



**Joint Submission in Response to South Africa's Follow-Up Report to the Concluding Observations and Recommendations by the United Nations Committee on Economic, Social and Cultural Rights on South Africa's Initial Report**

**August 2021**

**The Steering Group of the South Africa's Ratification Campaign of the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol**

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## INTRODUCTION

1. This report, in response to South Africa's Follow-Up Report to the United Nations Committee on Economic, Social and Cultural Rights (CESCR) (E/C.12/ZAF/FCO/1), is a joint initiative of members of the Steering Group of the South Africa's Ratification Campaign of the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol (the Campaign).
2. The Campaign became operational in May 2009. The Campaign was organised in response to the delay of the South African government to ratify the ICESCR. Following South Africa's ratification of the ICESCR in January 2015, the Campaign's focus is on raising awareness of the ICESCR and ensuring its effective implementation (including domestication). In relation to the Optional Protocol to the ICESCR, the Campaign focuses on raising awareness of the Optional Protocol and its mechanisms, and advocating for its ratification by South Africa.
3. Current non-governmental organisation (NGO) members of the Steering Group of the Campaign are: Black Sash<sup>1</sup>, Dullah Omar Institute for Constitutional Law, Governance and Human Rights (DOI),<sup>2</sup> People's Health Movement South Africa (PHM-SA)<sup>3</sup>, Socio-Economic Rights Institute of South Africa (SERI)<sup>4</sup>, Studies in Poverty and Inequality Institute (SPII)<sup>5</sup>. In addition to the above organisations, some individual experts actively participate in the work of the Campaign, including

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<sup>1</sup> For more information on Black Sash's activities, <https://www.blacksash.org.za/>.

<sup>2</sup> For more information on DOI's activities, see: <https://dullahomarinate.org.za/>.

<sup>3</sup> For more information on PHM-SA's activities, see: <http://phm-sa.org/>.

<sup>4</sup> For more information on SERI's activities, see: <https://www.seri-sa.org/>.

<sup>5</sup> For more information on SPII's activities, see <http://www.spil.org.za/>.

Lilian Chenwi<sup>6</sup> and Jackie Dugard<sup>7</sup> (both based at the School of Law at the University of the Witwatersrand and board members of SERI).

4. This report focuses on some of the concluding observations and recommendations issued by the Committee on Social, Economic and Cultural Rights in reviewing South Africa's implementation of the ICESCR at its 64th session (E/C.12/ZAF/CO/1).
5. Section A of this report addresses some of the recommendations that South Africa had to report on within 24 months and Section B addresses other recommendations, most of which are related to some of the section A recommendations.

## SECTION A

### **Recommendation number 48 (c) to the Government of South Africa to ensure that those between the ages of 18 and 59 with little or no income have access to social assistance:**

6. The Department of Social Development needs to provide an outline for the time frames and processes for the implementation of a policy on income support for unemployed people between 18-59 years of age.
7. The National Economic Development and Labour Council (NEDLAC) has apparently completed its report on the feasibility of a Basic Income Grant, but it has not been shared publicly and there has been no report whether NEDLAC has had productive engagements with government.
8. The CESCR should urge South Africa to fulfil its constitutional imperative and provide social assistance for the unemployed between 18 to 59 years, as the Covid-19 pandemic has plunged South Africa into a humanitarian and economic crisis which has exacerbated poverty, inequality and unemployment in the face of structural unemployment and the casualisation of the workforce.
9. *Introduction of the COVID Social Relief of Distress Grant for the unemployed:*
  - 9.1. As a response to the pandemic, the government introduced a Social Relief of Distress package by adjusting the existing social assistance framework with a monthly top up of R250 for six months (until October 2020) for the majority of grants; the Child Support Grant (CSG) was increased by R300 for one month (May 2020); a monthly grant of R500 for Caregivers as recipients of the CSG were paid for five months which ended in October 2020.
  - 9.2. A significant intervention was a monthly R350 COVID-19 Social Relief of Distress (SRD) for the unemployed for one year until April 2021. It was reintroduced in August 2021 until March 2022. Shortcomings with the duration of the COVID SRD Grant included: the limited duration; the amount of the grant of R350.00 was below the food poverty line of R585.00;<sup>8</sup> the exclusive online application process to access the grant yet potential beneficiaries lack access to internet, tools such as a smartphone and/or a computer and unable to afford data/air time; the recourse mechanisms were deficient; and the narrow eligibility criteria with a zero-rated income<sup>9</sup>.

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<sup>6</sup> For more information on Lilian Chenwi, see <https://www.wits.ac.za/staff/academic-a-z-listing/c/lilianchenwiwitsacza/>.

<sup>7</sup> For more information on Jackie Dugard, see <https://www.wits.ac.za/staff/academic-a-z-listing/d/jackiedugardwitsacza/>.

<sup>8</sup> Statistics South Africa 'National Poverty Lines' (2019), [www.statssa.gov.za/publications/P03101/P031012019.pdf](http://www.statssa.gov.za/publications/P03101/P031012019.pdf).

<sup>9</sup> 'Social Protection in a Time of COVID Lessons for Basic Income Support', [http://www.blacksash.org.za/images/0541\\_BS\\_-\\_Social\\_Protection\\_in\\_a\\_Time\\_of\\_Covid\\_Final\\_-\\_Web.pdf](http://www.blacksash.org.za/images/0541_BS_-_Social_Protection_in_a_Time_of_Covid_Final_-_Web.pdf). On the problems with the SRD grant in the context of endemic poverty, see J Dugard 'Testing the Government's Emergency Relief Mechanism: What happens when poor households attempt to access the Social Relief of Distress Grant?' in S Fukuda-Parr and V Taylor (eds) *Food Security in South Africa: Human Rights and Entitlement Perspectives* (2015, Juta).

- 9.3. The grant was reinstated recently whereby recipients of CSGs are also eligible which addresses the previous gender bias of the grant because they were previously excluded from applying for the grant even though they were unemployed because they were recipients of a social grant; and amended to qualify with an income of less than R595.00
10. *We request the Committee to recommend that South Africa:*
- 10.1. Implements social assistance with the transition of the COVID SRD Grant to permanent social assistance for the unemployed and low-income earners at an amount that a beneficiary can live with dignity phasing in universal basic income.
  - 10.2. Ensure the application process for the grant is accessible with a hybrid model.
  - 10.3. Ensure the eligibility criteria is inclusionary rather than exclusionary, whereby the means test must not be zero rated and should include low-income earners
  - 10.4. Ensure beneficiaries receive the full cash value of their grants, without incurring expenses to receive their grants (transport costs, bank charges).
  - 10.5. Ensure a comprehensive, transparent, and accessible recourse system is in place.

**Recommendation number 57 (c) to the Government of South Africa to expedite the adoption of the Social Assistance Amendment Bill of 2018 to increase the level of child support grants for orphaned and abandoned children living with relatives, for which it has already earmarked funds:**

11. It is important to clarify that the Social Assistance Amendment Act 16 of 2020 provides for additional payments linked to social grants which gives a discretion to the Minister of Social Development to top up grants and does not specifically provide for an increase in the grants.

## **SECTION B**

**Impact of Covid-19 on economic, social and cultural rights (ESCR) establishes the need for urgent implementation of other recommendations in the Concluding Observations:**

12. While the State's follow-up report is focused on the implementation of recommendations contained in paragraphs 48 (a) and (c), 57 (c) and 73 (c) as required by the CESCR, we consider that the impact of the COVID-19 pandemic on ESCR establishes the need for the State to implement other recommendations in the Concluding Observations, in the lead up to the second periodic report due on 31 October 2023.
13. The COVID-19 pandemic has had a devastating impact on the South African economy. In the Finance Minister's budget speech in February 2021, he revealed that the economy contracted by 7.2%; 2.2 million jobs were lost in the second quarter of 2020; the unemployment rate reached an all-time high at over 32% in the fourth quarter of 2020 and that overall, poverty and inequality were increasing.<sup>10</sup> In August 2021, Statistics South Africa released the Quarterly Labour Force Survey

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<sup>10</sup> Sanusha Naidu, 'The Impact of COVID-19: The Conundrum of South Africa's Socio-Economic Landscape' *ACCORD* (3 March 2021), <https://www.accord.org.za/analysis/the-impact-of-covid-19-the-conundrum-of-south-africas-socio-economic-landscape/>.

(QLFS) for the second quarter which revealed that the official unemployment rate now sits at a record 34.4%.<sup>11</sup>

14. Vulnerable populations like women bore the brunt of the impact of the pandemic: two thirds of estimated job losses between February and April 2020 were lost by women.<sup>12</sup> Further, women took on a disproportionate amount of childcare responsibilities as a result of schools and childcare facilities closing down during the pandemic.<sup>13</sup> In terms of the right to access to adequate housing, municipalities continued to evict people and demolish their homes during the pandemic, despite a national moratorium on evictions.<sup>14</sup>
15. Given this context, we wish to make the following submissions relating to other recommendations in the Concluding Observations.

**Recommendation number 7 to the Government of South Africa to withdraw its declaration in relation to articles 13(2)(a) and 14 of the Covenant:**

16. Recommendation 7 has implications for access to education for all, including for the groups mentioned in Recommendation 73 (c).
17. The government has neither responded to the recommendation nor withdrawn the declaration on articles 13(2)(a) and 14 of the ICESCR. The continued existence of the declaration has affected the immediate realisation of the right to basic education. This has led to a form of parallel regime, where the courts in recent decisions hold for the immediate realisation of the right yet the government maintains a progressive stance. Some of the persuasive decisions from the courts include *the Governing Body of the Juma Masjid Primary School and Ors v Ahmed Asruff Essay N.O. and Ors*<sup>15</sup>, *Section 27 & 2 Ors v Minister of Education & Ors* (2012)<sup>16</sup>, *Linkside & Ors v Minister of Basic Education & Ors* [2015]<sup>17</sup> and *Madzodzo & 7 others v Minister of Education & 4 Ors* (2014)<sup>18</sup>.
18. *We request the CESCR to again call on South Africa to withdraw its declaration.*

**Recommendation number 35 to the Government of South Africa to intensify its efforts to protect domestic and farm workers from exploitation and to provide them with enhanced labour and social protections:**

19. The CESCR's recommendation on 'extending to domestic workers the application of the Compensation for Occupational Injuries and Diseases Act [(COIDA)] for occupational injuries and deaths ...'<sup>19</sup> has been fulfilled.

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<sup>11</sup> Statistics South Africa 'Key findings: P0211 - Quarterly Labour Force Survey (QLFS), 2nd Quarter 2021' [http://www.statssa.gov.za/?page\\_id=1856&PPN=P0211&SCH=72944](http://www.statssa.gov.za/?page_id=1856&PPN=P0211&SCH=72944).

<sup>12</sup> Carilee Osborne and Pamela Choga 'Confronting COVID: How Civil Society is Responding Across Countries- South Africa' Center for Economic and Social Rights (August 2020) <https://www.cesr.org/confronting-covid-how-civil-society-responding-across-countries-south-africa>.

<sup>13</sup> Ibid.

<sup>14</sup> Socio-Economic Rights Institute (SERI), *Submission on The Impact of the COVID-19 Crisis on Housing Rights Socio-Economic Rights Institute of South Africa* (July 2020), [http://www.seri-sa.org/images/SERI\\_submission\\_SR\\_COVID\\_19\\_9\\_July\\_2020.pdf](http://www.seri-sa.org/images/SERI_submission_SR_COVID_19_9_July_2020.pdf).

<sup>15</sup> [2011] ZACC 13 (the eviction case), <http://www.saflii.org/za/cases/ZACC/2011/13.html>.

<sup>16</sup> [2012] 3 All SA 579 (the textbook case) <http://www.saflii.org/za/cases/ZAGPPHC/2012/114.html>.

<sup>17</sup> [2014] ZAECGHC 111 (the staff teaching case) <http://www.saflii.org/za/cases/ZAECGHC/2015/36.html>.

<sup>18</sup> [2014] 2 All SA 339 (ECM) (the furniture case) <http://www.saflii.org/za/cases/ZAECMHC/2014/5.html>.

<sup>19</sup> CESCR 'Concluding Recommendations on the Initial Report of South Africa' Recommendation 35.

20. On 19 November 2020, domestic workers were included in COIDA after the Constitutional Court handed down an order declaring the constitutional invalidity of section 1(xix)(v) of COIDA which excluded domestic workers employed in private households from the definition of 'employee', thus precluding them from claiming from the Compensation Fund for work-related injuries, illnesses or death. The Court also ruled that the order of constitutional invalidity is to have immediate and retrospective effect from 27 April 1994. At present, COIDA is in the process of being amended and a recent communication by the Parliamentary Committee on Employment and Labour indicates that transitional arrangements for domestic workers will be included in the amendment.<sup>20</sup>
21. However, the following recommendations from the Committee still need to be implemented: the second part of Recommendation 35 (a) that South Africa should intensify its efforts to protect domestic workers from exploitation, '...by providing legal guidance on the standard of accommodation'; Recommendation 35 (d) 'raising public awareness of the rights of domestic workers'.
22. Also, Recommendation 40 (a) 'apply the same minimum wage across all sectors, including the domestic, farm and retail sectors'; and (b) 'raise the national minimum wage and regularly adjust it to the cost of living so as to ensure an adequate standard of living for workers and their families' need to be fulfilled, as they have implications in relation to enhancing protection for domestic and farm workers in Recommendation 35.

**Recommendation number 59 to the Government of South Africa to, inter alia, improve/upgrade housing conditions, meet increasing demand, upgrade conditions in informal settlements, ensure evictions are a last resort and comply with international standards:**

23. Given the impact of Covid-19 stated in paragraph 14 of this report, implementation of Recommendation 59, bearing in mind Recommendation 60, is imperative. *We therefore request the CESCR to urge South Africa to:*
  - 23.1. Consider, as a matter for urgency, shifting its focus away from mega-projects in poorly located areas, towards housing developments and in situ informal settlement upgrading in well-located areas that are close to economic activity.
  - 23.2. Enforce its policies and programmes governing the in-situ upgrading of informal settlements.
  - 23.3. Enforce the prohibition on forced evictions contained in the South African Constitution by ensuring that evictions do not take place without proper legal safeguards and, particularly, the provision of adequate alternative accommodation to those rendered homeless as a result of evictions. Where alternative accommodation is provided, this accommodation should meet international law standards for adequate housing.
  - 23.4. Ensure the collection of complete and updated statistical data (disaggregated according to municipality and urban/rural areas) about the enjoyment of the right to adequate housing, which should record the number of forced evictions annually.
  - 23.5. Take substantive measures to address the challenges related to the allocation of state-subsidised housing and ensure that the tenure security of those that are granted state-subsidised housing is legally recognised. In particular, measures should be taken to address the backlog of unregistered title deeds for state-subsidised housing.

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<sup>20</sup> Response by Department of Employment and Labour on the written and oral submissions received on the Compensation for Occupational Injuries Bill. See <https://www.youtube.com/watch?v=4sTnZq8zIhA>.

- 23.6. Expedite the finalisation and adoption of the Special Needs Housing Policy and Programme.
- 23.7. Enhance coordination between the departments of Social Development, Human Settlements, Health, Correctional Services and Public Works at the national, provincial and municipality government levels, in providing housing for people with special needs.
- 23.8. Ensure that the new Rapid Land Release programme is adequately consulted before becoming policy in order to ensure that the principles of spatial justice, participation and housing consolidation/incremental upgrading are not abandoned through poorly located sites, without participation of affected communities and without housing support to mitigate against peripheral sites and services projects.
- 23.9. Ensure that rental norms and standards are developed in terms of the Rental Housing Act that provide a framework within which a fair practices rental regime can be applied.

**Recommendation number 71 (a) and (e) to the Government of South Africa to improve school infrastructure and guarantee high quality education for all children, especially those from disadvantaged families:**

24. Recommendation 71 (a) and (e) has implications for education for all, including for the groups mentioned in Recommendation 73 (c).
25. Although the right to basic education remains constitutionally guaranteed in South Africa,<sup>21</sup> the realisation of this right remains unattainable for many, especially the vulnerable and marginalised in society. The educational sector in South Africa, remains starkly unequal to this day, and a child's experience of this sector is largely a factor of which side of the divide they are born.<sup>22</sup> Inadequate resourcing of the public basic education department by the State creates a domino effect on majority of children's access to education. For many children from vulnerable contexts, under resourced schools are a barrier to their receiving quality basic education – there are insufficient classrooms, insufficient or non-existing sanitary provisions, insufficient and/or under qualified teachers and teaching equipment – contributing to creating barriers.<sup>23</sup>
26. In its follow-up report, South Africa outlines its commitment under the Constitution and international instruments to ensuring the fulfilment of the right to education. However, within the basic education sector, many barriers still exist especially for vulnerable and marginalised children to accessing quality basic education.
27. In 2020, the plight of vulnerable children's barriers to accessing education was thrust into the spotlight in the *Equal Education & Ors V Minister of Basic Education & Ors* case.<sup>24</sup> The claimants brought an order for an urgent declaratory injunction against the Minister of Basic Education and the MEC's of Education of eight provinces, declaring a breach of the constitutional right to food of learners in the basic education system under the National School Nutrition Programme (NSPN). The claimants argued that the NSNP is designed to fulfil *the unqualified rights* of children to basic education and basic nutrition under the Constitution.<sup>25</sup>

<sup>21</sup> South African Constitution, Section 29 (1)(a).

<sup>22</sup> Amnesty International 'Broken and Unequal: The State of Education in South Africa' AI Index: AFR53/1705/2020 (2020) 14-20, <https://www.amnesty.org/en/documents/afr53/1705/2020/en/>.

<sup>23</sup> Department of Basic Education 'National Education Infrastructure Management System' (2018), <https://bit.ly/2MJn5bq>.

<sup>24</sup> (22588/2020) [2020] ZAGPPHC 306, [2020] 4 All SA 102 (GP), <http://www.saflii.org/za/cases/ZAGPPHC/2020/306.html>.

<sup>25</sup> Ibid paras 43 & 54.

28. In granting the injunctions sought by the claimants, the Court noted that ‘...The Department’s own policy statements reflect basic nutrition as component to basic education. State policy is instructive on the content of the right to education and in the policies the provision of basic nutrition is inextricably linked to the fulfilment of basic education.’<sup>26</sup> As much as the judgment was a confirmation of the unqualified right of children to basic education and adequate nutrition,<sup>27</sup> it also exemplifies the fact that vulnerable children in South Africa are most likely to face barriers to accessing quality basic education.

**Recommendation number 77 to the Government of South Africa to adopt relevant measures to ensure the accessibility and affordability of the Internet, particularly in schools and rural areas and for the most disadvantaged groups:**

29. Recommendation 77 in relation to schools has implications for education for all, including for the groups mentioned in Recommendation 73 (c).

30. The socio-economic impact of the COVID-19 pandemic has further exacerbated these pre-existing barriers. Schools already struggling with insufficient infrastructure, were unable to meet up to the demands to transition to online based learning and provide continued education for poorer learners without access to computers or internet, thus leading to the loss of several months of learning over the academic year. In this light, data from the Trends in International Mathematics and Science Study (TIMSS 2015, Grade 9) indicated that for no-fee schools (the poorest 75%), less than half of children in a given class have a computer with internet access. Only in the wealthiest 5% of schools do at least 90% of learners have access to a computer and the internet at home.<sup>28</sup> It is thus appreciated that the CESCR’s Concluding Observations to SA included Recommendation 77.

31. Unfortunately, the failing of the State in this regard persists, with even more dire consequences for learners in the light of the recent COVID-19 pandemic.<sup>29</sup>

32. *We request the CESCR to urge South Africa to implement Recommendation 77.*

**Recommendation number 73 (b) and (e) to the Government of South Africa to ensure that inclusive education is a guiding principle in all education plans and programmes, including by providing reasonable accommodation for children with disabilities:**

33. Recommendation 73 (b) and (e) also has implications for education for those in the groups mentioned in Recommendation 73 (c) that have disabilities.

34. In addition, particularly vulnerable learners, such as learners with disabilities have been even further disproportionately impacted.<sup>30</sup> Although in response to the Concluding Observations of the CESCR, South Africa re-iterated its commitment to the protection and non-discrimination of learners with disabilities,<sup>31</sup> the reality is different from its stated commitment. This is evidenced by the application filed by the Centre for Child Law (represented by the Equal Education Law centre), against the

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<sup>26</sup> Ibid para 40.

<sup>27</sup> South African Constitution, Section 28 (1)(a).

<sup>28</sup> Martin Gustafsson & Carol Nuga ‘How is the COVID-19 pandemic affecting educational quality in South Africa?’ *Insight Briefs* (15 July 2020), [https://cramsurvey.org/wp-content/uploads/2020/07/Gustafsson.-Nuga.-How-is-the-COVID-19-pandemic-affecting-educational-quality-in-South-Africa\\_-1.pdf](https://cramsurvey.org/wp-content/uploads/2020/07/Gustafsson.-Nuga.-How-is-the-COVID-19-pandemic-affecting-educational-quality-in-South-Africa_-1.pdf)

<sup>29</sup> Ibid.

<sup>30</sup> McKenzie Justh et al. ‘The education of children with disabilities risks falling by the wayside’ (28 May 2020), <https://www.news.uct.ac.za/campus/communications/updates/covid-19/-article/2020-05-28-the-education-of-children-with-disabilities-risks-falling-by-the-wayside>.

<sup>31</sup> South Africa’s Follow-Up Report, paras 9-12.

Minister of Basic Education, for failure to provide adequate support to learners with disabilities, returning to special schools and special schools hostels.

35. A court order (by consent of parties) was handed down compelling the Minister to provide clear and inclusive guidelines, to provide health and safety measures designed specifically for learners with disabilities in schools, hostels, and offices. The guidelines were to prevent and manage the spread of COVID-19 in a way that caters for the specific needs of learners with disabilities, such as the provision of additional sanitisers, adapted masks, or additional personal protective equipment for officials who need to have direct contact with learners with disabilities.<sup>32</sup>
36. As the COVID-19 pandemic continues to affect schools' long term reopening, the government's failure to prioritise the unqualified right of vulnerable children's access to education is apparent. The following recommendations have become imperative:
- 36.1. The need to scale up the provision of infrastructure and especially technological access, prioritising the most vulnerable schools and children;
  - 36.2. Continued supply of adequate PPE to all schools and learners;
  - 36.3. Supporting remote learning to vulnerable schools and families;
  - 36.4. Prioritise a child's rights approach through a policy framework throughout the basic education system and at all levels.

## CONCLUSION

37. We thank the CESCR for the opportunity to make this submission and trust that the Committee will find our submission helpful for its processes. For further queries or questions please email Ebenezer Durojaye at [edurojaye@uwc.ac.za](mailto:edurojaye@uwc.ac.za) and Gladys Mirugi-Mukundi at [gmirugi-mukundi@uwc.ac.za](mailto:gmirugi-mukundi@uwc.ac.za).

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\*\*\***ENDS**\*\*\*

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<sup>32</sup> See further <https://eelawcentre.org.za/wp-content/uploads/centre-for-child-law-3123-20.pdf>.