receive, process and monitor requests for information;*
- f) *Compliance with sections 14, 15 and 32 of PAIA;*
- g) *Use of customer care and people centres for the distribution of request and appeal forms, promotional material on PAIA and the section 14 manual;*
- h) *Co-ordination of inter-departmental referrals;*
- i) *Co-ordination of regional and local information as resource base;*
- j) *Monitoring trends and developments in requests and records management, for the purposes of reporting and for accountability;*
- k) *Enhanced systems and processes through consultation with experts;*
- l) *Particular attention needs to be paid to communication systems governing progress etc. with requesters;*
- m) *Monitoring, tracking and assessment of data generated from regions and provinces;*
- n) *Provinces to monitor, track and assess data from local government structures;*
- o) *Structure and develop public participation and awareness raising initiatives regarding PAIA;*
- p) *Operational requirements must be reviewed and addressed;*
- q) *Service delivery agents to address capacity issues urgently;*
- r) *Compliance to form only one aspect in practical implementation and needs to be viewed in this way;*
- s) *Manuals need to be reviewed for user friendly content and accessibility; Information that is automatically available must be well defined and increased;*
- t) *Motivate and prioritise PAIA on departmental agenda;*
- u) *The accurate collation of statistics is essential for the mandatory reporting requirements.*

With reference to paragraph. 197 (Freedom of association)

The State report does not make a mention of the fact that community activists, a target for unfair arrest especially protests take place. Examples of incidences include, the so called 'Boiketlong four' who are community members of in North West Province were arrested in 2015 and sentenced for 16 years for arson during a service delivery protest. One of the four is said not to have been part of the protests on the day the three were convicted; but is currently serving jail time due to his association with community activism. The sentence is too

harsh and some community based organisations have been trying to context the harsh sentence placed on the four.

Another example is of a community activist based in Thembelihle in the Gauteng Province called Bhayzer Miya. Miya is currently in jail for arson even though it is said he was not in the particular protest he was arrested for partaking in.

General Moyo from Makause Informal settlement in the Gauteng Province has also been a victim of arbitrary arrests due to his involvement in service delivery protests. Moyo is currently out of prison but is susceptible to arrests.

The African commission is urged to ask:

What measures are being taken to protect the rights of human rights defenders in South Africa?

Recommendation:

It is recommended the state intervenes by responding to the concerns of civil society who feel that courts have erred in their decisions, particularly the case of the Boiketlong four.

With reference to paragraph 192 (Freedom of assembly)

The right assembly is enshrined in the Constitution under section 17 and this right is given life through its empowering legislation the regulations of Gatherings (RGA). This Act has been referred to in the State report in submission 194.

The RGA has over the years of application seen the abuse by authorities in the most atrocious ways. Members of the community who wish to organise protests have indicated that municipal authorities are unaware of the Regulations of Gatherings Act. Their lack of awareness leads to rejection of notices for demonstrations and/ or protests, making it difficult for people to organise legitimately.

The African Commission is urged to ask:

What form of capacitation activities are being undertaken to ensure that municipal authorities are aware and implement the RGA appropriately?

Recommendation:

It is recommended that the relevant municipal authorities make themselves more accessible to the public to address them directly about service delivery.

With reference to paragraph 217 (Right to participate in government)

In our observation opposition members of parliament are historically at risk of being silenced, such as in the incidence in 1997 where Member of Parliament Patricia De Lille, threatened to release the names of the African National Congresses and was suspended as a result.

In this regard we have noticed a trend in Parliamentary proceedings where members of opposition parties complain about not being afforded enough platforms to speak. This was specifically noted in the two State of the Nation Addresses (2014 and 2015) where members of the opposition were forcefully removed from parliament because they had not followed parliament etiquette.

The African Commission is urged to ask:

What is being done to ensure that the speaker of Parliament presides over debates without bias?

Media Monitoring Africa

With regards to par 185 (Freedom of information and expression)

The Return of the Statutory Media Appeals Tribunal: The period has seen the revival of the notion of the need for media regulation in South Africa. Advocates of statutory media regulation argue that South Africa needs such a body in order to ensure that media are accountable. However, those who oppose it believe that a statutory body that regulates the media will have a chilling effect on media reportage. Driven by limited political agendas, the debates have continued to be largely positional and little movement or understanding of some of the bigger challenges has taken place. Real challenges of media freedom, diversity and transformation remain broadly unaddressed. Valid and oppositionist critiques of accountability systems are not dealt with in any substantial manner with the result that little real focus is given to issues of media quality and reporting marginalised issues like social justice. Given that the debates on the possibility of a media appeals tribunal are still ongoing, we would want to find out where the South African government stands on this as this will have a material impact on media freedom in the country.

The African Commission is urged to ask:

Given the discussion regarding media regulation, where does the South African government currently stand?

Recommendation:

Before considering a media regulation body, there needs to be independent assessment of existing accountability mechanisms in order to effectively contribute to debates on this crucial issue.

The ICT Policy Vacuum: There has been no development on the Information Communication Technology (ICT) policy review. Despite being a core element of South Africa's National Development Plan (NDP),⁶ there is no clarity as to which department or ministry is responsible or who is taking which elements forward. Despite this, there has been some positive movement around provision of access to the internet. In Tshwane for example there is a clear effort to provide free internet access via wifi in public spaces. While this is very positive, it is too limited and does little to reduce the overall costs of internet access. Data costs remain high and there continues to be a deafening silence on the importance of digital literacy. What is clear is that digital literacy is currently not being addressed by government or the private sector with only a few voices from civil society raising the issue. Yet without digital literacy citizens will not be empowered to access their right to information.

**The African Commission is urged to ask:
What is the state doing to improve digital literacy?**

**Recommendation:
Perhaps what would be useful are community-owned and community-driven access systems as well as the provision of digital literacy skills so citizens can claim and make full use of the potential of the internet.**

The Conservative Silo Creep in Online Regulation and/or Internet Governance: In the period we have seen the Film and Publication Board (FPB) issue draft online regulations⁷ that have been influenced by conservative views and an approach to regulation of the Internet that borders on sheer megalomania. Despite convergence being a reality in technology, it would seem the FPB and other conservative figures seek to fight back against technology. In a dramatic throwback to the apartheid era they view the growth and integration of technology into society as a sign from the devil with paedophiles sitting behind every computer and/or mobile device connected to the internet. While this may sound dramatic it is really as bad as it sounds if not worse. In its submissions on the FPB's draft online regulations, Media

⁶ The NDP can be accessed here:

<http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf>

⁷ The draft online regulations can be accessed here: <http://www.fpb.org.za/profile-fpb/legislation1/514-draft-online-regulation-policy-2014/file>

Monitoring Africa⁸ and many other civil society organisations echoed that the regulations in their current form are impractical, illegal, overboard and will not achieve their stated aims. The regulations we also drafted in isolation with other processes undertaken by the Department of Justice and Constitutional Development (particularly the Cybercrimes and Cybersecurity Bill) as well as the ICT policy review and the National Development Plan.

The African Commission is urged to ask:

As mentioned, South Africa seems to be taking a conservative stance with regards to regulating ICT. Why is this preferred stance when it is inevitable that this would violate the right to access information, privacy and freedom of expression?

Recommendation:

In our view what is needed is a genuine multi-stakeholder forum that brings civil society, industry and government players together to develop South African positions on a range of online governance issues, not just children’s online safety but a range of privacy and other online matters – all of which have a profound impact on people’s ability to receive and share information.

The Cybercrimes and Cybersecurity Bill: In the period we witnessed the Department of Justice and Constitutional Development (DOJ & CD) publishing the Cybercrimes and Cybersecurity Bill. There is no doubt that such legislation is needed as “the Internet is one of the fastest growing areas of technical infrastructure development. ICTs are omnipresent and the trend towards digitisation is growing. The demand for Internet and computer connectivity has led to the integration of computer technology into products that have usually functioned without it, such as cars and buildings.”⁹ At present, South Africa has no legislation that addresses Cybercrimes and Cybersecurity, whether it is to describe what constitutes a Cybercrime, how to enforce the law governing Cybercrime, or to determine appropriate correctional sentencing for those convicted of offences in this realm. While the Bill is a welcome development as it will bring South Africa in line with international laws governing internet-based crimes, it is excessively far-reaching, not practical and in many instances it

⁸ Media Monitoring Africa’s submissions can be accessed here:

http://www.mediamonitoringafrica.org/index.php/resources/entry/mmas_submission_on_the_film_and_publications_borders_proposed_online_regulat/

⁹ Read “Understanding Cybercrime: Phenomena, Challenges and Legal Responses” here: <http://www.itu.int/ITU-D/cyb/cybersecurity/docs/Cybercrime%20legislation%20EV6.pdf>

grants a concerning level of discretion to the South African Police Service and the State's security cluster.¹⁰

The fundamental problem with the Bill is that it uses broad terms that are loosely defined such as 'critical data'. In addition, the Bill loosely uses the words 'unlawful' and 'intentionally,' and these are the only words standing between a lawful person, organizations, businesses and criminals.¹¹ What is startling is that a bill of this nature makes very little reference or even acknowledges freedom of speech.¹² To ignore freedom of speech is to ignore the basic principle of most laws, that the same rights that people have offline must also be protected online.¹³

The African Commission is urged to ask:

Aside from rectifying the definitional issues in the Cybercrimes Bill, we want to know what the government is doing to ensure that the Bill includes a public interest clause that will protect anyone that is in possession of data and/or critical data that is in the public interest. We also want to know what the government is doing to ensure that marginalised groups like children and women's needs and issues are highlighted in the Bill to ensure laws work to protect them and promote their rights.

Recommendation:

We encourage continuous research and training of IT security personnel, finance services sector personnel, police officers, prosecutors and the judiciary to keep them abreast of advancing computer technology.¹⁴ At the end of the day, a balanced approach that considers the protection of fundamental human rights and the need for the effective prosecution of cybercrimes is the way forward.

¹⁰ For more issues concerning the Cybercrimes and Cybersecurity Bill, see Media Monitoring Africa's submissions on the Bill here:

[http://www.mediamonitoringafrika.org/index.php/resources/entry/written_submissions_by_the_media_monitoring_africa_mma_on_the_cybercrimes_a/](http://www.mediamonitoringafrika.org/index.php/resources/entry/written_submissions_by_the_media_monitoring_africa_mma_on_the_cybercrimes_act)

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

