



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

**SOUTH AFRICA'S COMBINED 2nd TO 6th PERIODIC
REPORT TO THE UNITED NATIONS
COMMITTEE ON THE
ELIMINATION OF RACIAL DISCRIMINATION COVERING THE PERIOD
2002 TO 2011**

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ABBREVIATIONS AND ACRONYMS

ABET	Adult Basic Education and Training
AIDS	Acquired Immune deficiency Syndrome
APC	African Population Commission
ART	Anti-Retro Viral treatment
ASGISA	Growth Initiative for South Africa
ASIFUNDE	Let's read
AU	African Union
BCCSA	Broadcasting Complaints Commission of South Africa
BCLR	Butterworths Constitutional Law Reports
BEE	Black Economic Empowerment
BBBEEA	Broad Based Black Economic Empowerment Act
BOER	Farmer
CC	Constitutional Court
CCT	Constitutional Court
CERD	Committee on the Elimination of Racial Discrimination
COGTA	Department of Cooperative Governance and Traditional Affairs
COSATU	Congress of South African Trade Unions
CRL	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
CSG	Child Support Grant
DFID	Department for International Development
DEA	Department of Environmental Affairs
DTA	Department of Traditional Affairs
DoD	Department of Defence
DoE	Department of Education
DoJ&CD	Department of Justice and Constitutional Development
DSD	Department of Social Development
EMS	Emergency Management Services

ECT ACT	Electronic Communications and Transactions Act
EE ACT	Employment Equity Act
EU	European Union
FET	Further Education and Training
FDI	Foreign Direct Investment
FIFA	Fédération Internationale de Football Association
HDIs	Historically Disadvantaged Individuals
HIV	Human Immune-Deficiency Virus
ICERD	International Convention on the Elimination of All forms of Racial Discrimination
ICT	Information and Communication Technology
IDP	Integrated Development Planning
IEC	Independent Electoral Commission
<i>IMBIZO</i>	a forum for enhancing dialogue and interaction between government and the people
JIPSA	Joint Initiative on Priority Skills Acquisition
JSC	Judicial Services Commission
<i>'KE NAKO AFRICA'</i>	<i>' It's time Africa'</i>
<i>LEKGOTLAS</i>	a meeting place for village assemblies
NDoH	National Department of Health
NFAR	National Forum Against Racism
NHC	National Heritage Council
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders
NPA	National Prosecuting Authority
NSP	National Strategic Plan for South Africa
NYSP	National Youth Strengthening Programme
OAU CONVENTION	Organisation of the African Union Convention
OPERATION <i>UBUMBANO</i>	<i>'Operation togetherness'</i>
PPPFA	Promotion of Preferential Procurement Framework Act

PSALB	Pan South African Language Board
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
RDP	Reconstruction and Development Programme
RBX	Roll back Xenophobia
RICA ACT	Regulation of Interception of Communications and Provision of Communication Related Information
SABC	South African Broadcasting Commission
SACC	South African Constitutional Court
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SAIDE	South African Institute for Distance Education
SALRC	South African Law Reform Commission
SAPS	South African Police Services
SAS ACT	South African Schools Act
SASSA	South African Social Security Agency
SMEs	Small to Medium Enterprises
SMMEs	Small, Medium and Macro Enterprises
SOEs	State Owned Enterprises
SRSA	Department of Sport and Recreation South Africa
TRC	Truth and Reconciliation Commission (established after the Truth and Reconciliation Hearings to implement the recommendations of government in terms of the Promotion of National Unity Act, of 1995)
UAPS	Union of African Population Studies
<i>UBUNTU</i>	represents a spirit of kinship across both race and creed which unites mankind to a common purpose
<i>UKUTHWALA</i>	a form of abduction that involves kidnapping a young woman with the intention of compelling the young woman's family to endorse marriage negotiations
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization

I INTRODUCTION

1. South Africa's First Report under the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention) presented to the Committee on the Elimination of Racial Discrimination (the Committee) in December 2004 combined the initial to the third period reports of South Africa and was considered in August 2006. This combined report began by presenting a detailed history of the country and its people.¹ The social, political, cultural and economic history of the country is also adequately reflected in the Common Core Document accompanying this report. It is thus considered unnecessary to engage in a lengthy recounting of the country's history at this stage.
2. South Africa's transition from apartheid rule has been hailed globally as an example of a peaceful regime change in the midst of monumental challenges. That South Africa achieved the transition is testimony to the determination and will of its people. The adoption of a new Constitution, provisionally in 1994 and finally in 1996, was, arguably, the high-water mark of the transition process. Almost nineteen years after the formal abolition of apartheid and repealing of apartheid laws, the country is still undergoing multiple and systemic transitions. In an age that has witnessed an exacerbation of historically entrenched racial hierarchies, South Africa is still in the process of creating a credible non-racial society. The new constitutional dispensation marked the end of the age of white supremacy and the beginning of one democratic, non-racial and non-sexist state where all citizens have equal rights.
3. In today's South Africa, the legal framework provides for equality, which is enshrined in the Constitution. However, the Government is still

¹ See, CERD/C/461/Add. 3.

continuing with the implementation of the Affirmative Action Programme to address disparities of the past. Racial discrimination has, to a large extent, migrated into the realm of privately held beliefs. The Government recognises that this shift requires it and civil society organisations to devise appropriate awareness programmes so that the psychological and cultural legacy of apartheid can be eliminated. When South Africa adopted its Constitution in 1996, it was remarkable for both the inclusive and consultative process by which it was adopted as well as for its content. The process involved massive public participation in which the role of civil society was paramount. Regarding content, the South African Constitution is manifestly transformative and declares itself committed to the continued inclusion of civil society in governance. Since racism has been outlawed, the country's main challenge is to address all forms of covert and residual racism.

4. In preparing this combined report, the Government of South Africa is particularly mindful of the points that were raised in the Concluding Observations that the Committee provided during the consideration of the combined initial report.² In line with the direction provided in paragraph 34 of the Concluding Observations, this report attempts to address all the issues that were highlighted by the Committee during the consideration of the initial report.
5. This report is divided into three parts of which this introduction is the first part. The second part of the report provides a discussion pertaining to articles 1 to 7 of the Convention. This discussion attempts to address all the issues raised by the Committee with respect to each specific article, while at the same time also presenting the progress that South Africa has made in fulfilling the Convention's goals since the last report was presented. The third part of this report provides some

² CERD/C/ZAF/CO/3 19 October 2006

general concluding remarks on the implementation of the Convention in South Africa.

II ARTICLE 1: CONCEPT OF AND SPECIAL MEASURES TO COMBAT RACIAL DISCRIMINATION

6. South Africa has made great strides in dismantling the structures that had hitherto institutionalised and legalised racial discrimination. The Government of South Africa continues to allocate substantial human and financial resources towards the creation of non-racist state. All legislation that provided for racial discrimination have been repealed and a host of new statutes have been adopted to provide a framework for racial equality. The major pieces of legislation that are relevant in this regard were already brought to the Committee's attention during the last report – see paragraph 30 of South Africa's Initial Report.

7. In order to ensure that the South African legal framework complies with its constitutional imperatives and international legal instruments commitments, the government requested the SALRC to conduct a purification of statutes in all national legislation. The question of rationalisation of laws of South Africa has been the subject of concern to the government. This investigation was aimed at the revision of the statute books in order to recommend the removal or the amendment of the legislative provisions that are considered to be unconstitutional, redundant and/or obsolete or infringe section 9 of the Constitution providing for right to equality, which permeates the Bill of Rights and the Constitution in general. The constitutional validity aspect of this investigation focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in the Constitution. In practical terms, this means that this leg of the investigation will be limited to those statutes or provisions in statutes that –

- (a) differentiate between people or categories of people, and which are not rationally connected to a legitimate government purpose; or
- (b) unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or

- (c) unfairly discriminate on the grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.
8. Consequently, a law or a provision in a law which appears, on the face of it, to be neutral and non-discriminatory but which has or could have discriminatory effect or consequences will be left to the judicial process to be dealt with as and when it is challenged. An audit of all national legislation (excluding provincial and secondary legislation) which was conducted by the SALRC revealed that there are close to 3000 statutes comprising of principal Acts, amendment Acts, supplementary and/or additional Acts and private Acts.
9. The South African Government, however, concedes that its main challenge remains the eradication of residual forms of discrimination which often occur in very covert and subtle forms. Purification of statutes and prohibition of discrimination through the law results in formal equality, however the challenge is the attainment of substantive equality.
10. The Committee may recall that for purposes of defining discrimination, South Africa subscribes to the notion of "unfair discrimination" – section 9 of the Constitution. Section 9 of the Constitution is supported, principally, by the **Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (No 4 of 2000)**. While all discrimination involves differentiation, unfair discrimination is that differentiation which in application, is bound to have an unfair impact and outcome. The concept of unfair discrimination has special relevance to South Africa, especially in the light of the country's history and long experience with overt racism. This means that differentiation which is designed to achieve a worthy objective will be allowed to pass constitutional muster – this concept was further explained in South Africa's answers to the questions that had been posed by the Committee during the last report, see South Africa's response to question number 2 in the Initial Report.

A Population composition

11. In paragraph 11 of the Concluding Observations the Committee enjoined the Government of South Africa to provide a “qualitative description of the ethnic composition of its population.” It must be noted that South Africa’s population is both racially and ethnically diverse. By mid-2009 the population of South Africa was estimated at 49 320 500 people of which 52% were female.³ Of the total population, 79.3% classified themselves as African, 9.1% as White, 9% as Coloured and 2.5% as Asian/Indian. Africans made up about 39 million in the total South African population. The White population was estimated at 4.5 million, the coloured population at 4.4 million and the Asian/Indian population at 1.3 million. Nearly one third of the population (31.4%) were younger than 15 years and 7.5% (3.7 million) were 60 years or older. According to Statistics South Africa, the mid 2009 population estimates by population group can be tabularly summarised as follows:

Table 1: Mid-year population estimates for South Africa by population group and sex 2009

Population group	Male		Female		Total	
	Number	Percentage of total population	Number	Percentage of total population	Number	Percentage of total population
African	18 901 000	79.2	20 235 200	79.5	39 136 200	79.3
Coloured	2 137 300	9.0	2 295 800	9.0	4 433 100	9.0
Indian/Asian	635 700	2.6	643 400	2.5	1 279 100	2.6
White	2 194 700	9.2	2 277 400	9.0	4 472 100	9.1
Total	23 868 700	100.0	25 451 800	100	49 320 500	100

In terms of population distribution by province, Statistics South Africa estimates that the above population breaks down to the following pattern:

³ A national census is due to be conducted in October 2011 and this will certainly provide a clearer indication of the population in South Africa and how it breaks down.

Table 2: population distribution by province

	Population estimate	Percentage share of the total population
Eastern Cape	6 648 600	13.5
Free State	2 902 400	5.9
Gauteng	10 531 300	21.4
Kwazulu-Natal	10 449 300	21.2
Limpopo	5 227 200	10.6
Mpumalanga	3 606 800	7.3
Northern Cape	1 147 600	2.3
North West	3 450 400	7.0
Western Cape	5 356 900	10.9
Total	49 320 500	100.0

12. As indicated in the Initial Report, South Africa is a multilingual country and constitutionally recognises eleven official languages. The official languages are: Afrikaans, English, Isindebele, Isixhosa, Isizulu, Sepedi, Sesotho, Setswana, Siswati, Tshivenda and Xitsonga. Other languages that are also spoken in the country are: the Khoi, Nam and San languages, Arabic, German, Greek, Gujarat, Hebrew, Hindi, Portuguese, Sanskrit, Tamil, Telegu and Urdu. English is generally understood across the country, being the language of business, politics and the media, and the country's lingua franca.
13. The linguistic diversity of South Africa is such that the languages have, over time, influenced each other. The Government of South Africa actively promotes the use of all official languages plus the Khoi, Nama and San languages and all languages used by minority communities in South Africa. This is principally undertaken by the PSALB which operates under the aegis of the **Pan South African Language Board Act, 1995 (No 59 of 1995)** as amended by **Act No 10 of 1999**. Among the central objectives of the PSALB is the promotion of multilingualism in South Africa. The PSALB is also mandated to investigate complaints

about language rights violations from any individual, organisation or institution.

14. The CRL was established in terms of the **Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities Act, 2002 (Act No 19 of 2002)** (CRL Act). It is an independent institution which was established in terms of chapter nine (9) of the Constitution for the promotion and protect the rights of cultural, religious and linguistic communities in South Africa, this also includes the rights of minority groups.

B Protection of non-nationals in line with the Convention

15. The protection against discrimination that is embodied in the Constitution extends to both nationals and non-nationals. Generally speaking, therefore, almost all the rights that the Constitution guarantees extend to everyone in South Africa. In spite of this, the Constitution also underscores the importance of citizenship by reserving certain rights for South African nationals only. For example, section 21 (*movement, residence and the right to a passport*) and section 22 (*trade, occupation and profession*) are some of the rights that can be enjoyed by nationals only. Further, only nationals are allowed to exercise the section 19 political rights and the right to stand for parliament, provincial legislatures and for municipal councils – see, sections 47(1), 106(1) and 158(1) of the Constitution. In the same vein the ordinary law of South Africa also recognises that legitimate distinctions can be made between non-nationals and nationals. This is especially with regard to access to some state benefits. For example, in the public service, permanent appointments are reserved for South African nationals and persons with permanent residence. Non-nationals whether of African or European descent are employed on a contract basis and generally only for scarce skills.
16. The fact that some rights are reserved for South African nationals should not be understood to suggest that non-nationals are considered

to be of inferior status in South Africa. These distinctions merely recognise the primacy of citizenship as a category that is used to, in modern times, classify people and determine the distribution of benefits among them.

17. The South African legal system still accords primary importance to the preservation of non-discrimination and human dignity, which values are founded in sections 9 and 10 of the Constitution, respectively. The importance of human dignity in South Africa is highlighted by sentiments expressed by the Supreme Court of Appeal in ***Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA)*** where it was stated that “[h]uman dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected and protected ...” This statement by the Supreme Court underlies South Africa’s commitment to respect the dignity of all persons within its jurisdiction.

18. The **Immigration Act, 2002 (Act No 13 of 2002)** comprehensively regulates the admission of non-nationals in South Africa and also their residence and stay in South Africa. South Africa’s immigration policy is premised on the concession that the country can only accommodate a certain number of immigrants. The reason for this position is principally the presence of a huge reserve of non-skilled and semi-skilled labour force within the country. It is for this reason that South Africa is often reluctant to allow migrant workers in the non-skilled and semi-skilled categories. The **Immigration Act** aims at setting in place a system of immigration control, which would ensure that permanent residence permits are issued expeditiously and on the basis of simplified procedures and objectives and reasonable requirements and criteria without consuming excessive administrative capacity. The **Immigration Act** has since been amended by the **Immigration Amendment Act, 2004 (No 19 of 2004)**. The amendment to the **Immigration Act** was meant, among others, to clarify the powers of

the Immigration Officers and Police Officers with regard to interviewing a person when they are not satisfied that the person is entitled to be in the country. The amendment also attempts to make clarifications with regard to offences under the Act.

19. It must be pointed out that the Department of Home Affairs is strengthening its capacity to manage migration in a comprehensive manner. More immigration officers are being recruited and deployed. The Department has also designed a program to train law enforcement officials and justice department officials on immigration legislation. Specifically and in terms of paragraph 133 of the Durban Declaration and Programme of Action, the Department has developed human rights training for law enforcement officers. The purpose of this training is to ensure that enforcement of immigration legislation complies with the Government's international obligations and promotes a human rights culture as provided for by the Constitution and the **Immigration Act**. This training covers application of the 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol; the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa, the 1948 Universal Declaration of Human Rights and the implementation of domestic legislation. This training also covers the application of the International Convention on the Elimination of All Forms of Racial Discrimination.

Constitutional Rights Relevant to Migrants' Right to Health

20. In South Africa, like in all other SADC Member States, the Constitution is the supreme law of the land. In most of the SADC Member States, the right to health is constitutionally enshrined. Where a direct link to the right of health is not found, then the alternative is to rely on a progressive interpretation of other related provisions of the Constitution. The right to life and the equality and non-discrimination provisions enshrined in the Constitution may indirectly provide the basis for migrants' protection of the right to health.

21. In 2006, NDoH issued a memo clarifying that possession of a South African identity document is not a prerequisite for eligibility for ART, and in September 2007 issued a directive stating that refugees and asylum seekers, with or without a permit, should have equal access to antiretroviral treatment at all public health providers.
22. The **National Health Act, 2003 (Act No 61 of 2003)** seeks to “protect, respect, promote and fulfil the rights of the people of South Africa to the progressive realisation of the constitutional right to access health care services, including reproductive health care. The Act enumerates the rights of patients who inevitably include migrants, which include the right not to be refused emergency medical treatment.
23. A review of each of the following national strategic frameworks and/or plans includes statements about the particular vulnerabilities facing migrants and mobile population and the importance of responding to their particular needs. Furthermore, all these strategic frameworks and/or plans reflect a commitment to a human rights approach to programming. This includes attention to the rights of participation and inclusion, non-discrimination and equality and the universality, one of which is reflected below.

The HIV & AIDS and STI National Strategic Plan for South Africa (2007-2011)

24. The primary aims of the NSP are to reduce the number of new infections by 50% by 2011, and to mitigate the impacts of the AIDS epidemic by expanding, amongst others, access to treatment, care and support to 80% of all the people diagnosed with HIV by 2011. The NSP identifies population mobility and labour migration as one of the drivers of the AIDS epidemic and recognizes the vulnerability of mobile population to HIV. It acknowledges that individuals who engage in mobile forms of work or migrant labour are at increased risk to HIV. It further provides a guiding framework for the protection of rights of casual, contracts and/or poorly organised workers. It seeks to ensure

non-discrimination in accessing HIV prevention, treatment and support by marginalized groups including sex workers, refugees and undocumented migrants and immigrants. The new/draft NSP will also acknowledge the vulnerability of mobile population to HIV.

25. South Africa's commitment to equal treatment of nationals and non-nationals is manifested by the Constitutional Court's decision in ***Khosa v Minister of Social Development 2004 (6) SA 505 (Khosa)***. ***Khosa*** confirms that while the Constitution generally prohibits discrimination as between nationals, the right to equality further ensures that rights which are to the benefit of "everyone" should not be denied to any person simply on account of them being non-nationals. In ***Khosa*** the Constitutional Court dealt with a challenge to provisions of the **Social Assistance Act, 1992 (No 59 of 1992)** by a number of Mozambican nationals who had acquired permanent residence status in South Africa. The applicants had contended that their exclusion as non-nationals from the social assistance scheme created by the Act was inconsistent with the state's obligations under section 27(1) of the Constitution which directs that access to social security must be provided to everyone. The Constitutional Court held that properly interpreted the Constitution directs that a permanent resident qualifies for access to social security and that discrimination on the basis of nationality/citizenship in the context of social security amounted to unfair discrimination. In the Court's opinion this was because "the exclusion of permanent residents from the scheme is likely to have a severe impact on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus put in the role of supplicants."
26. The acquisition or loss of citizenship is regulated by the **Citizenship Act, 1995 (Act No 88 of 1995)** – see page 42 of the Initial Report. The principal ways of acquiring citizenship under the Act remain: birth, naturalisation and descent. Under section 6 of the **Citizenship Act**, a person may lose his/her South African citizenship if, for example,

he/she, while not being a minor, voluntarily and through a formal act acquires the citizenship or a nationality of another country. One may also make a declaration renouncing his South African citizenship by virtue of section 7 of the Act. The **Citizenship Act** ensures that there is no arbitrary deprivation of citizenship.

C Special measures taken to safeguard the rights of racial or ethnic groups

27. In spite of the adoption of several pieces of legislation meant to help in the eradication of the effects of apartheid in South Africa, arguably the most prominent step that has been undertaken in this regard is the adoption of the Broad-Based Black Economic Empowerment Program (B-BBEE). The B-BBEE Programme is implemented under the aegis of the **Broad Based Black Economic Empowerment Act, 2003 (No 53 of 2003)**. B-BBEE was launched to redress the inequalities of apartheid by giving economic support to members of previously disadvantaged groups (black Africans, coloureds, Indians and Chinese (declared to be black in June 2008)) who are South African citizens. It must be noted that under the Act, the term “black” is used in a generic term and is not limited to persons of African descent. The economic support and opportunities that are available under B-BBEE are often of the type that would previously not have been available to members of the disadvantaged groups. B-BBEE includes measures such as employment equity, skills development, ownership, management, socio-economic development and preferential procurement. One must constantly bear in mind that B-BBEE is not just a moral initiative aimed at redressing the wrongs of the past, but it is a pragmatic growth strategy that is meant to realise the country’s full economic potential. One also ought to recall that the decades of apartheid in South Africa systematically excluded Africans, Indians and other coloured people from any meaningful participation in the country’s economy. B-BBEE is meant to redress the effects of this systemic exclusion, especially the distortions in the economy that it engendered. In the application of the Act, therefore, constant effort is made not only to fulfil the objectives of

the Act but also the stipulations of the Constitution – section 3 of the Act.

28. B-BBEE does not aim to take wealth away from white people and give it to blacks. It is a growth strategy that recognises the inequalities that persist in South Africa today. The B-BBEE programme recognises that South Africa's economy can grow only if its growth integrates all its citizens in a meaningful way. As the name of the supporting legislation indicates, the strategy is broad based. The South African Government's approach is to situate black economic empowerment within the context of a broader national empowerment strategy focussing on historically disadvantaged people, particularly black people, women, youth, the disabled and rural communities.

29. Under the **B-BBEE Act** an integral part of the process is the sector wide generic score card which measures companies' empowerment progress. The generic scorecard is a way to measure the BEE status of a business, giving it a score out of 100%. As can be seen from Table 4, the generic score card measures empowerment progress in four key areas and these are: direct ownership, senior level management, employment equity and indirect empowerment. The generic score card can be diagrammatically represented in the following manner:

Table 4

THE GENERIC BEE SCORECARD		
CORE COMPONENT	INDICATORS	SCORE
Direct empowerment score		
Equity ownership	% share of economic benefits	20%
Management	% black persons in executive management and/or executive board and board committees	10%
Human development & employment equity score		
Employment equity	Weighted employment equity analysis	10%
Skills development	Skills development expenditure as a proportion of total payroll	20%
Indirect empowerment score		
Preferential procurement	Procurement from black-owned and empowered enterprises as a proportion of total procurement	20%
Enterprise development	Investment in black-owned and empowered enterprises as a proportion of total assets	10%
Residual	To be determined by sector or enterprise	10%
TOTAL SCORE		100%

30. This scorecard, as well as a scorecard for multinational companies, is defined and elaborated in the B-BBEE Codes of Good Practice. The Codes of Good Practice, which govern how companies do business in South Africa, allow global and multinational companies some flexibility in how they structure their empowerment deals. For example, representation does not only have to be at ownership level. The Codes are binding on all state bodies and public companies, and the Government is required to apply them when making economic decisions on:

- procurement,
 - licensing and concessions,
 - public-private partnerships, and
 - the sale of state-owned assets or businesses.
31. Private companies must apply the Codes if they want to do business with any Government enterprise or organ of state – that is, to tender for business, apply for licenses and concessions, enter into public-private partnerships, or buy state-owned assets. Private companies are also encouraged to apply the codes in their interactions with one another, since preferential procurement will affect most private companies throughout the supply chain. Different industries are required to draw up their own charters on B-BBEE, so that all sectors can adopt a uniform approach to empowerment and how it is measured. Overall B-BBEE is meant to help in the transformation of the South African economy in such a way that it is representative of the demographic composition of the country.
32. South Africa has also enacted the **Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000)** in order to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution, allowing preferential contracts with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; as well as to give further implementation of the programmes of the Reconstruction and Development Programme (RDP). Section 217(3) requires that national legislation be promulgated to facilitate the procurement processes of organs of state, and ensure that they are carried out in such a manner as best ensures the protection of and or advancement of previously disadvantaged persons or categories of persons.

II ARTICLE 2: POLICIES AND LEGISLATION TO COMBAT RACIAL DISCRIMINATION AND SPECIAL MEASURES TO DEVELOP AND PROTECT CERTAIN RACIAL GROUPS OR INDIVIDUALS

33. South Africa has adopted a variety of measures aimed at promoting equality and non-discrimination. In spite of this, and as conceded in the Initial Report – see page 16 paragraph 64ff and page 33 paragraph 127 – a gap persists between policy and practice. The South African Government is fully mindful of this gap and is actively taking steps to close the gap between the formal measures for achieving equality and the reality on the ground. Some of the measures are in the following areas:

A Judicial transformation

34. The law makers and particularly the judiciary were complicit in the maintenance of apartheid in South Africa. The result is that even with the formal demise of apartheid the judiciary and the legal fraternity, generally, remains white dominated. The transformation of the judiciary is essential if legitimacy of the judicial system has to be restored. The transformation is also necessary to enhance the access of the majority, especially previously disadvantaged people to the justice system. The judicial system must free itself from the images that characterised it as an accomplice in the oppression of black people in South Africa. The judiciary needs to present itself as an institution that is built on the values contained in the Constitution, a justice system with a face of the people (no longer white and male but fully integrated) and justice must be dispensed in the language of the people. It is recognised that the judiciary must not be seen as something imposing or to be feared, but as an effective system for the people, that is respected by those who use it because it is the protector of human rights. Most of the efforts in transforming the judiciary are aimed at freeing the judiciary from the racialised past in which the judiciary was so intricately caught up.

35. In terms of composition, by mid-2009, of the 205 judges, 45.37% (93) were white, 38.4% (78) were African, 7.80% (16) were coloured and

8.78% (18) were Indian. Overall 20.49% were female and 79.51% were male. In terms of the lower court judiciary, of the 1 096 magistrates, 46% were white, 39% African, 7% coloured and 8% Indian. Overall 33% were female and 67% male. Further, the **South African Judicial Education Institute Act, 2008 (Act No 14 of 2008)** will, for the first time in history, provide state sponsored judicial education for judges. The primary function of the South African Judicial Education Institute is however, to offer training to both Judges and Magistrates. Prior to the passing of the South African Judicial Education Institute Act and the establishment of the South African Judicial Education Institute, judicial training was offered by the Justice College (there was no institution for the training of judges, training was offered through exchanges with peer and senior judges).

36. Justice College offered a range of training interventions which target Magistrates, Prosecutors, Masters of the High Court, Family Advocates, Court Interpreters, Legislative Drafters, Registrars of the High Court, Clerks of the Court, Court and Area Court Managers, Managers, Admin personnel and other Legal professionals. The above Institution will provide training for both judges and magistrates. This should go a long way in enhancing capacity of the judiciary, especially in aligning the judiciary with the Constitution's vision for the country.
37. The transformation of the judiciary is closely related to the transformation of the legal profession and of legal scholarship generally. The Department of Justice and Constitutional Development has been working in partnership with Law Schools across the country in transforming the curriculum of the law degree in line with modern best practices. Law schools are also being encouraged to widen access to students from previously disadvantaged communities. Transformation of the legal profession entails making justice accessible to the poor, uneducated and vulnerable. Considerable effort is also being invested in transforming the prosecution and other legal services as well.

Small Claims Courts

38. In a bid to improve access to justice for the poor the government has introduced Small claims courts. Small claims courts have been established in terms of the **Small Claims Court Act, 1984 (Act 61 of 1984)**, to adjudicate on small civil claims. They are created to eliminate the time-consuming adversary procedures before and during the trial of these claims. The limit of cases involving civil claims in these courts is R12 000.
39. Matters within small claims courts are presided over by commissioners who are usually practising advocates or attorneys, legal academics or other competent persons. The service is voluntary as there are no fees paid to the commissioners.
40. Neither the plaintiff nor the defendant may be represented or assisted by counsel at the hearing. The commissioner's decision is final and there is no appeal to a higher court; only a review process is allowed. The department continues to strengthen the capacity of small claims courts. The improvement of the functioning of the small claims courts is a key priority area. The small claims courts constitute an inexpensive tool that was created to settle minor civil disputes in an informal manner. By May 2010, there were 206 small claims courts.

Legal Services Charter

41. The objectives of the Charter are to give effect to the Constitution, the **Promotion of Equality and Prevention of Unfair Discrimination Act** and the **Broad-based Black Economic Empowerment Act** through the facilitation of the transformation of the legal services sector, and the promotion and empowerment of HDIs; to ensure access to justice in all respects, namely through access to legal services, access to legal work, access to the courts, and access to the legal profession, to entrench the independence of the legal profession; to create an affirming and enabling environment; to promote equality and prevent

unfair discrimination; to provide mechanisms for the transformation of the legal services sector; facilitation of economic empowerment; removal of inequalities within the legal services sector; and also the implementation of positive measures to protect and advance HDIs.

The Superior Courts Bill

42. The aim of **Superior Courts Bill** is to rationalise, consolidate and amend the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa; incorporate “certain specialist courts” into the High Court; make provision for the administration of the judicial functions of all courts; make provision for administrative and budgetary matters relating to the superior courts; and to provide for matters incidental to the functioning of the superior courts.
43. In terms of section 2(c) of the draft Bill, provision is made for “the adjudication of matters relating to competition appeals, electoral disputes, tax matters, labour disputes and land claims by the superior courts”. The memorandum on the objects of the Bill states that existing specialist courts “similar in status to the High Court” will be incorporated into the High Court as specialist divisions.
44. Once enacted, the Bill will give effect to item 16(6) of schedule 6 of the Constitution in terms of which all courts must be rationalised with a view to establishing a single, integrated judicial system that is accessible and affordable.

B The role of traditional leadership

45. In paragraph 12 of its Concluding Observations, the Committee requested that detailed information should be provided on the role of traditional leadership and on the status of customary law in South Africa. The Committee also sought information about the measures in place to ensure that customary law was not applied in a manner that created or perpetuated racial discrimination. At the outset it must be

noted that Chapter 12 of the Constitution states that the institution, status and role of traditional leadership, according to customary law, is recognised subject to the Constitution. This institution was set up with the aim of deepening democracy, building peace and ensuring harmony. It assists in mass mobilization for socio-economic development, as the traditional leadership is the direct link between the political leadership and the rural electorate (it operates at grassroots level and has a direct link with the people). However, the institution of traditional leadership operates subject to the dictates of the Constitution and cannot be used to further racial or other discrimination or in anyway subvert the Constitution.

46. The Constitution mandates the establishment of houses of traditional leaders by means of either provincial or national legislation. The National House of Traditional Leaders was established in terms of the **National House of Traditional Leaders Act, 1997 (Act No 10 of 1997)**. Its objectives and functions are to promote the role of traditional leadership within a democratic constitutional dispensation, enhance unity and understanding among traditional communities and advise national government. Provincial houses of traditional leaders were established in eight (8) provinces, namely the Eastern Cape, Western Cape, Northern Cape, KwaZulu-Natal, the Free State, Mpumalanga, Limpopo and North West. Unlike the other provinces, Gauteng only has a Council of Traditional Leaders and not a Provincial House of Traditional Leaders.

47. The **Traditional Leadership and Governance Framework Act, 2003 (Act No 41 of 2003)**, provides for the establishment of local houses of traditional leaders. The national and provincial houses of traditional leaders enhance the co-operative relationships within national and provincial government, while the establishment of local houses of traditional leaders deepen and cement the relationship between municipalities and traditional leaders on customary law and development initiatives. In March 2008, Cabinet approved the proposal

to establish a national department for traditional leadership under the Minister of Provincial and Local Government to restore the dignity of traditional leadership, which is the custodian of African customs and heritage. The process will begin in the 2009/10 financial year. This process has largely been finalised and the Department of Traditional Affairs is fully operational under the Ministry of COGTA.

48. The stipulations of Chapter 12 of the Constitution and the advent of democracy required the transformation of the composition of traditional councils. Legislation has transformed the composition of traditional councils to provide for elements of democracy (40% of members must be elected) and gender representivity (one third of members must be women). Legislation has also opened a window of opportunity for municipalities and traditional councils to achieve co-operative governance. Traditional councils have been given a strong voice in development matters and may now enter into partnerships and service-delivery agreements with government in all spheres.

49. Closely connected to the role of traditional leadership in South Africa is the position of customary law in a multiracial dispensation. It must be stated that the status and relevance of customary law in South Africa has been acknowledged by the Constitutional Court. It is manifest that the Constitution also acknowledges the relevance and continued applicability of customary law in South Africa – for example, section 30 of the Constitution guarantees the right to language and cultural life and section 31 of the Constitution protects the rights of cultural, religious or linguistic communities. Furthermore section 39(2) of the Constitution specifically enjoins courts interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. Section 39(3) also provides that the Bill of Rights does not deny the existence of any other rights conferred by customary law so long as the same are not contradictory to the Bill of Rights. Furthermore section 211 of the Constitution protects those institutions that are unique to customary law. The overall result is that customary law and by extension the

institutions of traditional leadership though recognised by the Constitution must be understood and practiced in the light of the Constitution's values. This position has been affirmed in ***Bhe v Magistrate Khayelitsha 2005 (1) BCLR 1 (CC)*** and ***Alexkor Ltd and Another v Richtersveld Community and others 2003 (12) BCLR 1301 (CC)***. This means that customary law and the institution of traditional leadership cannot be used to perpetrate racial discrimination as they would then fall foul of the Constitution and may be invalidated on that basis.

The National Heritage Council of South Africa

50. NHC is a government institution that is responsible for the preservation of the country's heritage. In its seven years of existence, it has managed to place heritage as a priority for nation building and national identity. The important areas that the NHC focuses on are policy development for the sector to meet its transformation goals, public awareness and education, knowledge production in heritage subjects that were previously neglected, as well as making funding available to projects that place heritage as a socio-economic resource.

51. NHC has prioritised the country's most important history to be inscribed as the heritage of the people of this country, before it disappears from public memory. NHC is working on the development of a Liberation Heritage Route comprised of sites which will be presented to the World Heritage Committee under the United Nations UNESCO for consideration and possible inscription as a World Heritage Property into the prestigious list of such properties. We are aware that not all the sites will make it to this prestigious list but those that do not qualify according to the UNESCO World Heritage Convention of 1972 will remain of significance and protected through legislation nationally, provincially and locally.

C The promotion of gender equality

52. Racism was not just the oppression of blacks by whites, but included

discriminated on the basis of gender which served to emphasize the oppressive patriarchal practices that were already in place. Black women in South Africa, for example, were doubly discriminated against, firstly, on the basis of their race and secondly on the basis of their gender. For poor rural black women this meant no participation in the economy and reliance on the land, which was often arid due to overcrowding and overused for sustenance, while the men were away, often for long periods to work in cities or the mines.

53. For white women this oppression manifested itself in a different manner, many were required to be housewives and were excluded from the mainstream economy. For those who had gainful employment it was mainly in the professions relegated to women - the so called "softer professions" - such as teaching and nursing.
54. The promotion of gender equality is thus an important objective for the Government of South Africa. In order to give priority to the global issues which affect women, a new ministry has been established in the Presidency. This is the Ministry for Women, Children and People with Disabilities. It aims to pay particular focus to, and fast track the security, welfare and development of these vulnerable groups. The new ministry was created in 2009. It was established to ensure the need for equity and access to development opportunities by vulnerable groups within South African society. The Ministry works towards the creation of an environment in which the Government can achieve its objectives with regard to equity, equality and empowerment, especially in so far as marginalised communities are concerned.
55. South Africa is one of the few African countries which promotes gender equality and which has achieved some remarkable results in the process. South Africa has increased the role of women in development, socialization and policy development by implementing appropriate legislation which mandates the active involvement of women in the formal sector and in decision-making processes. The under-

representation of women in the private sector is clearly a point that requires greater attention and redress and is indicative of the deep-seated cultural discrimination which exists largely as a result of the patriarchal tendencies which are prevalent in South Africa. The approach here is targeted not only at eliminating gender inequalities but also the attendant gender dimensions that the inequalities entrench. Table 5 below gives an indication of the progress that South Africa has made in securing the equitable representation of women in senior government positions.

Table 5: Representation of Women in Political Positions between 2009 and 2010

Positions	Female Representation	Male Representation	Total Representation	Female Representation expressed in percentage (%)
President	-	1	1	0
Dep. President	-	1	1	0
Ministers	15	19	34	44
Dep. Ministers	11	16	28	39
Members of National Parliament	127	228	400	43
Members of National Council of Provinces	16	38	54	29.6
Premiers	5	4	9	55
MEC's of the Provincial Governments	41	50	91	45
Members of the Provincial Legislatures	176	254	430	41

D The promotion of language rights of indigenous peoples

56. The protection and promotion of the rights of indigenous communities/groups was paramount to the drafters of the both the interim and final

Constitutions of 1993 and 1996, and the maintenance of the equal status of each of the groups. The fundamental document of the South African human rights transition, the **Constitution- Act of 1996** provides in the bill of rights, Chapter 2, Section 6 (2) and (5) that the state must and should promote and protect the Khoi, Nama and San Languages.

57. As indicated in the Initial Report – paragraph 251 page 63 – the Government is engaged in an active dialogue with indigenous communities like the Khoisan in order to preserve their language, culture and generally to safeguard their rights and interests. The specific policies in place to help advance the rights of indigenous communities were also highlighted in South Africa’s response to the questions posed by the Committee during the consideration of the Initial Report – see response to question 5. In acknowledgment of the importance of all the indigenous ethnic groups that live within the borders of the country, the Constitution recognizes the significant importance of language as a signifier of identity. South Africa, as earlier stated, has eleven official languages.
58. The current policy and legal framework not only initiates a fresh approach to multilingualism in South Africa, but strongly encourages the utilisation of the indigenous languages as official languages in order to foster and promote national unity. The promulgation of the **Language Act of 1995** has been applied in South African cultural and language communities so as to protect and promote their indigenous languages.
59. It takes into account the broad acceptance of linguistic diversity, social justice, the principle of equal access to public services and programmes, and respect for language rights. This is indicative of the integration of indigenous peoples which South Africa seeks to achieve through the recognition of the multifarious cultures and linguistic communities who all live in South Africa.

60. The Pan South African Language Board and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are central national human rights institutions to this endeavour as they work towards developing, promoting and protecting/ safeguarding the rights of minority/indigenous communities in use of their languages and enjoying their cultures.

The Court Language Policy

61. The new language policy is a policy to introduce the use of indigenous languages in the courts in order to promote access to justice. The policy is aimed at developing a culture of understanding, tolerance and dialogue in courts and to improve the delivery of justice. Many courts have significant backlogs and hearing cases in indigenous languages will hopefully speed up cases.
62. Where one of the parties in an indigenous language court did not speak the language, the case is heard in English. But in places where 90% of the population including the magistrate and all court officials speak an indigenous language, the language policy has helped speed up the wheels of justice.
63. Research has indicated that the use of interpreters can also lengthen court proceedings. In diverse communities, some cases can be conducted in four languages. In such cases every word by witnesses, accused persons, magistrates and attorneys must be translated four times. Interpreters may also get in the way of justice. The use of interpreters can often be harmful to cases as the accounts of the accused or witnesses are often loosely translated and not accurate.
64. The indigenous language practices will initially be limited to magistrate's courts. The reasoning is that all cases heard in magistrate's courts are automatically subject to review by the high

court. When cases go for review or on appeal to the high court, the transcript will automatically be translated into English.

Promotion of multilingualism in the Health Sector

65. The Promotion of multilingualism in the Health Sector by the Health Department will allow people greater access to healthcare as they will be able to access healthcare in a language they know best. This will allow for the understanding of important health messages, and allow for fuller and greater participation in the health discourse. This measure is part of the emphasis on language services in order to achieve the government's vision of "a long and healthy life for all South Africans."

DOD Language Policy

66. The Department of Defence (DOD) is shaped by the linguistic diversity of its members and employees, as well as the citizens it serves. Realising its duty to uphold the provisions of Section 6 of the Constitution on language, the Department promulgated a Departmental policy on language.

In this policy, the Department commits to:

- a. non-discriminatory language practices;
 - b. the promotion of multilingualism among its members and employees and the linguistic empowerment of its members and employees, with a view to insuring its own efficient functioning;
 - c. linguistic diversity as an asset in its dealings with members, employees and the community at large;
 - d. applying, wherever possible, the principle of functional multilingualism; and
 - e. achieving language equity within its ranks.
67. The policy goes on to cover aspects of working language; language of record; policies, orders and instructions issued by the Ministry of Defence, Secretary for Defence and the Chief of the SANDF; and important documents affecting everyone in the Department.

68. In ensuring compliance with the policy, the Department places the responsibility to its members and employees to promptly bring to the attention of the superiors or notify them when a particular policy, order or instruction is not understandable due to the language used. Furthermore, it places the duty on seniors to respond positively to such requests, failing which, subordinates will be entitled to use the available mechanism to report grievances. Thus, the Department supports multilingualism and the language rights of all its members and employees and the citizen it serves.

E Legislation, policies and other measures in place to eliminate discrimination

69. The Government's Programme of Action for 2009 is aimed at building cohesive, caring and sustainable communities, the pursuit of African advancement and enhanced international cooperation. These are sought to be achieved through the social protection of and community development by boosting local economies. This will be achieved through the promotion and financial boost by Government of rural communities and agricultural communities by way of agricultural reform.
70. The criminal justice system is also undergoing review in order to achieve sustainable results and reduced crime rates and lessening overcrowding in prisons as well as averting and minimising the incidence of repeat offenders. The periodic review of existing legislation to address particular challenges relating to compliance also includes the **Employment Equity Act** and the **Broad-Based Black Economic Empowerment Act**, which were introduced to bring about and promote equal economic opportunities. The purpose of the **Employment Equity Act** is to eliminate unfair discrimination in the workplace, including dealing with issues relating to 'Equal Pay for Work of Equal Value'; and to implement affirmative action measures in order to achieve the equitable representation of the designated groups (i.e. Blacks, women and people with disabilities) in the workplace.

71. The purpose of the **B-BEE Act** is to address economic disparities faced by Black people, including women, people with disabilities, youth and people from the rural areas, which resulted from systemic racism stemming from the Apartheid era based on race. Codes were introduced to implement this Act that include the following seven elements employers are measured on: ownership, management control, employment equity, skills development, preferential procurement, social responsibility and enterprise development.
72. A more responsive and accountable public administration service is sought to be achieved through measures such as the direct hotline to the President's office regarding any queries or complaints a member of the public may have against a government department.

Criminalization of racism

73. Needless to state that no legislation supports racism in South Africa. The **Prohibition of Hate Crimes Bill**, discussed in detail under article 4 of the Convention, is being revised to align it with current forms of discrimination, namely xenophobia and related intolerance. The Government is dedicated to the development of democracy and a non-racial society through various mechanisms which seek to achieve and ensure accountability and transparency in terms of governmental actions. One of the key stratagems in place is that of public consultations through regular *imbizo's*, *public hearings for legislative developments*, *lekgotlas* and *other public engagement* which the government engages in from time to time in order to keep its electorate within full purview of government actions. The Government seeks to attain this by involving the full cross-section of the South African peoples without undue preference to any race.
74. South Africa is a signatory to the **EU Convention on Cybercrime**, and has already promulgated the **Regulation of Interception of Communications and Provision of Communication Related**

Information, 2002 (Act No 70 of 2002) (RICA Act) and the **Electronic Communications and Transactions Act, 2002 (Act No 25 of 2002) (ECT Act)** in furtherance of the aims of the **EU Convention on Cybercrime *inter alia*** to deal with the “criminalization of acts of a racist and xenophobic nature committed through computer systems.” This is all in furtherance of the Government’s objective to end racism, xenophobia and all other related intolerances. It must be pointed out that the **ECT** and **RICA Acts** were not primarily designed as tools for addressing racial crimes. The two pieces of legislation operate primarily to deal with cyber crime and also to provide a framework for lawful communications interception. However, the effect of their provisions is such that they can be used to investigate and subsequently prosecute people who use electronic media to propagate racial crimes. For example, if one uses electronic mails to propagate racial hatred or discrimination, such person can be tracked by cyber specialists and duly prosecuted for the offence.

III ARTICLE 3: CONDEMNATION, PROHIBITION AND ERADICATION OF RACIAL SEGREGATION AND APARTHEID AND PRACTICES OF THIS NATURE

A Measures to address *de facto* segregation

75. The Committee specifically required the Government of South Africa to provide detailed information on the measures adopted to address the situation of *de facto* segregation in the country – Concluding Observation paragraph 13. In response the Government confirms the existence of various legislative, policy and administrative measures have been adopted and form part of the policy framework aimed at eliminating segregation and the social legacy of apartheid. The **Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (No 4 of 2000)** continues to provide the overarching policy framework for eliminating all forms of racial segregation and all forms of discrimination. In the Initial Report attention was drawn to the fact that even though virtually all laws that directly created or enforced segregation have been abolished, repealing or incorporating the

remaining aspects of the **Black Administration Act, 1927 (Act No 38 of 1927)** constituted one of the few remaining challenges – see paragraph 77 page 19 of the Initial Report. Since then, the Repeal of the **Black Administration Act and Amendment of Certain Laws Amendment Act, 2008 (Act No 7 of 2008)** has been passed. This legislation among others repeals the provisions of the **Black Administration Act** and amends the **Administration of Estates Act, 1965 (Act No 66 of 1965)** so as to give the Masters of the High Courts jurisdiction over the property of all minors, including those who are governed by the principles of customary law. These amendments rectify some of the racial prejudices that were being perpetrated by the aforementioned pieces of legislation.

76. Another challenge raised in the Initial Report, was the restructuring of the courts. The shift in the basic law of government in South Africa, from a narrowly sectarian suppressive oligarchy to an inclusive, participative constitutional democracy inescapably resulted in the redefinition of the role of the judiciary. Much of the formal restructuring objectives have taken place, though several initiatives remain in progress. It is, however, widely accepted that it will be some time before the depredation of racism ceases to negatively affect both the demographic composition of those who staff the courts and the uneven impact of the administration of justice on certain sectors of the population. The courts have their own challenges, amongst which are the shortage of adequately trained staff and heavy work load. Part of this problem is that the personnel of the courts remains largely the same and as a consequence of the apartheid policy a shortage of black candidates leaves the court unrepresentative of the population's composition, especially regarding higher positions. Thus, ideologically, the majority of the population might lose confidence in the inherited judiciary. The lack of representation of the majority of the population as well as the insufficiency of training in human rights issues results in a danger of biased judgment. Judicial training seeks to address this problem.

Candidate Attorney Programme

77. The candidate attorney programme is rolled out in the justice sector, and is aimed at creating a skills base of qualified and experienced attorneys, while ensuring that poor communities have access to free legal services. The project is a derivative of the NYSP through which the DoJ&CD aims to support nation building, through involving young people in the delivery of crucial government services.

78. The DoJ&CD pays the graduates a monthly stipend for 24 months their practical law school fees, registration of articles and board examination fees, to qualify as attorneys after the two year period. The candidates attend part time practical law school at the cost of the DoJ&CD and write their board exam. Through this programme, the DoJ&CD aims to build a pool of skilled and experienced attorneys, which can be recruited.

National Youth Programmes of the Department of Defence

79. The Department initiated two programmes to promote youth development, namely the Military Skills Development System and the National Youth Service Programme. The above programmes seek to scarce skills to the youth of the country to enable them to contribute meaningfully to the growth of its economy.

Transformation of the Legal Services

80. The Judicial Services Commission (JSC) and the Magistrates Commission are two independent bodies which were set up to enhance the effectiveness and strengthen the independence of judiciary and magistracy of South Africa.

81. The JSC was established in terms of Section 178 of the Constitution, and its function is to select fit and proper persons for appointment as judges and to investigate complaints about judicial officers. It also

advises government on any matters relating to the judiciary or to the administration of justice. In terms of the Constitution, the President, in consultation with the JSC, appoints the Chief Justice and the Deputy Chief Justice, and the President and Deputy President of the Supreme Court of Appeal. The President appoints other judges on the advice of the JSC.

82. The Magistrates' Commission ensures that the appointment, promotion, transfer or discharge of, or disciplinary steps against judicial officers in the lower courts take place without favour or prejudice, and that the applicable laws and administrative directions in connection with such actions are applied uniformly and correctly. The commission also investigates grievances and complaints about magistrates and submits reports and recommendations to the minister, who in turn tables them in Parliament. The commission has established committees to deal with appointments, misconduct, disciplinary inquiries and incapacity; grievances; salary and service conditions; and the training of magistrates. Independence for the magistracy is as important as it is for the judiciary for without independence and accountability for the magistracy there will not be independence and accountability for the judiciary as a whole.

The Equality Courts

83. The establishment of equality courts is yet another measure by the government to eradicate racism and racial discrimination. The establishment of equality courts seeks to achieve the expeditious and informal processing of cases, which facilitates participation by the parties to the proceedings. The courts also seek to ensure access to justice to all persons in relevant judicial and other dispute-resolution forums.
84. In August 2009, the Minister of Justice and Constitutional Development designated the remaining magisterial districts as equality courts for their areas of jurisdiction. The designation increased the number of

equality courts to 386 nationally, making equality courts more accessible to communities. Following the designation, the department undertook a series of initiatives to strengthen and ensure effective functioning of the equality courts. These included provincial *izindaba*, and awareness and outreach programmes.

The TRC Unit

85. The DoJ&CD established a TRC unit to implement the recommendations of government arising from the TRC hearings, namely; reparations, medical benefits, community rehabilitation and exhumations.

86. Reparations to victims and communities are payable from the President's Fund, established in accordance with the **Promotion of National Unity and Reconciliation Act, 1995 (Act No 34 of 1995) (the Act)**, in terms of regulations made by the President. The Chief Directorate: Legislative Development, supported by the TRC Unit, develops the required regulations in conjunction with relevant government departments.

Final reparations (Once-off individual grants)

87. The payment of final reparations is not completed as yet, due to the fact that some beneficiaries must still be traced. Through the years several exercises were embarked upon to trace outstanding beneficiaries or their rightful next-of-kin in the case of deceased beneficiaries. These exercises yielded limited results. However, recent exercises undertaken are yielding promising results. At present, a total of 729 beneficiaries remain to be paid. This number is decreasing constantly, as more and more beneficiaries or their rightful next-of-kin are traced and paid.

Medical benefits and other forms of social assistance

88. Regulations on Basic Education, Higher Education and Training, Medical benefits and Housing assistance are in various stages of

development.

Community rehabilitation

89. A needs assessment is to be conducted in communities, the results of which will inform the development of regulations to enable implementation of community rehabilitation measures. The Director-General has approved the TRC Unit's engagement of the Independent Development Trust to act as implementing agent in this respect.

Missing persons, exhumations and reburials

90. A Missing Persons Task Team was established in the National Prosecuting Authority in 2004 to conduct investigations into the approximately 500 cases of persons who disappeared in political circumstances between 1960 and 1994, as reported to the TRC. To date, 72 exhumations have taken place, whilst 52 handovers of the remains to the families concerned have been conducted. Forty-seven (47) reburials have taken place, whilst five are imminent.
91. In addition to this process reflecting symbolic reparation, regulations have also been promulgated to provide financial assistance to the families. To date, 43 families have received reparations in this respect.
92. The TRC organises and conducts the handover of the exhumed remains to the relevant families during special ceremonies, whilst a supporting role is played during the reburial process.
93. The TRC Unit also assists families with, among others, obtaining death certificates and applications for special pensions and once-off reparation grants, where applicable. Counselling is arranged where necessary.

B Progress with respect to the Durban Programme of Action and Plan of Action

94. Subsequent to the World Conference Against Racism in Durban 2001, the South African Government approved the establishment of the

NFAR in 2003. The NFAR comprises of various stakeholders including national and provincial government and civil society organisations. The terms of reference of the NFAR include, among others:

- The development of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (National Action Plan)
- Monitor the implementation of the National Action Plan
- Hold meetings with a view to developing and monitoring the implementation of the National Action Plan
- Raise funding for the purposes of developing and monitoring the implementation of the National Action Plan

95. The Department of Justice and Constitutional Development (DoJ&CD) established a secretariat as a technical arm of the NFAR. Subsequently a Steering Committee was set up to spearhead the process of developing the National Action Plan. Several Drafts of the National Action Plan have since been produced. Once the National Action Plan is developed, a comprehensive strategy will be in place to deal with racism, racial discrimination, xenophobia and other forms of intolerance. The National Action Plan seeks to set out the responsibilities of the various government sectors in dealing with racism and also the mechanisms for monitoring progress towards the elimination of all forms of discrimination.

IV ARTICLE 4: CONDEMNATION AND CRIMINALISATION OF ALL PROPAGANDA BASED ON IDEAS OR THEORIES OF RACIAL DISCRIMINATION

96. Article 4 of the Convention requires, in the main, that States Parties criminalise racism and social discrimination. In South Africa the prohibition of and regulation of advocacy of hatred based on race derives its foundations from section 16(2) of the Constitution. Although section 16 guarantees the freedom of expression, the formulation in the Constitution makes it clear that advocacy based on race, ethnicity,

gender and religion that amounts to incitement to cause harm is excluded from the ambit of the right to freedom of expression. Two cumulative elements must be present before expression can be considered as hate speech; the expression must constitute advocacy of hatred on one of the listed grounds and the advocacy must constitute incitement to cause harm. Section 16(2) of the Constitution is directly supported by section 10 of the **Promotion of Equality and Prevention of Unfair Discrimination Act** which expressly criminalises hate speech in South Africa. In Paragraph 14 of its Concluding Observations the Committee requested the Government to ensure the full implementation of article 4 of the Convention as well as to adopt effective measures to prevent, combat and punish hate crimes and speech. As may be evident from paragraphs 118 -126 of the Initial Report, South Africa's legal system has been deliberately aligned to prevent, combat and punish hate crimes and speech. Below we detail out some instances that indicate South Africa's commitment towards the elimination of hate crimes and speech.

A Examples of South Africa's response to racial propaganda

Case Law

97. In ***Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) 1290** an appeal committee of the South African Human Rights Commission held that the political slogan "*Kill the farmer, kill the boer*" was advocacy of hatred. It held that calling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred unless the context clearly indicates otherwise. It is clear though, that the slogan complained of was also advocacy of hatred based on race or ethnicity as the term "*boer*" is clearly recognised to be a derogatory reference to Afrikaner peoples of South Africa. The Commission also emphasised that "harm" for the purposes of section 16(2) of the Constitution cannot be limited to physical harm but must also include psychological and emotional harm. It must be noted that around March 2010 controversy

over the song flared again when the President of the ANC Youth League repeatedly sang the song during public rallies. Several complaints were lodged with the South African Human Rights Commission. Subsequently a High Court interdict was obtained banning the further public singing of the song in ***AfriForum and another v Malema Case No 18172/2010***. The court found that the song was an incitement to hate and murder.

98. Again in ***Human Rights Commission of South Africa v SABC 2003(11) BCLR 92 (BCCSA)*** the Broadcasting Complaints Commission held that derogatory and inflammatory statements about the Indian population in a Zulu song were advocacy of hatred based in race. The song, according to the Commission, polarised Zulus and Indians by demeaning Indians and insinuating that they were the cause of the poverty of Zulus and were worse than whites. It is also important to note that South African courts have, perhaps as recognition of the importance of the right to freedom of expression, recognised that however offensive advocacy of hatred may be, it does not rise to the level of proscribed hate speech until it also tends to “incitement to cause harm.”
99. In ***Ramesh Dharamshee Jethalal v Mbongeni Ngema and Universal Music (Case No: 3524/2002, 28 June 2002)*** the Durban and Coastal Local Division of the High Court declined to extend an interim interdict which prohibited the publishing, marketing, distributing and selling of the song “*Amandiya*” – being track sixteen in the CD “*Jive Madlokovu*”. (This is the same song that the Broadcasting Complaints Commission had held to be derogatory and demeaning of Indians). The song had been on the market for three months prior to the granting of the interim interdict. The court referred to the fact that there had not been a single documented case of violent action by Blacks against Indians which could be ascribed to the song during that time, and found that the fear expressed by the applicant that the song would lead to race riots and bloodshed was founded merely on his own opinion and was not borne

out by any fact. Although the court had little doubt that the song was racist – since it contrasts one race (Blacks) with another race (Indians) in a very generalised and unspecific way – it emphasised that section 16(2) of the Constitution is not aimed at the advocacy of hatred based on race as such, but at advocacy of hatred based on race which also constitutes incitement to cause harm. Both elements – advocacy of hatred based on race, and incitement to cause harm – had to be present. Since there had been no violent actions against Indians, the targets of the racist song, the court declined to extend the interdict.

Prohibition of Hate Crimes Bill

100. South Africa's efforts to comply with Article 4 of the Convention are likely to receive a major boost with the "imminent" passing of the **Prohibition of Hate Crimes Bill**. The **Prohibition of Hate Crimes Bill** expressly recognises the imperatives that emerge from article 4(a) of the Convention and seeks to monitor hate speech while at the same time recognising the values that underline open and democratic societies. The Bill intends to criminalise the participation in, or promotion of, hate speech that is based on race, ethnicity, gender or religion thereby fulfilling South Africa's commitment to the elimination of all forms of discrimination. The proposed section 2 (1) in the **Prohibition of Hate Crimes Bill** indicates that it shall be a criminal offence to, among others, advocate hatred that is based on race, ethnicity, gender or religion against any group of persons in circumstances where it is reasonably construed to demonstrate an intention to be hurtful, incite imminent violence or undermine human dignity, among others. A person found guilty of the offence under section 2(1) is liable to a fine and imprisonment for a period not exceeding three years. A subsequent conviction, however, may lead to a further fine or imprisonment for up to six years. The Government is currently conducting further consultations on the Bill to align it with current forms of discrimination. It must also be pointed out that has been aligned with the objectives of article 4 of the Convention and the

current forms of discrimination, namely xenophobia and related intolerance.

Procedures for Transformation Management in the DOD Policy

101. This policy states that the human resources of the DOD will be transformed to reflect the values and aspirations contained in the Constitution. The DOD adheres to the principle of equity and equality opportunities in all practices. It values and manages diversity and in doing so recognises that talent, ability and potential are inherently distributed across the population. It further strives to eradicate all forms of unfair discrimination within the DOD.
102. In enforcing the requirements and provisions of this policy, the DOD ensures that any person appointed under the **Defence Act, 2002 (Act No 42 of 2002)**, complies with the provision of Section 105 of the Act.
103. This section makes provision for an offence called offensive behaviour. It reads that: *“Any member of the Defence Force or employee of the Department whose verbal or physical conduct denigrates, humiliates or shows hostility or aversion to any other person on the grounds of that person’s race, gender ... is guilty of an offence and liable on conviction to imprisonment not exceeding five years”*. The provision of this section criminalizes any verbal or physical conduct that among others amount to racial discrimination within the DOD.
104. All in all it must be apparent that South Africa has not and does not condone or in anyway encourage the propagation of racist propaganda. Where instances of racial propaganda have arisen swift effort to deal with the same has always been at hand. Public authorities are not allowed to promote or incite racial discrimination in any form.

V ARTICLE 5: GUARANTEE TO EVERYONE THE RIGHT TO EQUALITY BEFORE THE LAW, IN THE ENJOYMENT OF THEIR RIGHTS

105. Article 5 of the Convention enjoins state parties to guarantee the enjoyment of various civil and political rights as well as socio-economic rights to everyone in their territories. In paragraphs 15 to 22 of the Concluding Observations the Committee requested the Government to indicate the measures that it has taken in fulfilling the various obligations under article 5 of the Convention. Some of the measures that the Government has undertaken to fulfil the imperatives of article 5 of the Convention are reflected below.

A Equality and access to justice

106. The South African Constitution recognises the importance of equal treatment, and all legislation is expressly crafted to comply with the norms of equality and non-discrimination. This is critical because it facilitates access to and protection of other rights. The constitutional guarantees to equal protection of the law are manifested in sections 9 and 34 of the Constitution. In Section 9(1) the Constitution guarantees every one equal protection and benefit of the law. This is reinforced by section 34 of the Constitution which guarantees the right of access to justice and equality before the law to everyone regardless of race.

107. Since the demise of the apartheid, South African courts have repeatedly faced the question of access to justice. In **Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC)**, for example, the court stated that “[t]he right of access to Court is indeed foundational to stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. The right of access to Court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in the context of the rule of law and the principle against self-help in particular, access to Court is indeed of cardinal importance.”

108. The judicial authority of the Republic of South Africa is vested in the courts and it is a constitutional imperative that the courts are

independent, impartial and subject only to the Constitution and the law. No person or organ of state may interfere with the functioning of the courts and an order or decision issued by a court binds all persons and organs of state to which it applies as was stated in the case of ***S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)*** (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 . For example, in 2009 a Judicial Service Commission (JSC) enquiry into the conduct of Western Cape Judge President Hlope brought the question of judicial independence into the spotlight. Judge Hlope was accused of making improper suggestions to two constitutional judges. In August 2009 the JSC found that Judge Hlope was not guilty of misconduct and allowed him to return to work. The JSC's decision was successfully challenged by the Western Cape Premier Helen Zille on the ground that the JSC was not properly constituted at the time it heard the Hlope matter. The above cases demonstrate the importance that the South African Government and the South African people, generally, attach to judicial independence and the rule of law and extent to which they would go to safeguard the same. There is also direct access to the Constitutional Court where an application may be made by friends of the Court or it may also be accessed on appeal from the High Court.

B Legal aid

109. The Government recognises that it is its duty to ensure that every individual enjoys his or her right to access justice. The state gives meaning to this obligation through its legal aid system. The state endeavours to fulfil its constitutional obligations and to provide access to justice through Legal Aid South Africa, an autonomous statutory body established by the **Legal Aid Act, 1969 (Act No 22 of 1969)** Its objectives are:

- To render or make available legal aid to indigent persons as widely as possible within its financial means;

- To provide legal representation at the cost of the state, in accordance with the Constitution; and
- To provide legal services in terms of any co-operation agreement that may be enforced between the board and any other body from time to time.

110. It is accepted that South Africa is a developing country with a limited tax base and many demands on the public purse. In recognition of the financial strains, Legal Aid South Africa prioritized the following areas of service delivery:

- The positive rights to legal aid contained in the constitution, namely:
 - a) The right of children to have a legal practitioner assigned to them by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;
 - b) The right of detained persons, including sentenced prisoners, and accused persons, to have a legal practitioner assigned to them by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - c) The right of accused persons to appeal to, or review by, a higher court;
- Vulnerable groups, particularly women and children;
- The landless.

111. Legal Aid South Africa and the South African Police Service (SAPS) are working together on a system that will allow legal aid applications to be submitted electronically from police stations to facilitate easier access to legal representation. In 2009 Legal Aid South Africa

extended its national footprint to 62 justice centres and 55 satellite centres.

Liberty and freedom of movement

112. In ***S v Coetzee* 1997 (3) SA 527 (CC)** the court held that the state may only deprive the liberty of an individual when there is a rational connection between the deprivation and some objectively determinable purpose. The **National Health Act, 2003 (Act No 61 of 2003)** for instance, empowers the Provincial Minister of Health to order the detention of a patient for purposes of managing, preventing and controlling a communicable or non-communicable disease; and the **Immigration Act, 2002 (Act No 13 of 2002)** permits detention of illegal non-nationals at ports of entry prior to deportation. In ***Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC)** such detention was found to be justifiable and lawful.
113. Some non-nationals, however, do not enjoy adequate freedom of movement due to incidents of criminal intimidation of non-nationals - the expression of xenophobia. The problem of xenophobia was raised at the National Conference on Racism held in Johannesburg on August 30, 2000, and a national campaign to address this problem has been initiated. During 2008, more than 50 people died and thousands of people were displaced as a result of xenophobic violence in South Africa. The wave of violence extended beyond a simple conception of foreign versus indigenous, by traversing the spectrum of ethnicity, indignity, citizenship and even legal status (legitimacy).
114. Although the Government was not directly responsible for the attacks on foreign nationals, a range of perceptions are important in understanding the outbreak of this violence. These include:
- Frustration over insufficient pace of service delivery and consultation in general, and over housing provision and administration in particular;

- Ineffective communication and/or engagement with local citizenry around the violence and its underlying causes;
- Perceived corruption and impropriety of government officials, especially in the police service and Department of Home Affairs.

115. Recognising the dangers of xenophobia for the stability of society, the Government has launched various initiatives in the fight against xenophobia. Various projects, including an advocacy campaigns to raise awareness of the plight and rights of migrants among civil servants/social services providers, have been launched. Seminars and training workshops have been held to educate the media on these issues, and a campaign of radio and television programmes was conducted to educate the public and promote awareness of the importance of preventing xenophobia.

116. For example, the Department of Justice and Constitutional Development together with the Department of Cooperative Governance and Traditional Affairs, and the National Prosecuting Authority and the South African Police Service, led an initiative to prosecute community leaders and others involved in the xenophobic violence and to strengthen justice mechanisms to protect the rights of minority and marginalised groups.

117. The Government has also opened up more channels for legal migration, so as to encourage legal migration and help reverse clandestine migration. This has contributed towards reducing corruption, labour exploitation and other practices that undermined the rights and welfare of both South African and foreign nationals. For example, in April 2009 the Department of Home Affairs signed an agreement with its Zimbabwean counterparts removing the need for Zimbabwean nationals to obtain a visa to enter South Africa. Since then, Zimbabwean nationals arriving at any South Africa border with a valid travel document are automatically given a 90 day permit to remain

in the country. The permit can be endorsed with the right to work, if the applicant so informs the immigration officer. This has allowed the thousands of Zimbabweans to remain in South Africa legally.

118. The Department of Home Affairs has also drafted a Counter Xenophobia Strategy and Immigrant Integration Strategy. These strategies propose measures to be put in place to counter xenophobia and build a strong bond between the nationals and non-nationals. The strategies provide a proactive approach in dealing with xenophobia and treatment of foreign nationals. The Department also has an active Counter Xenophobia Unit that works with national and local organs.

119. The **Prevention and Combating of Trafficking in Persons Bill** has been published for comment. The Bill is intended to give effect to the South African Law Reform Commission's legislative recommendations relating to trafficking in persons. The Bill is intended to offer protection to the most vulnerable in society against highly organised crime syndicates. The Government of South Africa acknowledges that the current law is fragmented with low reporting and conviction rates. The proposed legislation is also meant to give effect to South Africa's obligations as a signatory to the **United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children**.

D Political rights

120. The core constitutional value pertaining to political rights is that of a multi-party democracy, based on regular elections, universal adult suffrage and a common voters roll. Shortly before the national election in 2004, the Constitutional Court, in ***Minister of Home Affairs and Others v. National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others*** 2005 (3) SA 280, upheld an application for an order declaring a section of the **Electoral Act** that prevented prisoners from voting, to be unconstitutional. South Africans living abroad were able to vote in both the first democratic poll

in 1994, and the subsequent national election of 1999. The law was, however, amended in 2004 and hundreds of thousands of South Africans were disenfranchised, the IEC being obliged to grant special votes only to those who were based outside the country on official business, or were studying abroad, participating in an international sporting event, enjoying an overseas holiday or on a business trip. On 4 March 2009 the Constitutional Court heard an application for confirmation of an order of constitutional invalidity made by the High Court in Pretoria in respect of section 33(1)(e) of the Electoral Act 73 of 1998 and certain regulations promulgated in terms of that Act. These provisions related to the right of registered voters who were not in South Africa on polling day to be granted special votes. In ***Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with AfriForum and Another as Amici Curiae)*** 2009 (3) SA 615 CC the Constitutional Court held that section 33(1)(e) of the **Electoral Act** and the related provisions of the Regulations constitute an unjustifiable limitation of section 19 of the Constitution in restricting the classes of registered voters who are absent from the Republic on election day from participating in elections. The consequence of this decision was that the Court had to make an order extending the period within which those who were to be abroad on polling day may notify the Chief Electoral Officer of their intention to do so. The effect of the Court's order was that all South African citizens who were registered voters and who would be abroad on polling day would be entitled to cast their national election vote, provided they gave notice of their intention to do so by a set date.

E Marriage and family life

Same sex marriages

121. Anyone who has attained the majority age of 18 years may, regardless of race, ethnic origin or nationality, choose a spouse and enter into a marriage. On 14 November 2006 South Africa's National Assembly approved the same-sex marriage **Civil Union Bill**. The Bill was signed into law in November 2006 as the **Civil Union Act, 2006 (Act No 17 of**

2006). The Act seeks to regulate the solemnisation and registration of civil unions by way of either marriage or a civil partnership and to provide for the legal consequences of the solemnisation and registration of the civil union. The Act is in line with the Constitutional Court's judgment in the case of ***Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others 2006 (1) SA 524*** which found that the common law definition of marriage in the **Marriage Act, 1961 (Act No 25 of 1961)** was inconsistent with the Constitution of the Republic of South Africa and invalid to the extent that it did not permit same-sex couples to enjoy the status, benefits and responsibilities it accords to heterosexual couples.

Forced and servile marriage

122. Ukuthwala is a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations. In ancient South Africa, particularly among the Nguni Group, Ukuthwala was a condoned although abnormal path to marriage targeted at certain girls or women of marriageable age. But it did not involve raping or having consensual sex with the girl until marriage requirements had been concluded. The act of Ukuthwala, however, was not with impunity; it incurred delictual liability for the culprit, in the form of the payment of one or more herd of cattle to the father or legal guardian of the girl. This practice of Ukuthwala has resurfaced, particularly in the Eastern Cape and Kwa-Zulu Natal Provinces, and it increasingly involves the kidnapping, rape and forced marriage of minor girls, by grown men old enough to be their grandfathers.

123. Having sex with a child without her consent, following her kidnapping and abduction (Ukuthwala), constitutes rape in violation of the **Criminal Law Sexual Offences Amendment Act, 2007 (Act No 32 of 2007)** (section 15). This Act, which is known as the **Sexual Offences Act of 2007** prohibits sex with a person without their consent. Regarding a

child, the age of consent is 16 meaning that sex with an under 16 constitutes statutory rape.

124. Sex with a child that is 12 and below is rape as a child of that age is legally incapable of consent. The Act also prohibits other sexual activities with children (sections 16 and 17), including sexual grooming (section 18). Section 17 of the **Sexual Offences Amendment Act of 2007** prohibits the sexual exploitation of children by parents and others. Parents or relatives and others who collude in or aid and assist the Ukuthwala of a girl child commit the crime of sexual exploitation of children. These parents and relatives also face being charged with Trafficking in Persons under section 71 of the **Sexual Offences Act**.
125. According to the **Recognition of Customary Marriages Act**, both the bride and the bridegroom must consent to marriage. The age of consent is 18 years. If one of the parties is under 18 years of age, parental consent is an additional requirement for a valid marriage. If this cannot be obtained the permission of a child Commissioner, a Judge of the High Court or the Minister of Home Affairs must be sought. However, this is subject to the provisions of the **Sexual Offences Amendment Act of 2007**, which sets the age of consent to sex at 16.
126. The **Prevention and Combating of Trafficking in Persons Bill of 2009** provides that parents and relatives that hand over a child into forced marriage for financial or other gain can potentially be prosecuted (section 4 read with section 1). The Bill prohibits the recruitment, sale, supply, procurement, transportation, transfer, harbouring, disposal or receipt of persons by means of the use of threat, force, intimidation or other forms of coercion; or by abusing vulnerability, for the purpose of exploitation. Health care professionals, social workers, educators, and staff and managers of children's homes have a duty to report the ill-treatment of children and young people in care. The Children's Act provides that in all matters involving children, the best interest of the

child is of paramount importance. It also stipulates the age of consent to marriage as 18 years.

127. In order to address the problem of forced child marriages (Ukuthwala) the government has requested the SALRC to investigate the adequacy of existing laws that are applicable to this problem and to recommend law reform if necessary. The laws that are applicable are on heritage and ownership of property as reflected below.

128. The right to inherit is not expressly provided for in the Constitution. However, cases regarding racial, gender and other forms of discrimination have been dealt with satisfactorily within the existing Bill of Rights and through court decisions. Section 9 on equality and the right against unfair discrimination, has been the basis of inheritance claims involving discrimination. For example, in ***Bhe v Magistrate Khayelitsha 2005 (1) BCLR 1 (CC)*** the intestate succession scheme under the **Black Administration Act, 1927 (Act No 38 of 1927)** preventing succession by women and extra-marital children was declared invalid. The Act and associated regulations (applicable only to persons governed by 'Black law and custom') were intended to give effect to the customary law principle of male primogeniture. The Constitutional Court declared the Act, the regulations and the 'rule of male primogeniture' invalid, as they infringe on the right to equality.

129. The case of ***Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC)***; raised issues about a traditional community's authority to develop their customs and traditions so as to promote gender equality in the succession of traditional leadership, in accordance with the Constitution. A woman was appointed to a chieftainship position for which she was previously disqualified by virtue of her gender. The Court was called on to decide whether the community has the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination, even if this discrimination occurred prior to the

coming into operation of the Constitution. The matter also raises issues regarding the relationship between traditional community structures and courts of law envisaged by our constitutional democracy. This Court had to consider how courts of law are to apply customary law as required by the Constitution, while acknowledging and preserving the institution and role of traditional leadership and the functioning of a traditional authority that observe customary law.

130. The case of ***Gumede (born Shange) v President of the Republic of South Africa and Others 2009 (3) BCLR 243 (CC)*** dealt with the unfair customary law rule that women could not own property. Mrs Gumede brought a claim of unfair discrimination on the grounds of gender and race in relation to women who are married under customary law as codified in the province of KwaZulu-Natal. The case brought into sharp focus the issues of ownership, including access to and control of family property by women during and upon dissolution of their customary marriages. On one level it underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon termination of a customary marriage, while at another level the case poses intricate questions about the relative space occupied by pluralist legal systems under the umbrella of one supreme law, which lays down a common normative platform. The High Court declared that the provisions of Section 7(1) of the **Recognition of Customary Marriages Act** (Recognition Act) which regulate the proprietary consequences of a customary marriage are inconsistent with the Constitution and therefore invalid.

F Socio-economic and cultural rights

a. Land

131. Although the laws that defined apartheid in terms of geographical separation no longer exist, the historical reality of apartheid in South Africa continues. Through legislation like the **Native Land Act (1913)**, The **Group Areas Act (1950)**, and the **Urban Areas Act (1923)** all

blacks were prevented from buying land outside the “reserves” and they could never acquire land in white areas.

b. Housing

132. The right to adequate housing and to acceptable living conditions is entrenched in the Constitution of the Republic of South Africa. The case of ***Government of the Republic of South Africa and Others v Grootboom and Others*** 2001 (1) SA 46; 2000 (11) BCLR 1169 dealt with the practical application of the Constitutional right to housing. Ms Grootboom and other respondents were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the High Court for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief. The appellants were ordered to provide the respondents who were children and their parents with shelter.
133. The Department of Housing has taken significant steps in addressing the inequalities that existed in the past as a result of race and gender discrimination. Various regulatory measures have been put in place to encourage financial institutions to extend credit to historically disadvantaged groups. One of these measures was the **Home Loan and Mortgage Disclosure Act, 2000 (Act No 63 of 2000)**, which sought to encourage financial institutions to provide credit to help historically disadvantaged persons to acquire housing.
134. South Africa has also put in place policies that increase historically disadvantaged groups’ access to credit to ensure that they are empowered economically. In addressing the needs of the poor for housing and shelter, the Rural Housing Loan Fund has been established to provide loans through intermediaries to low-income households for incremental housing purposes. Incremental housing is a people-driven process that seeks to empower low-income families in rural areas to access credit, to improve their homes or to build homes.

The subsidy beneficiaries must contribute towards achieving access to the benefits of the housing subsidy. As of April 2002, all subsidy beneficiaries were required to make a contribution (of R2 479.00). Significantly, beneficiaries of rural subsidies are exempt from making this contribution.

c. *Health care*

135. The Constitution of the Republic of South Africa guarantees equitable access to health-care services, regardless of race. The White Paper on Transforming Public Service Delivery, also known as the *Batho Pele* White Paper recognises that all citizens should have equal access to the services to which they are entitled. The Policy on Universal Access to Primary Health Care was introduced in 1994 and had a major impact on the landscape of health care programmes in South Africa. This policy promotes access to medical services by providing for free health care to, *inter alia*, pregnant and lactating women and children under the age of six. This policy is meant to benefit everyone in South Africa but even more centrally it aims at helping the previously disadvantaged communities.

136. The National Department of Health has identified several areas of concern, including the implementation of the National Strategic plan for HIV and AIDS and the improvement of maternal, child and women's health and nutrition. The South African Government acknowledges that sexual and reproductive health is one way of attaining health and a better quality of life. Consequently a Plan of Action for the Continental Policy Framework for Sexual and Reproductive Health and Rights was developed in 2007 whereby areas of concern were identified and strategies implemented. The Plan addresses, *inter alia*, unsafe abortion and the delivery of quality and affordable services in order to promote safe motherhood, child survival, maternal, newborn and child health. Reproductive health and peer education programmes focus on access and activities such as family planning advice, access to contraceptives and the choice on termination of pregnancy.

d. Poverty reduction and social services

137. Poverty bears a disproportionately female face. The proportion of women-headed households has increased, and individuals living in female-headed households account for a larger share of poverty than their share in the population. In 2005, more than half of the individuals considered poor in terms of both the R322 and income levels R174, lived in female-headed households. In contrast, only about 43% of the population lived in female-headed households. Income poverty experienced by women is associated with insufficient earned income. It reflects the high rate of unemployment of women; or low wages as a result of low skill and education levels and, in some instances gender discrimination. Income poverty therefore tends to be reproduced as a disproportionately female problem. Second-economy interventions and measures introduced via AsgiSA and Jipsa do have positive impact for women.
138. They need, however, to be extensively scaled up to make a lasting and substantial impact on the quality of life of the targeted groups. Social security assistance in the form of social grants has been highly effective in reducing poverty and promoting social development and health. It has been a key driver in reducing poverty, particularly among the targeted groups. Of the 12 million grant recipients in 2007, the CSG accounted for eight million, the Foster Care Grant for 450 000 and the Care Dependency Grant for 100 000. In other words, these three child-grants accounted for 70% of all beneficiaries. At least 90% of adult beneficiaries of the CSG were women, most of them between the ages of 27 and 33 years. The distribution of food packages to needy households as part of government's food security programme reached 66 000 households during 2008.
139. SASSA has managed to reach 1,273,077 children aged 14-17 through the CSG. This is an increase of 48,934 from the October 2010 dataset representing a 4% increase. Women form a large proportion of those

whose wages have been increased as a result of sectoral determinations in sectors where the vulnerability of workers is high, such as domestic work and farm work. The table below reflects the number of social grants and growth by grant type during the first quarter of 2010/11 financial year.

Grant Type	April	May	June	Growth	% growth
Care Dependency	110,743	108,847	109,729	(1,014)	-0.92
Child Support	9,672,627	9,745,770	9,847,330	174,703	1.81
Foster Child	518,516	491,222	497,992	(20,524)	-3.96
Old Age	2,573,498	2,584,740	2,599,787	26,289	1.02
War Veteran	1,206	1,173	1,118	(88)	-7.30
Disability	1,253,525	1,237,294	1,232,502	(21,023)	-1.68
Grant in aid	53,685	52,430	53,297	(388)	-0.72
Total	14,183,800	14,221,476	14,341,755	157,955	1.11

142. After assuming office, the new democratic government established its economic policies in the *1992 Ready to Govern blueprint*, and the *RDP of 1994*, among others. Key economic objectives were job creation, the elimination of poverty, the reduction of inequality and the overall growth of the wealth of the country. Chief among the tools used were macro-economic stability, steady trade reform and improved trade access in the context of strong multilateral system; industrial policies to add domestic value and to increase competitiveness and improve productivity to encourage exports; encouragement of FDI; strong competition policies to improve competitiveness and roll back white minority control of the economy; encouraging SMMEs, especially black-owned companies to promote skills development, including occupational skills and adult basic education and training.

143. Later, in the 1996/97 period, in order to deal with the inherited fiscal crisis as well as new difficulties pertaining to currency volatility and low investor confidence, the *Growth and Redistribution Programme* was introduced to further elaborate upon the notion of macro-economic stabilisation that was inherent in the RDP. While enormous challenges still lie ahead, these measures explain how the tide was turned from an unviable, internationally isolated apartheid economy into an economic environment that created jobs and contributed to poverty alleviation. For example, between 2004 and 2007, the economy grew by an annual average of five percent and created an average of half-a-million jobs per annum.

144. Access to basic services by historically excluded citizens also widened. For example the percentage of households with access to sanitation increased from 48% in 1994 to 73% in 2001. In 1994, 30% of households in South Africa had access to electricity and in 2007 this percentage increased to 80% for lighting, 67% for cooking and 59% for heating. This translates to 3.8 million households. Significant progress is recorded in the provision of adequate sanitation through the implementation of rigorous bucket eradication programme. By the end of December 2007, 81% of the 252 254 bucket toilets identified in February 2005 were replaced. The bucket sanitation system was eradicated in formal settlements in March 2008. However, more remains to be done for the scars of apartheid to completely disappear from the social face of South Africa.

e. *Education*

145. Compulsory education for children aged seven to 15 years has increased participation in the education system and the percentage of children with some secondary education. Gender parity in education is being attained. Female learners are tending to perform better in primary and secondary schooling than their male counterparts. However, the comparatively higher repetition rate among boys in primary schools and the smaller number participating in or completing

secondary schooling is a growing problem that needs addressing. FET institutions were established in 1998 and these colleges are increasingly seen as an alternative to other schooling. They play a critical role in vocational skills development.

146. Because many young people face financial constraints to furthering their studies, government assists learners from poorer families through the National Student Financial Aid Scheme. In 2007, R1,3 billion was allocated to the scheme. In 2011 the reach of the FET Colleges bursaries has tripled, R1,235 billion is available to financially needy yet academically capable students. This means that eligible students from poor and working class households enrolled in the Higher Education and Further Training.
147. Women outnumber men in Higher Education, suggesting that awareness of the benefits of education is increasing among girls and young women, recognising that education opens economic opportunities for an improved quality of life. However, gender disparities are still evident with regard to adult literacy. While literacy is increasing overall, more female adults have no schooling at all (12,1% in 2007) than males (8,4%). Currently the adult literacy rates are Males – 87,2% Females – 86,9%. Much improved access to ABET programmes by women would help change this. The mass literacy campaign, *Khari Gude*, should improve the situation. It began in April 2008 and aims to help 4,7 million people achieve literacy by 2012. It is noteworthy that the functional literacy rate of 15 to 24-year-olds increased from 88% in 2002 to 91% in 2009.
148. Another literacy improvement campaign is the 'Asifunde! Campaign'. The Asifunde! project began in response to the September 2000 call for a literacy campaign. It was a joint initiative of the Centre for Adult Education, other member organisations of the KwaZulu-Natal ABET Consortium and the SAIDE. It was funded by DFID, UK. The Asifunde! materials consist of a learner's Workbook which is designed for

learners to work through at their own pace and to take them from their first encounter with print in their mother tongue to a point where they can use newly developed literacy skills in a range of situations outside the classroom. It includes exercises in which the use of the literacy and numeracy skills they have learnt is simulated in a range of everyday contexts such as reading notices, writing letters, completing forms, comparing prices and resisting being coerced into signing a detrimental agreement.

149. The transition from youth to adulthood is by nature complex and difficult. Without relevant institutions and pathways that provide broader life chances, such as the educational system, many young people are marginalised and, in their lack of hope and inability to reason, see violence, crime, substance abuse and involvement in various undesirable behaviours as their only recourse. The involvement of young people in illegal activities results in criminality being engraved in their behavioural patterns. They are initiated and hardened into adulthood by the criminal world. The Department of Correctional Services reports an increase in the number of juveniles serving lengthy sentences for violent crimes. High levels of youth unemployment and a high rate of young offenders in prison are reflections of serious deficiencies in the education system and the economy. Those who drop out of school before completing their senior secondary education pose the most problem. They are unable to participate in the economy. There are few educational institutions to cater for them. They cannot make it in self-employment as evidence shows that success in this sector is associated with high levels of education and work experience.

The Environmental Affairs National Youth Service Programme

150. The implementation of the Social Responsibility Projects and Planning (SRPP) involve a deliberate attempt to engage communities using organised representatives from communities, where skills development is promoted through the Natural Resource Management's Social

Development Programme. The Natural Resource Management's Social Development Programme has set targets for a number of beneficiaries namely: 60% women, 40% youth and 2% people with disabilities.

151. The SRPP have set an employment target with purposive selection of the projects' participants because they benefit directly from them through work and skills development opportunities. The projects include, "Working for Water"; "Working for the Wetlands"; "Working for Fire" and "Working for Land". A total of 6 504 beneficiaries mainly women have received accredited training in the following fields: Hospitality; Conservation; Agriculture; Horticulture; Construction Masonry; Construction Tiling; Construction Painting, Construction and Plumbing; Field Rangers and Conservation Assistants. Certificates and attendance credits have been awarded to all participants that attended the training interventions.

Empower a Child Project

152. The DEA hosted 50 learners for an empowerment programme, from 4 high schools in the rural area of Pretoria, Hammaskraal. The project was an innovative approach to empower learners of both genders in grades 9 -10 on the thematic areas of Water and Environment. Since Environment and Water career path is considered scarce skills, it was deemed appropriate to expose learners to the field with the aim of establishing a firm foundation towards developing their consciousness of the career path, thus ultimately addressing the challenge of job creation. Central to the project was the focus in mindset shift where learners were encouraged to shift their thinking about the way they relate to the environment. The approach enhanced the efforts to educate and to create awareness on the thematic areas of Water and Environmental sectors. Learners were taken on educational excursions to various sites namely; the South African Weather Services (SAWS); the South African National Botanical Institute (SANBI); construction and waste management sites. Learned were

exposed to the following within the various sites: at SAWS, they were exposed to various instruments utilised for meteorological observations and weather forecasting, at SANBI they learned about various medicinal plants and herbarium and they were also briefed on the dam construction and various careers in the water sector. They were also briefed on waste sorting techniques and technologies at the waste management site.

Empowerment of Unemployed Youth

153. According to the Integrated Youth Development Strategy of South Africa (IYDS) 2011-2021 Economic participation of youth in South Africa is poor and characterised by high unemployment and poor entrepreneurial levels. Unemployment amongst youth is estimated to be above 70% compared to the older population groups at about 25%. The high rate of youth unemployment is more pronounced in the age group between 15 and 24. This pattern of unemployment has been consistent over a number of years with both African and Coloured youth mostly affected by unemployment. Unemployment is arguably not only a function of the ability of the economy to absorb labour, but it is also a function of the level of education and work experience of young people.

154. The DEA in its effort to address the unemployment of youth hosted 50 unemployed youth on 20-22 June 2012. The unemployed youth were empowered with information and opportunities in the waste management sector in order for them to ultimately generate income and create employment through cooperatives. The youth were taken for an educational excursion to Collect-a-Can Company where they received intensive information on business and income generating opportunities from cans.

f. Sport and recreation: The 2010 FIFA World Cup

155. The South African Government recognizes participation in sport and recreation as a fundamental human right and acknowledges that sport has the potential to build social cohesion and national unity. The SRSA is responsible for developing and implementing national policies and programmes regarding sport and recreation in the country. The SRSA's objectives and key strategic areas are to broaden the base of South African sport within an integrated development continuum. In May 2006, the SRSA launched the Sport Tourism Project at the Durban Tourism Indaba. The primary objective of the project is to attract foreign visitors to play and watch sport and experience traditional tourism attractions such as wildlife and cultural heritage.
156. The 2010 FIFA World Cup was the 19th FIFA World Cup, the world championship for men's national association football teams. It took place over a month in South Africa, from 11 June to 11 July 2010. The matches were played in ten stadiums in nine host cities around the country, with the final played at the Soccer City stadium in South Africa's largest city, Johannesburg.

Medical services

157. The World Cup enabled the country to improve on emergency medical services from which the country will benefit from even after the conclusion of the tournament. There was massive investment on ambulance services both ground and aero-medical services as part of the 2010 legacy strategy. Equally, there were job opportunities created through the project to recruit more EMS personnel who form an essential element of healthcare delivery. A partnership was struck up with the South African Military Health services to set up the National Health Operations Centre that helped improve on existing diseases surveillance, it is hoped that this will help to improve on the normal systems as part of providing healthcare services to ordinary South Africans, even after the world cup.

Justice and Police

158. There was also a justice and policing forum set up whose primary objective was the Administration of Justice to fast track all criminal matters emanating from the 2009/2010 events and deal with these cases in a fast and efficient way, especially where foreigners are involved, either as a complainant/witness or an accused. This was made up of departments of Police, Justice and Constitutional Development, the National Prosecuting Authority, State Security, Correctional Services. Police deployment for the World Cup resulted in 40 000 new, well-trained police officers incorporated into the police service. These recruits remain on the force, leading to a safer South Africa. The number of police personnel added to the service, as well as the equipment acquired for their use, is one of the important legacies of the World Cup.

Cultural diversity and integration

159. The International Football Village was specifically constructed to be a platform for African hospitality, cultural exchange, international dialogue and friendship. The venue did not only host the most number of soccer matches but was also a venue for cultural exchange and interaction. The venue was also host to cultural and sports performances and project showcases as well as innovative dialogue formats: Different nations presented their variety of music, dance, fashion, their cuisine and of course their country in general at the indoor and/ or outdoor areas. Different nations also presented their variety of music, dance, fashion, their cuisine and their country in general at the indoor and/ or outdoor areas.

160. There were also exhibitions which were organised by the South African department for Sports and Recreation such as the '*Ke Nako Africa*' – an Exhibition which served to unite representatives and contributions from the spheres of business, culture and sports under one roof. Embedded in the International Football Village, the joint presentation was a home for exhibitors from regional and international organisations (e.g. SADC), African countries, African and international enterprises,

SMEs, nongovernmental organisations, cultural exhibitors and artists from all over Africa and many more. An ambitious information and dialogue process set to promote and publicise the experiences and projects of the individual partners and strengthen capacities for cooperation for investments in the region.

161. Attention was focused on the respective target groups of the different partners - from international political and business representatives, SOEs from different regions and countries, through specialists and experts, local and international tourists, the international culture and sports communities in South Africa, right up to adolescents and children seeking to enjoy the location and the mixed programme together.
162. The partners of '*Ke Nako Africa*' were able to use these different stages and venues of the International Football Village to promote and discuss relevant, innovative issues, such as corporate social responsibility, youth development, nation building and social cohesion as well as transport, ICT, investment, energy, tourism and water.

VI ARTICLE 6: EFFECTIVE PROTECTION AND REMEDIES AGAINST ANY ACTS OF RACIAL DISCRIMINATION

163. With regard to articles 6 and 7 of the Convention the Committee in its Concluding Observations requested the Government to provide information relating to, among others, the measures in place to eradicate all forms of ill treatment of non-citizens in South Africa. The Committee also sought information on how the Government of South Africa has dealt with offences relating to racial discrimination and also information pertaining to the reform of the criminal justice system in order to prevent all forms of racial discrimination – see paragraphs 23 – 27 of the Concluding Observations. Below we set out some of the steps and interventions that the Government of South Africa has put in place.

A The protection of non-nationals against racially motivated violence

164. As earlier pointed out that non-nationals are subject to the same degree of protection as nationals in South Africa. In spite of this, reports of non-nationals being subjected to harassment and ill-treatment sometimes surface in the public media. In recent history the most outright manifestation of the hazards that non-nationals (especially those of African origin) face were brought to prominence by the xenophobic violence that erupted in May 2008. In connection to xenophobia in South Africa, it is important to note that the South African Government has for a long time recognised xenophobia as a serious threat to societal order.
165. As stated in the Initial Report, the South African Human Rights Commission, for example, has since 1997 formally recognised that xenophobia is a serious threat to human rights and democracy in the country. It is from this recognition that the Commission launched the RBX Campaign. Under the RBX Campaign the Commission together with other agencies have attempted to disseminate the message that hostility towards non-nationals is not acceptable in South Africa. COSATU, the country's largest trade union, has also unequivocally spoken out against xenophobia.
166. The incidence of xenophobia in South Africa is a manifestation of a complex set of circumstances. The outbreak of xenophobic violence in May 2008 was, however, neither a spontaneous nor impulsive act. Xenophobic currents have been discernible throughout the post-apartheid South Africa. It is impossible to comprehensively detail here the specific causes of xenophobia in South Africa and we thus only highlight some of the major causes. What is notable is that although reference is often made to xenophobic violence and xenophobic attitudes in South Africa, the resentment is generally towards non-nationals of African descent. This in itself emphasises the unique dynamics of what are termed "xenophobic attitudes" in South Africa.

167. At the outset one must clearly appreciate the unique history of the South African nation which was dominated by the legalised subjugation of the majority of the people on the basis of race. One must also realise that South Africa remains the main migrant-receiving nation in the whole of Southern Africa, attracting migrants from all over Africa. In this connection, one further notes that even though South Africa has always had migrant populations, it is the migration boom that occurred subsequent to the formal collapse of apartheid that, seemingly, generated significant attitude changes towards non-nationals.
168. The above combination of factors explains, but clearly does not excuse, the incidence of xenophobia and xenophobic attitudes. Firstly, it is noticeable that while non-nationals have integrated in the South African economy such integration has been very slow. The result is that in most poor communities non-nationals and nationals live side by side and utilise the same resources. It is this utilisation of the same resources and the proximity of non-nationals and nationals, that has tended to generate the feeling that non-nationals are competing with nationals for resources. This gives rise to xenophobic attitudes where non-nationals are viewed as the “other” and are often precluded from accessing benefits that are allowed to them by law.
169. It is also remarkable that the xenophobic violence predominantly affected poor individuals. Both the victims and the perpetrators were predominantly from economically depressed areas which are characterised by widespread unemployment, poor service delivery and poverty. There are clearly some social conditions that serve to aggravate the incidence of xenophobic attitudes. Related to the poverty is the obvious race dimension to the incidence of xenophobia in South Africa. It is striking that the victims of the xenophobic attacks in May 2008 and over the years have almost exclusively been poor black Africans – although a few incidents of violence against Asians have also been reported. This, however, is a direct legacy of apartheid and

colonialism that both dehumanised black people while promoting white superiority.

170. In response to the issue of discrimination against non-nationals in South Africa as discussed above, one can note that the Department of Home Affairs conducts public education and training for schools, communities and immigration officers. The education programmes cover human rights, refugee protection and immigration issues. The aim is to promote a human rights culture and to enhance mutual understanding between host communities and immigrants.
171. Public education on immigration, refugees and human rights is also running in schools around the Gauteng Province. Public education named 'Operation *Ubumbano*' (togetherness) was piloted in 21 schools from September to October 2009. It focussed on patterns of migration, refugees, *ubuntu*, manifestations of xenophobia, the Constitution and human rights. This public education has also been conducted in various local languages so as to increase the target audience.
172. The Government has also established a unit within the Department of Home Affairs for the purpose of preventing and counter-acting xenophobia within its immigration services. The Counter-Xenophobia Unit sensitises officials about xenophobia and is active within communities across the country and with all stakeholders to raise awareness of xenophobia. It educates communities and organs of civil society as to the rights of non-nationals in South Africa irrespective of whether the non-nationals are legally in the country or not. The focus of this education is the prevention of any manifestations of xenophobic violence in the country. The Department of Home Affairs has since prepared an Integration Strategy that is awaiting Government approval. Additionally, since 2008, the SAPS have (together with the UNHCR) been in the process of developing an early warning system for crimes and threats against non-nationals. The Crime Intelligence Division of

the SAPS makes regular assessments in respect of xenophobia so that all police departments at provincial level can be properly alerted.

173. As part of its efforts to address issues around social cohesion and xenophobia, the Department of Social Development engaged in a number of activities including:

- Convening a special round table on xenophobia at the UAPS Southern African seminar held in Somerset West in June 2008. At the Technical Meeting on Population and Development which followed the seminar, members of the SADC and the APC tabled and adopted a joint statement on xenophobia. The joint statement amongst other things cautioned that xenophobia could undermine sustainable political, social, economic development and regional integration, and urged member states to improve their understanding of the causes of xenophobia, to commit themselves to discourage all actions generating xenophobia and to support national, regional and continental efforts to promote peaceful co-existence and tolerance of migrants.
- Following the roundtable on xenophobia, a concept paper exploring the impact of xenophobia in communities and on the mandate of the Department was developed and this was presented at a workshop attended by representatives of various municipalities.
- The Department of Social Development, as convenor of the Social Cohesion Working Group jointly commissioned the development of a concept paper on social cohesion that amongst other things, provides practical guidelines (recommendations), including indicators to municipalities on how to incorporate social cohesion issues within their local IDP processes. The National Development Planning and Implementation Forum adopted the social cohesion concept paper in August 2009. DSD presented the concept paper on social cohesion at the Department of Arts and Culture's colloquium on Social Cohesion on 29 and 30 October 2009 in Durban where the output was development of a national framework

and programme on social cohesion, national identity and nation building.

- The Department also convened a two day workshop on social cohesion and xenophobia held at St. George Hotel on 11 and 12 November 2009 with an aim to garner greater understanding of social cohesion in the context of IDPs and develop practical guidelines promoting the integration of social cohesion in local planning, enhancing service delivery at the municipal level; to unpack those factors that influence social cohesion, including xenophobia and its impact on social development in particular as it pertains to the Department's mandate.
- Since 2004 the Department has strategically focused on local governments to address identified population concerns which include migration and Xenophobia. During 2008, a process was set in motion to develop guidelines to assist municipalities on integrating population concerns into IDPs. In 2010 the guideline document on how to integrate population issues (including migration, gender issues, social cohesion and xenophobia) in IDPs was finalised. Various municipalities have been capacitated on how to integrate social cohesion in planning processes and sharing of best practice in rural nodes and selected nodes. In addition, various projects have been implemented with the aim of development of communities, for example, in Bokfontein where it is a good case study of a cohesive society with an integrated community working together and combating any form of discrimination and xenophobia.
- DSD is now currently in the process of developing material in support of population education which is integrated within the school curriculum. Part of the material comprises of sections on migration and xenophobia in a bid to address notions of racism and discrimination. This will ensure that learners are educated about the disadvantages of racism and the realisation of human rights inherent to all people residing in South Africa.

169. Some of the major challenges are that Integrated Development Plans of municipalities have not yet completely integrated issues of population and development including migration, social cohesion and how to deal with issues of xenophobia. Since the core of implementation and service delivery is at local government, it is very crucial that IDP managers have a clear understanding on how to improve social cohesion in their communities as well as how to deal with issues emanating from migration and the implications of xenophobia and racism thereof. The majority of the municipalities cite migrants as a major concern in relation to border control and implications for service delivery. Xenophobia is also worse in the poverty stricken communities compared to the urban peripherals.
170. There is clearly a need for political will and commitment to encourage community members to exercise tolerance and prevent unfair discrimination. There is need to reinforce capacity building of political leaders on how to address and deal with issues emanating from xenophobia and intolerance among communities. Seeing that poverty also makes intolerance and xenophobia worse, as part of the community development interventions, communities are encouraged to work in teams and are provided with tools to help them earn a living.
171. In July 2009 the South African Sociological Association held a special congress dealing with the question of xenophobia in South Africa. The congress debated issues pertaining to xenophobia at great length and also addressed the question of means for preventing future incidents of xenophobia. Despite rumours that mass xenophobic attacks would take place after the FIFA Football World Cup, no such attacks have happened. Isolated incidents of alleged violence against foreigners in places like Kya Sands, an informal settlement north of Johannesburg, were quickly dealt with by the police service as criminality, rather than xenophobic attacks.

172. While commendable progress may have been made in rolling back xenophobia, challenges still remain. There are considerable obstacles to be overcome before the South African citizenry is prepared to embrace the notion of equal treatment with non-nationals and to ensure that African migrants (whether documented or undocumented) are constitutionally entitled to basic human rights, simply by virtue of being on South African soil. The Government fully acknowledges the challenge of xenophobia in South Africa and it is from this realisation that the various interventions, as illustrated above, have been devised to address the problem.

B Available avenues for redress

173. Several avenues exist in South Africa through which one can claim redress for acts of racial discrimination or other violations connected to racial discrimination. In addition to the ordinary courts, one can also obtain redress for racial discrimination from specialised tribunals. For example, one can bring a complaint for racial discrimination in the Equality Courts.

174. The Equality Courts are courts designed to deal with matters covered by the **Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No 4 of 2000)**. One can approach the Equality Courts with any complaint alleging unfair discrimination, publication of information that unfairly discriminates, harassment and hate speech. Notably, however, the jurisdiction of the Equality Courts only extends to events that occurred after 16 June 2003.

175. If an Equality Court finds in favour of a complainant, there are several orders that can be made. For example, the Court may order that the defendant provide an unconditional apology to the complainant. The Court may also give directions to the defendant to refrain from the continuation of a discriminatory practice. Equality Courts can also order the payment of damages to the victim of racially discriminatory practices. The damages can be for actual financial loss as well as loss

of dignity as a result of the racially discriminatory conduct by the defendant.

176. Aside from the Equality Courts, one can also bring a claim for racial discrimination before the South African Human Rights Commission (the Commission). It must be recalled that under the **Human Rights Commission Act, 1994 (Act No 54 of 1994)** the Commission is mandated to, *inter alia*, investigate complaints of violations of human rights and to seek appropriate redress thereto. The Commission is also mandated to undertake studies and report to Parliament on matters pertaining to human rights. In recent years the Commission has conducted studies on racism in the media and in schools and has also developed a national action plan on strategies to combat racism.

177. Non-state actors have also shown their willingness to assist in the enforcement of the rights of all persons within the Republic, including refugees and other asylum seekers, and to provide more avenues of redress for such persons. An example of such an actor is the Lawyers for Human Rights, a non-governmental organisation consisting of a number of legal professionals who offer free legal assistance to victims of human rights abuses and who work closely with the UNHCR, with particular emphasis on the rights of non-nationals and the question of racial discrimination. The Lawyers for Human Rights operates a Strategic Litigation Unit as well as the Refugee and Migrant Rights Project, both of which seek to enforce the rights of marginalised individuals and communities, including asylum seekers and other migrants. The Lawyers for Human Rights operate from six offices around the country, providing assistance in the spirit of racial togetherness that is being fostered by the South African Government.

C Examples of the successful implementation of anti-racist policies and laws and affirmation of Cultural, Religious and Language Rights

178. In ***MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC)** the South African Constitutional Court held that school policies forbidding students to wear certain forms of jewellery should be reworked to provide for freedom of cultural expression. In this case, a Hindu girl was forbidden by her school to wear a nose ring to class (as is part of her culture as a Hindu). The Constitutional Court held that this school policy was unfairly discriminatory based on the race, culture and religion of the plaintiff and thus unconstitutional. This case is an example of how South Africa has resolved the globally contentious issue of religious attire in public schools. What is notable was the Constitutional Court's recognition that the wearing of the nose stud was a form of expression. According to the Constitutional Court, public schools in South Africa still carry a legacy from the apartheid era where forms of expression that were not germane to white, western and Christian culture were discouraged. The Constitutional Court also confirmed that the residual stigmatisation that flows from the apartheid times stifles the diversity of religious and cultural expression and cannot be condoned in the new South Africa.
179. In ***Bhe and Others v Magistrate, Khayelitsha, and Others* 2005 (1) SA 580 (CC)**, the Constitutional Court invoked, *inter alia*, article 4 of the ICERD in its decision to rule that certain sections of the **Black Administration Act, 1927 (Act No 38 of 1927)** (that has since been repealed) were unconstitutional for unfairly discriminating on the basis of a person's race. This groundbreaking decision has led to major changes within the South African customary law of succession.
180. In ***Richtersveld Community v Alexkor Ltd and another* 2000 (1) SA 337 (CC)**, the Constitutional Court held that the eviction of over 3000 Nama people (of the *Khoi-khoi* indigenous group) to make way for diamond mining operations, was unconstitutional. Such eviction amounted to sweeping aside the Nama's laws of land ownership and was held to be unfair racial discrimination. Accordingly, the Nama were ordered to have their land (85 000 hectares) returned to them. The

South African Government has also collaborated with the Namibian and Angolan governments and absorbed the Richtersveld National Park into a trans-frontier park (The Richtersveld Transfrontier National Park) along the west coast of Africa which has significantly contributed to the preservation of the natural habitat and culture of the Nama people.

D Reconfirm South Africa Position: Article 14 declaration

181. The South African Government is mindful of the provisions of Article 14 of the Convention and it made a declaration under this article on 10 December 1998. The declaration came into force on 9 January 1999. The fact of making this declaration further confirms South Africa's willingness to be subjected to scrutiny with regard to its compliance with the provisions of the Convention.

VII ARTICLE 7: MEASURES IN THE FIELDS OF TEACHING, EDUCATION, CULTURE AND INFORMATION TO COMBAT RACIAL DISCRIMINATION

A. The government's vision for eliminating racial discrimination in education

182. During the period under review, the Government has pursued transformation in all aspects of education, including those aimed at the development of girls and women and the promotion of gender equality. The Government has also continued to ensure its fulfilment of the education for all goals and in fulfilling its obligations in terms of international agreements and national laws to promote gender equality in education and eliminate all forms of discrimination within the education sphere.

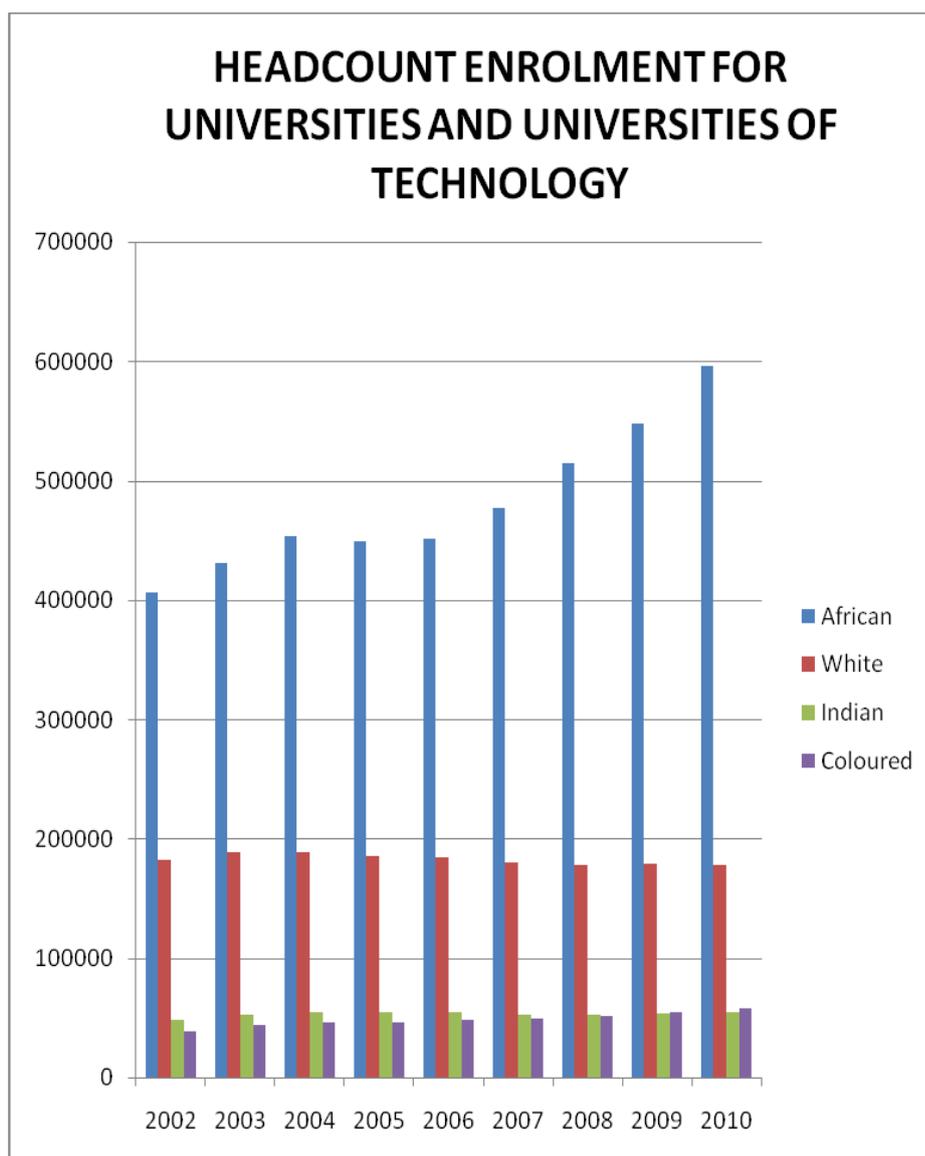
183. The South African Government has ensured that discriminatory practices in education are addressed for all learners through, *inter alia*, ensuring the same conditions for all with regard to career guidance, for equal access to studies and for the achievement of qualifications in

educational establishments of all categories in both rural and urban areas. The Government also promotes equality in education through measures designed at the elimination of any stereotyped concept of the roles of men and women at all levels by encouraging co-education and other types of education which will help to achieve this aim. The Government also supports the revision of teacher learner support materials and learning areas and adaptation of teaching methods so that they can be in line with the objectives of the Convention and the Constitution.

184. Regarding the elimination of gender stereotyping, the South African Government released a *Manifesto on Values, Education and Democracy* to promote the values of democracy, equity, non-racism, non-sexism and human dignity. These are reflected in the teaching material and the curriculum that have been reviewed to eliminate gender stereotyping and other forms of bias and discrimination. The new curriculum for education as well as teaching methods also seeks to integrate the principle of equality between women and men.

HEADCOUNT ENROLMENT FOR UNIVERSITIES AND UNIVERSITIES OF TECHNOLOGY

	African	White	Indian	Coloured	Total
2002	405914	181999	48717	38965	675595
2003	430776	188353	52883	43550	715562
2004	453639	188687	54315	46090	742731
2005	449241	185889	54618	46357	736105
2006	451108	184668	54859	48538	739173
2007	476770	180461	52596	49066	758893
2008	514955	178140	52401	51647	797143
2009	547686	179232	53629	55101	835648
2010	595963	178346	54537	58219	887065



B The legislative framework for eliminating racial discrimination in education

185. The education system in South Africa has undergone far-reaching changes since 1994. Beyond the structural changes initiated to conform to our Constitution, efforts have been made to introduce a value system totally at variance with the past but one that affirms internationally accepted standards. Central to this system of values are human dignity, the achievement of equality and the advancement of human rights and freedoms. The Constitution reinforces this commitment to equality and human dignity by spelling out an aversion to discrimination on the basis of race and gender. Section 29 of the

Constitution makes it clear that no form of racial discrimination in the field of education will be tolerated.

186. Besides the Constitution, the **South African Schools Act (SASA)** adopted in 1996 has had a pivotal impact on the desegregation of schools.

Key features of the Act are:

- Two categories of schools: public schools which comprise 98% of all schools (formerly state and state-aided schools) and independent (formerly private) schools.
- The establishment of governing bodies at all schools. These are composed of parents (the majority group by one), educators, pupils (in secondary schools), non-educator staff, a non-parent member of the community (optional), and owner of the school property or his/her representatives if the property is privately owned (optional).
- The governing body must determine the admissions, language and religious policy of the school within national norms and provincial frameworks. The governing body must also adopt a code of conduct for learners after consulting with learners, parents and educators.
- The levying of compulsory fees determined at an annual meeting of parents of the school and implemented by the governing body.

C The Department of Education and the promotion of equality and non-discrimination

187. Between 2008 and 2009 the Department of Education implemented special social cohesion programmes aimed at ensuring that all educational institutions promote human rights and the dignity of all people in their ethos, policies and practices. The Directorate: Race and Values in Education, organised several workshops on values and human rights practices while the development of a human rights culture in schools, as well as the implementation of the Strategy for Integration and Anti-Discrimination received priority. Workshops were conducted

on the purpose of the Strategy for Integration and Anti-Discrimination aimed at establishing provincial and district structures to support the implementation of the Strategy and to monitor and report incidents of discrimination and human rights abuse at district level. On-going support in this connection is being provided to the intervention teams.

188. The Department of Education is currently working together with the Department of Arts and Culture to promote arts education in the early stages of education. One of the main aims of this project is to promote a culture-driven approach to social development and increase knowledge and understanding of South Africa's rich cultural heritage. This partnership also aims to increase intercultural communication with the aim of reclaiming cultural identity and fostering non-racism, non-sexism and general respect for each other's cultures, backgrounds and human rights.
189. The Department of Education currently runs the Language in Education Policy, aimed at providing education in the language of choice of each learner as well as incorporating other languages (and thus other cultures) into the learning process. This policy has as one of its many aims the recognition of South Africa's multiculturalism and efforts to integrate different racial groups within schools and thus create an environment where people grow up and learn in unity so that they may go out into the world with the understanding and tolerance expected of a person within a democratic state. It is worth noting that in ***Nkosi v Vermark and another (2008) ZAKZHC 83*** the Equality Court of the Durban's Magistrate's Court held that the Durban High School's Policy which favoured Afrikaans as a language of instruction was illegal and unconstitutional. In this case the parent of one of the children attending the Durban High School complained that the school's language policy which did not allow for her child to be taught in IsiZulu while allowing for Afrikaans and English was discriminatory. The Court held that the preferential treatment accorded to Afrikaans and English negatively affected learners whose mother tongue was not English or Afrikaans.

Since the decision was made the Government has prepared the **Basic Education Laws Amendment Bill of 2009** which seeks to ensure that while a school's governing board may choose a language of instruction at a school, this choice must not be used to entrench discrimination. The Durban court's ruling and the proposed legislative amendment are in line with the Government's vision of ensuring that all languages treated similarly in the country.

D Measures taken to include multiculturalism in educational publications

190. The Pan South African Language Board established the *Khoi* and *San* National Language Body in 1999. This body aims to promote and develop the *Khoi* and *San* languages and conducts surveys in communities in which these languages are spoken in order to record and standardise terminology. This information will be used, *inter alia*, to create books published in the languages of the *Khoi* and *San*. The PSALB is also centrally responsible for the implementation of the Language in Education Policy. Between 2008 and 2009 the PSALB engaged in several activities that have a strong bearing on the elimination of racial discrimination within education as well as the promotion of diversity and multiracialism. For example, the PSALB embarked on a project with the National DoE regarding the translation of subject assessment guidelines and the learning programmes for Grade 10-12. The PSALB also monitors the implementation of the Language in Education policy and in December 2008 a meeting was held with the then Minister of Education to discuss issues pertaining to the implementation and monitoring of the Language in Education Policy, especially in so far as it related to the promotion of previously marginalised languages. The PSALB also advised the Minister of Education on the implementation of the home language as language of learning and teaching in the foundational phase of education. Overall the PSALB worked towards the advancement of the objectives of the Language in Education Policy in a bid to promote multi-lingualism in South Africa.

III CONCLUDING REMARKS

191. The elimination of all forms of racial discrimination remains high on the agenda of the South African government. South Africa's history brings into particular prominence the importance of eliminating all forms of racial discrimination. The Government continues to dedicate considerable financial, organisational and human resources in the fight against racial discrimination. The fight against all forms of racism in South Africa is particularly difficult because, as pointed out earlier, racism in South Africa no longer manifests itself overtly, but covertly. The entire legal framework, however, is very emphatic in its denunciation of all forms of racism. Government's attention is specifically focussed on eliminating all forms of covert racism, and ensuring that South Africans enjoy substantive equality in all aspects of life.
192. The Constitutional Court pointed out in ***Brink v Kitshoff 1996 (4) SA 197 (CC)*** "Apartheid systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the land mass of South Africa; senior jobs and access to established schools and universities were denied them; civic amenities including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society."
193. Despite the Constitutional guarantee of equality in section 9, particularly section 9(2) which permits measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken, the deep scars of the decades of systematic racial discrimination can be seen in all the key measures of the quality of life in South Africa. This impact on the progress of ensuring equality in access to housing, health, water, education and

many others. This further impacts on governments' progress on its programme of eradicating poverty of which the majority of the poor are blacks, especially Africans in rural areas.