

FOREWORD

Surveying the prevalence of racism and discrimination in Namibia has been long overdue and I am relieved that through tasking the Ombudsman with the responsibility for the focus area “*The Right not to be Discriminated Against*”, the National Human Rights Action Plan ‘forced’ me in a way to take on this arduous task to once and for all get a proper picture of the current situation as it relates to racism and discrimination, twenty-seven years after independence. Without carrying out this inquiry and conducting public hearings throughout the country, one may have thought that racism was a thing of the past, not realising that it was in fact very much alive, in spite of the fact that it has become more veiled and insidious.



The ultimate purpose of the inquiry was to find ways of ridding our society of racism, racial and other forms of discrimination, and tribalism; in this report, we not only remind government of its responsibilities in terms of international human rights treaties signed and/or ratified, but also make substantive recommendations as to measures that can and should be implemented by various ministries in order to eradicate racism/discrimination. It is also imperative that the private sector, the broader public and indeed all the citizens of Namibia should get on board with a paradigm shift in their attitude towards others and the fact that they may not yet, willingly or unwillingly, have accepted a dispensation with no tolerance for racism, racial and other forms of discrimination and tribalism; each person should do his or her part to ensure a future of mutual tolerance and respect for each other.

Without the candid and spontaneous participation of the Namibian public at large, a wide range of institutions, organisations, non-governmental organisations, school learners, traditional leaders and communities throughout Namibia, this project was doomed to fail. I would therefore like to extend my heartfelt gratitude to all those who participated in the project, ensuring the triumphant success thereof.

I also have to thank the esteemed panel members, Prof Nico Horn (Associate Professor of Public Law, University of Namibia), Ms Toni Hancox (Director: Legal Assistance Centre) and Ms Linda Baumann (National Coordinator, Namibia Diverse Women’s Association), who not only assisted with the public hearings in Windhoek and drafting of this report, but also for their full-hearted support and encouragement in executing the project. I would also like to sincerely thank the staff in the office who assisted with logistical and other arrangements, as well as serving on the various panels in the regions.

I submit this report to Parliament in the sincere belief that those responsible to implement the recommendations contained herein will do so with dedication and conviction as, ultimately, a society free of the shackles of racism, racial and other forms of discrimination, and tribalism can only be attained if we all stand as one in our condemnation and combating thereof.


ADV JOHN WALTERS
OMBUDSMAN: NAMIBIA

INDEX

<u>Contents</u>	<u>Page</u>
1. INTRODUCTION	4
1.1 Historical background	4
2. THE NEED FOR A NATIONAL INQUIRY	6
3. THE INQUIRY	7
3.1 The purpose of the inquiry	7
3.2 Methodology.....	8
4. DISCUSSION.....	10
4.1 Desk research.....	10
4.2 Public/community hearings	19
4.2.1 Access to Justice.....	20
4.2.1.1 Introduction	20
4.2.1.2 Concluding observations/recommendations	22
4.2.2 Derogatory Expressions and Racial Slurs	24
4.2.2.1 Introduction	24
4.2.2.2 Summary of submissions/presentations	24
4.2.2.3 Concluding observations/recommendations	25
4.2.3 Disability	26
4.2.3.1 Introduction	26
4.2.3.2 Summary of submissions/presentations	26
4.2.3.3 Concluding observations/recommendations	27
4.2.4 Education	30
4.2.4.1 Introduction.....	30
4.2.4.2 Summary of submissions/presentations.....	31
4.2.4.3 Concluding observations/recommendations	31
4.2.5 Employment.....	33
4.2.5.1 Introduction	33
4.2.5.2 Summary of submissions/presentations.....	34
4.2.5.3 Concluding observations/recommendations	35
4.2.6 Health.....	37
4.2.6.1 Introduction	37

4.2.6.2	Summary of submissions/presentations	37
4.2.6.3	Concluding observations/recommendations	38
4.2.7	Indigenous People	40
4.2.7.1	Introduction	40
4.2.7.2	Summary of submissions/presentations	41
4.2.7.3	Concluding observations/recommendations	43
4.2.8	Land Resettlement	49
4.2.8.1	Introduction	49
4.2.8.2	Summary of submissions/presentations	50
4.2.8.3	Concluding observations/recommendations	51
4.2.9	Language	54
4.2.9.1	Introduction	54
4.2.9.2	Summary of submissions/presentations	54
4.2.9.3	Concluding observations/recommendations	55
4.2.10	Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people	56
4.2.10.1	Introduction	56
4.2.10.2	Summary of submissions/presentations	56
4.2.10.3	Concluding observations/recommendations	57
4.2.11	Media and the Internet	58
4.2.11.1	Introduction	58
4.2.11.2	Summary of submissions/presentations	58
4.2.11.3	Concluding observations/recommendations	59
4.2.12	Sport	60
4.2.12.1	Introduction	60
4.2.12.2	Summary of submissions/presentations	61
4.2.12.3	Concluding observations/recommendations	62
4.2.13	Women and Girls	63
4.2.13.1	Introduction	63
4.2.13.2	Concluding observations/recommendations	64
5.	GENERAL	65
5.1	Introduction	65
5.2	Submissions/presentations	66
5.3	Concluding observations/recommendations	69
6.	IN CONCLUSION	70
	END NOTES	71

1. INTRODUCTION

While many of the humiliations and gross violations of human dignity characterized by apartheid have been removed through, amongst others, legislation and other policy directives, it is clear that there is still not a total break with the racialized social order through the re-distribution of land and resources. Many Namibians are still patiently waiting for a house, a job, potable water, sanitation and to be resettled on land, as well as acceptable access to requisite services.

The issue of recognition is pegged by George Ulrich when pointing out that *“the demand for recognition needs to be extended backwards into history and in particular towards its darkest moments, towards grave human rights violations and systemic wrongs in the recent and not-so-recent past”*¹. For this reason the introduction to this Report will extend backward into the past and although the history which we are going to share may be familiar to many, we believe a reiteration thereof will nonetheless be a good starting point.

1.1 Historical Background

- 1.1.1 The inhospitable Namib Desert constituted a barrier to European colonisation of Namibia, until 1878 when the British annexed Walvis Bay on behalf of the Cape Colony and in 1884, Germany colonised the rest of the territory, henceforth to be known as German South West Africa. Over the next hundred years our people suffered colonialism in its most oppressive and violent manifestation at the hands of Germany and subsequently, South Africa.
- 1.1.2 The land settlement law introduced by the German Administration was to facilitate the possession of crown land by immigrants. Goldblatt in his book States the following: *“The German Government had by confiscating the land of the native, provided itself with a large partition of the territory as crown land which in terms of the Versailles Treaty became crown land of South West Africa, under mandate”*². During the period 1907-1914, some of the confiscated areas were allocated by the German Government to white settlers, who were mostly Germans.
- 1.1.3 South African control of the then South West Africa commenced in July 1915, which control became subject to the mandate supervised by the League of Nations. Land was provided to white immigrant farmers by the application to South West Africa of the Union Land Settlement Act of 1912.
- 1.1.4 According to Prof J H Wellington, in 1937, the total area proclaimed as reserves for natives and coloureds in Namibia was 11,9 million ha, with a further 4 255 800ha reserved for extension of native reserves and in addition 1 356 200ha for the Rehoboth Gebiet. Of the 11,9 million ha proclaimed for native reserves, about 7,7 million were in the northern areas – namely Owambo, Kavango and Kaokoland. By comparison, European farm land then comprised 25 614 210ha, divided into 3305 white farms. Furthermore, the urban areas comprised 437 000ha, game reserves totalled 9 593 600ha and non-alienated crown land amounted to 21 100 000ha³.
- 1.1.5 The National Party won the election in South Africa and the 1950 elections for the South West Africa Legislative Assembly; the election manifesto for both South Africa and South West Africa was based in apartheid. This was the start of the refinement of the fundamental structures of colonial capitalism and colonial rule – the dispossession of native land, the system of migrant labour around the mining industry, the creation of racially separated residential areas, influx control in cities (pass laws). The racial order was crystallized and stabilized in space, in separate amenities such as shopping areas, beaches, sports clubs and even separate forms of sport; interracial marriages and relations were outlawed. The specificity of apartheid was however, that it devised a new ambitious attempt to stabilise and institutionalise all racial and ethnic

identities in the country. Apartheid was instrumental in creating a protected labour market for whites and was one of the grandest and most protracted schemes of affirmative action ever implemented⁴.

- 1.1.6 After the tragic events of 10 December 1959 in the Old Location in Windhoek, black people were forcefully moved to a new apartheid-styled township named Katutura, in which residences were racially zoned i.e. Nama Location, Damara Location, Herero Location, etc. The coloured people were moved to Khomasdal.
- 1.1.7 The Odendaal plan was implemented by the Development of Self-Government for Native Nations in South West Africa Act, no 54 of 1968, which provided for the creation of so-called autonomous “homelands” for each of the main ethnic groups, referred to as native nations, reserved and set apart for their exclusive use and occupation. They are Damaraland, Hereroland, Kaokoland, Kavango, Eastern Caprivi and Owambo.
- 1.1.8 The South African appointed Administrator-General had legislative power to make proclamations applicable in the territory and to sign into law legislation adopted by the National Assembly, e.g.:
- The Representative Authorities Proclamation AG 8 of 1980 laid the foundation for a segregated future Namibia. It divided the people of Namibia into 11 ethnic groups and created a so-called second-tier government for each group. The “population groups” so established were in respect of the following:
 - i) Basters
 - ii) Bushmen
 - iii) Caprivians
 - iv) Coloureds
 - v) Damaras
 - vi) Hereros
 - vii) Kavangos
 - viii) Namas
 - ix) Owambos
 - x) Tswanas
 - xi) Whites
 - The Identification of Persons Act 2 of 1977 compelled all persons over the age of 16 to be in possession of an identity document. In the formal application for such an identity document an applicant had to indicate the population group to whom he/she belongs. The identity document thereafter issued, indicated (by way of a code number) the race of such a person, i.e. 01 for Whites, 08 for coloureds, etc.
- 1.1.9 In 1985 the State President of South Africa, acting in terms of section 38 of the South West Africa Constitution Act, no 39 of 1968, issued Proclamation R101 to establish a Transitional Government of National Unity. Proclamation R101 included the Bill of Fundamental Rights and Objectives in an annexure.
- 1.1.10 In 1988, the full bench of the Supreme Court of South West Africa⁵ had the opportunity to test the constitutionality of Proclamation AG 8. The court found that the Proclamation in its entirety was in conflict with the Bill of Rights and that the effect of the combined provisions of Proclamation AG 8 and the Identification of Persons Act is that every person in the territory was deemed to be a member of one or other of the 11 population groups by operation of the

law and not by free choice and further has no real choice to select the population group he/she wished to belong to. As far as the composition of the 11 population groups was concerned, they were generally perceived to be either racial or ethnic groups⁶.

Horn N makes the following comment on the judgment:

“The judgment is important not only because it challenged the principle of racially separated development in South Africa–occupied Namibia, but also because it laid the foundation of the constitutional pillars framed by the South African Parliament for a future, independent Namibia while the tenability of a segregated State based on race or ethnicity had been rejected by both the SWAPO and SWANU liberation movements; the Supreme Court declared that it was also impossible to reconcile a State where ethnicity is the ideological foundation of all its laws and interaction with its citizens with a Bill of Rights.....”

- 1.1.11 The sad reality is that the South West African identity document is still in use today, and has survived apartheid 27 years after Namibia’s independence despite attempts for a transition to a new Namibian identity document.
- 1.1.12 George Ulrich reminded us that slavery, apartheid, racism, genocide and colonialism in its most oppressive and violent manifestations, the perils visited upon indigenous people, the world wide legacy of oppression and violence against women, aggressive intolerance against women, aggressive intolerance against sexual minorities, these are examples of past crimes that have not effectively been constituted as “*past*”, i.e. that continue to haunt the present and that demand candid recognition⁸.
- 1.1.13 It appears that racialized structures and racial language or expressions have survived apartheid in spite of a modern, liberal Constitution and a profound will to impose a radical break with the past. The use of words making distinctions and classifying/differentiating between people are still rife and seemingly embedded in peoples’ minds without considering the consequences of such language.
- 1.1.14 Racism, racial discrimination, tribalism and discrimination in general are not clearly defined or finite concepts. They are feelings, emotions, attitudes and realities within the make-up of each person and are influenced and guided by different contexts in the home, in the family, in schools and in the public arena. As such there will never be one solution to address the scourge of inequity and discrimination, racial or otherwise.
- 1.1.15 This does not mean that a solution is out of reach. What it does mean is that there may be more than one solution for various scenarios and that they must be guided by inputs and realities of all Namibians and people living within its borders. We should not think that a structure to address discrimination must address all concerns. In some cases it may only deal with a specific matter. What is important is to ensure that somewhere along the line, synergies between solutions will create a holistic response and create a society where all are treated equally, within their own realities.

2. THE NEED FOR A NATIONAL INQUIRY

- 2.1 The Namibian Ombudsman is a constitutional creation with its independence guaranteed under Chapter 10 of the Constitution⁹ and the Ombudsman Act no 7 of 1990; it is a multifunctional office, i.e. traditional Ombudsman with additional mandates. The mandates are the receiving and investigation of complaints relating to maladministration, the violation of human rights and freedoms, the misappropriation of public monies and misuse of property by officials and the protection of the environment.

- 2.2 The Ombudsman Act further empowers the Ombudsman to enquire into and investigate instances or matters out of own motion, i.e. without having received a complaint¹⁰.
- 2.3 The need for a national inquiry regarding the extent to which human rights violations in terms of racism, racial discrimination, discrimination in general, tribalism, etc. are still being perpetrated, was necessitated by -
- the many concluding observations and recommendations by UN treaty monitoring committees with regard to racism, racial discrimination and discrimination in general¹¹;
 - the State's responsibility to respect, protect and fulfil the rights contained in international, regional and sub-regional human rights instruments to which Namibia is a State party;
 - the recommendations of the World Conference Against Racism contained in the Durban Declaration and Programme of Action;
 - media reports on the persistence of racism, racial discrimination and tribalism;
 - concerns expressed about very few or no prosecutions under the Racial Discrimination Prohibition Act 26 of 1991 (as amended); and
 - the Ombudsman's responsibilities under the National Human Rights Action Plan (NHRAP) 2015-2019 with regard to The Right not to be Discriminated Against¹².
- 2.4 In order to carry out the inquiry the Ombudsman invoked the following powers conferred on him in terms of the Ombudsman Act:
- enquire into and investigate complaints concerning alleged or apparent or threatened instances or matters of violations or infringement of fundamental rights and freedoms;
 - call any person to appear before him in relation to the inquiry;
 - ask such person who appears before him to give evidence or to make submissions;
 - question such person who appears before him in connection with any matter which the Ombudsman may deem necessary in connection with the inquiry.

3. THE INQUIRY

3.1 Purpose of the inquiry

The purpose of the inquiry was to –

- assess the State's compliance with its obligations under various international, regional and sub-regional human rights instruments and the extent to which it implemented the recommendations made by the monitoring committees established under these instruments;
- conduct public hearings to assess the extent to which racism, racial discrimination, discrimination in general and tribalism were still prevalent in Namibia;
- determine the Namibian public's understanding of racism, racial discrimination, discrimination in general and tribalism and to solicit their views on how to address the prevention, elimination and combating of these scourges;
- compile a report with findings and recommendations for legal and regulatory reform that will give effect to non-discrimination provisions in various international, regional and sub-regional human rights instruments (the report does not contain any names as the aim of the public hearings was to allow people to raise their concerns freely and to express their opinions and views without fear).

3.2 Methodology

The methodology for the successful completion of this project comprised –

3.2.1 Desk research

The Ombudsman and his staff as well as public hearing panel members spent a considerable amount of time on the thorough scrutiny of a number of law regulations and policies, publications, international, regional and sub-regional human rights instruments to which Namibia is a State party as well as the concluding observations and recommendations made by monitoring committees established under these instruments.

3.2.2 Media campaign

3.2.2.1 Members of the public were invited on the Ombudsman website and face book page to make written submissions that should include, *inter alia*, the following:

- the person's understanding of racism, racial discrimination, discrimination in general and tribalism;
- experience/s of racism, racial discrimination or discrimination in general;
- proposals on how the issues could be addressed, either in new legislation or amending existing legislation, or any other suggestions.

3.2.2.2 A media conference to which all print and electronic media were invited to explain the purpose of the inquiry and to solicit media support for the project, was held.

3.2.2.3 Advertisements explaining the project and calling on public participation appeared in all major daily newspapers.

3.2.2.4 During interviews with journalists from newspapers, radio and television, the Ombudsman consistently pointed out the importance of participation by the public.

3.2.3 Public hearings

3.2.3.1 The public hearings were aimed at shedding light on group, individual and community perceptions and experiences of racism, racial discrimination, discrimination in general and tribalism. Regrettably, as a result of strained financial resources, the Ombudsman could not conduct a substantive nationwide survey of public opinion, or consult individuals and communities in all the regions of the country. However, in order to also ensure focused inclusion, invitation letters were forwarded to the following institutions/groups/persons to request them to attend the five-day public hearing in Windhoek presided over by a panel comprising the Ombudsman, Adv John R Walters, Prof Nico Horn, Ms Toni Hancox, Ms Linda Baumann and different staff members of the Ombudsman on the different days, and to make oral and/or written presentations (some of the invitees chose not to attend, but to only make written submissions):

- Legal Assistance Centre;
- Law Reform and Development Commission;
- Out Right Namibia;
- National Disability Council;
- Namibia Network of Aids Service Organisations;
- Namibia Sport Commission;

- Namibia Agricultural Union;
- Namibia National Farmers Union;
- Employer's Federation;
- National Union of Namibian Workers;
- Equity Commission;
- Parliamentary standing committees;
- UNAM (SRC);
- Engineering Professions Association of Namibia;
- Namibia Council for Architects & Quantity Surveyors;
- Sister Namibia;
- Women Leadership Centre;
- Teachers Union of Namibia;
- Namibia National Teachers' Union;
- Windhoek Gymnasium;
- Windhoek High School;
- St Paul's College;
- Dawid Bezuidenhout High School;
- Jan Mohr Secondary School;
- The Prosecutor-General;
- The Attorney-General;
- The Ministry of Justice;
- Mr Carlos Kambaekwa;
- Mr Keith Allies;
- Mr Edward Mensah.

3.2.3.2 Public hearings presided over by a panel comprising the Ombudsman and some of his staff members were also conducted at Gibeon, Katima Mulilo, Omega 3, Opuwo, Tsumkwe and Gobabis. The Ombudsman chose to conduct these hearings within the marginalized and indigenous communities in order to encourage them to attend and participate. During the course of these hearings, the panel collected information from a range of role-players and stakeholders, including NGO's and Chiefs, Headmen and Councillors from Traditional Authorities.

3.2.3.3 The presentations/submissions by all the participants were found to be of great assistance and we wish to express our gratitude to those who participated. The public hearings created an avenue to collate such inputs as a first step to understanding and synthesizing the bigger picture. It is unfortunate that this opportunity was not utilized by all interested stakeholders since buy-in can only be achieved if all feel that their concerns have been heard. In addition, their participation may have enriched the discussions and content of this report. However, what the public hearings did well is to start a conversation on the topics discussed. Furthermore, we heard from people from all avenues of life, urban and rural. We listened to the concerns they have on a daily basis and to the pain they feel for themselves and for others who have been treated without regard for their dignity. The pain may not be understood by others, but it does not make it any less real. At the end of the day, we hope that this process initiated by the Ombudsman will lead to changes, albeit incrementally, which will result in a more just society where each person has a sense of validation and dignity.

3.2.4 Compilation of Report

3.2.4.1 The inquiry culminated in the drafting of this report, which considers all the submissions, allegations, responses and points of law and fact; after careful consideration of all

the information and desk research results, numerous concluding observations and recommendations are made.

3.2.4.2 The report will be submitted to Parliament, where after it will be made public.

4. DISCUSSION

4.1 DESK RESEARCH

Namibia not only has domestic laws in its arsenal, but is also a State party to the core international, regional and sub-regional laws and human rights instruments which prohibit discrimination and enjoin a State party to take all necessary measures and steps to prevent, combat and eliminate discrimination and to ensure equal enjoyment of the rights so guaranteed in the instruments. The domestic laws and human rights instruments of relevance are:

4.1.1 The Namibian Constitution

The Namibian Constitution is highly idealistic and generous; it promises a land of fulfilment and plenty. Its preamble proclaims the equal and inalienable rights of all members of the human family, the establishment of a democratic society where the government is responsible to the people, the unity and integrity of the nation, national reconciliation and a determination to cherish and protect the gains of the long struggle against colonialization, racism and apartheid. Chapter 3 contains an impressive catalogue of entrenched fundamental rights and freedoms, and special provision is made for their enforcement.¹³

Article 10 guarantees the equality of all persons before the law and prohibits discrimination against persons on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. Disability and age are not explicitly part of the prohibited grounds of discrimination.

Article 23 provides for the prohibition of racial discrimination and apartheid and for affirmative action for the advancement of persons who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.

The underlying premise should always be article 10 of the Namibian Constitution. In addition it is argued that this list is not finite but should be extended by any practice that has the potential to undermine respect for human dignity which is also protected in our Bill of Rights in Article 8. This concept is also supported by the Committee on Economic, Social and Cultural Rights in its Concluding Observations in March 2016 on Namibia's initial report, where the Committee recommends the State party to: *"Expand the grounds for discrimination prohibited in the Constitution to include, among others, marital status, political or other opinion, HIV status, disability, sexual orientation, language, property and birth."*

4.1.2 Racial Discrimination Prohibition Act (Act no 26 of 1991)

The Namibian Constitution is not self-executing or a self-acting agent; it cannot prevent, eliminate or combat racism, racial discrimination or tribalism. It is government's task. To give expression to the promise of protecting the gains of the long struggle against colonization, racism, apartheid and the right to non-discrimination, government enacted the Racial Discrimination Prohibition Act, in order to *"render criminally punishable certain acts and practices of racial discrimination and apartheid."*

4.1.3 Labour Act (Act no 11 of 2007)

Section 5(2) provides that a person must not discriminate in any employment decision directly or indirectly, or adopt any requirement or engage in any practice which has the effect of discrimination against any individual on one or more of the following grounds:

- (a) race, colour, or ethnic origin;
- (b) sex, marital status or family responsibilities;
- (c) religion, creed or political opinion;
- (d) social or economic status;
- (e) degree of physical or mental disability;
- (f) AIDS or HIV status; or
- (g) previous, current or future pregnancy.

Section 7 provides a remedy for disputes alleging discrimination.

4.1.4 Policy of National Reconciliation

Reconciliation is dealt with in the pre-amble of the Namibian Constitution which reads:

“Whereas we the people of Namibia –

- *have finally emerged victorious in our struggle against colonialism, racism and apartheid;*
- *will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single State;”.*

4.1.5 Universal Declaration of Human Rights¹⁴

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

4.1.6 International Covenant on Civil and Political Rights (ICCPR)¹⁵

Article 2

Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

4.1.7 International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁶

Article 2

The States parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

4.1.8 International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)⁷

State parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

- (a) each State party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
- (b) each State party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
- (c) each State party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
- (d) each State party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
- (e) each State party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

State parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

State parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

State parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

- (a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

- (b) shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, State parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) the right to equal treatment before the tribunals and all other organs administering justice;
- (b) the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) political rights, in particular the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) other civil rights, in particular:
 - (i) the right to freedom of movement and residence within the border of the State;
 - (ii) the right to leave any country, including one's own, and to return to one's country;
 - (iii) the right to nationality;
 - (iv) the right to marriage and choice of spouse;
 - (v) the right to own property alone as well as in association with others;
 - (vi) the right to inherit;
 - (vii) the right to freedom of thought, conscience and religion;
 - (viii) the right to freedom of opinion and expression;
 - (ix) the right to freedom of peaceful assembly and association;
- (e) economic, social and cultural rights, in particular:
 - (i) the right to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) the right to form and join trade unions;
 - (iii) the right to housing;
 - (iv) the right to public health, medical care, social security and social services;
 - (v) the right to education and training;
 - (vi) the right to equal participation in cultural activities;
 - (f) the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

4.1.9 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)¹⁸

Article 1

For the purposes of the present Convention, the term "*discrimination against women*" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect

or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) to repeal all national penal provisions which constitute discrimination against women.

4.1.10 Convention on the Rights of the Child (CRC)¹⁹

Article 2

1. State parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. State parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

4.1.11 African Charter on Human and Peoples' Rights²⁰

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

4.1.12 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Woman in Africa²¹

Article 2: Elimination of Discrimination Against Women

1. State parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:
 - (a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
 - (b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
 - (c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
 - (d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
 - (e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

4.1.13 African Charter on the Rights and Welfare of the Child²²

Article 3: Non-Discrimination

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

4.1.14 African Youth Charter²³

Article 2: Non-discrimination

1. Every young person shall be entitled to the enjoyments of the rights and freedoms recognized and guaranteed in this Charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.
2. State parties shall take appropriate measures to ensure that youth are protected against all forms of discrimination on the basis of status, activities, expressed opinions or beliefs.
3. State parties shall recognize the rights of young people from ethnic, religious and linguistic marginalized groups or youth of indigenous origin, to enjoy their own culture, freely practice their own religion or to use their own language in community with other members of their group.

4.1.15 SADC Protocol on Gender and Development²⁴

Article 6: Domestic Legislation

1. State parties shall review, amend and or repeal all laws that discriminate on the ground of sex or gender by 2015.
2. State parties shall enact and enforce legislative and other measures to:

- (a) ensure equal access to justice and protection before the law;
- (b) abolish the minority status of women by 2015;
- (c) eliminate practices which are detrimental to the achievement of the rights of women by prohibiting such practices and attaching deterrent sanctions thereto;
- (c) eliminate gender based violence.

4.1.16 United Nations Declaration on the Rights of Indigenous Peoples²⁵

Article 2

Indigenous peoples and individuals are free and equal to all other people and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

4.1.17 Durban Declaration and Programme of Action²⁶

In 2001 at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the international community adopted the Durban Declaration and Programme of Action – a comprehensive and unequivocal statement against racism, racial discrimination, xenophobia and related intolerance.

The nations approved a programme of action calling on governments to draw up their own plans of action to implement the recommendations of the World Conference. The recommendations are addressed to governments as obligations under international law.

4.1.18 Ancestral Land and International Law

The issue of ancestral land is not unique to Namibia. Several traditional communities have claimed ancestral land taken from them by colonial powers. The struggle of the Sahrawi people of Western Sahara in its quest for independence from Morocco is a good example of how international law looked at the issue. It eventually ended up with the International Court of Justice.

The Moroccan government and Mauritania occupied Western Sahara shortly after Spain, the colonial power, relinquished power. The '*Western Sahara case*', as it is known, is not only important for international law; the principles embedded in the judgment were also confirmed and applied in a land action in Western Australia²⁷.

Both Morocco and Spain claimed that Western Sahara was uninhabited prior to Spain's occupation. The Western Sahara occupants were nomads, and according to this theory, the territory remained *terra nullius*.

Judge Brennan in the '*Mabo case*' summarizes the '*Western Sahara*' opinion as follows:

"Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terra nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of terra nullius by original title, but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical

sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a "terra nullius" in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not as original titles obtained by occupation of terrae nullius."

The judges were unanimous in their ruling that Western Sahara was not a *terra nullius* when it was occupied by Spain in 1884.²⁸

The High Court of Western Australia who ruled in the '*Mabo case*', ruled in favour of the Meriam people and recognised their rights to their islands in the eastern Torres Strait. In doing so, the Court overruled the old British ruling that the under-developed legal system of the Meriam people did not give them permanent rights on their island when the British occupied the island and included it into the British Colony of New South Wales in 1788. The High Court followed the '*Western Sahara case*' stating that the British occupation in 1770 and the establishment of a colony in 1788 did not destroy the original title of the Meriam people.

Land rights of disadvantaged communities:

In its submission to the Working Group on the Universal Periodic Review²⁹, the delegation of Namibia stated that Namibia had no national legislation directly related to indigenous people and that the term "*marginalized people*" was used. One of the resolutions of the National Land Conference of 1991 had been that land rights of disadvantaged communities should receive special protection, with the San and other marginalized communities receiving mention (emphasis added).

The Inter-American Court of Human Rights pointed out that possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration³⁰.

The African Commission on Human and Peoples' Rights has confirmed that indigenous peoples hold property rights to the lands and natural resources they traditionally used. In the view of the African Commission in the '*Endorois case*'³¹, the following conclusions can be drawn:

- 1) Traditional possession of land by indigenous people has the equivalent effect as that of a State granted full property title;
- 2) traditional possession entitles indigenous people to demand official recognition and registration of property title;
- 3) the members of indigenous people who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack the legal title, unless the lands have been lawfully transferred to third parties in good faith; and
- 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights.

In a recent judgement the African Court on Human and People's Rights³² authoritatively interpreted Article 14 of the African Charter on Human and People's Rights:

Article 14 of the Charter provides as follows:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

The Court observes that, although addressed in the part of the Charter which enshrines the rights recognised for individuals, the right to property as guaranteed by Article 14 may also apply to groups or communities; in effect, the right can be individual or collective.

The Court is also of the view that, in its classical conception, the right to property usually refers to three elements namely: the right to use the thing that is the subject of the right (*usus*), the right to enjoy the fruit thereof (*fructus*) and the right to dispose of the thing, that is, the right to transfer it (*abusus*).

However, to determine the extent of the rights recognised for indigenous communities in their ancestral lands as in the instant case, the Court holds that Article 14 of the Charter must be interpreted in light of the applicable principles especially by the United Nations. In this regard, Article 26 of the United Nations General Assembly Declaration 61/295 on the Rights of Indigenous Peoples adopted by the General Assembly on 13 September 2007, provides as follows:

- "1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*
- 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.*
- 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."*

It follows in particular from Article 26(2) of the Declaration that the rights that can be recognised for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof (*abusus*). Without excluding the right to property in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, use/utilization of land.

Applying these judgments to Namibia and the issue of ancestral land, might mean that the people are justified in claiming lost ancestral land. While Namibia is not bound to Australian cases, we need to take cognisance of their implementation of the international 'Western Sahara case', which form part of international law.

The Rehoboth Basters:

The Rehoboth Baster community forwarded documentation relating to their lost land. Looking at all the papers presented to us, we saw a picture very different from the general perception of the Namibian people. It remains a difficult process, even with the huge piles of documents, deed of sale, agreements between the Rehoboth Basters and the colonial authorities, both the pre-1919 German colonial government and the subsequent South African government, to determine why and how the Baster community lost their land.

In reading the judgments the perception has always been that the land was registered in the name of the Baster Captains Council (*Kapteinsraad*) and that they transferred it to the second tier government for the Basters during the period of the Transitional Government of National Unity (1984 – 1989). However, the documentation tells a different story.

Without going into the details, and on the basis of doing only a preliminary research of the documentation, it seems as if the land never belonged to the *Kapteinsraad*. The owner of the land seems to have been the Baster community (*Bastergemeente*). The endorsement on the deed of sale is not signed by any accredited member of either the *Kapteinsraad* or the *Bastergemeente*.

At face value it seems as if the Baster people suffered a huge injustice when their land was transferred, first to the interim government and finally to the central government after independence. To add insult to injury, the Baster community failed to be recognised as a traditional authority because they do not own land. And the majority judgment of the Human Rights Committee of the International Covenant on Civil and Political Rights rejected their claim to be a traditional community because they do not live off the land.

4.2 **PUBLIC/COMMUNITY HEARINGS**

The apparent calm and beauty that visitors to Namibia so admire, hides the pain and suffering of the majority of Namibians and the feeling that somehow they have been robbed of the dreams which independence were to provide to them. There was a sense of disappointment felt by those who addressed the panel, also borne out by the definitions/perceptions of racism, racial discrimination, tribalism and discrimination, as requested from the public and which we decided to quote verbatim below in order not to, in any way, unjustly reflect the gravitas of their opinions.

Racism

- *“Racism/Racial Discrimination and Discrimination in general - the belief that one race is inherently superior to others. Every Namibian, irrespective of origin or background, should be treated equally with the same respect and dignity according to international human rights principles.”*
- *“There is what is called “structural racism” and that is a concern for us as a union – it is not the type of racism where you go out and say “I am white or I am black” – that is gone, the Constitution does not allow that, but it is more imbedded in our institutions, more imbedded in our policies, it is more imbedded in our processes.”*
- *“The belief that some races are inherently superior (physically, intellectually, or culturally) to others and therefore have a right to dominate them.”*
- *“The belief that all members of each race possess characteristics, abilities, or qualities specific to that race, especially so as to distinguish it as inferior or superior to another race or races. Racism is driven by prejudices, beliefs, and intolerance contrary to racial diversity and co-existence.”*
- *“Racism is the dogma that one ethnic group is condemned by nature to congenital superiority.”*
- *“Racism involves many acts where persons are treated unfairly because of their race, colour, descent, national or ethnic origin or beliefs.”*
- *“Racism is a belief or doctrine that inherent differences among the various human racial groups determine cultural or individual achievement, usually involving the idea that one’s own race is superior and has the right to dominate others or that a particular racial group is inferior to the others.”*

- *“Racial discrimination is when preference is given based on biological characteristics.”*

Discrimination

- *“Bias or prejudice resulting in denial of opportunity, or unfair treatment regarding selection, promotion, or transfer. Discrimination is practiced commonly on the grounds of age, disability, ethnicity, origin, political belief, race, religion and sex, factors which are irrelevant to a person's competence or suitability; unequal treatment provided to one or more parties on the basis of a mutual accord or some other logical or illogical reason; differences in two rates not explainable or justifiable by economic considerations such as costs.”*
- *“Disability discrimination - when a person with a disability is treated less favourably than a person without the disability.”*
- *“The unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age, ethnic origin or sex and/or sexual preference.”*
- *“Regarding discrimination in general there is still a lack of awareness, a lack of understanding and a lack of appropriate information regarding people with disabilities. Superstition and traditional beliefs still play a big role, especially in the rural communities. All of this leads to and nourishes prejudice and stigmatization.”*
- *“Discrimination in general is giving preference to certain individuals, companies or any other group. This preference is given without any logical reason, and those that are involved in discrimination may not be aware if they are discriminating. Discrimination may occur due to: religion, culture, value, background, and lack of knowledge etc.”*
- *“Discrimination is defined as treating an individual or group of people differently, unfairly and to their disadvantage; a prejudicial and unequal treatment based on the victim's race, tribe or political opinion, usually by one with authority or influence; depriving an individual or group some rights, privileges or opportunities because of his or her tribe, race or political opinion.”*

Tribalism

- *“Tribalism - the belief that one tribe is inherently superior to others: In a broader sense, every Namibian ethnic group should be treated equally with the same respect and dignity according to international human rights principles.”*
- *“Loyalty to a tribe or other social group especially when combined with strong negative feelings for people outside the group. Tribalism is pervasive, influencing behaviour, sometimes overriding reason and logic.”*
- *“Tribal consciousness and loyalty, especially exaltation of the tribe above other groups.”*

4.2.1 Access to Justice

4.2.1.1 Introduction:

Equal access to courts is recognized as a fundamental human right in a plethora of human rights instruments. The right is critical because it facilitates access to and protection of other rights. Access to our courts has been a significant issue in a democratic Namibia. The Constitution guarantees a host of rights as part of an effort to design a democratic society based on equality.

Given the foundational role of equality and non-discrimination in our constitutional framework, the drafters of our Constitution directed the National Assembly to enact legislation *“to prohibit practices of racial discrimination and to practice an ideology of*

*apartheid and render such practices and the propagation of such practices criminally punishable by the ordinary courts.....*³³

Following the adoption of the Constitution on 9 February 1990 and the country's independence on 21 March 1990, the National Assembly enacted the Racial Discrimination Prohibition Act, no 26 of 1991 which was promulgated on 23 December 1991.

Barely seven years after its promulgation, the constitutionality of section 11 of the Act (limiting freedom of speech), was tested in the case of *State v Smith and Others* 1996 NR 367 (HC). The court found that section 11(1) is overbroad and unconstitutional. The State did not appeal against the judgment and the National Assembly opted to amend the Act and the Racial Discrimination Prohibition Amendment Act no 26 of 1998 was promulgated on 21 September 1998.

The new section 14(2) exonerates racist language and publication in section 11(1) if it is a subject of public interest, part of a public debate and the truth or on reasonable grounds believed to be true.

It also excludes prosecution if someone contravenes section 11(1) with the intention to improve race relations and to remove racial insult, tension and hatred.³⁴

In an unpublished article, Horn comments that the exclusions are extremely broad and that it is not surprising that no prosecutions took place under section 11(1) since the '*Smith case*'. According to him aggrieved people who were insulted and humiliated on the grounds of their race or belonging to a specific group lost the remedy of section 11 of the Act. The Prosecutor-General had to go back to the common law offence of *crimen injuria* to be able to prosecute in cases of hate speech, racial or group humiliation or offensive action.³⁵

O'Linn comments as follows:

*"It is true that the original section was perhaps too wide, but the amendment enacted by Parliament was ambiguous and confusing in regard to the onus of proof in regard to these defences and the many escape routes provided for accused persons. If the Legislature wished to ensure that the traditional hate mongers would be safe, it could not have done better. No wonder that this law has fallen into disrepute and disuse. What could have been a strong weapon to combat hate speech and racist instigation, now lies on the scrapheap of government failures. The results were foreseeable when the amending provisions were passed by Parliament."*³⁶

O'Linn came to the same conclusion as Horn when he states that the Amending Act in its section 14(2) introduced a series of qualifications to the original section 11(1) of the Act, which made it extremely difficult for the prosecution to prosecute and almost impossible to obtain a conviction in a court of law for contravening section 11.1.

Although the Act criminalizes certain acts and practices of racial discrimination, only a few cases came to court. For the past three to four years, the Prosecutor-General received 19 police dockets relating to racial discrimination for the decision to prosecute or not and only six cases are before court.

The absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination in the country should not be viewed as positive,

contrary to the belief of some States. It may reveal either that victims have inadequate information concerning their rights, or that they fear social censure or reprisals, or that victims with limited resources fear the cost and complexity of the judicial process, or that there is a lack of trust in the police and judicial authorities, or that the authorities are insufficiently alert to or aware of offences involving racism.³⁷

In light of the above, it is justified to pose the following questions:

- Can it be said that the current legal framework provides sufficient protection of a person's right to equality and dignity and equal access to our courts?
- How should we address the problem of dissemination of hate speech and racial material via social media?
- Is criminalisation of racism, racial discrimination, hate speech, etc., the only option?
- Does the formal adversarial and potentially intimidating court proceedings which often result in long delays, discourage victims to seek justice in our courts?
- Would amendments to the current legislation provide easier access to our courts and provide better protection?
- Should we not look into the possibility of creating an informal, inexpensive, and user friendly tribunal where the emphasis is on participation and the speedy processing of the matter? A tribunal where legal practitioners preside over the proceedings, giving the victim and perpetrator space to tell their stories and where "*simple justice between man and man*" prevails?
- Has the Act contributed to meaningful societal transformation which the Constitution envisages and which could form the basis of new patterns to guide interaction between individuals?
- Does referring to another person as an animal (monkey, baboon) or racial slurs such as '*kaffer*', '*kaffermeid*', '*hotnot*', '*boer*' amount to hate speech or does it constitute *crimen injuria*? (Dealt with in more detail in a substantive chapter on Derogatory Expressions and Racial Slurs)

Above questions formed part of the concept note which was sent together with the invitation letter to the institutions and individuals mentioned in paragraph 3.2.3.1 of this report. Unfortunately nobody responded, neither did we receive any written submissions on the issue of access to justice. Consequently this part of the report does not reflect information received, but it is compiled from research and reflects the views of the Ombudsman and other panel members. If the Act has fallen in disuse and failed to bring about social change, what should we do to bring it in use again, to undo the past, to remove major barriers to judicial access and to bring racism, racial discrimination, discrimination in general and tribalism under judicial review? Indeed we should also consider whether formal judicial review is the best option available.

4.2.1.2 Concluding observations/recommendations:

Overhauling the Act

- The World Conference against Racism in its Durban Declaration and Programme of

Action "Urges States to adopt and implement, or strengthen, national legislation and administrative measures that expressly and specifically counter racism and prohibit racial discrimination, xenophobia and related intolerance, whether direct or indirect, in all spheres of public life, in accordance with their obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, ensuring that their reservations are not contrary to the object and purpose of the Convention"³⁸.

- The Committee on the Elimination of Racial Discrimination in its 2008 observations expresses its concern that the 1998 Racial Discrimination Prohibition Amendment Act restricts the scope of the original law regarding the prohibition of hate speech by limiting the possibility to prosecute such acts only as *crimen injuria* and recommends that Namibia reviews its law in order to prevent, combat and punish hate speech with a view to upholding the provisions of the convention³⁹.
- The Committee in its 2016 observations, reiterates its concern that the definition of racial discrimination in the 1991 Act is still not in line with article 1 of the Convention and that amendments to the 1998 Amendment Act have not yet been finalized and adopted. The Committee recommends that Namibia brings its domestic law in line with the Convention including the definition of racial discrimination and that the definition of hate speech, as revised in the amended Act, is fully in line with article 4 and that it includes all groups recognized in article 1 of the Convention⁴⁰.
- The Committee on Economic, Social and Cultural Rights in its 2016 observations notes with concern that Namibia, in its Constitution, prohibits discrimination on only a limited number of grounds and recommends that marital status, political or other opinion, HIV status, disability, sexual orientation, language, property, birth, age, etc. be included in article 10 of the Constitution or other appropriate legislation⁴¹.

The need for an alternative court system

An alternative court system for reasons and incorporating proposals as mentioned below, should be considered:

- It is clear that the current legal framework does not provide sufficient protection of a person's rights to equality and dignity and equal access to our courts. The formal adversarial, expensive and potentially intimidating court proceedings that prevail in our courts may act as a barrier to those seeking justice.
- The huge backlog of criminal cases on the lower courts' roll and the unending postponement of cases often resulting in long delays, discourage victims of racism and racial discrimination to seek justice in our courts.
- We need a user-friendly court environment where proceedings are conducted along inquisitorial lines with the emphasis on informality, participation and the speedy processing of matters. Victims of racism, hate speech, tribalism, etc. want "instant justice".
- The court environment must create a space for perpetrator and victim to tell their stories so that systemic inequality, racism, hate speech, racial discrimination, etc. which seem to have survived apartheid, may be eradicated.

- We need an environment where lawyers are not needed, but where “*simple justice between man and man*” will prevail. In such an environment the parties will meet not in a court room, but in an informal room where the presiding officer would listen to both sides and come to a conclusion. The complainant has to prove his/her case only on a balance of probabilities and not beyond reasonable doubt.
- A tribunal which will provide easy access to justice to the most disadvantaged to seek speedy redress against discrimination on grounds of disability, HIV status, age, political affiliation, gender, religion, etc.
- Lawyers, assisted by well-trained clerks, should preside over the proceedings in offices at magistrate courts which are already established all over the country and where physical access will not be an issue.
- The South African experience with their Promotion of Equality and Prevention of Unfair Discrimination Act, no 4 of 2000 (Equality Act) with its equality courts as enforcement mechanism, is a good example to imitate. The Equality Act confirms the link between dignity interest and the right to equality in its prohibition of “*unfair discrimination*”⁴², *hate speech*⁴³, *harassment*⁴⁴ and *dissemination and publication of information that unfairly discriminates*⁴⁵.
- Racial slurs such as ‘*kaffer*’, ‘*kaffermeid*’, ‘*hotnot*’, ‘*boer*’, etc which are highly offensive and inflicting racial abuse, should not be prosecuted as *crimen injuria*, but as hate speech⁴⁶. The same applies to calling a person a ‘*baboon*’ or ‘*monkey*’, words which have racial undertones and from which it can be inferred from the use of the word that the person being called such is of subhuman intelligence and not worthy of being described as a human being⁴⁷.

The panel wishes to draw the attention of the Ministry of Justice to the importance of the above recommendations and requests the Ministry to provide the Ombudsman within six months after receipt of this report, with detailed information on the measures the Ministry intends to take to implement the above recommendations.

4.2.2 Derogatory Expressions and Racial Slurs

4.2.2.1 Introduction:

Racial name-calling or racial slurs, stereotyping or racial profiling of a person, is not only highly offensive and humiliating, but it also constitutes a violation of a person’s right to dignity and equality. Such utterances and their effect are to be viewed against the background of our history of racism and racial abuse. People often offend, stereotype and perpetuate imbalances on the ground of race through interaction with others fuelled by prejudice that has been passed on from generation to generation.

Under the Identification of Persons Act and Proclamation AG 8 of 1980 (*supra*) every person was deemed to be a member of one of the eleven population groups by operation of the law and not by free choice (emphasis added). Twenty seven years after the fall of apartheid, we persist in classifying ourselves as Wambos, Damaras, Coloureds, Whites, etc. or allow others to classify us as such.

4.2.2.2 Summary of submissions/presentations:

- It was pointed out that people living in Katutura are still said to live in the Owambo location, Damara location, Herero location, etc;

- it was alleged that a rugby club filed complaints of racism, where players of a white club called their opponents “kaffers”. Apparently the NRU failed to take action against the perpetrators;
- an incident of a similar nature happened in 2013 where a Namibian rugby player called a Moroccan player a “kaffer” and apparently “the sanction on a guilty verdict was no more than a joke”.

4.2.2.3 Concluding observations/recommendations:

There is an urgent need for “unlearning” racist language and dismantling of fixed identities through radical change. However, changing entrenched patterns of behaviour is hard, but not insurmountable; old patterns of behaviour must be “unlearned” and be replaced by new patterns of behaviour. If we are serious about breaking old patterns, we should ask ourselves where does change start or where can it begin. Meaningful change should start or begin with oneself.

To counter verbal abuse we have to engage a creative language that is itself dissident. We must purposefully engage language on the side of the common good, without levelling it to an economy of classification, reclassification and stereotyping⁴⁸.

The panel is of the opinion that racist language can only be “unlearned” if we can manage to substitute it with the use of creative language. In this regard, the panel recommends that creative language use as an antipode against derogatory expressions and racial slurs should be included in the language curricula of primary, secondary and tertiary institutions and should include, but not necessarily be limited to, the following:

In creative language we should refrain from calling a person –

- blind; instead of visually impaired;
- deaf; instead of hearing impaired;
- dumb/mute, instead of speech impaired;
- disabled; instead of a person with disability;
- mad; instead of mentally challenged;
- moffie; eshenge; moffiegell; Ode or sao!o; Otjikazecure (Otjikaendu, rumendu, Otjikala); instead of lesbian, gay, bisexual, transgender or intersex (LGBTI);
- boesman; instead of San.

In creative language we should stop referring to our residential areas as –

- “Wambo lokasie”, “Damara lokasie”; “Herero lokasie”, “Gemengde lokasie” or “Tswana block” etc.; instead, the residents of these areas should come up with appropriate names and approach the City of Windhoek for the necessary name changes.

In creative language we should stop classifying ourselves or allow others to classify us as –

- Basters, Boesmans, Caprivians, Coloureds, Damaras, Hereros, Kavangos, Namas, Owambo’s, Tswanas, Whites (the “population groups” established by AG 8 of

1980); instead we should “*promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation.....*”⁴⁹

In creative language we should stop calling people –

- “*baboons*” or “*monkeys*” because they are dehumanized when called animals and relegated to subjects of low intelligence;
- “*kaffer*”, “*kaffermeid*”, “*hotnot*”, “*boer*” or any of their variations, because such insults are humiliating and demeaning; they directly impact on the human dignity of persons, which is in contravention of the Constitution and can be termed “*hate speech*”.

4.2.3 Disability

4.2.3.1 Introduction:

Disability is not listed under article 10 of the Constitution as one of the prohibited grounds of discrimination. The Racial Discrimination Prohibition Act prohibits and criminalizes discrimination only on the grounds of colour, race, nationality or ethnic or national origin.

Namibia is a State party to the UN Convention on the Rights of Persons with Disabilities (CRPD) and it must submit to the Committee on the Rights of Person with Disabilities an initial report on measures taken to give effect to its obligations under the Convention and the progress made in that regard, with subsequent reports every four years. Namibia’s initial report was due in June 2010 (7 years overdue).

However, long before the adoption of the CRPD by the UN General Assembly, the National Assembly adopted in July 1997, the National Policy on Disability. To give expression to the Policy, Namibia enacted the National Disability Council Act, no 26 of 2004, which has the National Policy on Disability set out in the Schedule.

The Policy is highly commendable; it addresses every aspect regarding the rights of persons with disabilities (PWDs), i.e. access to rehabilitation, information, education, employment, language, social welfare and housing, employment, environment, social, economic and legal protection, etc.

Although the policy was adopted way back in 1997, many of its promises remain unfulfilled. The sad reality is that the National Disability Council fails to comply with its statutory duties under the Act and Policy. For these and other reasons, it was decided to include “*disability*” in the public hearings to hear from people with disabilities themselves and others of the extent of discrimination against PWDs and to make the necessary recommendations.

4.2.3.2 Summary of submissions/presentations:

Oral and written submissions revealed that –

- the number of PWDs increased from 42 932 in 1991 to 85 567 in 2001 and 98 413 in 2011, of whom 51 125 were females and 48 288 were males;
- there is a general failure by both the public and private sector to eliminate obstacles and barriers to accessibility to buildings, roads, transport, indoor and outdoor facilities, schools, housing, medical facilities, work places, etc.

The opinion was also generally expressed that:

- the terminology used to refer to PWDs is not only offensive but also derogatory; i.e. *“the deaf one”, “the mute”, “dumb” or “blind one”*;
- PWDs are denied access to services (clinic, hospital, bank etc.) due to a lack of skilled sign language interpreters;
- PWDs are also denied access to services that could assist and support their *‘normalization’*, i.e. there is no early identification, no early intervention, not nearly enough therapists and specialized professionals;
- PWDs are denied access to information due to lack of visual, videotape material in Braille and large print;
- PWDs are denied access to tertiary education due to lack of skilled and permanently employed sign language interpreters, as well as the lack of differentiation between academic and vocational streams at schools;
- PWDs are denied access to education due to a lack of specialized schools, eg. visually impaired learners in the mainstream are *“forced to look at the blackboard because learning material for them is too expensive”*;
- PWDs do not enjoy equal employment opportunities and no reasonable measures are taken to accommodate the limitation of PWDs;
- PWDs do not have equal access to land and do not benefit from the mass housing project;
- PWDs appealed the need for direct inclusion and not indirect, as provisions made are not considered from the beginning to include PWD in national developmental projects;
- there is a lack of understanding of the plight of PWDs regarding inclusiveness, due to the misconceptions, attitudes and misinformation by society;
- high unemployment rates due to a lack of equal employment opportunities;
- there is a lack of, or minimal legal regulations that promotes the awareness and inclusion of PWDs in service provision and in socio-economic developmental programmes;
- the current national programmes and services are facing a huge challenge as there are no mental health services that would assist PWDs, their families and the broader nation in understanding the importance of supporting and including diverse persons within our communities. It is also imperative to note that HIV services for PWDs are minimal and/or non-existent;
- lack of access to equal sport opportunities continues to impede on PWDs as very little resources are availed.

4.2.3.3 Concluding observations/recommendations:

Committee on the Rights of the Child (2012)⁵⁰

The Committee reiterates its previous concern regarding the discrimination against children with disabilities (CRC/C/15/Add.14, paras. 7 and 15) and that the State party continues to adopt a social welfare approach to disability. The Committee notes that the State party provides grants for children with disabilities; however, it notes with concern that only 10 per cent of them are receiving the disability grant. The Committee is particularly concerned that:

- (a) children with disabilities, especially girls and those living in rural areas, continue to face multiple forms of discrimination and serious obstacles to the full enjoyment of their rights, including limited access to education, health care and other social services;

- (b) the establishment of different structures and policies, in particular the National Disability Council and the National Policy on Disability of 1997, have not resulted in sufficient coordinated and concerted actions for children with disabilities. While noting that the National Disability Council is tasked with monitoring the implementation of the National Policy on Disability, the Committee regrets the lack of information on the Council's monitoring activities in the State party's report.

Recalling its general comment No. 9 (CRC/C/GC/9 and Corr.1, 2006), the Committee urges the State party to adopt a human rights-based approach to disability and specifically recommends that it:

- (a) develop holistic and coordinated programmes across ministries on the rights of children with disabilities;
- (b) ensures that children with disabilities are able to exercise their right to education, and provide for their inclusion in the mainstream education system to the greatest extent possible, including by providing teachers with special training, by increasing facilities for children with disabilities and by making schools more accessible;
- (c) provide effective remedies in cases of violations of the rights of children with disabilities, and ensure that those remedies are easily accessible to all children with disabilities, including girls and their parents and/ or other caregivers;
- (d) promptly implement the wide range of policy and administrative recommendations provided by the Health and Social Services System in 2008, including changes to the national health-care system in order to improve health care services for persons with disability; in addition, the State party should strengthen efforts to ensure that necessary professional (i.e. disability specialists) and financial resources are available, especially at the local level, and promote and expand community-based health services programmes, including to parents, caregivers and parent support groups;
- (e) conduct awareness-raising and educational campaigns targeting the public at large and specific groups of professionals with a view to preventing and eliminating de facto discrimination against children with disabilities.

Report of the Special Rapporteur on Extreme Poverty on her mission to Namibia (2012)⁵¹

The Special Rapporteur urged government to -

- (a) ensure that national legislation is in line with the obligations of Namibia under the Convention on the Rights of Persons with Disabilities;
- (b) take appropriate measures to ensure that persons with disabilities have equal access to transportation, information and communications; progressively remove barriers to accessibility in buildings, roads, transportation and other facilities, including schools, medical centres and workplaces;
- (c) effectively implement the National Policy on Inclusive Education and provide the human and financial resources necessary to make this policy a reality; ensure access to free primary education to all children with disabilities;
- (d) improve health-care services for persons with disabilities, particularly community-based health services programmes.

Committee on Economic, Social and Cultural Rights (2016) ⁵²

- The Committee is concerned that children with disabilities are disadvantaged in accessing education and that very few persons with disabilities are engaged in gainful employment, as a result of a lack of both enabling policies and resources. The Committee is also concerned that barriers to accessibility of persons with disabilities have been not eliminated. Moreover, the Committee is concerned that persons with disabilities are not accessing the grants available to them, since they have not been made aware thereof by the State party (art. 2 (2)).
- The Committee recommends that the State party:
 - (a) allocate resources for the implementation of the Sector Policy for Inclusive Education, especially for ensuring access to inclusive education outside urban areas;
 - (b) implement special measures, as provided for in the Affirmative Action (Employment) Act, to promote the employment of persons with disabilities;
 - (c) allocate the resources necessary for ensuring accessibility and availability of public goods and services and for the provision of reasonable accommodation to persons with disabilities, in law and in practice;
 - (d) ensure that persons with disabilities obtain the grants to which they are entitled.

The panel wishes to draw the attention of the Office of the Vice President: Veterans, Marginalised and Disability Affairs and the Ministry of Education, Arts and Culture to the importance of above recommendations and requests them to provide the Ombudsman within six months after receipt of this report, with detailed information on the concrete measures taken to implement above recommendations and those following below. The Office of the Vice President: Veterans, Marginalised and Disability Affairs must ensure that:

- committed and competent persons are appointed to the National Disability Council (the Council);
- the Council diligently monitors the implementation of the Policy; in particular, the Council to instruct Permanent Secretaries to comply with their statutory duty under section 17(1), in submitting annual reports on the implementation of the Policy by his or her Ministry and ensure that copies of these reports are kept open for public inspection at the Council's head office (section 17(2));
- legislation is enacted to combat discrimination against PWDs;
- the needs of PWDs are incorporated in all existing and new legislation dealing with education, employment, building codes, sport and recreation, housing, transport, telecom/communication and all other sectors serving the public;
- all government ministries and the private sector make their information and documentation accessible to PWDs, e.g. for the visually impaired or partially impaired, this information should be converted into Braille and in large print or made available on audiotapes/CDs;
- that inclusive schools recognize and respond to the diverse needs of their students by accommodating the different styles and rates of learning; and ensuring quality education to all through teacher training, appropriate curricula, teaching material, resources, etc.;
- mandatory standards and guidelines are developed to make the physical environment accessible to all PWDs;
- the specific needs of PWDs are considered at all levels of the health care system;

- special target groups, like women with disabilities, elderly people with disabilities and PWDs living in rural areas do not fall out of society, but remain integrated; to ensure that they are first in line for social housing, receiving a higher amount in social grants, etc;
- programs are designed and developed for awareness raising, better public understanding of disability issues, changing public attitudes, etc.;
- undertake a national survey on the status of PWDs in order to have the correct statistics of the number of PWDs in Namibia.

The Ministry of Education, Arts and Culture must:

- ensure physical access to school buildings; physical barriers, like staircases, narrow doorways, inappropriate seating or inaccessible toilets should be addressed and removed in order to educate children with disabilities in regular classrooms with their peers;
- make teachers aware of their responsibilities towards all children and build and improve their skills for teaching children with disabilities. It should have special emphasis on teachers in rural areas where there are fewer services for children with disabilities;
- consider introducing teachers assistance to provide special support to children with disabilities, while ensuring that this does not isolate them from other learners;
- ensure that the principles of inclusion are built into teacher training programmes, which should be about attitudes and values, and not just knowledge and skills. This will ensure that mainstream teachers are confident and competent in teaching children with diverse educational needs;
- establish and implement standardized methods to measure and track education performance of children with disabilities;
- commit resources to eliminate where there exists inequalities in education outcomes for children with disabilities;
- consider establishing financial assistance programmes designed to enable children with disabilities to attend institutions of higher learning.

4.2.4 Education

4.2.4.1 Introduction:

The right to education is guaranteed by article 20 of the Namibian Constitution. On a regional level this is protected by article 17 of the African Charter on Human and Peoples' Rights and by article 11 of the African Charter on the Rights and Welfare of the Child. The right to education is also recognized internationally, in particular by article 13 of the United Nations International Covenant on Economic, Social and Cultural Rights. Importantly, in the latter Covenant which Government has ratified, State parties are compelled to ensure general availability and accessibility of all levels of education with the progressive introduction of free secondary and higher education. At this stage Government has interpreted such right to include free education, first on primary level in 2014 and then subsequently on high school level as from 2016. From the above, the framework for a functional education system appears to be in place. It is however, still necessary to translate such framework into a practical education environment that will cater for the needs of each and every learner. This report cannot deal with all the concerns relating to education and the youth but will focus only on the issues of discrimination, racial and otherwise, and tribalism within the education system.

4.2.4.2 Summary of submissions/presentations:

The following submissions/presentations were made by pupils from participating schools, hence it cannot be construed to be the case in all schools:

- Racism was not experienced in school, but this was still a reality outside the school;
- discrimination from people of different races and genders have become the norm and the fact that it is not discussed is causing anger;
- racism is experienced on the sports field when playing against different schools;
- social media is used as a platform for racially driven arguments;
- in the informal structures at school, children of different races tend to only associate with one another;
- the opinion was raised that there was not just a huge gap between government and private schools, but also between historically white government schools and historically black/coloured government schools;
- government schools generally only offer historically “*black sports*” such as basketball and soccer;
- learners from the LGBTI community are targeted due to a lack of understanding and appreciation for diversity;
- tribalism was raised in the context that learners who do not belong to the same tribe as their teachers are treated differently, and not in a positive way;
- lack of national documents prevent some indigenous children from accessing State assistance and enrolment in schools.

4.2.4.3 Concluding observations/recommendations

From the context and the inputs made by the learners, it is apparent that concerns exist on different levels. Although the private schools may have the resources required due to the ability of their parents to pay for them, these resources do not address the innate sense of difference which was indicated in the presentation by the learners of one school and resulting in different cultures sticking together. This was seen as being normal. It is this very sense of normality that must be addressed. It should not be considered normal to keep to one’s own just because there is some safety in this practice. Diversity is precious and must be nurtured and understood.

In addition to discrimination on the level of culture and race, economic disparities further discriminate against those learners whose parents cannot afford to send them to private schools, which after all, should not be a requirement to obtain a good education. It is not necessary for every learner to have access to an iPad but real education requires good teachers and basic resources.

From the inputs made it is clear that children who do not conform to the established gender norms of society face additional discrimination. Once again, understanding and education comes into play, both in homes, communities and schools.

The panel was reminded that granting equal access to education for all can never have the desired result of equality of opportunity if the children come from unequal backgrounds, some having to work after school or not have access to electricity to study.

The Committee on Economic, Social and Cultural Rights (2016)⁵³

While noting the State party’s plan to introduce teaching in children’s home language, the Committee regrets the lack of information on other measures taken to promote

the cultural rights of the groups contributing to the State party's cultural diversity, especially in light of reports of discriminatory attitudes towards children from certain groups (art. 15)

The Committee recommends that the State party: (a) promote the culture of various groups that make up its population, including by teaching their histories and culture in school; (b) promote the preservation of the traditional way of life of the various ethnic and language groups; (c) combat prejudice and eliminate discrimination; and (d) provide not only teaching in children's home language but also curricula and school environments that are culturally appropriate. The Committee refers the State party to its general comment No. 21 (2009) on the right of everyone to take part in cultural life.

Durban Declaration and Programme of Action (DDPA)

The DDPA urges States -

- to intensify their efforts in the field of education, including human rights education, in order to promote an understanding and awareness of the causes, consequences and evils of racism, racial discrimination, xenophobia and related intolerance;⁵⁴
- to introduce and, as applicable, to reinforce anti-discrimination and anti-racism components in human rights programmes in school curricula, to develop and improve relevant educational material, including history and other textbooks, and to ensure that all teachers are effectively trained and adequately motivated to shape attitudes and behavioural patterns, based on the principles of non-discrimination, mutual respect and tolerance;⁵⁵
- to strengthen the human rights training and awareness-raising activities designed for immigration officials, police and staff of detention centres and prisons, local authorities and other civil servants in charge of enforcing laws, as well as teachers, with particular attention to the human rights of migrants, refugees and asylum-seekers, in order to prevent act of racial discrimination and xenophobia and to avoid situations where prejudices lead to decisions based on racism, racial discrimination, xenophobia or related intolerance.⁵⁶

Human Rights Committee (2016):⁵⁷

While noting the measures taken to eliminate discrimination, the Committee is concerned that protection against discrimination is insufficient. The State party should conduct extensive education and awareness-raising campaigns involving and targeting traditional leaders and the general public, both children and adults, to eliminate all forms of discrimination.

The panel wishes to draw the attention of the Ministry of Education, Arts and Culture to the importance of the above recommendations and wishes to request the Ministry to provide the Ombudsman within six months after receipt of this report with detailed information on the concrete measures taken to implement above recommendations.

The panel further recommends that -

the Ministry of Education, Arts and Culture ensures that schools:

- incorporate the fight against racism, racial discrimination, intolerance and tribalism, as well as respect for diversity into the school management policies;
- adopt and enforce a code of conduct against racism, racial discrimination, intolerance and tribalism for learners and staff;

- monitor key statistics on children from minority groups, such as school attendance, drop out and academic performance;
- actively promote equality through awareness raising campaigns targeted at all learners and their families;
- teach learners to use social media as a method of learning how to combat racism, racial discrimination, intolerance and tribalism;
- create cultural opportunities for learners to take part in exchange programmes with learners from other regions, cultures and backgrounds to appreciate more adequately the diversity and plurality of society;
- are provided with facilities in rural areas which are on par with those in urban areas, while sufficient funds and other resources should be provided to enable all schools to operate effectively and on the same level.

The Ministry should further ensure that –

- a national school curricula are directed to incorporate the full development of all learners to ensure that they are adequately prepared for adult life;
- teachers are made available who can teach primary school learners in their respective mother tongues.

4.2.5 Employment

4.2.5.1 Introduction:

The Namibian Constitution guarantees to all persons the right to practice any profession, or carry on any occupation or business, but it does not guarantee the right to work. However, Namibia is a State party to the Covenant on Economic, Social and Cultural Rights under which Namibia recognizes the right to work and the right of everyone to the enjoyment of just and favourable conditions of work which ensures, *inter alia*.⁵⁸

- fair wages and remuneration for work of equal value without distinction of any kind;
- equal opportunities for everyone to be promoted in his/her employment to an appropriate higher level, subject to no consideration other than those of seniority and competency.

Namibian workers are guaranteed protection under the Labour Act 11 of 2007, but the high unemployment rate remains a serious concern in Namibia.

The drafters of our Constitution directed the National Assembly to enact legislation “*providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in Namibia, arising out of discriminatory laws or practices...*”⁵⁹

To give expression to the directive of the Constitution, the National Assembly enacted the Affirmative Action (Employment) Act, no 29 of 1998 with its overall objective to guide employers to eliminate barriers against persons in designated groups so as to ensure that no person shall be denied an employment opportunity for reasons unrelated to ability.

4.2.5.2 Summary of submissions/presentations:

- The oral and written submissions revealed that employment in the public sector is apparently “reserved” and “meant” for one tribe only.
- The allegation was made that:
 - > in the Ministry of Defence, Home Affairs and Works as well as the Namibian Police Force, more than 80% of the workforce are taken from certain groups;
 - > this is the same for cleaners, security officers and messengers in the different Ministries as well as the VIP Protection officers at State House and elsewhere;
 - > when it comes to scholarships for further studies or the appointment of Namibians at diplomatic missions, once again more than 80% of the recipients or appointments are from one particular group.
- The opinion was expressed that Nama kids will never get jobs; the struggle kids are pushed into jobs without the vacancies being advertised. Only a part of the nation is trained, and they come from one tribe only.
- It was alleged that the struggle kids get employment, while the marginalized are used for voluntary jobs without payment.
- It was also alleged that:
 - > a non-Khwe Grade 10 drop-out is employed but a Grade 12 Khwe is not employed because it is said that a Khwe cannot teach;
 - > unemployment among the San Community is very high and they do not benefit from the affirmative action policy;
 - > San people are only farm workers, they are exploited and not even paid the minimum wage.
- Recruitment of workers for the road construction in the Kunene Region was also discriminatory; while the agreement was that persons from both regions should be recruited, only Ovambos were employed.
- The allegation was made that uneducated persons are discriminated against, e.g. interviews for cleaner or driver positions are conducted in English and one may fall out despite having the skills. One is discriminated against because he/she cannot speak English.
- The opinion was expressed that in the Namibian context, it is apparent that racism continues to influence employment decisions, especially in the private sector. It is said that:
 - > the latest workforce profile statistics from employers' affirmative action reports revealed that progress towards equity in employment has been slow and the top echelon in most business sectors remained unacceptably skewed in favour of white employees;
 - > the continuous marginalization of the previously racially disadvantaged and their appointment to lower level jobs where pay and benefits are generally poor, perpetuates the income inequities along the racial divide;
 - > it appears that management of white owned businesses in the private sector

- is reluctant to appoint black people to positions at the higher echelon of their business structures for reasons unrelated to occupational suitability;
- > the unavailability of skilled and suitably qualified persons from designated groups that is frequently cited by employers as reasons for the continuous under-representation, and in some cases absence, of black people at the top levels of their workforce profiles is no longer palatable;
 - > the income gap along racial lines in Namibia is real. The apparent resistance to offer black people better employment opportunities where remuneration is commensurate with their levels of responsibilities does not help to close the income gap that is regrettably defined along the racial divide.

4.2.5.3 Concluding observations/recommendations:

The panel supports the following concluding observations/recommendations:

The Committee on Economic, Social and Cultural Rights (2016)⁶⁰

The Committee notes with concern the persistently high unemployment, especially among the youth and women, and the large informal economy in the State party, in spite of stable economic growth (art. 6).

The Committee recommends that the State party:

- (a) place the realization of the right to decent work at the heart of such policies as the national employment policy and the industrial policy;
- (b) prioritize investments in sectors that are labour intensive;
- (c) undertake urgent reform and diversification of the vocational and technical training offers;
- (d) promote the creation of employment in the formal economy and the regularization of the informal economy by removing regulatory barriers and by supporting small businesses in meeting the cost of social and fiscal contributions;
- (e) provide specialized services to assist and support individuals in identifying and finding available employment;
- (f) improve, as soon as possible, its data collection system on unemployment as a tool for combating that phenomenon effectively, by conducting the labour force survey as frequently as possible and generating data disaggregated by factors related to the most disadvantaged and marginalized groups.

The Committee notes with concern that the State party does not have a statutory minimum wage applicable to all sectors, in spite of the existence of minimum wages established under collective agreements in four industries (art. 7).

The Committee recommends that the State party introduce a statutory minimum wage, indexed to the cost of living, applicable in all industries, which enables a decent living for workers and their families.

The African Commission on Human and Peoples' Rights (2016)⁶¹

The Commission recommends that -

- Namibia should monitor and evaluate the legislative and policy framework to ensure the effective implementation of the right to employment, especially the women and youth and to reduce poverty levels;

- the labour inspectorate be equipped with the necessary human and financial resources for the effective application of the Labour Act of 2007 and other relevant enactments;
- the goal of equal employment opportunities is not likely to be attained unless designated employers move a step further to foster a culture which is primarily concerned with interpersonal and inter-group communication and relationships at the workplace;
- they should promote mutual respect and actively confront prejudice, stereotypes and discriminatory practices;
- it is therefore important that employers realize and understand that it is fundamentally important that their human resource development strategies are inspired by the goals of diversity management, transformation and efficiency;
- employers should be encouraged to make every effort to promote diversity in the workplace and that the working environment is free from racial stereotypes and any form of prejudice.

The panel wishes to draw the attention of the Ministry of Labour, Industrial Relations and Employment Creation to the importance of the above recommendations and requests the Ministry to provide the Ombudsman within six months after receipt of this report, with detail information on the concrete measures taken to implement above recommendations and those following below.

The Labour Commissioner plays a crucial role in the implementation of policy and law to combat discrimination in employment. Therefore the Labour Commissioner should:

- create awareness among employers and employees of the prohibition of discrimination in employment (section 5(2) of the Labour Act) and the remedies available to victims (section 7);
- develop and disseminate programmes and strategies to eliminate discrimination in employment;
- provide support to victims of discrimination;
- speedily resolve, through mediation, arbitration or conciliation, disputes relating to discrimination in employment; if it fails, to assist workers who wish to enforce their rights through the courts, to apply for legal aid.

The Employers Federation of Namibia and the Namibia Chamber of Commerce and Industry are requested to disseminate the following recommendations to all their members. Employers should -

- ensure that job advertisement, interviewing and testing procedures are free from bias and specifically include PWDs;
- review qualifications and experience requirements to ensure that they are relevant to the job;
- train senior and middle management to become aware of the many ways in which discrimination can be manifested in the workplace;
- cooperate with trade unions and other workers' representatives to develop procedures to deal with racial discrimination and other forms of discrimination including sexual harassment;
- take steps to broaden the pool of candidates for jobs among previously disadvantaged groups, especially for women, people with disabilities and indigenous people;
- increase the rate at which suitably qualified members of previous disadvantaged groups are hired; and
- speed up their promotion prospects.

The Employers Federation of Namibia and the Namibia Chamber of Commerce and Industry must inform the Ombudsman within six months after receipt of this report, what means were used to raise awareness of the recommendations among their members and the measures taken by their members to implement the recommendations.

4.2.6 Health

4.2.6.1 Introduction:

The right to health is not specifically protected by the Bill of Rights in the Constitution but it forms part of the Principles of State Policy which in Article 95 promotes the welfare of the people. Article 95 confirms that there should be government policies which focus on every citizen's right to 95(e) "*fair and reasonable access to public facilities and services*" and 95(j) "*an acceptable level of nutrition and standard of living of the Namibian people*" and that there must be efforts made to "*improve public health*".

This premise in the Constitution is further underlined by the recognition of the right to health in article 12 of the United Nations International Covenant on Economic, Social and Cultural Rights which States that everyone has the right to the highest attainable standard of physical and mental health and that each country that has ratified the Covenant, which Namibia has, must take steps towards achieving the full realization of these rights. The right to health is further confirmed in a number of other international instruments to which Namibia is a party.

This exercise cannot deal with the many issues that relate to access to healthcare but must concentrate solely on how racial discrimination, tribalism and other forms of discrimination affects such access to health, if in fact they do.

4.2.6.2 Summary of submissions/presentations:

Unfortunately the panel was not favoured with many contributions focusing only on the right to health, but a number of contributions included challenges faced in addition to other matters raised, as follow:

- The youth are not accommodated respectfully in the health sector, therefore discrimination on the basis of age;
- the youth are turned away when they wish to access contraception and are denied access to condoms with the admonishment that they are too young for sex;
- key populations have special health needs (lubricants, condoms, PREP and PEP) and yet they are often denied services at health facilities due to prejudices even though the Namibian Patient Charter explicitly states that there should be no discrimination based on gender or sexual orientation;
- there are specific offices where ARVs are dispensed, thus making it obvious to all present why the patient is there;
- a comment from a visually impaired person was that he was ridiculed and laughed at when asking for condoms at a clinic;
- written information is not available in braille and physical access to some health facilities are problematic;
- due to a lack of information and distance from health centres, babies who are for instance born with club foot, which can be addressed if done within 6 weeks from birth, do not get the treatment required in a timely manner.

- it was mentioned that there is a perception that certain regions of the country are graced with better public services and are prioritized in terms of development based on the tribe which is predominant in such region;
- a member of the San Community advised that clinics and hospitals are too far away for the San to access them meaningfully;
- they do not have the money for transport and even if they do manage to get there, they have to describe their ailments in English which they cannot do; they will therefore just point to the general area of pain and hope for the best;
- more generally, it was stated that access to ARVs and other treatment are compromised by medicine stock outs, distance to facilities, lack of sanitary pads keeping school girls out of school and lack of potable water and sanitation which affects public health.

4.2.6.3 Concluding observations/recommendations:

According to the National Human Rights Action Plan, the vision for the right to health is a *“Namibia where every citizen enjoys access to quality, affordable and accessible health care towards attaining and sustaining highest standards of physical and mental health.”*

In Namibia, according to the UNFPA Namibia representative, *“18% of women have an unmet need for contraception, while 19% of adolescent girls (15-19 years old) have begun childbearing, with some regions reporting proportions of more than 36%. When a woman becomes pregnant, but has no access to quality antenatal care or has to deliver on her own, without the help of a midwife, her health, as well as that of her new born, is at risk. Tackling inequalities in sexual and reproductive health, reaching the furthest behind first, is a good place to begin”.*

It is not overly dramatic to say that the right to health is under severe threat in Namibia. Public institutions are facing budget cuts and this had a major impact on the facilities that can be offered by the health services Ministry. The daily newspapers, on any given day, will feature complaints in the sms pages or have an article on a concern faced within the hospitals or clinics.

In the current economic climate it is a reality that a large majority of our people cannot afford private health care. They have no choice but to utilize public health services and they have the right to a level of care that is of acceptable standard. There should never be a time when sick people are lying on mattresses on the floor, men and women mixed, not fully clothed with their belongings and food on the floor next to them, as one member of the public testified.

Therefore the NHRAP's vision is commendable and can be aligned to international standards, but if compared to the input of only a very small number of persons as referred to above it is clear that we are very far from attaining that ideal. Not only that, but a number of communities face greater challenges than is the norm when coming into contact with the public health services.

Accessibility is also clearly a concern given the vast regions of Namibia and in a number of cases affordability not only impacts on the actual health services to be attained, but on the fact that the distance to such clinic or hospital cannot be travelled due to a lack of funds to pay for transport. Accessibility is also impacted by language barriers and prejudice towards certain members of society who then consider it less painful to avoid the health services altogether.

Committee on Economic, Social and Cultural Rights (2016)

- While noting with appreciation the Statement by the delegation that no one could be refused health-care services because of an inability to pay, the Committee is nonetheless concerned at high maternal and infant mortality rates among low-income groups. Moreover, the Committee expresses concern at the limited availability of health services in rural and remote areas, in spite of improvement in access achieved during recent years. The Committee also expresses concern at the inequality in access to quality health services, with services of better quality in private facilities (art. 12).
- The Committee recommends that, while implementing the National Health Policy Framework 2010-2020, the Namibia Child Survival Strategy 2014-2018 and other relevant policies, the State party:
 - (a) ensures that the increase in the allocation and use of funding to improve access to the health system bridges the gap in health outcomes, such as declining infant and maternal mortality rates, between the wealthiest and the most disadvantaged groups;
 - (b) invests in improving access to quality health services, including secondary health care, for those in rural and remote areas.
- The Committee draws the attention of the State party to its general comment No. 14 (2000) on the right to the highest attainable standard of health.
- While noting the progress achieved, the Committee is concerned that, although HIV/AIDS remains an underlying cause of mortality for a certain number of diseases, 15% of individuals living with HIV/AIDS still do not have access to anti-retroviral treatment and 35% of HIV-positive pregnant women have not received treatment. The Committee is also concerned that the procedures in place requiring written consent prior to sterilization have not prevented sterilization being performed on non-consenting women (art. 12).
- The Committee recommends that, while implementing the National Policy on Sexual, Reproductive and Child Health, the State party take the following into account:
 - (a) focus efforts on delivering services to the HIV-positive individuals who currently do not have access to anti-retroviral treatment;
 - (b) make condoms available in prisons to further efforts to contain the spread of HIV/AIDS;
 - (c) implement measures for clearly defining the requirement of free, prior and informed consent with regard to sterilization, as recommended by the Committee on the Elimination of Discrimination against Women; and
 - (d) raise awareness among medical personnel of that requirement. In that regard, the Committee refers the State party to its general comment No. 22 (2016) on the right to sexual and reproductive health.

The panel recommends the following to address some of the issues raised:

The Ministry of Education, Arts and Culture should –

- include information on sexuality and sexual and reproductive health in school curricula within a space of sensitivity to cultural backgrounds;
- arrange for all schools to stock sanitary pads which can be provided to female learners.

The Ministry of Health and Social Services should –

- provide focal points at clinics to deal with the queries and needs of the youth when it comes to family planning, without any form of judgement;
- train health workers from all tribes to ensure that there are sufficient persons versed in all the languages of the country;
- increase the use of mobile clinics and health extension workers to provide services to outlying areas. The mobile clinics should be staffed by health workers who are conversant in the language(s) of the people whom they serve;
- access to comprehensive health care is made available and affordable for the San people;
- ensure that hospitals/clinics do not run out of ARVs – this is non-negotiable given the negative effects on persons living with HIV/AIDS;
- print pamphlets in all languages to explain what club foot is and how it can be addressed; health extension workers must be sensitized to speak to pregnant women about this and to facilitate the speedy referral for correction;
- embark on a public education campaign to address all forms of stigma; the campaign should include electronic and printed media adverts, pamphlets, newspaper inserts, etc.

4.2.7 Indigenous People

4.2.7.1 Introduction:

The history of environmental policies in South Africa (including Namibia) is a cruel one. Under colonial and apartheid governments, black people were forcibly removed from their ancestral land to make way for game parks and billions were spent on preserving wildlife and protecting wild flowers while people in ‘townships’ and ‘homelands’ lived without adequate food, shelter and clean water. In short, wildlife and wild flowers/plants were often considered more important than humans.⁶²

Prof Hinz comments as follows:

“The history of nature conservation in colonial and post-colonial Africa went through various stages. After exploration and exploitation, preservation was the principle that governed conservation policies for many years. Preservation was defined as the complete insulation of wildlife and their habitat from human interference. In many instances, people were moved from their ancestral lands, without any rights, not even visiting rights to sacred locations. In many cases, their move was facilitated by promises that they would eventually benefit from this change by receiving e.g. a share in the park fees or the sale of licenses to hunters. A particular problem exists with people living close to parks. Animals come and go and people often suffer from so called ‘problem animals’ which are raiding fields and livestock.”⁶³

In 2005, the African Commission’s Working Group on Indigenous Populations/Communities found that:

“Through land dispossession San Communities have lost their food security; they have become economically dependent on other ethnic groups and government food; they have experienced a loss of dignity, disruption of their social fabric, and degradation of their environment by intruders with large cattle herds; and, in sum, they remain a marginalized population. In West Caprivi, for example, the government in 2003 turned

the West Caprivi Game Reserve into a national park – the Bwabwata National Park. This placed stringent restrictions on where people can live in the national park and on the kind of activities that they can pursue there. For example, the people are not allowed to keep cattle in some parts of the new National Park, such as in Masambo and Omega III Villages, and there are limits placed on agricultural activities. The Khwe in West Caprivi are not permitted to hunt for animals within the National Park, are restricted on the quantity of veld fruits (such as devil claw) they can harvest, and food aid from government is very irregular. Where they do grow food, it is most often destroyed by elephants and other wild animals in the park. They receive no compensation from the government for the loss”⁶⁴

4.2.7.2 Summary of submissions/presentations:

Omega 3

- The Khwe community called for their own land which they can call home; the land where they now live is not recognised as their ancestral land and they want it to be restored. They do not want to be labelled as “landless people”;
- they alleged that government refuses to recognize them as a traditional community and to recognize their chief. The community acknowledges that they do not have a chief at present, but are unhappy to have a chief from a different tribe and a different region;
- it was also alleged that the Ministry of Environment and Tourism operates on their land and members of their community are not employed by the Ministry; they are prohibited to gather food and fruits in the Bwabwata National Park and restricted to cutting poles for building houses;
- the community indicated that other people are permitted to settle on their land by other chiefs. They also alleged that during 1996 their cattle were killed, because government disallowed cattle in the Park, but at present others are allowed to have cattle in the Park. It is unclear who the others are. There are allegations that land in the Park is sold to individuals which caused more people to settle in the Park;
- the opinion is expressed that their language and culture should be part of the school curriculum. The absence of radio broadcasts in the Khwe language forced them to listen to the radio broadcasts in the Thimbukushu language. They perceived the training and employment of the so called “struggle kids” in the public service *vis a vis* the high unemployment rate of Khwe youth as discriminatory in nature;
- the allegation was made that the government regards wild animals more important than humans. One community member said: “If a person is killed by an elephant, government compensates the family with N\$5000,00, but if a person kills an elephant, he is fined N\$5 million or 25 years imprisonment. Did the elephants vote in the last election?”;
- it is alleged that the Khwe community is prohibited to establish campsites to generate income and to create employment, but the Mayuni community is allowed to establish lodges in the Park;
- it is alleged that new settlements sprung up in the Park, authorized by the Hambukushu Chief; these people are allowed to keep cattle, clear land for agricultural purposes and cut down trees in the wild life corridors, which the Khwe is not allowed to do;
- the allegation is also made that police officers of the Anti-poaching Unit and members of other tribes operate shebeens in the Park, while there is no shop where the Khwe community can buy food.

Windhoek

- A community member of the San community in the Omaheke Region Stated that San women are subjected to discrimination on different fronts;
- the English language creates fear for the San and mother tongue teaching is not provided in schools;
- corporal punishment is a reality in schools coupled with bullying of San children by both teachers and fellow learners;
- they receive no service at hospitals and police if they do not speak English;
- the San people are kept out of employment in the public service because of requirements being too high;
- the opinion was expressed that government should recognize the San as the first people in Namibia and that they should also benefit from the affirmative action programmes.

Opuwo

- The oral and written submissions revealed the deep dissatisfaction of the community about the selective recognition of traditional authorities and the placing of the community under their jurisdiction;
- the Ovazemba feel discriminated against, being forced to be under the total control of a different tribal authority;
- the allegation is also made that children in grades 1-3 are not taught in their mother tongue but in other languages;
- it is further alleged that the OvaDhimba/Ovazemba is a minority group and very marginalized, but they do not benefit at all from the programmes of the government as the Ovatjimba, Ovatwe and San communities do;
- the oral presentations revealed the deep dissatisfaction of the long outstanding border dispute between the Ovazemba and the Uukolonkadhi Traditional Authority;
- the opinion was expressed that the Red Line fence has a history of discrimination which the government has inherited and continues to enforce, which has a negative impact on farmers north of the Red Line;
- english remains a barrier to get employment in the Public Service and the “*struggle kids*” are favoured when it comes to training and jobs;
- the human-wildlife conflict was highlighted as a serious concern for the community; A comment was made that “*we depend on our livestock, not on lions and elephants*”.

Gobabis

- A Chief of a San Traditional Authority alleges that the San Community as a whole did not benefit significantly, while officials in the Ministry of Land Reform and Regional Resettlement Committee benefitted from the resettlement scheme. The list of beneficiaries in the Ministry will prove the point. The call is made for the Ministry to make the list public;
- the community acknowledges that San people are resettled on Farm Skoonheid, where they live on 2000ha while Herero’s are resettled on two much bigger farms;
- it is alleged that people still call the San “*Boesman*”; it is also alleged that the San people are denied services because of their inability to speak English. They are not served in a language which they can understand;
- allegations of discrimination in the government employment recruitment process were also made.

4.2.7.3 Concluding observations/recommendations:

The Namibian Constitution takes away land rights from communities and vests in the State⁶⁵, and the Communal Land Reform Act confirms that all communal land areas vest in the State in trusts for the benefit of the traditional communities residing in those areas. The Act further gives the power to allocate customary land rights in respect of any portion of land in the communal area of a traditional authority to the Chief.⁶⁶

The Traditional Authorities Act, No. 25 of 2000 defines a communal area as “*geographic area habitually inhabited by a specific traditional community*”, and it also defines a traditional community.

The Khwe community claims that the geographic area habitually inhabited by them, is their ancestral land. In contrast with other San communities that are recognized as traditional communities and able to enjoy all related rights derived from such recognition; the Khwe are not recognized as a traditional community, but are placed under the authority of a different traditional community, and are also granted limited access to their land. The same applies to the Ovazemba, who are under the authority of the Uukolonkadhi Traditional Authority.

The Africa Court of Human and People’s Rights finds “*that the Respondent, by failing to recognize the Ogieks’ status as a distinct tribe, like other similar groups, and thereby denying them the rights available to other tribes, violated Article 2 of the Charter*” (*infra*).

From the research by the panel as well as oral and written submissions, it is evident that the concerns raised by communities and individuals are not new concerns; they were shared way back in 2005 with the African Commission’s Working Group, as well as more recently in State reports and stakeholders’ submissions to Treaty Committees and Special Rapporteurs. The observations and recommendations made by these bodies are equally applicable to the concerns shared with the panel by communities and individuals during the hearings. The panel therefore wishes to associate themselves with these recommendations and restate them in this report, for government action. However, the panel is aware of the fact that it is not possible in law to provide land title to groups or communities as recommended by the Committees (*infra*).

Key Recommendations

By the African Commission’s Working Groups (2005)⁶⁷

- The San should be provided with communal land they can call their own. Access to land and land security for the San population is the most critical element that should be addressed by the Namibian government. Land security would greatly facilitate efforts on the part of the government, NGOs, and the communities themselves aimed at addressing their critical health issues, educational and political marginalization, and numerous social problems. The protection and expansion of land rights is one of the most fundamental interventions that can be made on behalf of the San people in Namibia to secure their sustainable livelihood.
- The traditional leadership of the San should be recognized by the government. Insisting that a particular ethnic group such as the Khwe San in Western Caprivi

be ruled by another ethnic group, the Hambukushu, is a recipe for disorder and, eventually, conflict. Government should legislate affirmative action measures to increase the representation of San and other indigenous communities in governance structures such as Parliament, the National Council and local government structures. A quota system could be adopted to give indigenous communities a certain percentage of representation in these structures.

- The government should encourage the development of income-generating activities in and around San communities and give priority to the employment of San members to fill vacancies. The government should ensure that labour laws are enforced so that proper working conditions are ensured for the San.

By the Committee on the Elimination of Racial Discrimination (2008)⁶⁸

- The Committee regrets that it did not receive sufficient information on the criteria used by the State party to recognize traditional leaders under the Traditional Authorities Act of 2000 as well as the Council of Traditional Leaders Act of 1997, including on whether the scope of the laws includes all indigenous communities. It is therefore particularly concerned that no institution exists to assess applications for recognition independently of the Government. (art. 5(b)).
- The Committee requests the State party to provide, in its next periodic report, information on the criteria used for the recognition of traditional leaders. The State party should ensure that the criteria used for the recognition of traditional leaders under the Traditional Authorities Act of 2000 are objective and fair and that their application process is monitored by an independent body charged with assessing the legitimacy of applications for recognition by indigenous groups.
- The Committee acknowledges the difficulties within a democratic system in implementing land reform policies with a view to addressing existing imbalances. However, it is concerned about the apparent lack of clear and transparent criteria for the redistribution of land in practice, and notes with concern the paucity of information concerning the implementation of relevant policies in this field. (Act. 5(d)(v)).
- The State party is encouraged to implement its policies on land reform in such a way to ensure the equal exercise by the different ethnic communities of the rights enshrined in the Convention within the framework of a democratic system. The Committee invites the State party to provide information on the measures taken to ensure the implementation of land reform policy and particularly its impact on vulnerable groups.
- The Committee is concerned about the lack of recognition of the rights of ownership of indigenous communities over the lands which they traditionally occupy or have occupied (art. 5(d)(v)).
- The Committee reminds the State party of its general recommendation No. 23 (1997) on the rights of indigenous peoples, in particular paragraph 5, which calls on State parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their lands and territories. It therefore encourages the State party, in consultation with the indigenous communities concerned, to demarcate or otherwise identify the lands which they traditionally occupy or

use, and to establish adequate procedures to resolve land claims by indigenous communities within the domestic judicial system while taking due account of relevant indigenous customary laws.

- The Committee welcomes the Statement that local communities participate in the management of new conservation areas. However, it is concerned about the ability of the local indigenous communities to pursue their traditional way of life in such parks. The Committee is also concerned that those communities whose lands were taken before 1990 have not been able to receive redress for this dispossession (arts. 5 (d)(v) and (e)(vi)).
- The Committee encourages the State party to strengthen its laws and policies aimed at ensuring that national parks established on ancestral lands of indigenous communities allow for sustainable economic and social development compatible with the cultural characteristics and where indigenous communities have been deprived of their lands and territories traditionally owned, the Committee recommends that the State party take steps to return those lands and territories or to provide adequate reparation measures, in accordance with paragraph 5 of general recommendation No. 23 (1997) on the rights of indigenous peoples.
- The Committee remains concerned that despite the special measures taken by the State party to reduce poverty and to progressively realize equal and sustainable development, discrimination on the grounds of ethnicity with regard to the enjoyment of economic, social and cultural rights persists in the State party (art. 5(e)).
- The Committee recommends that the State party conduct studies with a view to assessing and evaluating the level of enjoyment of economic, social and cultural rights by the different ethnic groups in the State party, based on which the State party should strengthen its efforts in combating poverty among marginalized groups as well as its measures aimed at promoting equal opportunities for all persons.

By the Committee on the Elimination of Racial Discrimination (2016)⁶⁹

- While noting measures taken by the State party to improve the situation of indigenous peoples, including development programmes, the Committee expresses concern at the continued high rate of poverty and challenging economic and social situation of indigenous peoples, who face obstacles in accessing education, housing, employment, health care (including treatment for HIV/AIDS), ownership of ancestral lands, and political representation (arts. 3 and 5).
- The Committee recalls its general recommendation no. 23 (1997) on the rights of indigenous peoples, and recommends the involvement of indigenous communities in the planning, implementation and review of development programs aimed at improving their situation. The Committee also recommends that the State party monitor the impact of measures taken on the enjoyment of rights by indigenous peoples, and update the Committee on the effectiveness of these measures, and on the work of the Division of Marginalized Communities. The Committee further recommends that the State party implement the recommendations made by the Special Rapporteur on the rights of indigenous peoples, following his visit to Namibia in 2012.

- The Committee notes the challenges in remedying skewed land ownership patterns from the colonial past, and appreciates the update on resettlement of persons from “*previously disadvantaged communities*.” The Committee remains concerned that all ancestral indigenous lands remain under State ownership and that indigenous peoples continue to face challenges to own, develop and control communal lands. The Committee is also concerned about the limited consultation with indigenous peoples regarding extraction activities carried out on or nearby their ancestral lands (art. 5).
- In the light of its general recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee recommends the State party to work with indigenous peoples on titling their ancestral lands and securing their rights to these lands. The State party should also seek the informed consent of indigenous groups prior to granting licenses to extractive industries. The Committee requests an update on the recognition of ownership of indigenous peoples over the lands that they traditionally occupy or have occupied in the next periodic report of the State party.

By the Special Rapporteur on the Rights of indigenous people following his visit to Namibia (2012)⁷⁰

- The Government of Namibia should step up efforts to address the problem of landlessness of San groups and to carry out initiatives to secure for them rights to land, and do so, to the extent compatible with the rights of others, in accordance with their historical or traditional land tenure patterns.
- The Ministry of Lands and Resettlement should be provided with an increased budget to purchase lands for the purpose of resettlement. The selection of lands should be done in close coordination with the groups concerned and in accordance with prior feasibility studies. Lands purchased should be sufficient in size, location, and quality to guarantee that resettled groups have a sustainable basis for their economic, social and cultural development.
- Resettled San groups should be provided with the necessary financial and technical support to ensure that they are able to establish viable communities, and support should continue for as long as may be required to achieve this purpose. Non-governmental organizations in Namibia and abroad should also consider providing assistance to resettled San communities.
- The Government should give high priority to purchasing adequate resettlement lands for the Hai//om people living in Oshivelo and other similarly situated San groups who were removed from the Etosha National Park in the 1950s. When selecting lands, the Government should make all efforts to accommodate the Oshivelo community’s desire to have access to lands in Etosha National Park for tourism purposes and also receive lands adjacent to the park suitable for agricultural and other economic activities.
- Namibia should take measures to reform protected-area laws and policies that now prohibit San people, especially the Khwe in Bwabwata National Park and the Hai//om in Etosha National Park, from securing rights to lands and resources that they have traditionally occupied and used within those parks. The Government should guarantee that San people currently living within the boundaries of national parks are allowed to stay, with secure rights over the lands they occupy.

- In addition, the Government should take steps to increase the participation of San people in the management of park lands, through concessions or other constructive arrangements, and should minimize any restrictions that prohibit San from carrying out traditional subsistence and cultural activities within these parks.
- The Government should review its decision not to allow the Hai//om San people to operate a tourism lodge within the boundaries of Etosha National Park under their current tourism concession. Further, management of concessions should not be limited to only those Hai//om groups that opt to move to the resettlement farms.
- The Government should also address the concerns over lands and natural resources of other groups, including the long-standing land claim of the Baster people and the concern over natural resource exploitation expressed by the Nama people.

Committee on Economic, Social and Cultural Rights (2016)⁷¹

- While noting the State party's plan to introduce teaching in children's home language, the Committee regrets the lack of information on other measures taken to promote the cultural rights of the groups contributing to the State party's cultural diversity, especially in the light of reports of discriminatory attitudes towards children from certain groups (art. 15).
- The Committee recommends that the State party: (a) promote the culture of the various groups that make up its population, including by teaching their histories and culture in school; (b) promote the preservation of the traditional way of life of the various ethnic and language groups; (c) combat prejudice and eliminate discrimination; and (d) provide not only teaching in children's home language but also curricula and school environments that are culturally appropriate. The Committee refers the State party to its general comment No. 21 (2009) on the right of everyone to take part in cultural life.
- The Committee is concerned that the State party's legislation does not recognize communities that have self-identified as indigenous peoples. The Committee is also concerned that indigenous peoples' traditional uses and occupation of land are not recognized and protected (arts. 1(2) and (5)).
- The Committee recommends that the State party adopt a law recognizing indigenous peoples on the basis of self-identification and protecting their rights, including the right to ownership of the lands that they traditionally occupy or use as sources of livelihood and the respect of their free, prior and informed consent in decision-making processes affecting their rights and interests.

Human Rights Committee (2016)⁷²

- The Committee notes with concern that all traditional indigenous lands remain under State ownership while traditional authorities may only administer communal lands according to the Communal Land Reform Acts, and that indigenous groups are insufficiently consulted regarding the extraction of natural resources on their traditional lands (arts. 2 and 26).
- The State party should ensure that indigenous peoples have titles over lands, territories and resources they traditionally occupied or resources they owned. It

should seek the free and informed consent of indigenous communities and give primary consideration to their opinions and decisions prior to granting licences to extractive industries.

African Commission on Human and Peoples' Rights (2016)⁷³

Namibia should:

- i. Include information on human rights abuse against indigenous peoples, and measures taken by the Government to investigate and punish the perpetrators;
- ii. Ensure political participation of all indigenous communities;
- iii. Take urgent measures to address indigenous populations/communities specific needs in relation to land, education, health, employment and access to justice, and further ensure that affirmative action policies and measures adopted in this respect effectively and adequately benefit them.

The Ombudsman requests the Ministry of Urban and Rural Development to provide him within six months after receipt of this report, information on -

- the criteria used for the recognition of chiefs or heads of traditional communities in addition to those provided for by the Traditional Authorities Act, No. 25 of 2000;
- the outcome of pending applications for recognition of chiefs and heads of traditional communities and/or the reasons for the delay in the approval of the proposed designation by the minister;
- measures taken to ensure the timeous approval of the proposed designation by the Minister;
- the refusal of the Ministry to recognise the traditional leadership of the San (in particular the Khwe), Ovazemba and other traditional leaders who are now "ruled" by other ethnic groups.

The panel is concerned about the serious allegations of discrimination made by members of the Khwe community and the Ombudsman requests the Ministry of Environment and Tourism to -

- launch a thorough investigation into these allegations and provide the Ombudsman within 6 (six) months after receipt of this report with the outcome of the investigation and necessary steps taken to address the issues;
- provide the Ombudsman with detailed information on:
 - the measures taken to consult indigenous communities living in parks in order to obtain their prior, informed consent before decisions are made which might affect their livelihood;
 - consultation with affected communities in order to obtain their prior, informed consent regarding human-wildlife conflict;
 - the implementation of the above recommendations of the treaty bodies relating to national parks.

The panel wishes to draw the attention of the Office of the Vice President: Veterans, Marginalised and Disability Affairs, to the importance of above recommendations and wishes to request the Deputy Minister: Marginalised Affairs to provide the Ombudsman within six months after receipt of this report with detailed information on the concrete measures taken to implement above recommendations concerning economic, social and cultural rights of indigenous people. Information on the progress

made on the adoption and implementation of the White Paper on Indigenous People's Rights should also be included.

4.2.8 Land Resettlement

4.2.8.1 Introduction:

During the public session the panel had the privilege to listen to several people representing groups with interest in the problematic relationship between land in Namibia and our sad apartheid history. However, the problem is clearly not a part of our history that can now be shelved by ordinary people and left for the historians. One after the other, the presenters reminded us that twenty-seven years is a short period within which to normalize our society after generations of colonialism and apartheid.

We listened to presentations by several of the role players dealing with land issues and representing both public activists as well as organisations representing sectors of the farming community.

It was unfortunate that the farm workers in Namibia did not turn up to address the panel, neither did the union representing them. Consequently, the opportunity to find out to what extent they are still experiencing racism and racial discrimination, was lost.

Against the background of past unequal land distribution, government aimed to address this imbalance and to facilitate access to available land to the majority of Namibian people within the framework of social justice. Therefore, government came up with the National Resettlement Policy (2001) which *“aims to facilitate the upliftment of especially the Namibian citizens at the bottom of social and economic development in order to support themselves”* (emphasis added).

The policy is aimed at specific target groups which have been forced into destitution and landlessness by the apartheid regime. Among these are displaced citizens, the San community, former fighting forces (PLAN, SWATF, KOEVOET), Namibians from exile, people with disabilities and people within overcrowded communal areas. The policy also set out the selection criteria.

It appears that the objectives of the resettlement programme, to address the unequal distribution of land in the past and to facilitate access to land for the majority of the Namibian people, has not been accomplished. For many the imbalances of the past still exist, in that –

- > during the 1907-1914 the German Government allocated confiscated *“land of the natives”*, to white settlers and from July 1915, the South African government provided land to white immigrant farmers through its Union Land Settlement Act of 1912;⁷⁴
- > in present day Namibia *“only the rich benefits from the land resettlement programme and not the poor, landless people”*.⁷⁵

At Independence around 4000 white farmers owned 6000, or about 50% of Namibia's arable land. Between 1990 and 2007 the government bought 209 farms through the so-called *“willing seller, willing buyer”* procedure. The pace of land reform was however too slow to meet the high expectations of the Namibian people which lead

to an announcement that government will start with an extensive programme to expropriate farms.

The first expropriation of farms, generally referred to as the '*Kessl case*', was catastrophic.⁷⁶ The process was messy and hasty and most of the legal requirements of the Act, the Constitution and natural justice were not adhered to. The committee set up for the government to consult with before expropriation, sat in Windhoek on the day when the expropriation notice was served on Kessl by an entourage of officials, police officers and members of the Special Field Force.

Without going into the details of the case, the High Court declared the procedures irregular, looking at issues of natural justice, administrative justice in terms of the Constitution, to name some of the contentious actions of the Ministry of Lands and Resettlement. The '*Kessl case*' brought an end to land expropriation in terms of article 16(2) of the Constitution. While it brought some calmness to the formerly advantaged white farmers, the demand for land reform remained high on the government agenda – at least on paper and in its policies, if not on the ground. And the demands for land by the landless will not go away as long as the Constitution makes provision for expropriation.

4.2.8.2 Summary of submissions/presentations:

The oral and written submissions revealed the deep dissatisfaction of citizens about the way in which land resettlement takes places, amongst others that –

- the process is tainted by unfairness and discrimination;
- the claim to ancestral land only arose because of the unfairness in the land resettlement process;
- the land resettlement process is unfair and discriminatory because only the rich benefit and not the poor, landless people;
- a farmer who consistently applied for land and not being successful, approached a Governor who allegedly told him that he has no farms in his pocket for Damara/San and if asked, he would rather give land to those from Kavango/Caprivi;
- farms are allocated to persons from the North, while locals in their regions who are waiting to be resettled, are ignored;
- a farm was allocated to a person from the Kavango region, but he never took occupation of the farm, while locals in their regions are waiting to be resettled.
- a person who bought a farm with an affirmative action loan from Agribank, sold the farm. He applied for land and was resettled on a farm of 6000ha;
- a destitute, landless farmer applied for a certain farm, scored 26 points according to the criteria, but the farm was allocated to another applicant who scored 17 points. He questioned the fairness of the selection process and was promised the matter would be investigated, but he was not informed of the outcome thereof. He then invaded an unoccupied government farm from which he is now being evicted;
- the Aroab Small Farmers, who are poor and unemployed and wanting to make a living for themselves and their families from small stock farming, applied since 1994 for resettlement on not less than 29 farms. So far, they were unsuccessful every time. They now farm on town lands of 1700ha, leased from the Aroab Village Council. It is too small for all of them and their stock. They feel oppressed and discriminated against and that they are not included in the Harambee Prosperity Plan;

- the wife of a councillor was resettled on a farm of 7200ha;
- the San Community are not benefitting from the land resettlement process;
- psychological slave/master relationships still prevail in farming communities twenty-seven years after independence.

The following was also submitted:

- white farmers still have to be called 'baas' or 'boss';
- black commercial farmers still opt to operate without belonging to a union rather than joining the predominantly white union;
- white farmers see land tax as double tax and therefore discriminatory;
- white farmers want to know why there is no final date set to end affirmative action, land tax and the possibility of expropriation in 'public interest', which in their opinion has a negative effect on economic growth since the farmers are reluctant to develop and invest in their farms;
- the government is not interested in the return of communal land because the northern tribes did not lose land;
- communal and subsistence farmers are under-represented on regulating bodies;
- subsistence farmers cannot get credit from loan institutions without title deeds on the land they occupy.

4.2.8.3 Concluding observations/recommendations:

African Commission's Working Group on Indigenous Populations/Communities (2005)⁷⁷

- Though land is being acquired for resettlement under the Land Reform Act, the primary objectives of the national resettlement policy have thus far been achieved only in part, and in some cases not at all. Recent research has revealed that since the inception of the resettlement programme, the objective of attaining self-sufficiency by means of *"creating employment through full-time farming and bringing smallholder farmers into the mainstream of the Namibian economy by producing for the market"* has not been accomplished. The San in all the areas visited, except Tsumkwe, reported a lack of access to the wildlife and forest fruits they were used to. They also complained about their inability to do large-scale commercial farming due not only to lack of resources but also due to lack of training. Most of them depend almost entirely on government food aid, which is very irregular.
- The process of applying for resettlement also often bypasses the San, one reason being that most San in Namibia live in remote areas and are not made aware of resettlement projects planned in their areas until it is too late to apply, another reason being that many are illiterate and unable to submit a written application.

Committee on the Elimination of Racial Discrimination (2016)⁷⁸

- The Committee acknowledges the difficulties within a democratic system in implementing land reform policies with a view to addressing existing imbalances. However, it is concerned about the apparent lack of clear and transparent criteria for the redistribution of land in practice, and notes with concern the paucity of information concerning the implementation of relevant policies in this field. (art. 5(d)(v)).

- The State party is encouraged to implement its policies on land reform in such a way to ensure the equal exercise by the different ethnic communities of the rights enshrined in the Convention within the framework of a democratic system. The Committee invites the State party to provide information on the measures taken to ensure the implementation of land reform policy and particularly its impact on vulnerable groups.

Committee on Economic, Social and Cultural Rights (2016)⁷⁹

- Without prejudice to the overall objective of the land reforms and the “*willing seller – willing buyer*” approach, the Committee is concerned that the land reform programme of the State party has not addressed poverty or that security of tenure remains an enduring challenge, as a large number of individual and communal land owners are without title. The Committee is also concerned that many resettled farmers have not been able to restore their livelihoods and earn an adequate standard of living, even when support has been provided. Moreover, the Committee is concerned that the Communal Land Reform Act of 2002 has had little effect on women’s access to land.
- The Committee recommends that the State party take account of the following in the implementation of the resolutions adopted by the Special Cabinet Committee on Land and Related Matters:
 - (a) Streamline land registration procedures and render them affordable and accessible, including in rural and remote areas, and proactively reach out to register communal lands;
 - (b) work with indigenous peoples on titling of their traditional lands and securing their rights to these lands, to the extent compatible with the rights of others;
 - (c) increase the resources allocated to the acquisition of land for resettlement;
 - (d) engage in meaningful consultation processes with individuals and groups concerned prior to and during the resettlement;
 - (e) assist resettled farmers, beyond the provision of infrastructure such as fencing and land servicing, in restoring their livelihoods and lifting them out of poverty, and monitor the situation of resettled farmers;
 - (f) ensure, in the case of indigenous peoples, that the resettled groups lead and design the process and are provided with support during the rebuilding of their communities;
 - (g) ensure that the Communal Land Reform Act is implemented, so that widows can remain on communal land allocated to their deceased husbands;
 - (h) enact the Land Bill of 2010 in order to enhance the protection of communal lands;
 - (i) urgently address the excessive prices of land, including in urban areas.

Report on the Working Group on the Universal Periodic Review (2016)⁸⁰

- During the interactive dialogue the following response was made:
 - The delegation of Namibia stated that Namibia had no national legislation directly related to indigenous people and that the term “*marginalized people*” was used. One of the resolutions of the National Land Conference of 1991 had been that the land rights of disadvantaged communities should receive special protection with the San and other marginalized communities receiving

specific mention. The National Resettlement Policy of 2001 identified the San as a specific target group for resettlement, which was given conditional rights in terms of hunting concessions.

- It is recommended that Namibia should:
 - further strengthen its successful land reform and resettlement program, which grants land to historically disadvantage groups;
 - continue implementing its agrarian reform policy and resettlement program by land to groups who have been historically disadvantaged;
 - pursue its land reform and resettlement program in order to enable underprivileged persons to have access to land, given that the right to land is a fundamental right;
 - continue Government's efforts with its land reform and resettlement program both at rural and urban level.

Committee on the Elimination of Discrimination against Women (2015)⁸¹

- The Committee expresses its concern at women's limited access to land and the lack of information on rural women's access to microfinance and microcredit schemes. The Committee is particularly concerned at reports of land grabbing by relatives of deceased spouses and the impact on women in rural areas. The Committee calls upon Namibia to adopt specific measures aimed at facilitating women's access to land, in particular in rural areas and to intensify efforts aimed at curbing land grabbing, especially as regards women in rural areas, which affects the full enjoyment of the right to property by women.

The panel wishes to draw the attention of the Ministry of Land Reform to the importance of above recommendations and while full implementation is not possible at this moment, the Ombudsman wishes to recommend that the Ministry include the following on the agenda of the proposed land conference -

- a discussion point on ancestral land;
- a discussion point on the land resettlement policy with a view to establish a transparent application process with criteria which are objective and fair and include an appeal process;
- a discussion point on title deeds for subsistence farmers on farming units of 20ha or more;
- a discussion point on the removal of the 'red line';
- a discussion point on the renaming of communal land areas, which still appear as Kaokaland, Damaraland, Owamboland, Kavango, Caprivi, Bushmanland, Hereroland East and West, Namaland in the Communal Land Reform Act (No 5 of 2002);
- a discussion point on a clear policy of land reform, which should include, amongst others –
 - > a clear timeline for future expropriations;
 - > an expropriation process that will meet the requirements of the Act and natural justice;
 - > a process that will produce a living income for re-settled famers; and
 - > a process which would ensure that funds appropriated for the allocation of farms is aligned with reachable annual targets.

The Ministry should also –

- request ancestral land claim owners or interest groups to make their claims on title known in time for the land conference;
- publish an up to date list of names of the beneficiaries of land resettlement before the start of the conference;
- take account of the recommendations made by the Committee on Economic, Social and Cultural Rights (2016) and the Committee on the Elimination of Discrimination against Women (2015) in the discussion at the land conference;
- discuss with the Rehoboth Baster Community the injustice done to the people of Rehoboth (litigation did not help the Rehoboth Baster Community in their three cases at the Namibian High and Supreme Courts as well as the Human Rights Committee).

The panel wishes to draw the attention of the Ministry of Agriculture, Water and Forestry to the fact that more than one union exist for farmers, i.e. the Namibia Agricultural Union and the Namibia National Farmers Union, which do not promote unity and co-operation. The Ministry is therefore requested to encourage the unions to foster closer co-operation with a view to eventually merge into one union representing the interests of all farmers. In addition, the Ministry should look into regulations pertaining to relevant boards with a view to compel the inclusion of a number of previously disadvantaged farmers.

4.2.9 Language

4.2.9.1 Introduction:

English is the official language, but Namibia's relatively small population is extraordinarily diverse in language and culture. More than 11 languages are indigenous to Namibia. Many people commonly speak two or three languages. More than 50% of the people speak Oshiwambo, whereas Afrikaans is still widely used and functions as a lingua franca. Among European languages spoken in Namibia are German, Portuguese, Spanish and French.

English is the medium of instruction at all levels in schools but mother tongue is supposed to be used as a medium of instruction for grades 1-3. Education in the mother tongue, especially in the lower primary cycle of basic education, is crucial for concept formation as well as literacy and numeracy attainment. However, many learners do not have the opportunity to learn through their mother tongues.

Many Namibians cannot speak English or cannot express themselves properly in the official language (due to no fault on their part) and with public officials insisting to be addressed in English, this causes them to be denied access to public services.

4.2.9.2 Summary of submissions/presentations:

The following is a summary of the submissions/presentations received:

- San children are not taught in their mother tongue – they do not understand what is taught in class, they lag behind other learners and often drop out before they reach grade 4;
- San people do not know what "equal rights" mean; they are forced to communicate in a language (English) they don't understand. They are discouraged to apply for

- jobs because they cannot speak English or they don't have a Grade 10 certificate;
- doctors and nurses speak only English and they cannot explain to them what is medically wrong with them, often resulting in patients not receiving appropriate care or the correct treatment;
- the elderly do not receive service because they cannot speak English and then public officials refuse to serve them;
- the OvaDhimba/Ovazemba children in grades 1-3 are not taught in their mother tongue, but in another language; the Khwe children are taught in the Thimbukushu language;
- one elderly woman expressed herself in Afrikaans as follows: "*Where did I learn to speak English, we should be served in the language we understand*" (translated);
- it was alleged that there are no interpretation services available at police stations, hospitals and clinics.

4.2.9.3 Concluding observations/recommendations:

The right to a fair trial includes, *inter alia*:

- the duty of the police to inform an arrested person of the reasons for his/her arrest and his right to a lawyer, in a language which the person understands,⁸²
- while court proceedings are conducted in the official language, the presiding officers must ensure that the accused understands and follows the proceedings in the language he/she is most comfortable with and to express him/herself in that language. For these reasons, interpreters are used at courts to translate the proceedings to the accused/witness in the language they prefer. If that does not happen, the person's right to a fair trial has been violated and the conviction and sentence may be set aside on appeal or review;
- if a person is not served in the language he/she understands, it not only constitutes a denial of his/her right of equal access to public service,⁸³ but also a violation of fundamental rights. Why are there not interpreters at hospitals, clinics, police stations and at all public service providers?;
- can it be said that the right to a fair trial is more important than the right to health care, employment, education public service, etc.? Rights cannot be placed in a hierarchical order, all rights are equal and interdependent and all human beings are entitled to equal access to all rights. The judiciary complies with its duty to make justice accessible to all; it is not only expected, but all public service providers are under a duty to serve a person in a language he/she understands; to do otherwise will constitute a violation of fundamental rights.

Human Rights Committee (2004)⁸⁴

- While the Committee notes the reason why the State party (Namibia) recognizes only one official language, it is concerned that those persons who do not speak the official language may be discriminated against in the administration of public affairs and in the administration of justice and recommends that the State party (Namibia) should take measures to ensure, to the extent possible, that persons who only speak non-official languages used widely by the population are not denied access to public services. It should undertake measures to protect the use of other languages.

Working Group on the Universal Periodic Review (2011)⁸⁵

- Namibia must ensure that people who only speak non-official languages used widely by the population are not denied access to public service.

The Namibian Constitution

- The State promises in Article 95 to adopt policies aimed, *inter alia* to ensure that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law (emphasis added).

Namibian Public Service Charter

- The Charter requires, *inter alia*, that public service providers:
 - provide information about public service in a prompt, straightforward and open manner that is readily understandable (emphasis added).
 - ensure accessibility to public service by accommodating the service needs of our users (emphasis added).

The panel wishes to draw the attention of the Office of the Prime Minister (OPM) and/or the Public Service Commission (PSC) to the importance of these recommendations and promises and requests the OPM and/or PSC to provide the Ombudsman within six months after receipt of this report with detailed information on the concrete measures taken to ensure that all people who only speak non-official languages have access to public services.

4.2.10 Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people

4.2.10.1 Introduction:

Chapter 3 of the Namibian constitution protects the fundamental rights of all persons whilst article 10 prohibits discrimination on certain grounds; however, there is no explicit prohibition on the ground of sexual orientation. There is no legislation that explicitly discriminates against LGBTI people, however, they continuously experience different forms of discrimination. Although homosexuality is not illegal *per se*, sodomy is still a common law offence.

Although Namibia has made some progress in including Key Populations (LGBTI people and inmates) in the National HIV/AIDS Strategic Plan, human rights interventions for LGBTI people are minimal and access to public services are not always available.

Discrimination at places of employment is still experienced, as the prohibition on the ground of sexual orientation no longer appears in the 2007 Labour Act. Violence against LGBTI people occurs; however, this goes unreported as existing legislation does not provide specifically for violence involving LGBTI people.

4.2.10.2 Summary of submissions/presentations:

A historic background on systemic discrimination was shared during the hearing with the focus of the causes of discrimination based on -

- sexual orientation and gender;

- the impact of discrimination on the lives of LGBTI people;
- the impact on the wellbeing of the minority groups identified;
- access to education in the country is available however LGBTI people experience bullying and hate speech.

The following opinions were expressed in the above regard:

- that homosexuality is not illegal in Namibia, but same sex sexual activity between two males is criminalized (sodomy);
- public health research suggests that everyday discrimination on the basis of being a sexual or gender minority (known as minority stress) leads to depression, suicidality and substance abuse;
- religious and traditional notions on sex, gender and sexuality often lead to discrimination and violation of human rights of LGBTI people;
- while sexual orientation and gender identity were included as explicit grounds for non-discrimination in the 1992 Labour Act, they mysteriously fell away from the new 2007 Labour Act;
- the combating of Domestic Violence Act specifically excludes same sex partners from protection;
- within the Namibian Patient Charter, gender and sexual orientation are explicit grounds for non-discrimination and thus protects LGBTI people from exclusion, refusal and ill-treatment by health service providers;
- discrimination on the basis of sexual orientation and gender identity seeks only to punish and violate a person's human rights for something about themselves they are born with, akin to the colour of their skin, their height or being left-handed;
- transgender men, individuals assigned female sex at birth, but who identify as men, are unable to undergo the transition to male physique due to lack of access to gender re-assignment technology in Namibia;
- transgender men are often subject to rape (aptly dubbed corrective rape) *“to show them that they are still women”*;
- laws that criminalize sex/sexual activity between two males are remnants of the colonial laws which Namibia inherited at independence from South Africa and if government insists that the laws have not been used since independence, why are they still on the law books?

4.2.10.3 Concluding observations/recommendations:

Human Rights Committee (2016)⁸⁶

While noting the measures taken to eliminate discrimination, the Committee is concerned that protection against discrimination is insufficient. It is particularly concerned about:

- discrimination, harassment and violence against lesbian, gay, bisexual and transgender persons, including cases of so-called *“corrective rape”* against lesbians;
- discrimination on the basis of sexual orientation not being explicitly prohibited, exclusion of sexual orientation as a prohibited ground for discrimination from the Labour Act (Act No.11 of 2007), the maintenance of the common law crime of sodomy, the exclusion of same-sex partnerships from the Combating of Domestic Violence Act (Act No. 4 of 2003);
- the continuing discrimination against persons with disabilities, as well as against persons who are HIV-positive, including in employment (arts. 2, 3, 7 and 26).

The State party should conduct extensive education and awareness-raising campaigns involving and targeting traditional leaders and the general public, both children and adults, to eliminate all forms of discrimination. It should:

- adopt legislation explicitly prohibiting discrimination based on sexual orientation, including in the Labour Act (Act No. 11 of 2007), and adopt hate crime legislation punishing homophobic and transphobic violence and vigorously enforce it;
- abolish the common law crime of sodomy and include same-sex relationships in the Combating of Domestic Violence Act (Act No. 4 of 2003) so as to protect same-sex partners;
- intensify efforts to combat discrimination against persons with disabilities and against persons who are HIV-positive, and ensure their full integration into all spheres of public life.

The panel recommends that –

- the Prosecutor General issue a moratorium on the prosecution of sodomy, to allow the distribution of condoms in correctional facilities.

4.2.11 Media and the Internet

4.2.11.1 Introduction:

Article 21 of the Namibian Constitution provides for fundamental freedoms in a very broad spectrum, as follows: (a) freedom of speech and expression, which shall include freedom of the press and other media; (b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning and extended freedoms and limitations thereof. The World Press Freedom index ranked Namibia 17th in 2015 in terms of media freedom.

During the hearing the media was key in shaping the narrative of access to information and communications and the responsibilities of the citizens. Access to information has advanced in the country as technology reaches a high number of people through print, broadcast and online media. Namibians have been receptive to the transformation of media houses and the forms of reporting.

4.2.11.2 Summary of submissions/presentations:

- The media reported incidents of all forms of discrimination experienced in the country; however, the Editors Forum can only address the cases they receive. The Editors Forum presented a collective framework with clear regulations and guidelines that creates a forum of mediation to address all forms of discrimination experienced within media and reported to the different media houses.
- The panel engaged the representatives on gender representation within the media and the experiences of discrimination. The Editors Forum indicated that gender equality remains a challenge though news rooms have a high number of women journalists. The Editors Forum has been looking into the matter as that is key to represent a collective ownership in media.

4.2.11.3 Concluding observations/recommendations:

The Editors Forum of Namibia (EFN) must be commended for the adoption of the Self-Regulatory Code of Ethics and Conduct. The prohibition on the publishing of material which amounts to *“the advocacy of hatred that is based on race, ethnicity, religion or gender and that constitutes incitement to cause harm”* is most welcomed. The EFN must further be commended for the appointment of a Media Ombudsman who is mandated to investigate complaints of violation of the Code. But the media has a bigger role to play in the combating of racism, racial discrimination and tribalism and to raise awareness against these.

The internet has become a forum for millions of users around the world. Some people consider the internet to be an attractive tool for racist propaganda, because it guarantees a large audience; it is difficult to track down all sites and identifying persons responsible for publishing a racist site may be difficult, if the host cannot be compelled to reveal the identity of such persons.⁸⁷

Cyber racism is commonly defined as racism which occurs in the cyber world. This includes racism which occurs on the internet, such as racist websites, images, blogs, videos and online comments, as well as racist comments, images or language in text messages, emails or on social networking sites.⁸⁸

It is for this and other reasons that the Durban Declaration⁸⁹ warns against the dangers inherent in the use of new information technologies such as the internet, for the wrong purpose. The internet should not be used for purposes contrary to the respect for human values, equality, non-discrimination, respect for others and tolerance, including to propagate racism, racial hatred, racial discrimination and tribalism, because children and the youth who have access to this material could be negatively influenced by it. The ICERD⁹⁰ requires government to condemn racist propaganda and to adopt immediate and positive measures designed to eradicate all incitements to, or acts of such discrimination, and to declare the dissemination of ideas on racial superiority, hatred or incitement to racial discrimination, an offence punishable by law.

The panel recommends the following:

- Being the most important vehicle for expressing ideas and forming opinions, the media should develop policies and practices aimed at:
 - > combating racism, racial discrimination tribalism and intolerance;
 - > combating the proliferation of ideas of superiority, justification of racial hatred and discrimination in any form;
 - > promoting respect, tolerance and understanding among all individuals, peoples, communities, for example through assistance in public awareness-raising campaigns.
- The media have a unique position in society and have an important influence on people’s attitude. Therefore the media is encouraged, without encroaching on their editorial independence, to condemn the use of and dissemination of hate speech, racism, tribalism, etc.
- The media can play a very positive role in combating racism in sport, for example when they report racist incidents taking place during sport events, to put them in

the right context and later on also give publicity to the sanctions meted out to the racist offender.

The panel wishes to draw the attention of the Ministry of Justice to the possible abuse of the internet (including social media platforms), which is a serious concern in that it might be used by individuals and groups to disseminate racist messages, inciting intolerance and racial and ethnic hatred.

The Ombudsman wishes to recommend that the Ministry carries out research into existing legislation to determine whether -

- they are sufficient to combat cyber racism;
- the internet falls outside the scope of the law;
- the internet blocks the full implementation of the Racial Discrimination Prohibition Act (as amended);
- there is a need to adopt additional or new legislation to deal with cyber racism.

4.2.12 Sport

4.2.12.1 Introduction:

“Racist incidents continue to crop up sporadically in various sporting disciplines across the spectrum right in front of our noses, but the mere fact that no one is prepared to tackle or let alone discuss the merits – this burning issue become worrisome”⁹¹

There is no question that sport provides an important learning tool for young people. It is often during the playing of games and sport that children learn about sharing, cooperation and develop trust in others. At the same time sport contributes to personal growth through skill appreciation and the development of new competencies which contribute to greater self-esteem and confidence. These lessons help to shape positive attitudes and values as well as models for social comportment. In this regard, sport can make important contributions to the fight against racism, racial discrimination, xenophobia and related intolerance. The relationship-building and cooperation generated by team sports, in particular, can be conducive to positive racial attitudes and behaviour.⁹²

However, while sport can serve as an agent of integration; it can also be used to differentiate and discriminate. There can be no question that sport is punctuated by episodes of racism, discrimination, xenophobia and intolerance. The same factors which contribute to team-building can be equally applied in a competitive context to denigrate the opposition or to gain psychological advantage. Unfortunately, the exchange of racial epithets between athletes, crowd abuse and taunts which are based on race, ethnic or cultural background remain at the elite and community levels.

Sport may even act as a catalyst for the expression of racist and discriminatory behaviours or as a channel for radical elements and their intolerant sentiments. These instances demand a sport –driven as well as a societal response.

The above newspaper report and many others of similar nature, necessitated the inclusion of sport in the inquiry. In the Concept Note which was shared with invited institutions and individuals, the following questions were posed:

- Can relationship-building and cooperation generated by team sport, in particular, not be conducive to positive racial attitudes and behaviour?

- Does sport make positive contributions to the fight against racism, racial discrimination and intolerance?
- Is sport still punctuated by episodes of racism, racial discrimination and intolerance?
- Does sport act as a catalyst for the expression of racist and discriminatory behaviour and language?
- Is there a failure among the sport fraternity to promote diversity by selecting representative teams?

4.2.12.2 Summary of submissions/presentations:

The oral and written submissions revealed shocking expressions, opinions and allegations of racism in sport.

- One submission claimed that: “There is absolute blatant racism in Namibian sport – it’s just that people don’t talk about it or rather don’t want to hear about it”;
- the panel was referred to a much-publicised racial slur where a white rugby player called a black player a “*black baboon*”. It was only after sustained and persistent reporting by a newspaper that the rugby club took action against the perpetrator. It is alleged that the Namibian Rugby Union (NRU) turned a blind eye to the incident;
- it was alleged that the NRU terminated the employment contract of the secretary “*because her skin colour did not match the tradition and ethics of Namibian rugby*”. She was apparently replaced by a white South African lady;
- it was alleged that a rugby club filed complaints of racism, where players of a white club called their opponents “*kaffers*”. Apparently the NRU failed to take action against the perpetrators;
- an incident of a similar nature happened in 2013 where a Namibian rugby player called a Moroccan player a “*kaffer*” and apparently “*the sanction on a guilty verdict was no more than a joke*”;
- the opinion was expressed that rugby was historically tagged as a white man’s sport and it was hard for blacks to penetrate and successfully claim to be eligible for selection as administrators and representatives in the national team since this perception is still carried to this day;
- the opinion was expressed that there is a failure in rugby to promote diversity in selection of representative teams. To prove the point, the following statistics about the composition of the national team at Rugby World Cups were submitted: 1999, eight blacks out of a squad of 30; 2003, six blacks; 2007, ten blacks; 2011, eleven blacks and 2015, eight blacks. During 2017 at the Nations Cup in Uruguay, the composition was ten out of thirty-two. The position is the same in the selection of management teams which accompanied the national team;
- the allegation was made that “*whenever athletes of colour are selected to represent the country, particular in rugby, hockey and cricket, they are made to feel they are only there because of their skin colour, not on merit. And worse still, many strongly believe the inclusion of colour weakens the squad*”;
- the allegation was made that the picture relating to school sport is not better, since “*most of the representative youth teams do not reflect the country’s demographic layout*”;
- it was alleged that applications for citizenship/passports of South African born players, whose parents are Namibians living in South Africa, are fast tracked to allow their inclusion in national teams to the exclusion of Namibian players;
- the opinion of a sport administrator was that racism and tribalism are evident in Namibian sport in many ways; media reports and public outcries are testimony of that;

- the opinion was expressed that tribalism is the cause that the administration of some sport codes are failing, because “for 27 years, some of the so-called national priority codes are in the hands of either one ethnic/tribal or family clique”;
- allegations were made that the Sports Commission, in contravention of the Sports Regulation: Namibia Sports Act, allows the awarding of national colours to foreigners⁹³, as well as allowing sport bodies to select national teams without holding proper and representative trials at regional and national levels to select the best possible team.⁹⁴

4.2.12.3 Concluding observations/recommendations:

- While noting the creation of a Sports Commission with its functions, *inter alia*, of promoting the highest sportsmanship and to coordinate, control, develop and foster sport activities, the panel is concerned about the serious allegations of racism in sport and the apparent failure of the Sports Commission to execute its duties and functions and recommend that –
 - the Ministry of Youth, National Service, Sport and Culture should instruct the Sports Commission to launch a thorough investigation into the allegations of racism and tribalism in sport, including the grounds and conditions on which the Ministry of Home Affairs and Immigration issue work permits to foreign coaches and other officers; and
 - the Ministry should launch an investigation into the Sports Commission’s failure to execute its statutory duties with regard to the awarding of national colours and selection of national teams.
- While recognizing that sport can be a powerful tool in promoting equality for all and that schools are an ideal place to provide opportunities for sport, recreation and play and that every child has a fundamental right of access to physical education and sport, the panel is concerned about the allegation that school sport is not free from racism and discrimination and therefore recommends that the Ministry of Education, Arts and Culture should:
 - ensure that physical education is offered to all children in primary and secondary schools;⁹⁵
 - provide accessible recreational and sports opportunities and facilities at school;
 - promote physical, mental and emotional health among children, through sport, play, recreation, artistic and cultural expression;⁹⁶
 - ensure that sports competitions for children with disabilities take place at the same time and at the same venues as that of able children in order to form friendships and a better understanding of “disability”;
 - educate children through sport practiced without racism and discrimination of any kind and in the Olympic spirit, which requires human understanding, tolerance, fair play and solidarity;⁹⁷
 - promote diversity when selecting representative national school teams;
 - ensure that schools adopt and enforce a code of conduct against racism and discrimination for pupils and staff.

The panel wishes to draw the attention of the Ministry of Education, Arts and Culture to the importance of above recommendations and requests the Ministry to provide the Ombudsman within six months after receipt of this report, with detailed information on the concrete measures taken to implement the above recommendations.

- While the Racial Discrimination Prohibition Act did not achieve its objective and has fallen into “disuse”, the Ministry of Youth, National Service, Sport and Culture should amend the Namibia Sports Act or the Regulations to provide for special measures against racism and racial discrimination. It should further provide a clear definition of racism and racial discrimination that should apply in the field of sport; specific forms of racism and racial discrimination should be prohibited and it should provide for penalties for racist acts and behaviour.
- The Sports Commission, sport federations, sport clubs and individual sportsmen and sportswomen have a special responsibility in keeping the sport environment free from racism and racial discrimination. They should take a preventative approach to combat these dangerous phenomena. The Sports Commission should therefore:
 - ensure that sports federations and clubs include anti-racism and equality clauses in their constitutions or by-laws;
 - ensure that they produce codes of conduct clearly stating their commitment to promoting equality and tackling racism;
 - in addition ensure that they should provide coaches and referees with clear guidelines as to how to deal with racism and discriminatory behaviour. For example, the referee has to impose adequate sanctions for racist incidents taking place between players (a yellow or red card). All racist incidents and referees’ responses to them should be mentioned in the referee reports;⁹⁸
 - as regards awareness raising, ensure that sports federations and clubs publish in their game programmes announcements that they do not tolerate racism, condemn racist chanting and will take appropriate action; display anti-racism banners during sport events and integrate anti-racism messages in their communication strategy.⁹⁹

The panel wishes to draw the attention of the Ministry of Youth, National Service, Sport and Culture to the importance of above recommendations and requests the Ministry to provide the Ombudsman within six months after receipt of this report, with detailed information on the concrete measures taken to implement the above recommendations.

4.2.13 Women and Girls

4.2.13.1 Introduction:

Since the founding of the United Nations, equality between men and women has been among the most fundamental guarantees of human rights. Adopted in 1945, the Charter of the United Nations sets out as one of its goals “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women”.

Furthermore, Article 1 of the Charter stipulates that one of the purposes of the United Nations is to promote respect for human rights and fundamental freedoms “without distinction as to race, sex, language or religion”. This prohibition of discrimination based on sex is repeated in its articles 13, mandate of the General Assembly and 55, promotion of universal human rights.

Namibia as a signatory to international and regional instruments and have committed to uphold equality amongst men and women of which great strides have been achieved

in the country. However, Namibian women and girls continue to face health challenges such as access to sexual reproductive health and rights, access to information, language barriers, and HIV/AIDS treatment.

Over the years domestic violence and violence towards women and girls have been on the increase as passion killings, baby dumping, teenage pregnancies and rape are challenges which need to be addressed.

Women further face displacement when their husbands pass on and inheritance challenges are experienced due to cultural practices and a lack of understanding of their entitlements.

4.2.13.2 Concluding observations/recommendations:

Committee on Economic, Social and Cultural Rights (2016)¹⁰⁰

The Committee notes with concern that discriminatory practices that have been outlawed under the civil law, such as those relating to inheritance, still occur, in spite of the State party's established hierarchy of civil law taking precedence over customary law.

The Committee recommends that the State party raise awareness of women's rights as protected by civil law and awareness that certain practices under the customary law contradict human rights. The Committee refers the State party to its general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights.

Human Rights Committee (2016)¹⁰¹

The Committee is concerned about the persistence of discriminatory stereotypes and deep-rooted patriarchal attitudes regarding the roles and responsibilities of women, which furthermore constitute a major cause of violence against women. It also notes with concern that:

- (a) women are frequently discriminated by customary laws that, *inter alia*, allow family members to confiscate the property of deceased men from their widows and children;
- (b) reparation has not been granted to all women who have been subjected to forced or coerced sterilization owing to their HIV-positive status;
- (c) single mothers are regularly subjected to discrimination and stigmatization;
- (d) the rate of female unemployment is high, occupational segregation persists between men and women, and the number of women in positions of responsibility is relatively low (arts. 2, 3, 7 and 26).

The State party should take comprehensive measures to eliminate stereotypical conceptions of gender roles, involving and targeting traditional leaders and the public at large. It should also:

- (a) cooperate with traditional leaders to abolish discriminatory customary laws;
- (b) ensure that women subjected to forced or coerced sterilization have access to reparation as well as to sterilization reversal where possible, and adopt formal guidelines to ensure that the fully informed consent of a woman undergoing sterilization is systematically sought by medical personnel;

- (c) take comprehensive awareness-raising measures to eliminate all forms of stigmatization and discrimination against single mothers;
- (e) take concrete measures with a view to eliminating female unemployment as well as occupational segregation, both horizontal and vertical through, *inter alia*, education, training and retraining, and consider introducing temporary special measures where appropriate to increase the number of women in positions of responsibility.

Durban Declaration and Programme of Action (DDPA)

The DDPA urges:¹⁰²

- States to involve women, especially female victims of racism, racial discrimination, xenophobia and related intolerance, in decision-making at all levels when working towards the eradication of such discrimination, and to develop concrete measures to incorporate race and gender analysis in the implementation of all aspects of the Programme of Action and national plans of action, particularly in the fields of employment programmes and services and resource allocation;
- States and encourages all sectors of society to empower women and girls who are victims of racism, racial discrimination, xenophobia and related intolerance, so that they can fully exercise their rights in all spheres of public and private life, and to ensure the full, equal and effective participation of women in decision-making at all levels, in particular in the design, implementation and evaluation of policies and measures which affect their lives.¹⁰³

The panel wishes to draw the attention of the Ministry of Gender Equality and Child Welfare to the importance of above recommendations and request the Ministry to provide the Ombudsman within six months after receipt of this report with detailed information on the concrete measures taken to implement the recommendations.

In addition, the Ministry should –

- enforce the legislative and policy frameworks that promote equality and equity between women and men;
- ensure that health care services, including HIV/AIDS, reach women and girls in all communities, especially in the rural areas;
- assist women and girls to access justice;
- raise awareness regarding their right to employment, education, inheritance, health, equality etc.

5. GENERAL

5.1 Introduction:

The oral and written submissions demonstrated among other things, the importance of bearing witness to lived experiences of discrimination, racial discrimination, racism and tribalism and to give voice to such experiences. The experiences were frequently articulated in general and abstract terms reflecting the often elusive character of these phenomena. In many settings, be it employment, education, sport, service delivery, etc., it was reported that racism and

racial discrimination remain persistent phenomena. Notwithstanding substantive chapters with summarized versions of submissions/presentations on some of the aforementioned, the panel realised the importance of including this chapter to ensure that the report encapsulates the entire soul and spirit of submissions and presentations made; in the process, some of the summarized versions may be repeated, while others have not been mentioned in the substantive chapters.

5.2 Submissions/presentations:

The lived experiences (reflected mostly *verbatim*) are cited below, not only as examples of racism, racial discrimination, discrimination in general or tribalism, but also how such phenomena are practiced with impunity because of lack of legislative protection:

- Racism in Namibia is well and alive and is across the board, I've experienced it on several occasions and for someone to say there is none is either a white or ignorant person.
- The tourism industry is a white dominated industry that comprises privately white run organizations and for us black people, even though we are educated, we do not stand a chance of getting the compensation, salaries, promotions and recognitions we deserved. I had trained several white juniors whom in the end where promoted to the same position I held or to much higher positions, while I have a number of years of experienced backed up by my qualifications. If you go visit white ran lodges with your white colleagues, your white colleague will get the recognition right away by being welcomed with a nice warm face cloth plus welcome drinks and once they are done with the whites, that's when they will welcome the rest of the people.
- I've also picked up racism behaviour while shopping around in normal shops around Windhoek. So these clothing shops have security guards at their door. The one time I was just about to leave a certain clothing shop and as I walked out the security guard asked me to open up my bag to see if I've stolen anything (these security guards get strict instructions from their managers to behave in this manner or else risk losing their jobs if they do not follow these instructions). The sad part was that a white lady left the shop just a few seconds before me and no one asked her to open up her bag to be searched. So I told the guard that the only way they are going to search my bag will be if they searched that white lady's bag first. So the security guard backed off.
- I've been dating a white man for over five years and he was previously married and has two children from his previous marriage. At times the ex-wife will send messages to my boyfriend saying that she cannot believe that he stood so low as to date a black woman and that the rest of the white community looks at it with a negative eye.
- Racial discrimination, a very serious cancer affecting all Namibians, even in post-independent Namibia; to the surprise of many previously disadvantaged citizens blacks discriminates against fellow blacks. I personally ever since I was a child experienced being discriminated against by my own relatives (even up to this day) simply because I was fathered by someone from a different ethnic group. Racial discrimination has time and again stuck out its ugly head esp. in the private sector, some sporting codes, educational institutions and to some extent at political, business and church level. Those are but just some areas amongst many others where racial discrimination has proven to be alive and kicking in Namibia. There are many examples of real-life situations which can be presented starting from private company salary differences based on racial discrimination.

- Citizens are discriminated against with regard to employment opportunities, their sex, disability, political affiliation, religious belief etc. Discrimination in general happens generally almost on a daily basis to any Namibian citizen at different levels and places.
- For the past three years that I have been with the financial sector. Regardless of the sector enjoying a massive black client base, they continue mistreating and under the rate black individuals employed instead of giving them the benefit of the doubt by treating them equally.
- To start with mistreatments which are persistently continuing includes the low acceleration rate for a black employee to benefit from promotions. This basically means that a black person needs to work double effort to get the necessary upgrade as compare to a white person and if even get elevated will not get compensated equally as the counterpart due to racial discrimination.
- I lodged a complaint about a colleague earning more than me at the same level and a white receptionist basic salary which was above mine as a marketing officer. After the matter was investigated by the Equity Commission, I was invited for a meeting with Mr X (CEO) and Mr Y (Director) of the business to tell me that my employment contract will be terminated because I am overqualified and they will outsource marketing.
- Before I found out I was HIV positive and having a child, I was okay. But after I tested positive, they treated me badly. They said why do you want to have a baby if you are HIV positive.
- A lesbian woman was raped and a few days after the incident, she reported the case at the police station. The case was registered (CR 879/3/15), but the victim was denied justice by the police; they failed to consider the case by reasoning that it was too late for them to gather enough evidence against the perpetrator.

The lived experience articulated in general terms are:

- As a nation which has emerged from apartheid, cases of racism remain prevalent. Cases are experienced in private spaces such as lodges, schools, guesthouses, commercial farms and certain hard to crack “strongholds”.
- One needs to have the right connection to get a job.
- Expressions such as “only in the Damara tribe, one will find lesbian and gays”.
- Unequal distribution of resources between schools in urban and rural areas.
- Facilities and equipment in schools are not *on par*.
- One traditional authority is now waiting for 6 years to be provided with a motor vehicle, while all others have received theirs.
- 75-80% Of the fishing quotas are allocated to people of the north, while Nama people do not have fishing quotas.
- Non-SWAPO members are not allowed to be members of Village or Constituency Development Committees. A strategic way to exclude them from rural community project grants, tenders and job opportunities under constituency office administration. To be enlisted for opportunities, individuals are required to be SWAPO card carrying members.

- United Democratic Party members feel discriminated, or deprived of their right and freedom to form or join a political party of their choice, since the Party is believed to have been banned.
- Leadership/management in informal settlement, is organised along tribal lines.
 - smaller groups are moved in the name of development only for those plots to be allocated to one language group to influence voting patterns, for the latter to dominate and imposed leadership on the others;
 - announcements and communications are done in secret and often in Oshiwambo/Kavango; languages of the majority to exclude other groups.
- Persons with disabilities are not elected as members of councils.
- The law is gender-biased; the prohibition against abortion does not give women a choice.
- The Agricultural (Commercial) Land Reform Act, no 6 of 1995:
 - provides that all agricultural land owners must pay land tax; however, agricultural land owners as defined by Article 23 of the Constitution have the right to rebate, but must apply for such rebate;
 - prohibits transfer of agricultural land from father to son;
 - prohibits potential young white farmers to acquire agricultural land;
 - prohibits inheritance of agricultural land to closed corporation or companies;
 - makes no provision for when emerging farmers should be eligible for land tax;
 - makes no provision for a sunset clause that once the land reform programme has come to an end, land tax will be suspended.
- Under the New Equitable Economic Equality Framework (NEEEF) proposals:
 - only one selected group of the population is compelled to make available 25% of their business interest to another group (previously disadvantaged);
 - only one selected group of the population may not benefit from the proceeds of the proposed NEEEF/NEEEB (incidentally the same group as above);
 - the objective of the NEEF/NEEEB proposals, is thus to ring-fence only a small selected group despite their contribution towards the local economy (even after 27 years of independence).
- The inequality gap is no longer just about race and tribe, but class and how those in power use tribe to entrench certain positions of power and wealth.
- The Affirmative Action (Employment) Act discourages appointment of candidates from selected groups of the population to any government or SOE position, despite their qualifications and/or the contribution they could make to the local economy (notwithstanding being born after Namibia's independence).
- The Caprivi Concerned Group addressed the forum on what they perceived not only as discrimination against them, but also government action against them that limit their human rights such as denying them public spaces for meetings and discrimination against them by the Zambezi administration.
- People attending the hearings were not in agreement on the origin of these strong ethnic attitudes. Some saw it as part of Namibia's apartheid heritage. However, the economic situation and the competition for Namibia's limited resources, including but not exclusively so, access to land, gave old feuds and ethnic prejudice a second life.

- The apartheid system was bad and cannot be defended by any rational argument. Yet, we should not forget that the unity of the oppressed black Namibians was the glue that kept the struggle together and eventually lead to the fall of apartheid. The present tribalism came for many as a surprise after years of ethnic harmony. While the Namibian nation needs to deal with the ghosts of our past, we also need to face new challenges.

5.3 Concluding observations/recommendations:

- A precondition for the development of effective preventative and correctional measures lies in the general knowledge that problems of racism and racial discrimination are pertinent in the very context one operates, not just far away and long ago, but also here and now.¹⁰⁴
- From the discussions above, it is evident that there is a general acknowledgement among Namibians that problems of racism, racial discrimination and tribalism are alive and pertinent in their daily lives.
- One must therefore find or cultivate a determined non-racialism that seeks to replace race, to make it irrelevant and instead build a new Namibia on the basis of equality, unity and fraternity.
- But the nation needs something; an excess or a supplement that can narrow the gap between ourselves and the other; a supplement that can help to replace race and make it irrelevant.
- What supplements are on offer for contemporary Namibia with its many languages and vast territory?
- There seems to be three: the Policy of National Reconciliation; the Nationhood and National Pride (NNP) campaign; and education.
- A general understanding of national reconciliation posits the nation as a community of victims, as those who have suffered during the colonial and apartheid era now united with the former perpetrators, healed through the process of forgiveness.¹⁰⁵
- The “re” in reconciliation means a return to origins; where the colonial past and present time can converge in a moment in which black and white, coloured or non-coloured, man and woman, were all at once, a State of ethical oneness.¹⁰⁶ For Sharon Davis, oneness in humankind is the guarding principle behind the healing of racism. It is knowledge about our collective capacity to reach deep into the human spirit and solve one of the most persistent challenges of our time, namely racism. The pressing need for us is to be unified in all essential aspects of human life, yet infinite in our diversity.¹⁰⁷
- The NNP campaign is directed to “*our individual and collective consciousness of our duty, commitment, obligation and responsibility to the nation and to each other as fellow citizens*”. It is aimed to address social ills such as tribalism, and violence against women and children, with its core values of tolerance, respectfulness, friendliness and loyalty. To achieve the mission of educating and empowering every Namibian, the NNP must be built into the school’s curriculum.
- Education and the education system are, in the long term, the royal root to generate a change in the attitudes and behaviours. They are acquired, where perceptions and images are conveyed and take root, and where respect for human rights and the values articulated in the NNP can firmly be instilled.

The Ministry of Education, Arts and Culture should:

- consider tolerance education in schools an urgent imperative; and
- devote special attention to improve teacher training, content of textbooks, lessons, new educational technologies with a view to educating caring and responsible citizens open to other cultures; also to appreciate the value of freedom, respect for human dignity and difference, and able to prevent conflicts or resolve them by non-violent means.

6. IN CONCLUSION

Throughout this report, the panel placed the duty to implement the recommendations on various ministries. This duty flows from Namibia's (State party) obligation under international human rights law and our Constitution. The successful combating of racism, racial discrimination, discrimination in general and tribalism depends on the effective translation of these recommendations into action by the ministries. The implementation of these recommendations should be seen as positive steps taken by the various ministries in fulfilment of Namibia's obligations under the various treaties. They present the minimum requirements (we do not claim they are the only ones), which, if implemented, may result in less violations of a person's right to dignity and equality.

Strategies aimed at eradication of racism, racial discrimination, discrimination in general and tribalism must be victim orientated. Research has shown that effective remedies are unavailable or unhelpful to those who are most in need of them. For this reason we suggest the creation of an informal and inexpensive tribunal, where victims can tell their stories so that systemic inequalities, racism, racial discrimination, may be eradicated. Our anti-discrimination law fails dismally to bring about social change as it disempowers those who experience racial discrimination.

The fight against racism, racial discrimination and tribalism begins with being informed. Through the lived experiences of ordinary citizens, we have learnt that racism, racial discrimination, discrimination in general and tribalism are present in the workplace, in education, sport, health, service delivery or the lack thereof, the spoken word and in our thoughts. We set out the body of national and international laws whose function is to translate the principle of non-discrimination into binding rules on how we should behave. These rules place obligations on the State and on all of us.

What are our obligations?:

When we learn or mislearn something as emotionally charged as racism at an early age, it is almost impossible to forget. The earliest education on race starts at home. We accept that children by nature are not racist, until being taught that they should attribute significance to racial, socially marked differences and colour. We are convinced that the integration of human rights learning and teaching into education can ensure that racial prejudice and intolerance are successfully combated in children when they are in school and out of school.

Thomas Blom Hansen¹⁰⁸ argues that institutional changes, successful redistribution of land and wealth or racially mixed schools and neighbourhoods are not unlikely to erase race from the everyday consciousness of the Namibians. It will require a profound and protracted change of the entire public culture in the country; a cultural revolution. It is therefore necessary not only to develop mutual understanding between divided groups, but also to unlearn racist attitudes and patterns of behaviour. How difficult it may seem to be, we must unlearn racist language, stop to classify ourselves or allow others to classify us, and stop using racist slurs.

Racist ideas are ideas and we should dig into the deep roots of racism and confront the enemy within. Ibram X Kendi¹⁰⁹ confesses that while he was committed to the antiracist idea of group equality, he was able to self-critique, discover and shed the racist ideas that others have produced over the lifetime of America. He believes that readers of his book will join him on the journey of interrogation and shedding our racist ideas. He concludes by stating: *"My open mind was liberated in writing this story. I am hoping that other open minds can be liberated in reading this story"*.

We hope that this report will give Namibians the courage to start the journey of interrogating and shedding their racist ideas. Only when our open minds are liberated can we rightly claim: *"One Nation, one Namibia"*, but the tribe must die so that the Nation can live.

END NOTES

1. Ulrich, G *“Epilogue: Tolerance between Romanticism and Law”* in Discrimination and Intolerance (2002) Hastrup K, and Ulrich G (eds) p285
2. Goldblatt, I *“A History of Resistance in South West Africa”* p14 as quoted by O’linn, B in Namibia The Sacred Trust of Civilization Ideal and Reality Vol I 2010 p10
3. Wellington, J H, *“SWA and its Human Issues”* (1967) p312-313
4. Hansen, T B *“After the Excess: Race, Racism and Reconciliation in Contemporary South Africa”* in Discrimination and Intolerance (2002) Hastrup K, and Ulrich G (eds) p129-130
5. Ex Parte Cabinet for the Interim Government for SWA: In Re Advisory Opinion in Terms of sec 19(2) of Proc 101 of 1985 (RSA), 1988(2) SA 832
6. Ibid p841
7. Horn, N *“The forerunners of the Namibian Constitution”*, in Constitutional Democracy in Namibia: A critical analysis after two decades (2010) Bösl, A, Horn, N & Du Pisani, A (eds) 2010 p75
8. Ibid Ulrich, G, p286
9. Article 89(2) *“The Ombudsman shall be independent and subject only to this Constitution”*
10. Section 3(2) of the Ombudsman Act, No 7 of 1990
11. These concluding observations and recommendations form part of the recommendations that the panel makes to government
12. See National Human Rights Action Plan on website www.ombudsman.org.na
13. Wiechers, M *“The Namibia Constitution: Reconciling legality and legitimacy”* in Constitutional Democracy in Namibia, Ibid p54
14. For the full text see Compendium of International Human Rights Law for Parliamentarians on website: www.ombudsman.org.na
15. Ibid p76
16. Ibid p92
17. Ibid p100
18. Ibid p114
19. Ibid p136
20. Ibid p278
21. Ibid p286
22. Ibid p310
23. Ibid p320
24. Ibid p344
25. Ibid p190
26. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance; Declaration and Programme of Action (DDPA) (2002) United Nations
27. Mabo and Others (n. 2, 1992) 175 CLR 1 F.C. 92/014
28. Mabo and others v. Queensland (No. 2) [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992)
29. Human Rights Council: Report of the Working Group on the Universal Periodic Review: Namibia; 15 April 2016
30. Mayagna (Sumo) Awas Tingni Community v Nicaragua, Inter-America Court of Human Rights, Judgment of 31 August 2001
31. Centre for Minority Rights development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Africa Commission on Human and peoples’ Rights 276/2003 (4 Feb 2010) para 209
32. African Commission on Human and Peoples’ Rights v Republic of Kenya, Application No 006/2012, Judgment of 20 May 2017
33. Article 23(1) Namibian Constitution
34. The full text of the changes reads as follows:
 - 11 (1) *No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with the intent to:*
 - (a) *threaten or insult any person or group of persons on the ground that such person belongs or such persons belong to a particular racial group; or*
 - (b) *cause, encourage or incite hatred between different racial groups or persons belonging to different racial groups; or*
 - (c) *disseminate ideas based on racial superiority.*
 - 14 (2) *No person shall be convicted of an offence under subsection (1) of section 11:*
 - (a) *if the act complained of was, at the time of the commission thereof, relevant to any subject of public interest, the discussion of which was for public benefit, and if on reasonable grounds such person believed the statement or statements concerned to be true; or*
 - (b) *if such person, in good faith and with the intention of removing matters tending -*
 - (i) *to threaten or to insult any racial group or any person belonging to such racial group; or*
 - (ii) *to cause, encourage or incite hatred between different racial groups or between persons belonging to different racial groups, pointed out such matters;*
35. Horn, N, State v Smith and Others: A defeat for hate speech legislation in Namibia (unpublished article)
36. O’Linn, B; Namibia The Sacred Trust of Civilization Ideal and Reality Vol II p 268-9
37. General comment, Recommendation No 31, on the prevention of racial discrimination in the administration and functioning of the criminal justice system; Committee on the Elimination of Racial Discrimination (2005)
38. Paragraph 68 of the DDPA
39. For the full text see Compendium of International Human Rights Law for Parliamentarians on website: www.ombudsman.org.na
40. For the full text see website: www.ombudsman.org.na
41. Ibid
42. Ibid Sections 6, 7, 8 and 9

43. Ibid Section 10
44. Ibid Section 11
45. Ibid Section 12
46. Gouws v Chairperson, Public Service Commission (2001) 22 ILJ 174 (LC); see also Ryan v Petrus 2010 Ryan v Petrus 2010 (1) SA 169 (ECG)
47. Strydom v Chiloane 2008(2) SA 247(T)
48. Hastrup, K *"Introduction: The Responsibility of Intellectuals"* in *Discrimination and Tolerance*, Ibid p7 and p10
49. Preamble; Namibian Constitution
50. Ibid Compendium p755
51. Ibid p201
52. Ibid website: www.ombudsman.org.na
53. Ibid
54. DDPa para 127
55. DDPa para 129
56. DDPa para 138
57. Ibid website: www.ombudsman.org.na
58. Ibid Compendium p92
59. Article 23(1) Namibian Constitution
60. Ibid website: www.ombudsman.org.na
61. Ibid
62. David A McDonald, *Environmental Justice in South Africa* 2010, p1
63. Manfred O Hinz, *"Customary Law and the Environment"* in *Environmental Law and Policy in Namibia* 3ed 2016, p442
64. Report of the African Commission's Working Group in Indigenous Populations/Communities; Mission to the Republic of Namibia July – Aug 2005
65. Article 100 Namibian Constitution
66. Communal Land Reform Act, No 5 of 2002 Section 20
67. Ibid Report of the African Commission's Working Group
68. Ibid Compendium p107
69. Ibid Ombudsman website: www.ombudsman.org.na
70. Ibid Compendium p178
71. Ibid Ombudsman website: www.ombudsman.org.na
72. Ibid
73. Ibid
74. Historical fact
75. Opinion expressed by a participant at one of the public hearings
76. Kessl v Ministry of Lands and Resettlement and Three Others; Heimaterde cc v Ministry of Lands and Resettlement and Three Others; Riedmaier v Ministry of lands and Resettlement and Three Others; Coram Muller, J et Silungwe, A J; heard on 24 and 25 July 2007; judgment delivered on 6 March 2008
77. Ibid Report of the African Commission's Working Group
78. Ibid website: www.ombudsman.org.na
79. Ibid
80. Ibid
81. Ibid
82. Article 8 of the Namibian Constitution
83. Article 21(2): Universal Declaration of Human Rights
84. Ibid Compendium p89
85. Ibid Compendium p15
86. Ibid website: www.ombudsman.org.na
87. OHCHR (2005) *Dimensions of Racism* p169-170
88. See AHRC Fact sheet 2014 (PDF) <http://www.racismnoway.com.au/wp>
89. Article 141 and 143
90. Article 4
91. Article in *New Era*; 13 Feb 2015
92. Durban Review Conference 20-24 April 2009: Concept Note for Side Event: Combating Racism through Sport and Youth Empowerment, Geneva
93. Section 30(4)(c) and 33(3)(d)
94. Regulation 16
95. UNESCO: *International Charter of Physical Education and Sport*; 21 Nov 1978
96. United Nations Special Session on Children – 'A World Fit for Children' 2002
97. European Commission against Racism and Intolerance; General Policy Recommendations No 12 on Combating Racism and Racial Discrimination in the Field of Sport, 2009
98. Ibid
99. Ibid
100. Ibid website: www.ombudsman.org.na
101. Ibid
102. DDPa para 51
103. DDPa para 53
104. Ulrich, G *"The persistence of Race"* in *Discrimination and Intolerance*, Ibid p91
105. Hansen, T B, *"Race, Racism and Reconciliation"*, Ibid p135
106. Ibid 136
107. Davis, S E *"The Oneness of Mankind: Healing Racism Today"*
108. Hansen, T B Ibid p138
109. Kendi, I X, *Stamped From the Beginning: The Definitive History of Racist Ideas in America* 2016, p11