



HELENSUZMAN
FOUNDATION

The Secretary of the South African Law Reform Commission

For attention: Ms T Prinsloo

Email: disabilityresponse@justice.gov.za

28 May 2021

Dear Ms Prinsloo

Submission on the Domestication of the Convention on the Rights of Persons with Disabilities (CRPD)

We attach herewith our written submissions in response to the South African Law Reform Commission's issue paper on the domestication of the United Nations Convention on the Rights of Persons with Disabilities.

Should you have any queries, please contact Sophie Smit (sophie@hsf.org.za) and Zeenat Emmamally (zeenat@hsf.org.za).

Yours sincerely,

Francis Antonie

Director



Submission in response to SALRC call for comment to Domestication of the Convention on the Rights of Persons with Disabilities (CRPD)

1. Introduction

The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions in response to the South African Law Reform Commission’s issue paper regarding the domestication of the Convention on the Rights of Persons with Disabilities (CRPD).¹

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability.

In this submission, the HSF seeks to respond to the following questions put forth in the issue paper:

1. What should be the role of the South African Human Rights Commission (SAHRC), other chapter 9 institutions and provincial and local government?
2. How should the CRPD be monitored?

The HSF views this submission as an opportunity to ensure that monitoring of the CRPD is properly carried out, with coordination and information-sharing between bodies whose work may implicate the rights of persons with disabilities, and with the input of persons with disabilities or organisations that act on behalf of persons with disabilities.

¹ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106.

2. Background

Article 33 of the CRPD provides that State Parties must establish an independent mechanism to ‘promote, protect and monitor implementation’ of the CRPD. In its Concluding Observations on the Initial Report of South Africa, the Committee on the Rights of Persons with Disabilities noted its concern with the absence of an independent entity designated to fulfil the monitoring function under art 33 of the CRPD, and recommended that the South African Human Rights Commission (SAHRC) be designated as the independent monitoring mechanism (IMM).²

In its 2019/2020 annual report, the SAHRC noted that it has previously submitted reports to the UN, but has not done so as a formally designated IMM, and that such designation is necessary.³ The HSF agrees that this designation is appropriate, but notes that other bodies, in the exercise of their powers, collect vital information which may concern the rights of persons with disabilities, and which may impact upon, or overlap with, the SAHRC’s functions as IMM. In this submission, the HSF suggests that in order for the SAHRC to discharge its duties as the IMM of the CRPD, and to prevent the wastage of additional resources, the work of these bodies must be shared with the SAHRC.

Further, art 33 also states that persons with disabilities and their representative organizations must be involved in the monitoring process. For this purpose, the SAHRC has established the Disability Advisory Committee (DAC) in terms of section 11 of the South African Human Rights Commission Act No.40 of 2013. The DAC was established ‘for the purposes of advising the Commission, or making recommendations to it, in respect of the matter for which the committee has been established’.⁴ It is comprised of 14 disability organisations who are represented by one individual member.

² Committee on the Rights of Persons with Disabilities “Concluding Observations on the Initial Report of South Africa” (23 October 2018) UN Doc CRPD/C/ZAF/CO/1 para 54-55.

³ South African Human Rights Commission “Annual Report (for the year ended 31 March 2020)” pages 34-35.

⁴ Section 11 of the South African Human Rights Commission Act No.40 of 2013.

3. Coordinating the work of monitoring bodies

Statutory bodies and offices carry out functions that may implicate the rights of persons with disabilities. These bodies include the mental health review boards (MHRBs) created by the Mental Health Care Act 17 of 2002, and the Office of Health Standards Compliance (OHSC), including the Health Ombud, created by the National Health Amendment Act 12 of 2013. After setting out the functions of these bodies and how it will inevitably intersect with the SAHRC's monitoring functions, the HSF submits that MHRBs and the Ombud must provide the SAHRC with any and all information that affects the rights of persons with disabilities, in order to enable the SAHRC to discharge its obligations as the IMM.

3.1 Mental Health Review Boards (MHRBs)

The Mental Health Care Act provides that a Member of the Executive Council responsible for health services in a province must establish an MHRB in respect of every health establishment providing mental health care, treatment and rehabilitation services; and that an MHRB may be established for a single, a cluster or all health establishments in a province.⁵ Section 19 sets out the powers and functions of an MHRB, which are the following:

- (a) consider appeals against decisions of the head of a health establishment;
- (b) make decisions with regard to assisted or involuntary mental health care, treatment and rehabilitation services;
- (c) consider reviews and make decisions on assisted or involuntary mental health care users;
- (d) consider 72-hours assessment made by the head of the health establishment and make decisions to provide further involuntary care, treatment and rehabilitation;
- (e) consider applications for transfer of mental health care users to maximum security facilities; and^{SEP}
- (f) consider periodic reports on the mental health status of mentally ill prisoners

⁵ Section 18 of the Mental Health Care Act.

It is clear from the above that MHRBs are the entities that persons must approach to contest their institutionalisation. The MHRB thus makes decisions that will affect the rights of persons with intellectual disabilities, particularly the right to dignity⁶ and the right not to be deprived of freedom arbitrarily or without just cause.⁷ Further, according to the SAHRC itself, MHRBs are “intended to serve as bodies that monitor the observance of human rights in mental health facilities”.⁸ As such, the work of MHRBs is of paramount importance to the SAHRC, not just because it affects the rights of persons with intellectual disabilities, but also because the SAHRC and MHRBs have overlapping monitoring functions. It is therefore submitted that each MHRB must produce a report at determined intervals to be provided to the SAHRC.

Apart from its powers under the Mental Health Act, MHRB also play a vital role in overseeing compliance with the “Guidelines for the Licensing and Regulation of Day-care Facilities for People with Mental and/or Intellectual Disabilities” (Licensing Guidelines).⁹ The Life Esidemeni Tragedy, which saw the deaths of 144 patients with mental or intellectual disabilities, occurred because the patients had been transferred to facilities that were unlicensed. It is vital that the SAHRC be kept abreast of issues related to these community-based mental health residential and day care services and facilities.

However, although the Licensing Guidelines provide that MHRBs play an oversight role in monitoring compliance with the Licensing Guidelines,¹⁰ documents that are produced in accordance with these Guidelines- such as licences issued or reasons for refusal of a licence,¹¹ reports on inspections of facilities,¹² provincial audits of these facilities,¹³ and monthly operation reports produced by the facilities-¹⁴ do not seem to

⁶ Section 10 of the Constitution of the Republic of South Africa, 1996. See also art 17 of the CRPD which protects the ‘integrity’ of persons with disabilities.

⁷ Ibid section 12(1)(a), which has its parallel in Art 14 of the CRPD.

⁸ South African Human Rights Commission “Report of the National Investigative Hearing into the status of mental health care in South Africa” (14 and 15 November 2017) page 20.

⁹ Guidelines for the Licensing and Regulation of Day-care Facilities for People with Mental and/or Intellectual Disabilities.

¹⁰ Ibid guideline 34.

¹¹ Ibid guideline 13.

¹² Ibid guideline 21.

¹³ Ibid.

¹⁴ Ibid guideline 35.

automatically go before MHRBs. As such, it is submitted that the Licensing Guidelines be amended so that these are immediately provided to the relevant MHRB.

Further, as submitted above, MHRBs should send reports to the SAHRC. In doing so, any documents produced in accordance with the Licensing Guidelines, along with any conclusions drawn by the relevant MHRB, should be included.

3.2. The Office of Health Standards Compliance (OHSC) and the Ombud

The National Health Amendment Act 12 of 2013 created the Office of Health Standards Compliance (OHSC) which ensures that health establishments comply with the norms and standards prescribed by the Minister for Health.¹⁵ The Ombud located in the office, is empowered, either upon a complaint on his own initiative, to investigate the norms and standards of any health establishment. The Ombud, and the OHSC more broadly, conduct activities that implicate the rights of persons with disabilities. For example, following the Life Esidimeni tragedy, it was the Ombud that investigated the deaths of the patients and produced a report.¹⁶

Section 81A of the National Health Amendment Act requires the Ombud to report his or her findings and recommendations back to the complainant and the health facility; and to make recommendations for action to the chief executive officer of the OHSC, who must implement the recommendations. It is submitted that when the complainant is a person with disabilities, or acting on behalf of a person with disabilities, the Ombud should report such findings and recommendations to the SAHRC.

¹⁵ Section 79 of the Act sets out an extensive list of functions that the OHSC may carry out, which include, among others, inspecting health establishments, investigating complaints, and speedily reporting any serious breached of norms and standards to the Minister.

¹⁶ Office of the Health Ombud “No guns: 94+ silent deaths and still counting” (The report into the circumstances surrounding the deaths of mentally ill patients: Gauteng province) (1 February 2017).

4. Involvement of persons with disabilities in the monitoring process

Art 33 states that persons with disabilities and their representative organizations must be involved in the monitoring process. For this purpose, the SAHRC has established the Disability Advisory Committee (DAC) in terms of section 11 of the South African Human Rights Commission Act No.40 of 2013. The DAC was established ‘for the purposes of advising the Commission, or making recommendations to it, in respect of the matter for which the committee has been established’.¹⁷ Put simply, the DAC must ‘advise the SAHRC on matters and interventions relating to people with disabilities’.¹⁸

The HSF recognises the fact that the DAC is comprised of over 10 members representing different disability organisations. This is to be applauded as it is imperative that the rights of disabled persons are wholly protected and advocated for, without certain subgroups being left behind. The HSF submits that the composition of the DAC is in furtherance of art 33 and promotes the inclusion of the lived experiences of disabled persons in the monitoring process. In order to benefit from the diverse range of expertise represented by each of the members, the DAC should hold an annual meeting during which each member representing their organisation could highlight their individual concerns and present them to the SAHRC for its consideration.

The DAC also serves a vital monitoring function as it is to report to the SAHRC on the completion on any function or mandate given to it by the SAHRC.¹⁹ As submitted at the outset, this type of information sharing will ensure that the DAC, as an additional resource, is utilized to its full potential as well as that those whose rights are being advocated for, are being heard.

An important aspect of the DAC’s mandate will have to be openness and transparency with the public. One of the many gaps highlighted by the Life Esidimeni tragedy was the lack of information available regarding the decisions taken by the relevant departments. As a collection of organisations seeking to further the rights of disabled persons, the DAC must be an open and reliable source of information for the public

¹⁷ Section 11 of the South African Human Rights Commission Act No.40 of 2013.

¹⁸ South African Human Rights Commission ‘Disability’, available [here](#).

¹⁹ Section 11 of the South African Human Rights Commission Act No.40 of 2013.

with regards to any decision taken which would affect those who are either directly implicated or those who may have an interest in the decision, such as family members. The importance of such transparency cannot be overstated as disabled persons often rely on family members and those around them to make decisions on their behalf. Therefore it is important that those who support family members who may need institutional help are aware of any and all decisions taken. This may be done through a public website which showcases the work done by the DAC and any submissions made to the SAHRC as well as more informal methods of communication such as webinars or open hearings. Any method which is openly available and accessible to the general public will allow the DAC to carry out its mandate of providing an 'independent and critical point of view' to the SAHRC.²⁰

In the city of Ballarat, Australia, one of the main objectives of their DAC is to 'advocate to the Community and Council on behalf of people with disabilities'.²¹ This indicates the important link that the DAC must serve between institutions, communities and those with disabilities. Therefore, public consultations and accessible information is of paramount importance to its mandate.

5. Conclusion

The role of the SAHRC is to be the independent mechanism necessary to discharge South Africa's obligations in terms of art 33 of the CRPD to 'promote, protect and monitor implementation' of the CRPD. However, there must be a more cohesive and connected approach to its monitoring process.

The HSF has suggested that in order for the SAHRC to discharge its duties at the IMM of the CRPD, the work of various statutory bodies and offices which carry out functions that may implicate the rights of persons with disabilities, be shared with the SAHRC. This will ensure that the CRPD is monitored in an efficient, transparent and accountable manner.

This may be done in various ways through specifically: Mental Health Review Boards (MHRBs), the Health Ombud and the Disability Advisory Committee (DAC).

²⁰ Ibid.

²¹ City of Ballarat 'Disability Advisory Committee', available [here](#).

MHRBs and the Ombud must provide the SAHRC with any and all information that affects the rights of persons with disabilities. The SAHRC and MHRBs have overlapping monitoring functions. It is therefore submitted that each MHRB must produce a report at determined intervals to be provided to the SAHRC. Furthermore, the MHRBs play an oversight role in monitoring compliance with the Licensing Guidelines.²² It is vital that documents that are produced in accordance with these Guidelines- such as licences issued or reasons for refusal of a licence,²³ reports on inspections of facilities,²⁴ provincial audits of these facilities,²⁵ and monthly operation reports produced by the facilities-²⁶ automatically go before MHRBs. As such, it is submitted that the Licensing Guidelines be amended so that these are immediately provided to the relevant MHRB.

The health Ombud is empowered, either upon a complaint on his own initiative, to investigate the norms and standards of any health establishment. In order to monitor the CRPD, it is submitted that when the complainant is a person with disabilities, or acting on behalf of a person with disabilities, the Ombud should report such findings and recommendations to the SAHRC.

Lastly, the DAC as an important link between institutions, communities and those with disabilities, must conduct public consultations and serve as a source of accessible information in order to fully realise its mandate. The DAC must further hold an annual meeting during which each member representing their organisation could highlight their individual concerns and present them to the SAHRC for its consideration.

In order for the SAHRC to properly carry out its mandate as the independent monitoring mechanism, it is imperative that the bodies carrying out various functions on its behalf are open and transparent in their undertakings and assist the SAHRC in any and every way possible.

²² Ibid guideline 34.

²³ Ibid guideline 13.

²⁴ Ibid guideline 21.

²⁵ Ibid.

²⁶ Ibid guideline 35.