

Stakeholder Submission to the UN Human Rights Council

Universal Periodic Review of Zambia

(28th UPR Session – 6 to 17 November 2017)

SUBMITTED BY:

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1. INTRODUCTION

1.1 This submission was prepared by the Southern Africa Litigation Centre (SALC)¹ a regional human rights organisation based in Johannesburg, South Africa. SALC was established in 2005 as a non-profit organization to promote and advance human rights and the rule of law in Southern Africa through strategic litigation, research, capacity building, training and advocacy within the following thematic areas: women’s land and property rights; freedom of expression; health rights; international criminal justice; prisoners’ rights; sexual minority rights; disability rights and regional advocacy.

1.2 The information contained in this Report has emanated from SALC’s own research, cases it has handled, as well as reports and documents of UN treaty based institutions and special mechanisms working towards the advancement human rights.

1.3 The report raises a number of concerns including gaps in the domestic legislative framework, challenges relating to the advancements of rights of persons with disabilities, criminalisation of certain offences, and challenges to ensure adequate protection of the right to access to justice for the people of Zambia.

2. THE NATIONAL HUMAN RIGHTS FRAMEWORK

A. Scope of international obligations

2.1 Zambia has ratified a number of international human rights instruments including the Convention on the Rights of Persons with Disabilities and others. Although Zambia has made progress in terms of the number of human rights instruments ratified, it has not

¹ SALC <http://www.southernafricalitigationcentre.org/>

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yet ratified other important instruments relevant for the advancement of human rights in the country. These include the Optional Protocol to the Convention on the Rights of Persons with Disabilities, the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention on the Elimination of All forms of Discrimination Against Women and the three Optional Protocols to the Convention on the Rights of the Child. The Country has also not submitted its initial report and the first periodic report to the Committee on the Rights of Persons with Disabilities.

Recommendation 1

- (a) SALC recommends that Zambia should take steps to ratify all outstanding human rights treaties, including the Optional Protocol to the Convention on the Rights of Persons with Disabilities, the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women and the three optional Protocols to the Convention on the Rights of the Child;
- (b) Zambia should also domesticate the provisions of human rights treaties and ensure these are justiciable and implemented.

B. Constitutional and domestic legislative framework

2.2 The Constitution of Zambia is the supreme law of the land. The Bill of Rights Chapter in the Constitution guarantees both civil and political rights. However it expressly excludes economic, social and cultural rights. The latter are only provided for under Part IX of the Constitution which deals with directive principles of State or national policy.

2.3 The Persons with Disabilities Act was enacted in 2012 as part and parcel of government efforts to domesticate the Convention on the Rights of Persons with Disabilities. However, a 2016 report by the Special Rapporteur on the Rights of Persons with Disabilities highlights that only some provisions of the Convention were domesticated. A number of provisions like those dealing with the rights of women and rights with disabilities as well as provisions speaking to respect for privacy and freedom of opinion and expression were excluded.² This undermines significantly the extent to which women and children with disabilities as well as persons with disabilities, generally, can enjoy their human rights.

Recommendation 2:

- (a) Zambia should make all human rights protected under the Constitution justiciable;

² See, generally, report of the UN Special Rapporteur on persons with Disabilities.

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- (b) Zambia should continue with the constitutional reform process relating to the Bill of Rights; and
- (c) Zambia should review the Persons with Disabilities Act to ensure that its provisions are consistent with the standards entrenched in the Convention on the Rights of Persons with Disabilities.

3. PROMOTION AND PROTECTION OF HUMAN RIGHTS

A. Disability rights

3.1 In 2015, statistics estimated that the prevalence of disability stood at 7.2 percent³ of the Zambian population. As a welcome development the country adopted a National Policy on Disability. However, outdated pieces of legislation continue to undermine the enjoyment of human rights by persons with disabilities. A 2016 report by the Special Rapporteur on the Rights of Person with Disabilities highlights that the “Mental Disorder Act of 1951 (...) authorises psychiatric interventions without free or informed consent, and the arrest and detention of individuals with psychosocial and intellectual disabilities on the grounds of their disabilities or non-criminal behaviour”.

3.2 In addition, stigma and discrimination continue to undermine the enjoyment of human rights by persons with disabilities in Zambia.⁴ SALC's own research on stigma and discrimination in health care settings shows that persons with disabilities continue to experience lack of physical access to health facilities, and refusal to be treated, verbal abuse and failure to be treated with dignity by health care workers.⁵ Health care workers often fail to recognise persons with disabilities as autonomous persons who are able to consent to treatment and who are entitled to health care services including sexual and reproductive health care services. These negative practices need to be addressed in order for persons with disabilities to enjoy their rights fully.

Recommendation 3:

- (a) Zambia should repeal the Mental Disorder Act of 1951;
- (b) Zambia should address negative practices that exacerbate stigma and discrimination against persons with disabilities; and

³ See report of the UN Special Rapporteur on persons with Disabilities.

⁴ As above, p 8.

⁵ SALC (2016) Accountability and redress for discrimination in healthcare in Botswana, Malawi and Zambia, 110-114, available at <http://www.southernafricalitigationcentre.org/2016/09/28/research-report-accountability-and-redress-for-discrimination-in-healthcare-in-botswana-malawi-and-zambia/>.

- (c) Zambia should establish training programmes aimed at raising public awareness among communities and government employees, including health care workers, to enable them to understand disability related issues.

B. Criminalisation of consensual same sex sexual acts

3.3 Section 158 of the Penal Code criminalises “indecent practices” between persons of the same sex. This offence is overly broad and includes consensual and non-consensual acts, acts with children and acts with adults, acts in public and acts in private. The penalty for such offences is 7 to 14 years imprisonment. The offence criminalises indecent practices between men and indecent practices between women.

3.4 The UN Human Rights Committee, in its third periodic report of Zambia, noted with concern that the Penal Code criminalizes same-sex sexual activities between consenting adults and recommended the repeal of these provisions. We concur with these observations.

Section 155 includes within its ambit anal intercourse between two adults of a consensual nature and anal intercourse between two adults of a non-consensual nature. It is this lack of differentiation which makes the section discriminatory.

3.5 We submit that there is no rational basis on which to criminalise consensual sexual acts taking place in private. In fact, it is our experience that, to do so, is detrimental to the interests of society. For example, UN agencies⁶ have pointed to the fact that criminalisation of consensual sexual acts between men is a barrier to HIV prevention. Policy makers often struggle to provide prevention services when same sex sexual practices are illegal. SALC's research on stigma and discrimination in health care settings shows that lesbian, gay, and transgender persons experience a range of discriminatory practices in health care settings in Zambia, including blaming, lack of confidentiality, verbal abuse, refusal to treat, and inferior counselling and health services.⁷

Recommendation 4:

- (a) Zambia should repeal Sections 155 and 158 in their entirety. Non-consensual cases of anal penetration which currently fall under the ambit of section 155 should fall within the ambit of the offence of rape; and

⁶ UNAIDS (2010) We can remove punitive laws, policies, practices, stigma and discrimination that block effective responses to HIV, Joint Action for Results, UNAIDS Outcome Framework: Business Case 2009-2011, 13. “Punishing and stigmatising environments, in contrast, can increase people’s vulnerability to HIV infection, reduce access to and use of HIV services and other health and social services, discourage individual behaviour change, and increase the impact of HIV on people already living with the virus and on their families and communities.” At page 5.

⁷ SALC (2016) Accountability and redress for discrimination in healthcare in Botswana, Malawi and Zambia, 95-103, available at <http://www.southernafricalitigationcentre.org/2016/09/28/research-report-accountability-and-redress-for-discrimination-in-healthcare-in-botswana-malawi-and-zambia/>.

- (b) Zambia should ensure the provision of services to all persons irrespective of their sexual orientation or gender identity.⁸

C. Criminalisation of Freedom of Expression

Defamation of the President

- 3.6 Section 69 of the Penal Code states that: “Any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years.”
- 3.7 This provision is in direct conflict with the constitutional protection of the right to freedom of expression, which includes the freedom to impart and communicate ideas and information. The reputation of the President is not enough to trump the exercise of the right to freedom of expression by others, and so section 69 is not justifiable under article 20(3) of the Constitution which provides circumstances in which the right may be permissibly infringed.
- 3.8 We note the concerns expressed by the UN Human Rights Committee, in its concluding observations on Zambia's third periodic report, about the offence of defamation against the President, and its recommendation that it should be repealed.

Recommendation 5:

That section 69 be repealed in its entirety.

Criminal defamation

- 3.9 Chapter XVIII of the Penal Code makes criminal defamation an offence. Section 191 of the Penal Code provides for the misdemeanour offence of libel, which is, in the part that is relevant for the media, the unlawful publication by print or writing of any defamatory matter (defined in section 192 as matter ‘likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation’) concerning another person, with the intent to defame that person.
- 3.10 All of the provisions of the Penal Code relating to criminal defamation do not comply with international standards for freedom of expression and should be repealed. We are

⁸ <http://www.southernafricalitigationcentre.org/2016/09/27/laws-and-policies-affecting-transgender-persons-in-southern-africa/>

of the view that other mechanisms can be used to deal with the publication of material that genuinely defames such persons, such as civil defamation as well as enforcement of media codes of ethics by self-regulatory bodies such as the Zambia Media Council.

Recommendation 6:

- (a) The following sections should be repealed – Section 191 (Libel); section 92 (Definition of defamatory matter); section 193 (Definition of publication); section 194 (Definition of unlawful publication); section 195 (Cases in which publication of defamatory matter is absolutely privileged); section 196 (Cases in which defamatory matter is conditionally privileged); section 197 (Explanation as to good faith) and section 198 (Presumption as to good faith).

D. Criminalisation of minor nuisance-related offences

3.11 Chapter XVII of the Penal Code relates to nuisances and other offences against health and convenience. Historically, vagrancy-related offences have often been vague, over-broad and arbitrarily applied by police in order to target persons whose existence or actions are deemed undesirable.⁹

3.12 The UN Special Rapporteur on Extreme Poverty and Human Rights noted: “Penalisation policies reflect a serious misunderstanding of the realities of the lives of the poorest and most vulnerable and ignorance of the pervasive discrimination and mutually reinforcing disadvantages that they suffer... Asymetries of power mean that persons living in poverty are unable to claim rights or protest their violation.”¹⁰

3.13 The UN Special Rapporteur on Extreme Poverty and Human Rights has noted the disproportionate effect of nuisance laws on the poor. Such laws:

- Undermine the right to an adequate standard of physical and mental health;
- Constitute cruel, inhuman and degrading treatment;
- Deny life-sustaining measures to the poorest (e.g. by burdening the ability of the poor to engage in activities such as street-vending);
- Lead to harassment or bribery by police, especially of vulnerable groups;
- Impose fines on the poor, the enforcement of which is inefficient and reflects a waste of state financial and administrative resources, contributing to perpetuating social exclusion and economic hardship;
- Force street children into dangerous and abusive situations by barring their engagement in street-vending, touting and begging; and

⁹ L Sebba “The creation and evolution of criminal law in colonial and post-colonial societies” (1999) 3 *Crime, Histoire et Sociétés*, at para. 22. Sebba notes that the imposition of criminal laws was “reminiscent of the vagrancy laws in early English history; the vagueness of which has been seen as providing a legal basis for the control of populations perceived as dangerous to the establishment”.

¹⁰ UN General Assembly, *Report by Special Rapporteur on Extreme Poverty and Human Rights*, 66th session, 4 August 2011, A/66/265, 5, <http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf>

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- Lead to arrest, which affects the poor particularly negatively because indigent populations are frequently detained for longer periods of time than their more affluent counterparts and do not have access to legal representation.¹¹

3.14 Penal Code offences such as being an idle and disorderly person and being a rogue and vagabond are sometimes used indiscriminately to arrest persons, contributing to overcrowding in police cells and placing a strain on resources in the criminal justice system. These laws tend to give law enforcement officials a wide discretion in application, which increases the vulnerability of persons living in poverty to violence and harassment.¹²

3.15 Over the past two decades, there has been increasing calls for the repeal of outdated offences.¹³ The main argument for this has been that many persons in pre-trial detention in Africa, are detained for being poor, homeless or a “nuisance”. This was the argument made in the Ouagadougou Declaration and Plan of Action on Accelerating Prisons’ and Penal Reforms in Africa.¹⁴

3.16 Section 181(c) deems as a rogue and vagabond, every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself. The elements of this offence have been considered by various Commonwealth courts in the context of similar offences. The elements are, however, unacceptably vague and therefore likely to be interpreted arbitrarily by law enforcement officials. Where a person is suspected of criminal behaviour, that person should be charged under the appropriate section in the Penal Code. We submit that section 181(c) is vague and overly broad. There is a substantial risk that the section would be applied arbitrarily and not within the narrow confines suggested by various courts. Section 181(c) is further contrary to the principles of criminal law, including the presumption of innocence, in that a person can be targeted by police under this section purely on the basis of the person’s appearance or failure to engage in any immediate productive activity. An Irish court declared a similar offence unconstitutional in *King v the Attorney General and Director of Public Prosecutions*¹⁵ for over-breadth, vagueness and arbitrariness.

3.17 Section 181(d) of the Penal Code states that “every person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose; shall be

¹¹ UN General Assembly, *Report by Special Rapporteur on Extreme Poverty and Human Rights*, 66th session, 4 August 2011, A/66/265, 5, <http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf>

¹² *Gwanda v State* [2017] MWHC 23.

¹³ <http://www.achpr.org/press/2017/02/d349/>

¹⁴ Second Pan-African Conference on Prison and Penal Reform in Africa, held in Ouagadougou, Burkina Faso between 18-20 September 2002.

¹⁵ [1981] IR 233.

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deemed to be a rogue and vagabond. This offence was recently declared unconstitutional by the Malawi High Court.¹⁶

Recommendation 7:

- (a) Zambia should repeal sections of the Penal Code which are vague and overly broad, including section 181(c) and section 181(d).

E. Access to Justice

SADC Tribunal – independence of the judiciary and access to justice

3.18 In August 2014, Zambia signed the amended Protocol on the Tribunal of the Southern Africa Development Community (SADC Tribunal or Tribunal), which introduces substantial changes with implication on the [protection of human rights by the Tribunal. During early stages of its establishment and operation the Tribunal acted as regional human rights court which individuals could access when their governments were unable or unwilling to provide effective protection of human rights. If duly ratified, the amended protocol will remove individual access to the Tribunal as well as the human rights jurisdiction of the court. In order jurisdictions challenges have been levelled against states that contributed to the weakening the SADC Tribunal.¹⁷

3.19 The SADC Tribunal was suspended in 2010 following a challenge by Zimbabwe to its mandate and legitimacy. SADC states including Zambia¹⁸ moved swiftly to appoint judges who will adjudicate disputes between staff and the SADC as an institution.

3.20 The Committee on Economic, Social and Cultural Rights (CESCR) stated that the revised Protocol of the SADC Tribunal violates the right of access to justice.¹⁹ In its pronouncement the Committee called upon one of the state parties involved in the operationalization of the revised Protocol of the SADC Tribunal to, “reconsider the position taken and take the initiative in promoting the reinstatement of the right of access of natural and legal persons to the Tribunal”.

Recommendation 8:

¹⁶ Gwanda v State [2017] MWHC 23. For more information see <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/malawi-challenging-constitutionality-of-rogue-and-vagabond-offence/>, (accessed 28 March 2017).

¹⁷ Examples of states where challenges were made include South Africa, Mozambique and Tanzania. For more details on South Africa see <http://www.lssa.org.za/our-initiatives/advocacy/sadc-tribunal-matter> and <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africa-supporting-regional-individual-access-to-justice-in-sadc/>, (accessed 28 March 2017).

¹⁸ For details on Zambia's involvement on appointment of judges to the SADC Administrative Tribunal see <https://www.pressreader.com/swaziland/swazi-observer/20170317/281479276227514>, (accessed 28 March 2017).

¹⁹ See paragraph 8, Committee on Economic, Social and Cultural Rights, Concluding observations on the initial report of Namibia, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/062/16/PDF/G1606216.pdf?OpenElement>, (accessed 28 March 2017).

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- a) Withdrawing its commitment to the revised SADC Tribunal protocol which violates the right of access to justice;
- b) As has been recommended to other states in relation to the SADC Tribunal, “reconsider the position taken and take the initiative in promoting the reinstatement of the right of access of natural and legal persons to the Tribunal ..., with a view to providing the citizens of the member States of the Southern African Development Community the right to assert and vindicate their human rights”.²⁰

²⁰ Recommendation of CESCR to Namibia, paragraph 9, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/062/16/PDF/G1606216.pdf?OpenElement>, (accessed 28 March 2017).