



education

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THE RIGHT TO EDUCATION

**5th Economic and Social Rights Report Series
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South African Human Rights Commission

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PREFACE

In this 10th year of our young but thriving democracy, we are all engaged in some way or the other, in critically reflecting on the achievements we have secured over the past years as well as the unfinished work that lies ahead. In the context of the various rights guaranteed by our Constitution, they seek in their totality to ensure that the individual and the society are able to develop to their full potential and indeed that human rights becomes a central feature of our society. In this regard we have made much progress, and in the main, few argue against the notion that civil and political rights are well secured both in law and in practise.

However, the challenge that is situated at the heart of our Constitutional contract is how we advance social and economic rights and in so doing ensure that we advance the interests of the poor and those many who are still to enjoy the full benefits of our democracy. The inclusion of social and economic rights in the Bill of Rights was a clear articulation that democracy was as much about the right to vote, and of free expression and of association as it was about the right to shelter, the right to food, the right to health care, the right to social security, the right to education and the right to a clean and healthy environment.

The Constitution has tasked the Commission with a specific mandate to advance social and economic rights. In particular, section 184(3) requires that: “Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.”

A healthy and robust debate exists around these measures that the Constitution requires the State to take. In addition, the human rights discourse sees considerable contestation around issues such as the nature and scope of the right, the adequacy or otherwise of the measures taken and the meaning of the phrase ‘progressive realisation of rights.’ These are difficult issues and it is not always possible, nor may one say desirable, to always have consensus on them. In some instances the Courts have had to rule on them. We see this Report, however, not only as a contribution to those debates but also as a tool that can assist Government, Parliament and civil society in developing a critical understanding about social and economic rights and their implementation.

The modus operandi of the Commission in discharging its constitutional mandate to monitor and assess the observance of economic and social rights has in the main focussed on requiring organs of state to report to us on measures they have taken. This continues to pose several challenges, namely: to ensure that organs of State submit to the Commission reports that are timely, accurate and of good quality . We are pleased that good progress has been made on this front over the past year and the process of presenting draft reports to organs of state and civil society for comment has been most valuable to the Commission in finalising this report .

The launch of the 4th Economic and Social Rights report in April 2003 generated considerable interest and much debate and discussion on the Report ensued. We were invited by numerous parliamentary portfolio committees from the National Assembly and National Council of Provinces to present the Report. We certainly found the engagement with Parliament a very useful and mutually rewarding exercise. It provided the Commission with a unique opportunity to share its thinking and vision around its work

with Parliament while it enables us to better understand Parliament's expectation of the Report and its use to them as a tool in their work. There have been numerous valuable recommendations that have emerged from our presentations to Parliament which we are committed to giving effect to from our side.

So as we commence the beginning of the 2nd decade of our democracy the delivery of social and economic rights become crucial to the ongoing success of our nation and the entrenchment of a culture of human rights. It is certainly our hope, and the intention of this Report, to contribute to ensuring that the promise and the vision underpinning our Constitution is shared and enjoyed by all in our country.

Jody Kollapen

Chairperson - South African Human Rights Commission

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INTRODUCTORY SECTION

The aim of the *Introductory Section* is to provide an outline of the common analytical framework used in the reports, briefly discuss the political and economic context of the year under review, and provide an integrated summary of the key findings and recommendations of all eight reports in the series. Details of the report production process are also included at the end of this introduction.

The 5th Economic and Social Rights Report follows a more user friendly format than previous reports. There are now separately bound, less bulky, reports on Land, Water, Environment, Food, Health, Social Security, Education and Housing. Each report has an executive summary to facilitate access to the main findings and recommendations. Issues that connect one right to another are highlighted in the body of each report to emphasise the interrelatedness and interdependence of the rights in the Bill of Rights of the Constitution of the Republic of South Africa Act 108 of 1996 (simply referred to as the Constitution throughout the reports).

A) Analytical Structure and Framework

Each report in this series follows a basic structure:

1. **Introduction:** a discussion of the meaning and content of the right with reference to the Constitution, case law and relevant international human rights instruments.
2. **Progress in the realisation of the right:** a factual description of measures instituted by government during the period under review and their impact, especially on vulnerable groups.
3. **Challenges for the realisation of the right:** a description of key challenges that hamper the realisation of the right, and in some cases, government's response to these challenges.
4. **Critique of measures instituted:** a consideration of some of the shortcomings of the measures instituted by government.
5. **Recommendations:** a set of recommendations that may encourage progressive realisation of the right as expeditiously as possible.¹

Each report consolidates information from various sources including: relevant government protocol responses, government Annual Reports and Strategic Plans, the Intergovernmental Fiscal Review, as well as research funded by government, international donors or other agencies.

All reports employ the standard of reasonableness as laid down in the *Grootboom*² and *TAC*³ judgements of the Constitutional Court, in conjunction with relevant international human rights instruments.

¹ Some reports in the series end with a conclusion.

² Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC)

The constitutional provisions pertaining to socio-economic rights require the State to “take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of [these rights]”.⁴ This requirement, read with the provision on the obligation of the State to “respect⁵, protect⁶, promote⁷ and fulfil⁸ the rights in the Bill of rights” in section 7(2) of the Constitution ensures an effective guarantee of socio-economic rights in South Africa. The judicial enforcement of these rights by the courts and the constitutional mandate of the South African Human Rights Commission to monitor and assess the observance of the rights by the State⁹ and non-State entities also contribute to the effectiveness of the constitutional guarantee of these rights.

The Constitutional Court has played a significant role in ensuring the effective guarantee of socio-economic rights in our country. On the obligation of the State, Judge Yacoob held in the *Grootboom* case:

*The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.*¹⁰

On the effective guarantee of basic necessities of life for the poor, Judge Yacoob further said:

*This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.*¹¹

3 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)

4 See sections 26(2), 27(2) and 29(2) of the Constitution.

5 Respect is a negative obligation, which requires the State to refrain from denying or limiting equal access for all persons to the enjoyment of the rights. This also means that the State should abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure which violates the integrity of the individual or which in any way interferes or limits his/her right to pursue the enjoyment of the rights in the Bill of Rights.

6 The obligation to protect places a positive obligation on the State to prevent the violation of any individual's rights by a third party.

7 The obligation to promote places a positive obligation on the State to create a conducive atmosphere in which people can exercise their rights and freedoms by promoting awareness of their rights through public education.

8 The duty to fulfil places a positive obligation on the State to institute active measures that enable each individual to access entitlements to the right and which cannot be secured through exclusively personal efforts. State parties are also obliged to provide a specific right when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. e.g. people in disaster situations or those in dire need.

9 See sections 184(1) and (3) of the Constitution.

10 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC) [24]

On the role of the courts in ensuring that the State fulfils its role in giving effect to these rights and thus ensuring that there is an effective guarantee of these rights, Judge Yacob said:

I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.¹²

A similar position was taken by the Constitutional Court in another seminal judgment, *Minister of Health and Others v Treatment Action Campaign and Others*, where the Court held:

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflicts our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.¹³

In outlining the role of the courts, the Court also stated:

The primary duty of courts is to the Constitution and the law...Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to do so.¹⁴

While there might be some criticism directed at the Constitutional Court pertaining to the determination of when there are no available resources for the State to fulfil its obligation pertaining to socio-economic rights, the courts, particularly the Constitutional Court, have and will continue to play an important role in ensuring that the provisions in the Bill of Rights are effectively guaranteed for our people.

B) The Political and Economic Context of the Year Under Review

The period under review, 1 April 2002 to 31 March 2003, followed the 11 September 2001 attacks and a 24% depreciation of the South African currency (Rand) near the end of 2001. Consumer Price Inflation, especially for goods and services bought predominantly by the poor, increased sharply to the highest level since 1994. Concerns were signalled to the Competition Commission about the impact of import parity pricing in several sectors of the economy, most notably in food production, processing and retailing as well as metals and engineering. Interest rates were raised in an attempt to curb inflation, with a

11 Ibid., [93]

12 Ibid., [94]

13 *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) [36]

14 Ibid., [99]

subsequent dampening effect on the rate of economic growth in the latter part of the financial year. According to the Reserve Bank Quarterly Bulletin for March 2003, economic growth stood at a robust 3% in 2002.

As a result of prudent fiscal management, the government introduced a more expansionary Budget in February 2002. Total government expenditure increased from R262,6 billion in 2001/2002 to R291,8 billion in 2002/2003. Overall, the budget directed more resources towards reducing poverty and vulnerability, improving education and training, developing skills amongst the youth, building and enhancing physical infrastructure and basic municipal services, as well as making communities safer places to live, work and play.

It is also important to note that the February 2003 Budget provided for significantly greater expenditure than the previous year. Total expenditure was R331,7 billion for 2003/2004. The additional allocations accommodated substantial policy changes for all three spheres of government and also provided for *higher than anticipated inflation in 2002*.

By the end of the reporting period in March 2003, the Rand had appreciated by 18%. This created concern about the job losses that could arise out of an increase in import competition. Therefore, during the period under review, the goals of progressively realising economic and social rights took place in the context of significant macro-economic volatility, inflation and an expanding government budget.

C) Key Interrelationships Amongst Economic and Social Rights

The Right to Land

The State was responsible for achieving progressive realisation of the right to land during the reporting period. The Commission demonstrates that there was a year on year improvement in land delivery performance by the State, especially through the Land Restitution and Land Redistribution sub-programmes. Improvements in rural tenure reform were less noticeable.

Between 2000 and 2001 there were 12 094 settled Restitution claims, while in February 2002 there were approximately 32 000 settled claims. By March 2003, there were 36 488 settled claims recorded. Although the majority of these claims were in the urban areas, settled rural claims show a substantial increase. The people working on the Land Redistribution for Agricultural Development sub-programme delivered 103 682 ha against a target of 81 555 ha for the year under review. Whereas the Department had targeted to benefit 3 601 people, the programme ended up benefiting 6 170. Concerning tenure reform, the State initially delivered 30 000 ha of land through 201 projects. Beyond that, the State is working towards bringing the Extension of Security of Tenure Act (ESTA) and Labour Tenants Act (LTA) together in the Consolidated ESTA/Labour Tenants Bill.

Throughout the report, the Commission reflects on the demand, voiced by landless people and others, that the pace of land redress is too slow and inattentive to vulnerable groups. The report recommends accelerating land reform to meet its new targets by relieving budgetary constraints and the associated problems of personnel shortages, lack of quality training and understandable communication; land acquisition; and improvements in monitoring and evaluation.

The Commission would also like to highlight that it was informed by the Department of Land Affairs that it was impossible to represent the racial and gender composition of land purchase transactions and reposessions, according to the size and value of land parcels.

The Right to Education

The right to education is analysed as a continuum of three bands of schooling- General Education and Training, Further Education and Training and Higher Education and Training. The State instituted measures to respect, protect, promote and fulfil the right to General Education and Training, and in the Commission's overall assessment, it succeeded in achieving progressive realisation of this right.

The Department of Education succeeded in ensuring that all targeted Early Childhood Development sites for children between the ages of five and six were operating. However, the Department acknowledges the challenge, which has budgetary implications, that only 13% of all children have access to the programme. In the context of a substantial increase in the rate of student enrolment in primary schools between 1994 and 2001, the National Department focused on further increasing access to General Education and Training through reviewing public school financing and the system of school fee exemptions. The report highlights the shortcoming that some schools and Provincial Departments of Education failed to make parents aware of the school fee exemption.

While progress was made in eliminating instances where learners are forced to receive education in environments that are not conducive to teaching and learning, the report emphasises that more needs to be done to address infrastructure backlogs, especially when it comes to water and sanitation. The Department also made progress in developing a redistribution model for personnel and operating expenditure that would achieve equality of teaching quality and equality of learning outcomes in the schooling system from 2003/2004 onwards. All stakeholders in education, including the SAHRC need to explore and come up with a definition of quality basic education which could be measurable and relatively easy to monitor.

Conditions in farm schools were identified as hinderance to progress in the realisation of the right to General Education and Training. The issue of street-children also has to be given some serious attention by all the relevant stakeholders. Amongst other recommendations to further observance of the right to General Education and Training, the report calls for better-published medium term strategies and improved spending on Adult Basic Education and Training. In the 2001 Census, 4,5 million people aged 20 years and older did not have a formal education and 4 million people had primary schooling only.

Most of the developments in the Further Education and Training band met the Constitutional requirement to respect, protect, promote and fulfil the right. *Dinaledi*, the programme that seeks to improve participation and performance of learners from historically disadvantaged backgrounds in Mathematics, Science and Technology (MST), reportedly surpassed its target of 10% of students enrolling for MST in its first two years of implementation. The development of Recognition of Prior Learning (RPL) is another development that contributes to the realisation of the right to Further Education and Training. RPL recognises non-formal and/or non-academic education. RPL also stands to maximise learning opportunities for those without formal and/or academic qualifications to acquire formal qualifications in Further Education and Training institutions, which must all be registered with the State.

Areas where the State fell short of its obligations to progressively realise the right to Further Education and Training include: insufficient public education on school fee exemptions and insufficient Learner Support Materials and/or their late delivery. The report also highlights that participation rates in education by girl learners were being negatively affected by girls' involvement in income generating activities.

While Higher Education and Training is not explicitly recognised as a right in the Constitution, it obviously depends on the learning outcomes achieved in General and Further Education and Training. Here, there seems to be room for improvement as the average graduation rate for university and technikon students is 15%; less than half the ideal average of 33%.

Key challenges associated with the Higher Education and Training band include assisting potential students with subject selection choices and career guidance at school and university level, as well as lowering the high costs of accessing higher education and applying to different tertiary institutions. The report recommends ensuring that admission requirements to tertiary institutions are transparent and fair, promoting indigenous languages as academic/scientific/legal languages, mobilising funds for bridging courses and improving access for mature and post-graduate students, including part time students.

The Right to Water

Ever since 2001 and the introduction of Regulations Relating to Compulsory National Standards and Measures to Conserve Water, the State instituted a national measure to fulfil the right to water by supplying 6000 litres of free, clean water, per household per month, otherwise known as Free Basic Water.

During the reporting period, approximately 1,6 million people gained access to improved piped water supplies through Department of Water Affairs and Forestry's Community Water Supply and Sanitation Programme. Approximately 65 thousand toilets facilities were constructed during the reporting period under the same programme, but it should be noted that these figures exclude the large number of sanitation facilities that were delivered as part of the State's housing programmes. Less than 530 000 households also benefited from water and sanitation projects through the Department of Provincial and Local Government's Consolidated Municipal Infrastructure Programme. Although the above indicates that the roll-out of water and sanitation infrastructure is proceeding towards the Department's medium delivery targets, the report raises concerns about the level of dysfunctional infrastructure and projects, especially in rural areas.

At the end of the reporting period in March 2003, access to Free Basic Water by poor people stood at 38% or approximately 12,2 million people. Access to Free Basic Water by non-poor households stood at close to 100% or approximately 14,2 million people. A large number of poor people (19,6 million) were still to receive their Free Basic Water allocation. Where Free Basic Water was not available, the average cost of 6 kilolitres (kl) was approximately R13 per month. The price for 6kl of life-line supply was highest in Limpopo province at approximately R19 per month. Gauteng and KwaZulu-Natal also had comparatively high average charges for life-line supplies where Free Basic Water services were not operational.

In order to remove these glaring inequities in Free Basic Water provision, the report calls for an urgent revision of the pricing system to include a significantly greater level cross-subsidisation from high volume water users to low volume users in the 0-6 kl range.

More support and funding is required to assist municipalities with capacity problems in implementing Free Basic Water. During droughts, local governments should ensure that Free Basic Water supplies for domestic users are assured and that a situation cannot develop where agricultural, mining and industrial users are allocated large volumes of water at similar prices to low-volume users.

The report describes some aspects of the devolution of domestic water quality monitoring and testing from Provincial Departments of Health to local municipalities and calls for rapidly providing sufficient funds for water quality monitoring to prevent serious disease outbreaks and illness.

The report recommends that the Department of Water Affairs and Forestry (DWAF) should take a leading role in making sure that farm dwellers, residents near commercial farms and poor households in rural and urban areas access clean water and proper sanitation services. DWAF should also ensure that it develops and implements a plan to address the specific problems of water access experienced by people living with HIV/AIDS.

The report suggests that monitoring bodies should be created at local level to effectively monitor the implementation of policies and laws aimed at fulfilling the right of access to water. The report warns that monitoring will only be effective if monitoring bodies from local, regional and national spheres work together. Where possible and when possible, the Free Basic Water allocation should be increased to cater for higher levels of domestic water consumption. A 50kl water allocation per household per month would bring South Africa's Free Basic Water allocation into the 'low level of health concern' range defined by the World Health Organisation.

The Right to Health Care

The report on the right to health care focuses on key developments in three key health programmes of the State (Health Service Delivery, Strategic Health Programmes and Administration). Although the policy and legislative measures developed in the fiscal year under review can be said to be "reasonable" in their conception, there remain large gaps in implementing them in a manner such that all the provinces, urban and rural peoples, rich and the poor have equal access to the same high quality of care.

The three most important, and universally acknowledged, indicators to measure the health status of a nation are Life Expectancy at Birth, the Maternal Mortality Ratio, and the Infant Mortality Rate. Life expectancy has fallen from 56 years in 1996 to 52,5 in 2002 and is projected to fall to 47 by 2005. The infant mortality rate has increased from 45 in 1998 to 59 in 2002. This means that more children under the age of one died in 2002 as compared to 1998. The under five-mortality rate has risen from 61 in 1998 to 100 in 2002. Similarly, the maternal mortality ratio shows a steady increase since 1998 and is estimated to be 150 per 100 000 live births. The National Department of Health, as well as independent researchers, have concluded that this is due to HIV/AIDS related deaths.

The single most important challenge that government faces is the one posed by the AIDS pandemic and the high incidence of opportunistic diseases such as tuberculosis. It is estimated that about one tenth of the population of the population is infected with the HI virus i.e. close to 5 million people. The number of AIDS orphans is estimated to be one million. In a landmark case instituted by Treatment Action Campaign against the Minister of Health, the Constitutional Court, in 2002 confirmed the finding of the High Court that

government's policy to limit Nevirapine to research and training sites was in "breach of the States obligations under section 27(2) read with 27(1)(a) of the Constitution." The report recommends that the Comprehensive National Aids Plan should be rolled out effectively in all the provinces so as to meet targets and timelines in order to substantially reduce new infections and to prolong the lives of those already infected.

In spite of the fact that policies and programmes directed at improving the health status of the country have been put in place such as the Integrated Management of Childhood Illnesses, the AIDS pandemic continues to be the single most cause of death in South Africa. This has placed an enormous strain on an already overburdened health system and undermines the efforts made by the State. This is compounded by the fact that the other economic and social rights, which contribute substantially to the health status of a nation, are also not fully enjoyed by the vast majority of poor South Africans due to the huge backlogs inherited from the past. Inadequate housing, poor sanitation, overcrowding, lack of clean drinking water, lack of efficiently run social services, insufficient nutrition and health education exacerbate the diseases of poverty. Moreover, a household that is affected by AIDS contributes to depleting the financial resources available to the family, thereby increasing the level of poverty.

government developed legislative and other measures to comply with its constitutional obligations in terms of section 7(2) of the Constitution. However, despite national policies and programmes, which, in the main comply with international standards and targets, the health care system has not been able to successfully deliver quality health care on an equitable basis in all the provinces. Provinces do not spend the same amount per capita on health care delivery, and there is a serious lack of managerial capacity in the health system. The biggest challenge facing the efficient running of the health system is training managers to operationalise efficient systems especially for running clinics and hospitals where many problems have been identified. Efficient management systems in conjunction with effective engagement with labour should be operationalised with immediate effect in the public health sector so as to ensure that hospitals and clinics run well.

The report also recommends that there is a need to increase efforts in promoting preventative health measures by the State as well as by non-state actors. Programmes and policies should also be put in place to address the needs of the poor and vulnerable members of society, including a National Health Insurance System. Inequities in the health system such as intra- and inter-provincial health expenditures, access to clinics and hospitals, number of doctors, specialists, and nursing staff need to be addressed so as to give meaning to the constitutional right to universal and equal access to everyone. Finally, Departments of Health are strongly advised to improve their monitoring, evaluating, and reporting systems

The Right to Social Security

The Constitution provides that everyone has a right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The number of social assistance beneficiaries increased dramatically by 966 311 people from April 2002 to the end of March 2003, mostly as a result of increased registration for Child Support Grants for children up to the age of seven. By the end of March 2003, 5,6 million people were beneficiaries of social assistance, which mostly comprised of child support grants (2,5 million people), old age pensions (2 million people), disability grants (897 050 people) and foster care grants (133 309 people). The most rapid increases in uptake of social grants took place in Gauteng, Free State, KwaZulu-Natal, Mpumalanga and

Limpopo. Take up rates were considerably lower in the Northern Cape, North-West, Eastern Cape and Western Cape.

Most provincial departments indicated that the allocated budget was not enough and that numbers of grant beneficiaries were constantly increasing, resulting in overspending for social security. However, the delivery of social services has not been efficient in some parts of the country as a result of administrative problems, lack of documentation as barriers to accessing grants, poor conditions at pay points, as well as corruption and maladministration.

As a result of rapid inflation in the cost of basic goods bought by the poor, in 2002/2003, the State moved swiftly to implement above inflation related increases in social grants. The old-age pension was increased by R20 to R640, the child-support grant increased by R10 to R140, the grant in aid increased from R120 to R130, the foster-care grant from R450 to R460, and the care dependency grant from R620 to R640.

The National and Provincial Departments of Social Development spent 90% of the R49 million allocated to the HIV/AIDS (home based/community based care) programme. The Home/Community Based Care programmes, through the collaborative work of government, non-governmental organisations, including faith-based organisations, and communities have benefited 29 612 children orphaned or vulnerable to HIV/AIDS by the end of March 2003. The programme reached 75 000 children orphaned or vulnerable owing to HIV/AIDS since its inception in 2000.

The State also instituted new measures to further the right to social security, including disability assessment panels, a social relief of distress policy and the implementation of the National Food Emergency Scheme/Programme. Figures of the number of households that were assisted with food parcels in the pilot phase of the National Food Emergency Programme from December 2002 to the end of March 2003 range from 60 089 to 149 779.

The social security system at present does not cater for everyone and not everyone in need of social assistance is afforded such assistance. This is especially so for children in child headed households and children who live in the streets who sometimes engage in exploitative forms of labour. Some parents also fail to provide and take care of their children and put strains on the maintenance and social assistance systems.

The report recommends that the Department of Labour should take the International Labour Organisation's Decent Work for All Strategy forward in South Africa. It is also recommended that the relevant organs of State achieve better regulation of the insurance, health and maintenance systems. Particular attention should be paid to the coverage of old age pensions for workers in non-formal employment. The Department of Social Development is encouraged to continue fostering collaboration with all stakeholders, such as other government departments, Faith Based Organisations and Non-Governmental Organisations. The Basic Income Grant should continue to be considered as a viable option for addressing poverty in the country, especially amongst people of working age. The proposal to extend social assistance to all children in need (up to the age of 18), should also be kept alive.

The Right to Food

The report concludes that many people, and children in particular, had their right to food violated during the reporting period as they lost access to affordable food due to high prices and/or unreasonable plans devised and supervised by government. During the reporting period, 101 152 children were admitted to hospital with severe malnutrition and it was not possible for the Commission to state how many children died of malnutrition. However, it is alarming that case fatality rates for severe malnutrition in two under-resourced hospitals in the Eastern Cape ranged from 21% to 38%.

The report finds the National Department of Health's targets for reducing malnutrition to be unreasonable in their conception because the targets for 2000 and 2005 were virtually identical. The report also finds two elements of the Primary School Nutrition Programme to be unreasonable in their conception.

The first issue concerns the reduced allocation of resources to the programme in 2002/2003 as compared to 2001/2002. In 2001/2002 the total cost of the school food "meal" ranged from approximately 99 cents to R2.10. In 2002/2003, the maximum budgeted resource available per targeted learner per day was less than 67 cents. This is clearly an unreasonable set of parameters for the programme to be improved to meet the higher standards set by Cabinet.

The second element of the programme that was unreasonable was the reduction in the targeted number of children who should benefit from the programme. In the context of increasing numbers of children enrolled in schools, the Primary School Nutrition Programme did reach 4,5 million children in grades R to 7, however this was 151 615 children less than the year before. The drop in the number of learners who were reached is connected with government reducing its target from 5,4 million learners in 2001/2002 to 4,9 million learners in 2002/2003 as well as rapid increases in the cost of food procured for the programme. A three month gap in the implementation of the programme in the Eastern Cape also reduced access to the programme.

Non-State actors appear to have fallen short in their observance of their positive obligations to fulfil the right to food. As one example, the Yiyo Lena sifted maize relief programme introduced by a group of companies is alleged to have sold relief maize packs at a 20% discount, despite that fact that the companies announced that the programme would entail a 50% discount.

High basic food prices during the reporting period, were partly attributable to inadequate safeguards on the South African Futures Exchange, where maize prices are formed. High prices for maize were passed on to low-income consumers, who could ill afford such dramatic basic food price increases for such a sustained period of time. The potential for market manipulation should have been prevented by the Johannesburg Securities Exchange when allegations of abuse were first signalled in 2002. The report identifies that there are weaknesses in the State's observance of its obligation to protect against fraud, unethical behaviour in trade and contractual relations.

There were some signs of improvement in the State's delivery of production support to emerging farmers and people who grow their own food. For example, the Comprehensive Farmer Support Package was instituted during the reporting period to assist land reform beneficiaries. However, it was implemented in some provinces only.

The LandCare programme, which is one of the major production support programmes from the National Department of Agriculture, was heavily underspent at 65% of the total conditional grant to provinces. There is also a significant gap in production support for rural restitution beneficiaries.

It was found that very few Provincial Department's of Agriculture were operating well funded programmes designed specifically to provide grants or revolving loans to support increased access by small scale and emergent farmers to production and/or marketing related infrastructure. Production support materials and learning support materials that are relevant to resource to poor farmers in water scarce areas were also not readily available.

On the whole, the report determines that the State absorbed the heavy burden of duty to achieve the progressive realisation of the right to food as expeditiously as possible, within its available resources. However, there was a crucial weakness in the measures to protect the right to food from being violated by non-State actors or third parties that need not be repeated in future.

The report suggests that there is a need for greater care in the preparation of strategic and financial planning targets so that they inspire civil society to marshal their resources in support of the progressive realisation of the right. The report recommends: public education to raise awareness of malnutrition, rolling out the Integrated Food Security Strategy at a provincial level, improving food safety, achieving better regulation of the food industry through State procurement, accelerating agrarian reform, and communication policy and legislative developments more effectively. Finally, the report supports the call for government, labour, community and business representatives to negotiate an agreement at the National Economic Development and Labour Council (NEDLAC) to ensure the right to food and quality job creation in the food industry.

The Right of Access to Adequate Housing

In order to fill some gaps in the housing policy framework, the State identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities for 2002/2003. Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to transport and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualised as a result of the *Grootboom* judgment and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control (e.g. disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety). The report highlights that it was not clear whether the Emergency Housing Policy should also cover people living in informal settlements, because they are living in intolerable circumstances. Social Housing projects demonstrate that socially, environmentally and sunshine conscious design principles can make a difference to the quality of State subsidised housing.

The State reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from Occupation of Land Amendment Bill and the commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000. With a view towards curbing discriminatory practices, the Act compels financial institutions to disclose information in their financial statements on home loan patterns according to categories of persons and geographic areas (both of which may be prescribed). The Community Reinvestment Bill confirmed the State's intention to increase private sector investment in the lower end of the housing market. The report highlights that the State

was also attending to some aspects of the Housing Act 107 of 1997, as amended, in order to ensure that the Act, and its implementation, did not violate an individual's right to property in terms of the Constitution.

In terms of on-going policies and programmes, in 2002/2003, the State reported 203 288 houses completed or under construction, whilst the State approved 519 498 subsidies to households with a joint monthly income less than or equal to R3 500, or R1 500 if the house was built under the apartheid system. By the end of 2002/2003, the State reported that over 1,4 million houses had been delivered since 1994, whilst the number of families without houses (i.e. dwellings in backyards, informal dwellings, backyard dwellings in shared properties and caravans/tents) was reflected as 2 399 825- from the 2001 Census. The State also increased the subsidy amounts for the housing programme to keep pace with inflation and maintain the well-known quality and size of housing. Sixty-three projects were also completed as part of the Human Settlement Redevelopment Programme in order to correct imbalances and dysfunctionalities in existing settlements that cannot be funded through the housing subsidy scheme (e.g. sports facilities, business hives, labour exchanges, cemeteries, parks and ablution blocks).

There was under expenditure on housing delivery amongst many provincial departments responsible for housing. Reporting on the constraints associated with underspending was not complete, but included the following in some cases: failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in the National Department approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the People's Housing Process and delays at the Deeds Office.

Comparing performance in relation to targets was a problem in that provincial information was reported in the format of the number of units completed *or* under construction. Nevertheless, Gauteng and Limpopo provinces stand out as the only provinces to show a reduction in units, whether complete or under construction, from 2001/02 to 2002/03. The Gauteng Department of Housing reported delivering 59% of the target in the incremental housing programme and 39% of the target in the Social Housing programme. A Customer Support Service in the province acknowledged 83 714 queries and responded to a further 11 774 by letter.

According to the National Department of Housing, in 2002/2003, 6 469 houses did not conform to the Department's construction and safety standards. The National Home Builders Registration Council's (NHBRC) Warranty Scheme was instituted to provide assurance to beneficiaries that houses built and financed through the housing subsidy scheme are of an adequate quality. After trying to resolve disputes about the quality of construction, a housing subsidy beneficiary can forward complaints to the NHBRC. However, the report highlights that public education is required to empower consumers to identify quality problems and make use of the complaint procedures of the NHBRC. The Mpumalanga Department of Housing also reported that building works inspectors from provincial government and local government monitored the work of contractors.

The report makes one urgent recommendation, namely: to establish the dedicated fund for acquiring well-located land for low-cost housing. Other recommendations include reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, interpreting the Peoples' Housing Process as a route for strengthening culturally adequate housing, creating an informed and supportive environment for whistleblowing, and ensuring effective participation in the delivery of housing. Specific

attention is drawn to the plight of farmworkers and vulnerable groups, especially HIV/AIDS orphans and People with Special Needs.

The Right to a Healthy Environment

Section 24 of the Constitution establishes the right to environment in order to ensure the health and well-being of present and future generations. At its core, the right to environment aims to grant this benefit to everyone in South Africa, not just to the few. Although, translating this vision of the benefit of environmental health into reality has become increasingly complicated, ensuring that there are no violations of this right is as urgent as any violation of other rights in the Bill of Rights.

Analysts of data from South Africa's Global Atmosphere Watch station at Cape Point contend that continued emissions of greenhouse gases are cause for concern. Like many countries, South Africa is sensitive to global climate change and there are also occasions, especially in major urban areas, when more localised air pollution becomes a health threat.

By way of illustration, the Johannesburg *State of the Environment Report 2003* indicates that “while in many parts of Johannesburg, air quality is within acceptable standards, approximately 20% of the City, particularly dense settlements and lower income townships, experience severe air pollution, with ambient air pollution levels exceeding acceptable guidelines by approximately 20-30% particularly during winter when temperature inversions prevent emissions from dispersing.” The report goes further to state that “levels of particulate matter in certain townships can exceed the World Health Organisation standards by as much as 250% in winter.”

Progress in the realisation of the right to environment could not be very well monitored and observed by the Commission during the year under review because annual progress reports in terms of section 11 of the National Environmental Management Act 107 of 1998, were inaccessible at the time of writing. These progress reports should contain detailed information on the implementation of measures instituted to ensure the right to environment.

Nevertheless, the Commission did observe the growing influence of the Committee for Environmental Co-ordination through an interpretation of its review, and subsequent consolidation, of Environmental Implementation Plans and Environmental Management Plans submitted by relevant organs of State. These reports contain the planned and *aligned* outputs of national and provincial departments with an impact on, or management function over, aspects of the right to environment. The Commission also recognises that some Environmental Co-ordinating Committees were established at the provincial sphere, also for the purposes of alignment and co-operative governance.

Progress has been made, through the courts and other avenues, towards realising the procedural aspects of the right to environment (access to information, participation in decision-making processes, redress and remedy). The report includes several examples of objections and court applications lodged by Non-Governmental Organisations, with a view towards safeguarding environmental health in low-income areas. Despite these opportunities to access information and participate in decision making, some remedies for old violations could not be realised without concerted action on the part of the State. One example, is the case of workers with mercury poisoning, which first occurred many years

ago. In March 2003, Thor Chemicals was served with a R60 million toxic chemical clean-up directive by the State.

On the substantive issue of waste management and pollution control, what was reported by government to the Commission fell short of what was expected in terms of the strategic objectives of the policy and strategy for pollution and waste management. The report highlights that there is still no clear understanding among the different mandate holders for this function of what they are required to do and as a result, implementation was not as effective as it could be. Having said this, there were positive developments during the period under review, including the introduction of waste buy-back centres which address brown issues and could assist in strengthening the bargaining power of the very low income people who do the hard work of collection.

On the issue of Air Quality, the report acknowledges that progress was made in the Southern Industrial Basin through the focused action of the State and Community Based Organisations (CBOs) in linking asthma in school children to emissions, however there is an urgent need for national legislation to institute mechanisms and standards to effectively protect against pollution that threatens health and well-being, possibly including pollutant release and transfer registers.

Several new control measures were introduced to manage water pollution, including the second draft of the National Water Quality Management Framework Policy and the Waste Discharge Charge System. The Working for Water programme succeeded in protecting and preventing against water loss due to alien invasive plant species, however it was not clear how much of this work focused unfairly on commercial farmlands and not on areas inhabited by vulnerable sections of the population.

Most of the work by the State on inland as well as marine and coastal biodiversity and conservation was reasonable in as far as it related to tourism and the economic development of the country.

The report highlights that the challenges facing South Africa in terms of the right to a healthy environment include: allocating sufficient resources for progressive realisation of the right for the benefit of vulnerable groups; educating and training communities; ensuring that proper implementation systems are in place; ensuring effective co-operative governance; operating proper monitoring and evaluation systems.

The report recommends that while most policies and laws are in place or about to be instituted, there should be a quantum shift in focus towards implementation of measures to further the right to environment for vulnerable groups in a more decentralised way. Provincial government and local government should be resourced to concentrate their energies on implementation, in association with community based organisations that have already developed innovations to further the right, sometimes in the face of extreme resource scarcity.

The State has made valuable contributions to promoting the right to environment through for example, the “Bontle ke Batho” or the clean schools, wards and towns campaign; however, organs of State could do more to ensure that their own internal operations reflect implementation of the right to environment. For example, the Council for Scientific and Industrial Research (CSIR) implemented International Standards Organisation 14001 standards for handling and disposing of its own hazardous waste. This initiative by an organ of State seems to have afforded the CSIR the opportunity to gain some capacity and

insight, which could be applied to other relevant contexts in the public or private sector within the South Africa.

The report also recommends that monitoring and evaluation systems need to be simplified where possible and improved. Annual progress reports in pursuit of targets and plans laid down in Environmental Implementation Plans and Environmental Management Plans should include a focus on the substantive aspects of the realisation of the right for vulnerable groups. The contents of the reports should also be widely communicated so as to avoid conflict and encourage effective participation. The Committee for Environmental Co-ordination could also be complemented by the National Environmental Advisory Forum (NEAF) envisaged in the National Environmental Management Act 107 of 1998. This provision to encourage participation should be effected without delay.

D) Protocols and the Report Production Process

The production process for this report began with the SAHRC sending questionnaires, which are called protocols, to various organs of State for their comment in May 2003. The Commission then took some time to revise the protocols, which were resent to all relevant organs of State for comment and suggestions in June 2003. The response from relevant organs of State was not satisfactory; with the Department of Housing (Gauteng Province), the Department of Land Affairs and the Department of Water Affairs and Forestry being the only organs of State to respond. However, the Commission acknowledges that further work is required, in the next reporting cycle, to ensure that the protocols are improved for all spheres of government and parastatals.

The final protocols were sent to various organs of state (national and provincial government, parastatals, metropolitan and local councils) in July 2003, as mandated by section 184(3) of the Constitution. In future, the Commission will pay more attention to smaller municipalities by focusing field research on the implementation of programmes and projects at a local level.

The first deadline for the release of this Report was in December 2003. However, the Commission had major problems in getting timeous responses from organs of State and as a result, the Commission took a decision to subpoena several departments and postpone the release of the Report until sufficient information had been received (see summarised list overleaf).

SPHERE	INSTITUTION	DATE RESPONSE RECEIVED
2 - Provinces	GAU Social Services and Population Development	21 August 2003
1 - National	NATIONAL Labour	29 August 2003
2 - Provinces	EC Health	29 August 2003
2 - Provinces	WC Agriculture	29 August 2003
2 - Provinces	LIMPOPO Agriculture and Environmental Affairs	31 August 2003
2 - Provinces	FS Health	1 September 2003
2 - Provinces	NW Health	1 September 2003
2 - Provinces	WC Social Services	1 September 2003
2 - Provinces	EC Education and Training	5 September 2003
2 - Provinces	GAU Health	5 September 2003
2 - Provinces	KZN Agriculture and Environmental Affairs	9 September 2003
4 -Parastatals	PARASTATAL Rand Water	9 September 2003
2 - Provinces	KZN Traditional and Local Government	10 September 2003
2 - Provinces	MP Local Govt and Traffic	10 September 2003
2 - Provinces	NW Education	10 September 2003
1 - National	NATIONAL Land Affairs	12 September 2003
2 - Provinces	FS Social Welfare	12 September 2003
2 - Provinces	GAU Housing	12 September 2003
2 - Provinces	NC Health	12 September 2003
2 - Provinces	NC Social Services and Population Development	12 September 2003
1 - National	NATIONAL Agriculture	15 September 2003
1 - National	NATIONAL Water Affairs and Forestry	15 September 2003
2 - Provinces	EC Agriculture and Land Affairs	15 September 2003
2 - Provinces	FS Education	15 September 2003
2 - Provinces	GAU Education	15 September 2003
2 - Provinces	MP Housing and Land Administration	15 September 2003
2 - Provinces	WC Education	15 September 2003
2 - Provinces	WC Environmental Affairs and Development Planning	15 September 2003
2 - Provinces	WC Health	15 September 2003
2 - Provinces	WC Housing	15 September 2003
2 - Provinces	NC Agriculture Conservation and Environment	15 September 2003
2 - Provinces	KZN Health	16 September 2003
1 - National	NATIONAL Education	18 September 2003
2 - Provinces	MP Health	18 September 2003
2 - Provinces	NW Agriculture, Conservation and Environment	23 September 2003
2 - Provinces	MP Social Services and Population Development	25 September 2003
3 -Metropolitan Councils	METRO Greater Tswane Metropolitan Council	2 October 2003
3 -Metropolitan Councils	METRO Nelson Mandela Metro Council	2 October 2003
1 - National	NATIONAL Correctional Services	3 October 2003
1 - National	NATIONAL Social Development	3 October 2003
2 - Provinces	LIMPOPO Health and Welfare	3 October 2003
2 - Provinces	EC Social Development	3 October 2003
1 - National	NATIONAL Health	10 October 2003
2 - Provinces	GAU Agriculture, Conservation, Environment and LandA	10 October 2003
4 -Parastatals	PARASTATAL Medicines Controls Council	10 October 2003
2 - Provinces	FS Local Govt and Housing	29 October 2003
1 - National	NATIONAL Housing	30 October 2003
1 - National	NATIONAL Provincial and Local Government	30 October 2003
1 - National	NATIONAL Environmental Affairs and Tourism	31 October 2003
4 -Parastatals	PARASTATAL Agriculture Research Council	31 October 2003
1 - National	NATIONAL Minerals and Energy Affairs	3 November 2003
2 - Provinces	KZN Education and Culture	3 November 2003
2 - Provinces	EC Housing, Local Government and Traditional Affairs	4 November 2003
2 - Provinces	GAU Development Planning and Local Government	4 November 2003
2 - Provinces	LIMPOPO Education	4 November 2003
2 - Provinces	MP Agriculture, Conservation and the Environment	4 November 2003
2 - Provinces	NC Local Govt and Housing	4 November 2003
2 - Provinces	WC Planning and Local Govt	4 November 2003
4 -Parastatals	PARASTATAL National Education Financial Aid Scheme	4 November 2003
2 - Provinces	NW Developmental Local Government and Housing	5 November 2003
3 -Metropolitan Councils	METRO Eastrand Metropolitan Council	5 November 2003
4 -Parastatals	PARASTATAL Umngeni Water	5 November 2003
3 -Metropolitan Councils	METRO Cape Town Metro Council	6 November 2003
4 -Parastatals	PARASTATAL Medical Research Council	6 November 2003
2 - Provinces	FS Agriculture	7 November 2003
2 - Provinces	KZN Welfare and Pensions	7 November 2003
2 - Provinces	LIMPOPO Local Govt and Housing	7 November 2003
2 - Provinces	MP Education	7 November 2003
2 - Provinces	NC Education	7 November 2003
4 -Parastatals	PARASTATAL National Housing Finance Corporation	7 November 2003
2 - Provinces	KZN Housing	14 November 2003
3 -Metropolitan Councils	METRO eThekweni Metropolitan Council	17 November 2003
4 -Parastatals	PARASTATAL Landbank*	17 November 2003
4 -Parastatals	PARASTATAL Council for Scientific and Industrial Council	18 November 2003
2 - Provinces	FS Environmental, Tourism and Economic Affairs	19 November 2003
3 -Metropolitan Councils	METRO Greater Johannesburg Metropolitan Council	17 December 2003
2 - Provinces	NW Social Services**	

_____ First deadline

_____ Extended deadline

_____ Subpoena hearings begin

_____ Subpoena hearings end

* Extension granted as a result of communication problems

** No subpoena served, a letter explains the breakdown in communication

Most organs of State submitted their reports before they were meant to appear at a subpoena hearing. However, the North West Department of Social Services, Arts, Culture and Sport did not provide a response to the Commission as a result of problems with network cabling and the resignation of the personal assistant to the Acting HoD. The Department submits that it was not out of irresponsibility and deliberate disregard of the law that the Commission did not receive a report from the Department.

In order to improve the quality of the information, analysis and recommendations in the reports and to forge closer and better working relationships with government and non-governmental entities, a set of draft reports were released for comment to government and civil society before a National Input Workshop on 27-28 January 2004. Comments made at the workshop, and in writing, have been considered by each report writer.

A set of second draft reports were then made available to the Director General of the relevant national department in February 2003 to correct any remaining problems with factual information. Responses were received from the following departments: Water Affairs and Forestry, Minerals and Energy, Provincial and Local Government, Health, Social Development, Education, Land Affairs, and Housing. The final reports were also reviewed intensively within the Commission before being published.

E) Conclusion

One of the concerns acknowledged by the Commission about the monitoring process so far is that it still relies heavily on reports from government.

Furthermore, even though the Bill of Rights applies vertically and horizontally and binds State entities and non-State entities, the Commission has some capacity problems in extending its mandate to non-State entities, especially big corporations.

In the next reporting cycle, the Commission will place more emphasis on conducting its own primary research in addition to improving on the existing protocols for each right and making better use of annual report information as soon as it becomes available.

ACRONYMS

ABET	Adult Basic Education and Training
CEPD	Centre for Education Policy Development, Evaluation and Management
CHE	Council on Higher Education
CTP	Committee for Technikon Principals
DoE	Department of Education
DoH	Department of Health
DoL	Department of Labour
ECD	Early Childhood Development
ECDE	Eastern Cape Department of Education
ELSEN	Education for Learners with Special Educational Needs
ERP	Education Rights Project
FET	Further Education and Training
FSDE	Free State Department of Education
GDE	Gauteng Department of Education
GET	General Education and Training
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
KZNDEC	KwaZulu-Natal Department of Education and Culture
LDE	Limpopo Department of Education
LSMs	Learner Support Materials
MDE	Mpumalanga Department of Education
MST	Maths, Science and Technology
MTEF	Medium Term Expenditure Framework
NCS	National Curriculum Statement
NER	Net Enrolment Ratio
NHEIAS	National Higher Education Information and Applications Service
NPHE	National Plan for Higher Education
NQF	National Qualifications Framework
NSFAS	National Student Financial Aid Scheme
NSNP	National School Nutrition Programme
NWDE	North West Department of Education
OBE	Outcomes-Based Education
PEDs	Provincial Education Departments
RNCS	Revised National Curriculum Statements
RPL	Recognition of Prior Learning
SAHRC	South African Human Rights Commission
SASA	South African Schools Act 84 of 1996
SCEs	Senior Certificate Examinations
SETAs	Sector Education and Training Authorities
SGBs	School Governing Bodies
UDHR	Universal Human Rights Declaration
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICESCR	United Nations International Covenant on Economic, Social and Cultural Rights
WCDE	Western Cape Department of Education

THE RIGHT TO GENERAL EDUCATION AND TRAINING - EXECUTIVE SUMMARY

Constitutional Obligations

The right to education is entrenched in the Constitution of the Republic of South Africa, Act 108 of 1996 as well as in the international and regional human rights instruments. The international human rights instruments in which the right to education is enshrined comprise the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights, the Convention on the Rights of the Child. The African Charter on Human and People's Rights is the regional instrument in which the right to education is also enshrined.

Section 29(1) of the Constitution guarantees everyone the right -

(a) to a basic education, including adult basic education; and

(b) to further education, which the State, through reasonable measures, must make progressively available and accessible.

Subsection 2 guarantees everyone the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. It goes further, adding that in order to ensure the effective access to, and implementation of, this right, the State must consider all reasonable educational alternatives, including single medium institutions, taking into account –

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.

Subsection 3 guarantees everyone the right to establish and maintain, at their own expense, independent educational institutions. However, such independent institutions would have to ensure that they do not practise racial discrimination; are registered with the Department of Education (DoE); and that their standards are not inferior to those at comparable public educational institutions. It is important to note that subsection 4 states that independent educational institutions are not precluded from State subsidies.

Progress in the Realisation of the Right to Education

During the reporting period, the State introduced a number of policy and legislative measures in its quest to realise the right to education. Legislative developments in the General Education and Training sector were mainly in the form of amendments that were made to the South African Schools Act (SASA)

April 2002 – March 2003

84 of 1996, as well as an amendment made to the Employment of Educators Act 76 of 1998.

The following are some of the policy measures introduced during the reporting period. They comprise the following: National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions, School Safety Programme, Regulations to Prohibit Initiation Practices in Schools and Teacher Development.

Respect

The National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions meets the constitutional obligation to respect the right to education. By introducing a policy on drug abuse in learning institutions, the State is being proactive in ensuring that the right to education is not jeopardised owing to drug abuse by both learners and educators.

An amendment was made to section 5 of SASA. The amendment seeks to conform to the Constitutional Court's ruling in the *Harrison* case that the Minister of Education does not have the powers to limit admission age requirements of learners to public schools. This judgment led to a situation whereby underage learners could be registered in public schools if they were school-ready.

Protect

The introduction of the Schools Safety Programme and Regulations to Prohibit Initiation Practices in Schools contribute towards the protection of the right to education as these prevent the violation of the right by any third party.

An amendment was made to section 8 of SASA. New subsections (6, 7, 8 and 9) were inserted after subsection 5 of section 8 of SASA. The amendment provides due process in safeguarding the interests of the learner and any other party involved in disciplinary hearings.

Promote

It was found that some schools expel learners for not paying school fees. This is a violation of the learners' right to education since these learners miss classes as a result of the expulsion for the non-payment of school fees. It therefore, still stands that PEDs have to take active steps to ensure that parents are aware of the school fees exemption thereby promoting the right to education. While the State has introduced school fees exemption for parents who cannot afford to pay the school fees, some schools have not been willing to make parents aware of the exemption. In this case the problem lies with schools that are not passing the message on to parents. Some schools still do not inform parents about school fees exemption.

Fulfil

Despite the lack of classrooms and other related facilities in other schools (for instance, in the Free State province in 2002 30 schools were housed under unacceptable conditions), the provision of classrooms and related facilities to those schools that initially did not have these, is another positive development that also contributes towards the fulfillment of the right to education as it enables learners and educators to do their work better in improved conditions. The Teacher Development Programme could as well contribute to the realisation of the right to education if it indeed becomes a success, that is, if most under-qualified/unqualified educators receive training.

The amendment that was made to the Employment of Educators Act contributes towards the fulfillment of the right to education. The amendment makes it possible for PEDs to appoint educators who have had a break in service without a School Governing Body's recommendation. This move is helpful particularly to rural schools which in most instances do not have qualified educators since most of them prefer teaching in urban areas to rural areas.

Overall Assessment of the Right to Education

Given the fact that most of the policy and legislative measures the State introduced during the reporting period conform to the constitutional obligations as well as to the *Grootboom* judgment, a conclusion may be reached that the right to education was partially realised. The *Grootboom* judgment, which was on housing but also had implications for other socio-economic rights, has three key elements to it. These are: the reasonableness of the measures adopted by the State to realise socio-economic rights; the progressive realisation of socio-economic rights; and the realisation of socio-economic rights within available resources. None of the measures pertaining to the right to education adopted by the State during the reporting period were brought before a court as a result of it violating the Constitution or the spirit of the *Grootboom* judgment.

However, there are shortcomings in the implementation of some policy measures. One example is the school fees exemption. Whilst the introduction of the school fees exemption was a reasonable action by the State to ensure that no school-going child was prevented from attending school as a result of the school fees, some schools failed to make parents aware of the exemption. According to the *Grootboom* judgment, a programme that is reasonable in its conception but otherwise not reasonable in its implementation may not pass the test of reasonableness. Therefore, in conjunction with schools PEDs have to ensure that schools do make parents aware of the school fees exemption for the poor. According to an official from the Gauteng Department of Education the poverty line to be used is R450 per learner. However, the official emphasised the point that the issue was still being discussed.

Furthermore, the *Grootboom* judgment makes it clear that, in its quest to realise socio-economic rights, the State should examine legal, administrative, operational and financial hurdles and, where possible, lower these over time. By

introducing the school fees exemption, the State was making a reasonable attempt to progressively realise the right to education by ensuring that the poor were not excluded from enjoying the right to education.

As has already been pointed out above, the attempt is being failed by schools' failure to make parents aware of the exemption. As to the availability of resources in as far as the school fees exemption is concerned, there has not been any indication that the State lacks, in this case, the financial resources.

Also the lack of classrooms and related facilities in some schools is being addressed by the State through donor-funding mobilisation, amongst other things. Again, the right is being progressively realised. In this case, the State has made an indication that financial resources are a major challenge in ensuring that all schools have access to decent facilities required for their education. Some of the developments contained in the body of the report do point to a number of achievements that took place during the reporting period. For example, the fact that the DoE succeeded in ensuring that all the targeted Early Childhood Development sites were operating. The Department also increased the net enrolment ratio in the General Education and Training sector.

There were other problematic areas that also hindered progress in the realisation of the right to education. These include, amongst others, the conditions of farm schools whereby in some instances it was found that school-going children were not attending school because they were working on farms as a result of poverty and parents not being informed in some schools about the school fees exemption.

Recommendations

These are some of the main recommendations made in contributing to the realisation of the right to education:

- The DoE, Department of Labour (DoL) and the Department of Social Development need to work together to help address the situation in farming communities. Each of the departments has a role to play to alleviate the conditions in farming communities. Both the DoE and the DoL need to educate farming communities about their rights – workers' rights and the right to education. The Department of Social Development would have to address the poverty aspect of farming communities where possible.
- Better-published medium term strategies and improved spending on ABET are issues that need the State's immediate attention especially when about 4,5 million people aged 20 and older do not have an education, and about 4 million people have primary schooling only.
- The DoE should play a leading role in educator post-provisioning if equity of quality in education is to be achieved.

- ECD intake has to improve from the reported 13% to benefit other children who are currently not benefiting from the programme. This obviously has budgetary implications.
- The School Fees Exemption mechanism has to be transparent to benefit all the deserving. It is also equally important that the State augment the budget for those schools that exempt learners from paying the school fees.
- Other provinces should follow on the example of the Gauteng Department of Education (some taxis are used to advertise the policy) to make parents aware of the school fees exemption where fees are charged. Whilst PEDs can do much to advertise school fees exemption, the onus is on schools to actively make parents aware of the policy.
- It is the responsibility of each PED to inform schools what a section 21 status means to a school. There also has to be communication between section 21 applicants and PEDs since some PEDs do not respond to applicants on their section 21 applications.
- The State should strictly enforce section 3(5) of SASA to ensure that parents or guardians of those children that are of school-age but are not attending school do eventually attend school. Both parents and the State should work as partners in realising the right to education, especially with regards to compulsory schooling.
- All stakeholders in education, including the SAHRC need to explore and come up with a definition of quality basic education which could also be measurable and thus easier to monitor.
- There is a need to update the statistics for child and care dependency grants since the current statistics (captured in the Education Statistics in South Africa at a Glance in 2001 published by the DoE in June 2003) for this vulnerable group of learners is now outdated. This requires that relevant government departments such as the Department of Social Development exchange information with the DoE for consideration in its budgeting and planning for better provisioning of education.
- The issue of street-children has to be given some serious attention by all the relevant stakeholders such as the civil society, the DoE and the Department of Social Development to ensure that street-children attend school.

GENERAL EDUCATION AND TRAINING

1 INTRODUCTION

1.1 Meaning and Content of the Right

Education is entrenched in the Constitution¹, as well as in regional and international human rights instruments, as a socio-economic right. For example, education is enshrined in international instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR),² the Convention on the Rights of the Child (CRC).³ The African Charter on Human and People's Rights⁴ is one regional instrument in which the right to education is entrenched.

The United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) bases its definition of the right to primary education on the interpretation of the term "primary education" from the World Declaration on Education for All, and that is: "The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs⁵ of all children are satisfied, and take into account the culture, needs, and opportunities of the community".

While primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, UNCESCR endorses the position taken by the United Nation's Children's Fund: "Primary education is the most important component of basic education." Primary education has two distinctive features: it is "compulsory" and "available free to all".⁶

In relation to secondary education, the UNCESCR expands on the term:

"While the content of secondary education will vary among State parties and over time, it includes completion of basic education and consolidation of the foundations for lifelong learning and human development. It prepares students for vocational and higher educational opportunities." Article 13, paragraph 2 [of General Comment No 13 of the UNCESCR on the right to education] applies to secondary education "in its different forms", thereby recognising that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The [UNCESCR] encourages "alternative" educational programmes that parallel regular secondary school systems.⁷

Regarding the right to higher education, the UNCESCR states that if the right to higher education is to respond to the needs of students in different social and cultural settings, it must have flexible curricula and varied delivery systems, such as distance learning. In practice, therefore, both secondary and higher education have to be available "in different forms".⁸ However, it is important to note that in South Africa higher education is not a right.

Article 26 of the UDHR states that technical and professional education shall be made generally available and higher education shall be made equally accessible to all on the basis of merit.⁹ Technical and vocational education shall form an integral component of all levels of education, including higher education.¹⁰ In simple terms, therefore, whereas secondary education “shall be made generally available and accessible to all by all appropriate means”, and “in particular by the progressive introduction of free education”, higher education is based on merit. This point is elaborated upon by the UNCESCR when it states that higher education is not to be “generally available”, but only available [on the basis of capacity]. The “capacity” of individuals should be assessed by reference to all their relevant expertise and experience.¹¹

The pervasiveness of the elements of availability, accessibility, acceptability and adaptability, which are common to education in all its forms and at all levels, should be borne in mind though in considering the right to education.

There have been some significant global initiatives that have sought to highlight the significance of the right to education as well as give effect to declarations and international human rights instruments on the right to education. At the April 2000 World Education Forum in Dakar, Senegal, 180 countries, including the United States, committed themselves to a simple yet profound goal: providing quality education for all the world’s children by 2015. The Dakar conference was aimed at assessing the steps taken since 1990, when most of the same participants met in Jomtien, Thailand, and committed themselves to ensure that all poor children would have access to quality primary education within a decade. So the Dakar declaration was simultaneously an admission of failure and a pledge to try again – a triumph, as Dr. Johnson once said about second marriages, of hope over experience.¹²

In June 1994, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) convened an international conference in collaboration with the Spanish Government on special educational needs (focusing on children with disabilities, children in difficulties). The theme was “ACCESS AND QUALITY”, and the aim of this conference was not only to look for a way of moving closer to the Jomtien objective of Education for All, by promoting the integration of children and adolescents with special educational needs.¹³

In May 2001 the Department of Education (DoE) published a White Paper on Inclusion of Children with Special Needs entitled removing barriers to learning. It may well be argued that the South African government took time to heed the call to include children with special education needs in mainstream education as well as address the needs of those children with special education needs. This development in the education arena, *inter alia*, shows the significance of global developments as well as their impact on the education systems of countries.

1.2 South African Constitutional Obligations

The South African Constitution upholds the right to education. Section 29(1) provides that everyone has the right to a basic education, including adult basic

education, and to further education, which the State, through reasonable measures, must make progressively available and accessible. Section 29(2) guarantees everyone the right to receive education in the official language or languages of choice in public educational institutions where that education is reasonably practicable.

Section 29(3) provides that everyone has the right to establish and maintain, at their own expense, independent educational institutions that do not discriminate on the basis of race; are registered with the State; and maintain standards that are not inferior to standards at comparable public educational institutions. Furthermore, section 29(4) states that independent educational institutions are not precluded from receiving State subsidies.

Socio-economic rights have limitations as well. The context in which the socio-economic rights may be limited is explained in detail in the Bill of Rights.¹⁴

1.3 Analysis

The analytical framework to be used in the assessment of the progressive realisation of the right to education includes, *inter alia*, the UDHR, ICESCR, CRC and the Constitution. The following are the main areas to be looked into:

- The State's duty to ensure guidance on educational decisions and ensure school attendance;
- The State's duty to ensure free basic education incrementally;
- The importance of supplementing secondary education with alternative education programmes in parallel to regular school-based learning;
- The policy intention to focus on children with special education needs; and
- The need to redress historic imbalances in access to basic, secondary and higher education and training as a matter of equality.

2 PROGRESS IN THE REALISATION OF THE RIGHT

2.1 New Policy and Programmatic Measures

2.1.1 National Sphere

The following are policy and programmatic measures instituted by the DoE during the year under review:

2.1.1.1 Curriculum Measures

The Revised National Curriculum Statement (RNCS) has to be implemented by all Provincial Education Departments (PEDs). The RNCS Grades R – 9 builds on the vision and values of the Constitution and Curriculum 2005. These principles include social justice, a healthy environment, human rights and inclusivity. This RNCS adopts an inclusive approach by specifying minimum requirements for all learners. The special educational, social, emotional and physical needs of learners will be addressed in the design and development of appropriate learning programmes.

2.1.1.2 School Nutrition Interventions

Owing to organisational, procurement and other problems in the National School Nutrition programme (NSNP), the Cabinet took a decision in September 2002 that the NSNP be transferred from the Department of Health (DoH) to the DoE from April 2004.¹⁵

2.1.1.3 School Safety Programme

Ikusasa Lethu - this is a self-defence programme for learners and educators launched by the DoE during the reporting period. It is aimed at teaching school communities basic techniques of avoiding and dealing with potential attackers. At the time of reporting, more than 2 500 learners and educators selected from 1000 schools had been through a master trainer's self-defence course. They in turn trained a further 70 000 learners in the nodal areas. According to the DoE, the impact of this course had to be evaluated during the latter half of 2003. The results would determine how the campaign would be rolled out further.¹⁶

The Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training (FET) Institutions was published in *Government Gazette No 24172* on 13 December 2002.¹⁷ It seeks to contribute towards the prevention, management and treatment of drug use, misuse and dependency in public, independent and FET institutions. The policy is consistent with, and complements the National Drug Master Plan 1999 – 2004 (Department of [Social Development]).

In its Annual Report for 2002/2003, the DoE pointed out that the distribution of this policy needed to be supported by extensive training for school and district personnel, and that financial support has already been secured from the United Nations Office on Drugs and Crime for the purpose.

2.1.1.4 The Regulations to Prohibit Initiation Practices in Schools

These were published in *Government Gazette No 24165* of 13 December 2002 to be implemented in all schools as from 2003.¹⁸ It is clearly stated in the regulations that they are not aimed at prohibiting the induction process whereby

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learners are introduced to their new academic environment in a manner where dignity is enhanced as learners are advised, guided and mentored.

2.1.1.5 Teacher Development

Teacher development affects quality and is recognised as the key driver of improvements in learner performance in the education system. At the beginning of 2003, the DoE appointed three prominent academics from university education faculties to develop a National Framework for Teacher Education. The framework will cover initial, pre-service training, as well as in-service, continuing professional development with a view to building greater synergies between the work of the DoE, Higher Education Institutions and other agencies such as South African Council for Educators and Education, Training and Development Practices Sector Education and Training Authority (commonly referred to as “ETDP SETA”).

The following are some of the key areas that would be examined in the process: A scientific analysis of overall supply and demand of teachers in the country; through the recruitment, retention and attrition of teachers. This will include a macro-study of the impact of ill health such as HIV/AIDS, tuberculosis, and alcohol and drug abuse on teacher supply and utilisation (which will be based on a significant sample of teachers).

2.2 New Legislative Measures

2.2.1 National Sphere

We will consider here those legislative developments that have a direct bearing on the realisation of the right to education.

2.2.1.1 Education Laws Amendment Bill of 2002¹⁹

2.2.1.1.1 *The South African Schools Act No. 84 of 1996*

Amendment of section 5 of Act 84 of 1996 pursuant to Section 4 of SASA²⁰, the Minister of Education amended the Age Requirements for Admission to an Ordinary Public School. Section 4(a) states:

Despite paragraph 4, the Head of Department may allow a learner who wants to be admitted to Grade 1, but who will not be turning 7 during the year of such admission, to be admitted at a lower age. This deviation by the Head of Department may only occur if, in the opinion of the Head of Department, reasonable grounds exist to show that such a learner is, based on educational principles, school ready for Grade 1 and it is in the best interest of such a learner to be admitted as an underage learner to a public school. The parent of the learner must show that the refusal to be admitted to a school will have a detrimental effect on the child's development.

Amendment of section 8 of Act 84 of 1996 pursuant to subsection 5 of section 8 of SASA, the amendment by the addition of subsections 6,7,8 and 9 after subsection 5, provides due process in safeguarding the interests of the learner and any other party involved in disciplinary hearings.²¹

2.2.1.1.2 The Adult Basic Education Act 52 of 2000

The Adult Basic Education Act is amended by the insertion after section 18 of the following section:

Curriculum and assessment

Section 18A (1) provides that the Minister may/shall by notice in the Government Gazette determine –

- (a) a national curriculum statement indicating the minimum outcomes or standards;
- (b) a national process and procedures for the assessment contemplated in subsection (1) must be applicable to public and private centres.²²

The Education Laws Amendment Act 50 of 2002 was enacted and promulgated in *Government Gazette No 24113* of November 28, 2002.

2.2.1.1.3 Employment of Educators Act 76 of 1998

Section 6A is inserted into the act to enable a PED to make appointment of new recruits or applicants after a break in service without the recommendation of a School Governing Body (SGB). The reason for this is that the PED will be in a better position to distribute these educators, especially to schools which are in rural areas. These schools find it difficult to recruit educators since most educators prefer to teach in urban areas or as a last resort, to areas which are adjacent to urban areas. This process will ensure a fair distribution of well-qualified educators. It will also assist in the placement of students in suitable employment, who have been awarded bursaries or study loans either by the employer or the State.

Item 7 of Schedule 2 of the Act is amended to cover expenses as a consequence of providing an educator with a transcript of electronic recordings in cases of disciplinary hearings. Educators who demand such transcript will have to foot the bill for such transcripts. This is in accordance with section 22 of the Promotion of Access to Information Act 2 of 2000.

2.3 Budgetary Measures Affecting the Right to Education

2.3.1 National Sphere

Tables 1 and 2 present the DoE's budget for the financial year 2002/2003.

Table 1: National Department of Education Total Budgetary Allocation

<i>Year</i>	<i>Total Departmental Allocation in Rands²³</i>	<i>Allocation as a % of the National Budget²⁴</i>	<i>Total Conditional Grant Allocation in Rands</i>	<i>Total Donor Funding in Rands</i>	<i>Actual Expenditure</i>
2001/02	8 222 060 000	3,12	297 500 000	128 000	8 103 846 052
2002/03	8 876 498 000	3,08	425 925 000	181 003	8 793 091 154

Source: National Department of Education's response to the SAHRC's protocol, 2002/03.

Table 2: National Department of Education Budgetary Allocation Towards Programmes and/or Projects

<i>Programme</i>	<i>Year</i>	<i>Total Departmental Allocation in Rand(s)</i>	<i>Allocation as a % of the National Budget</i>	<i>Total Conditional Grant Allocation in Rand(s)</i>	<i>Total Donor Funding in Rand(s)</i>	<i>Actual Expenditure</i>
<i>Thuba Makote and Infrastructure Development</i>	2001/02	68 558 000	0,03	48 000 000	8 743	13 647 0789
	2002/03	69 085 000	0,02	47 086 000	6 179 875	33 956 921
<i>General Education (total) including Inclusive Education</i>	2001/02	180 411 000	0,07	120 032 000	66 940	133 726 846
	2002/03	318 142 000	0,11	197 605 000	87 053 000	284 470 297
<i>School Education</i>	2001/02	18 572 000	0,007	0	19 292	65 435 654
	2002/03	47 377 000	0,01	0	36 220 802	138 979 025
<i>HIV/AIDS</i>	2001/02	70 165 000	0,03	63 500 000	-	65 435 654
	2002/03	151 364 000	0,05	144 605 000	-	138 979 025
<i>Early Childhood Development</i>	2001/02	32 288 000	0,01	21 000 000	-	23 229 443
	2002/03	68 183 000	0,02	53 000 000	-	58 931 594
<i>Adult Basic Education and Training and Ikhwelo Project</i>	2001/02	28 683 000	0,01	25 000 000	-	8 815 272
	2002/03	17 746 000	0,01	13 158 000	-	5 516 497
<i>Teacher Development</i>	2001/02	17 610 000	0,007	-	404	12 107 947
	2002/03	19 613 000	0,007	-	5 841 126	17 944 367

Source: National Department of Education's response to the SAHRC's protocol, 2002/03.

Notes: - Figure not provided

2.3.1.1 *Thuba Makote* and Infrastructure Development

An underspending of about 51% of the allocated funds occurred in the *Thuba Makote* programme²⁵ in 2002/2003. The underspending was ascribed to a number of problems. These included unfavourable weather conditions that resulted in the postponement of building and construction in some provinces; small, medium and micro-enterprises failing to meet deadlines to deliver

building materials to schools on time in Mpumalanga; shortage of gravel in the Eastern Cape; water shortage in Limpopo, and so forth.

The underspending is just above half the allocated budget. Apart from the weather conditions, which also contributed to the underspending, an underspending of about 51% is serious. The programme did not reach all the intended beneficiaries, that is, learners in need of classrooms and other related buildings and/or facilities. Notwithstanding the causes of underspending, in his study conducted in 2002 Russell Wildeman found that four of the nine provinces had no designated capital spending, and those provinces that had their capital funds set aside forecast negative real average growth rates over the [Medium Term Expenditure Framework (MTEF)].

If capital expenditure is projected to grow by 23%²⁶ in terms of the MTEF, the issue of capital investment is to be fast-tracked, and provinces have to improve spending in capital investment programmes. More allocation of funds to capital investment would also mean that a recommendation made in the Review of the Financing, Resourcing and Costs of Education in Public Schools, released in March 2003²⁷, should be heeded. The recommendation is comprehensive, as it goes beyond just physical planning. The recommendation is as follows:

The DoE should:

Conclude the formulation of a school capital investment and physical planning policy, as well as the production of well-informed and open-ended planning tools that can be adapted to local contexts. International best practice in physical planning should inform the process. The result of this work should be better prioritisation of construction and maintenance projects, physical structures in schools that better reflect the requirements of the curriculum and, importantly, better learner performance. The overall framework should begin to inform infrastructure development in 2004.

On a positive note, a number of developments that involved PEDs and other government departments such as the Departments of Labour (DoL), Agriculture and Health, have taken place in the *Thuba Makote* programme (in all nine provinces) to date. These include the use of schools built through the programme used by the DoL for skills training for the unemployed in the communities, to enable them to participate in the construction of schools. The Department of Agriculture also participates in the programme by assisting the school and community members in establishing vegetable gardens at the schools to supplement the learners' nutrition. The DoH assists by providing HIV/AIDS training sub-programmes.²⁸

2.3.1.2 Early Childhood Development

The DoE experienced problems with the appointment of training providers for ECD provisioning. The appointed ECD training providers failed to adhere to all the requirements of the tender, such that the DoE had to re-advertise the tender, dividing its three components into three tenders: training of practitioners,

training of management structures, and advocacy and information campaign. Using the figures provided by the DoE on ECD budget allocation, underspending amounted to about 13,5%.

Underspending on the ECD conditional grant was ascribed to difficulties in transferring funds from PEDs to selected ECD community-based sites since the majority of these sites are located in poor communities, which lack access to banking accounts. Alternatively, banking accounts may have been closed as a result of no current balances, thus further exacerbating the task of transferring funds. This explains the deviation between the ideal per-head allocation and the actual cost (transfer) per head. In addition, although the majority of sites have been reached, not all the earmarked funds had been transferred at the end of January 2003.²⁹

Table 3: Number of Successful Targeted sites thus far and Per Head Spending on ECD Conditional Grant in 2002/2003 (spending at 31 January 2003)

<i>Province</i>	<i>Transfer (R million)</i>	<i>Total available budget in 2002/03 (include rollovers from 2001/02)</i>	<i>Number of sites targeted thus far</i>	<i>Targeted number of learners</i>	<i>Per head allocation (R)</i>	<i>Actual cost (transfer) per head</i>	<i>Difference between per head and actual cost (transfer) per head</i>
Eastern Cape	9,805	13,655	550	16 500	594	430	-27,6%
Free State	3,339	4,638	130	3 900	856	522	-39%
Gauteng	6,519	9,051	368	12 000	543	576	-6,0
KwaZulu-Natal	11,713	13,264	400	11 040	1 061	566	-46,7%
Limpopo	8,321	11,618	472	14 160	588	356	-39,4%
Mpumalanga	3,869	5,402	220	6 600	586	256	-56,3%
Northern Cape	1,007	1,162	50	1 500	671	319	-52,5%
North West	4,240	5,920	240	7 200	589	190	-67,7%
Western Cape	4,187	5,119	238	7 140	586	289	-50,7%
Total	53,000	69,829	2 668	80 040	662	411	-37,9%

Source: Russell Andrew Wildeman, Reviewing Provincial Education Budgets 2003, Budget Brief No 130, Budget Information Service, Idasa

2.3.1.3 HIV/AIDS Training

According to the DoE, the fact that the PEDs did not claim all their salaries for provincial co-ordinators and financial administrators caused under-spending in the programme. Other PEDs such as the GDE, WCDE, ECDE and LDE did not fill vacancies for posts the programme required. About 8,2% of the funds allocated to this programme were under-spent in 2002/2003.

The epidemic affects groups between the ages of 2 and 25, and this happens to be a group of people populating learning institutions. A study conducted by the Human Sciences Research Council for the Nelson Mandela Children's Fund found that the epidemic seriously affects children aged 2–14 years.

Furthermore, the study found that the prevalence among girls and boys was found to be 5,2% and 5,9% respectively. This figure increased to 9,3% for youths (15–24) and to 15,5% among adults over the age of 25. Among adults the figures are 17,7% and 12,8% for females and males respectively. Prevalence is far higher in urban informal areas (20,2%) than in all other areas, whereas the national average found in this survey was 9,3%.³⁰

The epidemic is threatening the Education for All goal first adopted by the international community in 1990. It calls for universal access to free, quality education by 2015, and an end to gender disparity in education by 2005. That goal could become impossible to achieve, as the Human Development Report (2003) found that the prevalence of HIV/AIDS among teacher populations is as high as 30% in some countries. The strategic approach proposed by the Report calls for more education about the disease to prevent decimation of the educational sector. It calls for a number of specific actions including teacher preparation to address sexual and health topics, HIV/AIDS prevention education through childhood and adolescence, and mass media awareness campaigns targeted at young people to reinforce the message.³¹

In its Annual Report for 2002/2003 the DoE agreed that HIV/AIDS poses the biggest threat to the education agenda. According to Professor Charles Simkins, whilst HIV prevalence among teenagers has dropped slightly from 16,5% in 1999 to 15,4% in 2001, school enrolment is projected to decline by 3,9% in the next decade as a result of declining fertility and rising AIDS-related infant mortality. The number of AIDS orphans is projected to grow from the current 200 000 to almost 2 million between 2010 and 2014. There would also be a significant rate of children leaving school either to raise money for their families or look after sick relatives.³²

The study to be commissioned by the DoE to grapple with the impact of HIV/AIDS on education will not only give the Government an idea of the impact of the pandemic on education, but would also go a long way in improving the education of learners about the pandemic. Moreover, such a study will also inform policy-making.

2.3.1.4 Teacher Development Programme

An underspending of 8,5% was experienced in this programme as a result of the late signing of a training agreement between South Africa and Cuban Tutors.

2.3.1.5 Adult Basic Education and *Ikhwelo* Project

A 10-month delay in the appointment of 240 educators and 9 project coordinators was one of the reasons for under-spending in this project. Inadequate capacity was also cited as another cause of delays in the implementation of the project that eventually led to under-spending in the project. About 68% of the funds were under-spent. It is not a good state of affairs that this sector of education is under-funded. More funding, however, would have to go hand in

hand with capacity-building to ensure that the funds are spent efficiently and effectively.

*ABET spending continues its low share of PED budgets, and these budgets need to be supplemented by better-published medium-term strategies. The continuation of the national ABET grant appears necessary and should ideally be continued until PEDs develop medium- and long-term strategic plans for broader ABET provisioning.*³³

According to Russell *et al.*, the weighted contribution of ABET to real change in 2003/2004 and between 2002/2003 and 2005/2006 is 2%, which is smaller than that of Special Needs Education and ECD, which is 2,7% and 2,6% respectively.³⁴ Russell *et al.* make an observation that the relative small size of ABET and ECD budgets means far larger real changes need to occur in these programmes before they sizeably affect the average growth rate of provincial education budgets.

2.3.2 Provincial Sphere

The following section presents various PEDs budgets for the financial year 2002/2003. Only the PEDs that responded to questions relating to this section will be considered in this section of the chapter.

The ECDE did not furnish the South African Human Rights Commission (SAHRC) with its budgetary information related to its programmes/projects undertaken during the reporting period, whilst the NWDE supplied the SAHRC with the budgetary information for 2003/2004.

However, the NWDE indicated that the budget was inadequate for ECD Learner Support Materials (LSMs) programmes in 2002/2003 despite the fact that it underspent an amount to the tune of R17 million, which was a conditional grant allocation (grant not specified). These funds have had to be rolled over to the 2003/2004 financial year as per the approval of the North West Treasury. The NWDE cited red tape as the cause of underspending of conditional grants.

2.3.2.1 Gauteng Department of Education

Table 4: Gauteng Department of Education Total Budgetary Allocation

<i>Year</i>	<i>Total Departmental Allocation in Rand(s)</i>	<i>Allocation as a % of the Provincial Budget</i>	<i>Total Conditional Grant Allocation in Rand(s)</i>	<i>Actual Expenditure</i>
2001/02	7 507 050 000	-	-	7 268 490 000
2002/03	8 158 253 000	-	573 402 000	8 065 919 000

Source: Gauteng Department of Education's response to the SAHRC's protocol, 2002/03.

Notes: - Figure not provided, Donor funding was indicated as "0" for both years.

Table 5: Gauteng Department of Education Budgetary Allocation Towards Programmes and/or Projects

<i>Programme</i>	<i>Year</i>	<i>Allocation for programmes/projects in Rand (s)</i>	<i>Allocation as a % of the Department's Budget</i>	<i>Actual Expenditure</i>
Public Ordinary Schools Education	2001/02	5 455 452 000	73	5 438 350 000
	2002/03	6 274 787 000	77	6 393 301 000
Independent School Education	2001/02	117 127 000	2	102 117 000
	2002/03	117 127 000	1,4	120 701 000
Public Special School Education	2001/02	414 341 000	6	413 063 000
	2002/03	374 712 000	5	378 131 000
Public Adult Basic Education and Training	2001/02	140 251 000	2	99 743 000
	2002/03	165 192 000	2	133 886 000

Source: Gauteng Department of Education's response to the SAHRC's protocol, 2002/03

Notes: The GDE did not supply the SAHRC with figures for "Total Conditional Grant Allocation".

Disaggregating the programmes, the GDE overspent in the following programmes in 2002/2003: Public Ordinary Schools Education, Independent Schools Education, and Education in Special Schools by 1%, 2,9% and 0,9% respectively. The amount of money overspent in all the three programmes was insignificant. The overspending in the Public Ordinary Schools and Education in Special Schools programmes was ascribed to personnel costs. The Independent Schools programme also overspent as a result of a sudden increase in learner enrolments, which required more subsidies from government. However, the public ABET programme underspent by 19% as a result of savings in personnel expenditure. The fact that part-time educators who do not qualify for the same benefits as full-time educators were used, and that there were some unsettled orders for Financial Management and Quality Enhancement Grant projects, created savings for the GDE.

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2.3.2.2 Western Cape Department of Education

Table 6: Western Cape Department of Education Total Budgetary Allocation

<i>Year</i>	<i>Total Departmental Allocation in Rands</i>	<i>Allocation as a % of the National Budget</i>	<i>Total Conditional Grant Allocation in Rands</i>	<i>Actual Expenditure</i>
2001/02	3 833 963 000	0,015	1 695 000	3 793 053 000
2002/03	4 127 781 000	0,014	4 187 000	4 101 148 000

Source: Western Cape Department of Education's response to the SAHRC's, 2002/03

Notes: Donor funding was indicated as "0" for both years.

Table 7: Western Cape Department of Education Budgetary Allocation Towards Programmes and/or Projects

<i>Programme</i>	<i>Year</i>	<i>Total Departmental Allocation in Rands</i>	<i>Allocation as a % of the National Budget</i>	<i>Total Conditional Grant Allocation in Rands</i>	<i>Actual Expenditure</i>
Public Ordinary School Education	2001/02	3 490 902 000	0,013	-	3 406 317 000
	2002/03	3 726 611 000	0,013	-	3 705 062 000
Independent School Education	2001/02	39 233 000	0,0001	-	22 112 000
	2002/03	23 850 000	0,0001	-	23 747 000
Schools for Learners with Special Educational Needs	2001/02	282 976 000	0,001	-	293 725 000
	2002/03	307 279 000	0,001	-	300 927 632
Early Childhood Development and Adult Basic Education and Training	2001/02	70 896 000	0,0003	1 659 000	70 899 000
	2002/03	70 041 000	0,0002	4 187 000	71 411 958

Source: Western Cape Department of Education's response to the SAHRC's, 2002/03

Notes: The WCDE did not supply the SAHRC with figures for "Total Conditional Grant Allocation".

The WCDE accepted that its proportion of the national budget declined as part of the reduction in the share of the budget. This placed pressure on the Department to ensure that the available funds were spent as effectively and as efficiently as possible.

2.4 Policies, Programmes and Projects

The DoE and some PEDs directly supplied the information contained in this section of the chapter. Other PEDs did not respond to some questions hence there is uneven reporting between the PEDs in the report. In other cases where

the DoE or a PED presented information that seems to be in contrast with an independent source other than a PED or the DoE, reference is made to the independent source to give the reader a different view on the issue.

Six years into democracy, the South African education system had already undergone transformation in the areas of policy-making and governance structures. By 2000 stability had already been achieved and the fundamentals had been put in place, namely enhanced basic school functionality, improved provincial capacity to manage human and financial resources, and ensured focus on delivery.³⁵

*In 2001, the Department shifted its attention from basic systemic functionality to institutional renewal, focusing on teaching, learning and whole-school development; increasing participation in further and higher education, maths, science and technology; and targeting those communities that are part of government-wide programmes for rural and urban development.*³⁶

The following have been priority areas for the DoE in 2002 over the medium term:

- Four projects focused on the 18 rural and urban nodal points identified in the Integrated Sustainable Rural Development. These are the implementation of the reception year in accordance with policy on early childhood development; an infrastructure programme to improve national and provincial planning, delivery, design and innovation capacity; a more compact school effectiveness and teacher professionalism programme focusing on education managers and educational institutions; and the development of adult literacy and skills.
- Inclusive education and training opportunities for the estimated 280 000 out-of-school children are being developed, in terms of the White Paper on Building an Inclusive Education and Training System.
- A review of resource allocation and management policies.
- In collaboration with the Ministry of Labour, the new Human Resource Development Strategy for South Africa was developed.³⁷

The DoE has developed a draft strategic plan for the implementation of the NSNP, which should also address the increasing participation rates in basic education and FET. Funding in the schooling sector is guided by the National Norms and Standards Funding model. The National Norms and Standards for Funding model ranks schools according to poverty. The budget is then divided among schools in such a way that the five quintiles, from poorest to least poor, receive from 35% to 5% respectively. Since 2002 the redress portion of the Post Provisioning Norms has required provinces to distribute 5% of the posts in targeted poverty areas to entrench access to quality education by the poor.

To further enhance rights to education, the Government has recently adopted a Plan of Action for Improving Access to Free and Quality Basic Education for All. The Plan of Action represents a victory for pro-poor funding where school allocations will be targeted in Rand terms towards poor learners. National instead of provincial poverty quintiles will be used to drive funding so that equally poor learners across the country will be subject to the same pro-poor targeting.³⁸

At provincial level, the ECDE underscored a number of achievements during the year under review, for instance the successful launch of the RNCS Grades R – 9 in the province. The WCDE has trained 5 810 Foundation Phase educators and 959 principals for the implementation of RNCS policy and developed LSMs for the effective implementation of the RNCS that underpins Outcomes-Based Education.

The WCDE launched the Cape Teaching Institute for In-service Teacher Training in September 2002 in order to improve the quality of education in the Western Cape. The Department also increased the number of teacher training bursaries available for pre-service teacher training as well as commissioned research on future teacher requirements. GDE's Mathew Goniwe Institute for Leadership was also established.

2.4.1 White Papers on Early Childhood Development and Inclusive Education

One of the highlights during the year under review was the implementation of the White Papers on ECD and Inclusive Education. There are about 825 sites in the Eastern Cape that offer Grade R as the first year of school (since January 2003) and 475 Grade R sites that were attached to schools in January 2003. Furthermore, there are 12 mainstream schools and two special schools implementing the White Paper on Inclusive Education.

The GDE introduced a Grade R Implementation Conditional Grant programme based on the White Paper on ECD. One of the aims of the programme was to establish 552 Grade R sites; provide them with basic learner and teacher resources; provide accredited training to the 552 Grade R practitioners; monitor and follow up support to sites and practitioners; transfer salary subsidies to the 552 Grade R practitioners; and build capacity of provincial officials in ECD provisioning. Through the programme 551 sites were established and are reported to be operational. 368 Grade R sites received a basic resource kit. Accreditation was to start in September 2003 for the 551 practitioners. The practitioners are already receiving their subsidised salaries.

Furthermore, according to information supplied by the GDE, approximately 20 000 children between the ages of 5 and 6 from historically disadvantaged communities are presently accessing a quality accredited Grade R programme. There are also two Grade R sites situated in Alexandra specifically for children with special needs (one site for blind children with a blind practitioner and the other site is for physically disabled children). A few other sites located around the province cater for various disabilities.

The WCDE has increased the number of posts from 308 to 400 for educators to teach learners who are experiencing barriers to education. As a move to improve access to ECD, particularly in disadvantaged areas, the WCDE has increased the number of subsidised ECD sites from 879 to 1 315.

2.4.2 Capacity-Building Programme for School Management Teams

It is also noteworthy that the ECDE ran a capacity-building programme for School Management Teams of section 20 schools³⁹ to help these schools obtain section 21 status. This culminated in about 1 500 schools being granted section 21 status. Like the ECDE, the WCDE ran a mentorship and curatorship programme primarily for principals, including School Management Teams to improve management capacity at school level. The initiative led to a draft policy that is implemented on an *ad hoc* basis as required. As a result of the capacity-building programme for School Management Teams, about 48% of public schools in the Western Cape are section 21.

2.4.3 Adult Basic Education and Training

The ECDE ran the *Ikhwelo* Poverty Alleviation project in the Presidential nodal points (Motherwell, Mdantsane and Lusikisiki), as part of the implementation of the Skills Development Act 97 of 1998. The implementation of this project has resulted in the full-time employment of 48 educators in 12 ABET Learning Centres that engaged in sewing programmes, crop production, poultry and piggery. The *Ikhwelo* Poverty Alleviation project was aimed at rural women, unemployed men and out-of-school youth.

The ECDE also contracted some ABET learnerships for levels 4 and 5 of the National Qualifications Framework, which were aimed at providing applied competence and practice in the workplace; upgrading ABET Learning Centres' skills; and to bring about synergy between structured learning and structured workplace experience. About 115 learner educators are engaged with the learnerships. Furthermore, about 65 ABET educators from 12 districts received training on poultry production at Fort Cox Training College. The training they received should enable them to offer the programme as part of ABET. The reported increase of ABET learners in some selected ABET Learning Centres in the Eastern Cape was ascribed to skills upgrading programmes offered to unqualified ABET educators in the province.

2.4.4 Whole School Evaluation Programme

The NWDE implemented the Whole School Evaluation Programme (Government Gazette Vol 433, No 22512 of July 2001) during the year under review. Only 30 schools were evaluated as a result of misunderstandings related to the policy between teacher unions and the NWDE.

2.4.5 Values in Education

The programme is aimed at advocating the values captured in the Constitution and Manifesto and to instill these values into the policies and practices of the DoE. The intention is to instill in the learners a positive frame of mind, the appreciation of dialogue and debate and a sense of pride in being a South African and an African, as well as a culture of ethics and respect for human rights.

Some progress has also been reported here by the directorate responsible for the Values in Education programme. Such progress includes some schools responding positively to the materials and suggestions sent to them by the DoE. However, there is one worrying aspect regarding the programme, 'there are schools that are still plagued by racial incidents, both overt and covert'. It is pleasing to note, however, that already in 2002 the DoE developed a monitoring system that would help the Department find out the areas that need to be attended to in order to improve the programme.⁴⁰

2.4.6 Education and Communication Technology

The WCDE's programme on Education and Communication Technology has ensured that about 99% of schools in the Western Cape are linked to the Internet (Telecommunication Project). There are about 3 800 computers installed in school computer-laboratories.

2.4.7 HIV/AIDS Training Programme

The NWDE offered "extensive" HIV/AIDS Training to the following educators and learners:

- 1 055 urban-based educators
- 3 038 rural-based educators
- 488 urban-based learners
- 1 646 rural-based educators

Apart from offering HIV/AIDS Education to these categories of learners, the ECDE identified AIDS orphans and other vulnerable groups for financial grants offered by the Department of Social Development. Based on the National Education Policy Act 27 of 1996, the WCDE has trained more than 8 000 primary school educators on HIV/AIDS Education and made related educational materials available in three languages to primary schools. The training programme has also been launched in high schools.

2.4.8 Advocacy Campaigns to Raise the Levels of Awareness of the Right to Apply for Exemption from Payment of School Fees

Financially challenged parents are said to have become aware of exemption from paying school fees in Gauteng. The GDE further indicated that learners are no longer victimised for not paying the school fees.

3 CHALLENGES FOR THE REALISATION OF THE RIGHT TO EDUCATION

3.1 Access to Schooling

According to the DoE, access to schooling for children aged 7 to 15 has improved noticeably since 1994. In 1991 the net enrolment ratio (NER)⁴¹ for primary schools was 92%. However, during the subsequent years there was even more improvement in the NER for primary schools. For instance, by 1999 and 2001 respectively the number had risen to 95% and 97%. The DoE also points out that the increase in the primary school NER did not necessarily mean budgetary decline for education; however, where there was some decline it was ascribed to salary pressures at the time.⁴²

It is important to note, nevertheless, that the situation in the FET proved the contrary. The overall NER for secondary schools dropped slightly, from 89% to 88%. The problem is said to be partly linked to the fact that those learners who seem to be struggling academically leave school even before they reach Grade 12.⁴³ Despite the reported improvement in the NER for primary schools, the DoE accepts the challenge to achieve 100% coverage in the compulsory ages, that is ages 7 to 15. The education system can now account for over 96% of children aged 7 to 15 in the population. With the development and full implementation of the reception year in the next decade, this will increase to accommodate all 6-year-olds.

The 2001 NER of 97% implies that some 300 000 children aged 7 to 15 are not in any institutions. (Whilst home schooling is allowed in South Africa, its extent is so small that we can ignore it for the purposes of this discussion.) Many of these 300 000 potential learners are outside the system because of a disability.⁴⁴

Once more, a key intervention in 2003 was the completion of the Review of Public School Financing in February 2003, which identified key interventions to reduce the pressures on poor households and poor parents in ensuring the attendance of children at schools.

The following are some of the important interventions arising from the abovementioned review in the implementation of a national poverty-targeting framework. Currently non-personnel recurrent allocations are distributed according to provincial poverty-targeting lists, the consequence of which is that the poorest 20% of learners in a particular province may not be at the same level

of poverty as the poorest 20% in another province. According to the DoE's Plan of Action, the application of the national quintiles will take place in 2004.⁴⁵

In the new national targeting framework each province will be allocated funds according to their share of poor learners nationally. The national poverty profile and shares per province will be based on an index of poverty based on official Statistics South Africa data. PEDs will then develop a provincial resource-targeting list by ranking schools according to the poverty of the communities around the school. Provinces will then allocate a "normed" per learner amount for non-personnel recurrent school expenditure according to the national poverty groupings. The "normed" amount per learner will decrease progressively towards the non-poor groupings. The index of poverty will no longer include the condition of the school, as was the case at the time of reporting. The implication of the changes to the poverty index, the national poverty-targeting framework and the phased norm of R450 per poorest learner is that the National Norms and Standards for School Funding (Notice 2362 of 1998) in terms of SASA will have to be amended. Redress, in the form of inter-provincial pro-poor funding, will be firmly established on the non-personnel recurrent side.

In order to relieve the pressure of compulsory school fees on the poor and the consequences of the fee-setting process, the regulations governing exemptions from school fees in terms of SASA will be amended. All recipients of child grants and dependency grants from the Department of Social Development will qualify for full exemption from school fees (where fees are charged). The procedures for applying for fee exemptions so that parents may declare any "hidden fees or charges" and additional financial obligations imposed by schools, such as non-standard school uniforms, additional school material and other costs, may be taken into account for exemption.

Households, whose income is below a threshold, will be able to pool school-imposed costs in respect of all their children in their application for school fees exemption. The DoE will amend the prescribed forms for the application for fee exemption to include these amendments. All schools that levy fees will be obliged to circulate the fee exemption application forms to all parents in the school.

3.2 School Fees Exemption

Among the challenges presented by the GDE in policy implementation, one that stands out starkly is fee exemption. The GDE refers to the application for school fees exemption as a "cumbersome process". The process that has to take place for financially challenged parents to be granted fees exemption is said to be "tantamount to requesting parents to parade their poverty – which is further demeaning, resulting in the reluctance [of parents] to apply for school fee exemption". The GDE also cites schools' reluctance to apply the policy, as it results in a loss of revenue that is not recovered from the DoE. The fact that it is only the GDE that reported on this issue does not mean that the challenge is peculiar to the GDE only.

3.3 Inequities in Post-Provisioning

In 2000 the National Norms and Standards for School Funding was targeted at the non-personnel recurrent expenditure only. However, starting from financial year 2003/2004, this redistribution model will target both the non-personnel recurrent and personnel areas to achieve equality of quality and equality of learning outcomes in the schooling system. The model aims to achieve this through increasing inequality in favour of the poor, and more financial resources will be channelled towards the poor.⁴⁶ Starting from 2003, the post-provisioning norms, which allocate educators to schools, will also be driven by pro-poor allocations.⁴⁷

Apart from this promising response by the DoE on the asymmetrical post-provisioning situation currently manifested in the schooling system, some of the stakeholders are still not pleased with the government proposal:

Turning to personnel spending (90[%]) little has been done to redress past inequalities since 1994, and here the [Review of Public School Financing] is downright misleading. The impression is conveyed that the progressive redistributive principles of the funding norms have now been transported into the post-provisioning system. The truth is less dramatic: for the first time this year [2003] provinces are required to budget 2[%] to 5[%] of posts for redress (most opted for the 2[%]). At best this cancels out the bias in the post-provisioning system towards well-resourced schools, which provide a wide curriculum offering, which attracts more resources in terms of the post-provisioning formula.⁴⁸

While policy choices served to equalise post-provisioning models better across schools, the policy choices did not progressively distribute educators through the system to address historic disadvantage. Put another way, there was no provision for the progressive distribution of personnel in the system. There were two ways in which the policy, in practice, privileged historically advantaged schools with reference to personnel spending. Firstly, several curricular areas were identified as enjoying a certain privilege whereby “weighted norms” were applied to “special fields” of study including agriculture, technology, etc (RSA 1998:3B–75). These curricular areas were primarily offered in historically advantaged schools. Secondly, historically advantaged schools enjoyed educators with higher qualifications. Thus, in practice historically advantaged schools would enjoy a higher-per-capita personnel expenditure than historically disadvantaged schools.⁴⁹

3.4 Translation of School Allocations into Goods and Services

Both schools and PEDs experienced problems in using financial resources to purchase goods and paying for services rendered to schools. For schools the problem was largely a lack of capacity in policy implementation, whilst PEDs struggled with management and governance issues to achieve intended policy objectives fully.⁵⁰

Non-section 21 schools are dependent upon PEDs for the bulk of their funding. Some of these schools cannot be exonerated from contributing to a number of problems that have been identified in most of them. The following are some of the problems already identified:

- School principals often lack the skills to lead the budgeting process. However, in terms of the School Funding Norms, PEDs should draw up budgets for non-section 21 schools.
- Schools often do not understand the overall pro-poor school-funding framework. This seriously jeopardises chances for poor schools to be allocated funds that match their socio-economic conditions.
- Schools often do not understand what a section 21 status entails, whether in terms of qualitative improvements in the schools or the acquisition of this very status by schools, etc.
- Schools often do not comprehend the instruction from PEDs that some portions of their allocation be spent on particular items to achieve optimal school resourcing. Comparatively, there are fewer restrictions placed on section 21 schools as opposed to non-section 21 schools regarding what funds should be spent on which items.
- Most PEDs fail to provide schools with running balances on their budgets such that schools end up not knowing how much they spend on utilities, for instance.

Non-section 21 schools are at an economic disadvantage, as they cannot purchase large equipment owing to the fact that they are forced to spend their allocation within one financial year. This compels these schools to do without large equipment such as a photocopier, which is relatively expensive.⁵¹

In the case of many non-section 21 schools, where the PED allocates and spends on behalf of the school, the conversion of monetary allocations to goods and services for the school has been fraught with problems. The Plan of Action refers to measures that can address this problem through the transfer of the school allocation into separate accounts, which the PEDs will control on behalf of the schools. It should be noted that section 21 schools already have the State funds transferred into their banking accounts.

The DoE promises that the translation of budgets into goods and services will be improved, firstly, through better administrative systems that can enhance, for instance, the procurement services offered by PEDs, and, secondly, through policy interventions and engagements with particular industrial sectors to explore the possibility of lower prices, particularly with respect to textbooks and school uniforms.

3.5 Infrastructure Development

Apart from the *Ithuba Makote* programme, the DoE has its own infrastructure development project designed to eliminate instances where learners are forced to receive education in the environments that are not conducive to teaching and learning, and/or that are unsafe. According to the DoE, additional to government funding, the European Union has funded 83 schools and the Japanese government has provided funds for 65 schools. However, despite all the efforts made to address infrastructure backlogs in schools, the Eastern Cape, KwaZulu-Natal and Mpumalanga still experienced high infrastructure backlogs.⁵² It can only be hoped that a Draft National Sanitation Strategy that has been produced, that aims to accelerate delivery of water and sanitation provision to schools will assist in improving sanitary conditions of schools.

3.6 Ineffective Procurement Strategies

The DoE referred to ineffective procurement strategies that hamper policy implementation, for example in the delivery of LSMs. To address these challenges, the Department plans to evaluate and review procurement models and arrange procurement training and management development for personnel charged with implementation. In addition, the DoE plans to strengthen its monitoring system and verification strategies on implementation of policies, since the monitoring and evaluation system was cited as “inadequate” and constrained by budget.

3.7 Textbook Pricing

The pricing of textbooks is another challenge the DoE is taking steps to address. At the time of reporting it was estimated that the DoE spent about R1 billion per annum on textbooks, which of course, is a relatively substantial amount of money. As part of the move to address this challenge, plans were afoot to try and remove pricing distortion in textbook production and supply, which occurred as a result of sole suppliers in most instances.⁵³

The fragmented fashion in which schools in all the nine provinces purchase their textbooks was cited as one of the contributory factors to the expensive pricing of textbooks. The pricing of textbooks impacted negatively on the right to education during the reporting period in 4 provinces. For instance, in its Annual Report for 2002/2003, the DoE reported that the 4 provinces were not able to deliver textbooks to schools on time as a result of 'lengthy negotiations with manufacturers to ensure consistency and uniformity in pricing.' However, it is pleasing to note that PEDs have consistently increased their budget allocations for LSMs over the past 5 financial years, that is, from 1998/1999 to 2002/2003.⁵⁴

3.8 Implementation of ECD Policy

The GDE cited the implementation of the ECD policy as a challenge. The response stated that both the DoE and PEDs underestimated the implementation

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of the ECD policy, which was evident in delays experienced in the implementation of the policy. Whilst it is generally accepted that most targeted ECD sites have been reached, the fact that only 13% of children have access to the ECD programme is a challenge that the Government has to address immediately if the Education for All goal of 2015 is to be met.

There is nothing in [the Financing Review of Public Schools] on the funding of [ECD] for ages 0 to 6. Currently only 13[%] of children have access to this crucial level of education, which, according to international research, is vital in preparing learners for subsequent success. [Ad hoc] pilot schemes and vague undertakings made by the DoE to comply with the Education for All targets are not enough.⁵⁵

3.9 HIV/AIDS and Life Skills

HIV/AIDS and Life Skills were challenges mentioned by both the ECDE and the WCDE. The former referred to understaffing in this learning area. National Norms and Standards for School Funding was another challenge the ECDE cited as a contested terrain by schools in the province.

The DoE has been engaged in a number of activities to address the HIV/AIDS pandemic during the reporting period. Such activities include a conference on HIV/AIDS that was attended by, amongst others, children, the youth, parents, traditional leaders and educators; a Traditional Leaders' Imbizo, in which the process of developing resource guides to assist parents and SGBs in developing school-based HIV responses was started. It is also important to underscore that as part of a response to the pandemic, the DoE developed an HIV/AIDS component for inclusion into the children's series Takalane Sesame as well as trained 50 000 educators to facilitate HIV/AIDS and Life Skills in the curriculum.⁵⁶

However, the lack of sufficient and reliable information on the extent of HIV/AIDS is a challenge that has to be addressed to ensure that all the effort put into dealing with the pandemic is strengthened.

3.10 Adult Basic Education and Training

Low provincial budgets for ABET is but another challenge facing the PEDs. The Education Rights Project (ERP)⁵⁷ cited a number of problems that contributed to the failure of ABET. *Inter alia*, the following were some of the problems cited in the implementation of ABET:

- The South African National Initiative (commonly referred to as SANLI), as an initiative that focused on adult basic education, showed only weak links to the deeper intentions of ABET or the NQF.

- The lack of wide consultation by the DoE within the field of ABET contributed to the exclusion of some practitioners with ability and experience from the board.⁵⁸

Despite the shortcomings the ERP pointed out in SANLI, the programme has achieved some good results. During the first year of the programme (2001/2002) focus was on policy development, programme design and setting up of systems for planning and monitoring. The programme is aimed at co-ordinating the establishment of a voluntary teaching service to reach South African adults who are illiterate. It also aims to build capacity in community organisations that are involved in literacy training, to facilitate access to funding and improve service delivery.⁵⁹

During the year under review, the programme was said to be a success as it not only reached its enrolment target but even surpassed it. A tender for literacy classes was awarded in two regions of KwaZulu-Natal, with financial assistance from the Danish Development Agency (commonly referred to as DANIDA). Other tenders for literacy classes were also awarded in the Western Cape, Northern Cape and the Free State. In conjunction with the UNISA ABET Institute, SANLI recruited 100 000 learners which far exceeded the expected number of 75 000 learners in a period of two years.⁶⁰

3.11 Farm Schools Conditions

In responding to the SAHRC's protocols on vulnerable groups, the DoE and PEDs do not elaborate upon conditions of farm schools. However, there are some important studies conducted by other organisations in this area such as the ERP. According to the ERP, there has been very little change in farm schools conditions since the apartheid era. The following are cited as the main obstacles to the provision of a quality education in farm schools:

- Farm schools' dependence on, and often their vulnerability to, the farmer on whose land they are built;
- Farm schools are often the most extreme examples of indigence in the South African education system, with relatively few schools enjoying access to a full few schools' range of services and resources; and
- Chronic levels of poverty in the communities served by farm schools and a deeply entrenched [...] culture of violence and oppression on farms.⁶¹
- Inadequate, and sometimes lacking, infrastructure that should be enhancing learning was also cited as cause for concern in farm schools. Additionally, it was reported that current legislation (SASA) has failed to provide most farm schools with security of land tenure. The State's scheme for ensuring security of land tenure for farm schools depends irrationally on the co-operation of

landowners who have no intention of signing agreements referred to in section 14⁶² of [SASA].⁶³

The report that was released by the SAHRC on the Inquiry into Human Rights Violations in Farming Communities concluded with findings regarding the conclusion of property agreements, or the lack thereof, between the DoE and farm owners:

The DoE is aware that some farm owners have resisted signing the agreements. Under the previous regime farm owners had agreements that were more favourable towards them. Some farmers now view the agreements as an opportunity to benefit and want to charge exorbitant amounts. Some farm owners object to concluding the agreements by pointing out that one farm school may service the education needs of three farms in the area.⁶⁴

3.12 Sexual Abuse and Violence in Schools

It is pleasing to note that during the reporting period, the DoE undertook a number of initiatives in the way of addressing gender and HIV/AIDS-related problems in the education sector, to an extent that already a first draft of Sexual Harassment Guidelines for Schools was being circulated to relevant stakeholders and necessary amendments were being effected on the draft. Some of the initiatives undertaken by the DoE in addressing gender and HIV/AIDS-related problems comprised the following: a “Train the Trainer” training course on Gender, Masculinity and HIV/AIDS the DoE presented to Student Organisations; a workshop on Gender Violence and HIV/AIDS held with learners, educators, SGB members, parents and traditional leaders in KwaZulu-Natal, *etcetera*. However, financial constraints have been cited as a challenge to most of these initiatives.⁶⁵

It is important that the initiatives referred to above are strengthened to counteract the scenario presented by a Human Rights Watch report. The report concluded that, amongst other things: sexual harassment and sexual violence had a profound destabilising effect on the education of girls in South Africa; rape survivors' school performance was suffering and that it was harder for rape survivors to concentrate on their work after their assaults; some of the girls reported losing interest in school altogether; some of the girls transferred to new schools; and other simply left school entirely.⁶⁶

It is equally important as well, that since South Africa ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979 (commonly referred to as CEDAW), on 15 December 1995, it upholds the principles and spirit of this international instrument.

The non-existence of the domestic measures in the schooling system to back up the UN Convention is a drawback when there is compelling evidence that girls are on the receiving end of sexual violence in South African schools. The State needs to speed up the formulation of the Sexual Harassment Guidelines for

Schools to ensure that schools become safe teaching and learning environments.⁶⁷

According to Human Rights Watch, many South African girls have suffered great harm from male teachers and classmates. The remedies available to them are usually inadequate or non-existent. Sexual violence is a form of gender discrimination, and South Africa is obligated to take all appropriate measures to eliminate violence against girls as against women more generally. The Government has an obligation to take meaningful steps to prevent teachers from committing acts of violence against learners, and to investigate and prosecute teachers who commit acts of violence against school children. Schools, as public institutions, are responsible for reporting crimes committed against learners. Furthermore, the systematic failure of the State to hold learners accountable for acts of violence against their classmates is itself a violation of human rights law.⁶⁸

Other challenges, which the WCDE was acting on, include:

- ensuring quality basic education for all children of school-going age in the province;
- equipping educators in their efforts to provide effective education; and
- ensuring a safe school environment.

The RNCS and MST were some of the mechanisms cited by the WCDE to ensure the provision of quality basic education in schools. In as far as safety is concerned in schools, the WCDE introduced a Safe Schools programme, which currently benefits 900 schools in the province.

4 CRITIQUE

As far as primary education is concerned, article 28 of the Convention on the Rights of the Child 1989, provides that State parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall in particular make primary education compulsory and available for free to all.⁶⁹

It appears that whilst the State, through the School Funding Norms, attempts to provide free primary education to poor learners, the fact that primary education is compulsory is not being enforced. Parents are obliged in terms of SASA to ensure that they send their children to school within the appropriate age limits set out in the Act.⁷⁰

According to the Review of Public School Financing, there are 300 000 children aged 7 to 15 who are not in any institutions. If the compulsory aspect of the General Education and Training could be enforced, the UN Millennium Goal of

achieving 100% enrolment by 2015 could be a step closer than it is at the moment.

Since 1990, Sub-Saharan Africa has had the second largest population of primary school-age children of all the regions in the world. This region recorded a substantial rise in this age group from over 82 million in 1990 and rising to 106 million in 2000. In spite of the deceleration of the rate of increase in the population of children of primary school-age the projection for 2015 is 139 million.⁷¹

Table 8 shows that about 4,5 million people aged between 5 and 24 do not have an education, followed by about 4 million people with some form of primary schooling. Out of the 4 million people who are without an education, about 1,6 million of them completed their primary school education. A similar problem may be observed in the secondary education sector. About 7,8 million people have some form of secondary education, but only about 5,2 million people completed matric. This scenario obviously results in fewer people who gain access to tertiary institutions of learning since not every learner pass matric with endorsement.

Table 8: Highest Level of Education of Over 20-year-olds

<i>Highest level of education</i>	<i>Persons</i>
No schooling	4 567 497
Some primary	4 083 742
Complete primary	1 623 467
Some secondary	7 846 125
Grade 12/Standard 10	5 200 602
Higher/Tertiary Education	2 151 336

Source: Census 2001, Atlas, Statistics South Africa, 2003

Table 9: Education Institution Attended by 5- to 24-year-olds

<i>Institution Being Attended</i>	<i>Persons</i>
None	5 463 873
Pre-school	575 936
School	12 584 825
College	191 230
Technikon	145 977
University	169 604
Adult Education Centre	26 480
Other	33 791

Source: Census 2001, Atlas, Statistics South Africa, 2003

The issue of street-children needs attention too, if the 2015 Millennium Goal of universal access to education is to be achieved. Inasmuch as one does not have the statistics for children living in the streets, there needs to be a concerted effort by civil society and the Departments of Education and Social Development in particular, to address the plight of this category of vulnerable groups. By the same token, the Government should be commended for the intervention it has made in which all the recipients of child grants and dependency grants from the

Department of Social Development will qualify for fee exemptions from school fees (where school fees are charged).⁷² This intervention may contribute immensely to the progressive realisation of the right to education. It further conforms to the spirit of the *Grootboom* judgement, which was based on the right of access to adequate housing. The *Grootboom* judgement ruled that:

*Legal, administrative, operational and financial hurdles should be examined and where possible lowered over time.*⁷³

The DoE should be commended for introducing the Teacher Development and Training programme in the reporting period. This is one of the important aspects of the right to education.

Apart from spending less than 50% of the budget in the *Thuba Makote* programme, the collection of statistical information on infrastructure still needed in schools is a positive action on the side of the DoE; it shows that the DoE is serious about improving the physical condition of schools. The *Thuba Makote* programme seems to have the potential to address the physical conditions of some schools.

*The poverty alleviation programme, Thuba Makote, is making a substantial contribution to community development. Currently there are 11 facilities under development in the nine provinces. These are located at: Reaipela School near Kuruman, Northern Cape; Zinyosi School near Mount Frere, Eastern Cape; Jacob Mdhuli School in Makoko, Mpumalanga; Thulani Primary School in Mkhuhlu, Limpopo; Mogale City High School near Magaliesberg, Gauteng; Boitumelo Secondary School near Ficksburg, Free State; Dirang ka Natla School near Klerksdorp, North West; Bloekombos Secondary School near Cape Town, Western Cape; and Machibisa Primary School in Edendale, KwaZulu-Natal.*⁷⁴

While programmes such as *Thuba Makote* can go a long way in addressing infrastructure backlogs in schools, there is still a huge shortage of classrooms in some provinces. For instance, 213 schools in Mpumalanga experienced overcrowding in 2002. The Mpumalanga Department of Education reported to the Minister of Education that at 60 of the 213 schools there was a total shortage of 404 classrooms and that the remaining 153 of these schools with 1 157 classrooms were housed in unacceptable structures.⁷⁵

In 2002, the Free State province reported to the Minister of Education that there was one school where learners were receiving education under trees, namely Caledonpark in Ficksburg. The Free State Department of Education (FSDE) solved this problem by erecting two pre-fabricated classrooms. In the Free State 30 schools were reportedly housed in unacceptable structures. A total estimated cost of R4 925 521 would be required to upgrade the 30 schools to acceptable standards. The infrastructure challenges facing the schooling system are enormous such that the FSDE indicated that the proposed 23 new schools and additional facilities at 21 schools planned for the current [MTEF] cycle 2002–

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2005 will not receive attention during the financial year owing to budgetary constraints.⁷⁶

Table 10: Number of Classrooms Per Province Where Learners are Accommodated in Structures other than Classrooms

<i>Province</i>	<i>Hall</i>	<i>Offices</i>	<i>Staff Room</i>	<i>Store Rooms</i>	<i>Passages</i>	<i>Outside / Under Trees</i>	<i>Shelters</i>	<i>Other</i>	<i>Total</i>
Eastern Cape	270	82	153	106	20	73	3110	130	3 944
Free State	165	75	46	76	10	19	319	111	821
Gauteng	289	134	103	175	37	57	392	185	1 372
KwaZulu-Natal	1 107	277	218	179	20	195	1 226	215	3 437
Limpopo	392	153	152	156	25	250	2 572	122	3 822
Mpumalanga	282	173	100	121	138	93	0	0	907
Northern Cape	54	60	23	53	7	12	51	34	294
North West	339	106	87	96	21	41	402	131	1 223
Western Cape	157	38	37	53	20	15	141	69	530
Total	3 055	1 098	919	1 015	298	755	8 213	997	16 350

Source: Seventh Report to the President from the Minister of Education, 12 December 2002

Several problems have been identified in the implementation of the School Funding Norms. One of the key problems with the School Funding Norms mentioned in the Review of Public School Financing is the lack of consistency between provinces and schools regarding what inputs are covered by the allocations. Another problem is that schools do not have an equal stock of assets to begin with. To exacerbate this problem, it is not clear which inputs should be covered by the school allocations. It is also a problem that the equally poor across the country are not treated the same.⁷⁷

However, after the release of the Review of Public School Financing on June 14 2003, the DoE released its Plan of Action to implement some of the recommendations of the review of Public School Financing:

Informing the entire plan is the need for free and quality education for all, and the implications are listed:

- Public funding of schools, especially where learners are poor, must be sufficient to cover the cost of all the basic inputs required for a quality education.
- Schooling must provide all learners with meaningful knowledge and skills that will empower them to take part fully in the economic, political and cultural life of the country.
- No learners, especially those of compulsory school-going age, should experience any economic, physical or other barriers to attending school.⁷⁸

4.1 Is the Right to Education Being Realised?

The assessment of some of the policy measures instituted during the reporting period has some inherent limitations as a result of being new, such that the assessment of such policy measures becomes limited to policy formulation only. Be that as it may, assessing policy measures that have not been implemented is equally important. Such policy measures include the RNCS and Religious Education, which are applicable to both the GET and the FET bands. The novelty of these measures manifests itself through the ongoing amendments and refinements that are being proposed to them. Of course, the amendments and refinements to be made to these measures are also part of the quest to realise the right to education progressively, which is referred to in the right to education embodied in the various international human rights instruments, the *Grootboom* judgement and the Constitution. Despite the novelty of the measures, some pointers can be given as to whether the right to education is being realised.

Starting off with the RNCS, it can be said that this policy measure inculcates the country's constitutional values in the curriculum. This policy measure is also in line with article 13 (1) of the ICESCR, which reads as follows:

State parties agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship, among all nations and all racial, ethnic or religious groups, and further the activities of the UN for the maintenance of peace. State parties are required to ensure that curricula, for all levels of the educational system, are directed to the objectives identified in article 13(1). They are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13, paragraph 1.⁷⁹

Regarding the School Funding Norms, which has been a subject of refinement for the past few months, a general conclusion can be drawn that this measure has not been able to achieve one of its main objectives, that is, to ensure that the poorest of the poor receive funding that is in line with a minimum package that a South African learner needs. A number of problems have been identified in the School Funding Norms, and as such the DoE introduced its "Plan of Action" to close the loopholes in this redistribution model. A problem was identified that funding for learners' education was unequal, and an attempt was made to address the problem but proved ineffective. It may be concluded that the attempt, in the form of the School Funding Norms, has failed the *Grootboom* judgement test of reasonableness in realising the right to education.

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The intended beneficiaries are not enjoying the benefits of the School Funding Norms. Instead the policy is fraught with inconsistencies and hence dismally fails to address the problem, that is, to provide a minimum package of funding to the poor learners.

Reasonableness meant that the State was obliged to act to achieve the intended result, and the legislative measures would invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive.⁸⁰

According to the *Grootboom* judgement, “within available resources” conveyed that the content of the obligation in relation to the rate at which the desired result was achieved as well as the reasonableness of the measures employed to achieve were governed by the availability of resources. This element of the *Grootboom* judgement or legal obligation will not be entertained in as far as this measure is concerned since it has not been established what would constitute a minimum package for an average learner. The measure needs to realise the right to education progressively. This means that the policy has to ensure that participation in education is progressively facilitated.

Legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. It imposed an obligation to move as expeditiously and effectively as possible towards the goal.⁸¹

It can be said that the ECD programme is progressively realising the right to education. Firstly, the programme nationally has successfully covered most of the sites it set to cover when it was implemented, despite the reported challenges, including less funding per capita allocation in most provinces as a result of allegedly closed bank accounts of some ECD providers. However, one of the main challenges facing the ECD provisioning is the extension of the programme. Currently, the coverage is limited to 13% of children who should be on the programme. It appears that the programme will have to cover more children in the financial year 2003/04 progressively realising the right to education, and ensure that beneficiaries are funded according to specifically set allocations.

On the one hand, it is not possible to establish whether or not some measures do contribute to the realisation of the right to education, as a result of insufficient information either supplied by PEDs or available in the State official documents. The ABET programme is one such policy measure. However, Russell *et al.* point out that provincial ABET spending continues its low share of budgets. Most PEDs do not have medium- and long-term strategic plans for broader ABET provisioning, yet according to Census 2001 statistics about 4,5 million people aged between 5 and 24 do not have an education, followed by about 4 million people with some form of primary schooling only.

On the other hand, an underspending of 68% of the funds allocated for ABET and *Ikhwelo* project (applicable to two provinces only), owing to a 10-month delay in the appointment of 240 educators and 9 project co-ordinators seriously

compromised the right to fundamental education, which corresponds to basic education. This incident manifests the lack of proper planning to a greater extent in as far as ABET is concerned. The lack of proper planning could lead to the right to fundamental education not being respected. This automatically becomes a violation of the constitutional obligations by the State.

Infrastructure backlogs and maintenance have proved to be a daunting challenge amidst budgetary constraints faced by the State. Despite the underspending incurred in the *Thuba Makote* programme in the reporting period, the programme has proved to be progressive, as it has not only helped make available some community facilities, but has also benefited schools in the process.

Russell *et al.* found that four provinces had no designated capital spending plans and those that do set aside capital funds forecast negative real average growth rates over the MTEF. Even though infrastructure backlogs in schools in most provinces far outweigh the financial resources available, capital spending plans are a prerequisite to better use and management of resources in addressing the problem. As shown in this report, the availability of statistics on infrastructure backlogs in schools makes it easier for the PEDs to produce capital spending plans for each MTEF cycle since the infrastructure backlogs in schools far exceed the available financial resources.⁸²

Availability of resources does not only refer to the availability of financial resources but to the availability of human resources too. In most of the programmes reported upon for the period under review, it appears that human resources were not a hindrance to the realisation of the right. However, there were some instances in which the realisation of the right was compromised because the financial resources available were not being spent properly; in other words, the allocated financial resources were underspent. For example, in the *Thuba Makote* programme about 51% of the allocated funds for the financial year were underspent. Underspending on ECD is understandable given the fact that some of the providers in the rural areas have had their accounts closed owing to the lack of funds in these accounts.

It is concerning, nevertheless, that some PEDs did not fill the vacancies for HIV/AIDS programmes. Using the *Grootboom* judgement, it may be concluded that the programme fails the test as a result of the shortage of human resources to implement the programme – when the problem could have been avoided. The drop in the coverage of poor learners in the NSNP as a result of “organisational failures” in the Eastern Cape and KwaZulu-Natal is unacceptable. The programme could fail the *Grootboom* test on these grounds.⁸³

4.2 Constitutional Obligations

Generally, most policy measures do conform to the constitutional obligations.

The National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions respect the right to education. The introduction of the policy measure by the State is an

attempt to address drug abuse in schools and FET institutions, which may prevent a learner from exercising his/her right to education. In this case, therefore, the State is being proactive in addressing a situation whereby the right to education could be in jeopardy as a result of drug abuse. However, a study would have to be conducted to measure the impact of the policy measure on the illegal use of drugs in schools and public FET colleges.

The Regulations to Prohibit Initiation Practices in Schools conform to the constitutional obligation to protect the right of individual learners from being ill-treated by others by subjecting them to initiation practices that may jeopardise their right to education.

PEDs must know that sending learners away from school or barring them from writing their examinations because of unpaid fees is in violation of the right to education, as the action does not respect the right to education. PEDs must ensure that instructional staff and principals know and understand the rights of learners and parents. This can be done by incorporating the human rights education into the teacher training curricula. The same applies to the awareness about school fees exemptions; if parents do not know that they can apply for school fees exemption, it means that the State is not making parents aware of this opportunity. This is also in violation of the constitutional obligations to fulfil and promote the right to education.

The ERP research findings concluded that poverty was the main reason why many children on farms get involved in farm work and consequently miss school. Section 3(1) of SASA on “compulsory attendance” makes it the parents’ responsibility to cause a child to attend school. It appears that some parents allow their children to engage in work on farms, and it seems that no authority has taken steps to challenge the behaviour of these parents. Section 3(5) of SASA⁸⁴ is therefore not being applied. In light of the failure of the State to apply section 3(5) of SASA, as the circumstances warrant in this case, the constitutional obligations to respect, protect and fulfil the right to education are violated. Furthermore, the State has also failed to promote the right to education since it is the responsibility of the State to make parents and learners aware of the right to education.

Violations of article 13 may occur through the direct action of State parties (acts of commission) or through their failure to take steps required by the Covenant [ICESCR] (acts of omission).⁸⁵

It is worth noting though that for the first time in South Africa, a farmer has been convicted for using child labour. The Department of Labour brought the case against the farm after Waronice van Wyk, who was working on the farm, lost a leg when she fell off a trailer. The incident happened two years ago. Co-owner and managing director of the farm, Mike Barnard, pleaded guilty to three charges – under South Africa’s Basic Conditions of Employment Act.

Besides admitting to employing Van Wyk, he also pleaded guilty to not notifying the Department of an accident on the farm within the required seven days, and not having a safety representative for workers.⁸⁶

The statistics of child labour in the country is also shocking.

According to a survey released last year [2002], out of 13,4 million children in the country, 1,4% [about 182 000] were engaged in commercial agriculture; 0,4% [about 52 000] were engaged in manufacturing and 0,5% [about 65 000] were engaged in construction and mining.⁸⁷

It is a significant development, however, that South Africa is in the process of developing measures to combat child labour. For instance, a Draft White Paper on a National Labour Action Programme has already been formulated (July 29 2003).⁸⁸

4.3 General Conclusion on the Realisation of the Right to Education

It may be concluded that the right to education has been partially realised since, generally, most of the policy measures do conform to the international human rights instruments and the constitutional obligations enshrined in section 7(2) of the Constitution where necessary, including those policy measures whose assessment was limited to policy formulation only. Take the RNCS Grades R – 9 and the Religious Education policy as an example. Of course, if the measures fail to achieve intended objectives in implementation, such measures will not be contributing to the realisation of the right to education. The weaknesses noted in some policy measures, which were discussed in detail in the chapter, must be addressed accordingly such that in future, a conclusion may be drawn that the right to education is being realised, that is, in full.

It is an achievement for the country if participation rates in education are improving. For instance, the DoE reported that the NER for children aged 7 to 15 has improved noticeably since 1994 such that the enrolment ratio in 1991 was 92% for primary schools and is currently standing at 97%. However, the assessment of the right to education should not be limited to participation rates only, which is quantifiable. The quality of policy measures instituted is as important as the outcomes of the policy measures adopted for the realisation of the right to education. The following excerpt elucidates the point:

There is no question but that information other than statistics is used in monitoring whether or not a government is complying with its human rights obligations. The UN Committees charged with overseeing the various rights treaties routinely request information of all sorts: from enjoyment of the right by persons within the jurisdiction of the [S]tate. It is also clear that there is a solid tradition in the human rights field of using the word “indicator” itself to refer to information beyond statistics. The International Labour Organisation (ILO), discussing the question of whether human rights indicators go beyond statistical information, states: [The ILO’s supervisory bodies use a variety of indicators of the degree of implementation of the instruments they supervise ... Many of these indicators include a “numerical” aspect, many do not.]⁸⁹

It is therefore important to note that indicators in the field of human rights mean more than just statistical information. Thus the assessment of any measure introduced by a government should transcend statistical data analysis to include other indicators such as the quality aspect of measures introduced. The foregoing assessment of the right to education has, as such, been informed by this approach to assessment.

5 RECOMMENDATIONS

The situation on farm schools needs co-operation between Government departments, particularly the DoE, DoL and the Department of Social Development. Each of these government departments has a role to play in as far as the problems experienced by farming communities are concerned. The DoE needs to review section 14 of SASA to ensure that it produces the desired results. Both the DoE and DoL need to educate farming communities about their rights – workers' rights and the right to education. The Department of Social Development would have to address the poverty aspect of the farming communities where possible. The following excerpt is an attempt to illustrate the situation in most farming communities:

In many of the farming communities where the ERP conducted research, child labour was routinely practised. It soon became clear that the issue was more complex than just a farmer whisking off children from the classroom to the potato field – that it was a complex issue of poverty and survival. Learners' and parents' rights in many communities are routinely violated. A few common instances include schools not informing parents about fee exemptions; preventing learners from writing exams because of unpaid fees; withholding reports and refusing registration for the following year without prepaid fees. Some schools also used debt collectors to terrorise parents into paying. These violations exist because national and provincial departments of education have done very little in educating parents and learners about their rights and because of the pressure schools face to generate revenue from parents.⁹⁰

The lack of better-published medium-term strategies from provinces and low provincial spending in this sector of education may jeopardise the right to adult basic education. Better-published medium-term strategies and improved spending on ABET are issues that need to be attended to immediately given that about 4,5 million people aged between 5 and 24 do not have an education, and about 4 million people have primary schooling only.⁹¹

It is commendable as well that the State has sought donor funding to address this challenge.⁹² However, PEDs need to have audits to plan capital spending better. Russell Wildeman *et al.* found that four PEDs did not have capital spending plans. PEDs must always have statistics on important areas, including infrastructure backlogs. Such statistics must be accompanied by spending plans or business plans. These should not be prepared only when the Minister of Education needs them; they should be available for the PEDs themselves for better planning each financial year. Concrete steps have to be taken by the PEDs

to ensure that the planned numbers of classrooms to be built during the current MTEF cycle (2001/02 – 2004/05) per province are met.

At the end of 2001/02 financial year: 42 933 classrooms; 7 848 schools needed water; 174 439 toilets; 10 276 administration blocks; 7 680 laboratories; 21 912 libraries; 12 232 schools needed minor repairs and renovations; 7 477 schools needed electricity; and, 10 963 schools needed telephones. The total estimated cost to address all these backlogs is R30 billion.⁹³

Table 11: Numbers of Actual and Planned Delivery on Priorities: 1999/2000 to 2004/2005 Financial Year

<i>Facility</i>	<i>1999/00</i>	<i>2000/01</i>	<i>2001/02</i>	<i>2002/03</i>	<i>2003/04</i>	<i>2004/05</i>
Classrooms	1 936	2 267	2 660	3 750	4 330	4 748
Toilets	1 345	1 211	4 173	6 562	6 909	7 473
Water	252	253	181	202	171	182

Source: Seventh Report to the President From the Minister of Education 12, December 2002

There has to be equity of quality in post-provisioning to achieve better education outcomes across schools. Post-provisioning should be informed by a proper educator and subject/learning area audits. These audits must consider subject offerings in each school. The DoE should take a lead in addressing this issue; PEDs should not have a margin of discretion in post-provisioning, as the impression is created currently. Currently, PEDs use their discretion to decide on the budget for post-provisioning. PEDs use between 2% and 5% of their budgets to address the past imbalances in post-provisioning.⁹⁴

A way has to be found to ensure that schools enjoy balanced subject offerings that do not work against some schools as a result of a limited package of subject offerings. Educator qualifications is another crucial issue in which the PEDs have to take a leading role to achieve an almost balanced spread of better-qualified educators across schools to attain better education outcomes. This warrants that PEDs work closely with SGBs in cases whereby an SGB is an employer.

ECD intake has to improve, which would obviously necessitate budget increase for the programme. Regardless of the raw figure – 13% – that is the current percentage intake of ECD learners; it is insufficient. Of course, it is commendable that most PEDs achieved their targets of ECD sites during the reporting period.

Generally, there is a need for Government to ensure that its policies are understood from national office of the DoE right down to the districts. The issue of exemptions for poor learners who cannot afford school fees needs to be re-examined. Some parents do not even know that they should be exempted from paying the fees. And if they are aware, do they know how the process of exemption is determined? Whilst a PED such as the Gauteng Department of Education has advertised the school fees exemption policy in a much more visible way (for example on taxis), it appears that the onus is now on schools,

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not only in Gauteng but in other provinces as well, to ensure that parents are informed about the school fees exemption policy for those families who cannot afford school fees.

The School Fees Exemption mechanism needs to be reviewed if beneficiaries are to enjoy the exemption from paying the school fees. It is also equally important for the State to augment the budget for those schools that do exempt learners from paying school fees in order not to violate the constitutional obligation to respect the right to education.

PEDs have to explain to schools what it entails to be a section 21 school as well as how this status is obtained. PEDs should also inform applicants of their outcomes on their application for obtaining section 21 status timeously so that they know whether they qualify for the section 21 status, and if not, how they could maximise their chances to qualify in future.

The State should use section 3(5) of SASA to ensure that parents or guardians of those children that are of school-age but are not attending school do eventually attend school. Both parents and the State should work as partners in realising the right to education, especially with regards to compulsory schooling.

There is a need for greater focus on what quality basic education means for South Africa. All stakeholders in education, including the SAHRC need to explore and come up with a definition of quality basic education which could also be measurable and thus easier to monitor.

Given that the Government has made a decision to exempt the recipients of child grants support and dependency grants from paying the school fees, it is important to ensure that these grants recipients attend school.

There is a need to update the statistics for child support and dependency grants since the current education statistics (captured in the Education Statistics in South Africa at a Glance in 2001, published by the DoE in June 2003) for this vulnerable group of learners is now outdated. This requires that relevant government departments such as the Department of Social Welfare exchange information with the DoE for consideration in its budgeting and planning for better provisioning of education.

There needs to be a concerted effort by civil society, the DoE and Social Development and other stakeholders to ensure that street-children attend school.

THE RIGHT TO FURTHER EDUCATION AND TRAINING – EXECUTIVE SUMMARY

Progress in the Realisation of the Right to Further Education

Unlike in the General Education and Training band, there were not as many policy measures instituted in the Further Education and Training (FET) band. FET refers to Grades 10 to 12 and technical colleges). The only policy measure that was introduced in this band was the National Curriculum Statement. Draft Subject Statements and a Draft Qualification and Assessment Policy Framework were also developed. The Draft Subject Statements reflect 35 subject offerings that replaced 264 subject offerings that were once in place as a result of the grading of matriculation examinations into standard, lower and higher grades.

Some amendments were made to the Further Education and Training Act 98 of 1998.

Respect

Provincial Education Departments (PEDs) issued instructions to principals of FET institutions where educators/principals had expelled learners for outstanding school fees. This was ensured that learners' right to FET was not violated. The reduction of the FET Colleges from 150 to 52 was successfully implemented as the right to further education and training was not in any way violated, instead it could potentially help the DoE manage its resources better.

Section 16A was inserted in the Act to ban corporal punishment in any FET institution and to make it a criminal offence to administer corporal punishment to a student. Corporal punishment may have adverse effects on learners such that they may end up not going to these institutions to receive education. The result would obviously be that affected students would have their right to education jeopardized and consequently the State would be in violation of the right.

Protect

An amendment was made to section 24 of the FET Act. The amendment made the registration of private FET institutions compulsory. This amendment is important as it prevents the operation of illegal FET institutions, which may not have been accredited by the Department of Education.

Promote

It was found that some schools expel learners for not paying school fees. This is a violation of the learners' right to education. It therefore, still stands that PEDs have to take more active steps to ensure that parents are aware of the school fees exemption thereby promoting the right to education. While the State has introduced school fees exemption for parents who cannot afford to pay the school fees, some schools have not been willing to make parents aware of the

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exemption. PEDs, principals and educators must communicate the message about school fee exemptions to parents in an appropriate manner.

Fulfil

The development of the new curriculum for the FET band contributes to the fulfillment of the right to FET as it provides a variety of opportunities to students to pursue either academic education provided by universities or technical education provided by technical colleges. The commissioning of the study into distance education by the DoE in the FET band is a good move that could make FET even more accessible to a number of people who would like to further their studies in the FET band. The introduction of *Dinaledi* as a programme that seeks to improve participation and performance of learners from historically disadvantaged backgrounds in Mathematics, Science and Technology (MST), is another development by the DoE that with time, will contribute immensely to the fulfillment of the right to further education and training.

Apart from actions that violated the right to education such as the expulsion of learners for not paying school fees, the inadequate provision and/or late distribution of Learner Support Materials (LSMs) to schools was said to be a recurring problem especially in the rural provinces. At the start of 2002, for example, only 25% of textbooks had been delivered in Limpopo. Poor retrieval rates also contributed to the shortage of textbooks in schools.

Infrastructure backlogs impact negatively in the realisation of the right to education. According to a situation analysis study undertaken by the Center for Education Policy Development, Evaluation and Management (CEPD) for UNICEF's Girls Education Project, it was found that the Eastern Cape, Limpopo, and KwaZulu-Natal were the most affected by the lack of libraries, telephones, electricity and water.

Overall Assessment

Despite the many challenges that faced the FET band, there were some achievements during the reporting period, including, amongst others: *Dinaledi*, which reportedly surpassed its target of 10% of students enrolling for MST in its first two years of implementation; the registration of learnerships for learners as part of skills development; and the registration of private providers of FET. As already demonstrated in the section above, most of the developments in the FET band met the constitutional obligations as espoused in section 7(2) of the Constitution. They also conformed to the spirit of the *Grootboom* judgment.

Whilst the introduction of the school fees exemption was a positive development was intended to ensure that no learner was excluded from participating in education as a result of his/her poor financial background, the implementation of the measure fell short in its implementation. In the language of the *Grootboom* judgment, any measure taken by the State should be well-considered both in its conception as well as in its implementation. The implementation part

of the measure needs to be revisited to ensure that every parent knows about the school fees exemption and that the State augments the budget for those schools that offer school fees exemption to poor learners.

Although PEDs spent almost all their budget allocations for LSMs, the late distribution and delivery of insufficient LSMs to some schools must be addressed. The delivery of insufficient LSMs as well as their late distribution impact the right to FET is not being fulfilled. A study undertaken by the CEPD found that girl learners' participation rates in education were being negatively affected by their involvement in income-generating activities owing to poverty.

Considering the challenges the State has in the FET band - *vis-à-vis* its achievements, a conclusion may be drawn that the State is partially realising the right to FET. It must be taken into account that the right to education cannot be fully realised immediately given the scope of the socio-economic challenges South Africa is facing as a country.

Recommendations

- Late distribution and delivery of insufficient LSMs in some cases and the infrastructure backlogs experienced at some schools should be some of the main issues that are addressed in the financial year 2004/2005, if the right to education is to be fully realised.
- While the creation of *Dinaledi* is a commendable move, more effort still needs to be devoted to increasing potential girl-learners' participation in education. The involvement of girl-learners in income-generating activities as a result of poverty, and the time they spent on domestic chores were cited as barriers to girl-learners' education.
- Related to the causes of the high-drop-out rates in the FET sector, ways have to be found to address this situation in this sector of education.

THE RIGHT TO FURTHER EDUCATION AND TRAINING

6 POLICY AND PROGRAMMATIC MEASURES

6.1 National Policy and Programmatic Measures

6.1.1 National Curriculum Statements for Grades 10 to 12

The phasing in of Outcomes-Based Education (OBE)⁹⁵ in the FET grades involved the development of the National Curriculum Statement Grades 10 to 12 (NCS)⁹⁶, which took place from May 2002 to March 2003. 35 Draft Subject Statements⁹⁷ were developed including the Draft Qualification and Assessment Policy Framework.

6.2 National Legislative Measures

6.2.1 Education Laws Amendment Bill of 2002⁹⁸

6.2.1.1 Further Education and Training Act No. 98 of 1998

Amendment of item 7 of Schedule 2 to Act 76 of 1998

The Education and Training Act is amended by the insertion after section 16 of the following section:

“Prohibition of corporal punishment and initiation practices”

16A(1) A person may not administer corporal punishment to a student at a further education and training institution.⁹⁹

Substitution of section 24 of Act 98 of 1998

The following section is substituted for section 24 of the Education and Training Act:

“Registration of private further education and training institution

24(1) A person other than a public further education and training institution or an organ of state may not provide further education and training unless that person is –

(a) registered or recognised as a juristic person in terms of the Companies Act, 1973 (Act No. 61 of 1973); and

(b) registered or provisionally registered as a private further education and training institution in terms of this Act”

Amendment of section 47 of Act 98 of 1998

This section of the Education and Training Act is amended by the substitution for section 47 of the following section:

“Regulations

47. [(1)] The Minister may make regulations consistent with this Act on

–

(a) safety measures at public and private further education and training institutions;

(b) a national process and procedures for the assessment of student achievement for public and private further education and training institutions;

(c) a national process for the assessment, monitoring and evaluation of education in public and private further education and training institutions;

(d) initiation practices at public and private further education and training institutions;

any matter which the Minister is empowered or required to prescribed by regulation in terms of this Act; **[and]** or

[(b)] any matter in respect of which regulations are necessary or expedient in order to achieve the purpose of this Act.”¹⁰⁰

The Education Laws Amendment Act of 2002 (Act No 50 of 2002) was enacted and promulgated in *Government Gazette No 24113* of November 28, 2002.

6.3 Provincial Policy and Programmatic Measures

Apart from the NCS Grades 10 to 12 that all the Provincial Education Departments (PEDs) have to implement, the Eastern Cape Department of Education (ECDE) formulated the Recognition of Prior Learning (RPL) policy during the reporting period. It is aimed at promoting the National Qualifications Framework (commonly referred to as NQF) principles of articulation and portability. The RPL policy provides for the recognition of skills and knowledge learned outside the academic environment.

The KwaZulu-Natal Department of Education and Culture (KZNDEC) completed the merger process of FET colleges. The Mpumalanga Department of Education (MDE) institutionalised the Provincial Further Education and Training Act with former Technical Colleges rationalised to three FET colleges in the province. At the time of reporting, the MDE was still working on the

development of a learner support programme. Furthermore, the MDE formulated and circulated Guidelines on Conducting Memorial Services at all educational institutions to prevent memorial services from taking place during working hours. The MDE also issued a directive to minimise lawlessness during the matric dance functions in the province.

The MDE trained Grade 10 educators and FET college lecturers on the OBE to ensure that these educators are able to implement the FET curriculum. The MDE was also engaged in learnerships in the three FET colleges as part of the nationwide skills development initiative.

6.4 Budgetary Measures

Only the KZNDEC presented total budgets for each programme. Other PEDs presented consolidated budgets only, which does not make disaggregation of programmes possible.

Table 12: National Department of Education Total Budget Allocation

Year	<i>Total Departmental Allocation in Rands</i>	<i>Allocation as a % of the National Budget</i>	<i>Total Donor Funding in Rands</i>	<i>Actual Expenditure</i>
2001/02	93 427 000	0,04	1 439	85 213 418,06
2002/03	111 596 000	0,04	11 637 000	99 893 174,60

Source: National Department of Education's response to the SAHRC's protocol, 2002/03

During the year under review the DoE underspent by 10,4% in the FET programme. The reasons given for underspending range from delays in the implementation of the *Thuba Makote* project¹⁰¹ as a result of extensive stakeholder consultation and rainy weather conditions; small, medium and micro-enterprises failing to supply builders with materials on time; delays in the provision of some services to support the implementation of the *Ikhwelo* project; to some PEDs not claiming salaries for HIV/AIDS co-ordinators and finance administrators.

Table 13: Gauteng Total Budget Allocation for FET

<i>Year</i>	<i>Total Departmental Allocation in Rands</i>	<i>Allocation as a % of the National Budget</i>	<i>Actual Expenditure</i>
2001/02	276 314 000	-	275 948 000
2002/03	271 458 000	-	274 490 000

Source: Gauteng Department of Education's response to the SAHRC's protocol, 2002/03

Notes: Donor funding was indicated as "0" for both years, - Figure not given

The GDE overspent by 1,1% in this programme during the year under review. The incurred overspending was ascribed to personnel costs, as more educators were needed to keep up with growing learner enrolment in the FET band.

Table 14: KwaZulu-Natal Total Budget Allocation for FET

<i>Year</i>	<i>Total Departmental Allocation in Rands</i>	<i>Total Donor Funding in Rands</i>	<i>Actual Expenditure</i>
2001/02	9 346 610 000	145 934 000	9 264 055 000
2002/03	10 140 719 000	226 445 000	10 403 458 000

Source: KwaZulu-Natal Department of Education and Culture's response to the SAHRC's protocol, 2002/03

Notes: The KZNDEC did not supply the SAHRC with the "Allocation as a % of the National Budget" figure

Table 15: KwaZulu-Natal Budgetary Allocation Towards Programmes and/or Projects

<i>Programmes</i>	<i>Total Appropriation 2002/03</i>	<i>Actual</i>	<i>Variance over/ (under)</i>
1. Administration	196 351 000	190 377 000	5 974 000
2. Public Ordinary Schools	9 083 162 000	9 361 395 000	(278 233 000)
3. Independent Schools	22 655 000	23 285 000	(630 000)
4. Special Schools	217 722 000	214 898 000	(2 824 000)
5. Teacher Training	26 075 000	14 387 000	11 688 000
6. Technical Colleges ¹⁰²	152 755 000	146 405 000	6 350 000
7. Non-Formal Education (ECD)	58 766 000	52 598 000	6 168 000
8. Sports and Recreation	16 030 000	15 160 000	870 000
9. Arts and Culture	19 889 000	20 312 000	(423 000)
10. Auxiliary Services	347 314 000	349 092 000	(1 778 000)
11. Auxiliary Functions	Figure not given	3 001 000	(3 001 000)
Total	10 140 719 000	10 390 910 000	(250 191 000)

Source: KwaZulu-Natal Department of Education and Culture's response to the SAHRC's protocol, 2002/03

The KZNDEC expressed dissatisfaction with the financial resources allocated to it for FET activities during the reporting period. It felt that the financial resources were under-allocated. Consequently, not all the activities planned for the financial year could be undertaken. The KZNDEC overspent the consolidated departmental budget by 3%. The Department ascribed this principally to the hiring of additional educators.

Table 16: KwaZulu-Natal School Building and Maintenance Programme

<i>Year</i>	<i>Allocation for programmes and projects in Rand (s)</i>	<i>Allocation as a % of the Department's budget</i>	<i>Total Conditional Grants Allocation in Rand(s)</i>	<i>Total Donor Funding in Rand(s)</i>	<i>Actual Expenditure</i>
2001/02	Given directly to the Department of Public Works		68 179 000	Nil	222 348 000 ¹⁰³
2002/03	238 506 000	2,4	132 449 000	50 000 000	262 056 00

Source: KwaZulu-Natal Department of Education and Culture's response to the SAHRC's protocol, 2002/03

The programme experienced overspending as a result of more toilets and classrooms being built than originally planned. The Department felt that the budget allocation for this programme was insufficient, as it could not address the current infrastructure backlogs in the province. However, in the financial years 2003/04 and 2004/05 the financial resources will be increased for this programme to R421 824 000 and R543 671 000 respectively.

Table 17: Mpumalanga Total Budgetary Allocation

<i>Year</i>	<i>Allocation for programmes and projects in Rands</i>	<i>Allocation as a % of the Department's budget</i>	<i>Total Conditional Grants Allocation in Rands</i>	<i>Actual Expenditure</i>
2001/02	86 343 000	-	7 320 000	86 170 314
2002/03	148 962 000	-	14 276 000	148 947 104

Source: Mpumalanga Department of Education's response to the SAHRC's protocol, 2002/03

Notes: The MDE did not supply the SAHRC with "Allocation as a % for the Department's Budget" as well as "Total Donor Funding"

Table 18: Mpumalanga Budgetary Allocation Towards Programmes and/or Projects

<i>Year</i>	<i>Allocation for programmes and projects in Rands</i>	<i>Allocation as a % of the Department's budget</i>	<i>Total Conditional Grants Allocation in Rands</i>	<i>Actual Expenditure</i>
2001/02	29 465 000	-	7 320 000	27 894 250
2002/03	44 773 000	-	14 276 000	44 892 025

Source: Mpumalanga Department of Education's response to the SAHRC's protocol, 2002/03

Notes: The MDE did not supply the SAHRC with "Allocation as a % for the Department's Budget" as well as "Total Donor Funding"

The MDE expressed satisfaction with its budget allocation, which it underspent by 1% only.

Table 19: Western Cape Total Budget Allocation for FET

<i>Year</i>	<i>Total Departmental Allocation in Rands</i>	<i>Allocation as a % of the National Budget</i>	<i>Actual Expenditure</i>
2001/02	125 166 000	0,0005	125 859 000
2002/03	136 347 000	0,0005	132 707 087

Source: Western Cape Department of Education's response to the SAHRC's protocol, 2002/03

Notes: Donor funding was indicated as "0" for both financial years

The WCDE overspent by 2,6% in the programme during the financial year 2002/03. Nevertheless, there were not any particular reasons given for the incurred over-expenditure.

7 PROGRESS IN THE REALISATION OF THE RIGHT TO FET

The DoE has hailed the development of a new curriculum as an important step and an achievement for senior secondary schools. The DoE hopes that the new curriculum will “produce [life-long learners] who are creative, reflective, ready either to pursue their learning careers in higher education or to enter the labour market”. The DoE has also hailed the reduction of technical colleges through mergers and incorporation from about 152 to 50 as a major achievement. The DoE hopes that the newly formed colleges “will provide a set of vocational programmes to learners of varied potential, interest, need and age grouping without unnecessary duplication and inefficiencies that characterised the old system”.

In 2000, the DoE commissioned a study into open learning in both the General Education and Training and FET bands in an attempt to broaden participation in education. Since then, the Department has been developing a national strategy for open learning and distance education in public FET colleges.

The DoE was involved in some of the following projects during the reporting period:

The abolition of the differentiation of the matric subjects into standard, lower and higher grades.

- *Dinaledi* is a project aimed at improving participation and performance of learners from historically disadvantaged backgrounds in MST. The project is said to have already surpassed its target of 10% in its first two years of implementation.
- Establishment of a new funding regime for FET colleges: a funding framework has been developed with proposals on formula-funding of programmes, funding for special purposes, student funding and private funding.

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- Registration of private providers: proposals were sent out to the public for comment such that a policy proposal on registration of private providers was in the process of being finalised.

It is noteworthy that almost all the PEDs which submitted their responses to the SAHRC protocols referred to a number of common areas that sought to meet at least three constitutional obligations¹⁰⁴ of the right to education, which are to respect, promote and fulfil the right to education.

The existence of learnerships does not only further the objectives of the Skills Development Act 97 of 1998, but also benefits the out-of-school youth (who are otherwise unemployable as a result of lack of skills and requisite experience) and unemployed adults. The GDE indicated its satisfaction with the links it has established with various Sector Education and Training Authorities (SETAs). A Safe Schools programme was another initiative referred to by at least two provinces. The WCDE, for instance, instituted this programme, which culminated in the development of a provincial Schools Safety policy.

As part of addressing skills shortage in MST, the NWDE increased the number of schools participating in *Dinaledi* to 15. There were several categories of vulnerable groups that the NWDE considered in its quest to realise the right to FET. For instance, the NWDE encouraged girl-children to take part in MST; and offered fee exemptions to learners from low-income and poverty-stricken groups as per the South African Schools Act (SASA) 84 of 1996.

In order to improve learner performance (especially in disadvantaged areas) and girl-children's participation in MST, the WCDE launched the following projects/programmes: MST, Integrated Teacher Training, Development of Learner Support Materials, and Special Interventions and Diagnostic Testing programme. In March 2003, the WCDE launched the MST Academy to improve the matric pass rate in MST, especially among learners from disadvantaged backgrounds. Resources had already been invested and facilities put in place for first intake in 2004. During the reporting period the WCDE implemented a Multi-Grade Schools programme to support educators and learners in MST teaching and learning in rural schools.

The WCDE's programme on Education and Communication Technology ensured that about 99% of schools in the Western Cape were linked to the Internet (Telecommunication Project). There were about 3 800 computers installed in school computer laboratories. The DoE also referred to a similar programme taking place in the Northern Cape and Mpumalanga in which about 80% of schools were participating. The WCDE provided a learner support transport scheme to ensure access to schooling in poor communities. Youth from the Western Cape province benefited from the WCDE, as it provided support to Youth at Risk as part of its services for Learners with Special Education Needs (LSEN).

8 CHALLENGES FOR THE REALISATION OF THE RIGHT TO FET

According to the DoE, the new curriculum caters for learners and youth aged between 16 and 18 years old in schools, and youth and adults aged 18 and over in technical colleges. The intention of the new curriculum is to address imbalances of the past and benefit learners in rural areas and historically disadvantaged racial groups. Issues of inclusivity (learners with barriers to learning) and increasing the number of girls offering Mathematics and Science are being addressed.

Groups targeted by the FET colleges initiatives are females, persons without formal qualifications (through the RPL policy), persons living in rural areas, persons living with and/or affected by HIV/AIDS, unemployed persons, low-income or poverty-stricken groups and historically disadvantaged racial groups.

The ECDE experienced a shortage of both human and financial resources, especially for FET Secondary. However, in addressing the problems the ECDE transferred personnel from districts and funds from other programmes to FET Secondary.

According to its report to the SAHRC, the GDE focuses on strategies that affirm the status of African learners (especially girls) across the education system and the curriculum. A large number of programmes, including curriculum redress activities, were introduced in 2002 under the Girl-Learner Project. The GDE has a budget programme aimed at addressing the needs of LSEN. In the Education of Learners with Special Education Needs (ELSEN) sector, the GDE has an equitable school funding system based on the needs of the sector. The Department has, however, established a redress fund to address the needs of ex-DET schools that have a backlog in education resources required to meet the needs of LSEN.

Some PEDs still experienced cases of learners being turned away from writing examinations or even expelled from school for non-payment of fees. In June 2003 some learners in Gauteng were refused to sit for their national FET examinations as a result of unpaid fees. However, the issue was resolved as the GDE had to send a memorandum, making heads of FET institutions aware that such an act was in violation of the right to education.

The KZNDEC pointed to the poverty (decile) rating that was in use during the reporting period to allocate funding to schools as the main difficulty in the schooling sector.¹⁰⁵ Poverty rating was partially determined by the location of the school. One salient problem cited by the KZNDEC regarding this instrument, however, was that some schools are located in relatively wealthy areas (and thus received lower funding) yet some of their learners came from poor surrounding areas. As a result of this, an imbalance was created in the school funding policy. The KZNDEC is working with the DoE to correct this anomaly.

Reporting to the SAHRC on the administrative actions it took during the reporting period, the KZNDEC mentioned that it received between 40 and 60

complaints that pertained to the School Admissions policy. There was also an instance whereby some SGBs and headmasters attempted to prevent learners from sitting for examinations (owing to unpaid school fees) and from being admitted to some schools simply because they were not resident in areas around the schools.

In another separate incident, an application was brought against the KZNDEC and DoE in which an applicant, an SGB, demanded decent facilities in the form of proper classrooms for learners at a school near Eston. Whilst it was correct that the facilities at the school were inadequate and unsuitable, the problem experienced by the KZNDEC was that the school was situated on private land and the KZNDEC did not have a lease agreement with the owner of the land. Consequently, infrastructural developments to the school could not be effected easily. Eventually, the KZNDEC entered into a lease agreement with the owner of the land. The court case against the respondents, the KZNDEC and the DoE was avoided, as the KZNDEC had the opportunity to improve the quality of the facilities at the school within a period of seven months.

The following were the infrastructural developments that took place at the school:

- Five classrooms were constructed.
- An administration block was erected.
- Latrines were erected.
- Sportsfields were constructed and grassed.

One of the ABET learners reported that she had sat for examination, but when the results were announced the learner's results were not available. In other words, it appeared as though the learner had not sat for the examination. Internal enquiries to find out what had happened and requests to check registers were eventually unsuccessful.

The KZNDEC received about 62 complaints pertaining to pension benefit payouts during the reporting period. Briefly, the complaints revolved around time delay in the processing of applications for pension benefit payouts. In addressing the problem, the KZNDEC designed a *pro forma* response to deal with former employees' enquiries regarding pension benefit payouts. The KZNDEC intervened such that both the regional and district offices have improved the time they take to process the pension benefit payouts applications and related matters.

The MDE demonstrated in a number of ways that it catered for various categories of vulnerable groups through its policy measures. For example, in the Mpumalanga province educators have been trained on how to deal with people living with and/or affected by HIV/AIDS. Ongoing training and awareness campaigns have been conducted for SGBs and parents in different communities.

The MDE is also collaborating with the Department of Correctional Services to provide the ABET programme to prisoners.

The WCDE reported that it managed 75 schools with specialised education needs during the reporting period, and was in a process of developing policy for inclusive education, which would expand support for these learners in public ordinary schools. The WCDE also reported that it provided ongoing support for ABET in prisons. Regarding AIDS orphans, the WCDE has formed partnerships with other government agencies and civil society groupings to provide appropriate support. In addition, the WCDE was engaged in the development of a Human Resources Strategy in conjunction with the provincial Department of Economic Affairs to strengthen the skills development of FET colleges and ABET centres to benefit both their learners and unemployed persons. Girl-children are encouraged to take part in MST, as this was previously a male-dominated area. The expansion of ECD sites benefited female-headed households. It was a commendable move for the WCDE to establish an FET college to serve the West Coast area, with sites in Atlantis, Citrusdal, Vredendal and Vredenburg. Particular attention was given to the promotion of access to FET colleges among previously disadvantaged persons. Another campus was established in Caledon.

9 GENERAL INDICATORS¹⁰⁶

Table 20: Eastern Cape Secondary Schools (Infrastructure)

	<i>Total</i>	<i>Urban</i>	<i>Rural</i>
Total number of schools	6 331	2 498	3 833
Number of schools with buildings in a state of disrepair	1 039	316	723
Number of schools that have a shortage of classrooms	*	1 277	1 937
Number of schools with inadequate textbooks	*	*	*
Number of learners residing beyond 5 km radius	*	*	*
Number of schools with no water within walking distance	*	*	*
Number of schools with no electricity	*	766	2 096
Number of schools with no telephones	*	1 390	2 800
Number of schools with inadequate toilet facilities	*	241	845
Number of schools with lack of access to computers	*	2 056	3 385
Number of schools with lack of access to laboratories	*	2 206	3 442
Number of schools with lack of access to library facilities	*	2 043	3 391
Number of schools with lack of access to recreational and sporting facilities	*	*	*

Source: Eastern Cape Department of Education's response to the SAHRC's protocol, 2002/03.

Note: The asterisk () in all the tables indicates that the information required was not made available to the SAHRC.*

Table 21: Western Cape Further Education And Training (Secondary)

	<i>Total</i>	<i>Female</i>	<i>Rural</i>	<i>Learners with Special Needs</i>	<i>African Coloured Indian White</i>
Learner/Educator Ratio	26:1				
Total number of learners in Public Ordinary Schools in the FET band	173 128*	95 041	57 353	Statistics not available	Statistics not available
Total number of learners in FET colleges	45 000	Statistics not available			
Number of learner refugees and asylum seekers	Statistics not available				
Net Enrolment Ratio (NER)	48% of learners leave high school before completing Grade 12				
Number of learners who enrol and leave school early during the year	48% of learners leave high school before completing Grade 12				
Number of children aged 15–18 years excluded from secondary school for failure to pay fees	None				
Number of persons over normal ending age of 18 years who complete secondary school	7 111 learners registered in Grade 12; statistics not available on the pass rate of this particular group				
Number of children of school-going age who are not able to attend school without just cause	Statistics not available				
Number of children from families of permanent residents that attend secondary school	Statistics not available				

Source: Western Cape Department of Education's response to the SAHRC's protocol, 2002/03

Table 22: Western Cape Matric Pass Rate

	<i>Year</i>	<i>Total</i>	<i>Urban</i>	<i>Rural</i>	<i>Female</i>	<i>African</i>	<i>Coloured</i>	<i>Indian</i>	<i>White</i>
Number of matriculants	1999	37 199	22 949	14 250	-	-	-	-	-
	2000	38 318	23 761	14 557	-	-	-	-	-
	2001	37 606	23 079	14 527	20 905	-	-	-	-
	2002	39 373	24 073	15 300	21 696	8 436	20 817	530	9 590
Number of learners who have passed matriculation examination	1999	29 304	17 545	11 759	-	-	-	-	-
	2000	30 447	18 258	12 189	-	-	-	-	-
	2001	31 074	18 846	12 228	17 141	-	-	-	-
	2002	33 008	20 079	12 929	18 027	5 570	17 447	507	9 484
Number of disabled learners who have passed matriculation examination	1999	119	-	-	-	-	-	-	-
	2000	120	-	-	-	-	-	-	-
	2001	129	-	-	-	-	-	-	-
	2002	3	-	-	1	-	-	-	-
Number of disabled learners who obtained matriculation exemptions	1999	10	-	-	-	Same figures	-	-	-
	2000	15	-	-	-	-	-	-	-
	2001	5	-	-	-	-	-	-	-
	2002	1	-	-	-	-	-	-	-
Number of learners who pass with endorsements	1999	9 090	5 800	3 290	-	-	-	-	-
	2000	9 169	5 760	3 409	-	-	-	-	-
	2001	9 381	6 068	3 313	5 354	-	-	-	-
	2002	10 084	6 395	3 689	5 649	692	3 585	332	5 475
Number of learners who wrote at higher-grade level	1999	118 008	75 107	42 901	-	-	-	-	-
	2000	113 863	71 489	42 374	-	-	-	-	-
	2001	115 045	73 074	41 971	64 157	-	-	-	-
	2002	116 681	73 185	43 496	64 484	20 409	54 538	2 366	39 368

Source: Western Cape Department of Education's response to the SAHRC's protocol, 2002/03.

Notes: The dash (-) in the table denotes that the information was not available to the WCDE itself.

Table 23: Western Cape Literacy Rates

	<i>Total</i>	<i>Rural</i>	<i>Urban</i>	<i>Female</i>	<i>Learners with special needs</i>	<i>African</i>	<i>Coloured</i>	<i>Indian</i>	<i>White</i>
Literacy Rate for persons aged 15–24 years	72%	Statistics not available							
Literacy Rate for persons aged 24 years +	79%	Statistics not available							

Source: Western Cape Department of Education's response to the SAHRC's protocol, 2002/03

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Table 24: Western Cape Secondary Education (Infrastructure)

	<i>Total</i>	<i>Rural</i>	<i>Urban</i>
Total number of schools	300	102	198
Number of schools with buildings in a state of disrepair	2	0	2
Number of schools that have a shortage of classrooms	85	15	70
Number of schools with inadequate textbooks	31%	*	*
Number of learners residing beyond 5 km radius	Not available		
Number of schools with no water within walking distance	0	0	0
Number of schools with no electricity	33	33	0
Number of schools with no telephones	6	6	0
Number of schools with inadequate toilet facilities	Not available		
Number of schools with lack of access to computers	49	16	33
Number of schools with lack of access to laboratories	21	6	15
Number of schools with lack of access to library facilities	48	15	33
Number of schools with lack of access to recreational and sporting facilities	Not available		

Source: Western Cape Department of Education's response to the SAHRC's protocol, 2002/03

Table 25: Western Cape Number of Platoon Schools

<i>Province</i>	<i>Number of learners/schools</i>		
	<i>Total</i>	<i>Rural</i>	<i>Urban</i>
Western Cape	9	1	8

Source: Western Cape Department of Education's response to the SAHRC's protocol, 2002/03

Table 26: Gauteng Matric Pass Rate

	<i>Total</i>	<i>Female</i>	<i>African</i>	<i>Coloured</i>	<i>Indian</i>	<i>White</i>
Number of matriculants	65 912	35 910	41 529	3 219	2 477	18 229
Number of learners who have passed matriculation examination	37 186	19 854	24 698	2 042	974	9 273
Number of disabled learners who have passed the matriculation examination	5	2	5	0	0	0
Number of learners who obtained matriculation examination	14 282	8 089	3 801	457	1 261	8 619
Number of learners who pass with endorsements						
Number of learners who write at higher-grade level	206 121	113 133	120 392	7 842	9 961	65 947
Number of learners who write at standard-grade level	208 976	112 494	142 139	11 935	5 084	46 847

Source: Gauteng Department of Education's response to the SAHRC's protocol, 2002/03

Table 27: Gauteng Secondary Education (Infrastructure)

	<i>Total</i>	<i>Urban</i>	<i>Rural</i>
Total number of schools	775	61	714
Number of schools with buildings in a state of disrepair	70	8	62
Number of schools that have a shortage of classrooms	272	36	236
Number of schools with inadequate textbooks	0	-	-
Number of learners residing beyond 5 km radius	244 594	20 306	224 288
Number of schools with no water within walking distance	0	0	0
Number of schools with no electricity	8	3	5
Number of schools with no telephones	23	22	1
Number of schools with inadequate toilet facilities	7	4	3
Number of schools with lack of access to computers	236	38	198
Number of schools with lack of access to laboratories	200	27	173
Number of schools with lack of access to library facilities	224	28	196
Number of schools with lack of access to recreational and sporting facilities	292	28	264

Source: Gauteng Department of Education's response to the SAHRC's protocol, 2002/03

Notes: The dash (-) in the table denotes that the information was not available to the GDE itself.

10 CRITIQUE

Whilst the bulk of the analysis on programmatic and policy measures applicable to both the GET and FET bands are covered in the GET section of the chapter, this section of the chapter will address mainly those issues that are more specifically applicable to the FET band. These comprise skills development and education, and the academic performance of learners in FET Secondary in learning areas such as mathematics and physical science. The reason for this bias is that these are learning areas with which most learners are struggling and that they have been dominated by male learners over the years. Therefore, analysing performance by gender in these learning areas would be helpful. The analysis of the academic performance of FET Secondary learners will be based mainly on other sources of information since most PEDs did not make such information available.

However, it is worth mentioning upfront that inconsistencies in reporting on programmatic and policy measures by various PEDs affect the quality of this report adversely. For instance, only three PEDs referred to the programme on Education and Communication Technology; it is not known what the other

provinces are doing regarding education and technology, and yet technology is an important part of the right to education and relates to the right to work.

An introduction to technology and to the world of work should not be confined to specific technical and vocational education programmes but should be understood as a component of general education. According to the Convention on Technical and Vocational Education adopted by the General Conference of UNESCO in November 1989, technical and vocational education consists of “all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life”. This view is also reflected in certain International Labour Organisation (ILO) Conventions.¹⁰⁷

Again, not all the PEDs reported on the General Indicators and National Action Plan for Human Rights. This section is crucial to the assessment of programmatic and policy measures adopted by the State in a reporting period. Providing information on the General Indicators and the National Action Plan for Human Rights assists in determining whether or not the right is being progressively realised.

The development of NCS Grades 10 to 12 was a progressive development in as far as the inculcation of the constitutional values in the South African education system was concerned. This means that the impact of this curriculum cannot be assessed since it is in the early stages of implementation. However, Samiera Zafar warns that the well-intentioned goals of the subject statements lie in their implementation, which has to make a qualitative difference to the lives of learners. Moreover, Zafar makes the point that the contribution to the development of learners as envisaged in the NCS policy requires efficiency in the educational system; strategic and well-planned implementation; mobilisation of the requisite human and financial resources; and quality assurance within the system.¹⁰⁸

From a human rights’ point of view, the availability of different forms of education in the FET sector offered in senior secondary schools and in technical colleges is desirable, and the DoE must be commended for bringing about such a transformation in the FET sector. This is also in line with the interpretation of the United Nations Committee on the Economic, Social and Cultural Rights (UNCESCR) of article 13, paragraph 2 (b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The UNCESCR interprets article 13, paragraph 2 (b) as follows:

Secondary education includes the elements of availability, accessibility, acceptability and adaptability, which are common to education in all its forms and at all levels.

While the content of secondary education will vary among State parties and over time, it includes completion of basic education and consolidation of foundations for lifelong learning and human development. It prepares learners

for vocational and higher educational opportunities. Article 13, paragraph 2 (b) applies to secondary education “in its different forms”, thereby recognising that secondary education demands flexible curricula and varied delivery systems to respond to the needs of learners in different social and curricula settings. The Committee encourages “alternative” educational programmes that parallel regular secondary school systems.¹⁰⁹

The incident in which an SGB in KwaZulu-Natal brought an application against the KZNDEC and DoE points to the inherent problem within SASA section 14 on public schools on private property. It is becoming common course that access-related problems are experienced with schools on privately owned land. It is unfortunate that in most instances the right to education is violated when these problems are encountered.¹¹⁰

10.1 Constitutional Obligations

It may be concluded that South Africa is meeting the legal obligation to fulfil (provide and facilitate) the right to secondary education. It is a positive development that the DoE is in the process of developing a national strategy for open learning in both the GET and FET bands and distance education in public FET colleges. Should the development be successful, it would further contribute to the fulfillment of the right to FET. This move would also make education available in a form different from contact education; it would be more accessible to people who may not be able to attend contact classes, including vulnerable groups in our communities, thereby progressively realising the right to FET. In addition, the provision of education in a distance mode is important too, as it forms part of the four features or elements that education must “exhibit in all its forms and at all levels”, that is, availability, accessibility, acceptability and adaptability.

The development of RPL is another development that contributes to the realisation of the right to education. RPL recognises non-formal and/or non-academic education, thereby broadly encompassing education of all kinds other than the usual academic or formal education. This also maximises learning opportunities for those without formal and/or academic qualifications to acquire academic qualifications in the FET institutions.

10.2 Learner Performance in Mathematics and Physical Science FET Secondary

The State must be commended for the introduction of a project such as *Dinaledi*, which encourages the participation and improvement of performance of the historically disadvantaged learners in MST, especially girl-children. According to a report on a situation assessment and analysis of girls’ education in the Eastern Cape, Limpopo and KwaZulu-Natal prepared by the Centre for Education Policy Development, Evaluation and Management (CEPD) for UNICEF’s Girls’ Education Project, female performance in mathematics has improved substantially since 1996. The report elaborates that in 2002 more girls than boys wrote mathematics but did not perform as well, and 37% and 30% of

male and female candidates passed mathematics respectively. In 2002 the number of girls participating has grown at a faster rate than boys, and the gender gap decreased in pass rates.¹¹¹

However, the CEPD's study found that there was a relatively greater decrease in the number of girls enrolling in higher-grade mathematics when compared to their male counterparts. The study suggests that it is possible that girl-learners are being discouraged from enrolling in higher-grade mathematics.¹¹² This is obviously a negative development that has to be abated if participation rates of girl-learners in MST have to improve to bring about gender balance.

As far as physical science is concerned, the CEPD's study found that the number of girls enrolled and passing has increased more rapidly compared with boys, but the gap between pass rates is wider than in mathematics; the pass rate among boys was 31% and among girls 23%. Also, Indian and white girls perform markedly better than African and Coloured girls at the higher-grade level.¹¹³

The poor performance in mathematics and science could be ascribed to a number of factors. These include poorly trained educators and poor learning conditions at many schools, especially in townships and rural schools. The differences in pass rates between provinces may be attributed largely to the amount of resources available at various schools in the provinces. The revision of the School Funding Norms policy has to address the unequal allocation of financial resources to schools to ensure that the right to education is enjoyed by all the schools as opposed to the current scenario in which other schools receive more financial resources. Better-resourced provinces tend to outperform the rural provinces, which are more disadvantaged. In 2002, the Eastern Cape had the lowest overall pass rate (52%), whereas in KwaZulu-Natal and Limpopo the pass rate was 71% and 70% respectively.¹¹⁴

The inadequate provision and/or late distribution of LSMs are also a recurring problem, especially in the more rural and disadvantaged provinces. At the start of 2002, for example, only 25% of textbooks had been delivered in Limpopo. Textbook shortages are aggravated by poor retrieval rates.

The Eastern Cape, Limpopo and KwaZulu-Natal provinces are the most affected by backlogs in infrastructure and facilities, including a lack of telephones, electricity and water. Very few schools have libraries, despite the importance of libraries for learning and cognitive development. The number of learners per classroom was also higher than in other provinces (43 in the Eastern Cape and 40 in KwaZulu-Natal and Limpopo respectively).¹¹⁵

The lack of infrastructure at many schools, the inadequate provision and/or late distribution of LSMs to schools, and poor textbook retrieval rates adversely affect the realisation of the right to education, as they deprive learners of resources needed to engage fully in the learning process. One of the elements of the right to education is the 'availability' of resources.

The UNCESCR interprets article 13, paragraph 2 of the ICESCR on the availability of education in the following manner:

Functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends on numerous factors, including the developmental context in which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained [educators] receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.¹¹⁶

This quotation shows the significance of resources to ensure that the right to education is progressively realised.

Table 28 shows the number of facilities available in schools in the Eastern Cape, KwaZulu-Natal and Limpopo.

Table 28: School Facilities and Services

<i>Province</i>	<i>Telephones</i>	<i>Water</i>	<i>Electricity</i>	<i>Toilets</i>	<i>Computers</i>	<i>Libraries</i>
Eastern Cape	59	59	40	81	5	10
KwaZulu-Natal	68	68	43	94	10	20
Limpopo	49	63	51	93	5	7
National	65	71	55	91	12	20

Source: Monica Bot, School Register of Needs 2000: An update. Edusource Data News No 35/December 2001

It is also important to look into achievement levels by gender in Senior Certificate Examinations (SCEs). Generally, boys perform better than girls in SCEs. However, in 2002 the gap was closing; 71% of boys passed in 2002 compared with 67% of girls. In KwaZulu-Natal, boys and girls had the same pass rate, and a higher proportion of girls obtained endorsements. Limpopo showed the biggest gender differences, with 73% of boys and 66% of girls passing, whereas the Eastern Cape performed worst of all provinces.¹¹⁷

However, disaggregating the SCEs results, Helen Perry found that girls do better than boys. The analysis revealed that a higher percentage of girls pass with merit and with distinction in almost all provinces. In addition, the proportion of girls who pass the examination as a proportion of the female cohort is larger than that for boys.¹¹⁸

Table 29 provides more information on SCEs results for 2002 by gender.

Table 29: 2002 SCEs Results by Gender

Province		Candidates	Passes		Endorsements		Failures	
Eastern Cape	M	27 820	15 026	54%	2 452	9%	12 793	46%
	F	36 437	18 260	50%	2 737	8%	18 175	50%
KwaZulu-Natal	M	45 862	32 485	71%	7 873	17%	13 376	29%
	F	51 627	36 488	71%	9 763	19%	15 138	29%
Limpopo	M	32 924	24 106	73%	6 829	21%	8 818	27%
	F	38 520	25 538	66%	5 688	15%	12 982	34%
National	M	202 730	143 289	71%	35 392	18%	59 413	29%
	F	241 091	162 485	67%	39 656	17%	78 578	33%

Source: Edusource Data News No 39/May 2003

11 RECOMMENDATIONS

In light of the fact that in most instances PEDs do not have information on the General and National Action Plan Indicators, it is advisable that the provincial Education Management Information Systems Units work closely with the SAHRC to avoid omissions in the SAHRC's social and economic rights monitoring report. Currently, the only available education statistics report is, in a way, outdated, as *Education Statistics in South Africa at a Glance in 2001* was published in June 2003.

A concerted effort by all stakeholders in the promotion of girl-children education needs to be made to ensure that barriers to education of girl-children are removed. These include poverty, involvement in income-generating activities and domestic chores. These barriers prevent girl-learners from participating in quality education. The following statistics attests to these barriers to participating in quality education:

Within each population group, a larger percentage of female than male individuals live in households with zero pay income and a smaller percentage of female than male individuals live in the top 25[%] of households having the highest incomes. Overall, women and girls are more likely than men and boys to be living in households in which there are no wage earners.¹¹⁹

The problems of late distribution of LSMs and the lack of infrastructure at many schools in South Africa have to be addressed as matter of urgency in this financial year, i.e. 2004/05.

Related to the causes of the high-drop-out rates in the FET sector, ways have to be found to address this situation in this sector of education.

HIGHER EDUCATION - EXECUTIVE SUMMARY

Key Developments in Higher Education and Training

Notwithstanding the fact that the South African Constitution does not explicitly recognise Higher Education and Training (HET) as a right, it is important to create a link between HET and the other two bands (i.e. General Education and Training and Further Education and Training). This link is necessary because:

- The three bands of education are related as they make up one right, the right to education. Therefore continuity in the monitoring and evaluation of the three bands is essential.
- The State invests large amounts of public funds in HET.
- There are provisions in the Constitution that speak to human rights issues in HET. For instance, section 29(2) refers to use of the official language/languages in public educational institutions, whilst section 3 refers to the establishment of independent educational institutions.

Amidst the on-going transformation and restructuring process in the HET band, the following are the measures that were adopted during the reporting period:

Language Policy for Higher Education

After the release of this policy paper in November 2002, the Minister of Education appointed a Ministerial Committee in 2003 to advise on a framework for the development of indigenous languages for use as languages of instruction in higher education. In a broader view, the policy paper attempts to ensure the simultaneous development of a multilingual environment in which all languages are developed as academic/scientific/legal languages, while at the same time ensuring that the existing languages of instruction in the higher education institutions do not serve as a barrier to access and success.

Higher Education Act 101 of 1997: Government Gazette No. 22 138, Notice Number 230

The aim of the notice was to invite representations regarding the proposal to merge certain public higher education institutions or subdivisions of public higher education institutions. In this case the Minister of Education gave notice in terms of the Higher Education Act of his proposal to establish a single higher education institution, providing both university and technikon programmes through the merger of Port Elizabeth Technikon, the University of Port Elizabeth and the Port Elizabeth Campus of Vista University.

April 2002 – March 2003

National Higher Education Information and Applications Service

The establishment of the National Higher Education Information and Applications Service (NHEIAS) is provided for in the National Plan for Higher Education (NPHE) of 2001. It was in this context, that in October of the same year, the Minister of Education appointed a Working Group to advise the Ministry on the establishment of a NHEIAS. Basically, the aim of this measure is to provide information, enable a single application to higher education institutions and therefore reduce the costs associated with applying to different tertiary institutions.

The central service will have to ensure that:

- students are aware of the courses offered and institutions available;
- access to higher education, particularly for rural pupils, is promoted;
- the processing of students' applications and the provision of accurate statistics are managed better, and;
- the costs of applying for tertiary education [are] lower.

At the time of reporting, the policy was still under discussion between the Ministry of Education and the South African Universities Vice-Chancellors' Association (SAUVCA) and the Committee of Technikon Principals (CTP).

Funding of Public Higher Education: A New Framework

This is one important development the Ministry began working on in 1998. Briefly, the new funding framework gives the Minister a direct control over government only grants to the public higher education. This makes the new funding framework an ideal steering mechanism to be used to achieve national goals and objectives of higher education transformation. Moreover, the new funding framework was achieved through a wide consultation process between the Ministry and other stakeholders in higher education including SAUVCA and CTP.

Progress and Challenges in Higher Education and Training

The following issues were found to be rather worth discussing:

Access to Higher Education

Apart from relatively few numbers of matriculants who gain entry into higher learning institutions, the high cost of tertiary education has often been cited as a barrier to accessing higher learning for most students.

Representation of Black Staff in some Higher Learning Institutions

The representation of black and female staff in higher education institutions is cause for concern. For example, a national working group appointed by the Minister of Education found that black representation on staff was unsatisfactory at the following universities: Pretoria, Rand Afrikaans and Wits.

Graduation Trends

According to the South African Institute of Race Relations' South Africa Survey 2002/2003, the average graduation rate for university and technikon students is 15%; less than half the ideal average of 33%. About one in five students drop out every year, resulting in R1,3 billion in government subsidies being spent on students who do not complete their studies. On a positive note, the gender gap among graduates is beginning to close. The South African Qualifications Authority figures show that in 1998, 30 461 women and 27 592 men graduated.

Recommendations

- Admission policies to higher education have to be transparent. Without compromising “quality education and high standards”, both the State and higher learning institutions need to work together to ensure that admissions requirements and processes (e.g. teach test teach) do not discriminate against students with potential. Gender disparities in staff and participation rate of particularly African, Coloured and students with disabilities, in particular, in higher education necessitate this kind of co-operation between higher education institutions and the State.
- Whilst the solution to this problem may not lie in the admissions requirements being relaxed, it is necessary that appropriate mechanisms are put in place to address the problem. For example, bridging courses and academic development programmes. Bridging courses on their own are expensive; students need funding for these. Unfortunately, most patrons are not keen on investing in students who do bridging courses or a foundation phase, as some institutions would call this programme. Together with the institutions of higher learning, the State should mobilise funds, not only for the academic development programmes but for bridging courses as well. This is one way that would see the participation of African students, in particular, increasing in higher education.
- The National Student Financial Aid Scheme has to look into the funding of mature and post-graduate students including part-time students, if access to higher education is to improve.

April 2002 – March 2003

- There is a need for the State to provide structures that will help learners and potential higher learning students with subject selection choices as well career guidance at both school and university levels. This is part of the State's constitutional obligation to fulfil, that is, to facilitate access to higher education.

HIGHER EDUCATION

12 INTRODUCTION

This section of the report looks at policy/programmatic developments that took place between 01 April 2002 and 31 March 2003. However, to ensure continuity between developments, the scope of the issues discussed may transcend the 2002/03 reporting period where necessary.

13 POLICY, PROGRAMMATIC AND LEGISLATIVE MEASURES

13.1 Policies and programmatic measures

13.1.1 Language Policy

After the release of the Language Policy for Higher Education in November 2002, the Minister of Education appointed a Ministerial Committee in 2003 to advise on a framework for the development of indigenous languages for use as languages of instruction in higher education.¹²⁰

Such a framework should, amongst [other things], address the following:

- criteria for the selection of languages to be developed for use in higher education. (This may require an assessment of the current usage of indigenous languages in higher education);
- the number of languages that should be earmarked for development, [as well as the relevant] academic disciplines or fields of study;
- an identification of the key areas which will require attention, such as the development of dictionaries, teaching and learning materials, staff development, *etcetera*, and;
- the institutional arrangements required for implementation, including the respective responsibilities of higher education institutions and the Government.¹²¹

In a broader view, the policy paper (the Language Policy for Higher Education) attempts to ensure the simultaneous development of a multilingual environment in which all languages are developed as academic/scientific languages, while at the same time ensuring that the existing languages of instruction in the higher education institutions do not serve as a barrier to access and success.¹²²

Limited as this right may be, section 29(2) of the Constitution provides that everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. As a secondary legislative piece, the Higher Education Act 101, 1997 specifically reinforces this right as it accords the Minister of Education the powers to determine language policy for higher education.¹²³

13.1.2 Higher Education Act 101 of 1997: Government Gazette No 22 138, Notice Number 230

The aim of the notice was to invite representations regarding the proposal to merge certain public higher education institutions or subdivisions of public higher education institutions. In this specific case, the Minister of Education gave notice in terms of the Higher Education Act, of his proposal to establish a single higher education institution providing both university and technikon programmes through the merger of Port Elizabeth Technikon, the University of Port Elizabeth and the Port Elizabeth Campus of Vista University.

Interested parties had until Friday 4 October 2002 to make representations to the national Department of Education (DoE).¹²⁴

13.1.3 National Higher Education Information and Applications Service for South Africa

The establishment of the National Higher Education Information and Applications Service (NHEIAS) is provided for in the National Plan for Higher Education (NPHE) of 2001.¹²⁵ It was in this context, that in October of the same year, the Minister of Education appointed a Working Group to advise the Ministry on the establishment of a NHEIAS.

*The Working Group examined the structures and processes of four existing national applications services in other countries, those of the United Kingdom, Ireland, Kenya and Turkey. In addition, it looked closely at the more recently established local regional office in KwaZulu-Natal (the esATI [Central Applications Office]). In its research into ways in which these services function, the Working Group took note of the size of the systems (i.e., the number of member institutions served), funding of the service, governance structures, legal constitution, and, most critically, the operating processes. The latter involved the handling of applications, selection, the construction of handbooks, fees, communication with institutions and applicants, the administration of admissions criteria, and the ICT platform to support the service.*¹²⁶

Basically, the aim of this new development is to provide information, enable a single application to higher education institutions and therefore reduce the costs associated with applying to different tertiary institutions.

The central service will have to ensure that:

- students are aware of the courses offered and institutions available;
- access to higher education, particularly for rural pupils, is promoted;
- the processing of students' applications and the provision of accurate statistics are managed better, and;
- the costs of applying for tertiary education [are] lower.¹²⁷

However, at the time of reporting this measure was still under discussion between the Ministry of Education and the South African Universities Vice-Chancellors' Association (SAUVCA) and the Committee of Technikon Principals (CTP).

13.1.4 Funding of Public Higher Education: A New Framework

This is one important development the Ministry began working on in 1998. Briefly, the new funding framework gives the Minister a direct control over government only grants to the public higher education. This makes the new funding framework an ideal steering mechanism to be used to achieve national goals and objectives of higher education transformation. Moreover, the new funding framework was achieved through a wide consultation process between the Ministry and other stakeholders in higher education including SAUVCA and CTP.

A basic feature of the new framework is that it links the awarding of government higher education grants to national and institutional planning. This funding/planning link makes the new framework essentially a goal-oriented mechanism for the distribution of government grants to individual institutions, in accordance (a) with national planning and policy priorities, (b) with the quantum of funds made available in the national higher education budget, and (c) the approved plans of individual institutions.¹²⁸

However, it has taken the Ministry rather a long time to eventually produce a complete and comprehensive funding framework for higher education. The rationale for the long gap between the initiation of the developmental work and the release of the framework is largely due to the fact that, although the Education White Paper 3: A Programme for the Transformation of Higher Education (July 1997) outlined the principles that should guide the development of a new funding framework, key policy issues relating to the restructuring of the higher education system remained unresolved. These issues have been addressed in the NPHE, thus enabling the finalisation of the new funding framework.¹²⁹

The new funding framework is informed by funding principles and framework outlined in the Education White. It replaces the old the funding framework introduced in 1982, which proved to be unsuitable as 'a steering mechanism to achieve the policy objectives and goals for the transformation of higher education system.'

Apart from its origins in the apartheid past, it is based on a market-driven model, which precludes its use as a steering mechanism to address national goals and objectives. The role of the Government in this model is limited to funding student demand and to correcting market failures that may occur. However, under apartheid the market model was itself distorted by ideological factors, which restricted and constrained institutional and student choices and decisions.¹³⁰

13.2 Legislative developments

There were not any legislative developments in the Higher Education sector during the period under review.

13.3 BUDGETARY MEASURES

Table 30: Total State Finance and Spending on Education as a % of GDP (R'000)

	<i>GDP</i>	<i>Total State Finance</i>	<i>Education System</i>	<i>Department of Education</i>	<i>Higher Education</i>	<i>College/School Education</i>
January 2000						
Actual outcome	910 500	233 942	50 769	500	7 014*	43 255
% of GDP		25.7	5.58	0.05	0.77	4.75
% of total state finance			21.7	0.21	3	18.49
February 2001						
Preliminary outcome	990 000	262 590	55 186	575	7 532**	47 079
% of GDP		26.5	5.57	0.06	0.76	4.76
% of total state finance			21.02	0.22	2.87	17.93
March 2002						
Budget estimates	1 082 800	287 909	59 669	834	7 969	50 865
% of GDP		26.59	5.51	0.08	0.74	4.7
% of total state finance			20.72	0.29	2.77	17.67

* Excludes a once-off expenditure of R58, 3m from the Adjustments Estimates for 2000/01 specifically for January 2001 student fee difference between each higher education institution's fees (tuition as well as hostel fees) and that of incorporated colleges of education.

** Includes the incorporation of 28 colleges of education into universities and technikons.

Source: Department of Education. Information on the state budget for higher education, July 2002 as reproduced in Edusource Data News No. 38/January 2003

The allocation for universities for 2002/03 amounted to R5, 7 billion (up from R5, 4 billion in 2001) and R1, 9 billion for technikons. This meant that the universities allocation was increased by R300 million and this amount was mainly to be used for university subsidies and the National Student Financial Aid Scheme (NSFAS). It should be noted that the allocated funds for universities did not include the transformation and restructuring taking place in higher education.¹³¹

...Director-General of Education Thami Mseleku told parliamentary portfolio committee on education that implementing the [NPHE] was one of the Department's priorities for the year ahead [that is, 2003/04].¹³²

Table 30 above shows a declining trend in higher education allocation over the last three years – 2000/01 to 2002/03 both as a percentage of Gross Domestic Product (from 0.77 % in 2000/01 to 0.74% in 2002/03) and as a proportion of total state finance (from 3.0% to 2.77%).

Table 31: Summary of State Budgets for the University and Technikon Sectors, 1995/96 – 2002/03

	Universities		Technikons		Other*		Total
	R'million	Nominal Increase	R'million	Nominal Increase	R'million	R'million	Nominal Increase
1995/96	3 066,5	19.6%	1 006,3	34.2%		4 072,8	22.0%
1996/97	3 850,8	25.6%	1 356,5	34.8%		5 207,3	27.9%
1997/98	3 975,9	3.2%	1 455,5	7.3%		5 431,4	4.3%
1998/99	4 336,7	9.1%	1 663,1	14.3%	3.6	6 003,4	10.5%
1999/00	4 648,2	7.2%	1 896,9	14.1%	65.1	6 610,2	10.1%
2000/01	5 001,2	7.6%	1 976,7	4.2%	36.1**	7 014,0	6.1%
2001/02	5 398,8***	8.0%	2 122,8***	7.4%	10.0	7 531,6	7.4%
2002/03	5 707,8	5.7%	2 215,9	4.4%	45.7	7 969,4	5.8%

*Includes funds for redress purposes, NSFAS administration, [ad hoc] needs during the incorporation of colleges of education and NSFAS funds earmarked for teacher training.

** Excludes a once-off expenditure of R58 million from Adjustments Estimate for 2000/01 specifically for January 2001 student fee differences between each higher education institution's fees (tuition as well as hostel fees) and that of the incorporated college(s) of education.

*** Includes the incorporation of 28 colleges of education from seven provincial education departments.

Source: Department of Education. Information on the state budget for higher education, July 2002 as reproduced in *Edusource Data News No.38/January 2003*.

Table 31 above shows that between 1995/96 and 2002/03 State spending on universities increased by 86%, with yearly nominal increases ranging from a low of 3 % to a high of almost 26%. State spending on technikons increased by 120% over this period, with yearly nominal increases ranging from 4% to 35%.¹³³

14 PROGRESS AND CHALLENGES IN HIGHER EDUCATION

Assessing progress made by the State in higher education, may at this stage, prove to be a limited exercise given that at least most higher education institutions in the country were occupied with transformation and restructuring – an ongoing process up-to-date. Ironically, mergers and incorporations that have already taken place in most higher learning institutions can be hailed as successful. However, the conclusion of the mergers and incorporations process only spells more challenges for the higher education sector. These comprise access to higher education, improvement of participation rates, representation of black and female staff, graduation trends, *etcetera*.

It is worthwhile discussing briefly each of the challenges facing the higher education sector.

14.1 Access to Higher Education

Apart from relatively few numbers of matriculants who gain entry into higher learning institutions, the high cost of tertiary education has often been cited as a barrier to accessing higher learning for most students.

A Human Sciences Research Council survey found that almost three-quarters of grade 12 learners would like to proceed to higher education. The high cost of tertiary study was the biggest barrier to entering a tertiary institution. Most learners (55%) intended to study at technikons and 35% intended to go to university.¹³⁴

14.2 Improvement of Participation Rates

It is encouraging, however, that South Africa has more than three times the number of students than its closest competitor in sub-Saharan Africa.

In 2001 South Africa had 633 918 students enrolled in tertiary education, with the runner up being Sudan with 200 538 students. However, participation rates are still too low, with only 15 percent of youths aged between 18 and 24 years enrolled in higher education.¹³⁵

Ironically, in most institutions of higher learning African students were in majority in 2000. African students made about 55% at universities whilst technikons had about 72%. Enrolment rates also increased at universities especially because colleges of education were incorporated into universities. The following two tables on student enrolments contain preliminary figures at institutions of higher learning in 2002.

Programmes such as the Carnegie Scholarship¹³⁶ are desirable as they have the potential to increase numbers of especially women students in scarce skills fields such as science and technology, engineering and economics. During the reporting period, the first cohort of 41 female students was in their first year of undergraduate study at eight South African universities and were selected from public schools across all nine provinces.¹³⁷

Another progressive development, used as vehicle to achieve the NPHE goals, namely, enhancing access and retention in higher education, capacity development of historically disadvantaged institutions and co-operation between institutions in SADC is the South Africa-Norway Tertiary Education Development programme launched in 2000. Two major access and retention projects have been fully implemented during the year under review at the University of Durban-Westville and the University of the Western Cape.¹³⁸

Table 32: Preliminary Enrolment at Universities, 2002

	<i>African</i>	%	<i>Coloured</i>	%	<i>Indian</i>	%	<i>White</i>	%	<i>Un-Known</i>	%	<i>Total</i>	<i>Incr/dec r over '01</i>
Cape Town	5222	27	2750	14	1362	7	10120	52	36	0	19490	12%
Durban- Westville	5612	60	121	1	3410	37	198	2	0	0	9341	25%
Fort Hare	7405	99	20	0	2	0	19	0	0	0	7446	67%
Free State	8464	48	745	4	387	2	7914	45	0	0	17510	53%
Medunsa	3473	86	31	1	361	9	168	4	0	0	4033	7%
Natal	13304	47	895	3	8339	30	5685	20	0	0	28223	73%
North	10455	99	8	0	15	0	34	0	1	0	10513	49%
North West	6663	99	15	0	27	0	31	0	0	0	6736	7%
Port Elizabeth	14951	77	926	5	272	1	3083	16	186	1	19418	177%
Potchefstroom	18182	57	885	3	258	1	10479	33	2292	7	32096	80%
Pretoria	35582	56	2323	4	1742	3	23822	38	1	0	63470	116%
Rand Afrikaans	8415	38	655	3	1349	6	11569	53	53	0	21988	15%
Rhodes	3117	43	323	5	468	7	3262	45	0	0	7170	35%
Stellenbosch	3216	15	2304	11	430	2	15305	72	0	0	21300	18%
Transkei	4457	97	11	0	106	2	16	0	0	0	4590	3%
Unisa	64564	47	7320	5	16658	12	48819	36	0	0	137361	36%
Venda	7820	10	1	0	1	0	3	0	0	0	7825	38%
Vista	20346	0	424	2	141	1	485	2	12	0	21408	14%
Western Cape	5638	95	5825	46	925	7	281	2	91	1	12760	30%
Witwatersrand	10063	44	526	2	3250	15	8254	37	33	0	22126	20%
Zululand	6289	45	37	1	99	1	362	5	0	0	6787	49%
Total	263283	93	26145	5	39602	8	149909	31	2652	1	481591	40%

* Racial breakdown based on 2001 percentages.

NB Percentages may not add up due to rounding off

Source: Personal communication, Department of Education, December 2002

Some Comments:

According to preliminary figures, university enrolment increased substantially between 2001 and 2002, by some 40% or approximately 137 500 students. This is in part due to the inclusion of colleges of education. Exact figures could not be obtained at the time of writing, unfortunately. In 2002, there were also 11 230 teachers upgrading their qualifications at higher education institutions. (Beeld 27/8/02)

The majority of students were African (55%), just under a third (31%) were white, 8% were Indian and 5% coloured.

Rough calculations show that African enrolment increased by some 53% between 2001 and 2002, coloured enrolment by 45%, Indian enrolment by 27% and white enrolment by 19%

While most former coloured, Indian and white universities are fully racially integrated, the historically African universities are still predominantly African (at Fort Hare, Medunsa, the North, North West, Transkei, Venda, Vista and Zululand between 85-100% of Students were African). The only other universities where there was a majority of students of one race were Port Elizabeth (77% African), Cape Town (52% white), Rand Afrikaans (53% white) and Stellenbosch (72% white).

The majority of students are female (56.5%) and 72% of students study at the undergraduate level. Relatively more male than female students are studying at the postgraduate level (25% of men compared with 21% of women).

Of all higher education students, 69% study at universities (up from 63% in 2001) and at technikons.

Source: Edusource Data News No.38/January 2003.

Table 33: Preliminary Enrolment at Technikon, 2002

	<i>African</i>	%	<i>Coloured</i>	%	<i>Indian</i>	%	<i>White</i>	%	<i>Unknown</i>	%	<i>Total</i>	<i>Incr/decr over '00</i>
Border	4774	99	19	0	5	0	48	1	0	0	4846	0.17
Cape	4280	30	4026	29	276	2	5507	39	0	0	14089	0.2
Eastern Cape	7158	98	12	0	3	0	12	0	110	2	7295	0.52
Free State	5203	66	434	6	30	0	2189	28	0	0	7856	0.13
M L Sultan	6553	67	116	1	2953	30	130	1	0	0	9752	0.14
Mangosuthu	7054	100	1	0	4	0	6	0	0	0	7070	0.25
N Gauteng	10912	94	22	0	4	0	14	0	0	0	10952	0.15
Natal	5553	52	230	2	1555	15	1353	13	1975	19	10666	0.01
North West*	4477	100	2	0	2	0	3	0	0	0	4484	-
Peninsula	5736	63	3125	34	42	0	238	3	1	0	9142	0.15
Port Elizabeth	5503	58	1237	13	165	2	2637	28	0	0	9542	0.17
Pretoria	24528	74	492	1	598	2	7584	23	0	0	33202	0.3
South Africa	37252	70	4131	8	2182	4	9311	18	278	1	53154	-0.13
Vaal Triangle	14522	88	218	1	102	1	1634	10	0	0	16476	0.15
Witwatersrand	11375	82	295	2	556	4	1725	12	0	0	13951	0.18
Total	154880	72	14360	7	8477	4	32391	16	2369	1	212477	0.07

Some Comments

Technikon enrolment increased by 7% or just over 17 400 students between 2001 and 2002. Especially African enrolment increased (by 15 699 students or 11%), while coloured and Indian enrolment increased by 1 867 students (15%) and 587 students (7%) respectively. White enrolment decreased by 5% however, or by 1559 students

The majority of students at Technikons are Africans (72%, slightly up from 71% in 2001), followed by whites (16%), coloureds (7%) and Indians (4%).

All but one Technikon (Cape Technikon) now have a majority of African students

Female students comprise 47% enrolment, the same as in 2001

Most students study at the pre-diplomate or undergraduate level (96.6%)

**Information for 2001*

Source: Personal Communication, Department of Education, December 2002 reproduced from Edusource Data News No.38/January 2003.

The Council on Higher Education (CHE) made a recommendation to the Ministry that participation rate in higher education must be increased from 15% to 20% within a ten to fifteen year time-frame and that it must be driven primarily by equity concerns. The CHE's recommendation went further to say that the increase in participation rate should be made up principally of African and Coloured students so that their current under-representation is eroded. Adding its weight behind the CHE's recommendation, the Ministry indicated that the "increase in the participation rate must also target disabled students."¹³⁹

A concern has also been raised regarding the enrolment of medical students at higher learning institutions. The DoE asserts that there are more than enough students who qualify in mathematical and science subjects. The DoE cites the highly competitive nature of entrance and admission to medical schools as the factor that bars potential medical students from enrolling. According to the dean of Medical School at the University of Pretoria, enrolment of black students at medical schools was declining. For instance, the pool of black students who qualified with science and mathematics to enter university was only about 5000 in the year 2000 and the majority chose to enter fields such as engineering and information technology.¹⁴⁰

So, admissions requirements of medical schools are said not to be promoting access to students who are not the brightest but show academic potential.

... the admissions requirements of most South African medical schools are targeted, in the main, at the academically brightest applicants rather than at attracting those who have the potential, but have not had the opportunity to develop their potential to the full because of the poor state of schooling in black areas. Moreover, the evidence suggests that a large majority of the students currently receiving training in medical schools leave the country soon after graduating. This suggests that the values and practices of some medical schools may be at variance with the values and principles and the broader objectives that underpin the transformation agenda in higher education and the needs of the country.¹⁴¹

It stands to reason that some innovative ways have to be found to attract more students to enrol for a course in medicine. The Wits University Medical School is one such innovative institution. It has developed non-traditional criteria to help students who would not have otherwise qualified to take up a course in medicine. In 2002 the Minister warned higher learning institutions that Government might resort to a quota system if higher learning institutions do not meet their own targets for admission of black students. Government intentions were also made clear that it wanted to increase access to workers, mature students, women, the disabled and other non-traditional students.¹⁴²

14.3 Representation of Black Staff in some Higher Learning Institutions

The representation of black and female staff in higher education is cause for concern.

A national working group appointed by Minister Asmal reported that black representation on staff was unsatisfactory at the University of Pretoria, [Rand Afrikaans University – as a result of transformation and restructuring in higher education. RAU has had a name change to “University of Johannesburg”] and Wits University. While 57% of students at Wits in 2000 were black, only 20% of all permanent academic staff and 22% of permanent professional staff were black. Wits said that its target was to have 20.4% black academic staff by June 2003 and that half of the permanent academics appointed in 2001 were black. At the [University of Johannesburg], 70 students were white and 7% of its permanent academic and 8% of its permanent professional staff were black in

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2000. At the University of Pretoria, 6% of permanent academic and professional staff were black in 2000.

A survey conducted by the Mail & Guardian on gender equity at tertiary institutions revealed that (at the ten universities polled) women account for 30% to 40% of all full-time academic staff, with the majority of them employed in junior positions. The percentage of women in senior ranks such as professor, head of department or dean is much lower, and only about 10% of senate members are women.¹⁴³

The situation at the above-mentioned institutions might have improved given that the statistics on black staff representation given above dates back to 2000 and 2001. However, it is still important that trends in staff and student composition in higher learning institutions are monitored to ensure that the past imbalances are addressed as a matter of equity.

14.4 Graduation Trends

It has been mentioned on a number of occasions that the school system fails to prepare learners for tertiary education.¹⁴⁴ As a result of this disjuncture between tertiary and school education, most students do not complete their studies in higher education. According to the South African Institute of Race Relations' South Africa Survey 2002/2003, the average graduation rate for university and technikon students is 15%; less than half the ideal average of 33%. About one in five students drop out every year, resulting in R1, 3 billion in government subsidies being spent on students who do not complete their studies.¹⁴⁵

It is a positive development, however, that generally, the gender gap among graduates is beginning to close. The [South African Qualifications Authority] figures show that in 1998, 30 461 women and 27 592 men graduated, and [the 2003] analysis of data trends attest to this fact.

15 CRITIQUE

The Ministry of Education must be commended for the broader transformation and restructuring it has introduced into the higher education system during the reporting period. The process has not been without challenges and resistance from some quarters located both in the academia and the public at large. However, it is important to understand that the mergers and incorporations that have taken place in higher education (some are yet to take place in 2005) are meant to ensure that all deserving South Africans benefit from the public higher education system – that is funded by the State. The State has a duty to ensure that all deserving individuals and communities benefit from the higher education.

The new funding framework, which gives the Minister an opportunity to study and analyse the trends in higher education and on these bases, allocate funding to institutions of higher learning, is another positive development in higher education. It gives the Minister an opportunity to use the funding framework as a

tool to further transform the higher education sector. The transformation of higher education cannot and should not be left to institutions of higher learning. The regulation of the sector is the responsibility of the State; the sector cannot regulate itself. The State has to ensure that institutions of higher learning benefit the country by meeting the country's social, economic and political goals.

It is increasingly becoming difficult to distinguish between the higher learning institutions' autonomy and the State's obligations to ensure that higher education is enjoyed by those who qualify to do so. The institutions of higher learning are accountable to the public, which invests its resources in these institutions. The State has to ensure that these institutions are governed in line with its broader objectives that embody principles such as equity and equality. The following excerpt help clarify the point:

The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance that is necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.¹⁴⁶

The fact that higher education is a qualified right further complicates issues of access and equality in higher education. This fact also contributes to the much-fought about concept of the "autonomy" of higher learning institutions. Access to higher education is not automatic like the basic and further education. Section 29(1) of the Constitution is clear on the right to basic education. It reads as follows:

Everyone has the right –

- a) to a basic education, including adult basic education; and
- b) to further education, which the [S]tate, through reasonable measures, must make progressively available and accessible.¹⁴⁷

The following excerpt draws a distinction between secondary and higher education. It emphasises the capacity or the ability of an individual to enrol at an institution of higher learning.

According to article 13, paragraph 2 (b) [of General Comment No. 13 of the United Nations Covenant on Economic, Social and Cultural Rights], secondary education "shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education". The phrase "generally available" signifies, firstly, that secondary education is not dependent on a student's apparent capacity or ability and,

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secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all.

... higher education is not to be “generally available”, but only available “on the basis of capacity”. The “capacity” of individuals should be assessed by reference to all their relevant expertise and experience.¹⁴⁸

Having said that higher education is not an entitlement, it is equally important to bear in mind that in South Africa education has not been distributed equally across the various sectors of the population. The unequal distribution of education in this country therefore makes the intervention of the State necessary to address the imbalances of the past. One general finding of the report is that more work still needs to be done in this sector of education to bring about equality in all the areas. These include access, recruitment of African lecturers in historically white institutions, promotion of women lecturers, *etcetera*.

Looking at the few problem areas briefly discussed in the report, it would seem that more work is yet to be done in transforming the higher education sector. This does not in any way seek to ignore the many gains already achieved in higher education. The mergers and incorporations that have taken place in higher education will present, in a much more pronounced manner, issues of equity, equality and quality.

The A4 scheme will be used to determine whether higher education has been progressively realised or not. It is important to note that according to the A4 scheme higher education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms at all levels.

The first element, “availability”, refers to functioning educational institutions and programmes being available in sufficient quantity within the jurisdiction of the State party. What they require to function depends on numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities and information technology.¹⁴⁹

Mergers and incorporations that have taken place in higher education precisely attempt to address the availability element of an education, particularly the availability of programmes ‘in sufficient quantity’ and the availability of relevant facilities to assist in teaching programmes on offer in institutions of higher learning. A conclusion can be drawn that this aspect of education has been met. Some of the programmes have had to be scrapped in some higher learning institutions. In August 2003 the DoE released a document entitled “Approved Academic Programmes for Universities and Technikons: 2003 to 2006”.

Only programmes approved by the Ministry would qualify for State funding. Criteria for the removal of programmes include graduation rates, qualified academic supervisors, whether a neighbouring institution offers the same qualification, whether programmes are appropriate to the mission of the institution and programmes for which no enrolments were recorded from 2002. Post-graduate programmes would be removed from the universities of the North (19), Venda (20), Fort Hare (15), the North West (18), Port Elizabeth (6), Wits, [KwaZulu-Natal University] and [University of Johannesburg] (3 each), and one from Rhodes. Technikon Pretoria and Technikon Witwatersrand would have 13 and 17 programmes removed respectively.¹⁵⁰

Accessibility refers to educational institutions and programmes being accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimension:

- i) Non-discrimination: education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds;
- ii) Physical accessibility: educational has to be within safe physical reach, either by attendance at some reasonable convenient geographic location (e.g., a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programmes);
- iii) Economic accessibility: education has to be affordable to all. This dimension of accessibility... primary education shall be available “free to all”, States parties are required to progressively introduce free secondary and higher education.¹⁵¹

In the South African case it cannot be certainly concluded that accessibility to higher education has been achieved. Most of the factors that limit access to higher education have already been alluded to in this report. They comprise cost of higher education, lack of information about financial assistance available for higher education and lack of career guidance for learners, poor academic performance at school level, *etcetera*. So, economic accessibility to higher education in South Africa is an issue – more especially when ‘almost three quarters of grade 12 learners cannot access higher education owing to high cost of tertiary study.’

The same was said about mature students; they are not receiving appropriate support, with cost of tertiary study acting as a deterrent and the inflexibility of programmes on offer at the institutions of higher learning contributing to the inaccessibility of higher education. Programmes on offer fail to take into account the mature students conditions such as home and work commitments. With the exception of private tertiary institutions, the choice of institutions available to address mature students’ needs is, at most, limited to the University of South Africa (commonly known as UNISA) and Technikon South Africa.

Furthermore, it can also be concluded that our higher education system, in general, is not in congruence with the social aspect of the element of adaptability of education since it fails to sufficiently accommodate the needs of mature students. “Adaptability” as an element of the right to education means that education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.¹⁵²

The fact that the DoE has scrapped some of the programmes in some institutions of higher learning, does give an indication that the DoE is committed to ensuring that the programmes on offer are relevant, that is responsive to the social and economic needs of the country. It is important that the country’s limited resources are invested where the rate on return is high, that is, in programmes that will in turn produce an educated workforce that benefits the country’s economy.

Acceptability refers to the form and substance of education, including curricula and teaching methods that have to be acceptable (e.g., relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13, paragraph 1 of the United Nations Covenant on Economic, Social and Cultural Rights), and such minimum educational standards as may be approved by the State.¹⁵³

16 RECOMMENDATIONS

Admission policies to higher education have to be transparent. Without compromising “quality education and high standards”, both the State and higher learning institutions need to work together to ensure that admissions requirements do not discriminate against students with potential. Gender disparities in staff and participation rate of African, Coloured and students with disabilities, in particular, in higher education necessitate this kind of co-operation between higher education institutions and the State.

Whilst the solution to this problem may not lie in the admissions requirements being relaxed, it is necessary that appropriate mechanisms are put in place to address the problem. For example, bridging courses and academic development programmes. Bridging courses on their own are expensive; students need funding for these. Unfortunately, most patrons are not keen on investing in students who do bridging courses or a foundation phase, as some institutions would call this programme. Together with the institutions of higher learning, the State should mobilise funds, not only for the academic development programmes but for bridging courses as well. This is one way that would see the participation of, African students, in particular, increasing in higher education.

The NSFAS has to look into the funding of mature and post-graduate students including part-time students, if access to higher education is to improve.

Regarding the enrolment of African students at medical schools, Wits University serves as a good example to other medical schools as it has already started opening its doors to potential students who otherwise do not meet the traditional admission requirements in place in medical schools.

There is a need for the State to provide structures that will help learners and potential higher learning students with subject selection choices as well career guidance at both school and university levels. This is part of the State's constitutional obligation to fulfil, that is, to facilitate access higher education.

¹ Constitution of the Republic of South Africa Act 108 of 1996.

2 South Africa has not yet ratified the covenant.

3 Article 28 (1) of the Convention on the Rights of the Child provides that State parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall in particular:

- a) Make primary education compulsory and available for free to all;
- b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- d) Make educational and vocational information and guidance available and accessible to all children;

Take measures to encourage regular attendance at schools and the reduction of dropout rates.

4 Article 17(1) of the African Charter on Human and People's Rights provides that every individual shall have the right to education. Unlike other international human rights instruments, the African Charter on Human and People's Rights does not provide an elaborate definition of "education". It appears that all it does is demonstrate the significance of education as a right.

5 The World Declaration defines "basic learning needs" as: "essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning."

6 *United Nations Committee on Economic, Social and Cultural Rights: Report on the Twentieth and Twenty-First Sessions* (April 26 – May 14 1999, November 15 – December 3 1999), Economic and Social Council, Official Records, 2000, Supplement No 2.

7 *Ibid.* 115

8 *Op cit.*, 117

9 *Universal Declaration of Human Rights, Adopted by the General Assembly of the United Nations, resolution 217 (III) of December 10 1948*, in "The Raoul Wallenberg Compilation of Human Rights Instruments", 1997, Martinus Nijhoff Publishers.

10 *Ibid.* 31

11 See footnote 8

12 Gene Sperling in *Foreign Affairs*, Providing Universal Education, September/October 2001. (No longer available on www.foreignaffairs.org)

13 The conference adopted the Salamanca Declaration and Framework of Action for special educational needs, which is inspired by United Nations recommendations, resolutions and publications, notably United Nations Rules for the Equalisation of chances in favour of Disabled People (resolution A/RES/48/96).

14 Section 36 (1) of the Constitution states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

15 See the chapter on the right to have access to sufficient food for more details on this subject.

16 Department of Education, Annual Report for 2002/2003.

17 The policy is also applicable to the Further Education and Training band.

18 This stance is also supported by the SAHRC, which investigated initiation practices in education institutions and subsequently made a recommendation that the only way of prohibiting such practices is by means of Regulations.

19 The Education Laws Amendment Bill, 2002 provides for the amendment of the South African Schools Act, 1996, so as to provide for a national curriculum and instrument for the assessment of learner achievement in public and independent schools; to make provision for an intermediary; to provide for admission age requirements for public and independent schools; to amend the Employment of Educators Act, 1998, so as to make provision for an intermediary and for certain consequential definitions; to amend the Adult Basic Education and Training Act, 2000, so as to effect textual corrections; to provide for safety measures at public and private centres; to provide for a national curriculum and instrument for the assessment of learner achievement for public and private centres.

20 This section of SASA states that the Minister by notice in the Government Gazette, after consultation with the Council of Education Ministers, determine age requirements for the admission of learners to a school or different grades at a school.

21 The added subsections read as follow:

(6) A learner must be accompanied by his or her parent or person designated by the parent at disciplinary proceedings, unless a good cause is shown by the governing body in the absence of the parent or the person designated by the parent.

(7) Whenever disciplinary hearings are pending before any governing body, and it appears to such governing body that it would expose a witness under the age of 18 years to undue mental stress or suffering if she testifies at such proceedings, the governing body may, if practicable, appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

(8) (a) An examination, cross examination or re-examination of a witness in respect of whom a governing body has appointed an intermediary under subsection (7), except examination by the governing body, must not take place in any manner other than through that intermediary.

(b) Such intermediary may, unless the governing body directs otherwise, convey the general purport of any question to the relevant witness.

(9) If a governing body appoints an intermediary under subsection (7), the governing body may direct that the relevant witness must give his or her evidence at any place, which –

(a) is informally arranged to put that witness at ease;

(b) is arranged in a manner in which any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) enables the governing body and any person whose presence is necessary at the relevant proceedings to hear, through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

22 The amendment is also applicable to SASA. A section on “curriculum and assessment” was inserted after section 6 of SASA.

23 This amount excludes grants, donor funding, personnel and related monies.

24 As per the vertical division of revenue.

25 This is a labour-intensive infrastructure development programme aimed at stimulating local economic development in the provinces.

26 Russell Andrew Wildeman, Budget Information Service, Idasa, April 29 2003.

27 For short this document will be referred to as the “Review of Public School Financing”.

28 Kader Asmal, *Seventh Report to the President From the Minister of Education*, December 12 2002.

29 See footnote 25

30 A Situation Assessment and Analysis of Girls’ Education in the Eastern Cape, Limpopo & KwaZulu-Natal prepared for UNICEF Girls’ Education Project by the Centre for Policy Development, Evaluation and Management, October 2003.

31 Joint World Bank, UNAIDS, UNESCO Press Release. Full text available on
. pdf

32 See footnote 31

33 Russell Andrew Wildeman, *Reviewing Provincial Education Budgets*, Budget Brief No 130, April 29 2003, Budget Information Service, Idasa.

34 Note that 2002/03 has been used as the base year to calculate these proportions.

35 National Treasury, *Estimates of National Expenditure*, February 2002.

36 Ibid.318

37 Op cit., 318

38 Currently provinces are using various provincial quintiles which have created inequalities both between schools in the same provinces as well as between schools in different provinces.

39 These are schools whose budgets are managed directly by Provincial Departments of Education as opposed to section 21 schools that manage their budgets themselves.

40 Opcit., 25

41 The NER measures the extent of participation of the official primary age cohort (7–13 years of age) in primary schooling, and therefore excludes those learners who are formally too young or too old to sit in primary school classrooms – but who do. However, it should be noted that the age cohort used in defining “NER” can only be an estimate since the Minister’s of Educations Notice on age 7 as a requirement for admission into Grade 1 was overturned by the Constitutional Court.

42 Kader Asmal, MP: Minister of Education, *Report to the Minister: A Review of the Financing, Resourcing and Costs of Education in Public Schools*, March 3 2003.

43 Ibid, 13

44 Op cit., 13

45 Through personal contact with some officials from the GDE on February 9 2004, it was revealed that a draft document on the NDE’s National Action Plan containing strategies and implementation dates was being prepared.

46 Ibid, 15

47 Op cit., 16

48 *SADTU'S Response to the Department of Education's School Financing Proposals* by Thulas Nxesi in Edusource Data News, No 40/August 2003: *Review of the Financing, Resourcing and Costs of Education in Public Schools: A Summary*.

49 *Education Financing: Framing Inclusion or Exclusion?* by Kimberley Porteus in *Quarterly Review of Education and Training in South Africa*, December 15 2002, Volume 9, Number 4.

50 See footnote 43

51 See footnote 46

52 See footnote 40

53 See footnote 47

54 See footnote 51

55 See footnote 44

56 See footnote 29

57 The ERP is a project established as a partnership between the Centre for Applied Legal Studies (commonly known as CALS) and the Education Policy Unit (commonly known as Wits EPU) at Wits.

58 Education Rights Project, *Farm Schools*, September 2002. <http://www.erp.org.za/htm>. Website accessed August 25 2003.

59 See footnote 16

60 Ibid. 17

61 Wilson Stuart, Education Rights Project. *Transforming Farm Schools*, Issue Paper 3, September 2002. <http://www.erp.org.za/htm/issues3-2.htm>. Website accessed August 25 2003.

62 In brief, section 14(1) of the South African Schools Act [SASA] No. 84 of 1996 states that, subject to the Constitution and this Act, a public school may be provided on private property only in terms of an agreement between the Member of the Executive Council and the owner of the private property.

Subsection 2 of the Act states that an agreement contemplated in subsection 1 must be consistent with this Act and in particular must provide for –

- a) the provision of education and the performance of the normal functions of a public school;
- b) governance of the school, including the relationship between the governing body of the school and the owner;
- c) access by all interested parties to the property on which the school stands;
- d) security of occupation and use of the property by the school;

- e) maintenance and improvement of the school buildings and the property on which the school stands and the supply of necessary services;

protection of the owner's rights in respect of the property occupied, affected or used by the school.

63 See Stuart Wilson, p1

64 South African Human Rights Commission, *Final Report on the Inquiry into Human Rights Violations in Farming Communities*, August 2003.

65 See footnote 59

66 Education Rights Project, *Sexual Harassment in School*. <http://www.erp.org.za/htm/htm/harass.htm>. Website accessed on August 25 2003.

67 See the UNICEF Report prepared by the CEPD: Situational Assessment and Analysis of Girls' Education in the Eastern Cape, Limpopo & KwaZulu-Natal, October 2003.

68 Human Rights Watch. <http://www.hrw.org/reports/2001/safrica/ZA-FINAL-09.HTM>. Website accessed on August 25 2003.

69 South Africa ratified the Convention on July 16 1995.

70 Section 3(1) of SASA states that -

Subject to this Act [SASA] and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.

However, it is important that section 3(1) of SASA is read with section 4 of the same Act. Section 4 of SASA provides that:

- 1) A Head of Department may exempt a learner entirely, partially or conditionally from compulsory school attendance if it is in the best interest of the learner.

Every Head of Department must maintain a register of all learners exempted from compulsory school attendance.

71 World Education Forum, Dakar, Senegal: April 26 – 28 2000, *Education for All, Year 2000 Assessment, Statistical Document*, UNESCO.

72 *Response from the national Department of Education to the SAHRC's protocol*, September 2003.

73 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

74 *Seventh Report to the President from the Minister of Education*, December 12 2002.

75 Ibid.13

76 Op. cit, 13

77 See footnote 42

78 Ibid.10

79 See footnote 11

80 See footnote 62

81 Ibid. 23

82 See the Minister of Education's Report to the President, December 12 2002.

83 See footnote 77

84 This section provides that –

If a learner who is subject to compulsory attendance in terms of subsection (1) is not enrolled at or fails to attend a school, the Head of Department may-

(a) investigate the circumstances of the learner's absence from school;

(b) take appropriate measures to remedy the situation; and

(c) failing such a remedy, issue a written notice to the parent of the learner requiring compliance with subsection (1).

85 See footnote 8

86 <http://www.warmafrika.com/index/geo/5/cat/5/a/a/artid/65>. Crackdown on employers using child labour. Website accessed on November 26 2003.

87 Ibid. 2

88 http://www.gov.za/docs/legislation/bcea/child_labour/index.html. Department of Labour. Website accessed on November 26 2003.

89 *Human Rights Quarterly: A Comparative and International Journal of the Social Sciences, Human, and Law*, The John Hopkins University, Volume 23, Number 4, November 2001.

90 *Testimonies from the Education Rights Project* by Brian Ramadiro and Salim Vally in *Quarterly Review of Education and Training in South Africa*, December 15 2002, Volume 9, Number 4.

91 See Table 3

92 Ibid. 10

93 See footnote 28

94 See footnote 45

95 The following policy documents inform the curriculum development process: the White Paper on Further Education and Training; Further Education and Training Act 96 of 1996; National Education Policy Act 27 of 1996; and the South African Qualifications Authority Act 58 of 1995.

96 National Curriculum Statement represents a policy statement for learning and teaching in schools. The NCS is aimed at replacing "A Resumé of Instructional Programmes in Schools, Report 550 (2001/08)."

97 These reflect 35 subject offerings, which have replaced 264 subject offerings that once existed as a result of the grading of matriculation examinations into higher, lower and standard grades.

98 The Education Laws Amendment Bill of 2002 provides for the amendment of the Further Education and Training Act, 1998, so as to provide for safety measures at public and private further education and training institutions; to effect textual corrections relating to the registration of private further education and training institutions

99 See also the amendment by insertion after section 20 of the Adult Basic Education Act, which reads as follows:

“Prohibition of corporal punishment and initiation practices

20A (1) A person may not administer corporal punishment to a learner at any adult basic education and training centre.

(2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which may be imposed for assault.

(3) A person may not conduct or participate in initiation practices at public and private centres.

(4) Any person who contravenes subsection 3 is guilty of misconduct and disciplinary action must be instituted against such a person.

(5) In addition to subsection (4), a person may institute civil action against a person or a group who manipulated and forced that person to conduct or participate in any initiation practices.”

100 See also the amendment of section 61 of SASA.

101 This is a project funded from the Poverty Relief, Infrastructure Investment and Jobs Summit Projects Fund. It is targeted at poor communities.

102 The budget allocation for Technical Colleges includes the Adult Basic Education and Training (ABET). However, the KZNDEC has since established directorates to specifically focus on ABET and Early Childhood Development.

103 Conditional grant allocations are included in the main allocation for the programme.

104 Section 7(2) of the Constitution provides that the State must respect, protect, promote and fulfil the rights in the Bill of Rights.

105 This subject was discussed in more detail in the GET section of the report.

106 Most provinces did not provide most of the information required in the section for General Indicators and the National Action Plan for Human Rights. There were six tables requiring information on the General Indicators and the National Action Plan for Human Rights. The tables were on the following indicators:

- Further Education and Training (Secondary)
- Matric Pass Rate
- Literacy Rates
- Secondary Education (Infrastructure)
- Availability of LSM per Subject
- Number of Platoon Schools

Therefore, the tables that are shown in this section are only those that seem to be containing information that can assist in assessing the realisation, or the lack thereof, the right to FET. The most cited reason for information not supplied to the SAHRC is the ‘unavailability’ of it.

107 See footnote 6

108 *National Curriculum Statement (NCS) Grades 10 – 12 (Schools) in Quarterly Review of Education and Training in South Africa*, December 15 2002, Volume 9, Number 4.

109 See footnote 10

110 See the GET section of the chapter as well as the SAHRC’s Final Report on the Inquiry into Human Rights Violations in Farming Communities Education Rights Project article on <http://www.erp.org.za/htm>

111 A Situation Assessment and Analysis of Girls' Education in the Eastern Cape, Limpopo and KwaZulu-Natal prepared for UNICEF Girls' Education Project by the Centre for Education Policy Development, Evaluation and Management, October 2003.

112 Ibid. 24

113 *Op cit.*, 24

114 See footnote 111

115 Ibid. 20

116 See footnote 107

117 See footnote 111

118 Ibid. 22–23

119 See footnote 115

120 Personal communication with an official from the national Department of Education. The said official revealed that starting from February 2004, the Ministerial Committee was given about six months to investigate and report back to the Minister on the use of indigenous languages as languages of instruction in higher education.

121 Ibid.

122 Language Policy for Higher Education, Ministry of Education, November 2002.

123 Section 27(2) states that subject to the policy determined by the Minister, the council, with the concurrence of the senate, must determine the language policy of a public higher education institution and must publish and make it available on request.

124 Ministry of Education, Government Notice. http://education.pwv.gov.za/Legislation/Call%20Comment/government_notice. Website accessed 24 February 2004.

125 Report of the Working Group to the Minister of Education: *The Establishment of a National Higher Education Information and Applications Service for South Africa*, June 2002.

126 Ibid, 1

127 Moshoeshoe Monare, *Government to Choose Varsity Students: Education Department Wants Central Agency to Administer Admissions*. Sunday Times, August 17, 2003.

128 Ministry of Education, *A New Funding Framework: How Government Grants Are Allocated To Public Higher Education Institutions*, February 2004.

129 Government Notice, Ministry of Education, Higher Education Act 101, 1997: *Funding of Public Higher Education*, 2003.

130 Ibid.2

131 George Subotzky, *Addressing Equity and Excellence in Relation to Employment in Higher Education*, *Edusource Data News* No.38/January 2003.

132 Ibid.17

133 *Op cit.*, 17

134 See footnote 11

135 See footnote 15

136 The Carnegie-South Africa Undergraduate Scholarship programme was set up in September 2002. Its aim is to increase the numbers of women entering and graduating in the science and technology, engineering, health sciences, economics and education fields of study by providing scholarship funding for three cohorts of women students entering higher education in 2003, 2004 and 2005.

137 See footnote 131

138 Ibid.24

139 Ministry of Education, National Plan for Higher Education, February 2001.
http://education.pwv.gov.za/DoE_Sites/Higher_Education/HE_Plan/national_plan_for_higher_education. Website accessed 27 February 2004

140 See footnote 138

141 See footnote 139

142 See footnote 140

143 Ibid. 27

144 See SAUVCA-CTP Joint Response to the Ministry of Education on the establishment of NHEIAS.

145 Thandile Ntshwaki-Khumalo, Edusource Data News, No. 42/December 2003: A Tertiary Update: October 2002-September 2003.

146 See footnote 116

147 *Constitution of the Republic of South Africa*, Act 108 of 1996.

148 See footnote 146

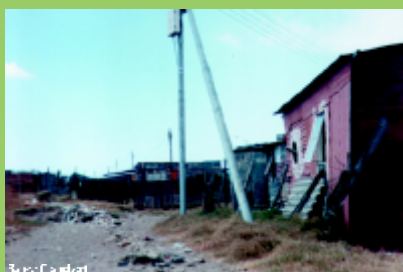
149 Ibid.113

150 See footnote 142

151 See footnote 148

152 Ibid.114

153 Op cit., 114



environment

ECONOMIC AND SOCIAL RIGHTS

5TH REPORT 2002/3

THE RIGHT TO A HEALTHY ENVIRONMENT

**5th Economic and Social Rights Report Series
2002/2003 Financial Year**

South African Human Rights Commission

21 June 2004

PREFACE

In this 10th year of our young but thriving democracy, we are all engaged in some way or the other, in critically reflecting on the achievements we have secured over the past years as well as the unfinished work that lies ahead. In the context of the various rights guaranteed by our Constitution, they seek in their totality to ensure that the individual and the society are able to develop to their full potential and indeed that human rights becomes a central feature of our society. In this regard we have made much progress, and in the main, few argue against the notion that civil and political rights are well secured both in law and in practise.

However, the challenge that is situated at the heart of our Constitutional contract is how we advance social and economic rights and in so doing ensure that we advance the interests of the poor and those many who are still to enjoy the full benefits of our democracy. The inclusion of social and economic rights in the Bill of Rights was a clear articulation that democracy was as much about the right to vote, and of free expression and of association as it was about the right to shelter, the right to food, the right to health care, the right to social security, the right to education and the right to a clean and healthy environment.

The Constitution has tasked the Commission with a specific mandate to advance social and economic rights. In particular, section 184(3) requires that: “Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.”

A healthy and robust debate exists around these measures that the Constitution requires the State to take. In addition, the human rights discourse sees considerable contestation around issues such as the nature and scope of the right, the adequacy or otherwise of the measures taken and the meaning of the phrase ‘progressive realisation of rights.’ These are difficult issues and it is not always possible, nor may one say desirable, to always have consensus on them. In some instances the Courts have had to rule on them. We see this Report, however, not only as a contribution to those debates but also as a tool that can assist Government, Parliament and civil society in developing a critical understanding about social and economic rights and their implementation.

The modus operandi of the Commission in discharging its constitutional mandate to monitor and assess the observance of economic and social rights has in the main focussed on requiring organs of state to report to us on measures they have taken. This continues to pose several challenges, namely: to ensure that organs of State submit to the Commission reports that are timeous, accurate and of good quality . We are pleased that good progress has been made on this front over the past year and the process of presenting draft reports to organs of state and civil society for comment has been most valuable to the Commission in finalising this report .

The launch of the 4th Economic and Social Rights report in April 2003 generated considerable interest and much debate and discussion on the Report ensued. We were invited by numerous parliamentary portfolio committees from the National Assembly and National Council of Provinces to present the Report. We certainly found the

engagement with Parliament a very useful and mutually rewarding exercise. It provided the Commission with a unique opportunity to share its thinking and vision around its work with Parliament while it enables us to better understand Parliament's expectation of the Report and its use to them as a tool in their work. There have been numerous valuable recommendations that have emerged from our presentations to Parliament which we are committed to giving effect to from our side.

So as we commence the beginning of the 2nd decade of our democracy the delivery of social and economic rights become crucial to the ongoing success of our nation and the entrenchment of a culture of human rights. It is certainly our hope, and the intention of this Report, to contribute to ensuring that the promise and the vision underpinning our Constitution is shared and enjoyed by all in our country.

Jody Kollapen

Chairperson - South African Human Rights Commission

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INTRODUCTORY SECTION

The aim of the *Introductory Section* is to provide an outline of the common analytical framework used in the reports, briefly discuss the political and economic context of the year under review, and provide an integrated summary of the key findings and recommendations of all eight reports in the series. Details of the report production process are also included at the end of this introduction.

The 5th Economic and Social Rights Report follows a more user friendly format than previous reports. There are now separately bound, less bulky, reports on Land, Water, Environment, Food, Health, Social Security, Education and Housing. Each report has an executive summary to facilitate access to the main findings and recommendations. Issues that connect one right to another are highlighted in the body of each report to emphasise the interrelatedness and interdependence of the rights in the Bill of Rights of the Constitution of the Republic of South Africa Act 108 of 1996 (simply referred to as the Constitution throughout the reports).

A) Analytical Structure and Framework

Each report in this series follows a basic structure:

1. **Introduction:** a discussion of the meaning and content of the right with reference to the Constitution, case law and relevant international human rights instruments.
2. **Progress in the realisation of the right:** a factual description of measures instituted by government during the period under review and their impact, especially on vulnerable groups.
3. **Challenges for the realisation of the right:** a description of key challenges that hamper the realisation of the right, and in some cases, government's response to these challenges.
4. **Critique of measures instituted:** a consideration of some of the shortcomings of the measures instituted by government.
5. **Recommendations:** a set of recommendations that may encourage progressive realisation of the right as expeditiously as possible.¹

Each report consolidates information from various sources including: relevant government protocol responses, government Annual Reports and Strategic Plans, the Intergovernmental Fiscal Review, as well as research funded by government, international donors or other agencies.

¹ Some reports in the series end with a conclusion.

All reports employ the standard of reasonableness as laid down in the *Grootboom*² and *TAC*³ judgements of the Constitutional Court, in conjunction with relevant international human rights instruments.

The constitutional provisions pertaining to socio-economic rights require the State to “take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of [these rights]”.⁴ This requirement, read with the provision on the obligation of the State to “respect⁵, protect⁶, promote⁷ and fulfil⁸ the rights in the Bill of rights” in section 7(2) of the Constitution ensures an effective guarantee of socio-economic rights in South Africa. The judicial enforcement of these rights by the courts and the constitutional mandate of the South African Human Rights Commission to monitor and assess the observance of the rights by the State⁹ and non-State entities also contribute to the effectiveness of the constitutional guarantee of these rights.

The Constitutional Court has played a significant role in ensuring the effective guarantee of socio-economic rights in our country. On the obligation of the State, Judge Yacoob held in the *Grootboom* case:

*The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.*¹⁰

On the effective guarantee of basic necessities of life for the poor, Judge Yacoob further said:

2 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC)

3 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)

4 See sections 26(2), 27(2) and 29(2) of the Constitution.

5 Respect is a negative obligation, which requires the State to refrain from denying or limiting equal access for all persons to the enjoyment of the rights. This also means that the State should abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure which violates the integrity of the individual or which in any way interferes or limits his/her right to pursue the enjoyment of the rights in the Bill of Rights.

6 The obligation to protect places a positive obligation on the State to prevent the violation of any individual's rights by a third party.

7 The obligation to promote places a positive obligation on the State to create a conducive atmosphere in which people can exercise their rights and freedoms by promoting awareness of their rights through public education.

8 The duty to fulfil places a positive obligation on the State to institute active measures that enable each individual to access entitlements to the right and which cannot be secured through exclusively personal efforts. State parties are also obliged to provide a specific right when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. e.g. people in disaster situations or those in dire need.

9 See sections 184(1) and (3) of the Constitution.

10 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC) [24]

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.¹¹

On the role of the courts in ensuring that the State fulfils its role in giving effect to these rights and thus ensuring that there is an effective guarantee of these rights, Judge Yaccob said:

I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.¹²

A similar position was taken by the Constitutional Court in another seminal judgment, *Minister of Health and Others v Treatment Action Campaign and Others*, where the Court held:

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflicts our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.¹³

In outlining the role of the courts, the Court also stated:

The primary duty of courts is to the Constitution and the law... Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to do so.¹⁴

While there might be some criticism directed at the Constitutional Court pertaining to the determination of when there are no available resources for the State to fulfil its obligation pertaining to socio-economic rights, the courts, particularly the Constitutional Court, have and will continue to play an important role in ensuring that the provisions in the Bill of Rights are effectively guaranteed for our people.

¹¹ Ibid., [93]

¹² Ibid., [94]

¹³ Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033

¹⁴ Ibid., [99]

B) The Political and Economic Context of the Year Under Review

The period under review, 1 April 2002 to 31 March 2003, followed the 11 September 2001 attacks and a 24% depreciation of the South African currency (Rand) near the end of 2001. Consumer Price Inflation, especially for goods and services bought predominantly by the poor, increased sharply to the highest level since 1994. Concerns were signalled to the Competition Commission about the impact of import parity pricing in several sectors of the economy, most notably in food production, processing and retailing as well as metals and engineering. Interest rates were raised in an attempt to curb inflation, with a subsequent dampening effect on the rate of economic growth in the latter part of the financial year. According to the Reserve Bank Quarterly Bulletin for March 2003, economic growth stood at a robust 3% in 2002.

As a result of prudent fiscal management, the government introduced a more expansionary Budget in February 2002. Total government expenditure increased from R262,6 billion in 2001/2002 to R291,8 billion in 2002/2003. Overall, the budget directed more resources towards reducing poverty and vulnerability, improving education and training, developing skills amongst the youth, building and enhancing physical infrastructure and basic municipal services, as well as making communities safer places to live, work and play.

It is also important to note that the February 2003 Budget provided for significantly greater expenditure than the previous year. Total expenditure was R331,7 billion for 2003/2004. The additional allocations accommodated substantial policy changes for all three spheres of government and also provided for *higher than anticipated inflation in 2002*.

By the end of the reporting period in March 2003, the Rand had appreciated by 18%. This created concern about the job losses that could arise out of an increase in import competition. Therefore, during the period under review, the goals of progressively realising economic and social rights took place in the context of significant macro-economic volatility, inflation and an expanding government budget.

C) Key Interrelationships Amongst Economic and Social Rights

The Right to Land

The State was responsible for achieving progressive realisation of the right to land during the reporting period. The Commission demonstrates that there was a year on year improvement in land delivery performance by the State, especially through the Land Restitution and Land Redistribution sub-programmes. Improvements in rural tenure reform were less noticeable.

Between 2000 and 2001 there were 12 094 settled Restitution claims, while in February 2002 there were approximately 32 000 settled claims. By March 2003, there were 36 488 settled claims recorded. Although the majority of these claims were in the urban areas, settled rural claims show a substantial increase. The people working on the Land Redistribution for Agricultural Development sub-programme delivered 103 682 ha against a target of 81 555 ha for the year under review. Whereas the Department had targeted to benefit 3 601 people, the programme ended up benefiting 6 170. Concerning

tenure reform, the State initially delivered 30 000 ha of land through 201 projects. Beyond that, the State is working towards bringing the Extension of Security of Tenure Act (ESTA) and Labour Tenants Act (LTA) together in the Consolidated ESTA/Labour Tenants Bill.

Throughout the report, the Commission reflects on the demand, voiced by landless people and others, that the pace of land redress is too slow and inattentive to vulnerable groups. The report recommends accelerating land reform to meet its new targets by relieving budgetary constraints and the associated problems of personnel shortages, lack of quality training and understandable communication; land acquisition; and improvements in monitoring and evaluation.

The Commission would also like to highlight that it was informed by the Department of Land Affairs that it was impossible to represent the racial and gender composition of land purchase transactions and repossessions, according to the size and value of land parcels.

The Right to Education

The right to education is analysed as a continuum of three bands of schooling- General Education and Training, Further Education and Training and Higher Education and Training. The State instituted measures to respect, protect, promote and fulfil the right to General Education and Training, and in the Commission's overall assessment, it succeeded in achieving progressive realisation of this right.

The Department of Education succeeded in ensuring that all targeted Early Childhood Development sites for children between the ages of five and six were operating. However, the Department acknowledges the challenge, which has budgetary implications, that only 13% of all children have access to the programme. In the context of a substantial increase in the rate of student enrolment in primary schools between 1994 and 2001, the National Department focused on further increasing access to General Education and Training through reviewing public school financing and the system of school fee exemptions. The report highlights the shortcoming that some schools and Provincial Departments of Education failed to make parents aware of the school fee exemption.

While progress was made in eliminating instances where learners are forced to receive education in environments that are not conducive to teaching and learning, the report emphasises that more needs to be done to address infrastructure backlogs, especially when it comes to water and sanitation. The Department also made progress in developing a redistribution model for personnel and operating expenditure that would achieve equality of teaching quality and equality of learning outcomes in the schooling system from 2003/2004 onwards. All stakeholders in education, including the SAHRC need to explore and come up with a definition of quality basic education which could be measurable and relatively easy to monitor.

Conditions in farm schools were identified as hinderance to progress in the realisation of the right to General Education and Training. The issue of street-children also has to be given some serious attention by all the relevant stakeholders. Amongst other recommendations to further observance of the right to General Education and Training,

the report calls for better-published medium term strategies and improved spending on Adult Basic Education and Training. In the 2001 Census, 4,5 million people aged 20 years and older did not have a formal education and 4 million people had primary schooling only.

Most of the developments in the Further Education and Training band met the Constitutional requirement to respect, protect, promote and fulfil the right. *Dinaledi*, the programme that seeks to improve participation and performance of learners from historically disadvantaged backgrounds in Mathematics, Science and Technology (MST), reportedly surpassed its target of 10% of students enrolling for MST in its first two years of implementation. The development of Recognition of Prior Learning (RPL) is another development that contributes to the realisation of the right to Further Education and Training. RPL recognises non-formal and/or non-academic education. RPL also stands to maximise learning opportunities for those without formal and/or academic qualifications to acquire formal qualifications in Further Education and Training institutions, which must all be registered with the State.

Areas where the State fell short of its obligations to progressively realise the right to Further Education and Training include: insufficient public education on school fee exemptions and insufficient Learner Support Materials and/or their late delivery. The report also highlights that participation rates in education by girl learners were being negatively affected by girls' involvement in income generating activities.

While Higher Education and Training is not explicitly recognised as a right in the Constitution, it obviously depends on the learning outcomes achieved in General and Further Education and Training. Here, there seems to be room for improvement as the average graduation rate for university and technikon students is 15%; less than half the ideal average of 33%.

Key challenges associated with the Higher Education and Training band include assisting potential students with subject selection choices and career guidance at school and university level, as well as lowering the high costs of accessing higher education and applying to different tertiary institutions. The report recommends ensuring that admission requirements to tertiary institutions are transparent and fair, promoting indigenous languages as academic/scientific/legal languages, mobilising funds for bridging courses and improving access for mature and post-graduate students, including part time students.

The Right to Water

Ever since 2001 and the introduction of Regulations Relating to Compulsory National Standards and Measures to Conserve Water, the State instituted a national measure to fulfil the right to water by supplying 6000 litres of free, clean water, per household per month, otherwise known as Free Basic Water.

During the reporting period, approximately 1,6 million people gained access to improved piped water supplies through Department of Water Affairs and Forestry's Community Water Supply and Sanitation Programme. Approximately 65 thousand toilets facilities were constructed during the reporting period under the same programme, but it should be noted that these figures exclude the large number of

sanitation facilities that were delivered as part of the State's housing programmes. Less than 530 000 households also benefited from water and sanitation projects through the Department of Provincial and Local Government's Consolidated Municipal Infrastructure Programme. Although the above indicates that the roll-out of water and sanitation infrastructure is proceeding towards the Department's medium delivery targets, the report raises concerns about the level of dysfunctional infrastructure and projects, especially in rural areas.

At the end of the reporting period in March 2003, access to Free Basic Water by poor people stood at 38% or approximately 12,2 million people. Access to Free Basic Water by non-poor households stood at close to 100% or approximately 14,2 million people. A large number of poor people (19,6 million) were still to receive their Free Basic Water allocation. Where Free Basic Water was not available, the average cost of 6 kilolitres (kl) was approximately R13 per month. The price for 6kl of life-line supply was highest in Limpopo province at approximately R19 per month. Gauteng and KwaZulu-Natal also had comparatively high average charges for life-line supplies where Free Basic Water services were not operational.

In order to remove these glaring inequities in Free Basic Water provision, the report calls for an urgent revision of the pricing system to include a significantly greater level cross-subsidisation from high volume water users to low volume users in the 0-6 kl range. More support and funding is required to assist municipalities with capacity problems in implementing Free Basic Water. During droughts, local governments should ensure that Free Basic Water supplies for domestic users are assured and that a situation cannot develop where agricultural, mining and industrial users are allocated large volumes of water at similar prices to low-volume users.

The report describes some aspects of the devolution of domestic water quality monitoring and testing from Provincial Departments of Health to local municipalities and calls for rapidly providing sufficient funds for water quality monitoring to prevent serious disease outbreaks and illness.

The report recommends that the Department of Water Affairs and Forestry (DWAf) should take a leading role in making sure that farm dwellers, residents near commercial farms and poor households in rural and urban areas access clean water and proper sanitation services. DWAf should also ensure that it develops and implements a plan to address the specific problems of water access experienced by people living with HIV/AIDS.

The report suggests that monitoring bodies should be created at local level to effectively monitor the implementation of policies and laws aimed at fulfilling the right of access to water. The report warns that monitoring will be only be effective if monitoring bodies from local, regional and national spheres work together. Where possible and when possible, the Free Basic Water allocation should be increased to cater for higher levels of domestic water consumption. A 50kl water allocation per household per month would bring South Africa's Free Basic Water allocation into the 'low level of health concern' range defined by the World Health Organisation.

The Right to Health Care

The report on the right to health care focuses on key developments in three key health programmes of the State (Health Service Delivery, Strategic Health Programmes and Administration). Although the policy and legislative measures developed in the fiscal year under review can be said to be “reasonable” in their conception, there remain large gaps in implementing them in a manner such that all the provinces, urban and rural peoples, rich and the poor have equal access to the same high quality of care.

The three most important, and universally acknowledged, indicators to measure the health status of a nation are Life Expectancy at Birth, the Maternal Mortality Ratio, and the Infant Mortality Rate. Life expectancy has fallen from 56 years in 1996 to 52,5 in 2002 and is projected to fall to 47 by 2005. The infant mortality rate has increased from 45 in 1998 to 59 in 2002. This means that more children under the age of one died in 2002 as compared to 1998. The under five-mortality rate has risen from 61 in 1998 to 100 in 2002. Similarly, the maternal mortality ratio shows a steady increase since 1998 and is estimated to be 150 per 100 000 live births. The National Department of Health, as well as independent researchers, have concluded that this is due to HIV/AIDS related deaths.

The single most important challenge that government faces is the one posed by the AIDS pandemic and the high incidence of opportunistic diseases such as tuberculosis. It is estimated that about one tenth of the population of the population is infected with the HI virus i.e. close to 5 million people. The number of AIDS orphans is estimated to be one million. In a landmark case instituted by Treatment Action Campaign against the Minister of Health, the Constitutional Court, in 2002 confirmed the finding of the High Court that government’s policy to limit Nevirapine to research and training sites was in “breach of the States obligations under section 27(2) read with 27(1)(a) of the Constitution.” The report recommends that the Comprehensive National Aids Plan should be rolled out effectively in all the provinces so as to meet targets and timelines in order to substantially reduce new infections and to prolong the lives of those already infected.

In spite of the fact that policies and programmes directed at improving the health status of the country have been put in place such as the Integrated Management of Childhood Illnesses, the AIDS pandemic continues to be the single most cause of death in South Africa. This has placed an enormous strain on an already overburdened health system and undermines the efforts made by the State. This is compounded by the fact that the other economic and social rights, which contribute substantially to the health status of a nation, are also not fully enjoyed by the vast majority of poor South Africans due to the huge backlogs inherited from the past. Inadequate housing, poor sanitation, overcrowding, lack of clean drinking water, lack of efficiently run social services, insufficient nutrition and health education exacerbate the diseases of poverty. Moreover, a household that is affected by AIDS contributes to depleting the financial resources available to the family, thereby increasing the level of poverty.

government developed legislative and other measures to comply with its constitutional obligations in terms of section 7(2) of the Constitution. However, despite national policies and programmes, which, in the main comply with international standards and targets, the health care system has not been able to successfully deliver quality health care on an equitable basis in all the provinces. Provinces do not spend the same amount per capita on health care delivery, and there is a serious lack of managerial capacity in

the health system. The biggest challenge facing the efficient running of the health system is training managers to operationalise efficient systems especially for running clinics and hospitals where many problems have been identified. Efficient management systems in conjunction with effective engagement with labour should be operationalised with immediate effect in the public health sector so as to ensure that hospitals and clinics run well.

The report also recommends that there is a need to increase efforts in promoting preventative health measures by the State as well as by non-state actors. Programmes and policies should also be put in place to address the needs of the poor and vulnerable members of society, including a National Health Insurance System. Inequities in the health system such as intra- and inter-provincial health expenditures, access to clinics and hospitals, number of doctors, specialists, and nursing staff need to be addressed so as to give meaning to the constitutional right to universal and equal access to everyone. Finally, Departments of Health are strongly advised to improve their monitoring, evaluating, and reporting systems

The Right to Social Security

The Constitution provides that everyone has a right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The number of social assistance beneficiaries increased dramatically by 966 311 people from April 2002 to the end of March 2003, mostly as a result of increased registration for Child Support Grants for children up to the age of seven. By the end of March 2003, 5,6 million people were beneficiaries of social assistance, which mostly comprised of child support grants (2,5 million people), old age pensions (2 million people), disability grants (897 050 people) and foster care grants (133 309 people). The most rapid increases in uptake of social grants took place in Gauteng, Free State, KwaZulu-Natal, Mpumalanga and Limpopo. Take up rates were considerably lower in the Northern Cape, North-West, Eastern Cape and Western Cape.

Most provincial departments indicated that the allocated budget was not enough and that numbers of grant beneficiaries were constantly increasing, resulting in overspending for social security. However, the delivery of social services has not been efficient in some parts of the country as a result of administrative problems, lack of documentation as barriers to accessing grants, poor conditions at pay points, as well as corruption and maladministration.

As a result of rapid inflation in the cost of basic goods bought by the poor, in 2002/2003, the State moved swiftly to implement above inflation related increases in social grants. The old-age pension was increased by R20 to R640, the child-support grant increased by R10 to R140, the grant in aid increased from R120 to R130, the foster-care grant from R450 to R460, and the care dependency grant from R620 to R640.

The National and Provincial Departments of Social Development spent 90% of the R49 million allocated to the HIV/AIDS (home based/community based care) programme. The Home/Community Based Care programmes, through the collaborative work of government, non-governmental organisations, including faith-based organisations, and communities have benefited 29 612 children orphaned or vulnerable to HIV/AIDS by

the end of March 2003. The programme reached 75 000 children orphaned or vulnerable owing to HIV/AIDS since its inception in 2000.

The State also instituted new measures to further the right to social security, including disability assessment panels, a social relief of distress policy and the implementation of the National Food Emergency Scheme/Programme. Figures of the number of households that were assisted with food parcels in the pilot phase of the National Food Emergency Programme from December 2002 to the end of March 2003 range from 60 089 to 149 779.

The social security system at present does not cater for everyone and not everyone in need of social assistance is afforded such assistance. This is especially so for children in child headed households and children who live in the streets who sometimes engage in exploitative forms of labour. Some parents also fail to provide and take care of their children and put strains on the maintenance and social assistance systems.

The report recommends that the Department of Labour should take the International Labour Organisation's Decent Work for All Strategy forward in South Africa. It is also recommended that the relevant organs of State achieve better regulation of the insurance, health and maintenance systems. Particular attention should be paid to the coverage of old age pensions for workers in non-formal employment. The Department of Social Development is encouraged to continue fostering collaboration with all stakeholders, such as other government departments, Faith Based Organisations and Non-Governmental Organisations. The Basic Income Grant should continue to be considered as a viable option for addressing poverty in the country, especially amongst people of working age. The proposal to extend social assistance to all children in need (up to the age of 18), should also be kept alive.

The Right to Food

The report concludes that many people, and children in particular, had their right to food violated during the reporting period as they lost access to affordable food due to high prices and/or unreasonable plans devised and supervised by government. During the reporting period, 101 152 children were admitted to hospital with severe malnutrition and it was not possible for the Commission to state how many children died of malnutrition. However, it is alarming that case fatality rates for severe malnutrition in two under-resourced hospitals in the Eastern Cape ranged from 21% to 38%.

The report finds the National Department of Health's targets for reducing malnutrition to be unreasonable in their conception because the targets for 2000 and 2005 were virtually identical. The report also finds two elements of the Primary School Nutrition Programme to be unreasonable in their conception.

The first issue concerns the reduced allocation of resources to the programme in 2002/2003 as compared to 2001/2002. In 2001/2002 the total cost of the school food "meal" ranged from approximately 99 cents to R2.10. In 2002/2003, the maximum budgeted resource available per targeted learner per day was less than 67 cents. This is clearly an unreasonable set of parameters for the programme to be improved to meet the higher standards set by Cabinet.

The second element of the programme that was unreasonable was the reduction in the targeted number of children who should benefit from the programme. In the context of increasing numbers of children enrolled in schools, the Primary School Nutrition Programme did reach 4,5 million children in grades R to 7, however this was 151 615 children less than the year before. The drop in the number of learners who were reached is connected with government reducing its target from 5,4 million learners in 2001/2002 to 4,9 million learners in 2002/2003 as well as rapid increases in the cost of food procured for the programme. A three month gap in the implementation of the programme in the Eastern Cape also reduced access to the programme.

Non-State actors appear to have fallen short in their observance of their positive obligations to fulfil the right to food. As one example, the Yiyo Lena sifted maize relief programme introduced by a group of companies is alleged to have sold relief maize packs at a 20% discount, despite that fact that the companies announced that the programme would entail a 50% discount.

High basic food prices during the reporting period, were partly attributable to inadequate safeguards on the South African Futures Exchange, where maize prices are formed. High prices for maize were passed on to low-income consumers, who could ill afford such dramatic basic food price increases for such a sustained period of time. The potential for market manipulation should have been prevented by the Johannesburg Securities Exchange when allegations of abuse were first signalled in 2002. The report identifies that there are weaknesses in the State's observance of its obligation to protect against fraud, unethical behaviour in trade and contractual relations.

There were some signs of improvement in the State's delivery of production support to emerging farmers and people who grow their own food. For example, the Comprehensive Farmer Support Package was instituted during the reporting period to assist land reform beneficiaries. However, it was implemented in some provinces only.

The LandCare programme, which is one of the major production support programmes from the National Department of Agriculture, was heavily underspent at 65% of the total conditional grant to provinces. There is also a significant gap in production support for rural restitution beneficiaries.

It was found that very few Provincial Department's of Agriculture were operating well funded programmes designed specifically to provide grants or revolving loans to support increased access by small scale and emergent farmers to production and/or marketing related infrastructure. Production support materials and learning support materials that are relevant to resource to poor farmers in water scarce areas were also not readily available.

On the whole, the report determines that the State absorbed the heavy burden of duty to achieve the progressive realisation of the right to food as expeditiously as possible, within its available resources. However, there was a crucial weakness in the measures to protect the right to food from being violated by non-State actors or third parties that need not be repeated in future.

The report suggests that there is a need for greater care in the preparation of strategic and financial planning targets so that they inspire civil society to marshal their resources

in support of the progressive realisation of the right. The report recommends: public education to raise awareness of malnutrition, rolling out the Integrated Food Security Strategy at a provincial level, improving food safety, achieving better regulation of the food industry through State procurement, accelerating agrarian reform, and communication policy and legislative developments more effectively. Finally, the report supports the call for government, labour, community and business representatives to negotiate an agreement at the National Economic Development and Labour Council (NEDLAC) to ensure the right to food and quality job creation in the food industry.

The Right of Access to Adequate Housing

In order to fill some gaps in the housing policy framework, the State identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities for 2002/2003. Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to transport and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualised as a result of the *Grootboom* judgment and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control (e.g. disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety). The report highlights that it was not clear whether the Emergency Housing Policy should also cover people living in informal settlements, because they are living in intolerable circumstances. Social Housing projects demonstrate that socially, environmentally and sunshine conscious design principles can make a difference to the quality of State subsidised housing.

The State reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from Occupation of Land Amendment Bill and the commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000. With a view towards curbing discriminatory practices, the Act compels financial institutions to disclose information in their financial statements on home loan patterns according to categories of persons and geographic areas (both of which may be prescribed). The Community Reinvestment Bill confirmed the State's intention to increase private sector investment in the lower end of the housing market. The report highlights that the State was also attending to some aspects of the Housing Act 107 of 1997, as amended, in order to ensure that the Act, and its implementation, did not violate an individual's right to property in terms of the Constitution.

In terms of on-going policies and programmes, in 2002/2003, the State reported 203 288 houses completed or under construction, whilst the State approved 519 498 subsidies to households with a joint monthly income less than or equal to R3 500, or R1 500 if the house was built under the apartheid system. By the end of 2002/2003, the State reported that over 1,4 million houses had been delivered since 1994, whilst the number of families without houses (i.e. dwellings in backyards, informal dwellings, backyard dwellings in shared properties and caravans/tents) was reflected as 2 399 825- from the 2001 Census. The State also increased the subsidy amounts for the housing programme to keep pace with inflation and maintain the well-known quality and size of housing. Sixty-three projects were also completed as part of the Human Settlement Redevelopment Programme in order to correct imbalances and dysfunctions in existing settlements that cannot be funded through the housing subsidy scheme (e.g.

sports facilities, business hives, labour exchanges, cemeteries, parks and ablution blocks).

There was under expenditure on housing delivery amongst many provincial departments responsible for housing. Reporting on the constraints associated with underspending was not complete, but included the following in some cases: failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in the National Department approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the People's Housing Process and delays at the Deeds Office.

Comparing performance in relation to targets was a problem in that provincial information was reported in the format of the number of units completed *or* under construction. Nevertheless, Gauteng and Limpopo provinces stand out as the only provinces to show a reduction in units, whether complete or under construction, from 2001/02 to 2002/03. The Gauteng Department of Housing reported delivering 59% of the target in the incremental housing programme and 39% of the target in the Social Housing programme. A Customer Support Service in the province acknowledged 83 714 queries and responded to a further 11 774 by letter.

According to the National Department of Housing, in 2002/2003, 6 469 houses did not conform to the Department's construction and safety standards. The National Home Builders Registration Council's (NHBRC) Warranty Scheme was instituted to provide assurance to beneficiaries that houses built and financed through the housing subsidy scheme are of an adequate quality. After trying to resolve disputes about the quality of construction, a housing subsidy beneficiary can forward complaints to the NHBRC. However, the report highlights that public education is required to empower consumers to identify quality problems and make use of the complaint procedures of the NHBRC. The Mpumalanga Department of Housing also reported that building works inspectors from provincial government and local government monitored the work of contractors.

The report makes one urgent recommendation, namely: to establish the dedicated fund for acquiring well-located land for low-cost housing. Other recommendations include reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, interpreting the Peoples' Housing Process as a route for strengthening culturally adequate housing, creating an informed and supportive environment for whistleblowing, and ensuring effective participation in the delivery of housing. Specific attention is drawn to the plight of farmworkers and vulnerable groups, especially HIV/AIDS orphans and People with Special Needs.

The Right to a Healthy Environment

Section 24 of the Constitution establishes the right to environment in order to ensure the health and well-being of present and future generations. At its core, the right to environment aims to grant this benefit to everyone in South Africa, not just to the few. Although, translating this vision of the benefit of environmental health into reality has become increasingly complicated, ensuring that there are no violations of this right is as urgent as any violation of other rights in the Bill of Rights.

Analysts of data from South Africa's Global Atmosphere Watch station at Cape Point contend that continued emissions of greenhouse gases are cause for concern. Like many countries, South Africa is sensitive to global climate change and there are also occasions, especially in major urban areas, when more localised air pollution becomes a health threat.

By way of illustration, the Johannesburg *State of the Environment Report 2003* indicates that “while in many parts of Johannesburg, air quality is within acceptable standards, approximately 20% of the City, particularly dense settlements and lower income townships, experience severe air pollution, with ambient air pollution levels exceeding acceptable guidelines by approximately 20-30% particularly during winter when temperature inversions prevent emissions from dispersing.” The report goes further to state that “levels of particulate matter in certain townships can exceed the World Health Organisation standards by as much as 250% in winter.”

Progress in the realisation of the right to environment could not be very well monitored and observed by the Commission during the year under review because annual progress reports in terms of section 11 of the National Environmental Management Act 107 of 1998, were inaccessible at the time of writing. These progress reports should contain detailed information on the implementation of measures instituted to ensure the right to environment.

Nevertheless, the Commission did observe the growing influence of the Committee for Environmental Co-ordination through an interpretation of its review, and subsequent consolidation, of Environmental Implementation Plans and Environmental Management Plans submitted by relevant organs of State. These reports contain the planned and *aligned* outputs of national and provincial departments with an impact on, or management function over, aspects of the right to environment. The Commission also recognises that some Environmental Co-ordinating Committees were established at the provincial sphere, also for the purposes of alignment and co-operative governance.

Progress has been made, through the courts and other avenues, towards realising the procedural aspects of the right to environment (access to information, participation in decision-making processes, redress and remedy). The report includes several examples of objections and court applications lodged by Non-Governmental Organisations, with a view towards safeguarding environmental health in low-income areas. Despite these opportunities to access information and participate in decision making, some remedies for old violations could not be realised without concerted action on the part of the State. One example, is the case of workers with mercury poisoning, which first occurred many years ago. In March 2003, Thor Chemicals was served with a R60 million toxic chemical clean-up directive by the State.

On the substantive issue of waste management and pollution control, what was reported by government to the Commission fell short of what was expected in terms of the strategic objectives of the policy and strategy for pollution and waste management. The report highlights that there is still no clear understanding among the different mandate holders for this function of what they are required to do and as a result, implementation was not as effective as it could be. Having said this, there were positive developments during the period under review, including the introduction of waste buy-back centres

which address brown issues and could assist in strengthening the bargaining power of the very low income people who do the hard work of collection.

On the issue of Air Quality, the report acknowledges that progress was made in the Southern Industrial Basin through the focused action of the State and Community Based Organisations (CBOs) in linking asthma in school children to emissions, however there is an urgent need for national legislation to institute mechanisms and standards to effectively protect against pollution that threatens health and well-being, possibly including pollutant release and transfer registers.

Several new control measures were introduced to manage water pollution, including the second draft of the National Water Quality Management Framework Policy and the Waste Discharge Charge System. The Working for Water programme succeeded in protecting and preventing against water loss due to alien invasive plant species, however it was not clear how much of this work focused unfairly on commercial farmlands and not on areas inhabited by vulnerable sections of the population.

Most of the work by the State on inland as well as marine and coastal biodiversity and conservation was reasonable in as far as it related to tourism and the economic development of the country.

The report highlights that the challenges facing South Africa in terms of the right to a healthy environment include: allocating sufficient resources for progressive realisation of the right for the benefit of vulnerable groups; educating and training communities; ensuring that proper implementation systems are in place; ensuring effective co-operative governance; operating proper monitoring and evaluation systems.

The report recommends that while most policies and laws are in place or about to be instituted, there should be a quantum shift in focus towards implementation of measures to further the right to environment for vulnerable groups in a more decentralised way. Provincial government and local government should be resourced to concentrate their energies on implementation, in association with community based organisations that have already developed innovations to further the right, sometimes in the face of extreme resource scarcity.

The State has made valuable contributions to promoting the right to environment through for example, the “Bontle ke Batho” or the clean schools, wards and towns campaign; however, organs of State could do more to ensure that their own internal operations reflect implementation of the right to environment. For example, the Council for Scientific and Industrial Research (CSIR) implemented International Standards Organisation 14001 standards for handling and disposing of its own hazardous waste. This initiative by an organ of State seems to have afforded the CSIR the opportunity to gain some capacity and insight, which could be applied to other relevant contexts in the public or private sector within the South Africa.

The report also recommends that monitoring and evaluation systems need to be simplified where possible and improved. Annual progress reports in pursuit of targets and plans laid down in Environmental Implementation Plans and Environmental Management Plans should include a focus on the substantive aspects of the realisation of the right for vulnerable groups. The contents of the reports should also be widely

communicated so as to avoid conflict and encourage effective participation. The Committee for Environmental Co-ordination could also be complemented by the National Environmental Advisory Forum (NEAF) envisaged in the National Environmental Management Act 107 of 1998. This provision to encourage participation should be effected without delay.

D) Protocols and the Report Production Process

The production process for this report began with the SAHRC sending questionnaires, which are called protocols, to various organs of State for their comment in May 2003. The Commission then took some time to revise the protocols, which were resent to all relevant organs of State for comment and suggestions in June 2003. The response from relevant organs of State was not satisfactory; with the Department of Housing (Gauteng Province), the Department of Land Affairs and the Department of Water Affairs and Forestry being the only organs of State to respond. However, the Commission acknowledges that further work is required, in the next reporting cycle, to ensure that the protocols are improved for all spheres of government and parastatals.

The final protocols were sent to various organs of state (national and provincial government, parastatals, metropolitan and local councils) in July 2003, as mandated by section 184(3) of the Constitution. In future, the Commission will pay more attention to smaller municipalities by focusing field research on the implementation of programmes and projects at a local level.

The first deadline for the release of this Report was in December 2003. However, the Commission had major problems in getting timeous responses from organs of State and as a result, the Commission took a decision to subpoena several departments and postpone the release of the Report until sufficient information had been received (see summarised list overleaf).

SPHERE	INSTITUTION	DATE RESPONSE RECEIVED
2 - Provinces	GAU Social Services and Population Development	August 21, 2003
1 - National	NATIONAL Labour	August 29, 2003
2 - Provinces	EC Health	August 29, 2003
2 - Provinces	WC Agriculture	August 29, 2003
2 - Provinces	LIMPOPO Agriculture and Environmental Affairs	August 31, 2003
2 - Provinces	FS Health	September 1, 2003
2 - Provinces	NW Health	September 1, 2003
2 - Provinces	WC Social Services	September 1, 2003
2 - Provinces	EC Education and Training	September 5, 2003
2 - Provinces	GAU Health	September 5, 2003
2 - Provinces	KZN Agriculture and Environmental Affairs	September 9, 2003
4 -Parastatals	PARASTATAL Rand Water	September 9, 2003
2 - Provinces	KZN Traditional and Local Government	September 10, 2003
2 - Provinces	MP Local Govt and Traffic	September 10, 2003
2 - Provinces	NW Education	September 10, 2003
1 - National	NATIONAL Land Affairs	September 12, 2003
2 - Provinces	FS Social Welfare	September 12, 2003
2 - Provinces	GAU Housing	September 12, 2003
2 - Provinces	NC Health	September 12, 2003
2 - Provinces	NC Social Services and Population Development	September 12, 2003
1 - National	NATIONAL Agriculture	September 15, 2003
1 - National	NATIONAL Water Affairs and Forestry	September 15, 2003
2 - Provinces	EC Agriculture and Land Affairs	September 15, 2003
2 - Provinces	FS Education	September 15, 2003
2 - Provinces	GAU Education	September 15, 2003
2 - Provinces	MP Housing and Land Administration	September 15, 2003
2 - Provinces	WC Education	September 15, 2003
2 - Provinces	WC Environmental Affairs and Development Planning	September 15, 2003
2 - Provinces	WC Health	September 15, 2003
2 - Provinces	WC Housing	September 15, 2003
2 - Provinces	NC Agriculture Conservation and Environment	September 15, 2003
2 - Provinces	KZN Health	September 16, 2003
1 - National	NATIONAL Education	September 18, 2003
2 - Provinces	MP Health	September 18, 2003
2 - Provinces	NW Agriculture, Conservation and Environment	September 23, 2003
2 - Provinces	MP Social Services and Population Development	September 25, 2003
3 -Metropolitan Councils	METRO Greater Tswane Metropolitan Council	October 2, 2003
3 -Metropolitan Councils	METRO Nelson Mandela Metro Council	October 2, 2003
1 - National	NATIONAL Correctional Services	October 3, 2003
1 - National	NATIONAL Social Development	October 3, 2003
2 - Provinces	LIMPOPO Health and Welfare	October 3, 2003
2 - Provinces	EC Social Development	October 3, 2003
1 - National	NATIONAL Health	October 10, 2003
2 - Provinces	GAU Agriculture, Conservation, Environment and Land Affairs	October 10, 2003
4 -Parastatals	PARASTATAL Medicines Controls Council	October 10, 2003
2 - Provinces	FS Local Govt and Housing	October 29, 2003
1 - National	NATIONAL Housing	October 30, 2003
1 - National	NATIONAL Provincial and Local Government	October 30, 2003
1 - National	NATIONAL Environmental Affairs and Tourism	October 31, 2003
4 -Parastatals	PARASTATAL Agriculture Research Council	October 31, 2003
1 - National	NATIONAL Minerals and Energy Affairs	November 3, 2003
2 - Provinces	KZN Education and Culture	November 3, 2003
2 - Provinces	EC Housing, Local Government and Traditional Affairs	November 4, 2003
2 - Provinces	GAU Development Planning and Local Government	November 4, 2003
2 - Provinces	LIMPOPO Education	November 4, 2003
2 - Provinces	MP Agriculture, Conservation and the Environment	November 4, 2003
2 - Provinces	NC Local Govt and Housing	November 4, 2003
2 - Provinces	WC Planning and Local Govt	November 4, 2003
4 -Parastatals	PARASTATAL National Education Financial Aid Scheme	November 4, 2003
2 - Provinces	NW Developmental Local Government and Housing	November 5, 2003
3 -Metropolitan Councils	METRO Eastrand Metropolitan Council	November 5, 2003
4 -Parastatals	PARASTATAL Umngeni Water	November 5, 2003
3 -Metropolitan Councils	METRO Cape Town Metro Council	November 6, 2003
4 -Parastatals	PARASTATAL Medical Research Council	November 6, 2003
2 - Provinces	FS Agriculture	November 7, 2003
2 - Provinces	KZN Welfare and Pensions	November 7, 2003
2 - Provinces	LIMPOPO Local Govt and Housing	November 7, 2003
2 - Provinces	MP Education	November 7, 2003
2 - Provinces	NC Education	November 7, 2003
4 -Parastatals	PARASTATAL National Housing Finance Corporation	November 7, 2003
2 - Provinces	KZN Housing	November 14, 2003
3 -Metropolitan Councils	METRO eThekweni Metropolitan Council	November 17, 2003
4 -Parastatals	PARASTATAL Landbank*	November 17, 2003
4 -Parastatals	PARASTATAL Council for Scientific and Industrial Council*	November 18, 2003
2 - Provinces	FS Environmental, Tourism and Economic Affairs	November 19, 2003
3 -Metropolitan Councils	METRO Greater Johannesburg Metropolitan Council	December 17, 2003
2 - Provinces	NW Social Services**	

First deadline

Extended deadline

Subpoena hearings begin

Subpoena hearings end

* Extension granted as a result of communication problems

** No subpoena served, a letter explains the breakdown in communication

Most organs of State submitted their reports before they were meant to appear at a subpoena hearing. However, the North West Department of Social Services, Arts, Culture and Sport did not provide a response to the Commission as a result of problems with network cabling and the resignation of the personal assistant to the Acting HoD. The Department submits that it was not out of irresponsibility and deliberate disregard of the law that the Commission did not receive a report from the Department.

In order to improve the quality of the information, analysis and recommendations in the reports and to forge closer and better working relationships with government and non-governmental entities, a set of draft reports were released for comment to government and civil society before a National Input Workshop on 27-28 January 2004. Comments made at the workshop, and in writing, have been considered by each report writer.

A set of second draft reports were then made available to the Director General of the relevant national department in February 2003 to correct any remaining problems with factual information. Responses were received from the following departments: Water Affairs and Forestry, Minerals and Energy, Provincial and Local Government, Health, Social Development, Education, Land Affairs, and Housing. The final reports were also reviewed intensively within the Commission before being published.

E) Conclusion

One of the concerns acknowledged by the Commission about the monitoring process so far is that it still relies heavily on reports from government.

Furthermore, even though the Bill of Rights applies vertically and horizontally and binds State entities and non-State entities, the Commission has some capacity problems in extending its mandate to non-State entities, especially big corporations.

In the next reporting cycle, the Commission will place more emphasis on conducting its own primary research in addition to improving on the existing protocols for each right and making better use of annual report information as soon as it becomes available.

1 INTRODUCTION

This report provides an assessment of the key measures undertaken by government towards the progressive realisation of the right to environment as enshrined in section 24 of the Constitution.

Section 24 of the Constitution states:

Everyone has the right-

*(a) to an environment that is not harmful to their health or well-being;
and*

(b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that -

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development

Section 24 of the Constitution therefore establishes the right to environment in order to ensure the health and well-being of present and future generations. However, as the preamble to the National Environmental Management Act 107 of 1998 (NEMA) acknowledges, many people in South Africa live in an environment that is harmful to their health and well-being.¹ Furthermore, NEMA highlights that inequality in the distribution of wealth and resources, and the resultant poverty, are an important cause of environmentally harmful practices.

Section 7(2) of the Constitution requires the State to respect, protect, promote and fulfil the right to environment and the other rights in the Bill of Rights. When section 24 is read with section 8, the Constitution also provides for the horizontal application of the Bill of Rights, thereby allowing for claims against third parties for violations of the right to environment.

1.1 The Meaning and Content of the Right to Environment

1.1.1 *International instruments*

The meaning and content of right to environment as a human right has not been fully defined by the United Nations. Internationally, the right has mostly been given a *procedural character*² in response to Principle 10 of the 1992 Rio Declaration, which states:

*Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate **access to information** concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to **participate in decision-making processes**. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including **redress and remedy**, shall be provided.*³

However, it is also significant that the United Nations Economic Commission for Europe has created a link between human rights and the environment through the Aarhus Convention of 1998. At an extraordinary meeting in May 2003, 36 parties to the Convention and the European Community adopted a Protocol on Pollutant Release and Transfer Registers. The Protocol “makes provision for pollutant release and transfer registers [that] have proven to be a highly effective and relatively low cost means of gathering environmental information from the private sector and putting it into the public domain”.⁴ Signing the protocol was open to all States until 31 December 2003.

With respect to South American countries, reference has also been made to the Convention concerning Indigenous and Tribal Peoples in Independent Countries for its provisions to protect the collective scientific, cultural and natural heritage rights of indigenous peoples, outside of existing intellectual property rights systems.⁵

Article 24(2)(c) of the Convention on the Rights of the Child makes reference to combating disease and malnutrition, whilst taking into consideration the dangers and risks of environmental pollution. Article 24(2)(e) of the Convention refers to informing children and parents, and providing access to education, about environmental sanitation. States that have ratified the Convention also agree that the education of the child shall be directed to ‘... the development of respect for the natural environment’.

During the year under review South Africa ratified or acceded to the following international agreements:

- Ratification of The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the East African Region and related protocols (Nairobi).
- Ratification of the South African Developing Countries Protocol on Fisheries.
- Ratification of South African Developing Countries (SADC) protocol on tourism.
- Ratification of the Convention for Cooperation in the Protection and Development of Marine and Coastal Environment of the East African Region and Protocols (Abidjan Convention).
- Ratification of the Rotterdam Convention on the Prior Informed Consent (PIC) for Certain Hazardous Chemicals and Pesticides in International Trade. This convention aims to protect countries that do not have the requisite infrastructure against the unknown importation of dangerous chemicals.
- The Stockholm Convention on Persistent Organic Pollutants was ratified in September 2002.
- South Africa acceded to the Agreement on the Implementation of the Provision of the United Nations Convention on the Law of the Sea of 1882 (The Straddling Fish Agreement) which relates to the conservation and management of straddling fish stocks and highly migratory fish stocks. Arrangements are under way to have the agreement ratified.
- Acceded to the Agreement on the Conservation of Albatrosses and Petrels (ACAP).

The *procedural* and *relational* character of the right to environment in South Africa is discussed further below.

1.1.2 The Procedural Character of the Right

In South Africa, the right of access to environmental information is being championed via section 32 of the Constitution and the Promotion of Access to Information Act 2 of 2000 (PAIA), which entitles everyone to information held by the State, or information held by another person, that is required for the exercise or protection of any rights.

The right of access to information was one of the matters at the heart of the application to the Pretoria High Court by Earthlife Africa⁶ to block the Department of Environmental Affairs and Tourism (DEAT) from permitting Eskom⁷ to build a pebble-bed modular reactor (PMBR) at Koeberg.⁸ The application was, however, denied on grounds that the court did not find the matter to be urgent and that Earthlife had known for more than six months that the matter had reached decision-making stage, but did not do anything.

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Earthlife only acted a few weeks before the dates when the decision would be made. The court's decision was also motivated by the fact that Earthlife did not provide convincing reasons for failing to take the necessary steps in good time.⁹

However, in the earlier case of *The Director: Mineral Development, Gauteng and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others*¹⁰ in which the Director refused the residents a hearing in an application by Sasol Mining for a mining licence for open cast mining of coal in the Sasolburg District, the Supreme Court of Appeal held that the residents were entitled to be heard under the *audi altarem partem* (hear from the other side) rule. The court's decision that the rule be applied was based on the "enormous damage" to the environment and ecological systems that mining posed and thus the need to give affected parties notification about the application and an opportunity for them to raise their objections.¹¹

Another important case with a bearing on the right to access environmental information and participate in decision-making was filed by Biowatch on 23 August 2002. The case concerns public access to information about Genetically Modified Organisms (GMOs) released into South Africa's environment for the purposes of field trials, crop production as well as animal and human consumption.¹²

There are also some South African precedents for remedies when peoples right to a healthy environment has been violated. For example, the Department of Minerals and Energy cites cases where the polluter pays principle was applied, as follows:

*With regard to coal mining operations it should be noted that in the Vryheid region, KwaZulu-Natal, an applicant's financial guarantee was called up, because he failed to meet his rehabilitation obligations in terms of the Minerals Act, 1991. The funds were then utilised to conduct the necessary rehabilitation work. In another instance in Mpumalanga Province a company was placed in liquidation. The Department had a financial guarantee, which could be called up to perform the necessary rehabilitation of the mining area.*¹³

However, remedies for other serious violations of the right to a healthy environment appear to be more complicated. For example, in the case of workers with mercury poisoning, Thor Chemicals was served with a R60 million toxic chemical clean-up directive in March 2003¹⁴, six years after the Davis Commission completed its first phase report in 1997.¹⁵ Mercury contamination affected workers, communities, livestock and groundwater in the Cato Ridge area of KwaZulu-Natal.

1.1.3 The Relational Character of the Right

The right to environment has also been given a *relational character*. Environmental rights extend to the **right to food and clean water** because processes that cause land and water-source pollution can negatively affect plant and animal life. In addition, these processes could change the nutritional and safety composition of food so as to violate the right of people to have safe food.¹⁶

The **right to water** as an aspect of the environment is clearly seen through the aspect of safe drinking water which has a lot to do with how water resources are managed and used and how other activities of human nature impact on the sustainability of water resources.

The right to environment also has a close link with the **right to health** because of the health impact of violations of the right to environment. Case scenarios would include the increasing risk of respiratory problems, eye irritation, cancers and other diseases due to the existence of noxious gases like sulphide, carbon dioxide and others which affect ambient air quality. Health is one of the component areas of the right as stipulated in section 24 of the Constitution where it refers to the right to an environment that is not harmful to health. The right to health as contained in Article 12(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) brings the link closer, where in the realisation of the right to health, States are obliged to take necessary steps for improvement of all aspects of environmental and industrial hygiene.

Environmental hygiene would cover all environmental factors that may affect human health like pollution of water sources that limit access to clean water, unsafe disposal of human excreta, sewage (please refer to the Right to Water report in this series) and other refuse, global warming and its effects on human health causing skin disorders and eye damage. Industrial hygiene deals with the measures to control worker exposure to harmful physical or chemical agents or conditions in their work environment. It relates to the control of “occupational environmental health hazards”.

The link between the right to environment and the right to health is now much more critical and has been a major underlying factor in many conventions and laws. According to the World Health Organisation (WHO), “sustained good health of any population over time requires a stable and productive natural environment that: (i) yields assured supplies of food and fresh water; (ii) has a relatively constant climate in which climate sensitive physical and biological systems do not change for the worse; and (iii) retains biodiversity...”¹⁷

The right to environment is also closely related to the **right to an adequate standard of living**, particularly so where issues of poverty, environment and development come together. According to Fabra, “poverty is the other side of the coin of development, but also sustainability... Poverty and environmental

degradation are often bound together in a mutually reinforcing vicious circle, and thus human rights abuses related to poverty can be both cause and effect of environmental problems".¹⁸ Substandard residential environments in many areas are the cause of environmental degradation.

One example is the use of environmentally unsustainable sources of energy for domestic use. Coal and wood burning for domestic heating and cooking is a major contributor to air pollution hazards in densely populated urban settlements. This is both a cause and effect of inadequate standard of living. It is mostly the poor that do not have electricity and thus have to resort to the use of fossil fuel sources with negative impacts on their health and livelihood. In some areas, the poor do not have access to safe and clean water or reside in polluted and dangerous environments near mines and factories. Sometimes people are forced to survive through scavenging on land fill sites and other waste dumps.

The right to environment encompasses the **right to development** with the component of protecting the environment for the benefit of current and future generations. This link is very prominent as a result of Agenda 21 and the following international agenda on environment and development. In this, the government of South Africa has taken up the position of custodian over the country's resources with a commitment to facilitate access by everyone to the resources for social and economic development. Most importantly the government takes responsibility to ensure that resources are used in a sustainable manner in line with the World Summit on Sustainable Development.

1.2 The International Context of State Obligations

Important developments in the international arena during the 2002/2003 period included the World Summit on Sustainable Development Declaration¹⁹ and the related Johannesburg Plan of Implementation.²⁰ The Johannesburg Plan of Implementation has three major objectives, which are relevant to the right to environment as contained in section 24 of the Constitution, namely:

- i) poverty eradication;
- ii) changing unsustainable patterns of production and consumption; and
- iii) protecting and managing the natural resource base of economic and social development.

The Johannesburg Plan of Implementation, among others, prioritises the provision of **clean drinking water and adequate sanitation** in order to protect human health and the environment (para 8). Another focus is on improving access of the people to 'reliable, affordable, economically viable, socially acceptable and **environmentally sound energy services and**

resources' (para 9) through various means, including 'enhanced rural electrification and decentralised energy systems, increased use of renewables, cleaner liquid and gaseous fuels and enhanced energy efficiency'. These commitments are linked to a poverty eradication component.

1.3 The National Context of State Obligations

In this report, specific guidance with regard to realising the right to environment will be drawn from sections 24 and 7(2) of the Constitution and the interpretation of closely similar rights that has been given in the *Grootboom*²¹ and *Treatment Action Campaign*²² cases.

The reasonableness test as expounded on in the *Grootboom* case entails the following:

- The programme must be comprehensive and coordinated with clear allocation of responsibilities and tasks to the different spheres of government: national, provincial and local government as contained in the Constitution. The programme must also ensure that appropriate financial and human resources are available. These spheres of government are allocated specific powers and functions, but they are under duty to cooperate with each other in carrying out their different tasks;
- The legislation must be supported with "appropriate, well-directed policies and programmes" for acting upon and achieving the legislative objectives. The policies must be reasonable in conception and implementation and programmes must be reasonably implemented;
- The social, historical and economic context and the capacity of the institutions responsible for implementing should be considered as well as the short, medium and long-term needs of the targeted population. The programme cannot be reasonable if it excludes "a significant segment of society";
- The programme must have provision for crisis or emergency situations and specifically must be able to respond to the needs of those in desperate situations. The state must "plan, budget and monitor the fulfilment of immediate needs and the management of crises";
- The measures should be assessed in view of the overall national objectives;
- The programme "must be capable of facilitating the realisation of the right" progressively and within the State's available resources.

2 PROGRESS IN THE REALISATION OF ENVIRONMENTAL RIGHTS

There is no single government department that has the responsibility for the right to environment, and in the same way, there is no single law that outlines the roles of the different government departments or spheres in that respect.²³

The concerted intervention of different government departments is being promoted via the principle of co-operative governance that is embedded in NEMA. Section 11 of NEMA requires relevant national departments and provincial government to furnish Environmental Implementation Plans (EIPs) and Environmental Management Plans (EMPs) within one year of promulgating the Act and at least every four years thereafter.²⁴ The Committee for Environmental Coordination (CEC), which was established by section 7 of NEMA, takes responsibility for aligning EIPs and EMPs and promoting their implementation. In terms of section 16(4)(a) and (b) of NEMA, each provincial department must ensure that municipalities adhere to the relevant environmental implementation and management plans in the preparation of any policy, programme or plan, including the establishment of Integrated Development Plans (IDPs) and Land Development Objectives (LDOs).

Annual progress reports on EIPs and EMPs may contain useful and accurate information on whether planned targets and outputs were achieved by relevant organs of State during the period under review. However, since none of these reports were available to the Commission at the time of writing, this report relies on the responses to the SAHRC's protocol, annual reports and information from organisations of civil society.

2.1 National Policies and Programmes

2.1.1 Department of Environmental Affairs and Tourism

2.1.1.1 Environmental Planning and Coordination

The purpose of this programme is to provide information to support effective environmental management and public participation in environmental governance, assess follow-up on the World Summit for Sustainable Development and help build capacity in the sector and manage the reform of environmental law.

2.1.1.1.1 Environmental Law Programme

The Environmental Law Programme of the DEAT aims at building on the legislative regime introduced by the National Environment Management Act (NEMA) of 1998 by developing a comprehensive regulatory framework for all sectors of the environment. Under this programme several initiatives have been taken to introduce laws that relate to several areas of NEMA including

biological diversity, protected areas, coastal resources management, and waste and air quality management.²⁵ All the foregoing is directed towards protecting South Africa's natural environment, promoting sustainable development and realising the right to a clean and healthy environment.

The Committee for Environmental Coordination (CEC) also reviewed several bills and made recommendations. These include the Sustainable Utilisation of Agricultural Resources Bill; the Land Use and Management Bill; Draft regulations to the Minerals and Petroleum Resources Development Act; Draft Regulations to the Forest Act; Limpopo Environmental Management Bill and the Eastern Cape Environmental Conservation Bill.

Submissions were made to the CEC on possible approaches to phasing out asbestos.

2.1.1.1.2 The Vehicle Emissions Strategy

The vehicle emissions strategy is a project that combines the efforts of DEAT and Department of Minerals and Energy (DME). The strategy is aimed at reducing harmful emissions by raising vehicle emission standards and legislating reductions in chemical additives to automobile petrol (sulphur, benzene, aromatics, ethers, and heavy metal additives). The strategy is a follow-up to DME's plan to phase out the use of leaded petrol by 2006.²⁶ The department reported that the strategy is in advanced stages of implementation.²⁷ The strategy is aimed at ensuring the reduction of air pollutants, which if present in high concentrations, pose health and environmental challenges.²⁸

2.1.1.1.3 State of the Environment Reports Initiative

The department was engaged in a project to capacitate provinces and local authorities to undertake the compilation of provincial state of the environment reports. This was done pursuant to section 31 of NEMA which entitles everyone to information relating to the implementation of the Act or on any other environment related law. Assistance was given to eight provinces.²⁹ A total of R7 996 000 was spent in 2002/2003 by DEAT under the environmental monitoring and reporting programme.

2.1.1.1.4 Environmental Indicator Initiative

The department set out to develop a core set of environmental indicators for the state of the environment reporting for provincial and local levels. The environment indicator initiative was intended to address the gap that has existed over the years in monitoring the realisation of the right to environment. Specifically the indicators aim to:

- Provide a summary of environmental trends at a national level (as well as at provincial and local levels where appropriate);

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- Facilitate the integration of environmental information management across resource issues, as well as administrative, policy and scientific boundaries;
- Promote the effective sharing of information between actors on existing approaches, technologies, data and knowledge on environmental management and related matters;
- Improve access to and availability of environmental information for various information users including resource managers, and the public;
- Provide an avenue for comparing notes from local to national level and compatibility with regional and global indicators; and
- Last but by all means the most important to promote informed decision-making among policy-makers, implementers among others.

The indicators cover the following eight broad issues: Atmosphere and climate; waste management, human well-being; environmental management; inland water; marine, coastal and estuarine environments; biodiversity and natural heritage, and land use.³⁰ The indicators were developed through a participatory process and were posted on the Indicators web site. They have since been accessed and used by a number of provinces to develop their State of the Environment Reports.

2.1.1.1.5 Programme for Environmental Potential Atlas (ENPAT) Series

The department embarked on a programme to collect geo-referenced environmental information to support environmental decision-making. In 2002/2003 data were collected for several Transfrontier Conservation and Protected Areas.

2.1.1.1.6 Conflict Management Programme

In line with s. 17 of NEMA³¹, a Draft Conciliation Manual was compiled, which gives detailed procedures on alternative dispute resolution mechanisms for conflicts within the government functions in the environmental sector. The Manual is intended to benefit national and provincial environmental departments and civil society. It is another achievement in the strengthening of structures for co-operative governance within the environmental sector.

2.1.1.1.7 Promotion of Co-operative Governance

This programme was geared towards the promotion of co-operative decision-making within the environmental sector through the compilation of Environmental Implementation Plans (EIPs) and Environmental Management Plans (EMPs) by scheduled national departments and provinces. This was in

consonance with section 11 of NEMA.³² The DEAT reported that all departments had fulfilled the first round of EIPs/EMPs. The First Edition plans focused on the promotion of the protection of the environment through co-operative environmental governance, the minimization of the duplication of procedures and functions, and the promotion of consistency in the exercise of functions that may affect the environment.

The Committee on Environmental Coordination considered the Plans and a Cooperative Governance Alignment Report was issued in May 2002. The Report was attempt by the CEC to fill the void regarding understanding of the roles, responsibilities, processes, structures and mechanisms that would facilitate co-operative governance within impacting and managing sectors across the three spheres of government, which information was not overtly accessible from the submitted plans. The CEC issued a Consolidated Action Plan for 2001 to 2004, during 2002, in order the CEC to have a tool to monitor the implementation of Departmental commitments.³³

The second round of EIP/EMP reports should be complete by 27 November 2004.

2.1.1.1.8 The World Summit on Sustainable Development (WSSD)

The WSSD took up a considerable amount of the department's resources in terms of time and money. The department coordinated Local Agenda 21 activities aimed at capacitating local authorities to develop sustainable strategies for environmental management in preparation for the WSSD. Local Agenda 21 multi-sectoral workshops were held in all provinces and the WSSD was successfully hosted in Johannesburg in September 2002. This reflected positively on the country's readiness to take up the challenge of integrating social and economic development with environmental protection. Some of the outcomes of the WSSD include the adoption of the Johannesburg Plan of Implementation which sets out programmes to deliver water, energy and a better environment for the world's poor. Partnerships were entered into in several areas as a way of forging a way forward for the realisation of the stated goals.³⁴

2.1.1.1.9 National Environmental Education Programme

The national environmental education programme is a collaborative venture between the DEAT and the Department of Education and it is under the coordination of the latter. It aims at supporting teachers in implementing environmental education in schools and to integrate it with the outcome-based curriculum. DEAT's direct contribution to the programme was in the development of resource materials. Another related activity was the celebration of wetlands and World environmental day as a way of raising awareness on environmental issues. These activities particularly targeted women and youth.

2.1.1.1.10 Poverty Relief Programme

DEAT's poverty relief programme sets three interdependent goals:- growing tourism market share and investment; protecting and conserving South Africa's Environment; and building the nation. At macro level, projects that can benefit from the relief funds are in the areas of providing critical infrastructure for tourism to promote investment; promoting of learnerships in tourism; protecting the coastline; protecting biodiversity; facilitating Trans Frontier Conservation Areas; and cleaning up towns and cities through proper waste management systems.³⁵ In addition, projects should be in targeted development areas, which include protected areas. Alternatively the other targeted development areas fall under the Integrated Sustainable Rural Development Programme Nodes. At the micro level, poverty relief projects target community-based organisations (and not individuals) for the purpose of training and capacity building, job creation for local populations with specific reservations for women, youth and disabled persons.

Some of the projects that benefited from DEAT's poverty relief funds in 2002/2003 are Working for Wetlands – which by the beginning of 2003 had employed 2000 previously unemployed people, injected money in the rural communities and developed skills in rehabilitation of 40 wetlands in various parts of the country. The Immanuel Centre for the Disabled in the town of Steinkopf also benefited from the relief funds in a nursery project for indigenous plants in the Northern Cape. DEAT's poverty relief funds also benefited the setting up of a kelp (sea bamboo) collection and processing project with a low-tech industry that employs unskilled people, mostly women, to collect, dry, mill and bag the kelp as a fertiliser or fish farm feed.

The Ivory Park Ecocity in Johannesburg also received funds from DEAT's poverty relief programme to develop a sustainable village within the city.

2.1.1.1.11 SADC Regional Environment Education Programme

In line with Agenda 21 and NEMA the department implemented the SADC education programme for environmental practitioners in the region. The programme was aimed at strengthening environmental processes for equitable and sustainable environmental management choices. Workshops were held for provinces to develop an environmental education strategy.

2.1.1.1.12 Integrated Sustainable Rural Development Programme (ISRDP)³⁶

With a view to developing a coordinated strategy for the DEAT's implementation of the ISRDP, a strategy was drafted and projects for nodes were identified. The initial nodes identified by DEAT are as follows:

- in the Eastern Cape: O.R Tambo, North East, Ukhahlamba, EG Kei district municipalities;

- in KwaZulu Natal: Umzinyathi, Umkhanyakude, Ugu and Zululand district municipalities;
- The Northern Cape and North West Provinces: the Kgalagadi Cross Boundary district municipality;
- Western Cape: the Central Karoo district municipality;
- Mpumalanga and Limpopo: the Sekhukhune Cross Boundary district municipality;
- Limpopo Province: the Eastern district municipality;
- Free State: the Maluti a Phofung municipality.³⁷

A proposal for deploying environmental managers in nodes to assist local governments in their planning was submitted during the reporting period.

2.1.1.2 Biodiversity and Conservation

The biodiversity and conservation programme of the DEAT is aimed at ensuring conservation and sustainable use of South Africa's biological diversity and cultural heritage for the benefit of all.

Three programmes were initiated in order to fulfil the departmental mandate under the above sub-programme, namely: Working for Wetlands, Establishment of Transfrontier Conservation Areas and the Protected Areas Programme.

2.1.1.2.1 *Working for Wetlands*

Working for Wetlands is an on-going programme run under a partnership arrangement between DEAT, DWAF and an NGO – the Mondi Wetlands Project. Working for Wetlands finds support for its existence in the *National Policy on the Conservation and Sustainable Use of Wetlands in South Africa*, the National Water Policy, the National Water Act No. 36 of 1998 and the Conservation of Agricultural Resources Act No. 43 of 1983. The programme aims at the rehabilitation of wetlands and alleviation of poverty through the provision of jobs, skills and economic opportunities. Some of the achievements of the Working for Wetlands programme are noted above under the DEAT's poverty alleviation programme.

2.1.1.2.2 *Establishment of Transfrontier Conservation Areas (TCAs)*³⁸

Three TFCAs were established and developed by DEAT namely:

- **Great Limpopo Transfrontier Park** (*Formerly Gaza-Kruger-Gonarezhou Transfrontier Park*) regarding 35,000km² in extent of

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which 10,000 km² is in Mozambique, 20,000 km² in South Africa and 5,000 km² in Zimbabwe;

- **Ais-Ais/Richtersveld Transfrontier Conservation Park in relation to 6,222 km² in extent with 1,902 km² (31%) in South Africa, and the remainder (69%) in Namibia and**
- **Maloti-Drakensberg Transfrontier Conservation and Development Area covering 8,113km² in extent of which 5,170 km² (64%) is in Lesotho and 2,943 km² (36%) is in South Africa.**

This was in accordance with the *New Partnership for Africa's Development (NEPAD)*; the *White Paper on the Conservation and Sustainable use of South Africa's Biodiversity and the Convention on Biodiversity*. The TFCAs will facilitate regional peace, cooperation and economic development in the area of conservation and sustainable use of biological and cultural resources. As a result of the TFCAs 1045 animals were transferred to the parks as a consequence of agreements entered into, and R40 000 000 was secured for various tourism related infrastructure projects. The department reported that the implementation plan had been reviewed by March 2003 and was being implemented.

2.1.1.2.3 Protected Areas Programme

The department set out to expand and consolidate protected areas with the ultimate objective of creating conservation areas with greater ecological sustainability that widened economic and social opportunities for the rural communities living near the conservation areas and the general South African public. As a result of the initiative 4 500 hectares of land were added to the South African National Parks (SANParks), particularly at the Addo National park. Work was also done at the Golden Gate National Park.

2.1.1.3 Marine and Coastal Management Programme

2.1.1.3.1 Coast Care Programme

DEAT has a Coast Care programme which guides the department in the conservation and development of the marine and coastal environment and ensures the sustainable utilisation of marine and coastal resources. The Coast Care programme is made up of projects and products that contribute to the implementation of the coastal policy objectives as enumerated in the *White Paper for Sustainable Coastal Development in South Africa of 2000*.

Coast Care also provides jobs and training for unemployed coastal communities as a way of getting them to participate in the maintenance of a cleaner and safer coastal environment. In 2002/2003 the department had targeted to employ at least 60% women. On the whole 60% of the poorer

coastal communities were covered. Adult Basic Training was also provided to the communities.

The Working for the Coast programme was another of DEAT's preoccupations under marine and coastal management. This one targets the previously disadvantaged communities, particularly the long-term unemployed and women. Approximately 2 000 people were employed in teams of 30 at 70 different sites.

With regard to coastal management, the department reported the award of the Blue Flag of international recognition of excellence in Beach management to eight of South Africa's beaches.³⁹

2.1.1.3.2 Transformation and Stabilisation of the Fishing Industry

Transforming and stabilising the fishing industry involved restructuring of the fishing rights allocation process in order to ensure sustainability of the fishing industry by protecting the country's natural marine resources. Policy was put in place for restructuring the fishing rights allocation process. A new allocation policy was introduced which provides for longer-term rights and a fee structure. Longer term fishing rights allocations were started in 2002. This introduced stability, transparency and fairness in the fishing industry.

In its 2002/2003 Annual Report⁴⁰ the department reported that the new allocation policy has benefited many communities and will ensure the regulation of fishing to avoid over-fishing and thus ensure sustainable use of marine resources for the good of the South African peoples. This policy is being used to reach previously segregated communities. 73% of the rights holders in the hake trawl sector are mostly owned by blacks. The restructuring also anticipates the opening up of new fisheries in order to widen opportunities. Specific attention for the future will be on cracking down illegal activities in the fishing industry, which reflect negatively on the environmental resources. In relation thereto the department kick-started the process of improving infrastructure, including acquiring patrol vessels and expanding existing fisheries to target undeveloped and unexploited fish species.

The regulatory mechanism for the fishing industry was fairly utilised during the period under review, resulting in the processing of up to 1 500 appeals and undertaking of several operations with law enforcement agencies to curb illegal fishing and corruption. This led to a number of high profile prosecutions⁴¹ and the recovery of up to R45 000 000.

DEAT also reported that its decisions were upheld in courts of law, leading to the conclusion that the fisheries section has gained a degree of sustainability which is good for the realisation of the rights envisaged under section 24 of the Constitution.

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2.1.1.4 Environmental Quality and Protection Programme

The DEAT's programme for environmental quality and protection directly targets the fulfilment of South Africa's constitutional right to a clean and healthy environment. It covers air quality management, chemicals and hazardous waste management, climate change and ozone layer protection, environmental resource economics and the SA Weather Service. Although the programme mainly looks at legislative and other measures, DEAT sought to transform policies and legislation into visible integrated waste management programmes that centred on the people.

The following programmes were carried out as part of the implementation process for the *National Waste management Strategy (NWMS)*.

2.1.1.4.1 Cleanest Town Competition

This competition was hosted by DEAT in line with the NWMS. The competition targeted changing the attitudes of the poor through awareness raising and education on good waste management practices. The competition targeted local authorities and their inhabitants. In total, 100 municipalities entered the competition and the 3 national winners were announced in June 2002. As a result of the event publicity, greater awareness was realised on waste management.

2.1.1.4.2 Medical Waste Management

Towards finding better solutions to the handling of medical waste, DEAT held a health care waste seminar. In addition pilot projects were launched at the Leratong (West Rand) and Itireling clinics in January 2003 under the Medical Waste/Sustainable Health Care Waste Management Pilot Project. The project will develop an integrated Health Care Waste Management (HCWM) Strategy and Action Plan; HCWM Guidelines and Technical Specifications and Tender Materials; and institutional arrangements for sustainable HCWM.

2.1.1.4.3 Pollution Control

DEAT's pollution control programmes covered the proper management of water resources to guard against water pollution as well as air quality management.

DEAT coordinated a project for countering the effects of persistent organic pollutants pursuant to the Stockholm Convention of Persistent Organic Pollutants. This intervention targeted civil society. A grant of USD 500 000 was secured by DEAT from the Global Environment Facility to eliminate obsolete pesticides that contaminate ground water systems and negatively impact on health.

DEAT focused on instituting an effective system of air quality management and countrywide compliance with national air quality standards. In this regard, the Department worked on the establishment of an air quality management plan for the South Durban Basin to benefit the residents and industrial establishments in the area. According to DEAT, Durban South has the second largest industrial conglomeration in South Africa. Due to improper planning in the past, residential dwellings were also established in amongst heavy industry with residents and school children suffering the consequences of air pollution. Progress has been made in implementing the Durban South air quality management plan, as follows:

- Existing monitoring systems were assessed;
- Air screening studies were done;
- A monitoring network was designed to support the modelling activity;
- Background and stress indicators were identified;
- Possible pollution sites were surveyed for measurement allocation;
- A quality control assessment of procurement procedures was done and existing Quality Assessment / Quality Control procedures were audited.

The Durban South Project is projected to benefit people living close to industries and waste disposal sites. This project can only be advanced as an interim administrative measure that is aimed at proactively addressing the pollution problems of the area while the Air Quality Management Bill is being considered by the legislature.

Regulations relating to plastic bags are discussed under legislative developments.

2.1.2 Department of Water Affairs and Forestry (DWAF)

DWAF draws its mandate for protection of environmental rights from a number of legal instruments including the National Water Act 36 of 1998⁴²; The National Forests Act 84 of 1998⁴³; and the National Veld and Forest Fire Act 101 of 1998⁴⁴ among others (e.g. NEMA).

2.1.2.1 Policy Developments

In the period under review the department did not develop any policies. However, the following developments were recorded which could contribute to policy development in the future. Some of these were instituted under specific programmes of the department that will be handled in this section:

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- A second draft of the National Water Quality Management Framework Policy was released in June 2002
- The department contributed to developing the SADC Forests Protocol, which was signed by South Africa. The protocol focuses on promoting sustainable management of forest resources in order to alleviate poverty and effectively protect the environment, generate economic opportunities for the SADC region and safeguard the interests of future generations.
- The Department of Water Affairs and Forestry (DWAF) indicated that it had begun to extend the existing Minimum Requirements for waste disposal site operation⁴⁵ to include staff training and to add more detail on the operation and auditing of landfills.⁴⁶ The Department undertakes to publish a new set of Minimum Requirements on Training, Operating and Auditing, but it was not clear when this would take place.
- Completed part of the Waste Discharge Charge System initiative
- In August 2002 an interim agreement was signed between Mozambique, South Africa and Swaziland for cooperation on the protection and sustainable utilisation of the Inkomati and Maputo watercourses.
- A formal partnership on the issue of the Congo Basin Forests was launched at the WSSD in September 2002. This was a result of DWAF's intensified international participation in forestry issues.

2.1.2.2 New Policies and Programmes

2.1.2.2.1 Development of the National Water Resource Strategy

Safe water is as much a component of environmental management as it is a core component of the right to water. In relation to the right to environment as contained in section 24 of the Constitution, a safe water resource is important for the health and well being of the people as well as protection and sustainable use of these resources for current and future generations.

DWAF developed the National Water Resource Strategy (NWRS), which was published in August 2002 for public comment. This project was undertaken under the auspices of the National Water Act with the objective of laying down the policies, procedures according to which the nation's water resource would be managed and protected. Section 1(1)(xxvii) of the National Water Act defines “water resource” to mean surface water found in water courses (rivers and streams), impoundments (dams), wetlands and estuaries, and groundwater found in underground aquifers.⁴⁷

2.1.2.2.2 Revision of the National Water Act Implementation Plan

DWAF engaged in the revision of the NWA Implementation Plan with the objective of improving the alignment between the National Water Act and the Strategic Plan. The second version of the plan was completed in October 2002 and facilitates monitoring and reporting on progress in implementing the National Water Act's provisions, including amongst others:

- determination of the Reserve;
- establishing representative and participatory water management institutions; and
- broadening access to water resources for previously disadvantaged and resource poor farmers.

The Components of the National Water Act are listed as a key area/challenge for DWAF in the *DWAF Multi-Year Strategic Plan 2003/2004 – 2005/6* under the water resource management objective. DWAF commits itself in the Plan⁴⁸ to implement the provisions of the National Water Act by:

- Establishing the National Water Resource Strategy;
- Developing and implementing a pricing strategy for waste discharge charges;
- Establishing, empowering and capacitating water management institutions;
- Continuing the development and implementation of water resource protection measures;
- Developing and implementing a strategy for compulsory water use licensing;
- Developing and implementing water conservation and demand management strategies.

Other areas of the DWAF water resource management objective include:

- implementing new organisational structure that is aligned to the mandate given under the National Water Act;
- continuing with efforts to develop, establish and maintain national water resource monitoring and implementation;

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- continuing with the national programme for clearing invading alien vegetation under the working for water programme
- positioning the department as the national water resource management policy development, regulatory, monitoring and support institution;
- continuing with the development and implementation of solutions for reconciling water availability with water demand
- ensuring safe dams;
- continuing with the operation and maintenance of water resource infrastructure where the function has not devolved to water management institutions;
- managing droughts and floods.

2.1.2.2.3 Integrated Water Resources Management

The objective of this programme was to promote sustainable use of water resources for social, environmental and economic needs having regard to principles of equity and efficiency. In line with this, DWAF developed minimum requirements for waste disposal site operation, auditing and training of operators and managers of waste management facilities; the National Water Quality Management Framework Policy; and finalised phase 2 of the Waste Discharge Charge System.

DWAF also ran a Communication and Awareness Creation Programme to raise awareness on water quality management. A Water Quality Management Booklet titled "*Managing Water Quality in South Africa and How Water Users Can Participate*" was developed by DWAF; water quality management communication strategies and sub-strategies were developed for different sectors; DWAF completed an initial review report for ISO 14001 Based Management for Water Quality Management. It is not clear whether the booklet was developed for particular user groups or for the general public. The on-line copy of the booklet is in English.

In the area of waste management regulation, DWAF issued 17 waste disposal permits and 29 directions in line with section 20(1) of the Environmental Conservation Act No. 73 of 1989. DWAF reported that currently all commercial hazardous waste disposal sites in South Africa are being controlled via the permit issuing process.

A specific project of the department related to the clean up of the Hammersdale Waste Water Treatment Site. The clean up was done in line with section 19 of the National Water Act in order to reduce the risk of the site to the human

health of all the people entering the site and the environment (ground water and sewers). As a result, all hazardous waste, waste that posed a fire hazard and contaminated soil were removed from the site and properly disposed of at appropriate waste facilities. This removed the risk of noxious gases and bacterial contamination for the people living near the site.

2.1.2.2.4 Working for Water Programme

The working for water programme is a collaborative initiative between DWAF, DEAT, the Department of Agriculture and other partners that aims at the eradication of invasive alien vegetation species as a way of optimising the use and conservation of natural resources, particularly water. According to Working for Water Programme, invasive alien species are the single biggest threat to biological diversity and the ecological integrity of natural systems.⁴⁹ Terrestrial weeds interfere with agricultural production while aquatic weeds destroy aquatic creatures and water sources in addition to being hazardous to human health.

By 2003 the programme involved a total of 304 projects and 466 279 initial hectares were cleared of alien vegetation by February 2003 and 523 618 follow up hectares were cleared by February 2003. This is more than 200% performance over the set target of 200,000 hectares. Table 1 below gives the programmes coverage across the different provinces and National Parks area.

Table 1: Coverage of Working for Water across provinces in 2002/2003

	<i>Area of the province</i>	<i>Estimate of invasion of 1996</i>	<i>Total initial hectares cleared since 1995</i>	<i>Total initial hectares cleared in 2002/3</i>	<i>Total follow-up hectares cleared in 2002/3</i>
SANParks	-	-	188 186	107 086	112 530
Free State	12 993 575	166 129	5 485	1 749	116
Northern Cape	36 198 060	1 178 373	119 127	4 195	28 683
Eastern Cape	16 739 817	671 958	85 357	13 116	21 039
North West / Gauteng	13 252 911	427 414	76 719	18 445	83 856
KwaZulu Natal	9 459 590	922 012	105 044	19 506	66 573
Limpopo	12 114 307	1 702 816	170 078	38 326	49 652
Western Cape	12 931 413	3 727 392	283 619	41 739	83 299
Mpumalanga	7 957 056	1 277 814	191 692	22 325	77 870

Source: Working for Water Annual Report 2002/2003

A lot of the Working for Water project hours and resources have gone into the clearing of invasive plants in the South Africa National Parks. A cumulative total of initial hectares and follow up hectares cleared (219 616 hectares) far surpass the extent of work done in any of the provinces covered. From the 1996 estimates, Western Cape had the biggest alien invasion problem, while Free

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State had the lowest. Western Cape represented the highest intervention by Working for Water at 125 038 hectares. Free State as the area with the lowest incidence also had the lowest intervention in relation to the rest of the provinces.

2.1.2.2.5 Water Conservation: 2020

Efficient use of water is a major facet of water conservation. However, how well people use water and water sources depends on how much they can appreciate their role and the need to conserve water. In a bid to increase awareness among school children and the general public about water conservation and efficiency DWAF coordinated a school-based water education programme. A pilot public education programme was introduced in Buffalo City, Eastern Cape and Mbombela, Mpumalanga. The department also coordinated the National Water Week, the Women in Water Awards and the Baswa le Meetse Awards.

DWAF also developed the first version of Water Management Plans which were successfully implemented by three water user associations in three provinces. Case studies on water use were carried out in Ugu and Mhlathuze (KwaZulu-Natal) under the Integrated Resource Management programme. Phase I of the Umtata (Eastern Cape) study was completed and the western Highveld Region (Mpumalanga) study was initiated.

2.1.2.2.6 Sustainable Management of South Africa's Forests

DWAF has the national mandate to oversee, regulate, protect and manage indigenous and commercial forests of South Africa and to support rural communities in managing forest resources. In 2002/3 the department implemented a restructuring of category B forests in Eastern Cape, KwaZulu Natal and Limpopo provinces.⁵⁰ The department also considered the effects of this restructuring process on the forest workers and was engaged in developing options to mitigate the negative effects. Communities and land claimants were involved in the restructuring process and a programme for further consultations with communities was being worked out in order to increase community participation.

At the time of reporting, the department was working on a national forest programme. The programme gives particular attention to communities with regard to sustainable use of forest resources.

DWAF also embarked on the process of conversion of Lowveld plantation into natural vegetation and the process is projected to end in 2006. As a result of the conversion, some saw millers saw the cancellation of their contracts. The matter went before arbitration to determine compensation and was not concluded by the time of reporting.

Assistance was extended to some NGOs to assist in the development of community forest management. Some of these NGOs include: Food and Trees for Africa, Eduplant, Trees for Homes Project for work in all the provinces and the Mineworkers Development Agency for the Marula Co-operative Project in Mpumalanga.

Other developments within the department included the signing of two forest leases; developing criteria and indicators of sustainable forest management; amendment of the national Forests Act 84 of 1998 to provide for creation of a trust fund to hold rental income for land reform beneficiaries. Regulations were also published under the Forests Act and the National Veld and Forest Act 101 of 1998. An inventory was developed of all forests and participatory forest management forums were established to roll out the Participatory Forest Management Strategy.

Through the National Veld and Forest Fire Act, the first inclusive Forest Protection Association (FPA) has been registered. DWAF received several applications for registration of FPAs and is in the process of making sure that they are legal as per the requirements of the Act before registering them. The Fire Danger Rating System has been finalised and approved.

2.1.3 Department of Minerals and Energy

The DME is scheduled under NEMA as one of the departments with functions that involve the management of the environment.⁵¹ The Constitution obliges the government to put in place a national energy policy that would ensure the optimal use of national energy resources and delivery of the same to cater for the needs of South Africa. The government is also required to ensure that the production and distribution of energy is sustainable and results in the improvement of the standard of living of citizens.

2.1.3.1 New Policies

2.1.3.1.1 Draft Radioactive Waste Management Policy

This draft policy was developed during the period under review and published for public comment in July 2003. The draft was translated in two local languages for easy access by the local communities - Xhosa, and Sepedi. The other languages were English and Afrikaans. This policy development will be discussed in the next reporting cycle.

2.1.3.1.2 White Paper on the Promotion of Renewable Energy and Clean Energy Development (Part One), August 2002

This white paper was designed against the background of air pollution resulting from South Africa heavy use of fossil fuel, including wood fuel, which has which has occasioned negative effects like acute respiratory illnesses. All this

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points to the need for the adoption of efficient and safe technologies to address the adverse effects on the population, particularly women and children who are mostly exposed to this pollution.

The policy is aimed at ensuring the optimal use of renewable energy resources like wind, biomass, bagasse, solar, wave energy and ocean currents as a way towards sustainable energy utilisation. In relation to the environment it is hoped that large scale utilisation of renewable energy sources will benefit the communities in terms of accessible and sustainable energy sources as well as by bringing about an improved environment as a result of a reduction in the emission of carbon dioxide and other pollutants.

2.1.3.1.3 Integrated Energy Plan (IEP)

Some time during 1999/2000, the government commissioned the Integrated Energy Policy (IEP) process, the objective of which was to determine the appropriate energy mix to meet South Africa's future needs. The draft report was released on 23 January 2004 for public comment and will therefore not be discussed in this report.

2.1.3.1.4 The Energy Efficiency Strategy

Although still in draft, the EES sets the target for energy efficiency implementation. It was released on 10 May 2004 and falls outside of the reporting period.

2.1.3.2 Ongoing Programmes

During the 2002/3 reporting period DME was involved in the implementation of the following programmes:

2.1.3.2.1 Implementation of the White Paper for a Mineral and Mining Policy for South Africa

DME spearheaded the implementation of the above mentioned white paper in which emphasis was placed on the need for government to ensure that the essential development of the country's mineral resources happens within a framework of sustainable development and within the guidance of the national environmental policy, norms and standards. In this regard, work in the mining sector was aligned to the vision for co-operative governance in compliance with a single national environmental policy which defined the hierarchy of governance.

The “polluter pays principle” was applied in the regulation and enforcement of environmental management. DME also affirmed its commitment to carry out equitable and effective consultation with interested and affected parties in its work towards the attainment of meaningful public participation.

The other components of the White paper for Minerals and Mining Policy for South Africa that were piloted include: the promotion of healthy and safe working conditions at all mines in line with national health policies; and ensuring that mines deal humanely with the health consequences of their work.⁵²

2.1.3.2.2 Rehabilitation of Derelict and Ownerless Mines

This is an on-going programme which was launched in 1986. It targets asbestos, coal and gold mines and is undertaken in compliance with a host of legislation and agreements.⁵³ The programme involves the assumption of responsibility by the government to address pollution resulting from abandoned mines that are detrimental to the safety and health of communities that reside near the mines.

During the period under review, work was done in the Northern Cape and Limpopo Region on the most critical asbestos pollution sources. The department still has an uphill task in respect of the many asbestos mines and dumps that exist. DME reported a total of 111 asbestos mines and 578 asbestos dumps to be rehabilitated, 62% were rehabilitated at a cost of R145 000 000. The department has committed itself to budget for the rehabilitation of the remaining mines and hopes to complete the process in 3 or 4 years.

In the case of coalmines, limited work was done on the Transvaal Delagoa Bay Colliery in Mpumalanga. This was largely because of limited financial resources.⁵⁴ Rehabilitation of gold mines was also limited owing to the fact that eight out of the twelve Government Mining Engineers (GME) Gold Dumps in Gauteng, were re-mined and removed by East Rand Gold and Uranium Company Limited (ERGO).

2.1.3.2.3 Excellence in Mining Environmental Management (EMEM) Award

This program focused on motivating the mining industry to excel and continually improve in their environmental management, to raise public awareness on mining environmental management, to promote responsibility and self-regulation within the mining industry and to promote *Mining Environmental Management Best Practices Guidelines*. It was implemented under the *1998 White Paper for Minerals and Mining for South Africa*.

In total, 64 mines competed for the award and 25 received the awards of excellence. Out of the 25, 12 first place winners from the regional competition were expected to compete in the national awards. As a result of this initiative there was increased mining environmental management awareness among government departments that are part of the mining regulatory framework in South Africa, the affected communities and landowners, and the entire mining industry.

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2.1.3.2.4 Mining Legacy Programme

This programme was launched in 2002 and will continue for some years. It focuses on development of a holistic national strategy to address pollution problems and rehabilitation of abandoned existing and operational mines. The programme targets government departments in the mining regulatory mechanism, affected communities, landowners and the industry. Specific action was taken towards development the Phepafaso Strategy (cleaning up strategy). The strategy was being finalised and would be distributed to role players for comment.

The strategy has three sub programmes on strengthening enforcement of environmental legislation: a) identifying mine pollution hotspot areas, b) assessing the extent of the pollution and the development and implementation of regional mine closure strategies, c) managing and monitoring measures to improve the situation and rehabilitation of derelict and ownerless mines.

2.1.3.2.5 Comprehensive Review of the Mine Health and Safety Inspectorate

This was concluded in March 2003. It involved benchmarking and comparing the local situation with international best practise. The inspectorate is undertaking measures to address the shortcomings identified in the review. The project components include causing a quantum shift in health and safety performance in goldmines and small and medium scale mines: increasing efforts to prevent mine fires and explosions; reducing impact of mining activities on the public at the source and ensuring that occupational health issues are addressed.

2.1.3.2.6 Implementation of the Energy Policy White Paper, 1998

Two projects were carried out under this policy document:

a) Energy Efficiency in the Public Sector: This is an initiative directed at the reduction of energy consumption and emissions in government buildings. As part of this an energy audit and implementation of energy efficiency were done at the DME head office. Another audit was done on the parliamentary building and upgrades were carried out. In relation thereto DME was also engaged in the Darling Farm project aimed at increasing the use of renewable energy sources and to provide wind generation on a pilot level. Technical and environmental studies were carried out on the viability of wind as an energy source.

b) Basa Njengo Magogo Initiative and the Low Smoke Policy: This was a programme under the Low Smoke Policy aimed at reducing pollution associated with coal use. It targeted coal consumers at the household level. A reduction in indoor air pollution from coal was recorded.

2.1.3.2.7 Free Basic Electricity (FBE) Programme

In line with government's commitment to delivering free basic services to the poor and needy people⁵⁵, DME is helping to put in place mechanisms for ensuring the supply of free electricity to poor households. DME's role here is to develop policies upon which municipalities are to implement FBE while actual implementation of the programme is overseen by the Department of Provincial and Local Government. Eleven locations were identified and in total 8 884 households were targeted for FBE.

The electrification of households and provision of free basic electricity are hailed as one of the greatest achievements of government. A total of 3 500 000 homes have received electricity since 1994 (about 435 000 annual connections). However, there is still a daunting backlog as 34% of households are estimated to be without electricity.⁵⁶ Rural areas take a big share of this backlog with 51% of households without electricity. According to DME, the backlog is expected to increase with the increase in informal settlements.

Although FBE is a service-based program that may have no direct correlation with protecting the right to environment, it carries indirect positive benefits for the realisation of an environment that is good for the health and well being of the people. FBE will give poor households access to safer and cleaner means of energy and reduce the burden on the environment from the use of unsustainable fuels like wood and coal. It is forecasted that 50 kWh of electricity will be delivered each month to cater for basic energy requirements like lighting, ironing and use of a black and white TV.⁵⁷

During the reporting period, DME was pre-occupied with preliminary issues for setting up the program, which was scheduled to start in July 2003. The department commenced a 2-year pilot study to inform the FBE policy and to determine the most effective and viable process of delivering FBE.

2.2 Provincial Policies and Programmes

The Commission provides two examples of provincial level implementation of policies and programmes below.

2.2.1 Gauteng

The Gauteng Department of Agriculture, Conservation, Environment and Land Affairs (DACEL) instituted the following measures during the reporting period.

2.2.1.1 Integrated Environmental Management for Rural Development

Under this programme, the Bronberg Strategic Environmental Assessment was implemented and 78 Environmental Impact Assessments were reviewed.⁵⁸ The programme was aimed at promoting environmentally sustainable rural

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development, integrating environmental issues in spatial planning and promoting participative and coordinated environmental management within the province. It mainly targeted the public in rural areas and local authorities.

2.2.1.2 Spatial Development Projects

Several strategies were implemented under these projects with a view to ensuring environmental best practice in the Blue IQ projects and promoting participative and co-ordinated environmental management for the benefit of local authorities, the public and specifically the Blue IQ projects.

2.2.1.3 Integrated Environmental Management for Urban Development

Under this programme DACEL completed phase 2 the strategic environmental assessment for Bronberg. Phase 2 of the strategic environmental assessment for Klipriviersberg, involving a legal review and identification of management models, was also completed. Development of Phase 1 and 2 of the Sensitivity Buffer Zones for Residential Developments project was completed. Gauteng Open Space Project (GOSP) projects for sewage and noxious industries was finalised. DACEL also administered the Magaliesburg Protected Natural Environment and reviewed 52 Environmental Impact Assessments.

2.2.1.4 Integrated Environmental Management: Transport and Communication

This programme was also implemented in line with the legislative requirements of NEMA and other laws mentioned above. The broad objectives of the programme were to develop systems/policies/legislation that promote integrated environmental management; to develop and update the Environmental Information Management Systems; to review and update the provincial state of the environment report and to develop provincial guidelines for advertising and signage structures in Gauteng. In line thereto, DACEL implemented the recommendations and guidelines on the Gauteng Communications Network Strategy and 115 EIAs were reviewed in that regard. The initiatives generally targeted the public, local authorities and businesses.

2.2.1.5 Industrial Impact Management

This programme was aimed at facilitating the development and implementation of pollution control strategies for air and pollution in the province. This was intended to benefit the general public, local authorities and businesses in different ways. One of the achievements of the programme was the development of the Gauteng Air Quality Management Strategy. The strategy focuses on the fact that the burden of pollution is heavily borne by the poor, the disadvantaged and those living in close proximity to polluting hotspots and therefore prioritises intervention to areas with high vulnerability categories. Another achievement related to the commissioning of the feasibility study for

Gauteng Cleaner Technology Fund. 299 EIAs were reviewed in connection with the cleaner technology objective of the fund.

2.2.1.6 Integrated Waste Management

The province's focus in this programme was on ensuring waste management that prioritises waste avoidance. It targets the general public in Gauteng, local authorities in their capacity as providers of waste management services, businesses as major sources of waste and government institutions. The Health Care Risk Waste Project is one of the initiatives being carried out with sustained progress. It gives special attention to workers and people living close to health care facilities. In relation thereto a Health Care Risk Waste Information System is being developed.

2.2.1.7 Environmental Education and Awareness

DACEL conducted several awareness activities with the aim of raising awareness about and rallying support for environmental issues. Among these was the "Bontle ke Batho" clean schools, clean wards and towns competition. It aimed at raising awareness about sustainable development best practices and the practical importance of the practices. The competition attracted 601 schools, 270 wards and 13 local authorities. DACEL also organised and convened the Gauteng Summit on Sustainable development and the Joburg Climate Legacy was set up to offset the greenhouse gases generated by the Summit.

2.2.1.8 Greening the World Summit on Sustainable Development

In partnership with DEAT, IUCN, GEF, and UNDP, DACEL undertook this programme with a view to promote best environmental practice in the planning and implementation of the WSSD. It was also used to raise awareness about sustainable development and how it can be implemented in practice.⁵⁹ Activities as part of the programme targeted the general public, the local authorities, communities, school children and delegates at the WSSD.

The Bontle ke Batho competition was one the activities. Other activities included: the Imvelo Hospitality Industry Awards for Sustainable Development and actual implementation of best environmental practices during the course of the WSSD. Some of the best practices related to environmental responsibility and practices for conserving the natural environment for companies that were awarded contracts for supplying goods and services to the WSSD, as well as encouraging hotels, restaurants and other hospitality service providers to adopt measures for reducing waste and promoting efficient use of water and energy. A Sustainable Development Barometer was displayed at the strategic sites around Gauteng.

2.2.1.9 Resource Management

This was a programme under the Conservation directorate of DACEL. It was generally aimed at ensuring sound management of biodiversity, communities, landscape processes and systems through the establishment and maintenance of protected areas; to advise resource users on resource management issues; to provide and expand visitor services and to provide ecologically viable advice to resource users within the 2 Blue IQ project areas.

As a result, 5 000 ha of land was added to the Suikerbosrand Nature Reserve and the Kareekloof Aventura resort was purchased. Facilities at several nature reserves (Suikerbosrand, Roodeplaat, Arievale and Alice Glockner Nature Reserves) were upgraded. A multi-stakeholder Operational Management Committee was set up for the community project at Abe Nature Reserve near Khutsong Township outside Carletonville. DACEL also injected R2 000 000 into job creation projects on nature reserves. In addition to the direct conservation benefits, the programmes have benefited various vulnerable groups through creating work opportunities.

2.2.1.10 Working for Water

DACEL initiated clearance of alien vegetation in the riparian zone of strategic river catchments in the province. A total of 646 ha of alien trees and 25 477ha of Queen of the Night alien plants were cleared.

2.2.1.11 Resource protection

DACEL carried out several activities aimed at promoting the wise use of natural resources by ensuring enforcement and compliance with the Nature Conservation Act and the CITES. As a result, 5 833 permits for animal movement/products were issued. 94 court cases were filed and investigations done. 22 of the cases were pending at the time of reporting. DACEL introduced a cost recovery scheme for permits on 1 May 2002. Investigations were done into the illegal sale, import and export of wild animals and animal products.

2.2.2 Free State

2.2.2.1 New Policies

In the area of policy development, the Free State Department of Tourism, Environmental and Economic Affairs (DTEEA) reported that it was in the process of developing a new policy on the importation, exportation and keeping of wild animals.

2.2.2.2 Ongoing Programmes

2.2.2.2.1 Conservation

Under the conservation directorate of the Department, which is the lead agency on environmental and conservation matters in the province, the following programmes were implemented:

- Nature reserves were fenced-off in compliance with the requirements of Ordinance 8 of 1969 in order to protect biodiversity in protected areas. As a result 40 jobs were created for the neighbouring communities to work in the reserves.
- As part of the poverty alleviation programme, the process for establishing a community owned tourist rest camp was started. The rest camp would have a public protected area and was intended to benefit the community of Zamani – Memel. By the time of reporting the project awaited EIA approval.
- With funds from the Poverty Alleviation Programme, an Environment Adventure Centre for children on the street and disadvantaged children was under construction where training would be given by an NGO.

2.2.2.2.2 Environment Protection

DTEEA carried out the following activities in line with environmental management and protection:

- DTEEA also carried out a programme for establishing Urban Conservancies in townships, which aimed at building the capacity of community members (urban rangers) who can train the broader community on environmental management. A total of 30 community members were trained in order for their knowledge to benefit their communities.
- 45 rural rangers were trained in biodiversity management as part of the programme to establish Rural Conservancies with a view to enhancing the management of natural resources in a conservancy.
- 120 members of Enviro clubs were trained as urban rangers in line with a project to capacitate youth in environmental management resulting in the grooming of environmentally literate youth and communities.
- In line with NEMA *Guidelines on Waste Recycling and the Strategy on the Implementation of the Polokwane Declaration*, DTEEA facilitated the establishment of 2 Buy-back centres for recyclable materials. The project aimed at relieving the

community of poverty and cleaning the communities. A sustainable business was started which benefited five people from Bohlokong and five others from Mangaung.

2.3 Legislative Measures

2.3.1 Department of Environmental Affairs and Tourism

In the previous monitoring cycles ineffective implementation and enforcement of laws for environmental protection and management was cited as one of the problems that was still dogging the department. In the current reporting cycle, the department made commendable strides towards diversifying the National Environmental Management Act and other norms and standards uploaded from the international commitments of South Africa. Among the legislative developments in this respect were the following:

2.3.1.1 The National Environment Management: Protected Areas Bill 2003

Currently, the National Parks Act No. 57 of 1976 (NPA) governs sustainable management of national protected areas. This Act has been found to be deficient with regard to current national environment management discourse, particularly in light of the National Environment Management Act of 1998. The Protected Areas Bill is aimed at addressing some of the shortcomings in the NPA. The Bill provides for the declaration and management of protected areas and for cooperative management of protected areas.⁶⁰ The Bill is likely to have an impact on better management of natural resources in the protected areas for the benefit of present and future generations.

2.3.1.2 National Environment Management: Biodiversity Bill 2003

Cabinet approved the Biodiversity Bill in 2003 and the department was due to submit the same to Parliament for debate. The Bill aims at providing a regulatory framework for ensuring the effective implementation of the *White Paper on Conservation and Sustainable Use of South Africa's Biological Diversity of May 1997*⁶¹. The Bill enumerates norms and standards for conservation, sustainable use and equitable benefit sharing of South Africa's biological resources. It provides a foundation upon which South Africa will work towards fulfilling its commitments under the Convention on Biological Diversity of 1993. The Biodiversity Bill contains requirements for Biodiversity Management Plans to be incorporated into the Integrated Development Plans of local government.

2.3.1.3 National Environmental Management Act Amendment Bill (No. 1)

This Bill proposed amendments to NEMA by adding chapter 9A, which provides for administration and enforcement of certain national legislations and also provides for the designation of Environmental Management Inspectors. It

lays the ground for administration and enforcement of the Biodiversity Bill, the Protected Areas Bill, the Air Quality Bill, Waste Management Bill and Coastal Zone Bill. It covers the gap that existed with effective enforcement and implementation of environmental laws.

2.3.1.4 Coastal Zone Draft Bill

DEAT reported that this Bill is in the making but no further information was provided on its objectives and how it will contribute to environmental rights realisation.

2.3.1.5 National Environment Management: Air Quality Draft Bill

The department reported that the process for setting standards for important air pollutants in line with World Health Organisation guidelines was started in 2002 in collaboration with the South African Bureau of Standards. Work on the Draft Bill on Air Quality was done by the department during the reporting period and culminated in the approval of the Bill in April of 2003. The Bill will repeal the Atmospheric Pollution Prevention Act (APPA) of 1965. It is aimed at enabling authorities to control the levels of pollution in the country by providing for a framework for governance of air quality management through national norms and standards and a framework for air management planning.

2.3.1.6 National Environment Management: Second Amendment Bill

New Regulations were made under the second amendment to NEMA, which had the objective of improving the quality of environmental impact assessments. These regulations replace the Environmental Impact Assessment Regulations of 1997 that were made under the Environmental Conservation Act.

2.3.1.7 Plastic Bag Regulations

In line with the country's waste management policy, regulations for the use of plastic bags⁶² were published in order to address the growing pollution problem. The regulations prohibit the manufacture, trade and commercial distributed of certain plastic bags that do not comply with paragraphs 4 and 5 of the Compulsory Specification.⁶³ Contravention of regulation is an offence for which the offender is liable to a fine or imprisonment of not more than 10 years or both. The department reported that pollution was mostly acute in areas that were poorly serviced with waste collection.

The regulations are aimed at regulating the use of non-reusable plastic bags and the excessive use of disposable plastic film for processing. It is hoped that the regulations will give the consumer a choice whether to use the plastic bag or not since the customer will know that he or she bears the cost as opposed to the situation earlier when the customer unknowingly covered the cost. In May 2003

DEAT set up a hotline on plastic bags to assist members of the public who need further information on the regulations and to serve as a central point for reporting on compliance. In June 2003 DEAT met with social partners to review and take stock of the implementation of the plastic bags regulations. One of the concerns that had earlier been raised was that the regulations were going to cause unemployment and increase costs for businesses. However this was settled in a Memorandum of Understanding between DEAT and Organised Labour and Business in which both sides agreed in a cooperative spirit that there was a need to address the environmental issues of dispersed waste, that there was a growing problem of collection and disposal of plastic bags, which particularly impacts on low income areas where refuse collection services are inadequate. However, no programme has been announced yet for effective implementation of the regulations.

2.3.1.8 Other legislative developments

DEAT also referred to several other legislative developments, including:

- a. Development of new regulations under the National Environmental Management: Second Amendment Bill (Chapter 5 of NEMA) is underway. These regulations are aimed at improving the quality of environmental impact assessments. This will replace the 1997 Environmental Impact Regulations that were published under the Environmental Conservation Act.
- b. Amendment of the Regulations to the Marine Living Resources Act was underway by the time of reporting. According to DEAT, the amendment will give increased protection to certain line fish and other species.

2.3.2 DWAF

The Department reported no new legislative developments.

2.3.3 DME

2.3.3.1 *The Minerals and Petroleum Resources Development Act No 28 of 2002*

The Minerals and Petroleum Resources Development Act No 28 of 2002 was passed by the Parliament. Amongst other things, it provides for state sovereignty and custodianship over the country's mineral resources, equitable access to mineral resources and opportunities for historically disadvantaged citizens.

DME reported that the process for developing and reviewing supporting legislation for the Act were in final stages. Among the legislation that was

being worked on were: Regulations in terms of the Minerals and Petroleum Resources Development Act, 2002; Mining Titles Amendment Act; Beneficiation Bill; Broad-based socio-economic development charter under section 100 of the Act; Royalties Bill; Energy Bill (as part of the energy development legal framework).

2.3.4 Gauteng (DACEL)

No provincial legislation was passed in Gauteng, but the Province followed the processes for the on-going national environmental law reform.

2.3.5 Free State (DTEEA)

The Free State Province is in the process of drafting an updated ordinance on Conservation to replace the Conservation Ordinance of 1969 which is now outdated.

Regulations were due to be issued regarding the new hunting seasons and the types of animals to be hunted in 2003.

2.4 Budgetary Measures

This section will assess the appropriateness and reasonableness of the budgetary measures that were reported on by DEAT, DME, DWAF, DACEL and DTEEA towards the realisation of the right to an environment that is not harmful to the health and well-being of the people.

2.4.1 DEAT

The expenditure trends of the department indicate a substantial short-term increase up to R1 500 000 000 in 2003/2004. This increase is mainly attributed to earmarked allocations for poverty relief, acquisition of fisheries patrol vessels, transfers to public entities like South African Tourism for international tourism marketing and the Johannesburg World Summit Company, which hosted the World Summit on Sustainable Development.⁶⁴ However there was a fall in percentage allocation for 2002/2003 as compared to the percentage allocation for the department in 2001/2002. Actual expenditure in 2002/2003 was R1 366 586 000 representing a variance of R34 000 000 from the projected expenditure of R1 400 586 000. The variance according DEAT was a result of commitments on capital expenditure which ran over several financial years and contributed to the department's roll-over request.

Donor funds and poverty relief funds were also instrumental in offsetting DEAT's projected budget. Donors contributed a total of R53 882 000 in 2002/2003 of which R53 683 000 was spent. Donor funds went to priority projects as indicated in the table below. The budget allocation for DEAT's Poverty Relief Programme was increased in 2002/2003 to R 240 000 000 and

R300 000 000 in 2003/2004.⁶⁵ From 1999 to the beginning of 2003, DEAT's Poverty Relief Programme had funded 400 community projects. Payments of up to R236 638 262 had been made by March 2003.⁶⁶ These funds were utilised according to poverty relief criteria. DEAT also relied on reprioritisation where the budget for a given programme or project was inadequate.

DEAT reported that the budgets for different programmes, with differing degrees, catered for the interests of women, female-headed households, child-headed households, and persons living in rural areas, poor communities and persons living in informal settlements. It is difficult to isolate the extent of the vulnerable group targeting because of the manner in which the information was provided in the financial statements of DEAT for 2002/2003. However, according to DEAT some of the programmes which address specific interests of vulnerable groups in their budgeting and implementation include the poverty alleviation programme, working for water, coastcare, working for wetlands, Transfrontier Conservation Areas and the expansion of protected areas.

Although not specifically considered in some programmes, women and historically disadvantaged people are attended to in the procurement of services and goods for the department. On the whole, this is reflected in the Department's procurement statistics, with the exception of procurement between R30 000 and R100 000 in the environmental planning and co-ordination programme and procurement above R100 000 for the Antarctica and Islands programme.

2.4.2 DME

The departmental allocation for 2002/2003 was R100 000 000 representing a percentage increase from the 2001/2002 budgetary allocation of R90 000 000

DME did not provide information on the allocation as a percentage of the total budget as well as the other sources of funding. DME however pointed out that the budget was not sufficient for realising the department's projected benchmarks. Particularly funding for the rehabilitation of derelict and ownerless mines/dumps was limited and thus slowed down the process of rehabilitation.

Funding at DME Regional Offices was also limited to an extent that interfered with the monitoring and inspection of mining sites.

Even with the inadequate budget, the DME recorded under spending of R 23 000 000 that was appropriated to address the ingress of water problems in the Gauteng province. This was due to the stalled appointment of consultants and undertaking of necessary research. According to DME this did not affect the realisation of the right but it had a cost-effect on gold mining companies that had to spend additional resources to address the ingress of water underground.

The under spending was temporary as consultants were eventually appointed and the project was implemented.

2.4.3 DWAF

DWAF budgetary allocation of 2002/2003 was R 3 100 800 000 compared to R 3 081 385 000 in 2001/2002 representing 82% and 87% respectively as a percentage of the allocation against the department's budget. No conditional grants were received. R 289 113 000 was received from donors representing a decline in amount as compared to the 2001/2002 donor contribution of R296 121 000. Actual expenditure was R 3 680 625 000 in 2002/2003 as compared to R 3 477 798 in 2001/2002. The budget was largely adequate. Request for increased budget was made to the Treasury for the development of appropriate information systems for monitoring and auditing the state of water resources with regard to quality, quantity and ecological sustainability. This information was derived from the DWAF response to the 5th protocol. The information as provided does not tally with the DWAF cash flow statement for the same period, particularly with reference to the total allocation for 2002/2003 and 2001/2002).

According to the DWAF Cash Flow Statement⁶⁷, total appropriation for DWAF in 2002/2003 was R3 762 691 000. Actual expenditure was R3 680 625 000 with a variance of R82 066 000 representing an under expenditure. There was an increase in total appropriation for 2002/2003 as compared to the total appropriation for 2001/2002 of R3 518 441 000. Table 2 provides a breakdown of resource allocation across the DWAF's programme areas and Table 3 gives a picture of resource allocation across programmes that relate to environmental protection.

Table 2: DWAF Budgetary allocations towards programmes

	2002/2003		2001/2002	
	<i>Allocation for Programme</i>	<i>Actual expenditure</i>	<i>Allocation for Programme</i>	<i>Actual expenditure</i>
Administration	229 390 000	229 187 000	211 418 000	196 552 000
Water Assessment	86 292 000	81 911 000	84 183 000	83 930 000
Integrated Water Resource Planning	48 291 000	42 412 000	57 360 000	50 234 000
Water Resource Development	248 517 000	247 941 000	363 201 000	359 157 000
Regional Implementation	2 591 008 000	2 534 082 000	2 225 663 000	2 195 585 000
Integrated Water resource management	87 237 000	79 060 000	81 127 000	74 639 000
Water Services	64 808 000	59 063 000	73 366 000	67 500 000
Forestry	403 461 000	403 291 000	422 123 000	434 467 000
Miscellaneous	3 687 000	3 687 000	-	
Total	3 762 691 000	3 680 625 000	3 518 441 000	3 483 055 000

Source: DWAF Appropriation statement for the year ended March 31 2003 in DWAF Annual Report 2002/2003, pp 90 - 107

One of the shortcomings of the information above is that it is inclusive of personnel costs, infrastructure and other miscellaneous costs which do not

relate to direct programme/project outcomes. It is therefore not possible to tell how much of the budget was used for actual programme outputs.

On the whole, actual expenditure on all the programmes/projects was below the appropriated amount. A total variance of R82 066 000 was recorded. The reasons for this ranged from late receipt of invoices from suppliers (in the case of water resource assessment, integrated water resource planning, integrated water resource management and water services); late appointment of consultants (as in the case of water resource assessment) and more revenue collection as compared the projection (as in the case of regional implementation). In the rest of the programmes the variance was discounted as insignificant.

Table 3: Positioning of specific programmes/projects related to the right to environment in view of total budget

<i>Programme / Project</i>	<i>Type of expenditure</i>	<i>Adjusted appropriation</i>	<i>Virement</i>	<i>Revised Appropriation</i>	<i>Actual expenditure</i>	<i>Expenditure as a % of revised allocation</i>
Water Quality Management	Current	18 811 000	(3 085 000)	15 726 000	12 353 000	79%
	Capital	4 400 000		4 400 000	9 194 000	209%
	Subtotal	23 211 000		20 126 000	21 547 000	
Working for Water	Current	11 401 000	(500 000)	10 901 000	11 177 000	103%
	Capital	249 000		249 000	477 000	192%
	Subtotal	11 650 000		11 150 000	11 654 000	
Water Conservation	Current	13 558 000	(1 350 000)	12 208 000	13 218 000	108%
	Capital	77 000		77 000	69 000	90%
	Subtotal	13 635 000		12 285 000	13 287 000	
Forestry Policy development	Current	9 735 000	-	9 735 000	13 073 000	134%
	Capital	232 000		232 000	133 000	57%
	Subtotal	9 967 000		9 967 000	13 206 000	
Indigenous Forestry Management	Current	59 990 000	3 495 000	63 485 000	56 861 000	90%
	Capital	3 225 000		3 225 000	1 903 000	50%
	Subtotal	63 215 000		66 710 000	58 764 000	
Community Forestry	Current	75 192 000	805 000	75 997 000	90 254 000	119%
	Capital	675 000		675 000	723 000	107%
	Subtotal	75 867 000		76 672 000	90 977 000	
Forestry Regulations	Current	4 588 000	-	4 588 000	2 865 000	62%
	Capital	416 000		416 000	130 000	31%
	Subtotal	5 004 000		5 004 000	2 995 000	
Grand Total		202 549 000		201 914 000	212 430 000	

Source: Extracted from the DWA Appropriation Statement for the year ended March 2003, DWA Annual Report 2003

The table above gives information on how resources were distributed in the various programme and project areas that have a link to the realisation of the right to an environment that is healthy and good for people's well being as well as the right to have the environment protected. It is worth noting here that

DWAF was unable to provide the information in the form required, which would provide the basis for an informed analysis of the budgetary allocation per programme /project.

The Working for Water programme is supposedly one of DWAF's progressive initiatives, which recorded commendable progress in 2002/2003. Working for Water used up the full budget of R416 000 000; it employed a total of 21,754 people, 55% of which were women, 24% were youth and 1% disabled persons. A total of 266,497 hectares of invasive alien plants were cleared and 523,618 hectares of invasive alien plants followed up. Table 4 below shows the progress with the budgetary allocations for the programme.

Table 4: Working for Water funding Sources

<i>Funding Sources</i>	<i>Amount received in 2002/2003</i>	<i>Amount received in 2001/2002</i>
Poverty Relief	330 000 000	290 000 000
Department of Water Affairs and Forestry	83 650 000	81 510 000
Local Authorities	50 000	400 000
Foreign/donors	2 300 000	-
Rand Water	-	500 000
Private Sector	-	300 000
Roll over	-	24 000
Grant total	416 000 000	372 734 000

2.4.4 Gauteng

DACEL allocation for 2002/2003 was R226 536 000 plus R60 000 000 that was received from conditional grants. No funds were received from donors. Actual expenditure was R208 343 000. In comparison with the 2001/2002 allocation of R149 618 000 there was an increase. Under-expenditure was experienced in 2002/2003 to the tune of R18 193 000. When analysed from the point of each of the programme areas of the department the reasons for the variance according to an explanation by DACEL were: - in the case of management and administration, under expenditure was due to the effect of resolution 7 which left several posts in the department vacant. Together with this was the fact that a planned and budgeted reorganisation of the department did not take place as projected. In the conservation programme savings here were a result of the delayed purchase of land and maintenance of some buildings that did not take place. Savings under the environment programme were in the area of employee compensation for the vacant positions as well as transfer payments due to the moving of staff to do work at the World Summit on Sustainable development.

DACEL reported that the noted under-spending did not have any impact on the realisation of the right in the province since planned objectives were substantially realised. In response to the problem of under-spending DACEL plans to address the issue of allocative inefficiencies in future budgets. In

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addition improvements will be made to DACEL's expenditure and tracking systems to ensure that they are implemented on an on-going basis.

The table below provides a summary of the allocations towards DACEL's environment protection mandate.

Table 5: Budgetary Allocation towards programmes and projects

<i>Year</i>	<i>Allocation for programme / project</i>	<i>Allocation as a % of the department's budget</i>	<i>Actual Expenditure</i>
Environment 2001/2002	16 630 000	11%	13 522 000
Conservation 2001/2002	52 580 000	35%	29 927 000
Environment 2002/2003	40 932 000	18%	34 776 000
Conservation 2002/2003	56 324 000	24%	49 731 000

Source: DACEL Response to 5th Environmental Rights protocol

2.4.5 Free State -Department of Tourism, Environmental and Economic Affairs (DTEEA)

The DTEEA budget information could not be used in the form that it was provided and attempts to have workable information re-submitted were not successful.

3 CHALLENGES

This section focuses on the factors that were hindrances to the realisation of the right to an environment that is not harmful to the health and well being of people and the protection of the environment. The factors listed below are from the point of view of institutions, which have the obligations to ensure realisation of the right.

3.1 Inadequate information reporting and monitoring systems:

There is no coherent reporting framework that would enable implementing and responsible organs to respond to their stated environmental management and protection duties as contained in legal and policy documents. One of the reasons for this gap is the absence of generally accepted indicators that apply to the mandates of the various departments and institutions involved.

In response to the section of the protocol requesting for information on "general indicators", DEAT pointed out that the information requested could not be provided in the form prescribed because it was not being collected in that format and that there were no methodologies at the time for the indicators given. DEAT reported that monitoring and enforcing compliance with environmental legislation within the sector was still very weak. For DEAT the

problem was partly due to the absence of environmental indicators which were being worked on at the time of reporting.

In the meantime, the department uses the reporting mechanisms of its various components to monitor. In the case of vulnerable groups, monitoring is done under DEAT's various projects. So far statistics are collected under the Poverty Relief programme and on a small scale under the environmental indicators initiative. It is hoped that the Environmental Indicators Initiative will provide a consistent and comprehensive means through which the provinces and local authorities can track implementation of the right to environment in their areas of operation, particularly with a view to ensuring a clean and healthy environment and sustainable management of South Africa's natural resources.

In the same way, DWAF, could not provide the number of people affected by water pollution because pollution alone does not prevent people from accessing safe water.⁶⁸ DACEL indicated that information with respect to the indicators as requested by the Commission was not available because the department was in the process of implementing a project to incrementally monitor strategic indicators with the establishment of the Management Information Systems Branch. DME could also not provide information on indicators but reported that environmental and sustainable development indicators were being developed and would measure DME's performance regarding the regulations of the mining industry and compliance by the industry with legislative requirements. As a result DME faced difficulties with regard to the conduct of regional inspections, which should be supported by a GIS (Geographical Information Systems). Ordinarily DME uses the following mechanisms for monitoring and assessing the right within the department's mandate: - the internal administration control system under the Mining Act (this is currently being replaced by a GIS based National Mining Promotion System); establishment of the compliance auditing function which enables the DME head office to audit compliance within the regional office; the Rehabilitation Priority Index Database is used for monitoring the rehabilitation of derelict and ownerless asbestos mines and dumps. These provided the necessary stopgaps under the circumstances.

In the meantime, investigations are being done on the prospects and viability of having a harmonised reporting system for environmental protection and management. Through a consultative process coordinated by DWAF a set of environmental indicators were developed while work on developing an environmental sustainability index and local level environmental indicators was on going.

3.2 Making cooperative governance work

Responsibility for realising the right to a clean and healthy environment as well as environmental management is an area of concurrent national and provincial competence. In addition to this it draws on the mandate of several spheres of

government and organs of the state. Specifically a number of national departments are recorded in Schedule 1 and 2 of the NEMA as exercising functions, which may affect the environment, or functions which involve management of the environment.⁶⁹ However, it has not been that easy to actually attain the envisaged cooperative governance in the management and protection of the environment rights. This was a major issue of concern with regard to implementing policies and legislations across intersectoral departmental and governmental mandates. A case in point was the working for water programme, which although it met its performance targets for the year was constrained because of the failure by DEAT and DWAF to coordinate the use of their various mandates. DWAF also reported that although it was supposed to oversee the devolution of State natural forests to other agencies, this was not done due to the lack of clarity about the national and provincial powers and functions in that respect.

Another area that is subsumed in cooperative governance relates to application of legislation. A number of cases have been litigated which raise issues of conflict of laws relating to exercise of mandates of one or more departments. In the case of *South African Shore Angling Association and Another v Minister of Environmental Affairs and Tourism*⁷⁰ the applicants brought an urgent application seeking an order to declare the regulations that made a general prohibition on the recreational use of vehicles in coastal zone null and void because they were *ultra vires* and unconstitutional. The regulations had been issued by the Minister of Environmental Affairs and Tourism under s.44 of NEMA with the purpose of protecting the environment of the coastal zones, human safety and enjoyment of coastal recreation. The applicants contended that in passing the regulations the Minister of Environmental Affairs and Tourism had usurped the powers of the Minister of Transport to make regulations concerning the use of the seashore under the Sea-shore Act of 1935. The court however found that even though NEMA and the Sea-shore Act authorised different ministers in respect of the same subject matter in the same area, this did not render the regulations made under either of the laws invalid. The court stated that “conservation issues affect many aspects of human activity. It is therefore to be expected that legislation dealing with the environment will overlap even conflict with a number of other Acts of Parliament”.⁷¹

Another case⁷² in point related to the application of Problem Animals Control Ordinance 27 of 1957 (Cape) and the Nature and Environmental Conservation Ordinance 19 of 1974 on one hand and the NEMA on the other hand. The Appellants in this case had been convicted for contravening the provisions of the 1957 ordinance by wrongfully and intentionally transporting three caracals without a valid permit or necessary authority as well as keeping the caracals which are classified as problem animals under the 1974 Ordinance. On appeal the appellants contended that they had a right under s. 24 of the Constitution to care for wildlife and that this right superseded the permit restrictions under the Ordinances. The court held that the provisions were not unconstitutional “but

simply require that people who transport or keep in captivity certain specified species of animals and birds acquire certificate or permit or license to do so”.⁷³

In the CEC Alignment Report, a conflict of interpretation of provisions was noted with regard to the sections 109 and 110 of the National Water Act of 1998 on one hand and the Environment Conservation Act of 1989 and the NEMA on the other hand.⁷⁴ The National Water Act requires the Minister of DWAF in his role of protection, use, development, conservation, management and control of the nations water resources to prepare an EIA that complies with the Environment Conservation Act. Under the NWA the Minister is exempted from this requirement where the waterworks are constructed in an emergency situation or they are considered to be minor. ECA and NEMA do not have provisions that exclude the preparation of an EIA and this could be a source of conflict as to which law is superior and can easily cause a stand-off between DEAT and DWAF to the detriment of the environment and the health of the people.

Several policy and strategic measures attempted to address the gap of cooperative governance but it remains to be seen how these will be implemented in actual terms. At the head of the measures was the function of the Committee on Environmental Coordination. The CEC undertook to provide a framework for identifying and clarifying the roles, responsibilities, structures and mechanisms for facilitating environmental cooperative governance. CEC identified gaps with regard to various functional environmental impacting and management areas namely: local economic development, energy provision, delivery of law income housing, land use planning, transport infrastructure development, provision of bulk-water infrastructure and water services, general waste management, biodiversity management, general and hazardous waste management, allocation of mining rights and water resource protection and conservation. Specific recommendations were made under each of the functional areas upon which responsible departments are required to report in their annual compliance reports. In the absence of information on compliance reports, it is not possible to comment on the effectiveness of this route for promoting cooperative governance among all the structures of environmental protection and management.

The National Department of Land Affairs (DLA) 2002 in its Annual Consolidated Environmental Implementation and Management Report⁷⁵ reported on the progress made with the cooperative governance structures in the land reform programme. In respect of the objective of assessing the land reform project for sustainability and environmental impact among other factors, DLA established district level project committees which were already functional, however there were challenges integrating these structure with municipal Integrated Development Plans (IDP). DLA also set up Provincial Grants Approval Committees in all provinces and the land reform project was approved for implementation at the provincial level, but problems were faced in trying to align and integrate the land reform programme plans with

provincial departments' plans and budgets. In relation to the vesting/disposal of state/public land for development to provincial departments for development, DLA reported that although Provincial Land Disposal Committees have been in existence since 1997, the custodian departments at the provincial level lack the capacity to administer the vast land parcels to be vested in them.

In the meantime creative measures are being established to address urgent environmental matters as the bigger implementation picture is being streamlined. Examples include the Rapid Response Unit that was established in the DEAT as well as Pollution Case studies.

3.3 Inadequate human resource and financial capacity:

The policy and legal framework for environmental protection and management is almost finalised. However, there is a looming implementation challenge. One of the concerns here relates to the inadequate human resource and financial capacity⁷⁶ to implement the vast policy and legal commitments made. It was noted that the increasing responsibilities in the management of the environmental and natural resource sectors was outweighing the departments' capacity to effectively contribute to economic growth and development which is their other area of responsibility. Monitoring and enforcing compliance with legislation are some of those areas that have suffered weaknesses. According to DACEL the indicators upon which the departments are required to report are numerous and national, provincial and local systems for the frequent updating and capturing of data are expensive and resource intensive. This results in a break of connection between the measures taken and the actual realisation of the right by the rights holders. This disconnect is to some extent related to the weak institutional relationships/partnerships noted above, which do not provide a conducive framework in which to progressively operate.

Funding and human resource constraints underlined most of the challenges faced by DLA in implementing its EIP/EMP targets.

3.4 Integrating environmental management into the planning process

Section 21 (1) (a) of the Local Government Municipal Systems Act, 2000 requires municipal planning to be developmentally oriented and carried out in a sustainable manner in line with section 152 of the Constitution. Under the Act local authorities are required to come up with Integrated Development Plans, which should incorporate environmental management considerations.

Integrating biodiversity and environmental management in the planning and delivery of services at all levels of governance remained a challenge. Of particular concern was the need to strengthen the capacity of local governments to integrate environmental issues in their planning processes. This is especially important in the face of the segregated duties between national, provincial and local authorities with respect to legislation and implementation. Urgent

attention is required at the implementation level, which makes it an urgent prerogative that local governments are adequately capacitated to plan for environmental management and conservation.

DEAT initiated several programmes to address this gap. Guideline documents were prepared for local authorities on how to strengthen environmental sustainability within the Integrated Development Planning process. Documents were also prepared on waste collection, waste recycling, and environmental impact assessments. A local authorities state of the environment initiative was introduced to complement the existing provincial initiative and a tool kit on environmental matters was developed for local authorities.

3.5 Implementing the Polluter Pays Principle

The DME faced difficulties with the implementation of the “Polluter pays” principle. The principle was introduced under the White Paper for Minerals and Mining Policy in South Africa as a way of shifting liability for costs arising from the mining activities of a mining entrepreneur on the particular mining company. Difficulties with the principle related to the determination of the quantum of financial provision to be provided by mining companies. It was also hard to monitor the adequacy of the financial provision annually in relation to the impact of damage caused to the environment. Moreover it was also not easy to quantify the economic and social benefits of the policies and projects adopted by the mining companies as part of their compliance with the polluter pays principle.

In a bid to address this problem DME was working on guidelines for the determination of the quantum of financial provision. At the regional level a financial provision strategy was implemented to strengthen management and control and a compliance audit system was also implemented.

The ‘polluter pays principle’ underlies the entire environmental management regime of South Africa. It is therefore likely that the problem with applying the principle will pervade other areas of environmental management such as air pollution, water pollution and land as well as the entire waste management system. DWAF was working on the Waste Discharge Charge System. It therefore calls for the adoption of a national standard/position on the systems or instruments for applying the principle across the different areas.⁷⁷

3.6 Implementing the outcomes of the WSSD

The WSSD presented a host of prospects for integrating social development, economic prosperity and environmental protection. It illuminated the central role of the environment as a contributor to sustainable social and economic development. But with this opportunity came a host of responsibilities upon the different spheres of government to turn the aspirations of WSSD into reality. There is a challenge of strengthening the institutional framework for the

integrated delivery of sustainable development as part of the national implementation of the outcomes of the World Summit on Sustainable Development (WSSD). In response to this challenge, DEAT has established a directorate to set up and coordinate the monitoring mechanism for implementing the WSSD outcomes as well as facilitate, monitor and strengthen partnerships for implementing the Johannesburg Programme of Implementation. The Directorate will also facilitate the engagement mechanism for maximising stakeholder participation.

3.7 Lengthy EIA Processes

Development projects will always impact on the environment in one-way or the other and EIAs have become the most accepted method for mitigating the negative impact of development projects on the environment. The EIA process is supposed to provide an equilibrium between the interests of development and the environment. However the EIA process has tended to be unduly tilted to either one of these objectives to the detriment of the other. DEAT uses the Environmental Impact Assessment process to identify probable negative impacts of development plans on the environment in order to recommend or direct appropriate mitigating measures. Shortcomings were realised with the EIA process in so far as it some times tended to be time-consuming and thus it stood the danger of being looked at as a hindrance to economic development. It was therefore necessary that DEAT removes the limiting factors of the EIA process in order to ensure that environmental protection and management does not become a burden to economic development, but that the three work in tandem for the common good.

It is anticipated that this will be addressed through the Second Amendment Bill to NEMA relating to Chapter 5 which will facilitate the fast-tracking of EIA applications. In addition, following an investigation that was commissioned by DEAT to compare available options for development and implementation of an Environmental Decision Support System (EDSS) for environmental impact management, an appropriate system was selected and will be developed in 2003/2004. According to DEAT, this system will assist in fast tracking EIA applications and facilitate improved decision-making.

3.8 Maladministration and corruption

Maladministration and corruption are still vices to contend with in public offices and it definitely has an impact on the realisation of the right to environmental rights. DWAF reported that the Implementation Manager of the Working for Water Programme was charged with misconduct for violating the Disciplinary Code and Procedure for Public Service, leading to the Manager's resignation before the completion of the disciplinary process. This interfered with the progress of the programme. DEAT reported failure by some officials to enforce compliance with laws and regulations. This was witnessed following complaints lodged against inspectors of the Marine and Coastal Management

Branch for facilitating the over-harvesting of marine resources, which they were supposed to control. DEAT followed up the matter; and the officials were prosecuted, found guilty and dismissed by the department. Several other tip-offs were recorded by DEAT on allegations of maladministration and corruption through its reporting hotline. Most of them related to the allocation of fishing quotas. DEAT investigated them as well.

Towards putting its house in order, DEAT used various measures, some of which were part of the administrative set up. These included the internal audit unit which reports to the Director-General and the Audit Committee; the Internal Control Component;⁷⁸ the Labour Relations Department;⁷⁹ the Tip-Offs Reporting Hotline Facility;⁸⁰ DEAT's Human Resource Management Directorate also provides an on-going training programme for orientation of staff, which includes a module on the Public Service Code of Conduct

The DEAT's response to the maladministration/corruption issues above is commended for being comprehensive, operational, effective and with measurable efficiency. It has a regular reporting component which keeps top management informed. It also involves reporting to other departments like the National Treasury, Auditor General, the Department of Public Service and Administration (where required by law or regulation). In addition the Tip Off facility has attracted many users resulting into continuous anonymous complaints being made, leading to investigations and appropriate corrective measures.

Poor administrative control on the royalties that were made by mining companies as well as illegal mining were cited as some of the hindrances to the progressive realisation of the environmental rights in the case of DME. The department's Audit Committee revealed these concerns. This is a legitimate concern given the likelihood of flouting environmental management regulations for the self-interest of officials concerned or the danger of non-compliant companies wanting to abuse or manipulate the enforcement system for their business interests.

Attempts to address this problem were carried out in line with the on-going Fraud Prevention Plan (2001) of the DME. At the time of reporting, DME had finalised investigations into the allegations and necessary action would follow.

4 CRITIQUE OF THE MEASURES INSTITUTED

A lot has been registered in the preceding pages regarding what has been done towards realising the right to environment. The legislations, policies and programmes discussed above do not by themselves deliver the right in question. This section serves to assess the adequacy of the instituted measures as measured against the constitutional standards and international standards and the interpretations that have been given of the same by South African courts of law, particularly the constitutional court. Specific guidance with regard to

realising the right to environment will be drawn from sections 24 and 7(2) of the Constitution and the interpretation of closely similar rights that has been given in the *Grootboom Case*⁸¹ and *Treatment Action Campaign Case*⁸²

The analysis in this section will be structured so as to take into regard the specific concerns identified in s. 24(2) (i), (ii), and (iii). Under the prevention of pollution, attention will be given to measures towards, air quality management, waste management and water resource management (with particular focus on the prevention of water pollution and conservation). In respect to preventing ecological degradation and promoting conservation focus will be placed on biodiversity conservation, forest conservation, marine and coastal management. And finally in respect of securing ecologically sustainable development and use of natural resources focus will be on energy development and use, management of the fishing industry, water resource management and mining and management of South Africa's mineral resources.

Among the crosscutting issues will be an assessment of how the measures deliver actual realisation of the right for those whose need is most urgent - the vulnerable; the effectiveness of measures for monitoring the realisation of the right for all people; issues of co-operative governance; compliance and enforcement; and budgetary allocation for environmental protection and management.

4.1 Cooperative Governance

Co-operative governance remained a problem as indicated in the challenges. One example is drawn from the response of the Free State Province to a question about the number and/or percentage of communities affected by toxic waste imported in the country, it stated that: “National DEAT normally keeps this information and is not usually communicated to provinces”.

It is also clear that many of the functions for environmental management have not devolved to the provincial and local levels, which makes it difficult to actually implement nationally set targets downwards.

Although section 152 (1) of the Constitution defines the role of Local governments with regard to the environment to include both an impacting and managing function there is currently reluctance on the part of local authorities to take up responsibilities apart from those that are specifically listed in schedules 4 and 5 of the Constitution. As a result there is an across-the-board non-prioritisation of environmental protection and management issues in the plans and budgets of local authorities. Local authorities are reluctant to take on non-funded responsibilities and it is difficult to pin them down on this.

IDPs are the core-planning instrument for local authorities as stipulated in the Municipal Systems Act, 2000 and they are targeted as conduits for integrating environmental matters into the local government planning systems. The

priorities of local governments under the provincial EIPs should therefore be drawn from municipal IDPs. In the first EIP/EMP cycle this was not possible since municipalities did not have IDPs at the time. The provincial reports were therefore inadequate as to the compliance standards for local authorities. The CEC Alignment Report recommended that in order to address this gap, provinces should be required to report on the compliance by municipalities with provincial EIPs in their annual progress reports.

4.2 Monitoring Realisation of the Right - Compliance Enforcement and Protection Issues

4.2.1 Inadequate Environmental Indicators and Measurement Systems

Monitoring the actual realisation of the right by responsible government organs and agencies still remains an overwhelming task. The crux of the matter, as noted by DWAF, is the absence of systems for monitoring some of the indicators and clear allocation of responsibilities. Some departments do not have departmental indicators; others are archaic and need overhauling, while others are specifically made for monitoring performance indicators for financial purposes that they do not tell anything about the progressive realisation of the right to environment. In the provinces, the scenario was closely similar. DACEL (Gauteng) could not provide the information on indicators and could hardly assess the outcome of the measures that it had taken because the departmental indicator systems were “presently being reviewed based on the National State of Environment Indicators and other inputs”.⁸³ Free State Province attempted to provide information on the indicators but they are generalised observations or conclusions that are not empirically verifiable or even up-to-date.⁸⁴

The problem as noted by Free State is that there is inadequate human resource capacity with only one official in the Environmental section responsible for pollution control and waste management. It is this official who singly undertakes inspections on municipal compliance with waste management legislation. Apart from that, the other methods of monitoring which are equally inadequate are – receiving and responding to complaints reported; and issuance of directives which unfortunately suffer from non-enforcement. The Environmental Affairs section of DTEEA does not have an enforcement section, only the Conservation Section has law enforcement which seems to be overwhelmed by enforcement on conservation issues.

There is a gap between the policies, programmes and legislation that were developed and the actual realisation of the right as a result of the lack of a comprehensive monitoring and evaluation system which focuses on the impact of measures on the health and well-being of the people and on protection of the environment. The problem relates to inadequate capacity and preparedness on the part of the national and provincial departments.

Fulfilment of the State's obligations is not only about passing laws, policies and programmes. According to the *Grootboom Case*, there is an obligation on the State to put in place a national framework for realising the right to environment which enables the obligations imposed to be met. In other words this plan must be workable. It must be able to deliver the right to everyone. It is impossible for the state to ensure that everyone enjoys the right without having baseline information upon which to build and collect data on a continuous basis since circumstances will always change according to different stimuli.

The Economic Social and Cultural Rights Committee of the UN noted in General Comment No. 3 that even where resources are not enough, the State should at least be able to monitor how the right in question is being realised or not being realised in order to facilitate planning. A bigger burden of this obligation falls on the national sphere of government. According to the *Grootboom case* the national sphere has the overarching responsibility to ensure that the measures taken are adequate to meet the state's constitutional obligation.

There are signals that indicators are being worked out. DEAT reported that indicators were developed and posted on an accessible web-site for all users. There is need to prioritise the institutionalisation of the indicators so that they are not for occasional use, but form part of the continual monitoring of the realisation of the right to environment in each of the spheres of government and the different departments. Indicators are important for government to determine the progress being made over time. Although DEAT reported that the indicators were developed through a broad-based consultative process, it is not clear whether all concerned departments have accepted the indicators and whether they are actually applicable to the specific mandates of each of the departments. This could be the reason for the likely problems with sampling and collecting usable data and the proposals to develop mining industry specific indicators.

4.2.2 Enforcement of environmental laws and regulations

Another area that is importantly linked to monitoring is the enforcement of environmental regulations and laws. This is an area of weakness as noted by DEAT. In its Alignment Report (2002) the CEC noted that a large percentage of landfill sites are operating illegally due to the limited cooperation and coordination in implementing the authorisation system. The role of permitting waste disposal sites under ECA is for DWAF. The provincial authorities have the responsibilities for monitoring compliance with landfill sites to the conditions of authorisation. The local authorities have the role of establishing waste disposal sites and complying with national regulations on waste disposal management. There is obvious laxity in the regulatory system as attested to by reported scenarios. The fact that a defective and old incinerator the (Ixopo incinerator) can continue being used without a permit and in the face of objections by DEAT is illustrative.

The sloppiness in the regulatory system has been the main reason given by environmental activists in their objections to the use of incinerators. In 2003 the Environment Network Justice Forum submitted objections to an application for government to approve a state-of-the-art incinerator at the Swartklip Products site between Mitchell's Plain and Khayelitsha. According to the Forum, the incinerators emitted some of the most health-damaging substances including dioxins and heavy metals like mercury. Their objection was based on the fact that "South African regulatory system was inadequate to properly monitor and control emissions from the incinerators and the fact that the technology could not guarantee that emissions would not constitute unreasonable risk to public health".⁸⁵

In the case of the Pelt Products semi-processing tannery⁸⁶ which produced gaseous emissions including ammonia and hydrogen sulphide gives credence to the existence of a lax regulatory system. Pelt Products started business without a permit and yet it used hydrogen sulphide in its industrial processes which required a registration certificate under the Atmospheric Pollution Prevention Act of 1965. On intervention by a lobby group the chief officer in terms of APPA took up the issue and required Pelt Products to apply for a permit which had certain conditions. Pelt Products was also ordered to appoint a consultant who would assess its operations and draw up an abatement plan. The consultant proposed a treatment process which required Pelt Products to carry out some modifications. In the meantime a provisional certificate for 3 months was issued in 1998 within which Pelt Products would effect the changes. At the end of 3 months the conditions of the provisional certificate had not been met and the certificate continued to be extended several times until a case was filed by Hichange Investments in 2001. It took the intervention of the court to order DEAT to force Pelt Investments to undertake an EIA and to take steps to prevent further pollution.⁸⁷

There has been an attempt to fill the gap in the regulatory system through the use of voluntary/ self-regulation by industries and the private sector. However, this cannot replace the role of the State in putting up an effective regulatory system. Most industries in South Africa follow the ISO 14001⁸⁸ and other international standards because of their incentives for access to the world market. An example of good practice by industrial establishments was the "Hazardous Waste Management and Medical Surveillance programme" of the Council for Scientific and Industrial Research (CSIR) under which policies and procedures were instituted for the proper handling and disposal of hazardous waste. The programme was carried out in line with the ISO 14001 and the OHSAS 18001 and aimed at safeguarding pregnant women from the effects of x-rays and workers who are exposed to toxic and hazardous substances.

Management had to comply with regulations and thus realise the right to environment as a result of the monitoring and assessment requirements for the ISO 14001 and OHSAS certification. As a result CSIR correctly disposed of 1517kg of hazardous waste and 67 438kg of general waste.⁸⁹ The advantage

with this international certification system is that it covers compliance with national legislation as one of the components for assessment. This international certification system can be effective for industries that are targeting the international market. They have more to gain by being accredited. For industries that have a local focus, the system does not provide much incentive. It therefore means that these industry-led self-regulation mechanisms can only have limited environmental impact.

4.3 Waste Management and Pollution Control

The White Paper on Integrated Pollution and Waste Management for South Africa (IP&WM)⁹⁰ and the National Waste Management Strategy (NWMS)⁹¹ form the core instruments for waste management and pollution control in South Africa.⁹² All measures adopted by the different national, provincial and local spheres of government during 2002/2003 were supposedly inspired and carried out in line with the goals of these documents.

It is however worth noting at the onset that what was reported upon by the various departments fell far short of what was expected of them in line with the strategic objectives of the Policy and Strategy for pollution and waste management. An analysis of how the measures taken fall short of reasonable standards follows below.

4.3.1 Assessment of the allocation of responsibilities for pollution control and management

The IP&WM policy lists water pollution, air pollution and land pollution as the key issues with regard to pollution management. In addition, waste was identified as a major source of pollution.⁹³

At the national level DEAT has overall responsibility for integrated pollution and waste management in South Africa. DWAF is responsible for water quantity and quality aspects of pollution and waste management (in terms of the National Water Act) and also holds responsibility for permitting landfill sites pursuant to section 20 of the Environment Conservation Act. DME in consultation with DEAT has the responsibility for regulating mining, radioactive and coal combustion waste and doing general regulation of the mining and nuclear industries. The department of Health in consultation with DEAT has the mandate with regard to regulating and guiding medical waste and treatment facilities. The Department of Agriculture takes charge of all agriculture waste.

The provincial and local government's are expected to work within the national framework to ensure that national strategies for waste and pollution management are implemented. Specifically the provincial government is responsible for monitoring and enforcing pollution and waste management issues within their provinces while municipalities take responsibility for providing waste management services and managing waste disposal facilities.

The IP &WM as seen above anticipates a well-coordinated system in which every sphere will handle its responsibilities in step to address the problem of pollution and waste as the major source of pollution. However, it is true that 3 - 4 years down the road, there are major issues that have hindered progress with integrated pollution and waste management. There is still no clear understanding among the different mandate holders of what they are required to do; as a result there is an overlap in implementation. Waste management seems not to be prioritised by most of the responsible organs this reflect on its financing and implementation progress in most of the provinces and municipalities. This fact came true during the Cleanest Town Campaign. Whereas the winning town (Port Elizabeth) maintained that waste management was weighted like a basic service and thus took innovative steps to provide the needed services, other towns did not prioritise it and this resulted in their dismal performances during the competitions.

There is also lack of infrastructure and capacity to implement existing laws and policies. This could be a result again of the failure to prioritise pollution prevention and waste management but it is largely due to underperformance with regard to goal 1 of the strategy - "to create, develop, implement, maintain and continuously improve an effective, adequately resourced and harmonised institutional framework and integrated legislative system and to build institutional capacity". The law reform process which would culminate in integrating the legislative framework has been slow and the benefit that will accrue from it can only be anticipated. Little has been done to consolidate the administrative system for authorisation and assessment reporting and capacity institutions to fulfil the tasks expected of them.

4.3.2 Pollution Prevention, Waste Minimisation, Impact Management and Remediation

4.3.2.1 Air Quality Management

South Africa's approach to meeting its obligations in terms of the Kyoto Protocol to the United Nations Framework Convention on Climate Change⁹⁴ illustrates the importance of taking environmental indicators and risks seriously. South Africa acceded to the protocol on 31 July 2002 and is required to present monitoring information on the following: the abatement of increases in greenhouse gas emissions, enhancement of sinks (e.g. forests), removals of greenhouse gases by sinks, capacity building and adaptation measures. Greenhouse gases are defined as:

April 2002 – March 2003

- Carbon dioxide
- Methane
- Nitrous oxide
- Hydrofluorocarbons
- Perfluorocarbons
- Sulphur hexafluoride

The South African Weather Service is a contributing member of the Global Atmosphere Watch (GAW). The concentrations of carbon dioxide, methane, nitrous oxide, surface ozone, and carbon monoxide are measured at 30m above the ground at Cape Point on a daily basis and submitted to the World Data Centre for Greenhouse Gases (WDCGG) based in Japan. Owing to its location, the Cape Point monitoring station may give a better indication of regional / global greenhouse gas concentrations than the conditions that prevail in many inland areas of South Africa. Some of the patterns reported on by the South African Weather Service correspond closely to patterns prevailing at a global and regional level.

For example, in the case of methane, the rate of growth in gas concentrations increased in the northern and southern hemispheres from 1983-1991, then grew less rapidly from 1992-1999 and then decreased to almost zero growth from 2000 onwards.⁹⁵ Concentrations of carbon dioxide and nitrous oxide at Cape Point showed steady increases from 1993/4 to December 2002. The trend in nitrous oxide concentration at Cape Point matches closely with the data from Cape Grim in Australia. The average concentration of surface ozone (which is defined as a greenhouse gas when it is present in the lower atmosphere) showed a slight increase from 1992 to 2002. There was no statistically significant trend in carbon monoxide concentrations at Cape Point. Analysts of the data from Cape Point conclude that continued emissions of greenhouse gases are a cause for concern.⁹⁶

As it is now, the legislative framework for air quality management is not up to standard. The Air Pollution Prevention Act of 1965 is the substantial law governing air quality management but its shortcomings go without saying. The Air Quality Bill of 2000 is intended to address these shortcomings. In the meantime however, any intervention should be inspired and conducted under the ambit of the IP&WM. The strategic objective for air pollution under the IP&WM requires that action be taken to “*manage, prevent, reduce and control* all identified forms of air pollution from various sources and to maintain human health and ecological functions, as they relate to air pollution at acceptable levels.”⁹⁷

Some of the major sources that are compromising the quality of air are industrial pollution, waste, use of wood and coal fuels for lighting and heating, among others. South Africa does not have ambient air quality standards. But

there are guidelines developed by DEAT that identify the maximum allowable concentrations of air pollutants in the air for sulphur dioxide, nitrogen oxides, carbon monoxide, particulate matter, volatile organic compounds, ozone and lead. In the absence of enforceable standards, the quality of air has been subjected to voluntary compliance measures by pollutant sources, particularly industry. The results of this are far below optimal. The scenario is characterised by poor management of pollutant sources, very minimal preventative measures where a leakage happens, deliberate actions involving the burning of chemical wastes as a way of ridding industrial plants of gases that can't be safely managed within, and the absence of appropriate control or remedial measures where there is escape into the air. This has resulted in ill-health as evidenced by respiratory diseases such as asthma, eye irritation, skin rashes, cancer among others.

Problem areas that have been identified in literature (National State of the Environment Reports) include the South Durban Basin as a result of industrial processes, Mpumalanga due to the extent of energy sector activities, particularly ESKOM coal-fired power generation; North West Province indicated that only scanty information was available on the state of air quality and a general observation that atmospheric air quality was not a problem in most of the province except some indications of deterioration in Rustenberg, Brits and Potchefstroom as well as poor air quality in settlements and houses that use coal and wood. the Johannesburg *State of the Environment Report 2003* indicates that “while in many parts of Johannesburg, air quality is within acceptable standards, approximately 20% of the City, particularly dense settlements and lower income townships, experience severe air pollution, with ambient air pollution levels exceeding acceptable guidelines by approximately 20-30% particularly during winter when temperature inversions prevent emissions from dispersing.” The report goes further to state that “levels of particulate matter in certain townships can exceed the World Health Organisation standards by as much as 250% in winter.”

Air quality management is obviously a major problem as indicated by various voluntary and community air monitoring activities.⁹⁸ The effects of air pollution on human and ecological organism are well known, including harm to health and environmental degradation. However, government action at the moment is not deliberate and comprehensive. This is true for legislation, policy and programmes. There is definitely no legally binding regulatory system, which accounts for the irresponsible actions by industrial actors.

The economic incentives for leaving polluting industrial processes un-bridled are tempting, however there are far-reaching impacts on the sustainable use of natural resources for present and future generations to warrant immediate action as well as the generational health costs of pollution. Government should take up the responsibility to consolidate community and voluntary actions for preventing air pollution in order to realise the right to environment as stipulated in section 24 of the Constitution. The establishment of the air quality

management plan for the South Durban Basin is a step in the right direction but more deliberate and focused action is needed and should be done expeditiously and effectively because the damage to health and the environment may not be easy to remedy over generations.

4.3.2.2 Waste management

All the components of the pollution and waste management system - waste minimisation and recycling, waste collection, waste treatment and waste disposal require the institutionalisation of mechanisms that can facilitate close monitoring and reporting on the operations under them in order to generate useful information for planning and further implementation.

The **Plastic Bag Regulations** were passed and are being implemented towards promotion of waste minimisation and recycling. This is a one-off intervention and does not take care of the host of problems that pertain to waste management as a source of pollution. A comprehensive system is required that will identify and periodically prioritise pollutants that require close prevention and monitoring from the source; promotion of cleaner production technologies and practices for effective handling of waste and pollution at source. Recycling is still a grey area. There is inadequate support and promotion of the same. This is a challenge to the plastic bags regulations and other areas. As the situation is now, there is no concrete plan for promoting recycling although concern has been raised about this as a component of the plastic bag regulations.

A major concern of the Plastic Bag Regulations is the negative impact that it has had on the plastics industry leading to the closure of industries as the volume of production dropped and the concomitant loss of jobs for many.⁹⁹ According to media reports, at least 500 people have lost jobs, and businesses have shut down for example Solidi Engineering and Plastics. Others are under threat of closure as the levy is due to be raised from 2 cents to 6 cents. The scenario raises questions relating to sustainable development requiring a balance between environment, social development and economic development. The government may need to rethink the pollution regulatory system in view of South Africa's position as a developing country under reconstruction from the ills of the past dispensation. The negative effects of the regulations should be carefully addressed since it is likely that more of the poor and historically vulnerable people will have to take the brunt of the plastic bags regulations. This brings to the fore the issue of the safety nets that the regulations have and how the polluter pays principles is being applied here. Probably the regulations should be subjected to a review to find out whether it is meeting its objectives and whether the regulations are being applied in a transparent manner. How are the financial resources collected being reaped back into the environment and those that are most affected by the pollution in question?¹⁰⁰

Waste collection is still very poor. By now there should be guidelines for appropriate waste collection services. Unfortunately these are non-existent. The

IP&WM targeted to provide waste collection services for 300 000 previously unserved households on a pilot programme. This was supposed to be done by local governments in the short term (1999-2002). It is not clear how much of this has been done since poor communities continue to be under serviced with regard to waste collection. Free State province reported that residents of previous homeland areas such as Thaba Nchu and Qwaqwa, totalling 338,233 did not have functional waste refuse removal facilities, while recycling facilities existed only in one town - in Botshabelo Town Centre.

Under waste treatment, a register of all waste treatment facilities should be in place by now, as well as a classification system for them. There should be regulations and standards for all these facilities, revised air emissions standards for waste incineration facilities under which all incineration facilities would be monitored and audited. With regard to medical waste there should be a plan for a system of medical waste treatment plants. It is clear that the measures taken in response to the foregoing fall short of expectation and do not address the need. It is not certain if there is a register of waste treatment facilities and it follows that no monitoring or auditing is being done.

DWAF reported that there were no appropriate system for monitoring the generation and final disposal of general and hazardous waste. This can be proved by the absence of usable information on amounts of waste treated and properly disposed of.

Medical waste is still a problem. It is claimed that most of the health care waste generated in most hospitals is not accounted for, raising the suspicion that this is waste that is illegally dumped or disposed of posing high risk to communities. Most hospitals use of incineration to dispose of waste and within responsible departments, incineration is advanced as the legal and best way (perception) to deal with medical waste. However, the use of incinerators is continuously becoming a health and environmental hazard, in addition to its huge cost-implications in comparison with other technology. Health facilities are currently using colour coding for plastic bags used for collection of waste in the hospitals. Red, yellow, blue and clear plastic bags are used. However, there is poor practice with the segregation of waste on the wards leading to the most of the waste being handled as if it was hazardous and thus automatically subject to incineration.¹⁰¹

Weak regulatory procedure has seen the continued illegal use of defective and un-permitted incinerators, for example the Ixopo incinerator referred to earlier. This incinerator, which is run by a municipal authority continued to be used even when a permit was denied and no action was taken to address that matter.

DWAF is responsible for regulating waste disposal facilities (section 20 ECA waste disposal facilities). In line with that, a register of all waste disposal facilities must be maintained, permitting of all medium and large landfill sites must be done and appropriate monitoring and auditing should follow. This is

partially being done as attested by the poor management of landfill sites. Although permits and directions were given under section 20 of ECA, there is little monitoring and auditing beyond permitting. Therefore it is half-truth for DWAF to maintain that all commercial hazardous waste sites are being controlled via permitting.

It is true that some of these sites are complying more with regulations via the ISO 14001 than as a result of DWAF's regulatory mechanisms. In fact DWAF was unable to provide information on the amount and type of hazardous waste correctly disposed of at permitted landfills because according to them "this is a great deal of very detailed information". This is indicative of the fact that this information is not being collected and collated in a manageable way which makes it had to be retrieved when the need arises. It therefore means that the information available (if at all it exists) cannot serve any useful planning purpose for other sectors and spheres beyond DWAF. DACEL (Gauteng Province) reported very dismal performance under its environment management programme in the area of compliance monitoring for industrial impact management. No performance compliance monitoring was done and no exemption auditing was done for authorised projects.¹⁰²

The developed Minimum Requirements for Waste Disposal Site Operation, auditing and training of Operators and Managers of Waste Management Facilities and the Waste Discharge charge system (Phase 2) are yet to be fully integrated in the implementation processes of DWAF. For now their contribution can only be speculated. DWAF/DME did not provide any information on whether a permitting system exists for mining and coal combustion wastes which pose a major environment and health risk for communities living adjacent to mining establishments. There are inadequate hazardous waste disposal facilities for the country, leading to the improper handling and disposal of waste by various sources.¹⁰³ Households would be a first category of potential improper disposal of hazardous waste because of inadequate awareness. In Free State there is only one hazardous waste site that is operated by Sasol. It should be a cause of concern where the other sources of hazardous waste dispose of their waste.

The Cleanest town Competition was carried out under the NWMS. It was aimed at raising awareness and educating people about waste management practices in line with goal of empowerment and education in IP&WM. Whereas the competition provided a way of rewarding the best, it should have identified the hot spots for poor pollution prevention and waste management practices for boosting in terms of education, capacity and financial contribution.

Waste management measures that were taken suffer almost the same shortcomings as the air pollution measures there is need for more concerted efforts on the part of national, provincial and local governments which prioritises waste management in line with the IP&WM policy and NWMS.

4.3.2.3 Water pollution management

The IP&WM identifies key water pollution issues to include:- salinisation of fresh waters resulting in low crop yields and increased corrosion of water conveyance systems; enrichment of fresh water bodies by nutrients which changes the composition and functioning of natural biota thus affecting the environment; deteriorating microbiological water quality due to human settlement which introduces disease-causing micro organisms into the water environment; sediment and silt migration which affect water and biotic communities; harmful inorganic and organic compounds as a result of industrialisation; diffuse water pollution from a variety of sources including industrial seepage, pit latrines, leaking sewerage pipes, human settlement and the effects of off-shore exploitation of marine resources on the marine environment.¹⁰⁴

The objectives for water pollution management component of IP&WM revolve around managing, preventing, reducing, control and remediating surface and ground water and marine pollution from all identified pollution sources. In addition to ensure that the quality of water needed to maintain ecological functions is protected from the effects of human use of water.

DWAF reported some developments related to these objectives. A second draft of the National Water Quality Management Framework Policy was published – this targets water quality management in line with the water resource management emphasis for conserving, managing and developing South Africa’s water resources in a scientific and environmentally sustainable manner to meet the country’s social and economic needs. Under the framework measures will be taken in 3 related areas: - source-directed, resource directed and remediation directed. This framework is still a work in making and cannot be relied upon now to determine government’s compliance with water pollution needs as they stand now. It is a work worth hailing but which awaits deeper analysing after being formally introduced.

In the same manner the Waste Discharge Charge System as one of the source-directed measures as a way of managing water pollution is just in the pipeline and will need to be given time before yielding benefits in line with the integrated pollution and waste management system.

The Clean Up of the Hammersdale Waste Water Treatment Site was a positive mark for DWAF to the extent that it resulted in the identification of a pollution “hot-spot”. Better results will be attained nationally if this forms part of a foreseeable annual or periodic identification plan under DWAF’s water service/water resource management activities.

The National Water Resources Strategy is also not a finished work, but like the others it is an indication of government’s commitment. All the above initiatives need to be hastened.

The Working for Water programme is one of DWAF's interventions for protecting and preventing loss of water due to alien plant species. It is not clear from the reports how much of the work on preventing and control invasive alien species has focused on areas pre-dominated by vulnerable sections of the population. How much of the land cleared is commercial farmland or communal areas. Considerable work has been done in the South African National Parks. A lot of public resources are injected into the interventions of the programme. It would be advisable that these resources are applied to the most needy and deserving areas. Possible suggestions for criteria here would be to focus on the vulnerable, poor and previously marginalized communities who require safeguarding of their environment as a way of ensuring basic livelihood. This would have to be properly balanced with the need to protect the public commons like the national parks.

This should be in agreement with the Working for Water position that everyone is responsible for clearing invading alien vegetation and in line with the principle that requires the polluter to pay for the environmental impact of his/her activities. Working for Water has entered into industrial partnerships with commercial forestry industry that has committed itself to clearing invading alien plants by 2008. There is also commitment together with the Department of Defence to clear alien plants on defence force land. A partnership with the South African Nurseries Association commits all nurseries not to sell invasive alien plants.

As stated by Working for Water in its 2002/2003 Annual Report, "While the prevention and control of invasive alien plants is a sufficient reason for its existence, what has made it extra-special is the way in which it has tried to embrace Government's reconstruction and development vision." Together with its visions for the environment the project targets the creation of jobs for poor unemployed people. There is scanty information on the wage rates and working conditions to enable an objective assessment of the impact of the jobs on the lives of the people. The Working for Water Annual Report provided some veiled admissions, as drawn from an external evaluation that was conducted that there are some problems affecting the workers including inadequate job descriptions, insufficient performance evaluations, timely payment of contractors and workers and the absence of an enabling environment for the exiting of contractors and workers. A look at the top management of the programme gives the first impression of a bias towards white managers.¹⁰⁵ Other concerns such as ensuring safe and healthy working conditions for field workers remain paramount.

One of the biggest challenges of the programme with regard to environmental management relate to the use of chemicals. The impact of these chemicals is yet to be evaluated. In addition there is a need to align the programme with the IP&WM with regard to waste minimisation, recycling and reuse. This is already being done with in the secondary industries for charcoal, woodchips, crafts, furniture and building materials.

4.3.3 Biodiversity and Conservation

Most of the work on biodiversity and conservation was reasonable in as far it related to tourism and the economic development of the country. Legislative developments are promising and they were handled quite expeditiously. Innovative Programmes were also recorded even while the legislation was still being worked out. This was possibly as a result of international and regional influences, which South Africa managed to take up in good step. These included, the Convention on International Trade in Endangered Species (CITES), the International Union for the Conservation of Nature targets, NEPAD and the Convention on Biodiversity among others. Again this emphasises the fact that tourism (and the related green issues) are prioritised and have attracted a lot of innovation and financial resources because of the economic benefit to the country. Another dimension was also introduced by the WSSD.

A point of concern however, arises with the formation of Transfrontier Parks in the Great Limpopo and Ais-Ais/Richtersveld. This may have required the moving of human barriers to allow the free movement of animals. DEAT did not provide information as to the impact of the agreements on human habitation/settlements in the designated parks and the remedial action that was taken. The right to protect the environment is intended to benefit current and future generations alike. This should be taken into consideration in conservation and biodiversity programmes.

The trend of the national departments was repeated by the provinces – there was a lot of focus on tourism as opposed to other environmental management issues. Most of the programmes reported on by Free State Province were in areas related to tourism and its related economic benefits – fencing nature reserves, establishing community owned rest camps, and creating environmental adventure centre for street children. The last one had a social development component that benefits the vulnerable. In addition the buy-back centres were an important step with regard to brown issues.

4.3.4 Promoting Ecologically Sustainable Development and use of Natural Resources

4.3.4.1 Environmental Impact Assessment

The EIA processes were major areas of success in most of the national and provincial reports, as a way of ensuring that proposed development processes were in line with principles of sustainable development and conservation. Existing EIA regulations were followed. DEAT processed 88 EIA applications out of a total of 134. DEAT estimated the value of the development projects at R43 000 000 000 when completed. The EIA provided the necessary checks and balances through which the right to environment was protected. However in the case of the provinces that reported, the EIA was a limiting factor for fulfilling

their objectives. Free State reported underexpenditure on their budget for capital development because of the lengthy EIA processes that resulted in the need for having funds rolled over. The EIA process should not be a burden to development but the way it was implemented raised such concerns, which would lead to the conclusion that the EIA as a measure for environmental impact monitoring was not reasonable.

The process needs to be streamlined in order to bear fruits from the environment, social development and economic development angles in order to contribute to sustainable development. In most cases EIA takes care of the interests of the most vulnerable in the face of impending development projects. On the other hand it seems to hamper the economic considerations of development projects which feel threatened by the outcome of the process. It is hoped that the remedial measures that have been proposed by DEAT in this regard will maximise both the environmental and economic development benefits for sustainability.

If EIAs are comprehensively and properly done, this will reduce on the cost-implications of monitoring compliance and enforcing regulations under the polluter pays principle. The direction with regard to the conduct of EIAs raises concern here. On the face of it, it appears that the responsible department is lax at the EIA end, leading to the requirement for more government input at the impact management side. Approvals are being made based on incomplete EIAs subjecting the public to enormous costs in terms of health, and depleted resources and public funds.

4.3.4.2 Energy Efficiency and Energy Development

Energy development is very crucial to environmental management and conservation. This can be from either a negative or a positive standpoint. In Mpumalanga¹⁰⁶ the power generation activities of ESKOM were a major reason for poor air quality in the province. ESKOM has 8 out of 11 of its countrywide operational power generation facilities in Mpumalanga most of which are coal-fired. The effect of power generation on the ambient air quality is projected to worsen as electricity distribution or the demand for electricity increases. On the flip side, domestic use of fossil fuels (firewood and coal) was also one of the sources of air pollution in Mpumalanga.

The Directorate of Energy Efficiency (DEE) in DME is not lost to the double dilemma with regard to environmental management. The mission of the Directorate is *“to develop energy efficiency measures and mechanisms which would promote energy saving, reduce negative impact of energy use on the environment, reduce energy cost to the economy, contribute towards sustainable development to achieve national energy policy and development goals”*

As a starting point, the new policies and legislations are sensitive to the requirements to recognise the right to environment as a right, and to put in place structures and mechanisms through which people can enjoy this right in light of the energy sector and avenues for redress where the right has been violated, including the implementation of the polluter pays principle. Where this is not possible the department as an organ of government has taken up the responsibility to take remedial measures in the name of government as the custodian for the environment.

The electrification programme is addressing the needs of the underprivileged and the previously marginalized populations by enabling them to access electricity as a better alternative to wood and coal fuel and as such reducing their exposure to health threatening pollution. Particular attention to the poor and most desperate is being realised through the provision of free basic electricity. As noted above, the increased demand for electricity is bearing down on the environment. This fact is being taken care of as alternative sources of electricity are proposed. The measures for promoting renewable and cleaner energy are therefore timely. Such renewable energy sources will protect communities, particularly poor communities that have been using smoke-heavy means of energy as emission's of carbon dioxide are reduced. The focus on women and children is very commendable since they are the most vulnerable to unsafe domestic energy sources. It remains however to be seen how the measure will deliver the right in practice.

The Energy Efficiency Strategy also contributes to environmental protection as pressure on natural sources of energy reduces.

In spite of the positive measures, energy development in relation to environment management is an area to watch in view of the backstage discussions about possible restructuring of the energy delivery systems, particularly at the local level. This could potentially compromise commitments to energy efficiency and have a negative impact on the effective servicing of the disadvantaged communities. Another issue that is of urgent import relates to provision of sustainable energy to the growing number of informal settlements.

4.3.4.3 Mining and Mineral Development

The measures taken by DME under this component were properly aligned with the government's commitment to sustainable use of natural resources, ensuring an environment that is good for health in respect to the people that live near mining areas through impact management as well as guaranteeing the health and safety of those most close to the danger of environmental hazards. The polluter pays principle is one such measure for ensuring that the negative effects of mining activities on the environment are not left in abeyance but that responsibility is taken up in good time and moreover expeditiously and effectively. Weaknesses were identified in implementation of the measure,

which raises questions about whether the environment and the people are actually benefiting from the enforcement of the principle. There is need for closer and better monitoring of the implementation of this principle and the efforts of DME to remedy the financial provision's gap are to be hailed.

In respect to the rehabilitation of derelict and ownerless mines, the measures taken by DME are comprehensive. DME is on top of the matter with all the information with regard to the mines and dumps that need attention and is also armed with a targeted programme within which all the work should be done. The situation with Asbestos is of urgency and warrants equally urgent attention. This is a very expensive venture but it produces value for money since ignoring the situation until later may be more expensive. Funds should be made available to complete this process in the shortest possible time. DME did not provide much information on the coalmines and not much work was reported there.

Even with inadequate funding, the magnitude of the problem with the coal and gold mines should be catered for in order to provide planning information at all levels of government. Provincial as well as local governments should be informed about interventions within their localities and work in co-operation with DME in that regard. If a province government does not have information on the working of mines in its area then there is a problem since integrated planning cannot progress effectively.

The Excellence in Mining Environmental Award was a good way of promoting the right to environment in the mining sector and more initiatives should be taken to draw the mining industry into centre place in environmental management.

DME did not provide much information on the enforcement of environmental regulations in the mining industry and specific data on individual complaints made and how these are being remedied. The effects of mining activities on the health of the neighbouring communities may not be documented or it may not be easy to allocate in reference to individuals. The effects may show in many generations to come. There is need for more deliberate action to ensure that communities that live in such environments are compensated in terms of effective services to mitigate the probable effects in their lifetime.

4.3.4.4 Marine and Coastal Management

A lot of good initiatives were reported under fisheries at national level with the restructuring of fishing rights allocation which gave priority to formerly segregated communities while at the same time regulating the use of the marine resources for current and future generations. The enforcement mechanism proved effective and was put to use. All the measures were reasonable and contributed significantly to realising the right to environment. In particular the enforcement mechanism brought financial benefits to the economy. These

should be thrown back into protecting the sources and managing the marine resources for posterity.

The policy measures were augmented by the Constitutional Court decision in *Bato Star Fishing (PTY) Ltd v The Minister of Environmental Affairs and Tourism*¹⁰⁷. The applicant was dissatisfied with the allocation of fishing quotas to it and sought a review of the allocation decision. The Constitutional Court upheld the allocation decision and gave deference to the objectives for fishing rights restructuring programme as advanced by the Marine Living Resources Act, 18 of 1998 (relating to the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry) and in view of other national objectives and constitutional values including those anticipated by s.24 of the Constitution.

The Coast Care and Working for the Coast programme are innovative measures for getting the environment in the public lime light while, raising awareness on environmental good practice in dealing with the coast and addressing the economic and social needs of poor coastal communities through job creation and literacy. Putting man-hours to more environmentally sustainable activities has a kickback as time is spent away from environmentally harmful activities like illegal fishing.

5 RECOMMENDATIONS

The new democratic government through its observance of the Constitutional obligations in section 24 of the Bill of Rights has created a development vision for the country which corrects the injustices of the past. Central to the right to a healthy environment is the concept of sustainable development. This means that the government should ensure that development is aimed at improving the quality of life especially those who were previously disadvantaged (vulnerable) groups/communities. These developments should affect the future generation in a positive way.

There has been a significant improvement in terms of laws, strategies and guidelines that have been implemented by government to fulfil the right to a healthy environment. Government should be commended in their efforts of implement these strategies and guidelines, but there is still a lot to be done by provincial government in terms of management and monitoring systems.

There are also few areas that National Departments need to address in their environmental policies and programmes, including:

- Improving Pollution and Waste Control;
- Focusing on affected people and their participation in environmental decision making;

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- Developing an effective system of co-operative governance, possibly through focusing on the facilitation work of provincial Committees for Environmental Co-ordination; and
- Involving NGO's and CBO's in management, monitoring and implementation plans.

This will bring about a more effective effort towards realising the right to a healthy environment and will unload the burden that the government is experiencing presently. Progress in the implementation and monitoring of the environment needs to be a combined effort, which will reflect the inputs of the public and the interests of the affected parties. For example community organisations and NGO's, industries, trade unions, businesses and government have a role to play in the national efforts to achieve sustainable development and sound environmental management. Practically speaking, the Committee for Environmental Co-ordination could also be complemented by the National Environmental Advisory Forum (NEAF) envisaged in the National Environmental Management Act 107 of 1998. This provision to encourage participation should be effected without delay.

Civil society has spearheaded a lot of useful initiatives, sometimes out of frustration for the inadequate intervention by government and sometimes out of a genuine desire to be partners with government. A lot of positive fruit has been born of partnerships between government and civil society actors as representatives of the affected communities. A lot of information has already been generated by NGOs and other community initiatives which would serve well to complement the efforts of government, for example in the area of greening hospitals and in getting better technologies for handling waste. These initiatives are paying off and should be encouraged.

Environmental management is an area of concurrent jurisdiction for national, provincial and local governments either in legislation, policy making or direct service provision. There is a need to see more activity devolved to the local and provincial levels because that is the closest contact with real people with real problems requiring real solutions. The effort that has been put into developing legislative and policy systems is very commendable but it is now time to concentrate energies and resources at the local and provincial levels for implementation. Provincial and local level capacity constraints should be specifically targeted in order to maximise the involvement of these two levels. Capacitating municipalities in environmental management and conservation issues should be a priority of the national and provincial governments in line with section 154 (1) of the Constitution.

Developing effective and simple information systems should be prioritised, as well as the general environmental management and conservation function of different national and provincial departments in the planning and budgeting processes of the governments. Baseline information will facilitate measuring of progressive realisation for the years to follow. This will facilitate the

identification of hotspots for targeting in view of the vast pressure on limited financial resources. More resources should be voted into provinces with major environmental challenges to help offset the effects and to facilitate the local authorities in fulfilling the obligation to protect residents from a harmful environment.

Simple mechanisms should also be found for making available and sharing reliable and useful information across departments so that each department has adequate information to plan and respond within its mandate. The report also recommends that monitoring and evaluation systems need to be simplified where possible and improved. Annual progress reports in pursuit of targets and plans laid down in Environmental Implementation Plans and Environmental Management Plans should include a focus on the substantive aspects of the realisation of the right for vulnerable groups. The contents of the reports should also be widely communicated so as to avoid conflict and encourage effective participation.

The State has made valuable contributions to promoting the right to environment through for example, the “Bontle ke Batho” or the clean schools, wards and towns campaign; however, organs of State could do more to ensure that their own internal operations reflect implementation of the right to environment (e.g. their own water, electricity, and paper use). For example, the Council for Scientific and Industrial Research (CSIR) implemented International Standards Organisation 14001 standards for handling and disposing of its own hazardous waste. This initiative by an organ of State seems to have afforded the CSIR the opportunity to gain some capacity and insight, which could be applied to other relevant contexts in the public or private sector within the South Africa.

Air pollution

Air pollution as a result of industrial processes is a matter that needs urgent attention. The situation is further aggravated by the absence of binding regulations. Guidelines do not help much. Government should prioritise developing regulations on emission standards. Self-regulation by industries although a positive aspect leaves a lot to be desired. There is a lot of information that business entities will not admit to in the interest of their existence and profit motives. The voluntary air testing by major industries does not give the entire picture of the pollution challenges in South Africa. The different spheres of government should come up and bolster the efforts that are being advanced out of community-based networks and initiatives.

Waste Management

Provincial governments should ensure that local municipalities are fully supported by providing them with guidelines on how to implement environmental strategies and also supporting them financially, as they deal with

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the real problems on the ground and people who are directly affected. The issue of waste management is the one that is seriously affecting all the provinces and there should be a solution to this.

There gap in waste disposal systems, especially in rural and informal settlements. Most of the existing waste sites are not registered and there is also little control from government over illegal waste dumping. Most of these wastes affect fresh running water used by community members. Recycling should also be encouraged. Some provincial governments are already adopting it in their community awareness and education programmes.

- 1 In the Act, unless the context requires otherwise, the term “environment” “means the surroundings within which humans exist and that are made up of-
 - (i) the land, water and atmosphere of the earth;
 - (ii) micro-organisms, plant and animal life;
 - (iii) any part or combination of (i) and (ii) and the interrelationship among and between them; and
 - (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well - being.”
- 2 The Universal Declaration of Human Rights recognises that procedural aspects of human rights are as important to full realisation of human rights as substantive protections such as the right to life and health. Denial of the fundamental rights of freedom of association, of opinion and expression and the right to take part in government, are denials of basic human rights without which protection of substantive human rights are called into question. Part III of the 1994 Draft Declaration of Principles on Human Rights and the Environment sets out the procedural aspects of human rights necessary for the full realisation of environmental rights. Procedural rights are enabling rights, as they make it possible for people to contribute actively to the protection of their environment. For more up-to-date details on the procedural aspects of the right please refer to the conclusion of the Meeting of Experts on Human Rights and the Environment, 14-15 January 2002 and the deliberations of the United Nations Commission on Human Rights at its 58th, 59th and 60th sessions.
- 3 United Nations General Assembly, *Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) Annex I, Rio Declaration on Environment and Development*, A/CONF.151/26 (Vol. I) 12 August 1992
- 4 For more information on the envisaged role of the Convention refer to United Nations Economic Commission for Europe website www.unece.org and search for “human rights” or refer to <http://www.unece.org/env/pp/HUMAN%20RIGHTS/ECE%20input%20to%20OHCHR%20report.doc>
- 5 International Labour Organisation, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 1989 <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>
- 6 *Earthlife Africa (Cape Town) v Department of Environmental Affairs and Tourism, ESKOM*, case 13542/03 High Court of South Africa Transvaal Provincial Division
- 7 Following restructuring, the Electricity Supply Commission (Escom) changed its name to Eskom in 1987. The Electricity Supply Commission was replaced by an Electricity Council appointed by government.
- 8 The application was brought as an urgent application to prevent the Director-General (DG) of DEAT from granting permission for the reactor to be built and to have the court order the DG to provide Earthlife with all the information on which the decision would be based. The argument by Earthlife was that it was only allowed to comment on the draft Environmental Impact Report and that no opportunity was given to comment on the final Environmental Impact Assessment (EIA) report, which had new information. The information that Earthlife alleged it had been denied access to included the safety and security impact assessment.
- 9 PBMR. (2003) Making Headlines: Nuclear Reactor Court Bid Fails. *SABC News* 4 June. https://www.pnbr.com/making_headlines/Nuclear%20Court%20Bid.htm
- 10 1999 (2) SA 709 (SCA) Case No. 133/98; 1999 (8) BCLR 845 (SCA)
- 11 *Ibid* para 20
- 12 *The Trustees for the Time Being of the BioWatch Trust v The Registrar: Genetic Resources and Others* in the High Court of South Africa, Transvaal Provincial Division Case No: 23005/2002
- 13 Pieter Alberts, Department of Minerals and Energy, Letter dated 12 March 2004 to the South African Human Rights Commission in response to the 2nd draft report provided to the Department on 3 March 2004.

- 14 Natal Mercury, 14 March 2003, *Name and shame threat to industry Minister to clamp down on polluters*
- 15 Report to the President of the Republic of South Africa, *First Phase of the Commission of Inquiry into Thor Chemicals*, 12 March 1997.
- 16 The Food and Agriculture Organisation (FAO) makes the connection between environmental protection and the right to food by recognising that people need physical and economic access to food that is adequate in quantity and quality for a healthy life and that for food to be adequate it must be produced in an environmentally and socially sustainable manner. In order to ensure that food is adequate it must be safe i.e. without or with safe levels of contaminants, bacteria, naturally occurring toxins or any other substance that make food injurious to health.
- 17 United Nations, Human Rights and the Environment (2002) Background Paper No. 3: The Intersection of Human Rights and Environmental Issues: A review of Institutional developments at the international level presented by Dr. Adriana Fabra to the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva p17 <http://www.unhchr.ch/environment/bp3.pdf>
- 18 Ibid., p13-14
- 19 United Nations Department for Economic and Social Affairs, Division for Sustainable Development, Commission on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, adopted at the 17th plenary meeting of the World Summit on Sustainable Development, 4 September 2002 http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm
- 20 United Nations Department for Economic and Social Affairs, Division for Sustainable Development, Commission on Sustainable Development, *Plan of Implementation of the World Summit for Sustainable Development*, adopted at the 17th plenary meeting of the World Summit on Sustainable Development, 4 September 2002 http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm
- 21 Government of the Republic of South Africa and Others v Grootboom and Others, 2000 (11) BCLR 1169 (CC)
- 22 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)
- 23 Schedules 4 and 5 of the Constitution list the functional areas of legislative competence for environmental rights. National parks, national botanical gardens and marine resources are the exclusive legislative competence of national government. Administration of indigenous forests, environment, nature conservation, pollution control and soil conservation are functional areas of concurrent national and provincial competence. Air pollution, refuse removal, refuse dumps and solid waste disposal are the competence of local government, albeit subject to monitoring and support by provincial government.
- 24 According to section 11, Schedule 1 and 2, of NEMA three national departments (Environmental Affairs and Tourism, Land Affairs and Water Affairs and Forestry) must adopt and publish Environmental Implementation Plans and Environmental Management Plans. These departments may also publish Consolidated Environmental Implementation and Management Plans. The national departments of Agriculture, Defence, Housing, Trade and Industry and Transport are required to adopt and publish Environmental Implementation Plans. The national departments of Health, Labour and Minerals and Energy are required to adopt and publish Environmental Management Plans.
- 25 The details of the legislation drafted and instituted are provided under section 2.2 on legislative measures.
- 26 Cabinet approved the phasing out of leaded petrol as a move towards promoting cleaner technologies with effect from the year 2006, that is, a 40% reduction from 0,5% to 0,3% of sulphur in diesel, which was implemented in January 2002 is expected to be followed by further reductions up to 0,05% by 2006.
- 27 See Department of Minerals and Energy and Department of Environmental Affairs and Tourism, *Joint Implementation Strategy for the Control of Exhaust Emissions from Road-Going Vehicles in the Republic of South Africa*, Final Draft - version 4 <http://www.dme.gov.za/publications/pdf/policydocs/the%20vehicle%20emissions%20strategy.pdf>
- 28 In Europe and other developed countries in the world it has been found that vehicle exhaust emissions containing lead and other pollutants pose a threat to human health and have long-term harmful effects on the environment and

that phasing out of leaded gasoline has proven to significantly increase the well-being of societies. The withdrawal of leaded petrol is part of a European Strategy to reduce pollution from road traffic and improve the air people breathe. It is reported that lead is a highly toxic metal and that it may cause a range of health effects from behavioural problems and learning disabilities, to seizure and finally death. Furthermore, scientific studies have shown that long-term exposure to even tiny amounts of lead can cause brain damage, kidney damage, hearing impairment and learning and behavioural problems in children. Those who are more at risk and more vulnerable are children, especially those in the range of six years old and below, this is owed to the fact that their bodies are growing very fast and therefore, their bodies tend to absorb more of the compound. It has also been reported in literature, that in adults, exposure to lead can result in increased blood pressures, kidney damage, nerve disorders, sleep problems, muscle and joint pain and mood swings. In addition to the above, sulphur in gasoline and diesel also contributes to the emissions of various pollutants, some of which play a role in the formation of secondary pollutants such as ground-level ozone. The existence of all these pollutants contributes to the severity of respiratory and cardiac ailments. It has been reported that most of the Canadian population have a high prevalence of the respiratory and cardiac ailments, episodes of bronchitis and asthma in children and that the prevalence of chronic bronchitis has been linked to poor air quality, high sulphur being one of the contributory factors. See www.nrtee.ca/eng/programs/Current_Programs/Health/SULPHUR_e.htm.

- 29 Please refer to the Department of Environmental Affairs and Tourism website <http://www.environment.gov.za/soe/> and the site maintained by the Centre for Scientific and Industrial Research http://spatial.csir.co.za/website/soe_index/Run.htm
- 30 Please refer to Department of Environment Affairs and Tourism website http://www.environment.gov.za/soer/indicator/docs/Summary_Table.pdf
- 31 Section 17 of NEMA prescribes several procedures for conciliation where a dispute arises concerning the exercise of functions by any minister, member of the executive council or municipal council.
- 32 Section 11 of NEMA requires departments listed under schedule 1 and schedule 2 to furnish EIPs and EMPs within one year of promulgating the Act and at least every four years thereafter, respectively.
- 33 Committee for Environmental Co-ordination, Consolidated EIP/EMP Action Plan, Summary of Commitments Made in Environmental Implementation Plans (EIP) and Environmental Management Plans (EMP). Emailed after a request to DEAT on 1 June 2004.
- 34 The World Summit on Sustainable Development and the Plan of Implementation build on the foundation of the United Nations Conference on Environment and Development (UNCED) of 1992 held in Rio de Janeiro and its outcomes in the Agenda 21. It also draws from several internationally agreed development goals such as the UN Millennium Declaration. The Plan among others focuses on enhancement of international cooperation towards the integration of the three components of sustainable development – economic development, social development and environmental protection. The specific objectives of the Plan are poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic development. The Plan commits itself to benefit all and to draw on the participation of all actors through partnership between governments of the north and south and governments and major groups – paras 1 –3 of the Plan of Implementation. United Nations, Article 18, Plan of Implementation, Report of the World Summit on Sustainable Development 2002, at http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf
- 35 *DEAT's poverty Relief Programmes and how they Work* at <Http://www.environment.gov.za>. Visited on 1st March 2004 at 2.45pm
- 36 The Integrated Sustainable Rural Development Programme is a government strategy that was launched in 2000 to ensure integrated sustainable development in rural areas across the entire country over a period of ten years. It is a multi-sectoral programme bringing together Government Departments, parastatals and other organisations in an effort to address rural development backlogs. The ISRDP vision according to the Department of Provincial and Local Government is to "Attain socially cohesive and stable rural communities with viable institutions, sustainable economies and universal access to social amenities, able to attract and retain skilled and knowledgeable people, who are equipped to contribute to growth and development."
- 37 *Supra*, footnote 7

- 38 A **Transfrontier Conservation Area** usually refers to “a cross-border region whose different component areas have different forms of conservation status such as national parks, private game reserves, communal natural resource management areas and even hunting concession areas. Although fences, major highways, railway lines or other forms of barriers may separate the various parts, these areas nevertheless border each other and are jointly managed for long-term sustainable use of natural resources” whereas a **Transfrontier Park** “is an area comprising two areas, which border each other across international boundaries and whose primary focus is wildlife conservation. Authorities responsible for the respective areas formally agree to manage the areas as one integrated unit according to a streamlined management plan. The authorities also undertake to remove all human barriers within the Transfrontier Park so that animals can roam freely”. – *Transfrontier Conservation Areas* at www.environment.gov.za visited 1st March 2004 at 3.53pm
- 39 The Blue Flag campaign is a European scheme that rewards Local Authorities for providing safe and clean beaches and marinas. A Blue Flag is awarded annually to beaches and marinas that meet environmental, amenity and safety criteria. See “National Report for the Intergovernmental review of the GPA 2001 at <http://www.gpa.unep.org/igr/Reports/SOUTH%20AFRICA.htm> visited on 1st March 2004 at 11.30am
- 40 DEAT Annual Report 2002/2003 at p.10
- 41 In April 2002, two directors of the Hout Bay Fishing Industries were convicted of 301 counts of over fishing and corruption. A fine of R 40 000 000 was imposed. In relation to this, SA Hake (Pty) and its directors were fined R 250 000 for catching and supplying hake to Hout Bay Industries. The department also seized a number of foreign vessels for illegal fishing in South Africa's waters and fines were imposed. Cobelo a fish-trawling vessel belonging to SA Hake (Pty) was seized and sold at a public auction for R 2 900 000. The enforcement of environmental regulations was also beefed up with the launching of the First Environmental Court in South Africa in early 2003 in Hermanus, Cape Town.
- 42 Act No. 36 of 1998 relates to the protection, use, development, conservation and control of water resources of the country in a sustainable and equitable manner for the benefit of all people of South Africa
- 43 This Act regulates the use, development, conservation, management and control of South Africa's forest resources - both indigenous and plantation - in a sustainable and equitable manner for the benefit of all people.
- 44 This Act gives the mandate to create a framework to prevent and combat veld, forest and mountain fires in the country and to counter the negative effects of these fires on life, property, crops, fauna and flora and veld in South Africa.
- 45 See Department of Water Affairs and Forestry, *Minimum requirements for the Handling, Classification and Disposal of Hazardous Waste : Second Edition 1998* and *Minimum requirements for Waste Disposal by Landfil : Second Edition 1998* on <http://www.dwaf.gov.za/Documents/Default.asp?Other> accessed 31 May 2004.
- 46 Department of Water Affairs and Forestry, *Water Quality Management in South Africa*, http://www.dwaf.gov.za/Dir_WQM/what_projDetail.htm accessed 31 May 2004.
- 47 An extensive consultative process was done. Thirty six sectoral and public meetings were convened countrywide between September 2002 and January 2003. Two thousand comments on the strategy were registered. This process affirmed the principle of people-centeredness and people participation as a prerequisite of environmental management and protection. Information on the composition of stakeholders that participated in the consultative process was not available to the SAHRC. However, in the Director-General's report on the progress of the consultative process it was indicated that submissions were received from “stakeholders from all over the country representing all the different water use sectors.”
- 48 DWAF Multi-Year Strategic Plan 2003/2004 – 2005/6 at pp 7-8 at <http://www.dwaf.gov.za/Communications/STRATEGIC%202003-4.pdf>
- 49 Working for Water Annual Report 2002/2003
- 50 Category B forests relate to state owned forests.
- 51 NEMA Schedule 2 and s.11

- 52 In June 2002, Regulations under the Mine Health and Safety Act No. 29 of 1996 (R.786 of 14th June 2002) were published requiring mining companies to establish and maintain a system of medical surveillance of all its employees working in a place where continuous A-weighted sound pressure level normalised to an 8 hour day or a forty hour working week is equal to or exceeds 85 dB(A) and to carry out baseline audiograms in respect of their employees in terms of reg.11.4 (4). The employer is also required to do a periodic (at least annual) audiogram and an exit audiogram.
- 53 These include the Minerals Act of 1991; the Mine and Safety Act of 1996; the Atmospheric Pollution Prevention Act of 1965; the Agreement between **DWAF** and Chamber of Mines (Fanie Botha Accord) regarding the implementation of pollution control measures at abandoned coal mines; S. 19 of the National Water act of 1998; the Standard Protocol for the rehabilitation of derelict and ownerless asbestos mines; Government private Sector partnership with Coaltech 2020 and the Chamber of Mines to rehabilitate derelict and ownerless mines
- 54 DME reported that only R 5 000 000 was spent of the Transvaal Delagoa Bay Colliery.
- 55 Free basic services are provided as part of the *White Paper on Reconstruction and Development of 1994* in which the government commits itself to the objective of meeting human needs.
- 56 *2003 Intergovernmental Fiscal Review 2003*, Electricity, pp 230-242
- 57 Supra, footnote 31 at pp 233-234
- 58 This was carried out in compliance with several national level legislations including the NEMA, the Atmospheric Pollution Prevention Act of 1989, the Hazardous Substance Act of 1973, the Environmental Impact Assessment Regulations of 1997 and the Noise Control Regulations of 1999.
- 59 The programme was legally founded in the provisions of the NEMA, the Air Pollution Prevention Act, the Hazardous Substances Act of 1973, the Environmental Impact Assessment regulations of 1997 and the Noise Control Regulations of 1999.
- 60 The Bill was published for public comment towards the end of 2002 and information seminars were held in a bid to consult with stakeholders. Formal Submissions were made, adjustments were made and the reworked draft was approved by parliament. By the time of reporting the bill was due to be debated by Parliament.
- 61 The White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity has six goals: - Conserve the diversity of landscapes, ecosystems, habitats, communities, populations, species and genes in South Africa; use biological resources sustainably and minimise adverse impacts on biological diversity; ensure that benefits derived from the use and development of South Africa's genetic resources serve national interests; expand the human capacity to conserve biodiversity to manage its use and to address factors threatening it; and create conditions and incentives that support the conservation and sustainable use of biodiversity; and promote the conservation and sustainable use of biodiversity at the international level.
- 62 Regulations under Section 24(d) of the Environment Conservation Act (Act No. 73 of 1989) – Plastic Bags and Plastic flat bags (GNR 625 GG 24839 of 9th May 2003)
- 63 Ibid, reg 2
- 64 2004 Estimates of National Expenditure, Vote 28 Environmental Affairs and Tourism, at p.765
- 65 For 2003/2004 poverty relief funds will increase to R305 600 000 according to the 2004 Estimates of National Expenditure
- 66 Output Indicators: Poverty Relief Projects - Environmental Affairs and Tourism Financial Cashflow Budget Payments Report for April 2002 – March 2003, Annexure 2 to the 5th Protocol on the right to environment.
- 67 DWAF Annual Report for 2002/2003 at p. 112
- 68 DWAF response to 5th Economic and Social Rights Protocol on the right to environment, p.8. DEAT response to 5th Economic and Social Rights Protocol on the right to environment, p. 21

- 69 See note 1.
- 70 2002 (6) BCLR (SE), pp 609 – 624. Case No: 63/02 in the High Court, Eastern Cape Local Division
- 71 See p. 613 -615
- 72 S v Mercer and Another, Case No. CA&R46/2002, 2003 (6) BCLR 616 (NC)
- 73 para 10 p. 621.
- 74 Page 44-45 of the CEC Alignment Report, see note ...
- 75 National Department of Land Affairs, 2002 Annual Compliance Report First Edition Consolidated Environmental Implementation and Management Plan (Gazette 21562, Notice 920, 15 September 2000).
- 76 Department of Environmental Affairs and Tourism, Response to 5th Economic and Social Rights Protocol at page 21.
- 77 Systems that have been advanced in minimising the costs of pollution control to the public include pollution taxes, effluent charges or emissions trading. Most of the experiences with applying the polluter pays systems are found in developed countries. They may therefore not serve as good reference points for developing countries like South Africa. The particularities of South Africa will need to be considered to adjust the developed country experiences to workable levels.
- 78 This Component is responsible for implementing the Fraud Prevention Plan. It was instrumental in establishing the “Tip-offs” reporting hotline.
- 79 The Labour Relations Department organised arbitration, conciliation and disciplinary hearings
- 80 This was set up to facilitate reporting of unacceptable/unethical behaviour, fraud, corruption and theft by anonymous callers. DEAT has a toll free number, a free post mail and a fax facility.
- 81 Government of the Republic of South Africa and Others v Grootboom and Others, 2000 (11) BCLR 1169 (CC)
- 82 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)
- 83 DACEL reported that a project was underway to incrementally monitor strategic indicators following the establishment of the Management Information Systems Branch early 2003. The project has six strategic indicators which are aligned to the 2014 development vision of the national and provincial governments. The indicators are – land use patterns, including change in land use and performance; soil productivity; water quality; air quality; waste quantity and job creation. – Refer to DACEL 5th protocol on environmental rights at pp 9 &15-16
- 84 DACEL actually confessed that the protocol was completed with information from the National Report on Community based Air Pollution Monitoring in South Africa 2000 - 2002
- 85 IOL Environment, Concern Mounts Over Toxic Cape incinerator by Myolisi Gophe (article cited to The Cape Argus of May 28, 2003 at p. 7) at <http://www.iol.co.za> (accessed 2004/03/23)
- 86 Case No. 1050/2001
- 87 Willemien du Plessis, “South Africa Responding to Pollution from a Tannery” at www.eli.org (accessed 2004/04/01)
- 88 This is a voluntary environmental management system which advances compliance with legislation, continuous improvement and prevention of pollution.
- 89 Even with the registered successes, there were challenges for CSIR but which have also been addressed in good step. Among the challenges – build up of spent chemicals and potentially hazardous samples in labs and workshops as a result of several factors like reluctance of business areas to incur costs of disposal, laziness of staff, it is time

consuming to organise collection and disposal and lack of clarity on how to dispose particular waste. This stockpiling posed a risk to staff and property. There was poor separation of recyclables; minimal use of alternatives to waste disposal e.g. reuse; poor allocation of waste bins. Even then dumping on site was a common occurrence. – CSIR Integrated Waste Management Plan – Status Quo Assessment (Scientia Campus, March 2003).

90 GN 227 GG of 17 March 2000

91 Version D of 15th October 1999

92 They are informed by the White Paper on Environmental Management Policy, which provides the first shot at consolidating the country's environmental management framework and is the overarching environmental policy in South Africa. In addition the NEMA informs the IP&WM and the NWMS. The focus of IP&WM is prevention of pollution and waste and avoiding environment degradation. This would be done through source-based controls, management of receiving media (impact management) and as a last resort, remediation.

93 National and provincial governments hold concurrent legislative competence in respect of integrated pollution and waste management as well as regulation of related activities of local government matters such as air pollution and water and sanitation services. Provincial governments further have exclusive legislative competence with regard to provincial planning and regulation of local government activities including among others refuse removal, refuse dumps and solid waste disposal, control of public nuisances and noise pollution.

94 United Nations Framework Convention on Climate Change, Kyoto Protocol to the United Nations Convention on Climate Change, Final Version <http://unfccc.int/resource/docs/cop3/07a01.pdf> visited on 17 May 2004

95 Labuschagne, Brunke, Scheel, Global Trends and Long-Term Observations of Environmentally Significant Trace Gases, University of Witwatersrand Climatology Research Group Seminar/Workshop file created March 2004

96 Ibid.

97 p. 35 of IP&WM

98 groundWork under its Air Sampling Project which took samples from Sasolburg, Secunda and Cape Town using the Bucket Brigade Sampling Methodology found high levels of toxic chemicals in air. – groundWork Annual Report 2003 at p. 8

Another air monitoring initiative by the Sasolburg Air Quality Monitoring Committee which was done through public sampling in Sasolburg and Zamdela identified 20 different chemicals in the air including benzene, hydrogen sulphide, vinyl chloride, carbon disulphide, methyl chloride, toluene and various xylenes. – *Sasolburg Air Quality Monitoring Committee* in South African Voices for Sustainable Energy and Climate Action, vol 8 November 2003 at p. 3

A study was also conducted in 2001 on “Air Contaminant Exposures, Acute Symptom and Disease Aggravation Among Students and teachers at the Settlers School in South Durban – Thomas G. Robins & others in The Settlers Primary School Health Study, Draft Final Report 9th November 2002

99 Edwin Naidu (2004) Plastic bags imported while locals lose jobs. The Sunday Independent, 21 March at p. 1-2

100 According to the Edwin Naidu, (ibid) “the department of environmental affairs and tourism referred questions about the levy to the national treasury, which did not respond to inquiries. In terms of the law, Valli Moosa, the minister of environmental affairs and tourism, does not set the levy. This is done by the national treasury, an aspect that critics say prevents the minister from implementing the law swiftly”.

101 Llewellyn Leonard, (not dated) Health Care Waste in Southern Africa: A Civil Society Perspective at p. 4. <http://www.groundwork.org.za/HCWandIncinerator/Healthcareconferencepaper>

102 DACEL Budget Estimate Statement 2 Outputs for 2002/2003, Addendum 1 to protocol at p. 24

103 This could be the reason for the case of illegal disposal of hazardous waste involving the burying of large quantities of liquid waste beneath the farm surface by Mandara Trust in Gonubie, East London. This case was only unearthed

by the Enforcement Directorate of DEAT in September 2003 when the directorate was established. See <http://www.environment.gov.za> accessed 26/3/2004

104IP&WM at p. 20

105Working for Water Annual Report 2002/2003 at p.5

106Mpumalanga State of the Environment Report 2003 at p. 35

107Case No. CCT 27/03 (judgement delivered on 12 March 2004). This was an application for special leave to appeal against the Supreme Court of South Africa judgement in Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another [2003] 2 All SA 616 (SCA)



food

ECONOMIC AND SOCIAL RIGHTS

5TH REPORT 2002/3

THE RIGHT TO FOOD

5th Economic and Social Rights Report Series 2002/2003 Financial Year

South African Human Rights Commission

21 June 2004

PREFACE

In this 10th year of our young but thriving democracy, we are all engaged in some way or the other, in critically reflecting on the achievements we have secured over the past years as well as the unfinished work that lies ahead. In the context of the various rights guaranteed by our Constitution, they seek in their totality to ensure that the individual and the society are able to develop to their full potential and indeed that human rights becomes a central feature of our society. In this regard we have made much progress, and in the main, few argue against the notion that civil and political rights are well secured both in law and in practise.

However, the challenge that is situated at the heart of our Constitutional contract is how we advance social and economic rights and in so doing ensure that we advance the interests of the poor and those many who are still to enjoy the full benefits of our democracy. The inclusion of social and economic rights in the Bill of Rights was a clear articulation that democracy was as much about the right to vote, and of free expression and of association as it was about the right to shelter, the right to food, the right to health care, the right to social security, the right to education and the right to a clean and healthy environment.

The Constitution has tasked the Commission with a specific mandate to advance social and economic rights. In particular, section 184(3) requires that: “Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.”

A healthy and robust debate exists around these measures that the Constitution requires the State to take. In addition, the human rights discourse sees considerable contestation around issues such as the nature and scope of the right, the adequacy or otherwise of the measures taken and the meaning of the phrase ‘progressive realisation of rights.’ These are difficult issues and it is not always possible, nor may one say desirable, to always have consensus on them. In some instances the Courts have had to rule on them. We see this Report, however, not only as a contribution to those debates but also as a tool that can assist Government, Parliament and civil society in developing a critical understanding about social and economic rights and their implementation.

The modus operandi of the Commission in discharging its constitutional mandate to monitor and assess the observance of economic and social rights has in the main focussed on requiring organs of state to report to us on measures they have taken. This continues to pose several challenges, namely: to ensure that organs of State submit to the Commission reports that are timeous, accurate and of good quality . We are pleased that good progress has been made on this front over the past year and the process of presenting draft reports to organs of state and civil society for comment has been most valuable to the Commission in finalising this report .

The launch of the 4th Economic and Social Rights report in April 2003 generated considerable interest and much debate and discussion on the Report ensued. We were invited by numerous parliamentary portfolio committees from the National Assembly and National Council of Provinces to present the Report. We certainly found the

engagement with Parliament a very useful and mutually rewarding exercise. It provided the Commission with a unique opportunity to share its thinking and vision around its work with Parliament while it enables us to better understand Parliament's expectation of the Report and its use to them as a tool in their work. There have been numerous valuable recommendations that have emerged from our presentations to Parliament which we are committed to giving effect to from our side.

So as we commence the beginning of the 2nd decade of our democracy the delivery of social and economic rights become crucial to the ongoing success of our nation and the entrenchment of a culture of human rights. It is certainly our hope, and the intention of this Report, to contribute to ensuring that the promise and the vision underpinning our Constitution is shared and enjoyed by all in our country.

Jody Kollapen

Chairperson - South African Human Rights Commission

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INTRODUCTORY SECTION

The aim of the *Introductory Section* is to provide an outline of the common analytical framework used in the reports, briefly discuss the political and economic context of the year under review, and provide an integrated summary of the key findings and recommendations of all eight reports in the series. Details of the report production process are also included at the end of this introduction.

The 5th Economic and Social Rights Report follows a more user friendly format than previous reports. There are now separately bound, less bulky, reports on Land, Water, Environment, Food, Health, Social Security, Education and Housing. Each report has an executive summary to facilitate access to the main findings and recommendations. Issues that connect one right to another are highlighted in the body of each report to emphasise the interrelatedness and interdependence of the rights in the Bill of Rights of the Constitution of the Republic of South Africa Act 108 of 1996 (simply referred to as the Constitution throughout the reports).

A) Analytical Structure and Framework

Each report in this series follows a basic structure:

1. **Introduction:** a discussion of the meaning and content of the right with reference to the Constitution, case law and relevant international human rights instruments.
2. **Progress in the realisation of the right:** a factual description of measures instituted by government during the period under review and their impact, especially on vulnerable groups.
3. **Challenges for the realisation of the right:** a description of key challenges that hamper the realisation of the right, and in some cases, government's response to these challenges.
4. **Critique of measures instituted:** a consideration of some of the shortcomings of the measures instituted by government.
5. **Recommendations:** a set of recommendations that may encourage progressive realisation of the right as expeditiously as possible.¹

Each report consolidates information from various sources including: relevant government protocol responses, government Annual Reports and Strategic Plans, the Intergovernmental Fiscal Review, as well as research funded by government, international donors or other agencies.

¹ Some reports in the series end with a conclusion.

All reports employ the standard of reasonableness as laid down in the *Grootboom*² and *TAC*³ judgements of the Constitutional Court, in conjunction with relevant international human rights instruments.

The constitutional provisions pertaining to socio-economic rights require the State to “take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of [these rights]”.⁴ This requirement, read with the provision on the obligation of the State to “respect⁵, protect⁶, promote⁷ and fulfil⁸ the rights in the Bill of rights” in section 7(2) of the Constitution ensures an effective guarantee of socio-economic rights in South Africa. The judicial enforcement of these rights by the courts and the constitutional mandate of the South African Human Rights Commission to monitor and assess the observance of the rights by the State⁹ and non-State entities also contribute to the effectiveness of the constitutional guarantee of these rights.

The Constitutional Court has played a significant role in ensuring the effective guarantee of socio-economic rights in our country. On the obligation of the State, Judge Yacoob held in the *Grootboom* case:

*The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.*¹⁰

On the effective guarantee of basic necessities of life for the poor, Judge Yacoob further said:

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access

2 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC)

3 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)

4 See sections 26(2), 27(2) and 29(2) of the Constitution.

5 Respect is a negative obligation, which requires the State to refrain from denying or limiting equal access for all persons to the enjoyment of the rights. This also means that the State should abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure which violates the integrity of the individual or which in any way interferes or limits his/her right to pursue the enjoyment of the rights in the Bill of Rights.

6 The obligation to protect places a positive obligation on the State to prevent the violation of any individual's rights by a third party.

7 The obligation to promote places a positive obligation on the State to create a conducive atmosphere in which people can exercise their rights and freedoms by promoting awareness of their rights through public education.

8 The duty to fulfil places a positive obligation on the State to institute active measures that enable each individual to access entitlements to the right and which cannot be secured through exclusively personal efforts. State parties are also obliged to provide a specific right when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. e.g. people in disaster situations or those in dire need.

9 See sections 184(1) and (3) of the Constitution.

10 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC) [24]

to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.¹¹

On the role of the courts in ensuring that the State fulfils its role in giving effect to these rights and thus ensuring that there is an effective guarantee of these rights, Judge Yaccob said:

I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.¹²

A similar position was taken by the Constitutional Court in another seminal judgment, *Minister of Health and Others v Treatment Action Campaign and Others*, where the Court held:

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflicts our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.¹³

In outlining the role of the courts, the Court also stated:

The primary duty of courts is to the Constitution and the law... Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to do so.¹⁴

While there might be some criticism directed at the Constitutional Court pertaining to the determination of when there are no available resources for the State to fulfil its obligation pertaining to socio-economic rights, the courts, particularly the Constitutional Court, have and will continue to play an important role in ensuring that the provisions in the Bill of Rights are effectively guaranteed for our people.

B) The Political and Economic Context of the Year Under Review

11 Ibid., [93]

12 Ibid., [94]

13 *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) [36]

14 Ibid., [99]

The period under review, 1 April 2002 to 31 March 2003, followed the 11 September 2001 attacks and a 24% depreciation of the South African currency (Rand) near the end of 2001. Consumer Price Inflation, especially for goods and services bought predominantly by the poor, increased sharply to the highest level since 1994. Concerns were signalled to the Competition Commission about the impact of import parity pricing in several sectors of the economy, most notably in food production, processing and retailing as well as metals and engineering. Interest rates were raised in an attempt to curb inflation, with a subsequent dampening effect on the rate of economic growth in the latter part of the financial year. According to the Reserve Bank Quarterly Bulletin for March 2003, economic growth stood at a robust 3% in 2002.

As a result of prudent fiscal management, the government introduced a more expansionary Budget in February 2002. Total government expenditure increased from R262,6 billion in 2001/2002 to R291,8 billion in 2002/2003. Overall, the budget directed more resources towards reducing poverty and vulnerability, improving education and training, developing skills amongst the youth, building and enhancing physical infrastructure and basic municipal services, as well as making communities safer places to live, work and play.

It is also important to note that the February 2003 Budget provided for significantly greater expenditure than the previous year. Total expenditure was R331,7 billion for 2003/2004. The additional allocations accommodated substantial policy changes for all three spheres of government and also provided for *higher than anticipated inflation in 2002*.

By the end of the reporting period in March 2003, the Rand had appreciated by 18%. This created concern about the job losses that could arise out of an increase in import competition. Therefore, during the period under review, the goals of progressively realising economic and social rights took place in the context of significant macro-economic volatility, inflation and an expanding government budget.

C) Key Interrelationships Amongst Economic and Social Rights

The Right to Land

The State was responsible for achieving progressive realisation of the right to land during the reporting period. The Commission demonstrates that there was a year on year improvement in land delivery performance by the State, especially through the Land Restitution and Land Redistribution sub-programmes. Improvements in rural tenure reform were less noticeable.

Between 2000 and 2001 there were 12 094 settled Restitution claims, while in February 2002 there were approximately 32 000 settled claims. By March 2003, there were 36 488 settled claims recorded. Although the majority of these claims were in the urban areas, settled rural claims show a substantial increase. The people working on the Land Redistribution for Agricultural Development sub-programme delivered 103 682 ha against a target of 81 555 ha for the year under review. Whereas the Department had targeted to benefit 3 601 people, the programme ended up benefiting 6 170. Concerning tenure reform, the State initially delivered 30 000 ha of land through 201 projects. Beyond that, the State is working towards bringing the Extension of Security of Tenure

Act (ESTA) and Labour Tenants Act (LTA) together in the Consolidated ESTA/Labour Tenants Bill.

Throughout the report, the Commission reflects on the demand, voiced by landless people and others, that the pace of land redress is too slow and inattentive to vulnerable groups. The report recommends accelerating land reform to meet its new targets by relieving budgetary constraints and the associated problems of personnel shortages, lack of quality training and understandable communication; land acquisition; and improvements in monitoring and evaluation.

The Commission would also like to highlight that it was informed by the Department of Land Affairs that it was impossible to represent the racial and gender composition of land purchase transactions and repossessions, according to the size and value of land parcels.

The Right to Education

The right to education is analysed as a continuum of three bands of schooling- General Education and Training, Further Education and Training and Higher Education and Training. The State instituted measures to respect, protect, promote and fulfil the right to General Education and Training, and in the Commission's overall assessment, it succeeded in achieving progressive realisation of this right.

The Department of Education succeeded in ensuring that all targeted Early Childhood Development sites for children between the ages of five and six were operating. However, the Department acknowledges the challenge, which has budgetary implications, that only 13% of all children have access to the programme. In the context of a substantial increase in the rate of student enrolment in primary schools between 1994 and 2001, the National Department focused on further increasing access to General Education and Training through reviewing public school financing and the system of school fee exemptions. The report highlights the shortcoming that some schools and Provincial Departments of Education failed to make parents aware of the school fee exemption.

While progress was made in eliminating instances where learners are forced to receive education in environments that are not conducive to teaching and learning, the report emphasises that more needs to be done to address infrastructure backlogs, especially when it comes to water and sanitation. The Department also made progress in developing a redistribution model for personnel and operating expenditure that would achieve equality of teaching quality and equality of learning outcomes in the schooling system from 2003/2004 onwards. All stakeholders in education, including the SAHRC need to explore and come up with a definition of quality basic education which could be measurable and relatively easy to monitor.

Conditions in farm schools were identified as hinderance to progress in the realisation of the right to General Education and Training. The issue of street-children also has to be given some serious attention by all the relevant stakeholders. Amongst other recommendations to further observance of the right to General Education and Training, the report calls for better-published medium term strategies and improved spending on Adult Basic Education and Training. In the 2001 Census, 4,5 million people aged 20

years and older did not have a formal education and 4 million people had primary schooling only.

Most of the developments in the Further Education and Training band met the Constitutional requirement to respect, protect, promote and fulfil the right. *Dinaledi*, the programme that seeks to improve participation and performance of learners from historically disadvantaged backgrounds in Mathematics, Science and Technology (MST), reportedly surpassed its target of 10% of students enrolling for MST in its first two years of implementation. The development of Recognition of Prior Learning (RPL) is another development that contributes to the realisation of the right to Further Education and Training. RPL recognises non-formal and/or non-academic education. RPL also stands to maximise learning opportunities for those without formal and/or academic qualifications to acquire formal qualifications in Further Education and Training institutions, which must all be registered with the State.

Areas where the State fell short of its obligations to progressively realise the right to Further Education and Training include: insufficient public education on school fee exemptions and insufficient Learner Support Materials and/or their late delivery. The report also highlights that participation rates in education by girl learners were being negatively affected by girls' involvement in income generating activities.

While Higher Education and Training is not explicitly recognised as a right in the Constitution, it obviously depends on the learning outcomes achieved in General and Further Education and Training. Here, there seems to be room for improvement as the average graduation rate for university and technikon students is 15%; less than half the ideal average of 33%.

Key challenges associated with the Higher Education and Training band include assisting potential students with subject selection choices and career guidance at school and university level, as well as lowering the high costs of accessing higher education and applying to different tertiary institutions. The report recommends ensuring that admission requirements to tertiary institutions are transparent and fair, promoting indigenous languages as academic/scientific/legal languages, mobilising funds for bridging courses and improving access for mature and post-graduate students, including part time students.

The Right to Water

Ever since 2001 and the introduction of Regulations Relating to Compulsory National Standards and Measures to Conserve Water, the State instituted a national measure to fulfil the right to water by supplying 6000 litres of free, clean water, per household per month, otherwise known as Free Basic Water.

During the reporting period, approximately 1,6 million people gained access to improved piped water supplies through Department of Water Affairs and Forestry's Community Water Supply and Sanitation Programme. Approximately 65 thousand toilets facilities were constructed during the reporting period under the same programme, but it should be noted that these figures exclude the large number of sanitation facilities that were delivered as part of the State's housing programmes. Less than 530 000 households also benefited from water and sanitation projects through the

Department of Provincial and Local Government's Consolidated Municipal Infrastructure Programme. Although the above indicates that the roll-out of water and sanitation infrastructure is proceeding towards the Department's medium delivery targets, the report raises concerns about the level of dysfunctional infrastructure and projects, especially in rural areas.

At the end of the reporting period in March 2003, access to Free Basic Water by poor people stood at 38% or approximately 12,2 million people. Access to Free Basic Water by non-poor households stood at close to 100% or approximately 14,2 million people. A large number of poor people (19,6 million) were still to receive their Free Basic Water allocation. Where Free Basic Water was not available, the average cost of 6 kilolitres (kl) was approximately R13 per month. The price for 6kl of life-line supply was highest in Limpopo province at approximately R19 per month. Gauteng and KwaZulu-Natal also had comparatively high average charges for life-line supplies where Free Basic Water services were not operational.

In order to remove these glaring inequities in Free Basic Water provision, the report calls for an urgent revision of the pricing system to include a significantly greater level cross-subsidisation from high volume water users to low volume users in the 0-6 kl range. More support and funding is required to assist municipalities with capacity problems in implementing Free Basic Water. During droughts, local governments should ensure that Free Basic Water supplies for domestic users are assured and that a situation cannot develop where agricultural, mining and industrial users are allocated large volumes of water at similar prices to low-volume users.

The report describes some aspects of the devolution of domestic water quality monitoring and testing from Provincial Departments of Health to local municipalities and calls for rapidly providing sufficient funds for water quality monitoring to prevent serious disease outbreaks and illness.

The report recommends that the Department of Water Affairs and Forestry (DWAF) should take a leading role in making sure that farm dwellers, residents near commercial farms and poor households in rural and urban areas access clean water and proper sanitation services. DWAF should also ensure that it develops and implements a plan to address the specific problems of water access experienced by people living with HIV/AIDS.

The report suggests that monitoring bodies should be created at local level to effectively monitor the implementation of policies and laws aimed at fulfilling the right of access to water. The report warns that monitoring will only be effective if monitoring bodies from local, regional and national spheres work together. Where possible and when possible, the Free Basic Water allocation should be increased to cater for higher levels of domestic water consumption. A 50kl water allocation per household per month would bring South Africa's Free Basic Water allocation into the 'low level of health concern' range defined by the World Health Organisation.

The Right to Health Care

The report on the right to health care focuses on key developments in three key health programmes of the State (Health Service Delivery, Strategic Health Programmes and Administration). Although the policy and legislative measures developed in the fiscal year under review can be said to be “reasonable” in their conception, there remain large gaps in implementing them in a manner such that all the provinces, urban and rural peoples, rich and the poor have equal access to the same high quality of care.

The three most important, and universally acknowledged, indicators to measure the health status of a nation are Life Expectancy at Birth, the Maternal Mortality Ratio, and the Infant Mortality Rate. Life expectancy has fallen from 56 years in 1996 to 52,5 in 2002 and is projected to fall to 47 by 2005. The infant mortality rate has increased from 45 in 1998 to 59 in 2002. This means that more children under the age of one died in 2002 as compared to 1998. The under five-mortality rate has risen from 61 in 1998 to 100 in 2002. Similarly, the maternal mortality ratio shows a steady increase since 1998 and is estimated to be 150 per 100 000 live births. The National Department of Health, as well as independent researchers, have concluded that this is due to HIV/AIDS related deaths.

The single most important challenge that government faces is the one posed by the AIDS pandemic and the high incidence of opportunistic diseases such as tuberculosis. It is estimated that about one tenth of the population of the population is infected with the HI virus i.e. close to 5 million people. The number of AIDS orphans is estimated to be one million. In a landmark case instituted by Treatment Action Campaign against the Minister of Health, the Constitutional Court, in 2002 confirmed the finding of the High Court that government’s policy to limit Nevirapine to research and training sites was in “breach of the States obligations under section 27(2) read with 27(1)(a) of the Constitution.” The report recommends that the Comprehensive National Aids Plan should be rolled out effectively in all the provinces so as to meet targets and timelines in order to substantially reduce new infections and to prolong the lives of those already infected.

In spite of the fact that policies and programmes directed at improving the health status of the country have been put in place such as the Integrated Management of Childhood Illnesses, the AIDS pandemic continues to be the single most cause of death in South Africa. This has placed an enormous strain on an already overburdened health system and undermines the efforts made by the State. This is compounded by the fact that the other economic and social rights, which contribute substantially to the health status of a nation, are also not fully enjoyed by the vast majority of poor South Africans due to the huge backlogs inherited from the past. Inadequate housing, poor sanitation, overcrowding, lack of clean drinking water, lack of efficiently run social services, insufficient nutrition and health education exacerbate the diseases of poverty. Moreover, a household that is affected by AIDS contributes to depleting the financial resources available to the family, thereby increasing the level of poverty.

government developed legislative and other measures to comply with its constitutional obligations in terms of section 7(2) of the Constitution. However, despite national policies and programmes, which, in the main comply with international standards and targets, the health care system has not been able to successfully deliver quality health

care on an equitable basis in all the provinces. Provinces do not spend the same amount per capita on health care delivery, and there is a serious lack of managerial capacity in the health system. The biggest challenge facing the efficient running of the health system is training managers to operationalise efficient systems especially for running clinics and hospitals where many problems have been identified. Efficient management systems in conjunction with effective engagement with labour should be operationalised with immediate effect in the public health sector so as to ensure that hospitals and clinics run well.

The report also recommends that there is a need to increase efforts in promoting preventative health measures by the State as well as by non-state actors. Programmes and policies should also be put in place to address the needs of the poor and vulnerable members of society, including a National Health Insurance System. Inequities in the health system such as intra- and inter-provincial health expenditures, access to clinics and hospitals, number of doctors, specialists, and nursing staff need to be addressed so as to give meaning to the constitutional right to universal and equal access to everyone. Finally, Departments of Health are strongly advised to improve their monitoring, evaluating, and reporting systems

The Right to Social Security

The Constitution provides that everyone has a right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The number of social assistance beneficiaries increased dramatically by 966 311 people from April 2002 to the end of March 2003, mostly as a result of increased registration for Child Support Grants for children up to the age of seven. By the end of March 2003, 5,6 million people were beneficiaries of social assistance, which mostly comprised of child support grants (2,5 million people), old age pensions (2 million people), disability grants (897 050 people) and foster care grants (133 309 people). The most rapid increases in uptake of social grants took place in Gauteng, Free State, KwaZulu-Natal, Mpumalanga and Limpopo. Take up rates were considerably lower in the Northern Cape, North-West, Eastern Cape and Western Cape.

Most provincial departments indicated that the allocated budget was not enough and that numbers of grant beneficiaries were constantly increasing, resulting in overspending for social security. However, the delivery of social services has not been efficient in some parts of the country as a result of administrative problems, lack of documentation as barriers to accessing grants, poor conditions at pay points, as well as corruption and maladministration.

As a result of rapid inflation in the cost of basic goods bought by the poor, in 2002/2003, the State moved swiftly to implement above inflation related increases in social grants. The old-age pension was increased by R20 to R640, the child-support grant increased by R10 to R140, the grant in aid increased from R120 to R130, the foster-care grant from R450 to R460, and the care dependency grant from R620 to R640.

The National and Provincial Departments of Social Development spent 90% of the R49 million allocated to the HIV/AIDS (home based/community based care) programme. The Home/Community Based Care programmes, through the collaborative work of

government, non-governmental organisations, including faith-based organisations, and communities have benefited 29 612 children orphaned or vulnerable to HIV/AIDS by the end of March 2003. The programme reached 75 000 children orphaned or vulnerable owing to HIV/AIDS since its inception in 2000.

The State also instituted new measures to further the right to social security, including disability assessment panels, a social relief of distress policy and the implementation of the National Food Emergency Scheme/Programme. Figures of the number of households that were assisted with food parcels in the pilot phase of the National Food Emergency Programme from December 2002 to the end of March 2003 range from 60 089 to 149 779.

The social security system at present does not cater for everyone and not everyone in need of social assistance is afforded such assistance. This is especially so for children in child headed households and children who live in the streets who sometimes engage in exploitative forms of labour. Some parents also fail to provide and take care of their children and put strains on the maintenance and social assistance systems.

The report recommends that the Department of Labour should take the International Labour Organisation's Decent Work for All Strategy forward in South Africa. It is also recommended that the relevant organs of State achieve better regulation of the insurance, health and maintenance systems. Particular attention should be paid to the coverage of old age pensions for workers in non-formal employment. The Department of Social Development is encouraged to continue fostering collaboration with all stakeholders, such as other government departments, Faith Based Organisations and Non-Governmental Organisations. The Basic Income Grant should continue to be considered as a viable option for addressing poverty in the country, especially amongst people of working age. The proposal to extend social assistance to all children in need (up to the age of 18), should also be kept alive.

The Right to Food

The report concludes that many people, and children in particular, had their right to food violated during the reporting period as they lost access to affordable food due to high prices and/or unreasonable plans devised and supervised by government. During the reporting period, 101 152 children were admitted to hospital with severe malnutrition and it was not possible for the Commission to state how many children died of malnutrition. However, it is alarming that case fatality rates for severe malnutrition in two under-resourced hospitals in the Eastern Cape ranged from 21% to 38%.

The report finds the National Department of Health's targets for reducing malnutrition to be unreasonable in their conception because the targets for 2000 and 2005 were virtually identical. The report also finds two elements of the Primary School Nutrition Programme to be unreasonable in their conception.

The first issue concerns the reduced allocation of resources to the programme in 2002/2003 as compared to 2001/2002. In 2001/2002 the total cost of the school food "meal" ranged from approximately 99 cents to R2.10. In 2002/2003, the maximum budgeted resource available per targeted learner per day was less than 67 cents. This is

clearly an unreasonable set of parameters for the programme to be improved to meet the higher standards set by Cabinet.

The second element of the programme that was unreasonable was the reduction in the targeted number of children who should benefit from the programme. In the context of increasing numbers of children enrolled in schools, the Primary School Nutrition Programme did reach 4,5 million children in grades R to 7, however this was 151 615 children less than the year before. The drop in the number of learners who were reached is connected with government reducing its target from 5,4 million learners in 2001/2002 to 4,9 million learners in 2002/2003 as well as rapid increases in the cost of food procured for the programme. A three month gap in the implementation of the programme in the Eastern Cape also reduced access to the programme.

Non-State actors appear to have fallen short in their observance of their positive obligations to fulfil the right to food. As one example, the Yiyo Lena sifted maize relief programme introduced by a group of companies is alleged to have sold relief maize packs at a 20% discount, despite that fact that the companies announced that the programme would entail a 50% discount.

High basic food prices during the reporting period, were partly attributable to inadequate safeguards on the South African Futures Exchange, where maize prices are formed. High prices for maize were passed on to low-income consumers, who could ill afford such dramatic basic food price increases for such a sustained period of time. The potential for market manipulation should have been prevented by the Johannesburg Securities Exchange when allegations of abuse were first signalled in 2002. The report identifies that there are weaknesses in the State's observance of its obligation to protect against fraud, unethical behaviour in trade and contractual relations.

There were some signs of improvement in the State's delivery of production support to emerging farmers and people who grow their own food. For example, the Comprehensive Farmer Support Package was instituted during the reporting period to assist land reform beneficiaries. However, it was implemented in some provinces only.

The LandCare programme, which is one of the major production support programmes from the National Department of Agriculture, was heavily underspent at 65% of the total conditional grant to provinces. There is also a significant gap in production support for rural restitution beneficiaries.

It was found that very few Provincial Department's of Agriculture were operating well funded programmes designed specifically to provide grants or revolving loans to support increased access by small scale and emergent farmers to production and/or marketing related infrastructure. Production support materials and learning support materials that are relevant to resource to poor farmers in water scarce areas were also not readily available.

On the whole, the report determines that the State absorbed the heavy burden of duty to achieve the progressive realisation of the right to food as expeditiously as possible, within its available resources. However, there was a crucial weakness in the measures to protect the right to food from being violated by non-State actors or third parties that need not be repeated in future.

The report suggests that there is a need for greater care in the preparation of strategic and financial planning targets so that they inspire civil society to marshal their resources in support of the progressive realisation of the right. The report recommends: public education to raise awareness of malnutrition, rolling out the Integrated Food Security Strategy at a provincial level, improving food safety, achieving better regulation of the food industry through State procurement, accelerating agrarian reform, and communication policy and legislative developments more effectively. Finally, the report supports the call for government, labour, community and business representatives to negotiate an agreement at the National Economic Development and Labour Council (NEDLAC) to ensure the right to food and quality job creation in the food industry.

The Right of Access to Adequate Housing

In order to fill some gaps in the housing policy framework, the State identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities for 2002/2003. Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to transport and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualised as a result of the *Grootboom* judgment and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control (e.g. disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety). The report highlights that it was not clear whether the Emergency Housing Policy should also cover people living in informal settlements, because they are living in intolerable circumstances. Social Housing projects demonstrate that socially, environmentally and sunshine conscious design principles can make a difference to the quality of State subsidised housing.

The State reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from Occupation of Land Amendment Bill and the commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000. With a view towards curbing discriminatory practices, the Act compels financial institutions to disclose information in their financial statements on home loan patterns according to categories of persons and geographic areas (both of which may be prescribed). The Community Reinvestment Bill confirmed the State's intention to increase private sector investment in the lower end of the housing market. The report highlights that the State was also attending to some aspects of the Housing Act 107 of 1997, as amended, in order to ensure that the Act, and its implementation, did not violate an individual's right to property in terms of the Constitution.

In terms of on-going policies and programmes, in 2002/2003, the State reported 203 288 houses completed or under construction, whilst the State approved 519 498 subsidies to households with a joint monthly income less than or equal to R3 500, or R1 500 if the house was built under the apartheid system. By the end of 2002/2003, the State reported that over 1,4 million houses had been delivered since 1994, whilst the number of families without houses (i.e. dwellings in backyards, informal dwellings, backyard dwellings in shared properties and caravans/tents) was reflected as 2 399 825- from the 2001 Census. The State also increased the subsidy amounts for the housing programme to keep pace with inflation and maintain the well-known quality and size of housing. Sixty-three projects were also completed as part of the Human Settlement Redevelopment Programme in order to correct imbalances and dysfunctionalities in

existing settlements that cannot be funded through the housing subsidy scheme (e.g. sports facilities, business hives, labour exchanges, cemeteries, parks and ablution blocks).

There was under expenditure on housing delivery amongst many provincial departments responsible for housing. Reporting on the constraints associated with underspending was not complete, but included the following in some cases: failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in the National Department approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the People's Housing Process and delays at the Deeds Office.

Comparing performance in relation to targets was a problem in that provincial information was reported in the format of the number of units completed *or* under construction. Nevertheless, Gauteng and Limpopo provinces stand out as the only provinces to show a reduction in units, whether complete or under construction, from 2001/02 to 2002/03. The Gauteng Department of Housing reported delivering 59% of the target in the incremental housing programme and 39% of the target in the Social Housing programme. A Customer Support Service in the province acknowledged 83 714 queries and responded to a further 11 774 by letter.

According to the National Department of Housing, in 2002/2003, 6 469 houses did not conform to the Department's construction and safety standards. The National Home Builders Registration Council's (NHBRC) Warranty Scheme was instituted to provide assurance to beneficiaries that houses built and financed through the housing subsidy scheme are of an adequate quality. After trying to resolve disputes about the quality of construction, a housing subsidy beneficiary can forward complaints to the NHBRC. However, the report highlights that public education is required to empower consumers to identify quality problems and make use of the complaint procedures of the NHBRC. The Mpumalanga Department of Housing also reported that building works inspectors from provincial government and local government monitored the work of contractors.

The report makes one urgent recommendation, namely: to establish the dedicated fund for acquiring well-located land for low-cost housing. Other recommendations include reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, interpreting the Peoples' Housing Process as a route for strengthening culturally adequate housing, creating an informed and supportive environment for whistleblowing, and ensuring effective participation in the delivery of housing. Specific attention is drawn to the plight of farmworkers and vulnerable groups, especially HIV/AIDS orphans and People with Special Needs.

The Right to a Healthy Environment

Section 24 of the Constitution establishes the right to environment in order to ensure the health and well-being of present and future generations. At its core, the right to environment aims to grant this benefit to everyone in South Africa, not just to the few. Although, translating this vision of the benefit of environmental health into reality has become increasingly complicated, ensuring that there are no violations of this right is as urgent as any violation of other rights in the Bill of Rights.

Analysts of data from South Africa's Global Atmosphere Watch station at Cape Point contend that continued emissions of greenhouse gases are cause for concern. Like many countries, South Africa is sensitive to global climate change and there are also occasions, especially in major urban areas, when more localised air pollution becomes a health threat.

By way of illustration, the Johannesburg *State of the Environment Report 2003* indicates that “while in many parts of Johannesburg, air quality is within acceptable standards, approximately 20% of the City, particularly dense settlements and lower income townships, experience severe air pollution, with ambient air pollution levels exceeding acceptable guidelines by approximately 20-30% particularly during winter when temperature inversions prevent emissions from dispersing.” The report goes further to state that “levels of particulate matter in certain townships can exceed the World Health Organisation standards by as much as 250% in winter.”

Progress in the realisation of the right to environment could not be very well monitored and observed by the Commission during the year under review because annual progress reports in terms of section 11 of the National Environmental Management Act 107 of 1998, were inaccessible at the time of writing. These progress reports should contain detailed information on the implementation of measures instituted to ensure the right to environment.

Nevertheless, the Commission did observe the growing influence of the Committee for Environmental Co-ordination through an interpretation of its review, and subsequent consolidation, of Environmental Implementation Plans and Environmental Management Plans submitted by relevant organs of State. These reports contain the planned and *aligned* outputs of national and provincial departments with an impact on, or management function over, aspects of the right to environment. The Commission also recognises that some Environmental Co-ordinating Committees were established at the provincial sphere, also for the purposes of alignment and co-operative governance.

Progress has been made, through the courts and other avenues, towards realising the procedural aspects of the right to environment (access to information, participation in decision-making processes, redress and remedy). The report includes several examples of objections and court applications lodged by Non-Governmental Organisations, with a view towards safeguarding environmental health in low-income areas. Despite these opportunities to access information and participate in decision making, some remedies for old violations could not be realised without concerted action on the part of the State. One example, is the case of workers with mercury poisoning, which first occurred many years ago. In March 2003, Thor Chemicals was served with a R60 million toxic chemical clean-up directive by the State.

On the substantive issue of waste management and pollution control, what was reported by government to the Commission fell short of what was expected in terms of the strategic objectives of the policy and strategy for pollution and waste management. The report highlights that there is still no clear understanding among the different mandate holders for this function of what they are required to do and as a result, implementation was not as effective as it could be. Having said this, there were positive developments during the period under review, including the introduction of waste buy-back centres

which address brown issues and could assist in strengthening the bargaining power of the very low income people who do the hard work of collection.

On the issue of Air Quality, the report acknowledges that progress was made in the Southern Industrial Basin through the focused action of the State and Community Based Organisations (CBOs) in linking asthma in school children to emissions, however there is an urgent need for national legislation to institute mechanisms and standards to effectively protect against pollution that threatens health and well-being, possibly including pollutant release and transfer registers.

Several new control measures were introduced to manage water pollution, including the second draft of the National Water Quality Management Framework Policy and the Waste Discharge Charge System. The Working for Water programme succeeded in protecting and preventing against water loss due to alien invasive plant species, however it was not clear how much of this work focused unfairly on commercial farmlands and not on areas inhabited by vulnerable sections of the population.

Most of the work by the State on inland as well as marine and coastal biodiversity and conservation was reasonable in as far as it related to tourism and the economic development of the country.

The report highlights that the challenges facing South Africa in terms of the right to a healthy environment include: allocating sufficient resources for progressive realisation of the right for the benefit of vulnerable groups; educating and training communities; ensuring that proper implementation systems are in place; ensuring effective co-operative governance; operating proper monitoring and evaluation systems.

The report recommends that while most policies and laws are in place or about to be instituted, there should be a quantum shift in focus towards implementation of measures to further the right to environment for vulnerable groups in a more decentralised way. Provincial government and local government should be resourced to concentrate their energies on implementation, in association with community based organisations that have already developed innovations to further the right, sometimes in the face of extreme resource scarcity.

The State has made valuable contributions to promoting the right to environment through for example, the “Bontle ke Batho” or the clean schools, wards and towns campaign; however, organs of State could do more to ensure that their own internal operations reflect implementation of the right to environment. For example, the Council for Scientific and Industrial Research (CSIR) implemented International Standards Organisation 14001 standards for handling and disposing of its own hazardous waste. This initiative by an organ of State seems to have afforded the CSIR the opportunity to gain some capacity and insight, which could be applied to other relevant contexts in the public or private sector within the South Africa.

The report also recommends that monitoring and evaluation systems need to be simplified where possible and improved. Annual progress reports in pursuit of targets and plans laid down in Environmental Implementation Plans and Environmental Management Plans should include a focus on the substantive aspects of the realisation of the right for vulnerable groups. The contents of the reports should also be widely

communicated so as to avoid conflict and encourage effective participation. The Committee for Environmental Co-ordination could also be complemented by the National Environmental Advisory Forum (NEAF) envisaged in the National Environmental Management Act 107 of 1998. This provision to encourage participation should be effected without delay.

D) Protocols and the Report Production Process

The production process for this report began with the SAHRC sending questionnaires, which are called protocols, to various organs of State for their comment in May 2003. The Commission then took some time to revise the protocols, which were resent to all relevant organs of State for comment and suggestions in June 2003. The response from relevant organs of State was not satisfactory; with the Department of Housing (Gauteng Province), the Department of Land Affairs and the Department of Water Affairs and Forestry being the only organs of State to respond. However, the Commission acknowledges that further work is required, in the next reporting cycle, to ensure that the protocols are improved for all spheres of government and parastatals.

The final protocols were sent to various organs of state (national and provincial government, parastatals, metropolitan and local councils) in July 2003, as mandated by section 184(3) of the Constitution. In future, the Commission will pay more attention to smaller municipalities by focusing field research on the implementation of programmes and projects at a local level.

The first deadline for the release of this Report was in December 2003. However, the Commission had major problems in getting timeous responses from organs of State and as a result, the Commission took a decision to subpoena several departments and postpone the release of the Report until sufficient information had been received (see summarised list overleaf).

SPHERE	INSTITUTION	DATE RESPONSE RECEIVED
2 - Provinces	GAU Social Services and Population Development	August 21, 2003
1 - National	NATIONAL Labour	August 29, 2003
2 - Provinces	EC Health	August 29, 2003
2 - Provinces	WC Agriculture	August 29, 2003
2 - Provinces	LIMPOPO Agriculture and Environmental Affairs	August 31, 2003
2 - Provinces	FS Health	September 1, 2003
2 - Provinces	NW Health	September 1, 2003
2 - Provinces	WC Social Services	September 1, 2003
2 - Provinces	EC Education and Training	September 5, 2003
2 - Provinces	GAU Health	September 5, 2003
2 - Provinces	KZN Agriculture and Environmental Affairs	September 9, 2003
4 -Parastatals	PARASTATAL Rand Water	September 9, 2003
2 - Provinces	KZN Traditional and Local Government	September 10, 2003
2 - Provinces	MP Local Govt and Traffic	September 10, 2003
2 - Provinces	NW Education	September 10, 2003
1 - National	NATIONAL Land Affairs	September 12, 2003
2 - Provinces	FS Social Welfare	September 12, 2003
2 - Provinces	GAU Housing	September 12, 2003
2 - Provinces	NC Health	September 12, 2003
2 - Provinces	NC Social Services and Population Development	September 12, 2003
1 - National	NATIONAL Agriculture	September 15, 2003
1 - National	NATIONAL Water Affairs and Forestry	September 15, 2003
2 - Provinces	EC Agriculture and Land Affairs	September 15, 2003
2 - Provinces	FS Education	September 15, 2003
2 - Provinces	GAU Education	September 15, 2003
2 - Provinces	MP Housing and Land Administration	September 15, 2003
2 - Provinces	WC Education	September 15, 2003
2 - Provinces	WC Environmental Affairs and Development Planning	September 15, 2003
2 - Provinces	WC Health	September 15, 2003
2 - Provinces	WC Housing	September 15, 2003
2 - Provinces	NC Agriculture Conservation and Environment	September 15, 2003
2 - Provinces	KZN Health	September 16, 2003
1 - National	NATIONAL Education	September 18, 2003
2 - Provinces	MP Health	September 18, 2003
2 - Provinces	NW Agriculture, Conservation and Environment	September 23, 2003
2 - Provinces	MP Social Services and Population Development	September 25, 2003
3 -Metropolitan Councils	METRO Greater Tswane Metropolitan Council	October 2, 2003
3 -Metropolitan Councils	METRO Nelson Mandela Metro Council	October 2, 2003
1 - National	NATIONAL Correctional Services	October 3, 2003
1 - National	NATIONAL Social Development	October 3, 2003
2 - Provinces	LIMPOPO Health and Welfare	October 3, 2003
2 - Provinces	EC Social Development	October 3, 2003
1 - National	NATIONAL Health	October 10, 2003
2 - Provinces	GAU Agriculture, Conservation, Environment and Land Affairs	October 10, 2003
4 -Parastatals	PARASTATAL Medicines Controls Council	October 10, 2003
2 - Provinces	FS Local Govt and Housing	October 29, 2003
1 - National	NATIONAL Housing	October 30, 2003
1 - National	NATIONAL Provincial and Local Government	October 30, 2003
1 - National	NATIONAL Environmental Affairs and Tourism	October 31, 2003
4 -Parastatals	PARASTATAL Agriculture Research Council	October 31, 2003
1 - National	NATIONAL Minerals and Energy Affairs	November 3, 2003
2 - Provinces	KZN Education and Culture	November 3, 2003
2 - Provinces	EC Housing, Local Government and Traditional Affairs	November 4, 2003
2 - Provinces	GAU Development Planning and Local Government	November 4, 2003
2 - Provinces	LIMPOPO Education	November 4, 2003
2 - Provinces	MP Agriculture, Conservation and the Environment	November 4, 2003
2 - Provinces	NC Local Govt and Housing	November 4, 2003
2 - Provinces	WC Planning and Local Govt	November 4, 2003
4 -Parastatals	PARASTATAL National Education Financial Aid Scheme	November 4, 2003
2 - Provinces	NW Developmental Local Government and Housing	November 5, 2003
3 -Metropolitan Councils	METRO Eastrand Metropolitan Council	November 5, 2003
4 -Parastatals	PARASTATAL Umngeni Water	November 5, 2003
3 -Metropolitan Councils	METRO Cape Town Metro Council	November 6, 2003
4 -Parastatals	PARASTATAL Medical Research Council	November 6, 2003
2 - Provinces	FS Agriculture	November 7, 2003
2 - Provinces	KZN Welfare and Pensions	November 7, 2003
2 - Provinces	LIMPOPO Local Govt and Housing	November 7, 2003
2 - Provinces	MP Education	November 7, 2003
2 - Provinces	NC Education	November 7, 2003
4 -Parastatals	PARASTATAL National Housing Finance Corporation	November 7, 2003
2 - Provinces	KZN Housing	November 14, 2003
3 -Metropolitan Councils	METRO eThekweni Metropolitan Council	November 17, 2003
4 -Parastatals	PARASTATAL Landbank*	November 17, 2003
4 -Parastatals	PARASTATAL Council for Scientific and Industrial Council*	November 18, 2003
2 - Provinces	FS Environmental, Tourism and Economic Affairs	November 19, 2003
3 -Metropolitan Councils	METRO Greater Johannesburg Metropolitan Council	December 17, 2003
2 - Provinces	NW Social Services**	

-----	First deadline
-----	Extended deadline
-----	Subpoena hearings begin
-----	Subpoena hearings end

* Extension granted as a result of communication problems

** No subpoena served, a letter explains the breakdown in communication

Most organs of State submitted their reports before they were meant to appear at a subpoena hearing. However, the North West Department of Social Services, Arts, Culture and Sport did not provide a response to the Commission as a result of problems with network cabling and the resignation of the personal assistant to the Acting HoD. The Department submits that it was not out of irresponsibility and deliberate disregard of the law that the Commission did not receive a report from the Department.

In order to improve the quality of the information, analysis and recommendations in the reports and to forge closer and better working relationships with government and non-governmental entities, a set of draft reports were released for comment to government and civil society before a National Input Workshop on 27-28 January 2004. Comments made at the workshop, and in writing, have been considered by each report writer.

A set of second draft reports were then made available to the Director General of the relevant national department in February 2003 to correct any remaining problems with factual information. Responses were received from the following departments: Water Affairs and Forestry, Minerals and Energy, Provincial and Local Government, Health, Social Development, Education, Land Affairs, and Housing. The final reports were also reviewed intensively within the Commission before being published.

E) Conclusion

One of the concerns acknowledged by the Commission about the monitoring process so far is that it still relies heavily on reports from government.

Furthermore, even though the Bill of Rights applies vertically and horizontally and binds State entities and non-State entities, the Commission has some capacity problems in extending its mandate to non-State entities, especially big corporations.

In the next reporting cycle, the Commission will place more emphasis on conducting its own primary research in addition to improving on the existing protocols for each right and making better use of annual report information as soon as it becomes available.

ACRONYMS

ARC	Agricultural Research Council
BEE	Black Economic Empowerment
CODEX	A collection of standards and product descriptions for a wide variety of foods was developed as the <i>Codex Alimentarius Austriacus</i> in the Austro-Hungarian Empire between 1897 and 1911. Although lacking legal force, it was used as a reference by the courts to determine standards of identity for specific foods. The present-day <i>Codex Alimentarius</i> draws its name from the Austrian code. The literal meaning of <i>codex</i> is a <i>volume</i> or a <i>roll</i> , but the legal term is particularly applied to a volume of civil law produced by the roman emperor Justinian in AD 529. Amongst Justinian's military pursuits was the re-conquering of Africa and Italy.
CPF-SP	Community Projects Fund Support Programme
EIA	Environmental Impact Assessment
EU	European Union
FAO	Food and Agriculture Organisation
HACCP	Hazard Analysis Critical Control Point
HIV/AIDS	Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome
IFSNP	Integrated Food Security and Nutrition Programme
IFSS-SA	Integrated Food Security Strategy for South Africa
JSE	JSE Securities Exchange
LRAD	Land Redistribution for Agricultural Development programme
NFES	National Food Emergency Scheme
PEM	Protein Energy Malnutrition
PMTCT	Prevention of Mother to Child Transmission
SAFEX	South African Futures Exchange
SMMEs	Small Medium and Micro Enterprises
SPFS	Special Programme for Food Security

EXECUTIVE SUMMARY - THE RIGHT TO FOOD

Constitutional Obligations

The Bill of Rights in the Constitution enshrines and affirms the democratic values of human dignity, equality and freedom as well as economic and social rights. Section 7(2) of the Constitution requires that the “State must respect, protect, promote and fulfil the rights in the Bill of Rights”.

The Constitution makes specific reference to food in three sections, namely: section 27(1)(b) where it refers to the State’s obligation to take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of everyone’s right to have access to sufficient food and water; section 28(1)(c) where every child has the right to basic nutrition, shelter, basic health care services and social services; and section 35(2)(e) where every detained person and sentenced prisoner has the right to adequate nutrition.

Progress in the realisation of the right to food

Respect

The State observed the constitutional obligation to respect the right to food through respecting the resources owned by an individual and respecting their knowledge, skills and actions to satisfy their own needs.

Protect

The obligation to protect the right to food in terms of section 27(1)(b), 28(1)(c) and 35(2)(e) of the Constitution includes the State's obligation to protect against fraud, unethical behaviour in trade and contractual relations, and the marketing and dumping of hazardous or dangerous food products.

High basic food prices during the reporting period, were partly attributable to inadequate safeguards on the South African Futures Exchange, where maize prices are formed. High prices for maize were passed on to low-income consumers who could ill afford such dramatic basic food price increases for such a sustained period of time. The potential for market manipulation should have been prevented by the Johannesburg Securities Exchange when allegations of abuse were first signalled in 2002. It was not possible to say what information, models, analysis and recommendations the Food Price Monitoring Committee report contains, since it is still not publicly available.

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A host of measures to ensure that food is safe and of a sufficient quality was introduced during the reporting period. One significant development related to this was the release of a sampling frame for food that is consumed within South Africa in order to scientifically test for excessive levels of harmful toxins in future.

The State instituted minimum wages and working conditions to protect the rights of domestic workers and farm workers. This is seen as a positive development because of the findings and recommendations of the Farming Communities Inquiry and the reasoning that the State is obliged to protect against unethical behaviour in trade and contractual relations.

Promote

The Integrated Food Security Strategy and Integrated Food Security and Nutrition Programme were released during the reported period to promote and fulfil the right to food. They made a valuable contribution to the right to food in the sense that they supported short-term, medium-term and longer-term actions by the State towards progressive realisation of the right to food. It also facilitated some much needed inter-sectoral co-operation between different line functions in order to realise the right to food as expeditiously as possible.

The National Guidelines for Integrated Management of Agricultural Water Use state that many traditional African production techniques should be recognised and supported because of their positive contribution to household food security. In other words small and micro rainwater harvesting, organic soil preparation and cultivation techniques, sharing hardy pest and drought tolerant cultivars and low-cost processing and storage techniques. The Guideline calls for “smart” subsidies and training to promote low external input sustainable agriculture (LEISA). It also calls for the zoning of land for urban agriculture as part of the Integrated Development Planning process at a local level.

Evidence presented in the report suggests that South Africa’s malnutrition problem is not a moderate public health problem, but a more deep seated one that is especially poorly understood by more affluent members of society.

Good nutrition needs to be promoted in an independent and culturally sensitive manner to all age groups. This is especially true for those areas of the country (like rural areas and informal settlements) that are actively supplied with low quality foods or foods with high concentrations of additives/toxins.

Fulfil

The obligation to fulfil childrens’ right to food in terms of section 28(1)(c) of the Constitution was mainly effected through the State’s Primary School Nutrition Programme for children in grade R to 7, the Early Childhood

Development Centre nutrition programme in Gauteng and nutrition programmes for children under 5 at health facilities across the country.

Based on information reported by personnel at health facilities across the country, the extent of growth monitoring of children under 5 improved considerably. More than 101 152 severely malnourished children were identified at health facilities during the year under review and a larger number were recipients of food supplements through the Protein Energy Malnutrition scheme based at health facilities.

Some health professionals went further and assessed the circumstances of households with malnourished children at their homes. These initiatives highlighted the extreme poverty of households, facilitated registration for State grants and in some cases stimulated household food production. There appears to be room for improvement from other professions when it comes to following-up on children with malnutrition after they have been discharged from hospital.

Nutritional supplementation interventions for people living with TB and/or HIV/AIDS were not reported separately from the Protein Energy Malnutrition scheme. It was therefore difficult to assess the size and coverage of this programme. The report recommends that the Integrated Nutrition Programme be expanded into a sustainable programme to half hunger by 2015.

Only the Gauteng Department of Health reported on a feeding scheme for children at Early Childhood Development Centres. The programme reached 66 579 children.

Indicators of the overall performance of the Primary School Nutrition Programme reveal an urgent problem. In the context of increasing numbers of children enrolled in schools, the Primary School Nutrition Programme did reach 4,5 million children in grades R to 7, however this was 151 615 children less than the year before.

The drop in the number of learners who were reached is connected with government reducing its target from 5,4 million learners in 2001/2002 to 4,9 million learners in 2002/2003 as well as rapid increases in the cost of food procured for the programme. A three month gap in the implementation of the programme in the Eastern Cape also reduced access to the programme.

The obligation to fulfil everyone's right to food in terms of section 27(1)(b) of the Constitution was mainly effected through the Department of Social Development's social assistance grants and the National Food Emergency Scheme.

One of the most significant measures to address the impact of high food prices during the reporting period was the increase in the value of existing social

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assistance grants and the extension of the coverage of the child support grant (see Social Security report in this series). During the reporting period, the old-age-pension increased by R20 to R640, the child-support grant increased by R10 to R140, the grant in aid increased from R120 to R130, the foster care grant from R450 to R460, and the care dependency grant from R620 to R640.

On 10 October 2002, Cabinet announced the National Food Emergency Scheme amounting to R230 million whereby the Department of Social Development distributed food parcels to eligible households. Figures on how many people benefitted from the pilot phase of the scheme before April 2003 range from 60 089 to 149 779 households (see Social Security report in this series).

The obligation to fulfil the right to food was also given effect through production support programmes initiated by the National Department of Agriculture and Provincial Departments of Agriculture.

There were some signs of improvement in the delivery of production support to emerging farmers. For example, the Comprehensive Farmer Support Package was instituted during the reporting period to assist land reform beneficiaries. However, it was only implemented in some provinces.

The LandCare programme, which is one of the major production support programmes from the National Department of Agriculture, was heavily underspent at 65% of the total conditional grant to provinces. There is also a significant gap in support for rural restitution beneficiaries.

Enough information was provided by the North West Department of Agriculture to establish that the delivery of agricultural infrastructure (tools, equipment, facilities and land works) lagged behind the delivery of training. This imbalance may limit the effectiveness of production support interventions. Very few Provincial Department's of Agriculture were operating well funded programmes designed specifically to provide grants or revolving loans to support increased access by small scale and emergent farmers to production or marketing related infrastructure. Production support materials and learning support materials that are relevant to resource poor farmers in water scarce areas were also not readily available, although the Agricultural Research Council has made progress in this regard.

The Agricultural Starter Pack Programme was announced during the reporting period and it is the programme that intends to reach a large number of resource poor farmers with production inputs and agricultural equipment. A substantial sum of money was allocated towards the programme, which was due to commence in April 2003.

Overall Assessment

It is not possible to make a single and simple determination on whether there was progressive realisation of the right to food during the reporting period or not. It is reasonable to argue that many people, and children in particular, had their right to food violated during the reporting period as they lost access to affordable food due to high prices or unreasonable plans devised and supervised by government.

On the whole, the report determines that the State absorbed the heavy burden of duty to achieve the progressive realisation of the right to food as expeditiously as possible, within its available resources. However, there was a crucial weakness in the measures to protect the right to food from being violated by non-State actors or third parties that need not be repeated in future. There is also a need for greater care in the preparation of strategic and financial planning targets so that they inspire civil society to marshal their resources in support of the progressive realisation of the right.

Recommendations

The report recommends: public education to raise awareness of malnutrition, rolling out the Integrated Food Security Strategy at a provincial level, improving food safety, achieving better regulation of the food industry through State procurement, accelerating agrarian reform, and communication policy and legislative developments more effectively. Finally, the report supports the call for government, labour, community and business representatives to negotiate an agreement at the National Economic Development and Labour Council (NEDLAC) to ensure the right to food and quality job creation in the food industry.

1 INTRODUCTION

1.1 CONSTITUTIONAL OBLIGATIONS

The Bill of Rights in the Constitution enshrines and affirms the democratic values of human dignity, equality and freedom as well as economic and social rights. It also requires that the “State must respect, protect, promote and fulfil the rights in the Bill of Rights”. The Constitution makes specific reference to food in three sections, namely: section 27(1)(b) where it refers to the State’s obligation to take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of everyone’s right to have access to sufficient food and water; section 28(1)(c) where every child has the right to basic nutrition, shelter, basic health care services and social services; and section 35(2)(e) where every detained person and sentenced prisoner has the right to adequate nutrition.¹

The obligation to respect the right to food is a negative obligation, which requires the State to refrain from denying anyone their right of access to food or limiting equal access to the right to food.² The equitable allocation of fishing quotas is one practical example of the State’s obligation to respect the right to food (see the Environmental Rights report). In international human rights law forums, much has been made of the proposal to treat the obligation to respect the right to food as a first order obligation, on the assumption that:

human beings, families or wider groups seek to find their own solutions to their needs. States should, at the primary level, respect the resources owned by the individual, her or his freedom to find a job of preference, to make optimal use of her/his own knowledge and the freedom to take the necessary actions and use the necessary resources – alone or in association with others – to satisfy his or her own needs.³

South Africa’s food marketing system was de-regulated from a form of State control into a form of private control from the late 1980s onwards. In many countries, including South Africa, food is characterised as a private good (a commodity) that should be accessed exclusively through markets. In light of the commoditised nature of food, the United Nations Special Rapporteur on the right to food stated that section 8(2) of the Constitution ensures “that the Bill of Rights applies to a natural or a juristic person, which means that a transnational corporation [or domestic business] could be held liable for violation of the right to food.”⁴

The obligation to protect the right to food requires “effective regulation of the food market by the State to ensure that basic foodstuffs are not inflated out of the reach”⁵ of vulnerable groups. The obligation to protect requires the State to actively prevent violations by the private sector.⁶ The State’s obligation may include, amongst other things, protection against fraud, unethical behaviour in trade and contractual relations, and the marketing and dumping of hazardous or dangerous food products.⁷

The State is also obliged to ensure protection against localised violations of the right to food such as farm owners who deny labour tenants and farm workers rightful access to grazing and crop land and water for production; inflate food prices at farm stalls; provide sub-standard food as in-kind payments; or deny food and water for the purposes of strategic evictions.⁸ The State's role of protecting the right to food as a first order of action is sensible, considering that violations by non-State actors can eventually have multiple consequences for the State. This was the case after certain farm worker and labour tenant evictions that demanded the provision of emergency nutrition, shelter and health care at the State's expense.⁹

The State's obligation to promote the right includes the delivery of broad-based public education on the right to food. The State should also run effective monitoring systems that indicate whether policies and legislation are successful in ensuring progressive realisation of the right over time.

The State's obligation to fulfil the right to food places a positive obligation on the State to create an enabling atmosphere in which everyone can exercise his or her right to food. This includes the policies, legislation, institutions and processes aimed at ensuring that food supplies and food distribution are sufficient for everyone. Whenever an individual or a group is unable to enjoy the right to food by the means at their disposal, the State also has an obligation to fulfil the right immediately for those in desperate need.¹⁰ This is especially so when it comes to emergencies and children's rights. Where parental and family care is available, the State need only provide economic and social rights on a "programmatically and co-ordinated basis, subject to available resources".¹¹ However, according to the *Grootboom* and *TAC* judgments, the State is obliged to ensure that children are accorded protection when effective parental or family care is lacking.¹²

Given the historic origins of the widespread malnutrition and hunger problem in South Africa, there are positive obligations on private agencies to fulfil the right to food, despite statements to the contrary as follows:

*consider a social-welfare right such as the right of access to sufficient food and water. As a matter of political morality, it is submitted that it would be wholly inappropriate for this right to be interpreted as imposing positive burdens on private agencies. Whatever view we may adopt regarding the existence of moral duties which require the rich to assist the poor, it would be intolerably far-reaching to endorse the proposition that rich persons have a constitutional duty to provide food to the impoverished. This conclusion is bolstered by section 27 (2) of the Constitution, which makes it clear that it is the State that is burdened with a duty to achieve the progressive realisation of the right of access to food and water. On the basis of this kind of reasoning, it may be concluded that social-welfare rights will, in general, not impose positive duties on private agencies.*¹³

1.2 RELEVANT CASE LAW

The *Grootboom* judgment, which elaborated on the housing rights of adults and children with “no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations”, reasoned that the State should “devise, fund, implement and supervise measures to provide relief to those in desperate need” within its available resources.¹⁴ In terms of the judgment, a reasonable programme would be one that resulted in progressive realisation of the right within available resources while being balanced and flexible, as well as making appropriate provision for attention to crises and to short-, medium- and long-term needs. In addition, “a reasonable programme had clearly to allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources were available”.¹⁵

Several interpretations of the right to food in light of the *Grootboom* judgment have placed an emphasis on:

- a) the extent to which a policy should respond to the immediate consumption needs of people in desperate situations as opposed to focusing on longer-term food production objectives; and
- b) the requirement that a policy is only reasonable when it is coherent and co-ordinated. In terms of the right to food, policy co-ordination between the National Departments of Agriculture, Health and Social Development at a national level has been seen as key.¹⁶

In terms of the right to food and other economic and social rights, the *TAC* judgment is significant because the Constitutional Court issued an order to government to act without delay in rolling out Neviripine with a view towards reducing the risk of mother-to-child transmission and saving lives.¹⁷ The *TAC* judgment is also important because it stated that for a “public programme ... to meet the constitutional requirement of reasonableness, its contents must be made known appropriately”.¹⁸ State provision of good nutrition to HIV/AIDS sufferers in the form of formula feed for infants or food supplements has not been the main subject of an application to court thus far. Although breast milk substitutes were discussed in the *TAC* judgment, the issue did not form part of the Constitutional Court order.¹⁹

Whether a right-to-food programme is reasonable in its conception and implementation is being brought into sharper focus by cases against the State and the implementation of its National Food Emergency Scheme in terms of the Social Assistance Act.²⁰ The South African Human Rights Commission (SAHRC) also intervened to ensure the implementation of the National Food Emergency Scheme after it failed temporarily in KwaZulu-Natal.²¹

1.3 INTERNATIONAL INSTRUMENTS

The legal content of the right to food has been defined in successive international instruments. Article 11(1) of the 1976 International Covenant on Economic, Social and Cultural Rights²² provides that “State parties recognise

the right of everyone to an adequate standard of living for himself (sic) and his family (sic), including adequate food, clothing and housing, and to the continuous improvement of living conditions”. Article 11(2) provides that State parties recognise that more immediate and urgent steps may be needed to ensure “the fundamental right to freedom from hunger and malnutrition”.

In 1999 the Committee on Economic, Cultural and Social Rights, in its *General Comment 12*,²³ elaborated on Article 11 as follows:

*the right to adequate food is realised when every man, woman and child, alone or in community with others, has physical and economic access to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense that equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realised progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural and other disasters.*²⁴

More recently, inspired by the *General Comment*, the United Nations Special Rapporteur on the right to food adopted a working definition of the right to food as:

the right to have regular, permanent and unobstructed access, either directly or indirectly by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free from anxiety.

The *General Comment* goes on to state that:

*“Food aid should ... be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the needs of the intended beneficiaries. Products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.”*²⁵

It is also worth noting that the Food and Agriculture Organisation (FAO) was mandated by the United Nations to develop voluntary guidelines on the right to food.²⁶ The purpose of voluntary guidelines is to provide a practical tool to assist in the implementation of existing legal obligations.²⁷ The Millennium Development Goal on the right to food is to “halve the proportion of people living on less than a dollar a day and those who suffer from hunger” by 2015.²⁸

While South Africa did not make a written submission to the Intergovernmental Working Group that guided the content of the draft voluntary guidelines, the country is represented as co-chair of the Bureau that has responsibility for developing the guidelines before they are submitted to the

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FAO's World Committee on Food Security and then the Economic and Social Council of the UN.²⁹ The South African Human Rights Commission is involved in preparing a case study on the right to food in South Africa as an input to the Intergovernmental Working Group.

This report includes a consideration of the right to food and vulnerable groups. International instruments provide some indication of how the right to food is conceptualised for women, children and older persons.

South Africa has ratified the Convention on the Elimination of All Discrimination Against Women (CEDAW).³⁰ Having noted the concern that in situations of poverty, women have least access to health, food, education, training and opportunities for employment and other needs, the Convention provides for the following in Article 12(2):

State parties shall ensure to women, appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.³¹

South Africa also ratified the UN Convention on the Rights of the Child in June 1995. Article 24 Convention states:

24(2) State parties shall ensure full implementation of this right and, in particular, shall take appropriate measures:

c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

Whilst, Article 27(3) states:

States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.³²

In light of the fact that older persons in South Africa play a major role as supporters of many families, it is also necessary to safeguard the principle that:

Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help.³³

2 PROGRESS IN THE REALISATION OF THE RIGHT

2.1 NEW POLICIES AND PROGRAMMES

2.1.1 National Government

2.1.1.1 Integrated Food Security Strategy for South Africa

The most significant policy development during the 2002/2003 period was the release of the Department of Agriculture's *Integrated Food Security Strategy for South Africa* (IFSS-SA) in July 2002.³⁴ The IFSS-SA is an extension of the *Discussion Document on Food Security* released in 1997.³⁵ The IFSS-SA represents the most coherent departmental statement on food security policy in South Africa to date.³⁶ Its acceptance by Cabinet as policy was subject to it being "translated into an implementable programme".³⁷ This approach emphasises the requirement of the *Grootboom* judgment that a policy may pass the test of reasonableness if it is reasonable in its conception *and* implementation.

The central principle of the IFSS-SA is that food security should be addressed by ensuring that the target population gains access to productive resources and is empowered to have nutritious and safe food. Where a segment of the population is unable to gain access to productive resources, food security interventions will ensure access to income and job opportunities to enhance purchasing power. Finally, any segment of the target population that is still excluded as a result of disability or extreme destitution will receive relief from the State over whatever time period is appropriate given the "nature of the interventions".

The IFSS-SA paints a positive picture of South Africa's ability to produce and export food, but highlights the scale of household and intra-household food insecurity. The report finds that between 35% and 39% of South Africa's population is vulnerable to food insecurity, but concludes that "compared with international ranges, protein energy malnutrition, as measured by stunting levels, is a moderate public health problem in South Africa".³⁸

The IFSS-SA also complies with the Millennium Development Goal to halve hunger by 2015. The IFSS-SA states that its goal "is to eradicate hunger, malnutrition and food insecurity over 2015."³⁹ The report poses a major challenge for "national policy-makers implementing" the IFSS-SA as "keeping abreast of the most important trends and prioritising them at any given time".

The IFSS-SA sees a wide range of food security challenges ranging from national level to household level. The report highlights five challenges that have implications for vulnerable households, namely:

- inadequate safety nets;
- weak support networks and disaster management systems;
- inadequate and unstable household food production;

- lack of purchasing power; and
- poor nutritional status.

Consistent with the central principles of the policy document outlined earlier, the report identifies priority areas for action in the following order:

- Increase household food production and trading;*
- Improve income generation and job-creation opportunities;*
- Improve nutrition and food safety;*
- Increase safety nets and food emergency management systems;*
- Improve analysis and information management systems;*
- Provide capacity building; and*
- Hold stakeholder dialogue.*

Exactly what measures will be instituted to realise the right and address the problems of vulnerable groups is not clear. Several possible policy interventions are proposed for each programmatic area, but inconsistencies and policy trade-offs have not been resolved. This appears to be because the IFSS-SA is still to be finalised at a national intergovernmental workshop⁴⁰ after “discussions among stakeholders, to ratify the proposed interventions, objectives and targets”⁴¹.

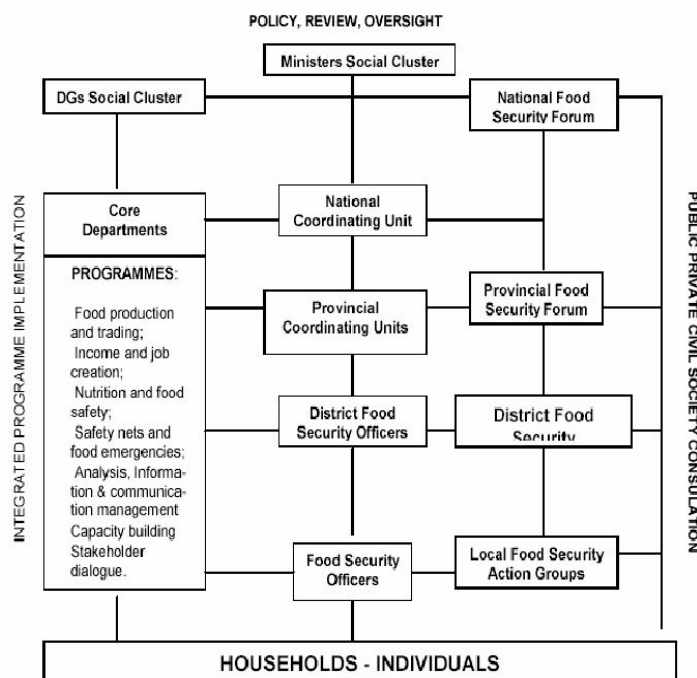


Diagram 1: Institutional Arrangements and Organisational Structures

The report acknowledges that one of the fundamental problems standing in the way of targeting and effective delivery is a lack of institutional capacity, especially in rural areas. A special organisational structure focusing on expanding the capacity under the Minister's Social Cluster is proposed in the IFSS-SA. The IFSS-SA mentions that it links with the *Integrated Sustainable Rural Development Strategy*, but these links are not spelt out clearly in the document.⁴²

2.1.1.2 Integrated Management of Agricultural Water Use

South Africa is a water scarce country, which inherited deep divisions in access to water, including water for the production of food.⁴³ The final version of the *National Guidelines for Integrated Management of Agricultural Water Use* was published on 24 July 2002 with a foreword by the Minister of Agriculture and Land Affairs.⁴⁴ The Guideline was approved by the Agricultural Minister and Members of the Executive Council (MinMEC) on 30 October 2002, and has been accepted for use by the National Department of Agriculture and all provincial departments of agriculture.⁴⁵ The Guideline responds to the fact that 1,3 million hectares (ha) of irrigated land in South Africa is distributed extremely unequally. In many water catchments, there is no water for additional irrigation activity. To remedy this situation, the Guideline document states that the National Department of Agriculture will launch a major national smallholder irrigation initiative under the WaterCare programme, which will be called the "Fruits of our Water" programme.

The Guideline document contains a detailed discussion of different categories of agricultural water use among smallholders in South Africa, including:⁴⁶

- **Low-risk household production for food security:** The Guideline states that many traditional African production techniques should be recognised and supported because of their positive contribution to household food security. In this regard, the report mentions small and micro rainwater harvesting, organic soil preparation and cultivation techniques, sharing hardy pest and drought tolerant cultivars and low-cost processing and storage techniques. The Guideline calls for "smart" subsidies and training to promote low external input sustainable agriculture (LEISA). It also calls for the zoning of land for urban agriculture as part of the Integrated Development Planning process at a local level.
- **Market-based SMME development:** The Guideline proposes that there are significant opportunities for small, medium and micro-enterprise development for farmer-entrepreneurs using water harvesting, moisture-conserving tillage practices, appropriate seed varieties and weed control under rain-fed and supplemental irrigation conditions. The Guideline also states that there are significant local economic development opportunities in previously neglected rural areas through

developing post-harvest value adding (like maize hammer milling), opening up local and external marketing channels and establishing a range of service SMMEs to provide agricultural inputs, mechanisation and market access.

The report warns that women who work the land are often overlooked when business opportunities arise and therefore calls for a special initiative to facilitate women's access to credit, land, water, training and membership of farmer and other organisations. The Guideline argues for defining a minimum economically viable scale of operation for each type of produce to avoid creating dependency on the State.

- **Revitalisation and local integration of smallholder irrigation schemes:** The State inherited a large number of farmer settlement schemes from the apartheid regime that were mostly operated by consultancies and parastatals without farmer or worker input into decision-making. The Guideline describes some of the elements of a revitalisation programme called Irrigation Management Transfer (IMT) that aims to transform ailing irrigation schemes into economically viable entities. The Guideline recommends a number of processes including community vision and institution building, beneficiary identification, achieving tenure security, partial and full debt-write offs, skills development and input supply (with possible transport subsidies for commercial input suppliers).
- **Transformation of commercial parastatal schemes:** Many apartheid-style parastatal irrigation schemes were transferred to provincial departments of agriculture after 1994. Many of these derelict or ailing schemes have now been earmarked for privatisation. In some cases this involves transferring ownership to workers, while in others it involves equity shareholding between investors, workers and landowners or communities.
- **Land reform beneficiaries:** The Guideline raises a number of concerns about the handover of intensive irrigation farms to land reform beneficiaries. The Guideline proposes that technical training and support to land reform beneficiaries should be intensified and delivered in an integrated way by different line function departments. Alternatively, it recommends that beneficiaries should be allowed to choose from a wider range of production systems with different levels of risk.
- **Joint ventures:** The Guideline proposes that the bargaining power of new farmer-entrepreneurs can be bolstered by the State issuing title deeds to land, water-use allocations, and a range of grants and subsidies. According to the Guideline, these measures will, in turn, provide incentives to those with capital and expertise to enter into joint venture arrangements.

The Guideline document proposes a wide range of projects and actions in order to implement the “Fruits of our Water” programme, including:

i) Transforming Provincial Irrigation Action Committees (IACs) or similar existing provincial structures into Co-ordinating Committees for Agricultural Water (CCAWs): The intention is to broaden the focus of existing technical decision-making structures from irrigation to broader agricultural water-use. This, in turn, will require widened participation by relevant roleplayers and disciplines at national, provincial and local level. The Guideline proposes that Co-ordinating Committees for Agricultural Water will need to be empowered by Cabinet to vet and support any new agricultural water-use projects supported by State resources before the Department of Water Affairs or Catchment Management Agency allocates a water licence.

ii) Declaring a consistent government policy for agricultural water-use projects: This involves a proposal that Cabinet should empower the National Department of Agriculture to develop a consistent national policy on agricultural water-use projects in conjunction with other relevant departments. The policy should include criteria for evaluating project proposals; provisions for community vision building processes; a matching grant scheme; an agreed percentage of the budget for training and capacity building; Environmental Impact Assessments (EIAs); standard requirements for grassroots institutions to be deemed eligible for assistance; and financial accountability.

iii) Actively building local government capacity and private sector service provision to smallholder agriculture in ISRDP priority nodes: The Guideline document proposes that Cabinet require District Councils to include an agricultural chapter in their Integrated Development Plans. Three pilot sites are proposed, one each in the Eastern Cape, Limpopo Province, and KwaZulu-Natal. The National Department of Agriculture and provincial departments of agriculture are encouraged to replace government and parastatals with SMMEs that provide services to small-scale farmers.

iv) Making training, credit and markets available to all interested small-scale agricultural water users that produce high quality produce: This involves Cabinet approving a training subsidy to enable all interested small-scale farmers to obtain South African Qualifications Authority (SAQA) accredited qualifications.

v) Supporting initiatives by individual farmers, especially women and youth: This involves a proposal for a communication Guideline to educate the public on how much water they can use without violating the law; appropriate technologies; market information and credit information.

vi) Redistributing land on irrigation schemes in communal areas in a phased manner to ensure sustainable use of a scarce resource: This

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involves a proposal to allow voluntary redistribution of Permission-to-Occupy certificates on existing irrigation schemes.

2.1.1.3 Integrated Food Security and Nutrition Programme

According to the National Department of Agriculture's response to the SAHRC's protocol for 2002/2003, the Integrated Food Security and Nutrition Programme (IFSNP) flows from the IFSS-SA and encompasses the following five areas of intervention:

- Social security nets and food emergency measures (2.1.1.4);
- Improving nutrition and food safety (2.1.1.5);
- Food production and trade (2.1.1.6);
- Income generation and job opportunities (2.1.1.7);
- Food security and information management system (2.1.1.8).

The Department of Agriculture is the overall convenor of the IFSNP. To the best of available information, each of these areas of intervention will be discussed below. Some of the five intervention areas above are discussed in the section on legislative developments in section 2.2 further below.

2.1.1.4 Social Security Nets and Food Emergency Measures

On 10 October 2002, Cabinet announced a special relief package amounting to R400 million drawn from its contingency reserve as a response to dramatic food price increases at the end of 2001, which remained at unprecedented high levels throughout 2002/2003. R170 million was allocated to the World Food Programme for its relief efforts in the southern African region and the remaining R230 million was to be used for a scheme to distribute food parcels to eligible households run by the Department of Social Development. A sub-programme of the Integrated Food Security and Nutrition Programme (IFSNP) called the National Food Emergency Scheme (NFES) was instituted and piloted by the Department of Social Development in December 2002. The details and impact of the NFES in 2002/2003 is discussed in the report on the Right to Social Security in this series.

2.1.1.5 Improving Nutrition and Food Safety

The National Department of Health reported on new policy developments concerning nutrition in the following way:

Nutrition is key to health status, and in 2002 the Department completed an intensive review of the Primary School Nutrition Programme and advised Cabinet on it. The report led to a number of recommendations being accepted. These covered the frequency of feeding, standardisation of menus, and the inclusion of grade R pupils in the programme. These

policy recommendations, together with a realisation of the impact of escalating food prices and a more general focus on mechanisms to impact on poverty in the context of HIV/Aids, see strong increases on the baseline allocations in the 2003 Budget.

Since the Primary School Nutrition Programme was an ongoing programme it is discussed later in this report.

2.1.1.6 Food Production and Trading Measures

2.1.1.6.1 Food Price Monitoring Committee

In the second quarter of 2002, a dramatic escalation in food prices had a significant impact on the majority of South Africans, and an especially negative impact on vulnerable households. Following concerns about a lack of competition that may have resulted in opportunistic price increases in the food chain, in January 2003 the National Department of Agriculture established the Food Price Monitoring Committee, under the National Agricultural Marketing Council.⁴⁷ The objectives of the Committee were “to act as a watchdog that will serve to protect the consumer against unfair price rises that have a detrimental effect on food security for the poor”.⁴⁸ The task of the committee was to “investigate and monitor pricing and competitiveness in the food supply chain, as well as recommend specific actions for government to take in the case of identified uncompetitive behaviour within the supply chain”.

The Committee has conducted and commissioned work according to its terms of reference and presented reports to the Minister of Agriculture and Land Affairs in addition to releasing several statements in the press. The Food Price Monitoring Committee did not succeed in bringing down food prices between January 2003 and the end of March 2003.⁴⁹

2.1.1.6.2 The Food Price Relief Programme (Yiyo Lena)

The National Department of Agriculture (NDoA) reported on a public-private partnership involving cut-price sifted maize meal for distribution in deep rural areas and designated urban areas. The partnership involved the sale of 80 000 12,5kg bags of sifted maize meal at a discounted price of R25,99 to two million people for three months (i.e. 3 000 tons in total), from November 2002 to January 2003.⁵⁰ This is approximately 500 grams of maize meal per capita per month. The Yiyo Lena relief programme was a temporary initiative that cost the private sector approximately R2,5 million and targeted poverty stricken areas in the Eastern Cape, KwaZulu-Natal and parts of Limpopo. The programme was designed to be self-targeting in the sense that sifted maize is often purchased by households that cannot afford higher grade special and super maize meal.

The impact of the programme was very limited because it amounted to only 0,34% of all white maize processed for human consumption in an average month. It was also reported in the press that Yiyo Lena brand maize was

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snapped up as soon as it was put on the shelves, leading to an early end to the programme in December 2002.⁵¹

Contrary to most media reports, the initiative did not involve a 50% discount as initially stated by Premier Foods, Metcash, Afgri and Nedbank, but a 20% discount.⁵²

2.1.1.6.3 The Agriculture Starter Pack Programme

The National Department of Agriculture's response to the SAHRC's protocol stated that the Agriculture Starter Pack Programme intended to target 2,23 million people in four bands according to per capita monthly expenditure on food (see Table 1). The Department refers to these households as the most food insecure and vulnerable households in the country. The report states that Cabinet identified the people and areas to be prioritised, i.e. 13 Integrated Sustainable Rural Development nodes and eight urban renewal nodes, plus poverty pocket areas. The implementation of this programme follows-up on the National Food Emergency Scheme, which provided food parcels to households in desperate need from March 2003 onwards. The scale and focus of the National Food Emergency Scheme and the Agricultural Starter Pack Programme were based on targeting calculations and national poverty hotspot maps produced by Statistics South Africa that were perhaps somewhat outdated compared to on-the-ground reality in 2002/2003 (see Table 1).

Table 1: Targeting calculations for the National Food Emergency Scheme and Agriculture Starter Pack Programme 2002/2003

<i>Band</i>	<i>Spending per month per capita</i>	<i>Households</i>	<i>Cumulative</i>
A	< R200	166 684	166 684
B	R200 – R300	962 625	1 129 309
C	R300 – R400	473 784	1 603 093
D	R400 – R500	631 947	2 235 040

Source: National Department of Agriculture, Protocol Response 2003

Notes: Produced by Statistics South Africa based on Statistics South Africa Census 1996 and October Household Survey, 1999. The four bands represent the lowest four income deciles of the South African population. According to the protocol response the figures will be adjusted with the 2001 Population Census. Statistics South Africa also produced a series of national poverty hot-spot maps to assist departments to calculate estimated costs for the National Food Emergency Scheme.

The Agriculture Starter Pack Programme was due to begin from April 2003 with part of the second year allocation of R400 million from the Integrated Food Security and Nutrition Programme.⁵³ According to the 2002/2003 Annual Report, the National Department of Agriculture has also “lined up Tele-Food Campaign projects” to benefit from agriculture starter packs.

2.1.1.6.4 Agricultural Production Programme

The National Department initiated a new programme during the 2002/2003 financial year. The Agricultural Production programme consists of Animal and Aqua Production Systems and Plant Production Systems as sub-programmes. This is of concern because the intended function of the programme is to work with “provinces and the Agricultural Research Council to identify and support strategic research and interventions to increase productivity, and to mitigate the effects of climate change and migratory pests”.⁵⁴ The programme failed to meet several of its targets. For example, the following reports were delayed:

- A policy on organic farming due in March 2003 was changed to a discussion document on best practices on organic farming and rescheduled for release in December 2003; and
- A policy on water-scarce farming due in March 2003 was changed to a discussion document on best practices for dry land crop production and rescheduled for release in 2004.

2.1.1.6.5 Agribusiness Promotion and Industry Relations

A new sub-programme was established within the National Department of Agriculture to develop a framework for Black Economic Empowerment (BEE) in agriculture. This began with conducting an inventory of BEE empowerment initiatives and resulted in policy, standards and support systems being developed. A draft BEE strategy was completed and published on 25 September 2003 and will therefore be discussed in the next report.⁵⁵

2.1.1.6.6 Comprehensive Farmer Support Package

In terms of support for Land Redistribution for Agricultural Development (LRAD) beneficiaries, the Comprehensive Farmer Support Package was developed and instituted during the reporting period and R3,7 million was transferred to the provinces for its first phase. Comprehensive Farmer Support Package funds are used to train land reform beneficiaries. A total of 1 865 land reform beneficiaries were trained by 11 service providers at a total cost of R1 837 859. The programme was implemented by provincial Department of Agriculture, however Gauteng, North West Province and the Northern Cape would begin the programme in the 2003/2004 financial year.⁵⁶

2.1.1.6.7 Drought Management Strategy

The National Department of Agriculture prepared a Drought Management Strategy in line with the Disaster Management Act of 2002 as mandated by the National Disaster Management Committee. The Department is in the process of drawing up strategies and plans in terms of the Act. A total of 1 367 farmers were assisted in 2002 following snow and veld fire disasters. A total of R170 million was transferred to the Land Bank for the purposes of relieving farmers

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affected by the 2001 flood disaster during the 2002/2003 and 2003/2004 financial years. However, the first payment only took place on 31 March 2003.⁵⁷ The Department runs a disaster database and an Agricultural Disaster Committee is operational.

2.1.1.7 Income Generation and Job Creation

In the State of the Nation Address on 8 February 2002, the President confirmed that a Growth and Development Summit would be held to address job creation and poverty alleviation, amongst other things:

In a meeting of the Joint Working Groups of government with "big business, black business, agriculture and labour" last December, it was agreed to convene as early as possible a Growth and Development Summit to address the urgent challenges facing us in the economy and build an enduring partnership in which all of us can lend a hand in building a prosperous South Africa.⁵⁸

One of the most significant measures to address the impact of high food prices and poverty, during the reporting period, was the increase in the value of existing social assistance grants. The coverage of the child-support grant was also extended (see Social Security Report in this series).

2.1.1.8 Food Security and Information Management System

The Department of Agriculture's FIVIMS Geographic Information system was not working. Instead, Statistics South Africa was requested to produce a series of poverty maps to assist in costing the delivery of the programme.

2.1.2 Provincial Government

2.1.2.1 Improving Nutrition and Food Safety

New policies and guidelines instituted by provincial department of health to further the right to basic nutrition are shown in Table 2.

Table 2: New Policies and Guidelines on Basic Nutrition Instituted by Provincial Departments of Health in 2002/2003

<i>Province</i>	<i>New Policies and Guidelines Instituted</i>
KwaZulu-Natal	<ul style="list-style-type: none"> • Integrated Nutrition Programme Strategic Plan 2003/04-2007/08 • Primary School Nutrition Programme Intervention Guidelines (reviewed April 2002) • Guidelines for a plan of action to transfer the School Feeding Scheme to the Department of Education and Culture • Guidelines for Health Facility Based Intervention • Provincial Protocols for supplementation of people living with HIV/AIDS and TB • Breastfeeding policy – promotion of exclusive breastfeeding from birth to six months • National Integration Project (NIP) and NIP sites care for vulnerable children through the provision of basic meals to and from school plus assistance in access to child support grants • Clinic gardens: as part of the Poverty Alleviation Programme and extension of the Protein Energy Malnutrition (PEM) scheme, targeting PEM participants, disadvantaged people, people with disabilities and people nutritionally at risk
Eastern Cape	<ul style="list-style-type: none"> • Broad guidelines for the implementation of the Integrated Nutrition Programme (INP) • Health Facility Based Nutrition Intervention Guidelines • National Breastfeeding Guidelines and recommendations for feeding infants of HIV positive mothers • Growth Monitoring and Promotion Guidelines • Guidelines for the smooth-running of the Primary School Nutrition Programme
Mpumalanga	<ul style="list-style-type: none"> • Good nutrition for the protection of People with Aids • Good nutrition to children and people with chronic and debilitating diseases • Implementation of the Primary School Nutrition Programme • Policy on the implementation of the Code for Breastmilk substitutes • Policy on the fortification of maize meal and bread
North West	<ul style="list-style-type: none"> • The Department reported at length on the Integrated Nutrition Programme (INP) and referred to the vitamin A supplementation programme and Baby Friendly Hospital Initiative as new measures
Gauteng	<ul style="list-style-type: none"> • A Vitamin A supplementation and fortification policy was developed in June 2002, focusing on the most commonly eaten foods, maize meal and white and brown bread flour with eight vitamins without changing the colour, taste or texture of the product.
Northern Cape	<ul style="list-style-type: none"> • Policy guidelines for Nutrition Interventions at health facilities were reviewed
Western Cape	<ul style="list-style-type: none"> • Draft Food Service Policy Guidelines 2002 • Disease specific nutrition guidelines 2003
Limpopo	<ul style="list-style-type: none"> • Breast feeding policy • Policy guidelines on vitamin A supplementation • Policy guidelines on Primary School Nutrition Programme • Regulations governing general hygiene requirements for food premises and the transport of food • Food fortification programme

<i>Province</i>	<i>New Policies and Guidelines Instituted</i>
Free State	<ul style="list-style-type: none"> The malnutrition programme was reviewed in response to the HIV and AIDS epidemic, the malnutrition programme was reviewed to include persons suffering from debilitating diseases such as AIDS and Tuberculosis

Source: Responses to the SAHRC's protocols 2002/2003

Notes: The Commission asks specifically for new policies to be reported, however, the Commission was not able to verify whether each guidelines/policy was new or not

2.1.2.2 Food Production and Trading Measures

The Free State Department of Agriculture reported in its response to the SAHRC's protocol that the Department signed a rider to the agreement with the European Community on the Community Project Fund Support Programme (CPF-SP). The agreement extended the 5 year period of the programme up to 2006. However, programme suffered as a result of a moratorium on expenditure instituted in July 2002, pending the approval of the European Union and the outcome of an independent audit. The rider to the agreement was signed on 25 September 2002. The impact of the renewed programme is reported on later in the report.

All other provincial departments of agriculture reported that there were no new policies instituted during the reporting period.

2.2 NEW LEGISLATIVE DEVELOPMENTS

2.2.1 National Government

As mentioned above, new national legislative developments are presented according to the intervention areas identified in the Integrated Food Security and Nutrition Programme.

2.2.1.1 Improving Nutrition and Food Safety

2.2.1.1.1 Regulations relating to food safety, nutrition and food manufacturing standards

The National Department of Health released an unprecedented number of regulations during the reporting period, most of which concerned food safety, nutrition or food labelling (see Table 3). These regulations were not discussed in the National Department of Health Protocol response or the National Department of Health's Annual Report 2002/2003.

Table 3: Regulations in terms of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 during April 2002 – March 2003

<i>Date of publication</i>	<i>Regulation number</i>	<i>Title</i>	<i>Brief Description</i>
14-Mar-03	358	Regulation relating to maximum levels for metals in foodstuffs: Amendment	Sets out maximum allowable levels of Antimony (Sb), Arsenic (As), Cadmium (Cd), Copper (Cu), Lead (Pb), Mercury (Hg), Tin (Sn) and Zinc (Zn) in foodstuffs.
13-Dec-02	1588	Amendment of regulations governing microbiological standards for foodstuffs and related matters	Sets out newer microbiological standards for Rooibos and Honeybush tea
13-Dec-02	1543	Amendment of regulations governing the maximum limits for veterinary medicine and stock remedy residues that may be present in foodstuffs	Sets out the maximum residue limit for 65 medicines fed to 'food producing animal species'.
13-Dec-02	1542	Regulations governing the maximum limits for pesticide residues that may be present in foodstuffs	Inserts a new regulation 4 stating "The standards for the methods of analysis and sampling of pesticide residues in food shall be as laid down in the latest edition of the Codex Alimentarius Standards, Pesticides Residues in Food: Methods of Analysis and Sampling, obtainable from the Department of Health."
13-Dec-02	1541	Regulations relating to the prohibition of comfrey and comfrey containing foodstuffs and jelly confectionery containing cognac in foodstuffs	As in the title.
4-Oct-02	1225	Regulations Governing The Tolerances For Certain Seeds In Certain Agricultural Products	Places restrictions on the level and type of poisonous seeds in cereal and oilseed agricultural products.
30-Aug-02	1111	Regulations Relating to Milking Sheds and the Transport of Milk	Sets out very lengthy and detailed requirements for milking shed standards.
8-Aug-02	1055	Regulations Relating to Labeling and Advertising of Foodstuffs, R 1055/2002 (incl. Annexures)	Amongst many other requirements, makes provision that "No claim shall be made that a foodstuff, both single ingredient foodstuffs and compound foodstuffs, is "hypoallergenic" or "nonallergenic" unless the foodstuff is modified by chemical or genetic means so as to reduce the quantity of endogenous allergens" ⁵⁹
12-Jul-02	723	Regulations Governing General Hygiene Requirements for Food Premises and The Transport of Food	Sets out very detailed requirements and standards for food premises and the transport of food.
26-Apr-02	493	Regulations relating to food for special medical purposes	Sets out labelling requirements for food used for special dietary use. Advertising of these products to the general public is prohibited.
26-Apr-02	492	Amendment of regulations governing microbiological standards for foodstuffs and related matters	Sets out microbiological standards for Rooibos and Honeybush tea.

<i>Date of publication</i>	<i>Regulation number</i>	<i>Title</i>	<i>Brief Description</i>
26-Apr-02	494	Regulations relating to the application of the hazard analysis and critical control point system (HACCP SYSTEM)	Outlines the detailed requirements for achieving Hazard Analysis Critical Control Point (HACCP) Certification, which is a system for identifying, evaluating and controlling hazards which are significant for food safety. Makes provision for requesting documentary evidence of the country of origin for external HACCP auditing and certification for imported foodstuffs.

Source: National Department of Health www.doh.gov.za/docs/regulations

The National Department of Health reported that regulations relating to the fortification of certain foodstuffs were drafted in terms of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972. According to the National Department of Health’s protocol response “the regulations will ensure that all people, especially children, receive the necessary micronutrients for healthy growth”.

The process to develop regulations for the mandatory fortification of maize meal and wheat flour with essential vitamins and minerals commenced during the reporting period. Fortification will be for wheat flour and maize meal (including unsifted maize meal). The mix will include Vitamin A, Thiamine, Riboflavin, Nicotinamide, Pyridoxine, Folic Acid, Iron and Zinc, but not Niacin.⁶⁰

The process to develop regulations for the Marketing of Designated Products (breastmilk substitutes) also commenced during the reporting period. These regulations relate to foodstuffs for infants and young children. The regulations are in compliance with the relevant Codex standards for infants and give effect to the provision of the International Code for Marketing of Breastmilk Substitutes.

2.2.1.2 Food Production and Trading

2.2.1.2.1 Agricultural Risk Insurance Bill

According to the Strategic Plan for the National Department of Agriculture:

*the Bill provides for: a system of agricultural insurance in order to improve the economic stability of agriculture; enhance the income of those farmers and producers most vulnerable to losses of agricultural crops and livestock due to natural disasters; financial assistance in establishing the system; the control of certain activities of agricultural insurers and intermediaries; and other matters thereto.*⁶¹

A draft Agricultural Risk Insurance Bill has been forwarded to the Minister of Agriculture and Land Affairs for tabling before Cabinet. After Cabinet approval, the Bill will be published in the Government Gazette for comments. The Bill was to be forwarded to Parliament by the end of July 2003.⁶²

2.2.1.2.2 Sustainable Utilisation of Agricultural Resources (SUAR) Bill

The Department drafted the Sustainable Utilisation of Agricultural Resources (SUAR) Bill, which combines the Subdivision of Agricultural Land Act and the Conservation of Agricultural Resources Act while adding LandCare and Prime and Unique agricultural land principles. According to the National Department of Agriculture Strategic Plan for 2003 – 2006:

the Bill seeks to repeal the Conservation of Agricultural Resources Act 43 of 1983 and section 41 of the Abolition of Racially Based Land Measures Act 108 of 1991. The Bill provides for the sustainable utilisation of natural agricultural resources, including control over the sub-division and change of use of agricultural land and prime and unique agricultural land, in support of biodiversity and for that purpose to provide for the designation and functions of an executive officer, the establishment of LandCare committees, the prescription of standards and control measures, the establishment of schemes and trusts, control over the spreading of weeds and invader plants, and provision for incidental matters thereto.⁶³

The SUAR Bill is to be published for public comment.⁶⁴ According to the National Department of Agriculture's Strategic Plan for 2003 – 2006, the Bill should have been gazetted in the first quarter of 2003.⁶⁵ A version of the Bill has been made available on the National Department of Agriculture's website.⁶⁶

2.2.1.2.3 Food Security Bill

The fragmentation of food security interventions has led the National Department of Agriculture to propose that the activities of different government departments should be integrated. The first draft Food Security Bill⁶⁷ attempts to achieve a greater degree of integration between government departments on the issue of food security, through:

- reporting of food security related activities by all relevant departments to a lead department (understood to be Agriculture and Land Affairs); and
- establishing a food security project proposal, evaluation and disbursement system using funds in the Agricultural Debt Management Account.⁶⁸

Areas of contention in the Bill include the absence of any measures to a) regulate the private sector, or b) maintain a strategic stock for the purpose of disaster relief and/or price stability, or c) guarantee a minimum income for those groups affected by malnutrition.

Another contentious aspect of the June 2002 Draft Bill is the provision for Food Security Management Co-operation Agreements in section 25. The devolution of responsibility for delivery to non-State actors who are tied to

targets towards the progressive realisation of the right to food occurs without similar provisions to bind relevant organs of State.

Furthermore, the biggest problem with project application based facilities like those envisaged in the Draft Bill is the lack of credible organisations to provide effective project packaging and service delivery to project members.

Finally, there are concerns that a lack of participation in the process of the developing the Bill has led to very low levels of awareness among the potential beneficiaries and implementers of the legislation.

2.2.1.2.4 Agricultural Development Finance Bill

The Agricultural Development Finance Bill is the proposed legislative framework for creating an enabling environment for Financial Service Co-operatives in agriculture. The Department resuscitated the Bill during the reporting period and planned to deliver a draft to Cabinet in October 2003.

2.2.1.3 Social Security Nets

2.2.1.3.1 Sectoral Determination for Domestic Workers and Farm Workers

This item is repeated in the Right to Social Security report in this series.

The Minister of Labour determined two sectoral minimum wages in terms of the Basic Conditions of Employment Act 75 of 1997 during the reporting period. The first determination was for domestic workers, which became effective from 1 September 2002.⁶⁹ The second determination was for farm workers and became effective on 1 March 2003. A major consideration in making both determinations was the high level of exploitation of domestic workers and farm workers, especially in rural areas and provinces next to our South African Development Community neighbours.

2.2.2 Provincial Government

2.2.2.1 Improving Nutrition and Food Safety

The Mpumalanga Department of Health reported that new legislative developments took place with regard to: a) specifics on feeding days and menus for the Primary School Nutrition Programme b) transferring the Primary School Nutrition Programme to the Department of Education and c) fortification of maize meal and bread. Legislation related to the National Food Fortification Programme was also reported by the North-West Department of Health.

Through the Environmental Rights protocols response, Provincial Departments of Health reported on their food safety inspectorate functions, especially the improvements in programmes with street traders and home-based workers.

2.2.2.2 Food Production and Trade

All provincial departments of agriculture reported that there were no new legislative developments.

2.3 PROGRESS IN IMPLEMENTING ONGOING PROGRAMMES

2.3.1 *Improving Nutrition and Food Safety*

2.3.1.1 Integrated Nutrition Programme

The National Department of Health refers to the Integrated Nutrition Programme (INP) as the guiding policy framework for its nutrition-related interventions. The INP consists of seven strategies to improve the nutritional status of all South Africans, namely:

- Disease-specific nutrition support, treatment and counselling;
- Growth monitoring and promotion;
- Nutrition promotion;
- Micronutrient malnutrition;
- Food service management;
- Promotion, protection and support of breastfeeding; and
- Contribution to household food security.

On average, about 86% of the INP Conditional Grant Allocation is used annually to fund the Primary School Nutrition Programme (PSNP). The remainder is mostly allocated to one or all of the following programmes:

- **Nutrition interventions at health facilities to manage and prevent child malnutrition.** This is aimed at ensuring a healthy nutritional status for infants and young children, i.e. to target interventions towards children from 0 to five years of age with severe malnutrition, and pregnant women at risk;
- **Vitamin A supplementation:** To reduce child Vitamin A deficiency from 33,3% to 19% through Vitamin A supplementation by 2007. The programme targets all women postpartum six to eight weeks, non-breastfed infants (0 – five months), all infants (six – 11) months, and all children (12 – 60 months);
- **Nutritional supplementation interventions for people living with TB and/or HIV/AIDS:** To ensure a healthy nutritional status for people living with TB and/or HIV/AIDS. The Department of Health had already released National Guidelines on Nutrition for People Living with TB, HIV/AIDS in 2001⁷⁰;

- **The Baby Friendly Hospital Initiative:** To protect, promote and support breastfeeding and ensure that practices and behaviours in the health care settings are supportive of breastfeeding. To ensure breastfeeding for six months and to ensure continued breastfeeding for up to 24 months of age with the introduction of appropriate complementary feeding at six months of age. To provide appropriate information and adequate support to mothers/caretakers where breastfeeding is contra-indicated, to enable them to make decisions on the feeding options for their infants and ensure that the option is successfully carried out; and
- **Food Service Management Standards:** To ensure that hospitalised patients attain healthy nutritional status. Food service management includes the activities of planning, development, control implementation and evaluation of, and guidance in respect of suitable food service systems (procurement, storage, preparation and service of foods and beverages) for the provision of balanced nutrition to groups in the community and in public institutions for healthy and/or ill persons.

2.3.1.2 Primary School Nutrition Programme

The National Department of Health reported on Cabinet recommendations to improve the Primary School Nutrition Programme in its 2002/2003 protocol response.⁷¹ According to the National Department of Health's Annual Reports, the Cabinet recommendations can be summarised, as follows:⁷²

- implementing a strategy to identify and reach areas where poverty is most extreme
- introducing standard menu options
- setting a minimum frequency of 156 out of the 197 school days in a year, by 10am each day
- the inclusion of Grade R pupils
- introducing a monitoring system on standardised food
- increasing the participation of women's groups in the running of the programme.

The Department of Education will assume the leading role in the delivery of the Primary School Nutrition Programme (PSNP) in April 2004 and has renamed the programme as the National School Nutrition Programme (NSNP) and intends to extend the coverage of the programme into the Further Education and Training band (see the Education report in this series).⁷³

During the 2002/2003 financial year, the reach of the PSNP decreased significantly from the previous financial year. In 2002/2003, 4,8 million learners were targeted and 4 548 385 learners were reached, as compared to 4 719 489 in 2001/2002.⁷⁴ This decrease in coverage occurred despite the fact an additional 983 schools were involved in the programme in 2002/2003 as compared to the year before. Based on a review of the protocol responses from the provincial departments of health, part of the decline in coverage may be attributed to rapid increases in the cost of food procured for the programme and inflexibility in allocating more resources to the programme.

As the KwaZulu-Natal Department of Health stated:

due to inflation, the per capita costs per child who participated in the PSNP increased by 10 cents. The enrolments in school increased resulting in an increase in commitments ... With respect to the INP (PSNP) the decision that no more money would be made available (to top up the conditional grant) could have indirectly violated the right to basic nutrition for school children.⁷⁵

The Western Cape Department of Health responded to the inflated price problem by implementing a rationing system as shown in Table 4. Schools scoring above 0,5 on an index of poverty prepared by the Department of Education were included in the PSNP. Further details of the calculations behind the index were requested in order to establish who gained access to the programme and who did not, but this request was not satisfied.

Table 4: The Western Cape Department of Health PSNP Rationing Policy

<i>Department of Education School Poverty Index</i>	<i>Rationing policy</i>
0,9 – 1,0	100% of children in Grades R to 7
0,8 – 0,89	50% of children in Grades R to 7
0,5 – 0,79	25% of children in Grades R to 7

Source: Protocol response, Western Cape Department of Health

Table 5 provides a summary of the number of children reached by the PSNP at provincial level. A lack of up-to-date statistics on the number of learners in Grade 1 to 7 and Grade R to 7 from the National Department of Education makes it difficult to provide a clear indication of the coverage of the primary school nutrition programme. However, assuming that the number of learners has increased since 2001, it does appear that there may be some deficiencies in the reach of the school-feeding programme relative to actual need. The low percentage of coverage in the Free State may be an unintended consequence of the formula used to allocate funds from a national sphere to the provincial sphere in addition to an inability to spend existing funds (see budget section).

Table 5: Reporting on the number of learners reached by the PSNP at provincial level

<i>Province</i>	<i>No of Grade 1 to 7 Learners in 2001*</i>	<i>No of Learners Reached by the PSNP 2002/03</i>	<i>% of learners reached in 2002/03 as a % of all grade 1-7 learners in 2001</i>
KwaZulu-Natal	1 685 113	1 222 225	73%
Limpopo	1 063 960	1 170 000??	110%
Mpumalanga	564 205	440 000	78%
Gauteng	963 633	293 457	30%
Western Cape	585 361	158 000	27%
Free State	433 142	145 103	34%
North West	567 973	263 693**	46%
Eastern Cape	1 421 752	744 545****	52%
Northern Cape	128 277	111 362	87%
Grand Total	7 413 416	4 548 385***	61%

*Source: Grade 1 – 7 learners, Education Statistics in South Africa at a Glance in 2001, Published June 2003 and PSNP data from Provincial Basic Nutrition Protocols 2003 ** North West Department of Health, Portfolio Report 2002/2003 *** National Department of Health Annual Report 2002/2003 p11 **** Calculated as the difference between the National Department’s Total and the sum of figures from all the other provinces for the purposes of illustration*

Notes: ?? This figure is exactly the same as the number provided to the Commission for the 4th Economic and Social Rights Report. The case of Limpopo having more PSNP beneficiaries in 2002/2003 than there were learners in 2001 requires more attention.

No figures on the number of learners reached in the Eastern Cape were provided in the protocol responses and no annual report from the Eastern Cape Department of Health was available to the Commission at the time of writing. However, according to the Eastern Cape Department of Health’s *Strategic Plan for 2003/2004*:

The 2002/2003 budget for the INP was R131 million of which R114 million was allocated to the PSNP ... primary school feeding commenced on 22 July 2002 after an absence of 3 months. This scenario will result in an under expenditure for the 2002/03 to the tune of about R41 million.⁷⁶

The North West Department of Health asserts that there has been a dramatic turnaround in the coverage of the school feeding as a result of decentralising the programme to community level thereby benefitting 660 women’s groups and ensuring an income for 5 000 women.⁷⁷ For example, the Department cites that 85% of children targeted in 2002/2003 were reached, while the figure for 2001/2002 was 58%. In its *Strategic Plan for 2003/2004*, the Department states:

The new scheme is characterized by fewer disruptions in service delivery. Community involvement and say in the programme is prominent. The service providers have reported improvements in their lives due the opportunity made available even for the “ordinary”

community members regardless of their educational levels and status in the community. This majestic rise to a programme that we can all be proud of still has challenges and areas that need improvement. As with lessons learned in 2001, the experience gained in 2002 will be employed to further develop the programme.

Sustained training and skills transfer is fundamental to ensure that the PSNP SMME's grow beyond school feeding for long-term benefits. Forging linkages and collaborations with other service and development agencies to build the capacity of PSNP Service Providers will fast track the growth beyond PSNP. Communities are not passive recipients of services but are masters of their own actions and development.⁷⁸

2.3.1.3 Community Based Nutrition Programme

It is also important to note that the Gauteng Department of Health reported on the Community Based Nutrition Programme, which targets learners in Early Childhood Development (ECD) Centres or creches. The Gauteng Department of Health's Annual Report for 2002/2003 states that the Department aimed to reach 1 244 creches and 90 000 children. The Department's actual achievement was to reach 1 890 creches and 66 579 children.⁷⁹

2.3.1.4 Nutrition Interventions at Health Facilities to Manage and Prevent Child Malnutrition

During the year under review, the National Department of Health made significant progress in improving the Integrated Management of Childhood Illness (IMCI) by training almost 5 000 health care workers.⁸⁰ Child malnutrition, in particular, was targeted through training 750 health professionals in growth monitoring and promotion. Guidelines for nutrition interventions to assist health care workers in preventing child malnutrition were also released. The Vitamin A supplementation programme introduced in one province before 2002 was extended to all provinces in 2002/2003.⁸¹

Because of the lack of reporting from National and Provincial Health Departments on the impact of these measures in their protocol responses, the South African Human Rights Commission conducted an analysis of data from the District Health Information System.⁸²

Health facilities across the country are supposed to keep registers of children suffering from malnutrition. According to the District Health Information System, the health sector has been struggling for many years to enforce common growth monitoring practices. To begin with, perhaps not every child is weighed every time they visit a health facility and often only children looking unhealthy/malnourished are weighed due to workload problems. When interpreting the number of children weighed in the tables for 2002/03 below, it should be noted that the indicator for weighing children under 5 may include repeat visits to health facilities by the same child (and their parents) during the year.

When children are defined as being malnourished, they may become 'clients' of the Protein Energy Malnutrition (PEM) scheme depending on whether they meet the scheme's entry or exit criteria. It is also important to note that an **active PEM client** is defined as “one that actually received food or food supplements. Even if the parents in practice often will share the food received between all siblings (a major problem with the scheme), only the registered client should be counted.”⁸³

Table 6: Summary of Nutritional Indicators in Health Facilities in South Africa 2000/2001 – 2002/2003

	<i>Child under five years weighed⁸⁴ (Monthly average case load)</i>	<i>Not gaining weight under five years⁸⁵ (Monthly average case load and prevalence rate)</i>	<i>Severe malnutrition under five years – new⁸⁶ (Monthly average new case load)</i>	<i>Vitamin A to children 12 – 60 months (Monthly average)</i>	<i>Vitamin A to infants 6 – 11 months (Monthly average)</i>	<i>Vitamin A to new mother (Monthly average)</i>
Definition	A child weighed and the weight plotted onto the Road to Health Card, the patient folder and other relevant recording systems. Shows different individuals per month, possibly for more than one month.	A child under five years that has not gained weight compared with the weight recorded at least one month earlier on the Road to Health chart. Shows different individuals per month, possibly for more than one month.	A new child found to weigh less than 60% of Estimated Weight for Age (EWA), or to suffer from Marasmus, Kwashiorkor, or similar, excluding newborn babies. Severe malnutrition might also be denoted as clinically malnourished. Shows different individuals per month. Repeat visits of the same child are not counted.	Persons receiving dosage	Persons receiving dosage	Persons receiving dosage
2000/01	78 591	1 119	209	-	-	-
2001/02	266 553	3 504	3 170	2	86	76
2002/03	949 488	13 049	8 044	16 742	11 315	4 561
No / low reporting	NW	GP, KZN (Most)		GP, KZN, LP (Most), WC, EC (Some)	GP, KZN, LP (Most), WC, EC (Some)	GP, KZN, LP, WC, EC (Some)

Source: National Health Information System V1.3.0.42A provided by the Health Systems Trust to the South African Human Rights Commission on 15 August 2003

The impact of measures to address child malnutrition is evident in statistics from health facilities across the country (see Table 6). From 2001/2002 to 2002/2003, there was a 256% increase in the average number of children under five whose growth was monitored each month using the Road to Health Card. Growth monitoring is not well reported through the District Health Information System by facilities in the North West province. There was also a major roll-out of Vitamin A supplements to children under five and to new mothers.

In the context of more children under five being monitored for malnutrition, there was also an increase in the reported number of children under five who

did not gain weight or who were defined as severely malnourished. According to the Health Information System definition, the number of children who did not gain weight is a sensitive early warning indicator of looming malnutrition in a community. However, reporting on children under five not gaining weight was not in evidence in Gauteng and most of the facilities in KwaZulu-Natal. From 2001/2002 to 2002/2003, the **average** monthly number of cases of children under five who were affected by severe malnutrition increased by 154%. Severe malnutrition appears to be well monitored and reported in all provinces and most health facilities.

Table 7: Summary of Nutritional Indicators at Health Facilities in Provinces 2001/2002 – 2002/03

	<i>Children Under 5 weighed</i>			<i>Severe Malnutrition Under 5</i>			<i>PEM client under 5</i>	
	<i>2001/02</i>	<i>2002/03</i>	<i>% Change</i>	<i>2001/02</i>	<i>2002/03</i>	<i>% Change</i>	<i>2001</i>	<i>2002</i>
Free State	645 101	675 786	5%	2 451	1 791	-27%	10 786	11 008
Mpumalanga	840 879	906 877	8%	564	1 996	254%	1 363	1 584
Western Cape	1 373 953	1 373 506	0%	2 255	1 997	-11%		
Northern Cape	3 818	188 810	4845%	913	2 351	158%		
North West				9 068	4 734	-48%	451	1 045
Limpopo		2 444 940			5 457			
Eastern Cape	1 991 094	1 856 313	-7%	11 629	7 909	-32%	100 253	84 188
Gauteng	1 308 201	1 417 151	8%	25 321	23 428	-7%	15 847	12 137
KwaZulu-Natal	2 325 286	2 949 730	27%	45 936	51 489	12%		
Total	8 488 332	11 813 113	39%	98 137	101 152	3%	128 700	109 962

Source: National Health Information System V1.3.0.42A provided by the Health Systems Trust to the South African Human Rights Commission on 15 August 2003

As opposed to monthly averages, annual statistics for each province provide a somewhat clearer picture of the child malnutrition crisis⁸⁷ and the way in which the health system responded (see Table 7). Health professionals weighed children 12 million times during the year under review. This is a substantial volume of work towards monitoring child health across the country. According to relatively complete statistical information from the District Health Information System, over 100 000 children were defined as severely malnourished during the year under review. According to much less complete information approximately 110 000 children were recipients of food supplements through health facilities.

The greatest number of children weighed in 2002/03 was in KwaZulu-Natal, which was also the province with the greatest number of children defined as being severely malnourished. A large number of children were defined as severely malnourished in all provinces, especially Gauteng, the Eastern Cape, Limpopo and North West.

According to the District Health Information System, by far the largest number of PEM scheme recipients was in the Eastern Cape. However, there are many gaps in information on PEM scheme clients, making it difficult to interpret from the District Health Information System alone how well the health system responded malnutrition during the year under review.

For example, the KwaZulu-Natal Department of Health's Annual Report for 2002/2003 states in the section on reducing under 6 morbidity and mortality due to malnutrition that approximately 203 836 people were issued with nutritional supplements. The report also mentions that monitoring of the supplementation programme was a challenge that was exacerbated by the number of TB and HIV positive patients.⁸⁸

Interventions to treat malnutrition take place at a local level at health facilities like State hospitals, clinics and mobile clinics. For purposes of illustration, further details on the delivery of support to households experiencing malnutrition in rural areas of the Eastern Cape are provided through a case study analysis of the Kwabhaca (Mount Frere) Health District within Health Region E in the far north-east of the province. Information from the District Health Information System is analysed together with information on the qualitative impact of nutrition interventions as provided by researchers from the University of the Western Cape's School of Public Health.⁸⁹

Table 8: Malnutrition indicators in the Kwabhaca Health District 2001/2002 – 2002/2003

	<i>Indicator</i>	<i>2002/2003</i>	<i>2001/2002</i>
Low birth weight	Births total	1 347	1 400
	Live birth	1 244	1 296
	Live birth under 2 500g	357	90
Nutrition indicators	Child under five years weighed	55 192	59 632
	Not gaining weight under five years	856	911
	PEM client under five years	2 003	3 110
	Severe malnutrition under five years – new	333	411
	Vitamin A 200 000 units capsule	3	1
	Vitamin A supplement to children 12 – 23 months	1 883	58
	Vitamin A supplement to infants 6 – 11 months	1 544	36
	Vitamin A supplement to new mother	569	8
Facility use indicators	Primary Health Care headcount five years and older	203 996	237 007
	Primary Health Care headcount under five years	68 080	72 923
	Primary Health Care total headcount	272 076	309 930

Source: National Health Information System (EC PHC Data) V1.3.0.42A provided by the Health Systems Trust to the South African Human Rights Commission on 15 August 2003

Table 8 shows that health facilities within the Kwabhaca health district⁹⁰ were used frequently during the current reporting period, although less so than the year before. Despite an increase in the total population to be served within the Health District, Table 8 appears to confirm the statement made in the Intergovernmental Fiscal Review of Health, that there might be a ceiling on the number of people that the health facilities can attend to while caring for more HIV/AIDS patients. The number of PEM clients dropped from 3 110 in 2001/2002 to 2 003 in 2002/2003. The number of reported child deaths at birth declined by one from 104 in 2002/02 to 103 in 2002/03 and the number of live births under 2 500 grams increased from 90 to 357.

For those patients that do enter the Protein-Energy-Malnutrition scheme, there are indications that health care workers can be very successful. For example, the UWC School of Public Health's evaluation points to several improvements in the care of severely malnourished children as a result of the implementation of the WHO's 10-step malnutrition protocol, which forms part of the IMCI training package. However, the success of the measures was still hampered by problems at health facility level, including:

- intermittent supply problems with vitamins and micro-nutrients;
- power-cuts and no heating;
- poor follow-up after being discharged from care;
- staff shortages, of both doctors and nurses, and resultant low morale; and
- inadequate exposure of community service doctors before they are expected to attend to cases.

As part of improving follow-up after discharging patients from hospital, the UWC School of Public Health's next step was to "determine Household Food Security, caregiver knowledge and factors associated with malnutrition" and look at the "rate of recovery and health status at one month and six months post-discharge".⁹¹ A shocking 71% of caregivers were unable to implement their acquired knowledge of feeding practices because of their poverty and lack of access to State grants. Seven percent of households visited at their homes had no staple food, while 40% had between one and four items in the homestead.

Following the publication of the results of the evaluation, and through Imbizo Focus Week visits, the Minister for Social Development ordered mobile units to process Child Support Grant applications, and R2 million in emergency aid was provided for poverty-alleviation programmes in the Alfred Nzo District Municipality in the Eastern Cape. Food parcels also formed part of the response, as follows:

*Mount Frere residents received tons of food parcels as government, the private sector and Durban-based humanitarian food aid organisation – Gift of the Givers Foundation – and Tiger Foods joined forces to alleviate hunger in the area.*⁹²

Several provincial Departments of Health reported that they facilitated access to poverty-relief projects to families with children admitted to the Protein-Energy-Malnutrition Scheme, those with no or low income, and those dependent on grants. While the North West Department of Health mentioned this activity, only the Gauteng Department of Health had specific targets for this activity, namely 1 500 unemployed parents preparing food at schools, 19 SMMEs providing food to schools, and the Zivuseni project to encourage communities to grow vegetable gardens to improve nutritional status.

2.3.1.5 Baby Friendly Hospital Initiative

This programme was not reported on in any detail except in the case of North West province where the Department aimed to implement three programmes per financial year before March 2007. This was achieved in the 2003/2004 financial year. No report was provided for 2002/2003, probably due to the fact that infant feeding guidelines were only developed in December 2003. The Department aims to monitor progress with this programme through indicators such as the number of baby friendly facilities, the percentage of distribution points using infant feeding guidelines, and the number of nutrition and PMTCT site personnel trained in infant feeding. The Gauteng Department of Health set itself the goal of two Baby Friendly Hospital Initiatives, but did not report on whether this was achieved or not.

2.3.1.6 Nutritional Supplementation for People Living with TB and/or HIV/AIDS

Although it is part of the national Integrated Nutrition Programme, this programme was not itemised separately by provincial departments of Health in their protocol responses, except in the case of the Gauteng Department of Health which reported on the Supplementary Feeding Scheme for child-headed households, AIDS orphans and children living with or affected by HIV/AIDS, as well as other groups. The aim of the programme was to monitor 433 000 children for supplementary feeding in terms of the guidelines on nutrition interventions. No information was provided in the protocol response on whether this aim was achieved. However, the Department's Annual report states that the target of monitoring 433 000 children was achieved.⁹³

2.3.1.7 Food safety

The Medical Research Council prepared a new sampling frame for food that is consumed within South Africa in order to test for excessive levels of harmful toxins in terms of the levels set by the Codex Alimentarius Commission of the World Trade Organisation.⁹⁴ It is not clear how this work relates to the Food Control Department of the National Department of Health or the Forensic Chemistry Laboratory which took 4 486 samples of food and 15 500 pesticide residue samples in 2002.⁹⁵

2.3.2 Food Production and Trade – National

2.3.2.1 Agricultural Research and Technology

According to the Agricultural Research Council (ARC), “research and development programmes make a very significant contribution to optimise food production for beneficiaries whose needs range from self-sufficiency to highly intensive commercial production”.⁹⁶ The ARC reported on some examples of technology transfer projects, training interventions and learning materials that

assisted vulnerable groups to produce food and process it. The ARC has gone as far as offering bee-keeping as occupational therapy for persons with disabilities, which is commendable.

The ARC stated in its report to the SAHRC that its main focus was on historically disadvantaged groups, low-income and poverty-stricken groups, person living in rural areas and persons living in informal settlements. However, several projects also touched the lives of children, women, person with disabilities, persons living with and/or affected by HIV/AIDS and unemployed persons. In short, the ARC was able to demonstrate that it had developed innovative technical options and had adapted them for use by vulnerable groups and small-scale farmers. In some cases, like the Bee-keeping for Poverty Relief Programme (BPRP), the ARC's approach has been acclaimed as highly successful.

However, from the ARC protocol response and its 2002/2003 Annual Report is not clear how much of the ARC's resources are devoted to providing support to vulnerable groups. In the protocol response it is also not clear how many different types of beneficiaries receive support from the ARC. Since 1998, the ARC has received less grant funding directly from the State and more revenue from external contracts. External contracts include significant payments from a range of industry trusts that deduct statutory levies (in terms of the Marketing of Agricultural Products Act 47 of 1997) for each ton of a commodity sold. Levies are to all intents and purposes public monies.

2.3.2.2 The Special Programme for Food Security (SPFS)

According to the *South African Yearbook 2001*, the SPFS was launched in February 2000 and aimed to support 3 000 households with infrastructure and agricultural input support to the value of approximately R2 000 to R3 000 per household. The SPFS was designed to increase food production and livelihoods among smallholders by encouraging adoption of new technology and reducing constraints to farm output.

According to the National Department of Agriculture's protocol response for 2003, the preparatory phase of the programme has been completed and an implementation report has been finalised along with institutional arrangements. The future aim of the programme is to reach 62 000 households per annum. In its 2003 – 2006 Strategic Plan, the National Department of Agriculture undertook to deliver production support packages and information packages to 200 000 food insecure households by March 2004.⁹⁷

2.3.2.3 The LandCare Programme

The LandCare Programme “supports the development of infrastructure and facilitates for productive and sustainable land use”.⁹⁸ The LandCare Programme is a community-based programme with an integrated approach to sustainable use and management of agricultural resources focused on degraded and water-scare parts of the former homeland areas. The National Department of

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Agriculture reports, “approximately 140 key soil conservation structures were completed during the period under review”.⁹⁹ The National Department of Agriculture measures its success in terms of the number of hectares of land protected from soil erosion. It stated that it achieved its objective of an additional 5 000 protected ha per year.¹⁰⁰

2.3.2.4 Water Use and Irrigation Development

The National Department of Agriculture reported that 16 irrigation schemes, serving 1 318 people, were revitalised during the reporting period. The main focus of the revitalisation programme is to “empower the community to take ownership of the schemes, to rehabilitate infrastructure, construct conservation works and manage the infrastructure and conservation works in a professional manner”.¹⁰¹ The Department met its target of five irrigation schemes revitalised per year.

The National Department of Agriculture reported the establishment and maintenance of infrastructure for water conservation through the drilling of boreholes for resource-poor farmers who reside in the ISRDP poverty nodes. The Department only drilled 337 boreholes in the 2002/2003 financial year. The Department’s target was to drill 650 boreholes per year.¹⁰² A total of 18 768 people benefited from borehole drilling valued at approximately R27 780 each, excluding the cost of the pump.

2.3.2.5 Financial Services and Co-operative Development

According to the National Department of Agriculture’s Annual Report for 2002/2003, at the end of March 2003, 439 co-operatives were registered under the Co-operatives Act 91 of 1981. Most of the co-operatives that remained registered under the Act were trading co-operatives (387), followed by agricultural co-operatives (50), and financial co-operatives (2). During the year under review, a total of 53 co-operatives were struck off the register in terms of section 45 of the Act.¹⁰³ A further 40 co-operatives were in the process of being removed from the register, whilst 51 applications for registration were being considered.¹⁰⁴

The National Department is involved in co-operative promotion through establishing financial services co-operatives of relevance to women¹⁰⁵ and the youth. This is being done through creating an enabling regulatory environment for the development of Financial Services Co-operatives (FSCs) in agriculture. The Department also strives to integrate the co-operative development activities for FSCs and agricultural co-operatives through a central committee.

The Department drafted the Agriculture and Rural Financial Services Policy, Agriculture and Financial Services Policy and draft sector specific strategies on co-operative development for consideration at the Intergovernmental Technical Committee on Agriculture (ITCA).

A co-ordinating committee comprised of representatives from the Reserve Bank, the National Treasury, Department of Trade and Industry and National

Department of Agriculture acts as the interim supervisory body for FSCs through dealing with compliancy issues, regulation and auditing.

The Office of the Registrar of Co-operatives reported that the Draft Co-operatives Bill was submitted to the office of the State Law Advisor for certification, however the Department also stated that the Bill has since been transferred to the Department of Trade and Industry for administrative purposes.¹⁰⁶

According to the National Department's protocol response, a total of 64 financial services co-operatives were established during the period under review. The Department's Annual Report states that "to date there are 63 registered and operational Financial Services Co-operatives in the country", mostly in KwaZulu-Natal (19), Mpumalanga (14) and the Eastern Cape (13). The number of Financial Services Co-operatives then drops off sharply to six each in Limpopo and North West, two in the Free State and only one in each remaining province.¹⁰⁷

However, the outputs, indicators and targets section of the Department's Annual Report states: "to date 18 Agricultural Co-operatives and eight Financial Services Co-operatives have been registered".¹⁰⁸ These figures do not concur with the information reported by the office of the Registrar of Co-operatives.

2.3.2.6 Farmer Settlement Programme

The National Department set itself the objective of settling 900 commercially viable farmers per year (100 per province) over the medium term. The National Department's main contribution towards achieving this appears to be through the comprehensive farmers support package described earlier. The Farmers Settlement Directorate otherwise supports the process by strengthening institutional systems, providing supportive infrastructure and launching special projects. The Directorate maintains an inventory of State land. It also creates Public-Private Partnerships (PPPs) with major agricultural input and service providers such as Syngenta, Bayer SA and Kynoch, among others.

Land Redistribution for Agricultural Development (LRAD) projects resulted in 15 605 individuals benefiting from the redistribution of a total of 272 480 ha. A total of 35% of the grants reached groups of women, while 22% of the grants reached groups of youths (35 years and younger).¹⁰⁹

The Directorate also supported some land restitution beneficiaries, but it was not stated how many communities or individuals this involved.

2.3.3 Food production and trade – Provincial

2.3.3.1 Eastern Cape

The Eastern Cape Department of Agriculture and Land Affairs reported on the launch of a major new project to boost maize production as follows:

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During this period the Massive Food Production project was launched which will produce between 40 000 and 100 000 tons of maize in the rural areas of the province per annum, during next five years. This is a conditional grant scheme for which the Cabinet has identified R50 million in the next financial year, 2003/2004.¹¹⁰

The Department listed its achievements in the 2002/2003 financial year as:

- Better control of animal tick-borne diseases;
- 600 km of fencing for field protection;
- 24 000 ha of arable land fenced for food production;
- 24 small irrigation schemes for vegetable production; and
- an estimated 20 000 farmers assisted in food production techniques.¹¹¹

The Department indicated that it catered for vulnerable groups as follows: women, female-headed households, those living in rural areas, the unemployed, low-income and poverty-stricken groups and historically disadvantaged racial groups. The Department was not able to provide answers to many of the questions in the sufficient food protocol because of a limited budget and because:

the Department has not established any [right to sufficient food] monitoring mechanisms at this time. If these are seen to be required, and if this is not done by those departments responsible for such monitoring, the Department of Agriculture will be willing to establish such monitoring for the Research Council on a cost-recovery basis.¹¹²

2.3.3.2 KwaZulu-Natal

The KwaZulu-Natal Department of Agriculture of Environmental Affairs provided a summarised list of projects delivered during the 2002/2003 financial year as part of its response to the sufficient food protocol. A substantial number of beneficiaries (22 609 people) were reported for a diverse range of farmer settlement projects (see Figure 1).

It is not clear whether all the projects in Figure 1 were delivered during the reporting period or whether they are reported in a multi-year fashion. The full impact of the projects on the economic and social life of the respective communities is the subject of an audit. The audit was not accessible to the Commission at the time of writing.

The Department stated that it catered for the same list of vulnerable groups as the Eastern Cape Department of Agriculture, with the addition of child-headed households, girl-children, and persons living with and/or affected by HIV/AIDS, but gave no details of specific projects aimed at these vulnerable groups.

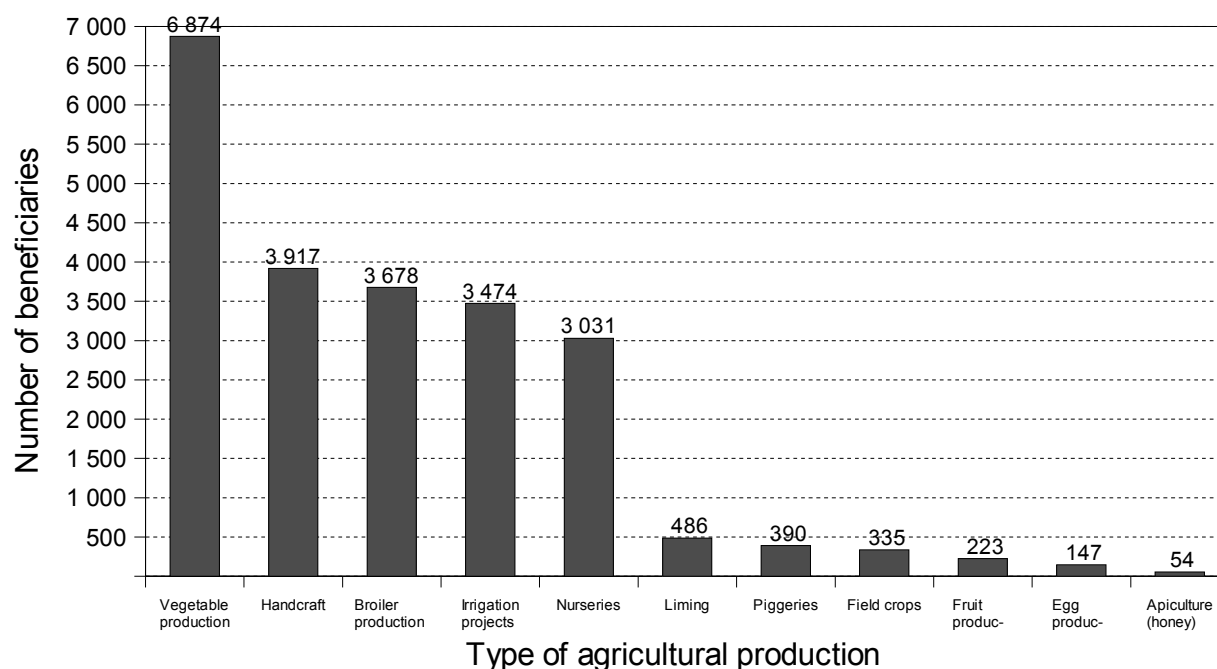


Figure 1: The Number of Farmer Settlement Beneficiaries According to Type of Project in KwaZulu-Natal

Source: KwaZulu-Natal Department of Agriculture and Environmental Affairs protocol response

2.3.3.3 Free State

The Free State Department of Agriculture reported very briefly on its activities in terms of the Integrated Food Security Strategy for South Africa. Some 82 beneficiaries who received food parcels under the National Food Emergency Scheme also received follow-up support for food production. The Department paid more attention to an EU-funded finance facility called the Community Projects Fund Support Programme (CPF-SP). Under this programme, 45 projects were approved and established by providing financial grants to 541 beneficiaries, 58% of whom were women. The CPF-SP envisages three main client groups, as follows:

- **Survivalists:** Groups that have no resources, no skilled/semi skilled work experience and live primarily off grants received by members of the household;
- **Subsistence micro-enterprise owners:** Individuals or groups with basic business skills who run a micro-enterprise that is able to meet very minimal subsistence needs of the household, but where there is risk of loss of assets shifting the household back into the survivalist mode;
- **Emerging farmers who benefited from the land reform process, and small business owners:** Individuals or groups who have access to

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productive resources such as land and or tools and have basic business training or farming skills. These groups require assistance with the quality and quantity of their products, access to markets, information, bargaining power and access to capital to take their businesses to economies of scale and greater levels of sustainability.

The Department admitted that it had a minimal impact during the financial year because its projects were still in their infancy. Despite stating that the CPF-SP catered for a wide range of vulnerable groups, the Department also stated that:

The Department did not have a formal Food Security Programme in any of the years under review. It is possible that the under-expenditure on the CPF-SP marginally distracted from the realisation of the “right”. It should, however be pointed out that the CPF-SP is not a Food Security Programme per se, rather a development programme for the development of sustainable projects to increase agricultural output in the province.

From the above it can be seen that the Department does not make a direct connection between its agricultural development programmes and the progressive realisation of the right to food.

2.3.3.4 Mpumalanga

At the beginning of the 2002/2003 financial year, the Mpumalanga Department of Agriculture, Conservation and Environment (DACE) was provided with a long list of recommendations by the Portfolio Committee on Agriculture, Conservation and Environment that covered detailed aspects of the functioning of the Department and its relationship with the Mpumalanga Parks Board and Mpumalanga Agricultural Development Corporation.¹¹³

The Portfolio Committee on Agriculture, Conservation and Environment made use of strategic plans, organograms and asset registers of the Department of Agriculture and the Public Entities to make its recommendations. This approach seems to have resulted in some considerable improvements in the delivery performance of the Department during the 2002/2003 financial year. The Department’s Annual Report for 2002/2003 highlights six achievements,¹¹⁴ which have been supplemented with relevant indicators:

Table 9: Summary of DACE Targets and Achievements Regarding Sufficient Food 2002/2003

	<i>Target</i>	<i>Achievement</i>
1. Successful implementation of pre- and post-LRAD settlement support in co-operation with the Department of Land Affairs, the Land Bank and other key stakeholders	Assist land affairs to screen and settle 900 beneficiaries on 82 farms (women, youth, rural)	1 271 beneficiaries settled on 81 farms
2. Farmer training being taken to new heights	Provide 7 400 farmers and prospective farmers with 381 courses	7 261 participants were reached by 392 targeted, needs-driven, practical courses
3. Food security being supported through funds set aside for technical support as there were no funds specifically budgeted for food security	Support 4 720 participants in 472 food security related projects	5 505 participants benefited from 563 projects
4. LandCare projects were implemented for improved natural resource utilisation and these projects succeeded in creating jobs	Sponsor 35 senior LandCare projects	206 females, 22 disabled males, 15 disabled females, five disabled youths, and 114 males benefited from grant funding of 36 senior projects. 28 Junior LandCare projects were supported
5. Significant results were achieved in disease control and animal health services	Promote sound health through controlling 33 diseases, maintaining 218 dip tanks and promote veterinary health and food safety through conducting and verifying 404 Hygiene Assessment Systems (HAS) in abattoirs for meat export	15 diseases were controlled, 206 dip tanks and handling facilities were maintained, and 404 HAS were verified
6. Research and Development remains the backbone of the farmer development programme, providing information and adapting agricultural technology that will enhance productivity and ensure sustainable use of the land	Extension support to 6 500 farmers through 24 000 contact sessions	8 014 farmers on 3 444 projects were reached by 25 631 contact sessions. As a result of 50% under-resourcing, partnerships were entered into with the Sugar Growers Association, CottonSA, Rural Action Committee (TRAC) and GTZ (German Technical Co-operation)

Source: Mpumalanga Department of Agriculture, Conservation and Environment Annual Report 2002/2003 and the protocol response from the same department.

The Head of Department highlights that the Department is revisiting its Medium Term Expenditure Framework with a view towards significantly accommodating funding for agricultural infrastructure development, including irrigation infrastructure development and funding for the Gutshwa dam, the

rehabilitation of dipping and animal handling facilities, and roll out of “start up packages” for food security.

2.3.3.5 North West

The North West Department of Agriculture reported on its objectives, beneficiary groups and achievements according to its new departmental strategic focus areas, some of which were derived from the *Strategic Plan for Agriculture*,¹¹⁵ namely:

Table 10: Summary of the North West Department of Agriculture’s Targets and Achievements Regarding Sufficient Food 2002/2003

Enhancing equitable access and participation¹¹⁶	
LRAD	<ul style="list-style-type: none"> 724 beneficiaries and 64 projects were implemented
Power of Attorney for Disposal of State Land	<ul style="list-style-type: none"> (11 farms were leased)
Black Economic Empowerment (BEE) Policy – Access to Finance	<ul style="list-style-type: none"> 60% of Taung irrigation scheme farmers were financed by SA Malters.¹¹⁷
Improving competitiveness and profitability¹¹⁸	
BEE facilitating cost-efficient production and access to markets	<ul style="list-style-type: none"> leasing three silos to two BEE companies
Integrated Sustainable Rural Development Programme (ISRDS) and National Strategy for Sustainable Development	<ul style="list-style-type: none"> livestock auction plans and a goat production programme
To ensure sustainable resource use and management¹¹⁹	
National LandCare Programme	<ul style="list-style-type: none"> 31 new LandCare projects implemented and 72 existing projects supported, resulting in 2 300 jobs being created
Integrated and Sustainable Rural Development	
Integrated Sustainable Rural Development Programme and Black Economic Empowerment Policy	<ul style="list-style-type: none"> completed situational analyses for goat production potential in 155 villages and trained 525 people in goat management
Food Security	
Integrated the Food Security Strategy and Poverty Relief programme	<ul style="list-style-type: none"> 30 new household food security projects were implemented, benefiting 200 households

This Department was able to claim other achievements such as:

- 3 000 people employed in the wild game industry and 7 000 in the tloutaxaba (Devil's Claw) project, of which 5 453 were women;
- 525 people benefiting from a livestock improvement programme; and
- 18 women and 30 youths trained as HIV/AIDS peer educators.

A more detailed look at the Department's performance measures suggests that there is a problem with agricultural infrastructure delivery. The source of the problem is not clear from the protocol response. Table 11 shows a summary of performance indicators provided by the Department. Further clarification is required from the Department in order to state whether there is a trade-off between the number of meetings held as part of capacity building and the delivery of planned-for (needed) infrastructure.

Table 11: Summary of the targets versus actual performance of the North West Department of Agriculture

<i>Area of performance</i>	<i>Average percentage of targets met</i>
Erection of livestock dipping tanks	38%
Provision of LandCare infrastructure facilities	41%
Settlement of new entrants into agriculture	55%
Provision of livestock infrastructure facilities	55%
Provision of horticultural infrastructure facilities	63%
Capacity building for farmers in crop production	74%
Support to farmers and commodity organisations	83%
Capacity building for farmers in horticulture	108%*
Capacity building for LandCare projects	110%**
Capacity building for farmers in livestock production	112%*

Source: North West Department of Agriculture Protocol response.

*Notes: * Results from over performance on meetings by a significant degree relative to other types of capacity building intervention. ** Results from more farmers' days and demonstrations than targeted.*

2.3.3.6 Western Cape

The Western Cape Department of Agriculture reported on the delivery of a diverse range of agricultural infrastructure projects and support services in 2002/2003. For example, the Department's infrastructure programme resulted in funding for 29 projects, its Agricultural Water Conservation programme delivered 75 irrigation blocks, and another infrastructure programme resulted in 9 conservation infrastructure projects for previously disadvantaged individuals. Some 57 Land Redistribution for Agricultural Development (LRAD) projects involving 3 944 people were also completed. The most notable aspect of the Department's protocol response was the emphasis placed on expanding the Farmer Settlement Directorate in the 2003/2004 financial year with two clear programmes:

- **Support for the Land Redistribution for Agricultural Development process (LRAD):** A protocol explaining the role of the Provincial Department of Agriculture in facilitating the National LRAD programme; and
- **An Infrastructure Development Process:** A proposed pathway for the delivery of infrastructure projects.

This approach may allow the Department to expand its level of service delivery and improve the quality of its work, however its successful implementation will be dependent on the allocation of additional funds to the Department.¹²⁰

The Department referred to the project feedback report of the Impendulo Poverty Relief Scheme (food parcel programme) in its protocol response. The pilot project was granted a budget of R1 million over a six-month period. The report states as follows regarding the distribution of food parcels:

*Members of the MK veterans association (MKMVA) were responsible for the transport of the parcels. They delivered an average of 5 500 parcels a day, three times a week (Mondays, Wednesdays and Fridays). This amount was far too much for the small-scale farmers to supply and commercial farmers were approached in order to resolve the problem. The supply of Grade 2 fruit and vegetables was inconsistent and volatile, while the price of vegetables was at times exceptionally high. During the initial stages of the project, only fruit was bought due to expensive vegetable prices. This made it difficult to budget over the short term.*¹²¹

This indicates that the effectiveness of the programme was hampered by insufficient supplies from small-scale farmers and high and volatile prices for basic foodstuffs supplied by commercial farmers.

2.3.3.7 Limpopo

During the year under review, the Limpopo Department of Agriculture focused on the restructuring and transformation of state-owned assets, support to land reform beneficiaries, poverty reduction programmes, animal health and production activities as well as farmer education and training.¹²² The Department also trained its staff to conduct inspections in terms of the Meat Safety Act 40 of 2000. The function of inspecting farm animal and wild animal meat in terms of the Act has been delegated to provinces by the National Department of Agriculture.

A summary of the Limpopo Department of Agriculture's main reported achievements during the period under review is provided in Table 12.

Table 12: Limpopo Department of Agriculture Programme and Sub-Programmes in 2002/2003

<i>Programme</i>	<i>Sub-programme</i>	<i>Target</i>	<i>Reported Achievement</i>
Restructuring State-owned assets	Agriculture and Rural Development Corporation (ARDC)	Continue to revitalise 41 out of 43 farmer settlement projects supported by the ARDC	Most projects are due to be converted into equity shareholdings involving farming communities and estate farm workers. However, due to the long-term nature of leases for implementation of this model of ownership, and in order to secure the productivity of the projects, short-term "operating contracts" emanating from the principles of equity shareholding have been implemented with a range of private investors. Nine schemes have reached self-sustainability and profitability. The staff complement of ARDC reduced from 2 800 in April 2001 to 1 300 in April 2003. There have been increased exports of higher quality fruit from some of the ARDC schemes.
	Clearing decommissioned sisal farms	Clear 15 sisal farms to make them available for restitution claimants or alternative land use.	The sisal clearing programme was 98% complete and benefited approximately 1 200 workers from surrounding communities and 40 black emerging contractors.
Land Reform	Land Redistribution for Agricultural Development	Create 70 000 farmers within 15 years	33 389ha (71% State land, 23% bought privately, 6% private donation) redistributed and 247 farmers created.
	Land Restitution	-	R3.3 million was spent on starter packs in the form of farming implements and machinery for 8 restitution communities. R500 000 of the R3,3 million was spent on chemical inputs for 14 horticultural farms, resulting in continued production and 227 jobs being saved during the process of transferring farm ownership.
	Settlement and Land Acquisition Grant (SLAG)	Rehabilitate 76 projects at risk of sequestration, desertion, or under-utilisation.	Molemole Cluster (comprising 19 projects) complete
	Irrigation rehabilitation	Revitalise 28 irrigation schemes funded by the WaterCare programme of the National Department of Agriculture	3 000 farmers have been trained in basic agricultural production and technical / financial management. A master plan for revitalising 114 irrigation schemes in the province will begin in 2003/2004 for a period of six years to the value of R230 million.
Poverty reduction	Smallholder poverty eradication projects	Revitalise 1 360 small scale projects developed by other departments	146 projects evaluated for further improvement

<i>Programme</i>	<i>Sub-programme</i>	<i>Target</i>	<i>Reported Achievement</i>
	FAO Supported Programme and Food Security	Enhance food security in the ISRDP nodal areas of Sekhukhune and Bohlabela districts through: a large irrigation project on less than 10-hectare plots, providing layer chickens to 10 000 families, providing 200 families with milk cows, assisting 30 000 households with vegetable production starter packs.	The Department embarked upon three home-based food production projects. A total of 5 598 egg-laying chickens were distributed to 315 households who received food parcels from the Department of Welfare. The planning phase for other elements of the programme had been completed by the end of the reporting period.
	Limpopo Agricultural Development Programme ¹²³	Establish 11 communal food gardens using the Community Based Planning methodology.	Baseline studies and training of extension staff and community members was completed.
	Broadening Access to Service and Extension Development (BASED)	To enhance the capacity of extension agents and smallholder farmers Participatory Extension Approaches.	Areas to scale up the programme have been identified. Smallholder farmers have produced drought tolerant maize seed. A seed-multiplication centre has been established at Madzivhandila College where farmers can have their seed cleaned and packaged for marketing.
Animal health and animal production			A range of animal health interventions against Foot and Mouth Disease, Rabies, Brucellosis, Tuberculosis, Corridor disease, Newcastle disease, Anthrax, Lumpy Skin Disease, Black Quarter, Bovine Malignant catarrh, and internal and external parasites were made during the reporting period, resulting in no major disease outbreaks.

Source: Limpopo Department of Agriculture Annual Report 2002/2003

2.3.3.8 Northern Cape

The Northern Cape Agriculture, Conservation and Environment Department reported that 386 beneficiaries were settled on 36 797 hectares of land through the Land Redistribution for Agricultural Development Programme. The Department also mentioned that it embarked on 12 food security pilot projects and identified 4 670 starter pack beneficiaries through the help of the Northern Cape Department of Social Services. The Department also highlighted the importance of the female farmer of the year competition.¹²⁴

2.3.3.9 Gauteng

The Gauteng Department of Agriculture, Conservation, Environment and Land Affairs indicated that the total farmland area in the province is 774 265 ha. The

Department estimates that 67% or 293 571 ha of the total arable farm land area is currently being cultivated, leaving room for further development of agricultural production especially in light of declining mining and industrial activities in some regions. The Department estimates that there are approximately 3 200 farmers in Gauteng employing 39 295 farm workers on 2 342 farm units. The Department provided detailed indicators of their targets and outputs for the reporting period according to programme and sub-programme categories. A short summary of achievements follows:

- **Agriculture – Household Food Security:** The Department assisted 2 664 women, 266 youth and 30 differently abled people to grow their own food during the reporting period.
- **Farmer Settlement and Established Agriculture:** Extension was provided to 1 372 beneficiaries, however the development of business plans and commodity-based structures and facilitation and co-ordination failed to meet their targeted outputs.
- **Specialised Support Services:** A wide range of technical services relating to agricultural planning, soil conservation and marketing were provided according to target.
- **Veterinary Services – Animal Health:** Animal health interventions against Brucellosis, Foot and Mouth Disease, Rabies and other diseases were completed according to the target or exceeded the target. 11 752 import/export control permits were issued during the reporting period.
- **Veterinary Public Health:** Ninety-four abattoirs and seven sterilisation installations were inspected for a range of hygiene risks according to target.
- **Epidemiology and Laboratory Services:** Surveillance and diagnostic services were rendered to support the other veterinary service sub-programmes.
- **Community Development and Law Enforcement:** Outreach activities were conducted at shopping centres with a view towards empowering communities with some veterinary knowledge. Curriculum materials for schools were prepared. A range of law enforcement activities were conducted mostly at livestock auctions and stock pens, although illegal slaughtering was also investigated. The Department reported that there were nine prosecutions.

2.3.4 Income Generation and Job Creation Opportunities

2.3.4.1 Public Works Programme

According to its 2002/2003 Annual Report, the National Department of Public Works created 20 539 jobs as a result of public works activities at a local level.¹²⁵ Public works are being designed in such a way as to deliver an integrated cluster of local needs, with job spin-offs, productive assets and

income to assist households to afford basic needs, including food. Key to the Department's approach is passing on the management and maintenance functions to local authorities and revitalising projects that have failed since construction was completed.

The Construction Industry Development Programme (CIDP), which was supported by the International Labour Organisation (ILO), has been an important vehicle for Black Economic Empowerment in many localities. However, one major problem with public works as a job creator and a means of Black Economic Empowerment is the pace of its expansion. In the 2003/2004 financial year, the Department anticipates that it will only create 25 000 jobs and 600 community assets.

2.4 BUDGETARY MEASURES

2.4.1 Improving Nutrition

The National Department of Health budget for the Integrated Nutrition Programme increased by approximately R15 million from 2001/2002 to 2002/2003 (see Table 13).

Table 13: National Budget for the Integrated Nutrition Programme

	<i>Allocation for National Programme in Rands</i>	<i>National Budget Expenditure in Rands</i>	<i>Conditional grant allocation (transfer to Provinces) in Rands</i>	<i>Conditional Grant (transferred to Provinces) in Rands</i>	<i>Conditional Grant (Provincial expenditure) in Rands</i>
2001/02	4 536 000	2 734 668 (60%)	582 411 000	582 411 000 (100%)	475 458 000 (82%)
2002/03	4 240 000	3 913 427 (92%)	592 411 000	592 411 000 (100%)	580 078 000 (98%)

Source: National Department of Health Protocol Response 2003

Notes: Allocation as a % of the Department's Budget was not provided because the Department's total revenue is unknown. Donor funding was zero in both years.

The Integrated Nutrition Programme consisted of transfers to the provincial Departments of Health. The Conditional Grant allocation to provinces were distributed from the National Department of Health according to an index, comprised of three indicators:

- the 1996 poverty gap (65% of the index);
- the 1996 population – 0 to 15 years – living under the poverty line (30% of the index); and
- the 2000 anthropometric indicators (5% of the index).

The transfers made to each province in 2002/2003 are shown in Table 14. Possibly due to food price increases, approximately R50 million more than allocated to provinces was required to maintain the programme at a substantially lower level of coverage than the previous financial year.

Table 14: Provinces Expenditure – Integrated Nutrition Programme

<i>Province</i>	<i>Transfer R'000</i>	<i>Amount Spent R'000</i>	<i>% Transferred Spent</i>
Free State	40 543	32 918	81%
Western Cape	28 789	28 657	100%
Eastern Cape	131 838	135 464	103%
Mpumalanga	39 728	40 956	103%
Northern Cape	10 390	10 973	106%
Limpopo	109 127	117 548	108%
North West	39 390	43 762	111%
KwaZulu-Natal	136 337	162 507	119%
Gauteng	56 269	69 809	124%
Total	592 411	642 594	108%

Source: National Department of Health Annual Report, 2002/2003 p122

Some of the operational problems involved in the Primary School Nutrition Programme have been discussed earlier in the report. However, one major cause of weakness in the programme was an unrealistic set of national financial assumptions. In 2001/2002 the cost of food in each “meal” ranged from 39 cents to R1 and the total cost of delivery per “meal” ranged from 60 cents to R1.10.¹²⁶ The total cost of the food dose in 2001/2002 therefore ranged from approximately 99 cents to R2.10. In 2002/2003, the maximum budgeted resource available per targeted learner per day was less than 67 cents.¹²⁷ This was clearly an unreasonable set of parameters for the programme to be improved to meet the higher standards set by Cabinet in 2001.

Only the Gauteng Department of Health provided a detailed breakdown of its Integrated Nutrition Programme budget. This approach may allow health facility spending on food supplements and nutrition to be itemised more clearly. Nevertheless, none of the protocol responses or Annual Reports from provincial Departments of Health provided a full breakdown for basic nutrition-related interventions. This appears to be a consequence of the aggregated requirements in the National guidelines for Annual Reporting from Provincial Departments of Health. Despite the lack of disaggregated budget information for the Integrated Nutrition Programme, Table 15 shows that Gauteng and Western Cape added considerable funds to the Conditional Grant from National Government in order to supplement their programmes. Others only made use of the Conditional Grant.

Table 15: Gauteng and Western Cape Departments of Health, Integrated Nutrition Programme Budget and Expenditure 2002/2003

	<i>Allocation for programmes</i>	<i>Conditional Grant</i>	<i>Actual Expenditure</i>
GAUTENG			
Primary School Nutrition Programme	54 797 630	56 268 692	57 061 755
Community Based Nutrition Programme	9 755 000		12 853 930
Supplementary feeding	1 416 370		536 859
Total	65 969 000	56 268 692	70 452 544
WESTERN CAPE			
Integrated Nutrition Programme	44 182 000	28 789 000	41 155 000

2.4.2 Food Production and Trade

2.4.2.1 LandCare Programme

In 2002/2003 the National Department allocated R24 million to the provinces for the implementation of the LandCare Programme. However, according to the National Department of Agriculture's 2002/2003 Annual Report only 65,1% of the funds that were transferred to provincial level were spent (see Table 16).

Gauteng does not receive a conditional grant under the LandCare programme. KwaZulu-Natal spent only 27% of the conditional grant from National Government, which indicates that there may have been serious problems within that Department. Free State and Mpumalanga also show levels of underspending greater than 10%.

Table 16: Actual Expenditure on the LandCare Programme by Provincial Departments of Agriculture

	<i>Actual Conditional Grant Transferred to Province R'000</i>	<i>Actual Amount Spent R'000</i>	<i>% of Transferred funds spent</i>
Eastern Cape	6 000	4 397	73%
Free State	1 400	880	63%
KwaZulu-Natal	4 000	1 093	27%
Mpumalanga	2 000	1 215	61%
Northern Cape	1 300	976	75%
Limpopo	5 000	3 585	72%
North West	3 000	2 283	76%
Western Cape	1 300	1 193	92%
Total	24 000	15 622	65%

Source: National Department of Agriculture, Annual Report 2002/2003, p165.

One concern about the LandCare programme is the fact that the Poverty Alleviation Programme from which the funds are derived at a national level ends in 2003/2004 at a value of R38 million. Thereafter, it appears that the LandCare programme will run under the SPFS, which was developed with the assistance of the FAO. No budget information on the Special Programme for Food Security could be found in the National Department of Agriculture's

Annual Report or the protocol response for 2003. The Department did not provide information on its objectives and targets for the SPFS or the LandCare Programme. The Department's detailed intentions and delivery performance in terms on these services are, therefore, unclear.

2.4.2.2 Agricultural Risk Management – Water Use and Irrigation Development

The National Department's only major capital programme is the drilling of boreholes under the water use and irrigation development sub-programme. In 2002/2003 96,6% of the R28 123 000 allocated was spent. This equates to an average capital cost of approximately R83 000 for each of the 339 boreholes delivered in the financial year.

2.4.2.3 Provincial Agriculture Departments

Agriculture is a concurrent National and Provincial competency and the total budget devoted to provinces (R2,6 billion) is approximately 3 times the National Budget (R0,87 billion). The Intergovernmental Fiscal Review of Agriculture for 2003 provides an account of the low level of capital expenditure by provincial Departments of Agriculture. Approximately 9,9% of the total budget (R201 million in 2002/2003) went to capital projects mostly involving the revival of irrigation projects, irrigation development, fencing, boreholes and other marketing support infrastructure such as sheep shearing infrastructure. The non-personnel, non-capital part of the budget is mostly devoted to animal health functions like dipping, vaccination and veterinary services (approximately R276 million of R610 million) as well as training relating to production and marketing (approximately R334 million of R610 million).

There are very few grants or revolving loan funds to assist new farmers to establish themselves. The Surplus People's Project has characterised the situation as follows:

of the seven departments for which figures are available, Limpopo, Northern Cape and Free State provide no funds from their budgets for such transfers to small-scale farmers. The other four provinces (Eastern Cape, KwaZulu Natal, Western Cape and Gauteng) appear to have allocated a total of approximately R26 million to transfers that may be related to supporting farmers. Considering the total budget of the seven agricultural departments and the needs of current and future farmers, this is miniscule.¹²⁸

3 CHALLENGES FOR THE REALISATION OF ECONOMIC AND SOCIAL RIGHTS

3.1 CORRUPTION

None of the Provincial Departments of Agriculture reported on corruption or administrative action. However, it is now commonly known that the KwaZulu-Natal Department of Agriculture has experienced problems during the reporting period.¹²⁹

More information on problems associated with the Primary School Nutrition programme was forthcoming from some Provincial Departments of Health. For example, the KwaZulu-Natal Department of Health reported on maladministration and corruption as follows:

The Department of Health Special Investigation Unit (SIU) has conducted numerous investigations into corruption relating to the feeding schemes. The SIU has also investigated these matters in conjunction with the Department of Social Development, Welfare, SAPS, Forensic Investigators and the Directorate of Special Operations (Scorpions).

The investigations led to the arrest of several senior officials from the Departments of Health, Social Welfare and Education. Private suppliers were also arrested in these investigations for defrauding the Department of Health.¹³⁰

3.2 THE DELIVERY OF BASIC SERVICES

It is commonly understood by most that the highest rates of poverty are to be found in rural South Africa.¹³¹ That said, people living in informal settlements in metropolitan areas or small towns also experience poverty and disease rates that are very high.¹³² The types of problems and solutions for each type of settlement (beyond simply rural and urban) differ in many respects. This point could be appreciated more fully if more people had access to reliable maps and aerial photographs of their own country, province and locality, especially when they indicate the status quo and plans for the future.

One of the most common and critical problems in all poverty-stricken areas, which relates to the problem of malnutrition, is insufficient clean water and sanitation, which often results in disease and contributes to the cycle of poverty. The problem of inadequate service availability and being trapped in a cycle of poverty are therefore interlinked.

There seems to be some consensus that improved levels of service are an important part of the fight against poverty. However, the ability to pay for services, due to the high unemployment levels, is a growing problem. This is especially the case when food prices rise, own production is limited by lack of quality land and finance¹³³ and incomes remain stagnant. This may be an especially big problem for people involved in informal income-earning

activities and those employed as casualised cheap labour, especially when rural to urban migration is taking place.

Public servants who are expected to deliver public services according to set timeframes at the same time as ensuring effective participation with beneficiaries can all too easily be squeezed between a mobilised community and an inflexible bureaucracy that had not planned properly or allocated sufficient resources. The key to successful implementation would seem to hinge on how beneficiaries are included in developing the service delivery system and how public office bearers, officials, private companies and other non-governmental support organisations (NGOs and CBOs) are held accountable.

3.3 GENDER AND THE RIGHT TO FOOD

In South Africa, there appears to be comparatively little useful research that indicates how the nutritional problems of males and females (of different ages) differ and how these problems come about. The undernutrition of girl-children is implicated in nutrition problems later in life, but it does not appear that there is a major focus on addressing this issue at present.

Many women are organised into pre-co-operative or semi-co-operative structures (burial societies, stokvels, and faith-based groups) that have an important supportive function in times of shock or crises. Many of these organisations operate rotating savings and credit schemes that are sometimes linked to productive activities or bulk purchases of basic goods including food. An enabling and supportive environment for these types of groups is not well catered for in the Co-operatives Act or the activities of those organs of State that are responsible for promoting co-operatives.

3.4 ROLE OF CIVIL SOCIETY

In the run up to the Growth and Development Summit Agreement in 2003, the trade union movement called for a number of sector summits, including one for agriculture and agro-processing. The proposal was for government, labour, community and business representatives to negotiate a sector-specific agreement that would ensure quality job creation in the industry and food security for the country over the medium term.

3.5 MONITORING, EVALUATION AND COMMUNICATION

In general, very few departments reported in any detail on their monitoring and evaluation systems. However, there were some notable exceptions to this general pattern. The KwaZulu-Natal Department of Health reported that:

the Nutrition Personnel in the Districts developed a standardised monitoring form for use. It is reviewed periodically. Statistics are on the Primary School Nutrition Programme and the Protein Energy Malnutrition Programme. Clinical records are kept at Primary Health

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Care level. Information is channelled to the Informatics section by District Health Officers. The statistics cover malnutrition rates.

and

Some of the indicators (data elements) were not collected and therefore difficult to assess, eg the impact of the Primary School Nutrition Programme.

The Mpumalanga Department of Agriculture, Conservation and Environment stated as follows:

The Department uses Department of Health, Social Services and Population Development data. Field officers, especially home economists, verify the data through physical engagements.¹³⁴

After raising the problem of “timely” community participation, the Western Cape Department of Agriculture stated:

Yes, the Department of Agriculture experienced difficulties in monitoring and assessing the realisation of the right. This is due to the limited skills available in the Department to collect and analyse the data required to make informed conclusions. Sociologists and/or anthropologists are not seen as a human resource capacity requirement in Agriculture.

The Eastern Cape Department of Agriculture and Land Affairs made an argument for centralising and co-ordinating food security initiatives at provincial level as follows:

It is difficult to co-ordinate food security and food production programmes that are initiated by other Departments and non-governmental organisations. There should be a provincial Food Security Strategy with its own budget. The various departments and organisations can then apply for funds for their programmes.

3.6 INTEGRATION

Prior to 2002/2003, the set of interventions by organs of State to realise the right to food was fragmented across three government functions: social security, health and agriculture. In April 2004, the Department of Education will also play a significant role when it takes up a leading role in the delivery of the National School Nutrition Programme (NSNP).¹³⁵ It is mostly with the introduction of the Integrated Food Security and Nutrition Programme (IFSNP) during this reporting period that there appears to be a higher degree of inter-departmental co-operation, however, this appears to mostly consist of interactions between Social Development and Agriculture in the Director General’s Social Cluster and at provincial level.¹³⁶ Integration with the National Department of Health appears to have been less of an emphasis, except in isolated cases at provincial level.

The National Department's protocol response identified three serious implementation difficulties with the IFSS-SA:

- Non-alignment of national and provincial priority areas;
- Ineffective co-ordination mechanisms within and across levels of government; and
- Inadequate human resource capacity.

While this was broadly a correct presentation of some of the problems involved in implementing the IFSS-SA, there were some positive developments during the reporting period. For example, the Mpumalanga Department of Agriculture, Conservation and Environment stated that:

The Resource Management Department has been tasked to come up with maps indicating soil potentials and where good soils are found in a municipality. However, the challenge is that of funds and the limitation of the technology to do such, since the (available) satellite photographs only go to a certain resolution. The Department is realigning its activities in order to ensure that the agricultural sector is accounted for ... There is continuous interaction between the Department of Health and the Department of Social Services and Population Development. Thanks to the integrated food security programme, departments now work in a complementary manner.¹³⁷

From available information, it was not clear whether the National Department of Agriculture had developed a comprehensive implementation plan to facilitate the integration of IFSNP activities at local, provincial and national spheres.

4 CRITIQUE OF MEASURES INSTITUTED

The key problems with the measures instituted to realise the right to food during the reporting period include: a) inadequate protection of the right to food, b) insufficient focus on the scale of hunger and severity of malnutrition, c) unreasonable operational planning, d) costly systems to regulate food quality, e) low levels of participation by those who are directly affected, f) the appropriateness of technology as an aspect of right to food interventions.

4.1 INADEQUATE PROTECTION OF THE RIGHT TO FOOD

During the 2002/2003 financial year, many government departments were faced with new challenges to realise the right to food within a tighter time frame and higher food prices. Dramatic food price increases, drought and disease within South Africa and the region led to new demands on State resources. Poor households, who spend a high percentage of their income on food, were also forced to pay substantially higher prices for food, with a negative impact on their resources for ensuring health, quality education and other economic and social rights. Community-based research confirms that

food price increases were the cause of very serious problems for many vulnerable groups.¹³⁸ Quantitative analysis also confirms that food price increases had a negative impact on poverty alleviation and inequality. As the main contributor to overall inflation during 2002/2003, food price increases also had a significant macro-economic impact.

During the reporting period, Cabinet responded to the food price problem by allocating contingency funds for targeted food relief programmes¹³⁹ and also approved the establishment of a food price monitoring mechanism. However, these positive interventions occurred quite some time after food prices had risen dramatically, and the profit rates of most large established agricultural, food trading, food processing and food retailing/wholesaling companies reached high levels.¹⁴⁰

The introduction of a new, emergency, food price monitoring mechanism to scrutinise prices accessible through the market, indicates a key deficiency in the State's existing system for regulating the sector. Furthermore, it was not possible for the South African Human Rights Commission to assess whether an unfair proportion of State funds, used to procure food for supplements or catering (in schools, hospitals, prisons and the military), was redirected back to the private sector as profit.¹⁴¹

During the period under review, the Competition Commission completed an investigation on the upsurge in food prices after rapid depreciation of the rand against the dollar in 2001.¹⁴² The lengthy report concluded that opportunistic behaviour leading to food prices increases was *unlikely* and food price increases were not excessive in terms of the Competition Act 89 of 1998. However, the report did raise concern about the price of white maize as follows:

*The importance of maize-meal in the diet of low-income South African consumers indicates that the maize price should be assessed. In particular, the Safex price-setting mechanism, as it is by all accounts the bellwether price of maize. Some complaints have been received by the National Chamber of Milling (NCM) about market manipulation by international trading companies, but on initial enquiries that seems unlikely, for there are safeguards in place, although it should be noted that there is not yet a limit on open positions.*¹⁴³

The potential impact of a lack of position limits is confirmed by the Chairperson of the Food Price Monitoring Committee when he stated the following:

accusations about unethical behaviour of certain commodity traders and the manipulation of the agricultural futures market of the Johannesburg Stock Exchange was rife. Various facts and some evidence obtained by the Food Price Monitoring Committee and the Financial Services Board point to the potential for price manipulation. It seems, however, very plausible that it was the market sentiment that was "manipulated". The potential for manipulation lies in the large open positions of traders, which makes it possible for larger traders to corner the market and lead

the market (especially inexperienced traders) into a particular direction. To prevent this from taking place, the JSE recently announced the introduction of position limits.¹⁴⁴

Apart from the fact that there is a court case regarding the alleged abuse of a workers' pension fund,¹⁴⁵ the key point here is that the costs of inadequate safeguards on SAFEX were potentially passed on to low-income consumers who could ill afford such increases for such a sustained period of time. At a minimum, the potential for manipulation should have been prevented when serious warnings were first signalled in 2002.

4.2 THE SEVERITY OF HUNGER AND MALNUTRITION

4.2.1 *The Scale of Absolute Poverty*

Malnutrition among children occurs within the context of high levels of absolute poverty in the country as a whole and a growing number of people are defined as vulnerable. Table 17 shows a set of indicators of absolute poverty at different points in South Africa's recent history. Poverty lines are mostly defined in terms of a minimum basket of foodstuffs and other household items per person, hence their relevance to the discussion here.

Table 17: Food insecurity, absolute poverty and vulnerable group indicators

<i>Poverty measure</i>	<i>Period 1</i>	<i>Period 2</i>	<i>Source</i>
<i>Individuals (millions)</i>			
Minimum Subsistence Level	1989 – 16,3		RSA, 1992a
2000 kcal/day	1994 – 14,8		PSLSD, 1994
BMR Minimum Living Level	1994 – 17		ANC, 1994
Food poor	1995 – 18,2	1999 – 19,2	NIEP, 2002
Orshansky poor	1995 – 23,8	1999 – 25,3	NIEP, 2002
UNDP poor	1995 – 21,1	1999 – 22,2	NIEP, 2002
World Bank poor	1995 – 14,2	1999 – 16,7	NIEP, 2002
Traditional poor	1995 – 31,8	1999 – 32,4	NIEP, 2002
Chronically poor migrants	2000 – 0,25 to 0,5		Aliber, 2003
Street/homeless	2000 – 0,02 to 0,1		Aliber, 2003
AIDS orphans	2000 – 0,371	2010 – 1,9	Aliber, 2003
R401 per adult equivalent	2001 – 21,1		Taylor, 2002
R354 per adult equivalent	1995 – 20,2	2002 – 21,9	UNDP, 2004
<i>Households (millions)</i>			
Chronically poor rural	2000 – 1		Aliber, 2003
Female-headed	2000 – 0,767		Aliber, 2003
Disabled	2000 – 0,038		Aliber, 2003
Elderly	2000 – 0,378		Aliber, 2003
AIDS families	2000 – 0,06	2010 – 0,54	Aliber, 2003

The following issues are worth highlighting upfront:

- the scale of the measured food insecurity (and poverty) problem is so large that there has been ongoing disagreement about the extent to which food-insecure households should be targeted with income/food

support programmes as opposed to using macro-economic price controls, more rapid agrarian reform and/or general consumer subsidies (like a Basic Income Grant);

- under apartheid, the State legitimised more limited and targeted programmes by arguing that the sheer magnitude of the indicators demonstrated that they were an incorrect reflection of reality on the ground;
- the level of absolute poverty does vary quite considerably depending on what indicator is used;
- few of the indicators have been monitored consistently over time, however, there appears to be an increase in absolute poverty when this has been done; and
- attempts to improve targeting through identifying the chronically poor are still in their early stages.

For instance, prior to the Integrated Food Security Strategy, the Government was accused of adopting a piece-meal approach to the problem of food insecurity as follows:

the 2000 Cabinet Lekgotla (strategic planning session) decided that there was a need to implement an Integrated Food Security Strategy, and this was later adopted at a MinMEC (forum of national and provincial agricultural ministers), and a Draft Bill on food security developed in 2001. Further work has occurred on setting up information systems and project identification, and three pilot projects have been initiated at provincial level, which will be rolled out to the rest of the country in due course. The Government has interpreted the problem as being addressed through demonstration projects. It has raised money for this approach through holding a Telefood concert, which was telecast internationally in conjunction with the SABC and the FAO. However, a piecemeal project approach may only produce temporary, palliative solutions. Without systematically addressing the land question, skills, inputs, extension services, credit, food prices and non-agricultural livelihoods, the food security of the South African urban and rural poor will remain elusive.¹⁴⁶

The key question raised above is whether macro-economic price controls, more rapid agrarian reform and general consumer subsidies (like a Basic Income Grant) could be more effective at addressing absolute poverty, within available resources, than targeted programmes that intend to reach a smaller number of people who are defined as chronically poor or vulnerable.

4.2.2 The Number of Stunted, Underweight, Wasted and Severely Malnourished Children

The prevalence of stunting, being underweight, wasting and severe malnourishment amongst children provides one way to identify households in

desperate need, ideally before there are malnutrition related deaths. Ever since the introduction of the Reconstruction and Development Programme (RDP) in 1994, emphasis has been placed on nutritional monitoring of children as part of a broader system of monitoring economic growth, development and poverty. Child growth monitoring provides one way to identify malnutrition problems early enough for preventative action to be taken. According to a World Health Organisation (WHO) study:

Stunting is a major nutritional problem in children under five years of age in South Africa, especially in urban-informal settlements and rural areas. It has only recently attracted much attention in South Africa and internationally.¹⁴⁷

In the period from 1994 to 1999, there was no improvement in the prevalence rate of undernutrition among young children in South Africa, despite increased monitoring in certain provinces (see Table 18). The prevalence of more severe forms of malnutrition showed signs of increasing rather than decreasing.¹⁴⁸

Table 18: The prevalence of undernutrition among young children compared with National Department of Health policy targets

	Survey 1994 Age 6 – 71 months ¹⁴⁹	Survey 1999 Age 12 – 71 months ¹⁵⁰	Target 2000 Age under 60 months ¹⁵¹	Target 2005 Age under 60 months ¹⁵²
Stunted	22,9%	23,8%	20%	20%
Underweight	9,3%	11,1%	10%	10%
Wasting	2,6%	3,6%	1% ^a	2%

Source: Survey results published by the Health Systems Trust on new.hst.org.za/indic

Notes: According to Census in Brief, the number of children under five years of age increased by 6 195 from 1996 to 2001. The total number of children under five in 2001 was 4,45 million.

^a Refers to the target for severe undernutrition, which is three standard deviations from the reference mean instead of two standard deviations, as is the case with wasting. Unlike the other values it is therefore not directly comparable. Severe malnutrition (for children under five years of age) refers to children whose weight on admission to a hospital is below the line representing the third percentile (60% of expected weight for age) on the Road to Health Card.

Although it is widely accepted that the causes of undernutrition among young children are complex and therefore not solely within the control of the Departments of Health. The least the National Department of Health could do is set progressive targets for itself and others. In this regard, it is not clear why the National Department of Health decided on virtually identical undernutrition targets for 2000 and 2005 (see Table 18). The targets are unreasonable.

It is acknowledged that from 1999 onwards the Department of Health has made considerable progress in consolidating a new and more comprehensive monitoring system from the district health level upwards. It is also acknowledged that the practical importance of district level health monitoring has been demonstrated in pilot projects in several vulnerable areas of the country. However, it is doubtful whether the scale and urgency of these

interventions matches the needs of all vulnerable groups. This is especially true in the context of the food price increases, which took place during the 2002/2003 reporting period, and the rapid increase in the number of malnourished children who entered the public health system under the Protein Energy Malnutrition scheme. The urgency of reducing the prevalence of malnutrition more rapidly than planned by the National Department of Health is underscored by statistics on the causes of death in South Africa.

4.2.3 Malnutrition Related Deaths

According to Statistics South Africa (STATSSA), the general pattern in causes of death from 1997 to 2001 is a major increase in HIV/AIDS related deaths relative to unspecified unnatural causes (i.e. suicide, drowning, motor accidents).¹⁵³ STATSSA also found that:

*malnutrition was a significant cause of death in the age group 0 – 14 years, being the seventh leading cause among males and females, accounting for 6,5% and 6,1% of deaths respectively.*¹⁵⁴

More detailed information based on the mortality profile in 2000 suggests that of the 303 081 male and 253 504 female deaths recorded for that year, protein energy malnutrition ranked lowest out of a list of 20 specific causes of death.¹⁵⁵ However, when the figures are recalculated to take account of the years of life lost, nutritional deficiencies rank 11th as a cause (at 1,6%) relative to HIV/AIDS which ranks highest (at 39%).

In 2000, the estimated number of deaths from protein energy malnutrition was 2 526 males and 2 123 females. An estimated 5 511 people died from protein energy malnutrition in 2000, with 83% of deaths occurring in the 0 – 4 years age group. A further 184 people died from other nutritional deficiencies, including pellagra, which almost exclusively affected people over the age of 14 years. At the time of writing, more up-to-date information on causes of death were not available to the Commission, but the Medical Research Council (MRC) stated that it was conducting further work on quantifying “risk factors, such as tobacco use, malnutrition, unsafe sex, alcohol consumption, poor water supply and sanitation, and hypertension.”¹⁵⁶

The above discussion makes it clear that in 2000, a large number of young children died from malnutrition. During the reporting period, 101 152 children were admitted to hospital with severe malnutrition, but it was not possible to state how many children died of malnutrition.

It is however, *very alarming* to understand that case fatality rates for children admitted with a diagnosis of severe malnutrition in January – April 2001 in two rural hospitals in the Eastern Cape ranged from 21% at Mary Theresa referral hospital to 38% at Sipetu referral hospital. The study concludes by stating:

*Quality of care improved with the implementation of the WHO [IMCI] guidelines and case-fatality rates fell. Although major changes in medical and nursing practice were achieved in these **under-resourced***

*hospitals, not all tasks were done with adequate care and errors led to unnecessary deaths.*¹⁵⁷

There appears to be a low level of awareness and sensitivity to the high number of deaths in South Africa as a result of protein energy malnutrition even outside of times of drought and high food prices. While 166 deaths in the Eastern Cape were reported at the height of the most recent crisis, this story only came to the media's attention through the advocacy of organisations involved in addressing the malnutrition problem at health facilities in the area.¹⁵⁸ Associated with the lack of awareness and sensitivity among those who are not affected by the crisis must be a lack of adequate awareness, amongst those who are directly affected, of their rights and available recourses.

4.3 UNREASONABLE OPERATIONAL PLANNING

Despite the fact that major new food programmes were implemented approximately six months after the Cabinet decision in October 2002 (i.e. March/April 2003), it should be borne in mind that the food price crisis began at the beginning of 2002, with warnings as early as December 2001. It took quite some time for key government agencies to realise the scale of crisis posed by a doubling of basic food prices within the space of a few months and what government could do about it in the short and medium term.

Part of the hesitance also stemmed from the defensive reaction of organised business to suggestions that food prices increases were unjustified and that companies were involved in "speculative profiteering". While interim relief measures were provided to existing beneficiaries of social grants through easy-to-implement increases in their transfer payments once during 2002, a large number of people face mostly document related administrative barriers in accessing social security (see the Social Security report). With the exception of the Department of Social Development which took responsibility for distributing food parcels with a view towards extending registration for child support grants, other government departments were expected to adopt new programmes at short notice, for which they appeared to be ill prepared.

In this regard, it does not appear to help matters that most government departments avoid setting themselves clear delivery targets that relate specifically to vulnerable groups. The lack of clear programmes linked to specific targets creates problems with financial planning, human resources and integration with the plans of other relevant organs of State and civil society. Clear programmes with objectives, targets and other resource information also facilitate the oversight function of local councils, provincial and national legislatures.

4.4 THE REGULATORY SYSTEM REGARDING FOOD QUALITY

When it comes to the ensuring quality standards of basic food there are also serious problems, especially when it comes to the issue of food fortification, its direct costs and the costs of enforcement. Since 1999, industry has refused to

carry the costs of fortification and has insisted that government allocate sufficient resources to monitor and enforce compliance with food standards. There has been very little movement towards food industries adopting codes of conduct that apply with any force to the members of industry lobby associations. Therefore, while the National Department of Health will be commencing with food fortification of maize and wheat in 2003/2004, the costs of the “new development” are passed on to poor consumers (as “beneficiaries”) when they buy products. Furthermore:

a delay in finalising the [fortification] programme for maize and wheat has led to problems for consumers ... in the absence of one standard micro-nutrient formula for all bread, there has been scope for companies to brand bread and label it with claims of vitamin “enrichment” that make it difficult for consumers to compare like prices.¹⁵⁹

4.5 THE LEVEL OF PARTICIPATION BY THOSE DIRECTLY AFFECTED

As handed down in the *TAC* judgment, for a government programme to be reasonable its contents must be made known appropriately. The Integrated Food Security Strategy and National Guidelines for Integrated Management of Agricultural Water Use released by the National Department of Agriculture are not widely known of, and nor is the Protein Energy Malnutrition scheme. Many other policies and documents relevant to those directly affected by malnutrition and hunger are not accessible or understood by the large number of people that are potentially affected by the problem.

4.6 THE APPROPRIATENESS OF INTERVENTIONS

The issue of technology is rarely considered as an aspect of the right to food. However, there are several reasons to be pre-cautious about inappropriate agricultural and food technology, because:

- it could eventually facilitate concentration of ownership of the means of production (especially land and machinery);
- it could displace labour to a significant extent or result in more hazardous working conditions;
- it could de-emphasise indigenous knowledge relative to western scientific knowledge;
- it could result in a food system with a highly negative energy balance and environmental externalities that will be impossible to reverse;

- it could result in food with little or low nutritional value and balance (i.e. specific food refinements and additives as opposed to holism and fermentation). Some new technologies may also cause nutritional hazards;
- it could also result in longer food chains with higher distribution and pest control costs and active ingredient resistance (i.e. while high input systems have economies of scale in planting, harvesting and storage (which smaller farmers usually do not benefit from) the flipside of the coin is diseconomies of scale in crop protection against fungus, insects and weeds in the field as well as fungus, insects and rats in silos and ships);
- finally, it could prejudice farmers' rights to save and share seed or everyone's right to bodily and psychological integrity.

Inappropriate technology may be especially present in highly unequal societies like South Africa where innovations tend to be skewed in favour of elites. In this regard, the ARC seems capable of providing and facilitating much more widespread and relevant agricultural support to vulnerable groups through provincial department's of agriculture and local municipalities, if its approach to resource allocation allows for this.

5 RECOMMENDATIONS

Previous Economic and Social Rights Reports focused on the multi-sectoral nature of the right to food and the details of government programmes to support food production, basic nutrition, income generation and social assistance. As far back as the 1st and 2nd Economic and Social Rights reports, the State was encouraged to integrate its activities, improve government information and monitoring systems, clarify qualification criteria, and institute practical measures to extend the scope of programmes to additional target groups or to address specific problems.

The 4th Economic and Social Rights Report called for progress in creating employment, reducing food prices and delivering nutritional education as ways to realise the right to food. The fourth report stated that legislation on the right to food would hopefully assist in addressing the shortfalls in the measures adopted by government.

This report emphasises that urgent progress must be made on the following:

1. curbing deaths from nutrition-related causes;
2. ensuring that the potential of children in vulnerable situations is enhanced by good basic nutrition; and

3. expanding the number of people that have the opportunity to produce, earn, or receive sufficient support to feed and sustain themselves.

Raising Awareness of Malnutrition

Evidence presented in this report suggests that South Africa's malnutrition problem is not a "moderate public health" problem; it is a malnutrition crisis that is especially poorly understood by more affluent members of society.

One way to begin to address this problem is to raise general awareness of the scale of the malnutrition problem in South Africa and communicate inspiring examples of how this is being addressed through income support, asset redistribution, and production support. The Female Farmer of the Year competition is already one example of a government awareness-raising programme. Given the significant problems in the Primary School Nutrition Programme in some areas of the country, there is also a need to effectively communicate how successful implementation of the programme has been achieved in some localities and provinces.

Good nutrition needs to be promoted in an independent and culturally sensitive manner to all age groups. This is especially true for those areas of the country (like rural areas and informal settlements) that are actively supplied with low quality foods or foods with high concentrations of additives/toxins.

Rolling out the Integrated Food Security Strategy

The next proposed step is to ensure that reasonable objectives and targets are released in terms of the Integrated Food Security Strategy, as a matter of urgency. Provincial integrated food security strategies may assist in bringing the work of different departments together in a way that draws on the Integrated Food Security Strategy at a national level, but adapts it to provincial reality. The targets contained in a provincial food security strategy should be based on the level of need that exists, especially as represented by indicators of malnutrition at a local level. This implies that Departments of Agriculture should better integrate their activities with the work of Health, Social Development, Education, Land Affairs and Water Affairs and Forestry at a decentralised level. Practical steps need to be taken to provide education, skills development and information systems (including Geographic Information Systems) to achieve better integration.

Consideration should be given to acknowledging and supporting primary health care workers, and Community Based Organisations of community health workers, in their efforts to identify individuals and households who currently fall outside the social security system. This could be done with a view to getting these households onto the system as well as referring them for further support from Social Development, Education, Agriculture and Public Works. More attention needs to be paid to staffing, equipment and vehicle purchasing and utilisation to ensure that families affected by malnutrition are brought onto the health care, social security and small scale production systems.

Practically speaking, the scale of the National Department of Health's National Integration Project (NIP) could be expanded to identify many more households that are in desperate need.¹⁶⁰ For example, at the NIP site in Impendle, KwaZulu-Natal, "approximately 900 orphans and vulnerable children were assisted to access education, 495 were assisted to access Child Support Grants and ... all children (identified) have at least 2 meals per day (to and from school) while their applications are being processed".¹⁶¹

The Department of Health should urgently revise its targets in order to halve the number of children suffering from malnutrition by 2015. The objectives and targets in terms of the Integrated Food Security Strategy should be properly costed and planned for, and should take into consideration, the practical experience gained by provincial and local government as well as NGOs and CBOs. The objectives and targets should be made known for comment before they are finalised.

The National Department of Health should substantially improve reporting on the Protein Energy Malnutrition scheme and nutritional supplementation interventions for people living with TB and/or HIV/AIDS, in order to support their urgent roll-out. In this regard, there is a need to consider how the Integrated Nutrition Programme (INP) could be reformulated to reflect a larger scale and more sustainable programme to support HIV/AIDS sufferers, including: patients who are receiving drug therapy, malnourished people more generally. Possibly, now that the National Department of Education is responsible for the National School Nutrition Programme, the National Department of Health could consider expanding the remaining sub programmes under the INP as one relatively speedy way to improve nutritional support, in co-operation with community based health care workers- in order to half hunger by 2015.

Improving Food Safety

There is a need for clear information on the different types of toxin and contaminant contraventions among domestic foodstuffs relative to the Medical Research Council's food sampling frame. This information will assist in assessing work done towards the implementation of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972.

Notwithstanding the National Department of Health's food fortification programme, the immune systems of vulnerable groups should not be further burdened by toxins in basic foodstuffs. Information on human and financial resource allocations towards testing domestically consumed basic food items (separating out imported food) as opposed to those for export, should also be provided.

Better Regulation of Food Pricing

When it comes to the issue of food price inflation, the Pricing Committee established by the National Department of Health to regulate drug prices, may hold important lessons.¹⁶² When the Department of Education takes up its role of delivering the Primary School Nutrition Programme in 2004/2005, this report demonstrates that it is going to have to pay careful attention to the issue

of food quality, pricing and affirmative procurement if it is to expand and improve the programme. Transparency is required on the price and quality of food purchased on tender by hospitals and other government departments, in order to ensure that food is accessible to the poor.

The National Department of Agriculture should report on the role they see for State-owned strategic grain stocks, both physical and “virtual”. The relevant organ of State should also report regularly on the number of quality jobs involved in producing quality food purchased by the State, by type and size of enterprise i.e. SMMEs, large established corporations and co-operatives. Co-operative groups are already involved in producing and processing food with intermediate technology.

Accelerating Agrarian Reform

Given that the concentrated structure of present day food markets derives from South Africa’s highly unequal distribution of land and natural resources, the progressive realisation of the right to food is fundamentally linked to rapidly realising the land and water rights of vulnerable groups (see the Right to Land report).¹⁶³

The National and Provincial Departments of Agriculture should change their budgeting format to clearly reflect spending on agricultural infrastructure and equipment, production inputs and training for land reform beneficiaries and resource poor farmers.

The Agricultural Research Council should deepen and expand its programmes that are relevant to resource poor farmers and HIV/AIDS sufferers. Possible sub-programme for consideration as part of sustainable rural livelihoods include: traditional, neglected and underutilised crops; agricultural diversification; home gardens; wild food plants; medicinal plants; and community seed systems.¹⁶⁴

Communication of Policy and Legislative Developments

A wide range of legislation, policy and guidelines is referred to in annual reports and in the protocol responses, and should be made much more accessible to the general public, especially through communicating in a relevant language and media format. Some specific examples of legislation and policy that requires broader awareness and understanding include:

- The Food Price Monitoring Committee Report;
- Agricultural Risk Insurance Bill;
- Sustainable Utilisation of Agricultural Resources (SUAR) Bill;
- Food Security Bill;
- Regulations in terms of the Foodstuffs, Cosmetics and Disinfectants Act No 54 of 1972; and
- The implementation report for the Special Programme for Food Security (SPFS).

National framework legislation on the Right to Food will be useful in that it will encourage focused action towards the realisation of the right to food at national, provincial and local level. Framework legislation will also be required to establish the institutions and systems required for effective participation from various organs of State and organs of civil society. Food security interventions cannot be left up to departmental policy, especially since the country is likely to face a drought or another spate of price volatility at some time in the not too distant future.

A framework law is a flexible instrument that focuses systematically on the realisation of the right to food. It therefore serves the purpose of the South African Constitution. Moreover, it is in accordance with international human rights law, which sees such a law as a State obligation under the International Covenant on Economic, Social and Cultural Rights. Even if such a law may not seem feasible today or tomorrow, it is worth the effort to start building a national campaign towards this goal. This process will also generate and/or strengthen the actors and monitoring mechanisms that will ensure that a framework law, once adopted, will be implemented.¹⁶⁵

Marshalling the energy and resources of society

Finally, the call for government, labour, community and business representatives to negotiate an agreement at National Economic Development and Labour Council (NEDLAC) that would ensure quality job creation in the food industry, and the right to food, should be supported. This approach to engaging with the problems in the food industry will ensure that participation in initiatives towards the right to food are broadened and deepened effectively.

1 The 5th basic nutrition protocol designed by the SAHRC is based on section 28 (1)(c) of the Constitution and was sent to the National Department of Health and the provincial Departments of Health for their response. The 5th sufficient food protocol is based on section 27 (1)(b) and was sent to the National Department of Agriculture, the Agricultural Research Council and the Provincial Departments of Agriculture. The Department of Correctional Services used the 4th Economic and Social Rights protocol relating to prisoners' rights in terms of section 35 (2)(e) to respond in the 2002/2003 financial year.

2 South African Human Rights Commission (2003) 5th Economic and Social Rights Protocols www.sahrc.org.za/protocols_2002_2003.htm (Accessed 9 February 2004)

3 Mr Asbjørn Eide, *The right to adequate food and to be free from hunger*, Updated study on the right to food, submitted in accordance with Sub-Commission decision 1998/106, Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1999/12, 28 June 1999.

4 United Nations General Assembly, Special Rapporteur on the Right to Food, *The Right to Food*, 05 August 2003 paragraph 39

5 Danie Brand, *The Rights to Food and Nutrition in South African Constitution*, Centre for Human Rights, University of Pretoria, July 2000.

6 The Commission adopts the following definition of the obligation to protect contained in section 7(2) of the Constitution: “

7 Mr. Asbjørn Eide, *The Right To Adequate Food And To Be Free From Hunger*, updated study on the right to food, submitted in accordance with Sub-Commission decision 1998/106, Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1999/12, 28 June 28 1999.

8 South African Human Rights Commission, *Final Report on the Inquiry into Human Rights Violations in Farming Communities*, August 2003.

9 *Ibid.*, 180.

10 South African Human Rights Commission, *The Right to Have Access to Sufficient Food*, in 4th Economic and Social Rights Report 2000/2002, April 2003.

11 Julia Sloth-Nielsen, *Children*, Chapter 23, South African Constitutional Law: The Bill of Rights

12 The *TAC* judgment concerned itself with the specific case of “children born in hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means”. The judgment states that these “mothers and their children are, in the main, dependent on the State to make health care services available to them”. See *Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)* [74-81].

13 Alfred Cockrell, *Private Law and the Bill of Rights: A Threshold issue of “horizontality”* Bill of Rights Compendium

14 *Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC)*

15 *Ibid.*, [39]

16 See for example, Danie Brand, *Between availability and entitlement: The Constitution, Grootboom, and the right to food*, Executive Summary of paper presented at a colloquium 17 - 19 March 2002 Socio-Economic Rights Project, CLC, UWC and Danie Brand, *Food security, social security and Grootboom*, Community Law Centre ESR Review, Vol 3, No 1 July 2002

17 *Ibid.*, [135]

18 See *Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)* [123]

19 In the *TAC* judgment the Constitutional Court called for a comparison between the savings from preventing newborn babies from being infected with HIV and the costs of providing breastmilk substitutes (see *Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)* p1060 [91]).

20 Based on the *Kutumela* case in the North West province, the Legal Resources Centre secured agreement from the National Department of Social Development to introduce binding national regulations on the implementation of the National Food Emergency Scheme by April 2004. Personal communication, Nick de Villiers, 8 October 2003. The National Food Emergency Scheme was announced on 29 October 2002 in response to rapid food price inflation that peaked in the first half of 2002.

21 Following press reports that the National Food Emergency Scheme was not being implemented in parts of KwaZulu-Natal, on 24 January 2003, Commissioner Karthy Govender wrote to the Minister of Social Development and the MEC – Provincial Social Development for KwaZulu-Natal requesting that the matter be resolved by 27 January 2003. A letter dated 28 January 2003 assured the Commissioner that food distribution would begin on 3 February 2003. The letter followed a meeting on 23 January 2003 between the National and Provincial sphere where the parties resolved questions

of mandates, guidelines and logistics. Gift of the Givers appears to have been the Not For Profit chosen for the task of delivering food parcels.

22 United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 entry into force 3 January 1976, South Africa signed the convention in 1994, but has not ratified.

23 Committee on Economic, Social and Cultural Rights, Twentieth Session, *General Comment 12 The Right to Adequate Food*, 26 April – 14 May 1999

24 The concept of a core obligation is problematic in South African law. In the *TAC* judgment the Constitutional Court stated that “Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1). See *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) p 1060 [34]

25 United Nations Economic and Social Council, *The Right to Food*, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10, 7 February 2001 (E/CN.4/2001/53). An emphasis on the notion of “access” is already present in South Africa’s Constitution and the draft Food Security Bill. The draft Bill defines food security as: “access by all people at all times to adequate, safe and nutritious food for a healthy and productive life” see National Department of Agriculture, Definitions, National Food Security Draft Bill [June.2002] [Latest Draft] Act Confidential- Not For Publication. This definition is virtually identical to the World Bank definition of food security first published in 1986.

26 The idea of voluntary guidelines on the right to food originates from major international conferences like the United Nations (UN) Millennium Summit in September 2000 and the FAO’s World Food Summit in 2001.

27 According to the Intergovernmental Working Group international obligations concerning the right to food include the following: Article 11 of the International Covenant on Economic, Social and Cultural Rights, Articles 24 and 27 of the Convention on the Rights of the Child, Article 12 of the International Convention on the Elimination of Discrimination against Women, and several provisions in the 1949 Geneva Conventions and their Additional Protocols.

28 United Nations, Millennium Development Goals, <http://www.undp.org/mdg/>

29 Mohammad Saeid Nouri-Naeni, *The Right to Food, Policies Against Hunger Defining the role of Food Aid*, 2-4 September 2003, http://foodaid.zadi.de/pr_naeni_en.ppt. A first draft of the voluntary guidelines will be discussed at the second session of the Intergovernmental Working Group from 27-29 October 2003. The guidelines will be prepared according to a framework agreed in June 2003 (see Food and Agriculture Organisation, Report of the 29th Session of the Committee on World Food Security (CFS), June 2003 CL 124/10).

30 South Africa ratified the Convention on 15 December 1995 and it came into effect on 14 January 1996.

31 United Nations General Assembly, Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), adopted 18 December 1979, entry into force as an international treaty on 3 September 1981 <http://www.un.org/womenwatch/daw/cedaw/econvention.htm> accessed 17 October 2003.

32 United Nations General Assembly, *Convention on the Rights of the Child*, General Assembly Resolution 44/25 of 20 November 1989, <http://www.unhchr.ch/html/menu3/b/k2crc.htm> accessed on 3 June 2004.

33 United Nations General Assembly 74th plenary meeting Implementation of the International Plan of Action on Ageing and Related Activities 16 December 1991 A/RES/46/91 <http://www.unescap.org/ageing/res/res46-91.htm>

34 Department: Agriculture Republic of South Africa, *The Integrated Food Security Strategy for South Africa*, Pretoria 17 July 2002. Published at <http://www.nda.agric.za/docs/Foodsecurity/FinalIFSS.pdf> (220kb) created on 27 March 2003. Website accessed 25 August 2003.

35 As the IFSS says “South Africa pledged to support the World Food Summit Plan of Action that was encapsulated in the 1996 Rome Declaration on World Food Security ... As a response to the Rome Declaration, the government appointed a Food Security Working Group to investigate options for achieving food security in South Africa. The IFSS builds on the proposals made in the 1997 Discussion Document on Food Security”. See Food Security Working Group (Agricultural Policy Unit) for The Department of Agriculture and Land Affairs Food Security Policy For South Africa – A Discussion Document November 1997. No longer available on www.nda.agric.za

36 The IFSS-SA is the result of a Cabinet decision during 2000 to “launch an updated national food security strategy to streamline, harmonise and integrate diverse food security sub-programmes in South Africa”. According to the 4th Economic and Social Rights Report, the strategy is also a response to the 2001 World Food Summit resolution mentioned earlier.

37 National Department of Agriculture, protocol response 2003.

- 38 Department: Agriculture Republic of South Africa, *The Integrated Food Security Strategy for South Africa*, Pretoria 17 July 2002. p23
- 39 Ibid., 13
- 40 Some interaction between Government and stakeholders on the IFSS-SA took place in Johannesburg after its release. However, it is not clear whether the national stakeholder workshop to integrate all the comments received from these stakeholders took place in October/November 2003 or not.
- 41 Ibid., 37
- 42 The Presidency, Republic of South Africa, *The Integrated Sustainable Rural Development Strategy*, 17 November 2000 <http://www.gov.za/reports/2000/isrds.pdf> The ISRDS was launched by the President on 7 July 2001 at the Kgalagadi Cross Boundary Municipality, one of 30 nodal points. See <http://www.anc.org.za/ancdocs/history/mbeki/2001/tm0707.html>
- 43 In the past, the development of irrigation infrastructure was mediated through irrigation boards, which were driven by the interests of commercial farmers involved in the irrigation scheme. The State advanced loans to irrigation boards for the construction of irrigation infrastructure, i.e. comparatively low interest loans from the State or the Land Bank, where the State also acted as guarantor in some instances.
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sector.

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163 The rights in the Bill of Rights are inter-related and mutually supporting. Thus, among other rights in Chapter 2 of the Constitution, the right to food is related to and mutually supportive of land reform and the right to “ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”(see Section 24 (b)(iii) of the Constitution).

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Source: William M. Loh



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health

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2002/2003 Financial Year**

South African Human Rights Commission

21 June 2004

PREFACE

In this 10th year of our young but thriving democracy, we are all engaged in some way or the other, in critically reflecting on the achievements we have secured over the past years as well as the unfinished work that lies ahead. In the context of the various rights guaranteed by our Constitution, they seek in their totality to ensure that the individual and the society are able to develop to their full potential and indeed that human rights becomes a central feature of our society. In this regard we have made much progress, and in the main, few argue against the notion that civil and political rights are well secured both in law and in practise.

However, the challenge that is situated at the heart of our Constitutional contract is how we advance social and economic rights and in so doing ensure that we advance the interests of the poor and those many who are still to enjoy the full benefits of our democracy. The inclusion of social and economic rights in the Bill of Rights was a clear articulation that democracy was as much about the right to vote, and of free expression and of association as it was about the right to shelter, the right to food, the right to health care, the right to social security, the right to education and the right to a clean and healthy environment.

The Constitution has tasked the Commission with a specific mandate to advance social and economic rights. In particular, section 184(3) requires that: “Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.”

A healthy and robust debate exists around these measures that the Constitution requires the State to take. In addition, the human rights discourse sees considerable contestation around issues such as the nature and scope of the right, the adequacy or otherwise of the measures taken and the meaning of the phrase ‘progressive realisation of rights.’ These are difficult issues and it is not always possible, nor may one say desirable, to always have consensus on them. In some instances the Courts have had to rule on them. We see this Report, however, not only as a contribution to those debates but also as a tool that can assist Government, Parliament and civil society in developing a critical understanding about social and economic rights and their implementation.

The modus operandi of the Commission in discharging its constitutional mandate to monitor and assess the observance of economic and social rights has in the main focussed on requiring organs of state to report to us on measures they have taken. This continues to pose several challenges, namely: to ensure that organs of State submit to the Commission reports that are timely, accurate and of good quality . We are pleased that good progress has been made on this front over the past year and the process of presenting draft reports to organs of state and civil society for comment has been most valuable to the Commission in finalising this report .

The launch of the 4th Economic and Social Rights report in April 2003 generated considerable interest and much debate and discussion on the Report ensued. We were invited by numerous parliamentary portfolio committees from the National Assembly and National Council of Provinces to present the Report. We certainly found the engagement with Parliament a very useful and mutually rewarding exercise. It provided the Commission with a unique opportunity to share its thinking and vision around its work

with Parliament while it enables us to better understand Parliament's expectation of the Report and its use to them as a tool in their work. There have been numerous valuable recommendations that have emerged from our presentations to Parliament which we are committed to giving effect to from our side.

So as we commence the beginning of the 2nd decade of our democracy the delivery of social and economic rights become crucial to the ongoing success of our nation and the entrenchment of a culture of human rights. It is certainly our hope, and the intention of this Report, to contribute to ensuring that the promise and the vision underpinning our Constitution is shared and enjoyed by all in our country.

Jody Kollapen

Chairperson - South African Human Rights Commission

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South African Human Rights Commission

INTRODUCTORY SECTION

The aim of the *Introductory Section* is to provide an outline of the common analytical framework used in the reports, briefly discuss the political and economic context of the year under review, and provide an integrated summary of the key findings and recommendations of all eight reports in the series. Details of the report production process are also included at the end of this introduction.

The 5th Economic and Social Rights Report follows a more user friendly format than previous reports. There are now separately bound, less bulky, reports on Land, Water, Environment, Food, Health, Social Security, Education and Housing. Each report has an executive summary to facilitate access to the main findings and recommendations. Issues that connect one right to another are highlighted in the body of each report to emphasise the interrelatedness and interdependence of the rights in the Bill of Rights of the Constitution of the Republic of South Africa Act 108 of 1996 (simply referred to as the Constitution throughout the reports).

A) Analytical Structure and Framework

Each report in this series follows a basic structure:

1. **Introduction:** a discussion of the meaning and content of the right with reference to the Constitution, case law and relevant international human rights instruments.
2. **Progress in the realisation of the right:** a factual description of measures instituted by government during the period under review and their impact, especially on vulnerable groups.
3. **Challenges for the realisation of the right:** a description of key challenges that hamper the realisation of the right, and in some cases, government's response to these challenges.
4. **Critique of measures instituted:** a consideration of some of the shortcomings of the measures instituted by government.
5. **Recommendations:** a set of recommendations that may encourage progressive realisation of the right as expeditiously as possible.¹

Each report consolidates information from various sources including: relevant government protocol responses, government Annual Reports and Strategic Plans, the Intergovernmental Fiscal Review, as well as research funded by government, international donors or other agencies.

All reports employ the standard of reasonableness as laid down in the *Grootboom*² and *TAC*³ judgements of the Constitutional Court, in conjunction with relevant international human rights instruments.

¹ Some reports in the series end with a conclusion.

² Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC)

The constitutional provisions pertaining to socio-economic rights require the State to “take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of [these rights]”.⁴ This requirement, read with the provision on the obligation of the State to “respect⁵, protect⁶, promote⁷ and fulfil⁸ the rights in the Bill of rights” in section 7(2) of the Constitution ensures an effective guarantee of socio-economic rights in South Africa. The judicial enforcement of these rights by the courts and the constitutional mandate of the South African Human Rights Commission to monitor and assess the observance of the rights by the State⁹ and non-State entities also contribute to the effectiveness of the constitutional guarantee of these rights.

The Constitutional Court has played a significant role in ensuring the effective guarantee of socio-economic rights in our country. On the obligation of the State, Judge Yacoob held in the *Grootboom* case:

*The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.*¹⁰

On the effective guarantee of basic necessities of life for the poor, Judge Yacoob further said:

*This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.*¹¹

3 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)

4 See sections 26(2), 27(2) and 29(2) of the Constitution.

5 Respect is a negative obligation, which requires the State to refrain from denying or limiting equal access for all persons to the enjoyment of the rights. This also means that the State should abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure which violates the integrity of the individual or which in any way interferes or limits his/her right to pursue the enjoyment of the rights in the Bill of Rights.

6 The obligation to protect places a positive obligation on the State to prevent the violation of any individual's rights by a third party.

7 The obligation to promote places a positive obligation on the State to create a conducive atmosphere in which people can exercise their rights and freedoms by promoting awareness of their rights through public education.

8 The duty to fulfil places a positive obligation on the State to institute active measures that enable each individual to access entitlements to the right and which cannot be secured through exclusively personal efforts. State parties are also obliged to provide a specific right when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. e.g. people in disaster situations or those in dire need.

9 See sections 184(1) and (3) of the Constitution.

10 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC) [24]

On the role of the courts in ensuring that the State fulfils its role in giving effect to these rights and thus ensuring that there is an effective guarantee of these rights, Judge Yacob said:

I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.¹²

A similar position was taken by the Constitutional Court in another seminal judgment, *Minister of Health and Others v Treatment Action Campaign and Others*, where the Court held:

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflicts our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.¹³

In outlining the role of the courts, the Court also stated:

The primary duty of courts is to the Constitution and the law...Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to do so.¹⁴

While there might be some criticism directed at the Constitutional Court pertaining to the determination of when there are no available resources for the State to fulfil its obligation pertaining to socio-economic rights, the courts, particularly the Constitutional Court, have and will continue to play an important role in ensuring that the provisions in the Bill of Rights are effectively guaranteed for our people.

B) The Political and Economic Context of the Year Under Review

The period under review, 1 April 2002 to 31 March 2003, followed the 11 September 2001 attacks and a 24% depreciation of the South African currency (Rand) near the end of 2001. Consumer Price Inflation, especially for goods and services bought predominantly by the poor, increased sharply to the highest level since 1994. Concerns were signalled to the Competition Commission about the impact of import parity pricing in several sectors of the economy, most notably in food production, processing and retailing as well as metals and engineering. Interest rates were raised in an attempt to curb inflation, with a

11 Ibid., [93]

12 Ibid., [94]

13 *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) [36]

14 Ibid., [99]

subsequent dampening effect on the rate of economic growth in the latter part of the financial year. According to the Reserve Bank Quarterly Bulletin for March 2003, economic growth stood at a robust 3% in 2002.

As a result of prudent fiscal management, the government introduced a more expansionary Budget in February 2002. Total government expenditure increased from R262,6 billion in 2001/2002 to R291,8 billion in 2002/2003. Overall, the budget directed more resources towards reducing poverty and vulnerability, improving education and training, developing skills amongst the youth, building and enhancing physical infrastructure and basic municipal services, as well as making communities safer places to live, work and play.

It is also important to note that the February 2003 Budget provided for significantly greater expenditure than the previous year. Total expenditure was R331,7 billion for 2003/2004. The additional allocations accommodated substantial policy changes for all three spheres of government and also provided for *higher than anticipated inflation in 2002*.

By the end of the reporting period in March 2003, the Rand had appreciated by 18%. This created concern about the job losses that could arise out of an increase in import competition. Therefore, during the period under review, the goals of progressively realising economic and social rights took place in the context of significant macro-economic volatility, inflation and an expanding government budget.

C) Key Interrelationships Amongst Economic and Social Rights

The Right to Land

The State was responsible for achieving progressive realisation of the right to land during the reporting period. The Commission demonstrates that there was a year on year improvement in land delivery performance by the State, especially through the Land Restitution and Land Redistribution sub-programmes. Improvements in rural tenure reform were less noticeable.

Between 2000 and 2001 there were 12 094 settled Restitution claims, while in February 2002 there were approximately 32 000 settled claims. By March 2003, there were 36 488 settled claims recorded. Although the majority of these claims were in the urban areas, settled rural claims show a substantial increase. The people working on the Land Redistribution for Agricultural Development sub-programme delivered 103 682 ha against a target of 81 555 ha for the year under review. Whereas the Department had targeted to benefit 3 601 people, the programme ended up benefiting 6 170. Concerning tenure reform, the State initially delivered 30 000 ha of land through 201 projects. Beyond that, the State is working towards bringing the Extension of Security of Tenure Act (ESTA) and Labour Tenants Act (LTA) together in the Consolidated ESTA/Labour Tenants Bill.

Throughout the report, the Commission reflects on the demand, voiced by landless people and others, that the pace of land redress is too slow and inattentive to vulnerable groups. The report recommends accelerating land reform to meet its new targets by relieving budgetary constraints and the associated problems of personnel shortages, lack of quality training and understandable communication; land acquisition; and improvements in monitoring and evaluation.

The Commission would also like to highlight that it was informed by the Department of Land Affairs that it was impossible to represent the racial and gender composition of land purchase transactions and reposessions, according to the size and value of land parcels.

The Right to Education

The right to education is analysed as a continuum of three bands of schooling- General Education and Training, Further Education and Training and Higher Education and Training. The State instituted measures to respect, protect, promote and fulfil the right to General Education and Training, and in the Commission's overall assessment, it succeeded in achieving progressive realisation of this right.

The Department of Education succeeded in ensuring that all targeted Early Childhood Development sites for children between the ages of five and six were operating. However, the Department acknowledges the challenge, which has budgetary implications, that only 13% of all children have access to the programme. In the context of a substantial increase in the rate of student enrolment in primary schools between 1994 and 2001, the National Department focused on further increasing access to General Education and Training through reviewing public school financing and the system of school fee exemptions. The report highlights the shortcoming that some schools and Provincial Departments of Education failed to make parents aware of the school fee exemption.

While progress was made in eliminating instances where learners are forced to receive education in environments that are not conducive to teaching and learning, the report emphasises that more needs to be done to address infrastructure backlogs, especially when it comes to water and sanitation. The Department also made progress in developing a redistribution model for personnel and operating expenditure that would achieve equality of teaching quality and equality of learning outcomes in the schooling system from 2003/2004 onwards. All stakeholders in education, including the SAHRC need to explore and come up with a definition of quality basic education which could be measurable and relatively easy to monitor.

Conditions in farm schools were identified as hinderance to progress in the realisation of the right to General Education and Training. The issue of street-children also has to be given some serious attention by all the relevant stakeholders. Amongst other recommendations to further observance of the right to General Education and Training, the report calls for better-published medium term strategies and improved spending on Adult Basic Education and Training. In the 2001 Census, 4,5 million people aged 20 years and older did not have a formal education and 4 million people had primary schooling only.

Most of the developments in the Further Education and Training band met the Constitutional requirement to respect, protect, promote and fulfil the right. *Dinaledi*, the programme that seeks to improve participation and performance of learners from historically disadvantaged backgrounds in Mathematics, Science and Technology (MST), reportedly surpassed its target of 10% of students enrolling for MST in its first two years of implementation. The development of Recognition of Prior Learning (RPL) is another development that contributes to the realisation of the right to Further Education and Training. RPL recognises non-formal and/or non-academic education. RPL also stands to maximise learning opportunities for those without formal and/or academic qualifications to acquire formal qualifications in Further Education and Training institutions, which must all be registered with the State.

Areas where the State fell short of its obligations to progressively realise the right to Further Education and Training include: insufficient public education on school fee exemptions and insufficient Learner Support Materials and/or their late delivery. The report also highlights that participation rates in education by girl learners were being negatively affected by girls' involvement in income generating activities.

While Higher Education and Training is not explicitly recognised as a right in the Constitution, it obviously depends on the learning outcomes achieved in General and Further Education and Training. Here, there seems to be room for improvement as the average graduation rate for university and technikon students is 15%; less than half the ideal average of 33%.

Key challenges associated with the Higher Education and Training band include assisting potential students with subject selection choices and career guidance at school and university level, as well as lowering the high costs of accessing higher education and applying to different tertiary institutions. The report recommends ensuring that admission requirements to tertiary institutions are transparent and fair, promoting indigenous languages as academic/scientific/legal languages, mobilising funds for bridging courses and improving access for mature and post-graduate students, including part time students.

The Right to Water

Ever since 2001 and the introduction of Regulations Relating to Compulsory National Standards and Measures to Conserve Water, the State instituted a national measure to fulfil the right to water by supplying 6000 litres of free, clean water, per household per month, otherwise known as Free Basic Water.

During the reporting period, approximately 1,6 million people gained access to improved piped water supplies through Department of Water Affairs and Forestry's Community Water Supply and Sanitation Programme. Approximately 65 thousand toilets facilities were constructed during the reporting period under the same programme, but it should be noted that these figures exclude the large number of sanitation facilities that were delivered as part of the State's housing programmes. Less than 530 000 households also benefited from water and sanitation projects through the Department of Provincial and Local Government's Consolidated Municipal Infrastructure Programme. Although the above indicates that the roll-out of water and sanitation infrastructure is proceeding towards the Department's medium delivery targets, the report raises concerns about the level of dysfunctional infrastructure and projects, especially in rural areas.

At the end of the reporting period in March 2003, access to Free Basic Water by poor people stood at 38% or approximately 12,2 million people. Access to Free Basic Water by non-poor households stood at close to 100% or approximately 14,2 million people. A large number of poor people (19,6 million) were still to receive their Free Basic Water allocation. Where Free Basic Water was not available, the average cost of 6 kilolitres (kl) was approximately R13 per month. The price for 6kl of life-line supply was highest in Limpopo province at approximately R19 per month. Gauteng and KwaZulu-Natal also had comparatively high average charges for life-line supplies where Free Basic Water services were not operational.

In order to remove these glaring inequities in Free Basic Water provision, the report calls for an urgent revision of the pricing system to include a significantly greater level cross-subsidisation from high volume water users to low volume users in the 0-6 kl range.

More support and funding is required to assist municipalities with capacity problems in implementing Free Basic Water. During droughts, local governments should ensure that Free Basic Water supplies for domestic users are assured and that a situation cannot develop where agricultural, mining and industrial users are allocated large volumes of water at similar prices to low-volume users.

The report describes some aspects of the devolution of domestic water quality monitoring and testing from Provincial Departments of Health to local municipalities and calls for rapidly providing sufficient funds for water quality monitoring to prevent serious disease outbreaks and illness.

The report recommends that the Department of Water Affairs and Forestry (DWA) should take a leading role in making sure that farm dwellers, residents near commercial farms and poor households in rural and urban areas access clean water and proper sanitation services. DWA should also ensure that it develops and implements a plan to address the specific problems of water access experienced by people living with HIV/AIDS.

The report suggests that monitoring bodies should be created at local level to effectively monitor the implementation of policies and laws aimed at fulfilling the right of access to water. The report warns that monitoring will only be effective if monitoring bodies from local, regional and national spheres work together. Where possible and when possible, the Free Basic Water allocation should be increased to cater for higher levels of domestic water consumption. A 50kl water allocation per household per month would bring South Africa's Free Basic Water allocation into the 'low level of health concern' range defined by the World Health Organisation.

The Right to Health Care

The report on the right to health care focuses on key developments in three key health programmes of the State (Health Service Delivery, Strategic Health Programmes and Administration). Although the policy and legislative measures developed in the fiscal year under review can be said to be "reasonable" in their conception, there remain large gaps in implementing them in a manner such that all the provinces, urban and rural peoples, rich and the poor have equal access to the same high quality of care.

The three most important, and universally acknowledged, indicators to measure the health status of a nation are Life Expectancy at Birth, the Maternal Mortality Ratio, and the Infant Mortality Rate. Life expectancy has fallen from 56 years in 1996 to 52,5 in 2002 and is projected to fall to 47 by 2005. The infant mortality rate has increased from 45 in 1998 to 59 in 2002. This means that more children under the age of one died in 2002 as compared to 1998. The under five-mortality rate has risen from 61 in 1998 to 100 in 2002. Similarly, the maternal mortality ratio shows a steady increase since 1998 and is estimated to be 150 per 100 000 live births. The National Department of Health, as well as independent researchers, have concluded that this is due to HIV/AIDS related deaths.

The single most important challenge that government faces is the one posed by the AIDS pandemic and the high incidence of opportunistic diseases such as tuberculosis. It is estimated that about one tenth of the population of the population is infected with the HI virus i.e. close to 5 million people. The number of AIDS orphans is estimated to be one million. In a landmark case instituted by Treatment Action Campaign against the Minister of Health, the Constitutional Court, in 2002 confirmed the finding of the High Court that

government's policy to limit Nevirapine to research and training sites was in "breach of the States obligations under section 27(2) read with 27(1)(a) of the Constitution." The report recommends that the Comprehensive National Aids Plan should be rolled out effectively in all the provinces so as to meet targets and timelines in order to substantially reduce new infections and to prolong the lives of those already infected.

In spite of the fact that policies and programmes directed at improving the health status of the country have been put in place such as the Integrated Management of Childhood Illnesses, the AIDS pandemic continues to be the single most cause of death in South Africa. This has placed an enormous strain on an already overburdened health system and undermines the efforts made by the State. This is compounded by the fact that the other economic and social rights, which contribute substantially to the health status of a nation, are also not fully enjoyed by the vast majority of poor South Africans due to the huge backlogs inherited from the past. Inadequate housing, poor sanitation, overcrowding, lack of clean drinking water, lack of efficiently run social services, insufficient nutrition and health education exacerbate the diseases of poverty. Moreover, a household that is affected by AIDS contributes to depleting the financial resources available to the family, thereby increasing the level of poverty.

government developed legislative and other measures to comply with its constitutional obligations in terms of section 7(2) of the Constitution. However, despite national policies and programmes, which, in the main comply with international standards and targets, the health care system has not been able to successfully deliver quality health care on an equitable basis in all the provinces. Provinces do not spend the same amount per capita on health care delivery, and there is a serious lack of managerial capacity in the health system. The biggest challenge facing the efficient running of the health system is training managers to operationalise efficient systems especially for running clinics and hospitals where many problems have been identified. Efficient management systems in conjunction with effective engagement with labour should be operationalised with immediate effect in the public health sector so as to ensure that hospitals and clinics run well.

The report also recommends that there is a need to increase efforts in promoting preventative health measures by the State as well as by non-state actors. Programmes and policies should also be put in place to address the needs of the poor and vulnerable members of society, including a National Health Insurance System. Inequities in the health system such as intra- and inter-provincial health expenditures, access to clinics and hospitals, number of doctors, specialists, and nursing staff need to be addressed so as to give meaning to the constitutional right to universal and equal access to everyone. Finally, Departments of Health are strongly advised to improve their monitoring, evaluating, and reporting systems

The Right to Social Security

The Constitution provides that everyone has a right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The number of social assistance beneficiaries increased dramatically by 966 311 people from April 2002 to the end of March 2003, mostly as a result of increased registration for Child Support Grants for children up to the age of seven. By the end of March 2003, 5,6 million people were beneficiaries of social assistance, which mostly comprised of child support grants (2,5 million people), old age pensions (2 million people), disability grants (897 050 people) and foster care grants (133 309 people). The most rapid increases in uptake of social grants took place in Gauteng, Free State, KwaZulu-Natal, Mpumalanga and

Limpopo. Take up rates were considerably lower in the Northern Cape, North-West, Eastern Cape and Western Cape.

Most provincial departments indicated that the allocated budget was not enough and that numbers of grant beneficiaries were constantly increasing, resulting in overspending for social security. However, the delivery of social services has not been efficient in some parts of the country as a result of administrative problems, lack of documentation as barriers to accessing grants, poor conditions at pay points, as well as corruption and maladministration.

As a result of rapid inflation in the cost of basic goods bought by the poor, in 2002/2003, the State moved swiftly to implement above inflation related increases in social grants. The old-age pension was increased by R20 to R640, the child-support grant increased by R10 to R140, the grant in aid increased from R120 to R130, the foster-care grant from R450 to R460, and the care dependency grant from R620 to R640.

The National and Provincial Departments of Social Development spent 90% of the R49 million allocated to the HIV/AIDS (home based/community based care) programme. The Home/Community Based Care programmes, through the collaborative work of government, non-governmental organisations, including faith-based organisations, and communities have benefited 29 612 children orphaned or vulnerable to HIV/AIDS by the end of March 2003. The programme reached 75 000 children orphaned or vulnerable owing to HIV/AIDS since its inception in 2000.

The State also instituted new measures to further the right to social security, including disability assessment panels, a social relief of distress policy and the implementation of the National Food Emergency Scheme/Programme. Figures of the number of households that were assisted with food parcels in the pilot phase of the National Food Emergency Programme from December 2002 to the end of March 2003 range from 60 089 to 149 779.

The social security system at present does not cater for everyone and not everyone in need of social assistance is afforded such assistance. This is especially so for children in child headed households and children who live in the streets who sometimes engage in exploitative forms of labour. Some parents also fail to provide and take care of their children and put strains on the maintenance and social assistance systems.

The report recommends that the Department of Labour should take the International Labour Organisation's Decent Work for All Strategy forward in South Africa. It is also recommended that the relevant organs of State achieve better regulation of the insurance, health and maintenance systems. Particular attention should be paid to the coverage of old age pensions for workers in non-formal employment. The Department of Social Development is encouraged to continue fostering collaboration with all stakeholders, such as other government departments, Faith Based Organisations and Non-Governmental Organisations. The Basic Income Grant should continue to be considered as a viable option for addressing poverty in the country, especially amongst people of working age. The proposal to extend social assistance to all children in need (up to the age of 18), should also be kept alive.

The Right to Food

The report concludes that many people, and children in particular, had their right to food violated during the reporting period as they lost access to affordable food due to high prices and/or unreasonable plans devised and supervised by government. During the reporting period, 101 152 children were admitted to hospital with severe malnutrition and it was not possible for the Commission to state how many children died of malnutrition. However, it is alarming that case fatality rates for severe malnutrition in two under-resourced hospitals in the Eastern Cape ranged from 21% to 38%.

The report finds the National Department of Health's targets for reducing malnutrition to be unreasonable in their conception because the targets for 2000 and 2005 were virtually identical. The report also finds two elements of the Primary School Nutrition Programme to be unreasonable in their conception.

The first issue concerns the reduced allocation of resources to the programme in 2002/2003 as compared to 2001/2002. In 2001/2002 the total cost of the school food "meal" ranged from approximately 99 cents to R2.10. In 2002/2003, the maximum budgeted resource available per targeted learner per day was less than 67 cents. This is clearly an unreasonable set of parameters for the programme to be improved to meet the higher standards set by Cabinet.

The second element of the programme that was unreasonable was the reduction in the targeted number of children who should benefit from the programme. In the context of increasing numbers of children enrolled in schools, the Primary School Nutrition Programme did reach 4,5 million children in grades R to 7, however this was 151 615 children less than the year before. The drop in the number of learners who were reached is connected with government reducing its target from 5,4 million learners in 2001/2002 to 4,9 million learners in 2002/2003 as well as rapid increases in the cost of food procured for the programme. A three month gap in the implementation of the programme in the Eastern Cape also reduced access to the programme.

Non-State actors appear to have fallen short in their observance of their positive obligations to fulfil the right to food. As one example, the Yiyo Lena sifted maize relief programme introduced by a group of companies is alleged to have sold relief maize packs at a 20% discount, despite that fact that the companies announced that the programme would entail a 50% discount.

High basic food prices during the reporting period, were partly attributable to inadequate safeguards on the South African Futures Exchange, where maize prices are formed. High prices for maize were passed on to low-income consumers, who could ill afford such dramatic basic food price increases for such a sustained period of time. The potential for market manipulation should have been prevented by the Johannesburg Securities Exchange when allegations of abuse were first signalled in 2002. The report identifies that there are weaknesses in the State's observance of its obligation to protect against fraud, unethical behaviour in trade and contractual relations.

There were some signs of improvement in the State's delivery of production support to emerging farmers and people who grow their own food. For example, the Comprehensive Farmer Support Package was instituted during the reporting period to assist land reform beneficiaries. However, it was implemented in some provinces only.

The LandCare programme, which is one of the major production support programmes from the National Department of Agriculture, was heavily underspent at 65% of the total conditional grant to provinces. There is also a significant gap in production support for rural restitution beneficiaries.

It was found that very few Provincial Department's of Agriculture were operating well funded programmes designed specifically to provide grants or revolving loans to support increased access by small scale and emergent farmers to production and/or marketing related infrastructure. Production support materials and learning support materials that are relevant to resource to poor farmers in water scarce areas were also not readily available.

On the whole, the report determines that the State absorbed the heavy burden of duty to achieve the progressive realisation of the right to food as expeditiously as possible, within its available resources. However, there was a crucial weakness in the measures to protect the right to food from being violated by non-State actors or third parties that need not be repeated in future.

The report suggests that there is a need for greater care in the preparation of strategic and financial planning targets so that they inspire civil society to marshal their resources in support of the progressive realisation of the right. The report recommends: public education to raise awareness of malnutrition, rolling out the Integrated Food Security Strategy at a provincial level, improving food safety, achieving better regulation of the food industry through State procurement, accelerating agrarian reform, and communication policy and legislative developments more effectively. Finally, the report supports the call for government, labour, community and business representatives to negotiate an agreement at the National Economic Development and Labour Council (NEDLAC) to ensure the right to food and quality job creation in the food industry.

The Right of Access to Adequate Housing

In order to fill some gaps in the housing policy framework, the State identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities for 2002/2003. Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to transport and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualised as a result of the *Grootboom* judgment and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control (e.g. disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety). The report highlights that it was not clear whether the Emergency Housing Policy should also cover people living in informal settlements, because they are living in intolerable circumstances. Social Housing projects demonstrate that socially, environmentally and sunshine conscious design principles can make a difference to the quality of State subsidised housing.

The State reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from Occupation of Land Amendment Bill and the commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000. With a view towards curbing discriminatory practices, the Act compels financial institutions to disclose information in their financial statements on home loan patterns according to categories of persons and geographic areas (both of which may be prescribed). The Community Reinvestment Bill confirmed the State's intention to increase private sector investment in the lower end of the housing market. The report highlights that the State

was also attending to some aspects of the Housing Act 107 of 1997, as amended, in order to ensure that the Act, and its implementation, did not violate an individual's right to property in terms of the Constitution.

In terms of on-going policies and programmes, in 2002/2003, the State reported 203 288 houses completed or under construction, whilst the State approved 519 498 subsidies to households with a joint monthly income less than or equal to R3 500, or R1 500 if the house was built under the apartheid system. By the end of 2002/2003, the State reported that over 1,4 million houses had been delivered since 1994, whilst the number of families without houses (i.e. dwellings in backyards, informal dwellings, backyard dwellings in shared properties and caravans/tents) was reflected as 2 399 825- from the 2001 Census. The State also increased the subsidy amounts for the housing programme to keep pace with inflation and maintain the well-known quality and size of housing. Sixty-three projects were also completed as part of the Human Settlement Redevelopment Programme in order to correct imbalances and dysfunctionalities in existing settlements that cannot be funded through the housing subsidy scheme (e.g. sports facilities, business hives, labour exchanges, cemeteries, parks and ablution blocks).

There was under expenditure on housing delivery amongst many provincial departments responsible for housing. Reporting on the constraints associated with underspending was not complete, but included the following in some cases: failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in the National Department approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the People's Housing Process and delays at the Deeds Office.

Comparing performance in relation to targets was a problem in that provincial information was reported in the format of the number of units completed *or* under construction. Nevertheless, Gauteng and Limpopo provinces stand out as the only provinces to show a reduction in units, whether complete or under construction, from 2001/02 to 2002/03. The Gauteng Department of Housing reported delivering 59% of the target in the incremental housing programme and 39% of the target in the Social Housing programme. A Customer Support Service in the province acknowledged 83 714 queries and responded to a further 11 774 by letter.

According to the National Department of Housing, in 2002/2003, 6 469 houses did not conform to the Department's construction and safety standards. The National Home Builders Registration Council's (NHBRC) Warranty Scheme was instituted to provide assurance to beneficiaries that houses built and financed through the housing subsidy scheme are of an adequate quality. After trying to resolve disputes about the quality of construction, a housing subsidy beneficiary can forward complaints to the NHBRC. However, the report highlights that public education is required to empower consumers to identify quality problems and make use of the complaint procedures of the NHBRC. The Mpumalanga Department of Housing also reported that building works inspectors from provincial government and local government monitored the work of contractors.

The report makes one urgent recommendation, namely: to establish the dedicated fund for acquiring well-located land for low-cost housing. Other recommendations include reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, interpreting the Peoples' Housing Process as a route for strengthening culturally adequate housing, creating an informed and supportive environment for whistleblowing, and ensuring effective participation in the delivery of housing. Specific

attention is drawn to the plight of farmworkers and vulnerable groups, especially HIV/AIDS orphans and People with Special Needs.

The Right to a Healthy Environment

Section 24 of the Constitution establishes the right to environment in order to ensure the health and well-being of present and future generations. At its core, the right to environment aims to grant this benefit to everyone in South Africa, not just to the few. Although, translating this vision of the benefit of environmental health into reality has become increasingly complicated, ensuring that there are no violations of this right is as urgent as any violation of other rights in the Bill of Rights.

Analysts of data from South Africa's Global Atmosphere Watch station at Cape Point contend that continued emissions of greenhouse gases are cause for concern. Like many countries, South Africa is sensitive to global climate change and there are also occasions, especially in major urban areas, when more localised air pollution becomes a health threat.

By way of illustration, the Johannesburg *State of the Environment Report 2003* indicates that “while in many parts of Johannesburg, air quality is within acceptable standards, approximately 20% of the City, particularly dense settlements and lower income townships, experience severe air pollution, with ambient air pollution levels exceeding acceptable guidelines by approximately 20-30% particularly during winter when temperature inversions prevent emissions from dispersing.” The report goes further to state that “levels of particulate matter in certain townships can exceed the World Health Organisation standards by as much as 250% in winter.”

Progress in the realisation of the right to environment could not be very well monitored and observed by the Commission during the year under review because annual progress reports in terms of section 11 of the National Environmental Management Act 107 of 1998, were inaccessible at the time of writing. These progress reports should contain detailed information on the implementation of measures instituted to ensure the right to environment.

Nevertheless, the Commission did observe the growing influence of the Committee for Environmental Co-ordination through an interpretation of its review, and subsequent consolidation, of Environmental Implementation Plans and Environmental Management Plans submitted by relevant organs of State. These reports contain the planned and *aligned* outputs of national and provincial departments with an impact on, or management function over, aspects of the right to environment. The Commission also recognises that some Environmental Co-ordinating Committees were established at the provincial sphere, also for the purposes of alignment and co-operative governance.

Progress has been made, through the courts and other avenues, towards realising the procedural aspects of the right to environment (access to information, participation in decision-making processes, redress and remedy). The report includes several examples of objections and court applications lodged by Non-Governmental Organisations, with a view towards safeguarding environmental health in low-income areas. Despite these opportunities to access information and participate in decision making, some remedies for old violations could not be realised without concerted action on the part of the State. One example, is the case of workers with mercury poisoning, which first occurred many years

ago. In March 2003, Thor Chemicals was served with a R60 million toxic chemical clean-up directive by the State.

On the substantive issue of waste management and pollution control, what was reported by government to the Commission fell short of what was expected in terms of the strategic objectives of the policy and strategy for pollution and waste management. The report highlights that there is still no clear understanding among the different mandate holders for this function of what they are required to do and as a result, implementation was not as effective as it could be. Having said this, there were positive developments during the period under review, including the introduction of waste buy-back centres which address brown issues and could assist in strengthening the bargaining power of the very low income people who do the hard work of collection.

On the issue of Air Quality, the report acknowledges that progress was made in the Southern Industrial Basin through the focused action of the State and Community Based Organisations (CBOs) in linking asthma in school children to emissions, however there is an urgent need for national legislation to institute mechanisms and standards to effectively protect against pollution that threatens health and well-being, possibly including pollutant release and transfer registers.

Several new control measures were introduced to manage water pollution, including the second draft of the National Water Quality Management Framework Policy and the Waste Discharge Charge System. The Working for Water programme succeeded in protecting and preventing against water loss due to alien invasive plant species, however it was not clear how much of this work focused unfairly on commercial farmlands and not on areas inhabited by vulnerable sections of the population.

Most of the work by the State on inland as well as marine and coastal biodiversity and conservation was reasonable in as far as it related to tourism and the economic development of the country.

The report highlights that the challenges facing South Africa in terms of the right to a healthy environment include: allocating sufficient resources for progressive realisation of the right for the benefit of vulnerable groups; educating and training communities; ensuring that proper implementation systems are in place; ensuring effective co-operative governance; operating proper monitoring and evaluation systems.

The report recommends that while most policies and laws are in place or about to be instituted, there should be a quantum shift in focus towards implementation of measures to further the right to environment for vulnerable groups in a more decentralised way. Provincial government and local government should be resourced to concentrate their energies on implementation, in association with community based organisations that have already developed innovations to further the right, sometimes in the face of extreme resource scarcity.

The State has made valuable contributions to promoting the right to environment through for example, the “Bontle ke Batho” or the clean schools, wards and towns campaign; however, organs of State could do more to ensure that their own internal operations reflect implementation of the right to environment. For example, the Council for Scientific and Industrial Research (CSIR) implemented International Standards Organisation 14001 standards for handling and disposing of its own hazardous waste. This initiative by an organ of State seems to have afforded the CSIR the opportunity to gain some capacity and

insight, which could be applied to other relevant contexts in the public or private sector within the South Africa.

The report also recommends that monitoring and evaluation systems need to be simplified where possible and improved. Annual progress reports in pursuit of targets and plans laid down in Environmental Implementation Plans and Environmental Management Plans should include a focus on the substantive aspects of the realisation of the right for vulnerable groups. The contents of the reports should also be widely communicated so as to avoid conflict and encourage effective participation. The Committee for Environmental Co-ordination could also be complemented by the National Environmental Advisory Forum (NEAF) envisaged in the National Environmental Management Act 107 of 1998. This provision to encourage participation should be effected without delay.

D) Protocols and the Report Production Process

The production process for this report began with the SAHRC sending questionnaires, which are called protocols, to various organs of State for their comment in May 2003. The Commission then took some time to revise the protocols, which were resent to all relevant organs of State for comment and suggestions in June 2003. The response from relevant organs of State was not satisfactory; with the Department of Housing (Gauteng Province), the Department of Land Affairs and the Department of Water Affairs and Forestry being the only organs of State to respond. However, the Commission acknowledges that further work is required, in the next reporting cycle, to ensure that the protocols are improved for all spheres of government and parastatals.

The final protocols were sent to various organs of state (national and provincial government, parastatals, metropolitan and local councils) in July 2003, as mandated by section 184(3) of the Constitution. In future, the Commission will pay more attention to smaller municipalities by focusing field research on the implementation of programmes and projects at a local level.

The first deadline for the release of this Report was in December 2003. However, the Commission had major problems in getting timeous responses from organs of State and as a result, the Commission took a decision to subpoena several departments and postpone the release of the Report until sufficient information had been received (see summarised list overleaf).

SPHERE	INSTITUTION	DATE RESPONSE RECEIVED
2 - Provinces	GAU Social Services and Population Development	21 August 2003
1 - National	NATIONAL Labour	29 August 2003
2 - Provinces	EC Health	29 August 2003
2 - Provinces	WC Agriculture	29 August 2003
2 - Provinces	LIMPOPO Agriculture and Environmental Affairs	31 August 2003
2 - Provinces	FS Health	1 September 2003
2 - Provinces	NW Health	1 September 2003
2 - Provinces	WC Social Services	1 September 2003
2 - Provinces	EC Education and Training	5 September 2003
2 - Provinces	GAU Health	5 September 2003
2 - Provinces	KZN Agriculture and Environmental Affairs	9 September 2003
4 -Parastatals	PARASTATAL Rand Water	9 September 2003
2 - Provinces	KZN Traditional and Local Government	10 September 2003
2 - Provinces	MP Local Govt and Traffic	10 September 2003
2 - Provinces	NW Education	10 September 2003
1 - National	NATIONAL Land Affairs	12 September 2003
2 - Provinces	FS Social Welfare	12 September 2003
2 - Provinces	GAU Housing	12 September 2003
2 - Provinces	NC Health	12 September 2003
2 - Provinces	NC Social Services and Population Development	12 September 2003
1 - National	NATIONAL Agriculture	15 September 2003
1 - National	NATIONAL Water Affairs and Forestry	15 September 2003
2 - Provinces	EC Agriculture and Land Affairs	15 September 2003
2 - Provinces	FS Education	15 September 2003
2 - Provinces	GAU Education	15 September 2003
2 - Provinces	MP Housing and Land Administration	15 September 2003
2 - Provinces	WC Education	15 September 2003
2 - Provinces	WC Environmental Affairs and Development Planning	15 September 2003
2 - Provinces	WC Health	15 September 2003
2 - Provinces	WC Housing	15 September 2003
2 - Provinces	NC Agriculture Conservation and Environment	15 September 2003
2 - Provinces	KZN Health	16 September 2003
1 - National	NATIONAL Education	18 September 2003
2 - Provinces	MP Health	18 September 2003
2 - Provinces	NW Agriculture, Conservation and Environment	23 September 2003
2 - Provinces	MP Social Services and Population Development	25 September 2003
3 -Metropolitan Councils	METRO Greater Tswane Metropolitan Council	2 October 2003
3 -Metropolitan Councils	METRO Nelson Mandela Metro Council	2 October 2003
1 - National	NATIONAL Correctional Services	3 October 2003
1 - National	NATIONAL Social Development	3 October 2003
2 - Provinces	LIMPOPO Health and Welfare	3 October 2003
2 - Provinces	EC Social Development	3 October 2003
1 - National	NATIONAL Health	10 October 2003
2 - Provinces	GAU Agriculture, Conservation, Environment and LandA	10 October 2003
4 -Parastatals	PARASTATAL Medicines Controls Council	10 October 2003
2 - Provinces	FS Local Govt and Housing	29 October 2003
1 - National	NATIONAL Housing	30 October 2003
1 - National	NATIONAL Provincial and Local Government	30 October 2003
1 - National	NATIONAL Environmental Affairs and Tourism	31 October 2003
4 -Parastatals	PARASTATAL Agriculture Research Council	31 October 2003
1 - National	NATIONAL Minerals and Energy Affairs	3 November 2003
2 - Provinces	KZN Education and Culture	3 November 2003
2 - Provinces	EC Housing, Local Government and Traditional Affairs	4 November 2003
2 - Provinces	GAU Development Planning and Local Government	4 November 2003
2 - Provinces	LIMPOPO Education	4 November 2003
2 - Provinces	MP Agriculture, Conservation and the Environment	4 November 2003
2 - Provinces	NC Local Govt and Housing	4 November 2003
2 - Provinces	WC Planning and Local Govt	4 November 2003
4 -Parastatals	PARASTATAL National Education Financial Aid Scheme	4 November 2003
2 - Provinces	NW Developmental Local Government and Housing	5 November 2003
3 -Metropolitan Councils	METRO Eastrand Metropolitan Council	5 November 2003
4 -Parastatals	PARASTATAL Umngeni Water	5 November 2003
3 -Metropolitan Councils	METRO Cape Town Metro Council	6 November 2003
4 -Parastatals	PARASTATAL Medical Research Council	6 November 2003
2 - Provinces	FS Agriculture	7 November 2003
2 - Provinces	KZN Welfare and Pensions	7 November 2003
2 - Provinces	LIMPOPO Local Govt and Housing	7 November 2003
2 - Provinces	MP Education	7 November 2003
2 - Provinces	NC Education	7 November 2003
4 -Parastatals	PARASTATAL National Housing Finance Corporation	7 November 2003
2 - Provinces	KZN Housing	14 November 2003
3 -Metropolitan Councils	METRO eThekweni Metropolitan Council	17 November 2003
4 -Parastatals	PARASTATAL Landbank*	17 November 2003
4 -Parastatals	PARASTATAL Council for Scientific and Industrial Council	18 November 2003
2 - Provinces	FS Environmental, Tourism and Economic Affairs	19 November 2003
3 -Metropolitan Councils	METRO Greater Johannesburg Metropolitan Council	17 December 2003
2 - Provinces	NW Social Services**	

_____ First deadline

_____ Extended deadline

_____ Subpoena hearings begin

_____ Subpoena hearings end

* Extension granted as a result of communication problems

** No subpoena served, a letter explains the breakdown in communication

Most organs of State submitted their reports before they were meant to appear at a subpoena hearing. However, the North West Department of Social Services, Arts, Culture and Sport did not provide a response to the Commission as a result of problems with network cabling and the resignation of the personal assistant to the Acting HoD. The Department submits that it was not out of irresponsibility and deliberate disregard of the law that the Commission did not receive a report from the Department.

In order to improve the quality of the information, analysis and recommendations in the reports and to forge closer and better working relationships with government and non-governmental entities, a set of draft reports were released for comment to government and civil society before a National Input Workshop on 27-28 January 2004. Comments made at the workshop, and in writing, have been considered by each report writer.

A set of second draft reports were then made available to the Director General of the relevant national department in February 2003 to correct any remaining problems with factual information. Responses were received from the following departments: Water Affairs and Forestry, Minerals and Energy, Provincial and Local Government, Health, Social Development, Education, Land Affairs, and Housing. The final reports were also reviewed intensively within the Commission before being published.

E) Conclusion

One of the concerns acknowledged by the Commission about the monitoring process so far is that it still relies heavily on reports from government.

Furthermore, even though the Bill of Rights applies vertically and horizontally and binds State entities and non-State entities, the Commission has some capacity problems in extending its mandate to non-State entities, especially big corporations.

In the next reporting cycle, the Commission will place more emphasis on conducting its own primary research in addition to improving on the existing protocols for each right and making better use of annual report information as soon as it becomes available.

ACRONYMS

AIDS	Acquired Immune Deficiency Syndrome
ALS	Advanced Life Support
ARVs	Anti-retrovirals
BCG	Bacillus Calmette-Guérin (BCG) vaccine for TB developed in 1906
CESCR	Committee on Economic, Social and Cultural Rights
CHBC	Community and Home Based Care
CHC	Community Health Centre
DHIS	District Health Information System
DHS	District Health System
DOT	Directly Observed Therapy
ECDoH	Eastern Cape Department of Health
EMS	Emergency Medical Services
EPI	Expanded Programme on Immunisation
FSDoH	Free State Department of Health
GTDoh	Gauteng Department of Health
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Integrated Development Plan
IMCI	Integrated Management of Childhood Illness
KZNDoh	KwaZulu-Natal Department of Health
LODoH	Limpopo Department of Health
MinMeC	Minister and Members of the Executive Council
MMR	Maternal Mortality Rate
MPDoH	Mpumalanga Department of Health
MRC	Medical Research Council
NALEDI	National Labour, Economic and Development Institute
NCDoH	Northern Cape Department of Health
NDoH	National Department of Health
NWDoH	North West Department of Health
PEP	Post Exposure Prophylaxis
PFMA	Public Service and Financial Management Act
PHC	Primary Health Care
PLWAS	People Living With AIDS
PMTCT	Prevention of Mother-to-Child Transmission
SANAC	South African National Aids Council
SANC	South African Nursing Council
SLA	Service Level Agreement
STIs	Sexually Transmitted Infections
TAC	Treatment Action Campaign
TB	Tuberculosis caused by an airborne bacterium
TOP	Termination of Pregnancy
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund
UN	United Nations
VCT	Voluntary Counselling and Testing
WCDoh	Western Cape Department of Health
WHO	World Health Organisation
WSSD	World Summit on Sustainable Development

EXECUTIVE SUMMARY – THE RIGHT TO HEALTH CARE

Constitutional obligations

The object of this chapter is to assess the “progressive realisation” of the right to health care as provided for in the Constitution. Key developments in the realisation of the right from 1 April 2002 to 31 March 2003 will be assessed, taking into account the provisions of section 7(2) of the Constitution which define the States obligations, in conjunction with, the application of the test for “reasonable” measures as defined by the Constitutional Court in the Grootboom case.

The right of access to health care services is enshrined in the Bill of Rights, which guarantees not only civil and political rights but also economic, social and cultural rights to everyone. Section 27(1)(a) provides for universal access to health care services, including reproductive health care. Section 27(3) states that “No one may be refused emergency medical treatment”. Children’s rights to “basic health care services” are provided for in section 28(1)(c), while section 35 (2)(e) provides for “adequate medical treatment” for detainees and prisoners at the State’s expense. The right to health care must be read in the context of other rights, which form the underlying determinants of health since rights are indivisible and interdependent as outlined in the Vienna Declaration. Other rights in the Bill of Rights which contribute to the underlying determinants of health are the right to a healthy environment, the right to adequate food and housing, safe drinking water, land, and social security.

Human Rights instruments with a general application, which include the right to health, are the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 25 of the UDHR of 1948 was the first to recognise the right to health. In 1966, the right to health was defined more precisely in article 12 of the ICESCR, which provides for the “enjoyment of the highest attainable standard of physical and mental health conducive to living a life of dignity”. The constitution of the World Health Organisation (WHO), in 1977, reiterated the view that health is a “state of complete physical, mental and social well-being and not just the absence of disease or infirmity”. The WHO also sets norms and standards for health, which countries endeavour to meet.

The UN Committee on ICESCR, in General Comment No.14, defines the normative content of the right to health as equal access for all, on the principle of non-discrimination, to health care facilities, goods and services. These have to be available in sufficient quantity; must be physically and economically accessible to everyone; must be ethically and culturally acceptable; and must be of a medically appropriate quality. The right to equality of health care services requires that vulnerable groups should enjoy special protection.

Progress towards the realisation of the right to health care

Key developments in three key strategic programmes (Health Service Delivery, Strategic Health Programmes and Administration) form the core of the assessment of the right to health in this report: In terms of section 7(2) of the Constitution, the State is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights. The following section is an attempt to interrogate whether organs of State have complied with their constitutional obligations.

Respect

The State in this reporting period has respected the right to health care in so far that it has refrained from infringing on the right.

Protect

The duty to protect the right places a positive obligation on the State to prevent the violation of any individual's right by the State or a third party. There have been several important developments to protect the individual's right of access to health care services and medicines, mainly against powerful third party interest groups such as mining companies, the pharmaceutical industry and also private medical schemes.

Through the Competition Act 89 of 1998, the State established the Competition Commission and Competition Tribunal as independent statutory bodies entrusted with ensuring that companies do not abuse their dominant positions in the market place. In September 2002, Hazel Tau and Others lodged a complaint with the Competition Commission against GlaxoSmithKline and Boehringer Ingelheim, alleging that these pharmaceutical companies were engaged in conduct prohibited by the Act. The complainants alleged that the companies were charging excessive prices for anti-retroviral drugs (ARVs) i.e. AZT, 3TC and Nevirapine, to the detriment of consumers. It was also alleged that these companies had refused to issue licences to manufacturers in South Africa to produce cheaper generics locally.

A settlement in favour of the complainants was reached between the Competition Commission and the respondents and the matter was not referred to the Competition Tribunal. Suffice to say, that the State fulfilled its obligation of conduct to protect the right by establishing a statutory body to oversee complaints of unfair practices by third parties. In this case, the right of a vulnerable group i.e. people living with AIDS,(PLWAs) to access affordable ARVs that are included in the WHO's Core List of the Model Essential Medicines Lists. ARVs are a minimum essential entitlement as defined in General Comment No.14 on the right to health.

Another measure aimed at protection was the Medicines and Related Substances Amendment Act 59 of 2002.

This amendment regulates the manufacture and marketing of medicines and related substances and makes them more accessible in terms of pricing by protecting the consumer against high and excessive price structures for imported medicines. It also established a Council to license the manufacture, importation and exportation of medicines.

The Government also passed the Medical Schemes Amendment Act 62 in 2002, which regulates the activities and fees charged by brokers. This further protects the right of individuals to access affordable health care in the private sector.

The Occupational Diseases in Mines and Works Amendment Act 60 of 2002, protects miners from third parties infringing on their right to compensation. Specifically, mine owners are obliged to pay compensation to workers who contract occupational diseases while in their employ. Mining companies, in the past, did not compensate workers who contracted diseases while in their employ. Many mineworkers contracted silicosis and asbestosis and died without receiving any form of compensation.

Promote

The obligation to promote the right requires all organs of State to take reasonable steps to create a conducive atmosphere in which people can exercise their right to health care by raising awareness of their rights through public education.

The National Department of Health, in addition to formulating policies and guidelines which it has disseminated to provincial departments, has also printed posters, held media conferences, organised awareness campaigns and provided training for health professionals and community workers. In addition, certain days of the year are designated to raise awareness around specific health issues such as, preventing abuse of the elderly, inherited disorders, AIDS, and other diseases. Government has also embarked on partnerships with NGOs such as LoveLife to promote education around AIDS.

Provincial Departments of Health reported similar activities, which promote awareness of the entitlements provided by the right to health care. However, in some cases, these efforts are inadequate in educating people to take preventative measures. A case in point is the annual outbreak of cholera, which can be prevented through proper education of vulnerable communities, many of who, are forced to use contaminated water from nearby rivers in the absence of clean, potable water. Another glaring case is education aimed at the 15-49 age group (reproductive and economically active population group) that is susceptible to contracting AIDS. The prevalence rate for AIDS in this age group has not shown a substantial decrease suggesting that there has not been a significant change in sexual behaviour. However, a recent study, conducted by the Nelson Mandela Foundation and the Human Sciences Research Council of South Africa, concluded that there have been some behavioural changes amongst young people in recent years. This is encouraging and shows that more work needs to be done in promoting preventative measures by the State as well as by non-State actors.

April 2002 – March 2003

Fulfil

The obligation to fulfil the right to health care imposes an obligation on the State to take policy, legislative, administrative, and other measures towards the progressive realisation of the right and within its available resources.

In order to improve administration, new Guidelines for District Health Planning and Reporting were issued to facilitate and improve planning and reporting at district and local spheres and to promote better inter-governmental co-operation.

Emergency medical services have seen an improvement during this reporting period with an increase in the number of ambulances in provinces and also a reduction in response times. However, many areas are still under-serviced, especially rural areas.

In this reporting period the State introduced several new legislative measures. The most important of these is the National Health Bill, which was enacted into law at the end of 2003. This framework legislation will standardise policies and practices across provinces. The Act defines provincial and municipal competencies with respect to health care services as well as structures for the District Health System. To date there is still a lot of confusion regarding the health responsibilities of different spheres of government. Budget allocations for implementing specific tasks by municipalities and by provincial departments are also at issue.

The Mental Health Care Act 17 of 2002 provides legal recourse and protection for the mentally ill and sets the stage for de-institutionalisation and home-based care. The Children's Bill and the Older Persons Bill protect these vulnerable groups against abuse.

Several regulations and notices were promulgated to regulate professional boards and set standards for practitioners of complementary and traditional medicine. This is important in a country where traditional medicine is widely practiced and where alternative forms of medicine are becoming increasingly more popular.

Notices for community service for several other categories of health professionals were promulgated in an effort to ensure their services in under-serviced and rural areas. These include dietetics, clinical psychology, environmental health, occupational therapy, physiotherapy, radiography, speech, language and hearing therapy.

The implementation of the Government's HIV/AIDS Strategic Plan 2000-2005 remains problematic. In a landmark case instituted by the Treatment Action Campaign (TAC) against the Minister of Health, the Constitutional Court, in 2002 confirmed the finding of the High Court which had found the Government's policy to limit Nevirapine to research and training sites to be in "breach of the States obligations under section 27(2) read with 27(1)(a) of the Constitution." The Court utilised the test of "reasonableness" as expounded by

Justice Yacoob in the Grootboom case. In evaluating the policy to limit Nevirapine (an anti-retroviral drug) to research and training sites, the Court ruled that the “Government policy was an inflexible one that denied mothers and their newborn children ... the opportunity of receiving a single dose of Nevirapine” in public sector facilities outside the pilot sites. In addition, the Court ruled that “waiting for a protracted period” to make it available was “not reasonable” within the meaning of section 27(2) of the Constitution.

As regards children's rights, the Court further ruled that the State is obliged to ensure that children are accorded protection contemplated by section 28. In this case, children born in public hospitals and clinics to mothers who are for the most part indigent and who require the protection of the State and should therefore receive a single dose of Nevirapine at birth to prevent transmission of the virus from mothers who are HIV positive.

Overall assessment

Government has developed legislative and other measures to comply with its constitutional obligations in terms of section 7(2) of the Constitution. However, despite national policies and programmes, which, in the main comply with international standards and targets, the health care system has not been able to successfully deliver quality health care on an equitable basis in all the provinces. Provinces do not spend the same amount per capita on health care delivery, with rich provinces like Gauteng and the Western Cape far exceeding the amount spent by poor provinces such as Limpopo, Mpumalanga and the Eastern Cape.

There is a serious lack of managerial capacity in the health system. The biggest challenge facing the efficient running of the health system is training managers to operationalise efficient systems especially for running clinics and hospitals where many problems have been identified. According to NALEDI, these problems include insufficient cleaning staff, nurses, doctors, dentists, pharmacists, psychologists, and specialists. This places an enormous pressure on existing staff. New staff are often unhappy with their working conditions, some of whom resign. Many opt for better remuneration and working conditions in the private health care sector or go abroad.

The three most important and universally acknowledged indicators to measure the health status of a nation are Life Expectancy at Birth, the Maternal Mortality Ratio, and the Infant Mortality Rate. Life expectancy has fallen from 56 years in 1996 to 52,5 and is projected to fall to 47 by 2005. The infant mortality rate has increased from 45 in 1998 to 59 in 2002. This means that more children under the age of one died in 2002 as compared to 1998. The under five-mortality rate has risen from 61 in 1998 to 100 in 2002. Similarly, the maternal mortality ratio shows a steady increase since 1998 and is estimated to be 150 per 100 000 live births. The National Department of Health, as well as independent researchers, have concluded that this is due to HIV/AIDS related deaths. In spite of the fact that policies and programmes directed at improving the health status of the country have been put in place such as the Integrated Management of Childhood Illnesses and other excellent programmes, the AIDS pandemic continues to be

one of the leading causes of death in South Africa. This has placed an enormous strain on an already overburdened health system and undermines the efforts made by the State. This is compounded by the fact that the other economic and social rights, which contribute substantially to the health status of a nation, and which form the underlying determinants of health are also not fully enjoyed by the vast majority of poor South Africans. This is mainly due to the huge backlogs inherited from the past. Inadequate housing, poor sanitation, overcrowding, lack of clean drinking water, lack of efficiently run social services, insufficient nutrition and health education exacerbate the diseases of poverty. Moreover, in a household that is affected by AIDS, there is a further depletion of the financial resources available to the family, thereby increasing the level of poverty and the ability to survive.

The single most important challenge that Government faces is the one posed by the AIDS pandemic and the high incidence of opportunistic diseases such as tuberculosis. It is estimated that about one tenth of the population of the population is infected with the HI virus i.e. close to 5 million people. The number of AIDS orphans is estimated to be one million.

In order to assess whether there has been progressive realisation of the right of access to health care facilities, the test of “reasonableness” as defined by Justice Yacoob in the Grootboom case has to be applied. Although the policy and legislative measures developed in the fiscal year under review can be said to be “reasonable” in their conception, there remain large gaps in implementing them in a manner such that all the provinces, urban and rural peoples, rich and the poor have equal access to the same high quality of care.

Recommendations

- There is a need to increase efforts in promoting preventative health measures by the State as well as by non-state actors. Proper sanitation especially in formerly disadvantaged areas and in informal settlements needs to be vastly improved and public awareness on preventative measures should be stepped up so as to empower communities on how to prevent contracting such diseases as cholera, TB, malaria, diarrhoea in children, amongst others. Education on eating habits and nutritional value of foods will enhance the capacity of the poor to improve their nutritional status and boost their immune status to combat infections.
- Efficient management systems in conjunction with effective engagement with labour should be operationalised with immediate effect in the public health sector so as to ensure efficiently run hospitals and clinics. Intergovernmental responsibilities should be clarified to avoid duplication and confusion as to which structure is responsible for which function.

- A culture of commitment and observance of the Patients Charter to be instilled in health care workers to improve the quality of care accessed by the majority of South Africans. Low morale amongst professional and support staff in health facilities impacts negatively on the quality of care received by patients and infringes on their right to dignity and access to quality care.
- The Comprehensive National Aids Plan should be rolled out effectively in all the provinces so as to meet targets and timelines in order to substantially reduce new infections and to prolong the lives of those already infected.
- Government needs to reconceptualize its housing policy to cope with almost a million AIDS orphans and also propose innovative and culturally appropriate housing projects to care for people living with AIDS. This applies equally to older persons..
- The State should plan to meet the Millennium Development Goals and the targets set by the Johannesburg Summit on Health.
- Programmes and policies should be put in place to address the needs of the poor and vulnerable members of society such as a National Health Insurance System
- Inequities in the health system such as intra- and inter-provincial health expenditures, access to clinics and hospitals, number of doctors, specialists, and nursing staff need to be addressed so as to give meaning to the constitutional right to universal and equal access to everyone.
- All Departments of Health are strongly advised to improve their monitoring, evaluating, and reporting systems and to make the requisite information and statistics available to the South African Human Rights Commission (SAHRC) for the next monitoring cycle, which will assess, amongst other programmes, the progress made on the delivery of ARVs to PLWAs as outlined in the National Plan..

1 INTRODUCTION

The right to health is a fundamental human right essential for the exercise of other human rights. It is guaranteed by various international and regional human rights instruments. The right of access to health care services is enshrined in the Constitution, which makes it obligatory on the State to provide equal and universal access to everyone.

The object of this report is to assess the “progressive realisation” of the right to health care services as provided for in the Constitution. Key developments in the realisation of the right from 1 April 2002 to 31 March 2003 will be assessed, taking into account relevant international human rights instruments and the test for “reasonable” measures as defined by the Constitutional Court in the *Grootboom* case.¹ In order to meet the test of reasonableness, the measures need to be “co-ordinated, comprehensive, coherent, balanced and flexible” and must in addition make appropriate provision for short-, medium- and long-term needs. Furthermore, the Court ruled that measures that do not provide for those in dire need and who find themselves in desperate circumstances do not meet the test of “reasonableness”.

Key policy, legislative, budgetary and other measures as reported by organs of state will be analysed and assessed. Where the information provided was inadequate or incomplete, information was gathered from other sources through independent research. In some cases, statistics provided in the Responses to the South African Human Rights Commission’s (SAHRC) protocols by provincial Departments of Health are summarised in tabular form. Where statistics were available from other sources, they have been included.

In section 2, information pertaining to the National Department of Health (NDoH)² is presented first, followed by provincial governments. Information from independent sources was incorporated where it was deemed necessary.

1.1 Constitutional Provisions and the Normative Content of the Right to Health Care

Health rights are recognised in many United Nations (UN) conventions, the first of which is article 25 of the Universal Declaration of Human Rights (UDHR) of 1948.³ In 1966, the right to health was defined more precisely in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides for the “enjoyment of the highest attainable standard of physical and mental health conducive to living a life of dignity”. The constitution of the World Health Organisation (WHO), in 1977, echoed the view that health is a “state of complete physical, mental and social well-being and not just the absence of disease or infirmity”.⁴

1.1.1 Constitutional Provisions

The South African Constitution provides for universal access to health care services including reproductive health; emergency medical services; basic health care services for children; and medical services for detained persons and prisoners. Section 27(1)(a) provides for universal access: “Everyone has the right to have access to health care services, including reproductive health care ...” Section 27(3) states that “No one can be denied emergency medical treatment.” Section 28(1)(c) provides for “basic health care services” for children, while section 35(2)(e) provides for “adequate medical treatment” for detainees and prisoners at the State’s expense. In addition to these, section 24 of the Constitution provides that everyone has a right to an “environment that is not harmful to their health or well-being”.⁵

Section 27(2) stipulates that “the state must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of each of these rights”.⁶ The Limburg Principles⁷ define “progressive realisation” to mean that State parties are to “move as expeditiously as possible towards the full realisation of the right” and are required to take immediate steps to provide the minimum core entitlements as defined by the Committee on Economic, Social and Cultural Rights (CESCR) (hereafter the Committee).

The South African Bill of Rights provides for universal *access to health care services* and not the right of everyone to the “highest attainable standard of physical and mental health” as provided for in article 12 of the ICESCR and the WHO constitution. Notwithstanding this difference, the South African Bill of Rights guarantees other economic and social rights which comprise the underlying determinants of health. These are the right to adequate housing, food, safe drinking water, education, social security, land and also such civil and political rights as the right to life and the right to pursue economic activities.⁸ This is in line with the Vienna Declaration and Programme of Action, which states that all rights are “universal, indivisible and interdependent and interrelated”.⁹

1.1.2 Normative content of the right to health

In the General Comment No. 14, the Committee defines the normative content of the right to health as equal access for all, on the principle of non-discrimination, to health care facilities, goods and services. These have to be available in sufficient quantity; must be physically and economically accessible to everyone; must be ethically and culturally acceptable; and must be of a medically appropriate quality.¹⁰

The right to equality of health care services requires that vulnerable groups should enjoy special protection. Their rights are guaranteed by specific conventions which include women,¹¹ children,¹² people living with HIV/AIDS,¹³ prisoners and detainees,¹⁴ refugees and asylum seekers.¹⁵

1.1.3 Core Entitlements

In General Comment No. 3 the Committee confirms that State parties have to ensure the satisfaction of minimum essential levels of all the rights enunciated in the ICESCR, including essential primary health care. In the Committee's view, this core includes at least the provision of essential drugs as defined by the WHO's Programme on Essential Drugs: ensuring equitable distribution of health facilities, goods and services; adopting and implementing a national public health strategy and a plan of action on the basis of epidemiological evidence; addressing the health concerns of the whole population; devising and reviewing the strategy and plan; and giving particular attention to all vulnerable or marginalised groups. The Committee also confirms that obligations of comparable priority include taking measures to prevent, treat and control epidemic and endemic diseases.¹⁶

The provision of minimum core benefits has been interpreted by the South African Constitutional Court to being relevant to the "reasonableness" of the measures adopted by the State and within the boundaries of "available of resources" to the State. In the landmark *TAC* case¹⁷ the Court made the following observations in referring to the *Grootboom* judgement:

Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated to as possibly being relevant to reasonableness under section 26(2) , and not as self-standing right conferred on everyone under section 26(1) and 27(1)

1.1.4 State obligations

The steps to be taken by State parties to the ICESCR to achieve the full realisation of the right to health include those necessary for:

- the provision of the reduction of the still-birth rate, of infant mortality and for the healthy development of the child;
- the improvement of all aspects of environmental and industrial health;
- the prevention, treatment and control of epidemics, endemic, occupational and other diseases;
- and the creation of conditions which would assure to all, medical services and medical attention in the event of sickness.

The Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights (ICCPR), has defined the role of the State in protecting the right to life, to include obligations to undertake

measures to eliminate epidemics.¹⁸ In 2002, the WHO issued guidelines for the use of ARVs in resource-poor countries. ARVs are included in the Core List of the Model Essential Medicines List. It is important to note that for effective treatment, people living with AIDS (PLWAS) should have access to (almost) all ARVs, and not just one essential drug on the List.¹⁹ This is of particular relevance to South Africa where the AIDS pandemic has reached alarming proportions and where ARVs are not yet available to all in the public health care sector.²⁰ Only those who can access private medical aid schemes, can afford expensive, ARV drug therapy.

1.2 Implementation

As regards implementation at the national level, the Committee recommends that States should have framework legislation to operationalise their national strategy. The framework legislation should establish national mechanisms for monitoring and supporting the implementation of national health strategies and plans of action. It should also include provisions on the targets to be achieved and the timeframes for their achievement; the means by which the right to health benchmarks could be achieved; the intended collaboration with civil society, including health experts, the private sector and international organisations; and institutional responsibility for the implementation of the national plan of action.²¹ South Africa, at the time of writing is in the process of passing such framework legislation in the form of the National Health Bill. It will probably be promulgated into law before the end of 2003.

In addition to national framework legislation governing health, States are also required to develop policies and strategic plans and programmes for the delivery of health care services. In the *Grootboom* case, Justice Yakoob stated that the measures adopted by the State must be reasonable in their conception **and in their implementation**. This test was applied in the *TAC* case in which the Constitutional Court ruled that the policy to limit treatment to the 18 pilot sites was in breach of the State's obligations under section 27(2) read with 27(1)(a) of the Constitution. The court found the policy to be inflexible and that it was unreasonable not to make the drug available for HIV positive mothers and their new born babies for a protracted time. In other words The Prevention to Mother to Child Transmission (PMTC) Programme was found to be unreasonable in both conception and implementation i.e. the State was in breach of both conduct and result.

1.3 Recent Developments

The UN Human Development Report 2002²² acknowledges the need for strengthening efforts in the area of health, and suggests that the answer lies in decentralisation to the district and sub-district levels of management, with greater control delegated to communities. South Africa has introduced a District Health System which will be run along these lines.

The UN Millennium Development Goals (MDG),²³ in recognition of the needs of developing countries, has set eight goals, which South Africa has pledged to

meet by 2015. The MDG calls for the reduction of extreme poverty and hunger; the reduction by two-thirds of the child mortality rate; the reduction by two-thirds of the maternal mortality rate ratio; the halting and reversal of the spread of HIV/AIDS, malaria and other major diseases such as tuberculosis; ensuring environmental sustainability; and developing a global partnership for development which includes the provision of access to affordable essential drugs and the promotion of gender equality and the empowering of women.

Four of the MDG goals relate to health, which serves to emphasise the fact that a nation cannot develop optimally without a healthy population or one that is suffering from a pandemic such as AIDS,²⁴ which affects the economically active sector of the population. AIDS also poses a security risk as people infected or affected by it are impoverished.²⁵ Thus a nation's health status impacts not only on the individual's ability to pursue an adequate standard of living but also on the development goals of the nation.

South Africa was party to the Johannesburg Declaration on Health and Sustainable Development in January 2002.²⁶ The goals set by this forum are relevant to assessing the progress made towards achieving them:

We recall the number of laudable development targets for health that have been agreed to at the Millennium Summit, and in other United Nations conferences and inter-national fora. These include, for example, reducing mortality rates for children under five by two-thirds, and the maternal mortality ratio by three-quarters by 2015; and, by 2010, reducing HIV prevalence in all young people (aged 15-24 years) by 25 per cent, and the proportion of infants infected with HIV by 50 per cent; as well as reducing TB deaths and prevalence, and the burden of disease associated with malaria by 50 per cent, also by 2010.

We note that, whilst there have been improvements in life expectancy and declines in infant and child mortality, the reality is that the world is not on track for achieving these targets. This is not because they are not achievable, but because the scale of the effort to achieve them falls far short of what is required.

We emphasise that it is the joint responsibility of all nations to ensure that these targets are achieved, with a particular focus on, and support for vulnerable developing nations.

1.4 Children's right to basic health care

As regards children's right to basic health care, South Africa participated in the Special Session on Children at the UN World Assembly in 2002 and adopted a declaration on *A World Fit for Children* and committed itself to an action plan to meet the targets for child development. A Children's Bill has been drafted which will be discussed under the relevant section.

2 PROGRESS TOWARDS THE REALISATION OF THE RIGHT TO HEALTH CARE

In this section, responses from the national and provincial Departments of Health to the Commission's protocols for the 2002/2003 financial year, are analysed. Where information is lacking or unreliable, recourse has been made to other available sources of information. The measures assessed are (1) Policies and programmes, (2) Legislation and (3) Budgets. Since the emphasis on this reporting period is on service delivery and implementation of existing policies and strategic plans, an assessment will be made on the outcomes according to benchmarks and indicators relevant to health care delivery.

The National Department of Health's (NDoH) strategic goals and objectives are guided by the White Paper on the Transformation of the Health System, the ten point plan outlined in the Health Sector Strategic Framework 1999-2004, and the HIV/AIDS Strategic Plan for South Africa 2000-2005.²⁷ Key objectives and programmes for 2002/03 are based on the 10-point plan that includes:

- 1) decreasing morbidity and mortality rates;
- 2) improving quality of care;
- 3) speeding up delivery of primary health care;
- 4) revitalising public hospitals;
- 5) improving resource mobilisation and management;
- 6) improving human resource development and management;
- 7) re-organising support services;
- 8) legislative reform;
- 9) improving communication and consultation;
- 10) strengthening international co-operation.

2.1 Key Programmes

The following three key programmes identified by the NDoH and the National Treasury (i.e. the budget reporting framework) will be the focus of this analysis:

A. Health Service Delivery: primarily at the provincial and local spheres of government which deal with sub-programmes directed towards preventive, promotive, curative and palliative care and which include the delivery of quality care, co-ordination of hospital services, human resources, support services and environmental health.

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B. *Strategic Health Programmes*: the co-ordination of critical sub-programmes including those that are organised into clusters, namely: the HIV, AIDS, STIs and TB cluster and the Maternal, Child and Women's Health cluster, which includes the Integrated Nutrition Programme;²⁸ and

C. *Administration*: which provides for the overall management of the National Department, including the policy and legal services of the Offices of the Minister and Director General.

Due to time and capacity constraints it is not possible for one researcher to treat all of these in the detail they deserve. Only key programmes will be treated in this Report.

2.2 New Policy and Programmatic Measures

2.2.1 The Right to Health Care Services for Everyone

2.2.1.1 National Sphere²⁹

There appear to be no new major policies or programmes instituted for Health Service Delivery and Strategic Health Programmes during this reporting period. Under Programme C, the following new guidelines were issued to facilitate administration:

2.2.1.1.1 Guidelines for District Health Planning and Reporting

The publication of the *Guidelines for District Health Planning and Reporting* is intended to assist district health managers from provincial and local government to prepare and implement medium-term, sub-district and district health plans, and to assess and report progress in achieving their stated goals and objectives. According to the guidelines, plans and reports are to meet the requirements of the Public Service and Financial Management Act (PFMA) No. 1 of 1999 and the Public Service Regulations. They should also serve as a basis for the health component of the Integrated Development Plan (IDP).

This is an important development since previous Economic and Social Rights reports identified the lack of capacity at managerial level as a constraint to the efficient delivery of services.³⁰ If *implemented successfully*, this planning and reporting tool in the hands of competent managers should result in a more efficient District Health System (DHS) and promote better intergovernmental co-operation between the local and provincial spheres in the delivery of health care services.

2.2.1.2 Provincial Sphere

The Mpumalanga Department of Health (MPDoH), the North West Department of Health (NWDoH), and the Northern Cape Department of Health (NCDoH) reported no new policy measures but listed existing ones.

The Eastern Cape Department of Health (ECDoH) reported the *Zanempilo Pilot Project*, which provides laboratory testing for TB in rural areas. The extension of laboratory services to the rural areas will impact positively on the rural poor who do not have ready access to clinic and hospital services.

The ECDoH stated that it intended to increase the number of nurses annually. Candidates selected from targeted areas will be expected to return to these communities upon qualification and will be required to sign a four-year contract with the Department. The loss of nurses from the profession has resulted in a serious shortfall of trained staff and this policy is to be welcomed in order to train and retain staff.

The KwaZulu-Natal Department of Health (KZNDoH) instituted a policy on the management of rape victims but provided no details.

The Limpopo Department of Health (LMDoH) instituted a protocol for providing a comprehensive package of care for the Prevention of Mother-to-Child Transmission (PMTCT) programme and policy guidelines for its implementation, while the MPDoH reported implementation of these guidelines.

The NCDoH reported the following new policy measures: a 24-hour service at Primary Health Care centres; in certain instances an operational call system; and training and teaching at the Henrietta Stockdale Nursing College. This Department is in the process of revising its cervical cancer policy guidelines as well as those on contraception. This will be beneficial to women and people of reproductive age.

The WCDoH reported that it was in the process of developing a policy framework- Health Care 2010, which aims at revitalising the Primary Health Care System (PHCS) by means of people management. Budget increases for delivery of services are also envisaged with a cross-sectoral approach across other departments.

The policies/programmes instituted by the provinces are based on previous ones developed by the NDoH and, if implemented, should impact positively on the delivery of PHC and HIV/AIDS services. These programmes cater for such vulnerable groups as women, children, the rural poor, people living with AIDS and HIV positive mothers and their babies. An increase in the number of nurses will impact positively on the quality of patient care since the loss of trained staff due to attrition has resulted in a shortage of nurses.

2.2.2 Children's Rights to Basic Health Care Services

2.2.2.1 National Sphere

There appear to be no new policies developed for this reporting period.

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2.2.2.2 Provincial Sphere

The KZNDoh reported a policy that facilitates the admission of abandoned children to hospitals and their placement with social workers. An immunisation programme for children with missed opportunities was also instituted. A *Baby Friendly Hospital Initiative* was accredited by UNICEF in November 2002 and exclusive breastfeeding was reported to be taught and practised at Port Shepstone Hospital.

The NWDoH reported the following new policies/programmes but provided no descriptions thereof:

- Draft proposal for Rapid Assessment of Health Care Needs of Children with Disabilities;
- Perinatal Education Programme to Improve the Quality of Care of Infants and Children; and
- Provincial Plan of Action

These policies/programmes are to be welcomed since they will improve the quality of care for children and also those with disabilities.

2.3 Developments in Key On-going Programmes and Projects

Key developments in Health Service Delivery and Strategic Health Programmes took place mainly in the implementation of ongoing programmes and/or projects, the issuing of guidelines, and training of health workers. These are discussed under the three key programmes identified above.

2.3.1 Health Service Delivery

2.3.1.1 Reducing Morbidity and Mortality Rates (Maternal, Women)

2.3.1.1.1 National Sphere

Maternal Death Notification and Confidential Enquiry into Maternal Deaths³¹

This programme was instituted to ensure that all maternal deaths are reported and investigated to ensure that there is no negligence during childbirth. The NDoH reported that according to the most recent triennium report on Saving Mothers (1999-2001), it would appear that there has been an increase in the number of maternal deaths in South Africa from 150 per 100 000 live births in 1998 to probably in the order of 175-200 per 100 000 live births in 1999-2001. The Maternal Mortality Ratio (MMR) is the total number of maternal deaths per 100 000 live births.

Table 1: Maternal Mortality Ratio (MMR) for provinces

<i>Province</i>	<i>Number of deliveries</i>	<i>Number of deaths</i>	<i>MMR</i>	<i>MMR (est.)</i>
Free State	44 201	96	217	199
Gauteng *	113 825	169	148	112
KwaZulu-Natal *	168 238	243	144	
Limpopo *	92 529	62	67#	
Mpumalanga	42 506	124	292	281
North West	36 900	112	304	289
Northern Cape *	16 080	27	168	
Western Cape **	146 087	92	63	54

Source: Saving Mothers – Second Report on Confidential Enquiries into Maternal Deaths in South Africa; 1999-2001, published in 2002, provided by the National Department of Health.

Data excludes deliveries from private institutions and community health centres and includes all referrals from other provinces. Coincidental deaths are excluded when known. MMR (est.) is calculated from an estimate of deliveries in private institutions from the SADH survey and a survey in Gauteng, estimates are for the number of births in CHCs from the 1998-1999 data.

**2001 data, ** 2000+2001 data. # Illustrates under-reporting.
No figures were provided for the Eastern Cape province.*

These deaths are most likely due to HIV/AIDS as there has been an increase in non-pregnancy related infections as a cause of death among mothers reported to the National Committee for the *Confidential Enquiry into Maternal Deaths*. The five major causes of maternal deaths were non-pregnancy related infections (mainly AIDS), complications of hypertension in pregnancy, obstetric haemorrhage, pregnancy related sepsis and pre-existing medical conditions. Women 35 years and older were at greater risk of dying than younger women in their twenties and those in their first pregnancy or with 5 or more pregnancies were also at greater risk.

The NDoH reported that training workshops were conducted in two provinces on the national *Maternity Case Record*, the *Policy and Management Guidelines for Common Causes for Maternal Deaths* and the *Guidelines for Maternal Care*. In addition, advanced training of midwives from NCDoh was supported.

National Contraception Policy Guidelines for the Sterilisation Act No. 44 of 1998

The overall goal for the contraception policy guidelines is to improve the sexual and reproductive health of all people in South Africa and enable everybody to exercise their contraceptive choice safely and freely. According to the National Department of Health's Annual Report, the Department of Health launched the

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National Contraception Policy Guidelines in March 2002. Training of trainers was subsequently conducted in Limpopo, Gauteng, Northern Cape, Mpumalanga, the Free State and the Western Cape.

Prevention of Violence Against Women

This policy is based on the Domestic Violence Act No. 116 of 1998 and the *Integrated Quality Social Strategy* of the GTDoH (1999). In addressing gender-based violence, the national department was in the process of developing the following documents:

- Policy guidelines for the management of survivors of sexual assault
- Case record for use as a guide to examination of sexual assault survivors

A men's workshop was organised during the 16-day campaign of Non Violence Against Women and Children in November 2002. Post-exposure prophylaxis (PEP) for rape survivors is operational in 100 per cent of medico-legal centres. The report failed to provide any figures on the number of women who had suffered violent abuse.

Termination of Pregnancy (TOP)

The Choice of Termination of Pregnancy Act 93 of 1996 allows abortion on request for all women in the first twelve weeks of pregnancy and in some cases in the first twenty week.

According to the NDoH's Annual Report there was an increase in the number of providers trained in manual vacuum aspiration, post abortion care and family planning from 293 in 2000 to 439 in March 2003. However, due to the high attrition rate and the allocation of trained nurses to other services, the number of abortion service providers has actually dropped. No figures were provide for the actual number of abortions performed nationally or per province.

According to the South Africa Yearbook (2002/03)² there has been a significant reduction in the maternal mortality rate from unsafe abortions from over 64 per cent in 1994 to 9,5 per cent in March 2002.

Breast Cancer and Cervical Screening

According to the NDoH's Report, the National Policy Guidelines require all women between the ages of 35-55 to be screened to reduce mortality due to cervical cancer, which is a major cause of death in women. Screening of cervical cancer remains a challenge. Implementation of the cervical cancer screening policy is at different levels in the provinces. Campaigns for both cervical and breast cancer are conducted annually. No statistics were provided or any other information on implementation levels.

2.3.1.1.2 Provincial Sphere

Maternal Death Notification and Confidential Enquiry into Maternal Deaths

According to the Gauteng Department of Health Annual Report 2002/2003, the *Saving Mothers Report* released in March 2003 estimates the Maternal Mortality Ratio for Gauteng as 112 per 100 000 live births. The major direct causes of death were identified to be hypertension, haemorrhaging, abortions, ectopic pregnancies, sepsis and non-pregnancy-related infection, mainly due to HIV. Eleven patients died from backstreet abortions according to the *Maternal Death Notification Report*.

According to its Report to the Commission, KwaZulu-Natal's Maternal Mortality Ratio was 158 per 100 000 live births. Eight maternal death assessors were trained and the number of advanced midwives was increased. Antenatal attendance at clinics increased to four visits per woman.

The MPDoH reported a Maternal Mortality Ratio of 291 per 100 000 live births in spite of training an additional 66 midwives.

The NWDoH reported a rate of 231 per 100 000 which is regarded as a conservative estimate. The figure has risen since 2001 when it was 194 per 100 000 live births³³ The rise in the death rate is attributed to non-pregnancy-related causes: 55 per cent were due to HIV/AIDS, 21 per cent to pneumonia, 19 per cent to sepsis, 11,5 per cent to obstetric bleeding after birth. Patient-related avoidable factors also ranked relatively high.

National Contraception Policy Guidelines for the Sterilisation Act 44 of 1998

The GTDoH reported that emergency contraceptive services were being provided in all primary health care facilities. In total, 37 master trainers were trained on the *National Contraceptive Guidelines*. The Sterilisation Act is implemented in all hospitals and panels have been set up to make decisions relating to sterilisations. Over 2 500 sterilisations were performed in the reporting period but there was no indication if these were performed on men or women.

The FSDoH reported that 30 master trainers in *Sexual and Reproductive Health* were trained, and that 22 hospitals in the districts offered sterilisation. In 2002, 1 634 sterilisations were performed. There was no gender disaggregation of the figures.

The KZNDoh revised its training package and increased the number of trained personnel.

The WCDoH reported that it had been extensively involved in the development of the *National Contraceptive Policy Guidelines* in 2002. which outline the rights of the client, the needs of service providers and new definitions of sexual

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and reproductive health. The province reported two seminars (one by satellite to five distance learning centres). A *Revised Sterilisation Policy* was put in place but no figures were provided.

Termination of Pregnancy (TOP)

The GTDoH has implemented TOP in 14 hospitals and 10 PHC facilities. Some 16 000 terminations were performed resulting in a 33 per cent reduction in early pregnancy-related deaths due to septic abortion and ectopic pregnancy. Thirty-eight midwives were trained for first trimester terminations in PHC facilities and 86 midwives and doctors were trained in seven hospitals for second trimester terminations.

The KZNDoH's Annual Report states that a total of 8 298 TOPs were performed, 54 per cent of which were in public hospitals. A total of 421 personnel were trained in counselling.

The WCDoH reported that out of a total of 30 hospitals which provided TOP services, 17 were urban and 13 rural. A total of 6 745 pregnancies were terminated of which 5 282 were in urban areas and 1 463 in rural areas.

Most of the provinces have instituted training programmes, but the number of TOPs performed in the public health sector remain low since many facilities still do not provide the service. Because of the stigma attached to abortions, many women still resort to backstreet abortions which often present with complications from unprofessional and unhealthy practices.

Breast Cancer and Cervical Screening

The GTDoH reported that the programmes had been implemented in all PHC facilities and service providers had been trained. About 25 000 women between the ages of 35 and 55 had been screened for cervical cancer and 180 female employees had been screened for breast cancer. An awareness campaign was held in October 2002.

The KZNDoH Annual Report states that the *Cervical Screening Policy* was distributed. A total of 74 district trainers were trained in screening, and 3 615 PAP smears were done, a 32 per cent increase from the previous year.

The WCDoH reported that mammograms were not readily available in the public sector but that 53 817 cervical smears had been done on women. Early detection numbers were not provided neither was it clear that the figure provided was for the reporting period or cumulative.

Screening for breast and cervical cancers is an important development in preventive measures to promote women's health. Most of the provinces did not even report on this important preventative measure. Judging from the few figures provided, much remains to be done to reach most women who qualify for this service.

2.3.1.2 Reducing Morbidity and Mortality Rates in Children

2.3.1.2.1 National Sphere

Integrated Management of Childhood Illness (IMCI)

According to the WHO every year, in developing countries, some 12 million children die before their fifth birthday. Seven out of ten of these children die from acute respiratory infections (mainly pneumonia) diarrhoea, measles, malaria, malnutrition or a combination of these diseases.³⁴ *The National Plan of Action for Children* requires the promotion of children's health and survival. The core intervention is the integrated case management of these diseases in children, with a view towards improving health care at a facility and community level.

The NDoH's Annual Report states that in March 2003, 1 261 facilities were implementing the IMCI. A total of 4 997 health workers had been trained in IMCI and 29 per cent of health facilities have at least one IMCI trained professional. In addition, surveys were conducted in seven of the nine provinces to assess the quality of care given to sick children. The findings indicated improved assessment and management of children by IMCI trained professionals and an 85 per cent decrease in the wastage of antibiotics.³⁵

Expanded Programme on Immunisation (EPI)

The NDoH's Annual Report views this as a priority programme and reported that it has achieved results in terms of vaccine preventable childhood diseases. Full immunisation has increased to 70 per cent, there have been no deaths due to measles since 1999 and the elimination of neonatal tetanus was validated in 2002 by WHO, UNICEF and the NDoH. Coverage of oral polio vaccine for the third dose was 89 per cent compared to 74 per cent in 1998. This exceeds the WHO's recommended target of 80 per cent. However, the acute flaccid paralysis detection rate was 1,3 rather than the required rate of 1,0 to qualify for polio-free certification from the WHO. Steps, which include training, monitoring and surveillance in all the provinces, have been taken to improve health workers' knowledge and to create public awareness around immunisation.

Human Genetics Policy Guidelines

The main purpose of the genetics guidelines for the management and prevention of genetic disorders, birth defects and disabilities is to facilitate the integration of genetic services into the primary health care package of services. This policy includes screening for genetic defects, counselling parents, management and

referral, and birth defect surveillance. The NDoH did not provide any details of this programme but indicated that due to cutbacks in funding this programme was not being implemented as planned.

Training of health care workers on genetics by National Department of Health (NDOH) and the Provinces is ongoing. The NDoH's Annual Report states that primary health care workers received training on human genetics in KwaZulu-Natal, LODOH and the NCDOH.

Foetal Alcohol Syndrome

A task team in the National Department of Health comprising of officials from the directorates of Women's Health and Genetics, Mental Health and Substance Abuse, Communication, Health Promotion, Child Health, District Health Systems Development, Nutrition and Health Systems Research, Research Coordination and Epidemiology is engaged in monthly meetings to coordinate the work on Foetal Alcohol Syndrome (FAS) within the health sector. Provinces are also encouraged to duplicate a similar structure in each of the provinces and to focus on issues of prevention of FAS.

Studies of Foetal Alcohol Syndrome (FAS) revealed high incidence in children, especially in the Western, Northern and Eastern Cape. A workshop was conducted in the ECDoH and it was found that less 10 per cent of districts, compared to a target of 40 per cent set in 2001, were implementing the guidelines, due to budgetary constraints. This impacts negatively on children and parents with genetic disorders. The Department's request for the budget to be topped up met with no success. It was suggested during these sessions that support should be given to trained health workers to collect data on congenital/birth defects, so as to identify the extent of the problem of genetic disorders, birth defects and disabilities in the respective districts.

2.3.1.2.2 Provincial Sphere

Integrated Management of Childhood Illness (IMCI)

KZNDoh reported that all districts implemented the IMCI. The policy also aimed to improve the care of children in homes and communities. The following achievements were reported:

- 60 per cent of PHC professional nurses were IMCI trained; and
- There was at least one IMCI trained nurse in 244 clinics, resulting in a 46 per cent coverage.

The NWDoH reported that the IMCI implementation begun in 1999 in the Brits sub-district and had been gradually rolled out through case management training to cover 100 per cent of districts and 85 per cent of sub-districts, by March 2003. The province provided information on relevant indicators for 2000/2001

rather than the current reporting period. However, it stated that 11,6 per cent of children were underweight at 6-71 months; and there were 6 000 AIDS orphans. Most of the provinces did not provide the information on outcomes and indicators required by the SAHRC.

The FSDoH reported that 4 per cent of children 6-71 months suffered from wasting, and 30 per cent between 6-71 months were underweight. The early neo-natal death rate was 7,7 per 1 000 live births within seven days after birth. The late neo-natal from 7 to 28 days was 3 per 1 000 live births; prevalence of measles was 0,0013 per cent. There were 31 hospitals, with 1 266 available beds for children and 28 840 paediatric patients.

Expanded Programme on Immunisation (EPI)

The ECDoH's response was very poor and in the few instances where figures were provided for indicators, they related to 2000/2001.

The FSDoH stated that there was 84 per cent immunisation coverage for children 0-11 months; 85 per cent for measles at 9 months; 78 per cent for BCG.

The NWDoH reported that 72 per cent of children were covered for measles immunisation at 9 months.

KZNDoH³⁶ reported a 89 per cent EPI immunisation coverage with a less than 10 per cent drop out rate; no measles or neo-natal tetanus cases; 22 nurses had completed the first phase of EPI training, and that 14 active birth surveillance sites had been established.

Human Genetics

GTDoh's Annual Report stated that 15 health care workers had been trained in human genetics in Sedibeng and an albinism support group had been established. Awareness campaigns were conducted on congenital abnormalities.

Other provinces reported similar training programmes but acknowledged that the shortage of trained staff and the lack of capacity prevented them implementing this policy. The impact of this is that children will continue to be born with birth defects, placing an additional burden on parents and the State.

Indicators

The tables show a summary of health status indicators provided by organs of State and from independent research organizations.

The indicators to assess the progress made in reducing morbidity and mortality in mothers, women and infants show an increase rather than a decrease in numbers. The infant mortality rate, the maternal mortality ratio and the under 5

mortality rate have all increased according to the figures in Tables 2 and 3. The under five mortality rate is higher in rural than in urban areas. This is corroborated by data from the UN Human Development Report of 2002, which shows that there has been a reversal of these important health indicators in South Africa since 1999. Life expectancy has also been reduced.

Table 2: Infant Mortality Rate, Maternal Mortality Ratio and Life Expectancy

<i>Province</i>	<i>Infant Mortality Rate Infant deaths per 1 000 live births</i>	<i>Maternal Mortality Ratio Maternal deaths per 100 000 live births</i>	<i>Life expectancy at Birth Years</i>
EC	62	133	60,7
FS	66,6	*	51,6
GT	46	112	54,8
KZN	84	158	-
LO	37,2	30	-
MP	-	291	-
NC	-	*	-
NW	42	231	53,3
WC	-	-	-

Source: These figures are taken from reports submitted by provincial departments of health to the SAHRC's protocols

** denotes irrelevant information provided ; - denotes no information provided*

Definitions:

Life expectancy at birth is defined as the average number of additional years a person could live if current mortality trends were to continue for the rest of that person's life.

Maternal mortality ratio(MMR) is defined as the number of women who die as a result of childbearing, during the pregnancy of within 42 days of delivery, per 100 000 live births during one year.

Infant mortality rate is the number of children less than one year old who die in a year, per 1 000 live births during that year.

The exact figure depends on the study and the method utilised. A comparison of Table 2 and 3 show statistics from different sources vary according to how the data was collected and the method of calculation. There are discrepancies between the statistics provided by NDoH, Provincial Departments of Health and research organisations. Another example of this is the number of deaths due to AIDS. The MRC's AIDS Report (2001) estimated that about 25 per cent of all deaths were due to HIV/AIDS. Statistics South Africa recorded 9 per cent of deaths due to HIV/AIDS. This was based on information recorded on death

certificates. In the absence of the HIV/AIDS status of the deceased this conclusion was arrived at from indicator conditions associated with the AIDS syndrome.

The policies and programmes put in place to reduce morbidity and mortality in mothers, women and infants, if implemented successfully, should achieve the desired results. However, in South Africa a reverse trend is observed, that is, there are more deaths rather than a decrease in the number of deaths, in spite of these programmes. This is attributed mainly to AIDS and AIDS related deaths.

Table 3: Health Status Indicators

<i>Indicator</i>	<i>Date</i>	<i>EC</i>	<i>FS</i>	<i>GT</i>	<i>KZN</i>	<i>LO</i>	<i>MP</i>	<i>NC</i>	<i>NW</i>	<i>WC</i>	<i>ZA</i>
Life Expectancy at birth	1996 ¹	60,4	52,8	59,6	53,0	60,1	53,5	55,6	53,3	64,0	57,0
	2002 ²	53,5	51,7	54,8	47,5	54,4	49,5	58,8	52,7	62,7	52,5
	2005 ³										47,0
MMR	1998	-	135	67	-	-	-	-	-	50	150
Maternal deaths	2000	103	92	164	228	74	126	29	78	46	940
Infant mortality rate	1998	61,2	53,0	36,3	52,1	37,2	47,3	42,8	42,0	30,0	45
	2002	72,0	63,0	46,0	68,0	53,0	59,0	46,0	56,0	30,0	59,0
Under 5 mortality rate	1998	80,5	72,0	45,3	74,5	52,3	63,7	55,5	56,0	39,0	61,0
	2002	112,0	106,0	82,0	124,0	87,0	106,0	72,0	95,0	46,0	100,0

Sources : Health Systems Review 2002³⁷

References: 1. Statistics South Africa (SSA) Human Development Index (HDI) 2001 (Table I) in Health Systems Review 2002 p 439.

2. HIV Indicators 2002 in Health Systems Review 2002 p439 (The figures for Limpopo probably oversate the impact of HIV)

3. Actuarial Science of South Africa (ASSA) 2000 in Health Systems Review 2002 p439

Number of maternal deaths is defined as the number of women who die as a result of childbearing, during the pregnancy of within 42 days of delivery. (the denominator is excluded due to the difficulty in obtaining accurate data on this) Note that the number of maternal deaths in a year is not generally considered an indicator.

Under 5 mortality rate is the number of children under 5 years who die in a year, per 1 000 live births during that year.

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2.3.1.3 Infectious Diseases

2.3.1.3.1 *National sphere*

Cholera

According to the NDoH's Annual Report, there was an 80 per cent reduction in cases in 2002 from 2001. The case fatality rate for 2002 was 0,64 per cent, well below the 1 per cent target set by the WHO. 165 deaths due to cholera were reported in 2001 and 105 in 2002 with a total number of cases of 98 061 and 16 376 in the respective years. The case fatality rate for 2001 was 0,17 per cent, while that for 2002 was 0,64 per cent, which indicates that a higher proportion of deaths occurred in 2002.

This figure suggests that in spite of the public awareness campaigns, and the provision of safe drinking water by the Department of Water Affairs and Forestry, these measures were not adequate to reduce the case fatality rate in 2002. It is estimated that about 1,5 million households receive free basic water and that around 4,6 million people lack adequate sanitation. Considering that the population of South Africa is about 45,5 million, the proportion of people who live in dire poverty and in poor sanitary conditions is alarming. Clearly, more needs to be done to prevent loss of life due to cholera in South Africa.

Measles

The case fatality rate of measles for 2000, 2001 was 0,00 suggesting the disease has been eliminated.

Malaria

According to the South African Year Book decline in the number of cases since 2000 was due to: a revision of drug treatment policy; change of insecticide used for spraying; increased cross-border malaria control; increased laboratory capacity and unfavourable climatic conditions for malaria transmission. Through the Lubombo Spatial Development Initiative, government has been able to reduce malaria transmission by 76 per cent in KwaZulu-Natal, 64 per cent in Swaziland and 40 per cent in the southern parts of Mozambique.

The WHO has honoured South Africa with an award for the best malaria control in Southern Africa. Deaths due to malaria in 2001 declined by 74 per cent compared to 2000 and by a further 21 per cent in 2002.³⁸ However, judging from the graph provided in the Annual Report there had been a steady increase in reported cases since 1996 with the highest number reaching 70 000 in 2000. The lowest number of reported cases was in 1971 and South Africa has not yet reached its target goal or returned to the 1971 figures.

The NDoH offered the following explanation to explain to account for this:

Due to the change in epidemiological situation surrounding malaria transmission in South Africa post 1994, it is extremely challenging to expect malaria transmission in South Africa to reach the 1971 figures, using the current interventions. One of the key factors that needs to be taken into consideration is cross-border movement of the malaria affected populations. Government is in the process of addressing cross-border malaria control with neighbouring Zimbabwe and Mozambique and through this intervention it is expected that malaria cases will approach the figures reported in the 1971, similar to the good results obtained in the malaria project in the Lubombo Spatial Development Initiative.

2.3.1.3.2 Provincial Sphere

In 2002 there were cholera outbreaks in KZN, Limpopo, and Gauteng. None of these provinces mentioned the cholera outbreak in their Annual Reports, nor in their responses to the SAHRC's protocols. This cannot be interpreted as an oversight and is not acceptable since these outbreaks received extensive media coverage. In KZN and Gauteng communities were using water from contaminated rivers. There were no proper toilet facilities, nor municipal services for sanitation.

Provinces in which malaria is endemic also failed to report.

Table 4: Provinces where malaria is endemic

Province	Total No. of Cases Year		Total No. of Deaths Year		Case Fatality Rate % Year	
	2002	2003	2002	2003	2002	2003
Limpopo	4 836	7 017	44	90	0,9	1,3
Mpumalanga	7 965	4 201	29	23	0,4	0,5
Kwa-Zulu Natal	2 345	2 042	16	3	0,7	0,1
Rest of SA	473	35	7	0	1,5	NA
TOTAL	15 619	13 295	96	116	0,6	0,9

Source: Dr Brian Sharp MRC- from figures compiled by the NDoH

Although the total number of cases since 2000 has shown a steady decline from about 64 000 to 13 000 in 2003 according to figures supplied by the NDoH, the number of total fatalities in the country has not changed much from 119 in 2001, 96 in 2002, and 116 in 2003. In 2003, the number of cases in Limpopo increased by almost double than those reported in 2002, while the reverse took place in Mpumalanga. There was not much change in the total number of cases in KZN. Limpopo and Mpumalanga remain the two provinces most affected by malaria.

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2.3.1.4 Non-Communicable Diseases

2.3.1.4.1 National Sphere

Disabilities

The National Department reported the purchase of 315 wheelchairs and a donation of a further 142 from the Buddha's Light International Association. Repair centres had been established in most parts of the country, including rural areas. People with disabilities had been trained to repair wheelchairs as a business initiative. MPDoH received the trophy for 2002 for the best province in the delivery of assistive devices and training in issues relating to disability.

Older Persons

An awareness campaign on the needs of older persons to combat neglect and marginalisation (International Day for Older Persons) was conducted in the NW province on 1 October 2002. No other specific programmes or projects were reported. None of the other provinces reported on specific policies or programmes dedicated to the health needs of older persons. Instead older persons had to access generalised ones which cater for geriatrics.

Speeding up Delivery of PHC

Delivery of the PHC package is through the District Health System (DHS). The goal is for it to become a municipal competency, wherever the capacity to deliver exists. The NDoH reported that it annually assesses district development, using a standardised set of indicators.³⁹ However, none were provided. It reported that GTDoH, ECDoH, FSDoH, and the WCDoH have signed service level agreements (SLAs) with municipalities.

According to the NDoH, more facilities were providing PHC during 2002/03, the cost of which has increased, partly due to inflation, from R176 per capita in 2000/2001 to R216 per capita in for 2002/03.⁴⁰ According to the IFGR the average per capita spending for the same period is R148.

Effective planning and reporting mechanisms are essential for the DHS to function optimally. With the assistance of the Equity Project, guidelines for provinces and municipalities⁴¹ have been issued.

2.3.1.5 Emergency Medical Services (EMS)

2.3.1.5.1 National Sphere

The aim of this service is to render rapid emergency medical services and patient transport.

An efficiently run emergency medical service is essential to reduce mortality and morbidity especially where there is a high level of violent crimes and also where physical and economic access to clinics and hospitals in rural areas is hampered by poverty, insufficient means of transport and in many cases bad roads which results in delays before patients receive treatment.

The NDoH is planning to introduce norms and standards, costing models and business plans for 2002/03 as well as providing services for international events held in South Africa. The NDoH reported that 444 emergency vehicles had been acquired and an additional 213 personnel were employed. Ten new emergency medical services bases and four new communication centres were established.

2.3.1.5.2 Provincial Sphere

Gauteng passed the GDoH Ambulance Service Act and purchased 44 new ambulances. Service Level Agreements (SLAs) were signed with all six local authorities who had 209 ambulances with a further 10 at hospitals for transfer of patients. GDoH also reported that there were four ambulances at Zola Clinic for the transfer of patients, as well as private sector ambulances in use.

According to its Annual Report, an improved response time of 15 minutes for 82,6 per cent of priority one patients was achieved and that 100 per cent of these patients were attended to by trained ambulance personnel.

The FSDoH reported on new developments in Emergency Medical Services. In order to improve service standards and enhance access, despite staff shortages the following circulars were implemented during the reporting period:

- Medical Support Services Circular No. 1 of 2003: Standing Operational Procedures for Emergency Care Practitioners;
- Medical Support Services Circular No. 7 of 2002, which determines that no volunteers be utilised in EMS. Appointed casual workers may, however, work additional hours as voluntary work.

During the reporting period, 53 new ambulances, 13 rescue vehicles and 19 planned patient transport vehicles were purchased to enhance both access to and the quality of care.

KZNDoH reported a policy change whereby maternity and paediatric calls are now coded red with intermediate life support response thus ensuring a faster response time and a higher level of life support for these patients. According to its Annual Report 2002/03 its Emergency Rescue Services has two sub-programmes: Emergency Patient Transport and Planned Patient Transport. Improved access had been achieved by:

- training 150 staff in medical dispatch procedures

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- improvement in response times- in the urban areas reduced to between 16-30 minutes and in the rural areas to between 1-2 hours
- communication centres had been established in all Districts
- the percentage of isiZulu speaking staff had increased from 56 per cent to 60 per cent (target is 80 per cent)
- ambulances with two crew members are being phased in within the limited resources available in towns which previously had no emergency services
- In all, 15 new patient support vehicles were purchased so as to separate emergency cases from patient transport services
- 116 ambulances were purchased of which 11 were ALS response units
- an additional 44 vehicles were deployed during peak holiday periods.

To improve the quality of care 6 mobile intensive care units of the 22 envisaged for the province had been introduced.

The NCDoH reported that regulations governing Emergency Medical Services were being applied. A three-year replacement policy of vehicles has been introduced and 25 new ambulances have been allocated to areas that had no services. A two-crew ambulance system was being implemented and towns with no services were being prioritised.

Emergency services were also separated from patient transport by the acquisition of 15 patient transport vehicles.

The NWDoH, through the establishment of a Planned Patient Transport programme, reported that 18 new ambulances were bought, two new EMS stations were opened, and 12 people (with disabilities) were appointed in administrative positions. Major constraints were a lack of suitable vehicles and trained staff. In order to address these constraints:

- Private EMS services were utilised so that there was no lack of continuity of service delivery to the community; and
- Staff were sent to private institutions for training.

Table 5 provides a breakdown of EMS by region provided by the NWDoH.

Table 5: Emergency Medical Services in the North West Province

<i>Indicator</i>	<i>Bojanala Region</i>	<i>Southern Region</i>	<i>Central Region</i>	<i>Bophirima Region</i>	<i>Total Province</i>
Number of vehicles per 1 000 people	3,7	3,81	3,99	4,12	3,9
Number of vehicles replaced	5	5	5	7	22
Total kilometres travelled	2 241 780	1 378 959	346 000	234 434	4 201 173
Number of patients transported per 1 000 people	188	143,24	140	101,68	143,23
Percentage of call outs answered by single person crew	0 per cent	0 per cent	0 per cent	10 per cent	2,5 per cent
Percentage of locally based staff with training in life support at basic level	88,68 per cent	86,67 per cent	88,33 per cent	88,89 per cent	88 per cent
Percentage of locally based staff with training in life support at intermediate level	11,32 per cent	13,33 per cent	11,67 per cent	11,11 per cent	12 per cent
Percentage of locally based staff with training in life support at advanced level	0 per cent	0 per cent	0 per cent	0 per cent	0 per cent
Cost per patient transported	R340.33	R408.59	R414.43	R589.40	R438.21
Percentage of response times within current national targets	72 per cent	68.75 per cent	71 per cent	74,5 per cent	70,18 per cent

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The WCDoH's provincialisation of EMS was not completed by the anticipated date of July 2002 when the Unicity EMS staff were to be transferred to the province due to labour-related matters. It is envisaged that provincialisation will result in improved deployment of resources and reduced emergency response time.

Improvements in Emergency Medical Services are to be welcomed. An increase in the number of ambulances and the shortening of response times will impact positively on those who require emergency treatment. This is of great relevance in South Africa where violent crime is one of the major causes of death. It is also important since access to health care facilities is not always within the reach of poor. It is estimated by the NDoH that 80 per cent of the South African population live within a 5 km radius of the nearest hospital. One hundred and seven mobile clinics were in use. However, 840 000 people were without a medical clinic within a 5 km radius.

2.3.1.6 Revitalisation of Public Hospitals

It has been estimated that one third of public facilities required rehabilitation and that 40 per cent of hospital infrastructure need revitalisation or repair. Public hospitals account for more than 50 per cent of public health expenditure. In 2002/03, 27 hospitals (three in each province) were earmarked for revitalisation to refurbish old ones or to provide new services. Allocations to upgrade infrastructure and equipment are made from the Hospital Facilities Revitalisation Grant. Three new hospitals were built in the last financial year: the Durban Academic Hospital, the Umtata Hospital and Pretoria Academic Hospital.

2.3.1.6.1 Costed Norms Approach

The development of integrated strategic planning to drive the budget process is important in that a costed norms approach gives a more realistic basis for expenditure. The system of cost centre financial accounting was in use in 46 hospitals and the plan is to extend this to others in order to ensure a more cost effective and efficient use of resources.

2.3.1.6.2 Indicators

According to UNDP's South Africa Human Development Report 2003, there are over 4 000 clinics and five hundred mobile clinics. The Table below shows the number of private and public health facilities in the country.

Table 6: Number of Private and public facilities

Total private hospitals	350
Total public hospitals	399
District hospitals	257
National central hospitals	11
Provincial tertiary hospitals	7
Regional hospitals	66
Specialised hospitals	58
Number of private sector beds	37 671
Number of public sector beds	106 084

Source: Medical Research Council (2003)

There has been an improvement in the number of health facilities in the country with more clinics providing antenatal services. But there are still regional and sub-regional differences in access to health care services where access is easier in the urban centres and also in the richer provinces while the poorer ones and former bantustans and rural areas are still under-served.

Maintenance expenditure is currently underfunded by about 2 per cent while replacement of equipment is estimated at R1.02 billion per year which sum far exceeds the current budget. Budgetary constraints have also led to widespread shortages of medicines, beds, linen, food and other essential items. This is in spite of increases in the overall health budget and the annual per capita expenditure from 1995 to 2003.

The table below gives the number of public health care personnel per 100 000 population (2000-2002)

Table 7: Public Health Care Personnel per 100 000 Population (2000-2002)

<i>Category</i>	<i>2000</i>	<i>2002</i>
Dental		
Dental practioners	1.7	1.59
Dental specialists	0.2	0.15
Dental therapists	0.3	0.33
Nursing		
Enrolled nurses	59.7	54.5
Nursing assistants	81.3	75.9
Professional nurses	120.3	106.8
Student nurses	21.6	19.2
Doctors		
Medical practitioners	21.9	19.3
Medical specialists	11.2	9.8

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<i>Category</i>	<i>2000</i>	<i>2002</i>
Environmental officers	–	1.42
Medical researchers	–	0.5
Occupational therapists	1.2	1.1
Pharmacists	3.1	3.3
Physiotherapists	1.3	1.22
Psychologists	0.7	0.71
Radiographers	6.1	5.3
Total health sector posts		
Total number	268 122 (2001)	197 898
per cent Posts vacant	57.3 (2001)	42.5
Community service professionals (CSP)		
Number of CSP dentists	164 (2001)	
Number of CSP doctors	1 194 (2001)	
Number of CSP pharmacists	406 (2001)	341

Source: Medical Research Council (2003)

From the above table it can be seen that there has been a decline in the number of key health care professionals in the public sector from 2000 to 2002. This is compounded by the fact that currently there are about 42 per cent of posts that have not been filled. Insufficient medical and support staff places an extra burden on staff who are running the health care system. It also means that patients are deprived of quality care. The retention of skilled and trained doctors, specialists and nurses remains a major area of concern. Many opt to go into private sector hospitals where remuneration and working conditions are more attractive or go abroad. The decline in the number of nurses is alarming and not enough are being trained to fill their positions.

Not only is there a shortage of doctors in the country but they are inequitably distributed across provinces. According to the UNDP⁴² hospitals in the North West and Limpopo have 0.8 and 0.9 doctors per 10 000 people respectively, while Gauteng has 6.8 per 10 000. The bed- to- doctor ratio is about 27:1 in the two provinces while Gauteng's is 5.7:1. Staff shortages have a negative impact on morale which contributes to abusive treatment of patients and adverse media attention. It must be noted that financial constraints has been cited as the single source of frustration amongst hospital staff. This is exacerbated by the AIDS pandemic which places an additional burden on an already overburdened health system.

Despite the fact that South Africa spends about 17 per cent of its GDP on health care, it has not as yet been able to reverse the problems inherited from the apartheid era. Inter- and intra-provincial inequalities result in unequal access. Provinces like Gauteng and the Western Cape have excess hospitals beds while the poorer provinces like the Eastern Cape, Mpumalanga and Limpopo have

shortfalls in the thousands. These inequalities are also manifest in the number of specialists available in these provinces and the quality of care received by patients.

At an inter-”racial” level, one finds that about 70 per cent of White South Africans belong to Medical Aid Schemes while less than 10 per cent of Black South Africans are covered by private Medical Aid Schemes.

The case studies below serve to highlight the poor conditions at Gauteng's Chris Hani Baragwanath Hospital, which serves mainly the Black population. The plight of poor farm communities is also highlighted.

2.3.1.7 Case Studies

2.3.1.7.1 A Survey of Hospitals conducted by the SAHRC in the Eastern Cape

Following complaints to the SAHRC and press reports regarding poor conditions in hospitals in the Eastern Cape, the SAHRC’s legal department conducted an investigation in March 2003.

The table below summarises the findings of the SAHRC’s team which conducted site visits of eight hospitals in the Eastern Cape.⁴³

For details see the South African Human Rights Commission’s Report: *Site Visits & Investigation, Eastern Cape Hospitals*. SAHRC, Johannesburg 2003. The report is based on interviews conducted by members of the Legal Department of the Commission with Medical Superintendents, CEOs, chief nursing officers and patients.

Table 8: Summary of the SAHRC's Report on Site Visits of 8 Eastern Cape Hospitals in 2003

	<i>Frontier</i>	<i>Fort Beaufort</i>	<i>Hewu</i>	<i>Bambisane</i>	<i>St Elizabeth</i>	<i>Holy Cross⁴⁴</i>	<i>Madwaleni</i>	<i>St Barnabas</i>	<i>Umtata General</i>
Access: Roads	Poor	Good	Good	Poor	Very Poor	Poor	Poor	Poor	Poor
Access: Wheelchair	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Access: Phones	Yes	Yes	Yes	No	No	No	No	No	No ⁴⁵
Ambulances	Metro	Metro	Metro	Metro	2 ⁴⁶	No	Metro	Metro	Metro
Over-crowding	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Adequate Staffing	No	No	No	No	No	No	No	No	No
PHC provided	Yes	No	No	Yes	No	Yes	Yes	Yes	Yes
Drugs, Food & Linen Shortages	Yes	No	No	No	Yes	Yes	Yes	No	Yes
Administration	Poor	Good	Good	Very Poor	-	Poor	Satisfactory	Very Poor	Poor

Source: SAHRC Report on Site Visits & Investigation of Eastern Cape Hospitals

Physical and economic accessibility

Accessibility was determined by the following indicators: the distance clients had to travel, road conditions, wheelchair access for the disabled, availability of ambulance services, and telephone access. Poor accessibility in most areas was found to be due to the poor road conditions and long distances people had to travel to get to hospitals, which were, on average 30 km-50 km away. The investigating team found that ambulance service was either inadequate or absent altogether. Where ambulance services were available from Metro Councils, they were totally inadequate to meet the needs of people, especially in the rural areas. In some cases, it was reported, that the ambulance arrived after a day, when the patient had already died. In many instances private transport had to be used, which for the rural poor, made medical care economically inaccessible.

It is obvious from the summary above that most hospitals visited were not accessible, especially to the rural poor. Poor physical access in 5 out of 8 hospitals investigated is tantamount to being denied access to health care services.

Shortages

There were a shortage of staff and inadequate supplies of drugs, and clean linen in most of the hospitals.

Hospitals delivering Primary Health Care

Although clinics are the designated facilities to deliver PHC, most hospitals visited were not turning away patients who complained that clinics were not adequately resourced in terms of staff, infrastructure and medicines to attend to their needs. Hospitals were therefore delivering PHC, placing an added burden on already understaffed facilities as well as their supply of drugs and other resources.

Poor administration

There was general dissatisfaction with the manner in which hospitals were being administered and at St Barnabas the post of the CEO had not been filled.

The team from the Commission concluded that “most of the problems emanate from poor administration and that “ the responsible organs of state are obliged to provide answers to that apparently unsatisfactory state of affairs.”

The SAHRC’s Report concluded that “ there were many omissions in the health services in the hospitals visited which are in a sorry state and constitute “at least on the prima facie level- violations of human rights which call for responses from the relevant service providers.” The MEC for Health in the province was informed of the findings of the SAHRC's legal team and his response was that measures would be put in place to address the problems identified. A followup

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visit by the SAHRC to the province is therefore necessary to assess whether the recommendations have been effected.

2.3.1.7.2 Chris Hani Baragwanath Hospital

Poor administration due to lack of proper management in hospitals appears to be of general concern. A case study of Gauteng's Chris Hani Baragwanath tertiary hospital, the largest hospital in the world illustrates this. In a study carried out by the National Labour and Economic Institute (NALEDI)⁴⁷ one of the main reasons for the appalling conditions at the hospital, was " ... a managerial vacuum caused by an acute shortage of senior managers and ineffective management structures and systems." The report further states that dysfunctional management structures and practices give rise to poor decision-making, inefficiency, conflict, lack of discipline and frustration. Dissatisfaction with poor working conditions and remuneration have resulted in health workers emigrating or joining the private health care sector.

2.3.1.7.3 Farming communities

The SAHRC conducted an inquiry into human rights violations in farming communities and according to its Report⁴⁸ of 2003, the challenges facing farming communities in the provision of health care are:

- Physical and economic access to PHC clinics. These are more than the "golden standard" of five kilometres away, there is a lack of transport and when it is available poor communities cannot afford the cost. Another problem is that clinics do not offer services after hours, on weekends and holidays when workers can attend clinics especially since many employers don't allow them to go during working hours.
- Mobile clinics often do not offer a comprehensive package of services
- Emergency services are extremely poor and often non-existent
- Lack of telecommunications services
- Lack of information regarding their rights to access social grants and little or no information or education on health, sexual and reproductive health, and other related matters.
- Provisions for home-based care for the terminally ill is difficult
- The National Department of Health was requested to respond to the concerns raised by the SAHRC (outlined above) . The response provided is summarised below:

- The Department acknowledged the problems identified by the SAHRC and stated that these were in part due to
- the difficulty in staffing rural clinics as a result of the exodus to urban areas and overseas, as well as a loss of health care professional to AIDS.
- the lack of knowledge and prompt medical care which contributed to high maternal mortality rates
- TOP facilities are concentrated in urban areas
- there was a lack of cervical screening and genetic services in some areas
- and that strengthening the DHS was the best way to address the health issues of farming communities.

2.3.2 Strategic Health Programmes

2.3.2.1 The Syndromic Management of HIV/AIDS, STIs and TB⁴⁹

The Strategic Plan for HIV/AIDS and Sexually Transmitted Infections (STIs) was adopted in 2000. The plan corresponds with international instruments to which South Africa is a signatory such as the Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases, and the Ungass Declaration of Commitment on HIV/AIDS.

The Strategic Plan calls for a partnership with civil society and outlines four strategic areas: prevention of infection; treatment, care and support; human and legal rights; and monitoring, evaluation and research.

New Policies and Guidelines

The following policies and guidelines were formulated in 2002/03 according to information provided by the NDoH after the workshop on first draft of the 5th ES Report:

Prevention of mother-to-child transmission

- Guideline for management of transmission of HIV and STI in sexual assault cases, 2002
- Training in PMTCT and infant feeding in the context of HIV/AIDS, 2003
- Revised HIV/AIDS protocol and PMTCT, 2003

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- Monitoring and Evaluation Framework for PMTCT 2003
- Follow up strategy for mothers and babies 2003

Voluntary Counselling and Testing (VCT)

- Guidelines on pre and post test counselling 2002
- Guidelines on ongoing counselling 2002
- Guidelines on group information session 2002
- Guidelines on couple counselling 2003
- VCT sites assessment document 2003

Community Home Based Care (CHBC)

- Integrated Community Home Care (IHC) in South Africa 2002
- Integrated Home /Community based care models options 2002
- STI Prevention and Care
- National STI guidelines revision and reviewing process, June 2002

A new phase of the awareness campaign was launched in September 2002 with R98 million of government funding in partnership with organisations such as Love-Life. Three hundred and fifty million condoms were distributed during the campaign. The distribution of the female condom was expanded from 114 to 203 sites, an increase of 78 per cent. Female condoms are distributed in addition to male condoms in six of the national departments. The South African AIDS vaccine initiative was scheduled to start clinical trials in 2003. Traditional healer task teams were established in all the provinces to assist in the fight against AIDS.

The following information was obtained from the Annual Report of the NDoH, the South African Year Book and from the responses to the SAHRC's protocol.

2.3.2.2 Prevention of Mother to Child Transmission (PMTCT)

After the Constitutional Court ruling to roll out Nevirapine to all who are prescribed the drug, all the provinces received guidelines for implementation of the PMTCT package and will expand services according to their capacities. The GT, WC, KZN and the NW Departments of Health have already begun rolling out Nevirapine to pregnant HIV positive mothers and their babies.

Approximately 1 200 nurses and doctors were trained in 2002 to facilitate the growth of the programme.

According to the NDoH's Annual Report, a total of 650 sites were established by January 2003 bringing national coverage to about 60 per cent of facilities providing antenatal care. At the time of writing, all the provinces had actually begun rolling out nevirapines to pregnant HIV positive mothers and their babies according to the NDoH.

The NDoH provided the following additional information after comments from them were solicited following the workshop where stakeholders were invited to offer a critique of the draft reports.

HIV/AIDS Prevention and Treatment

- VCT sites increased from less than 982 to 1700 (although Annual report says 472 in March 2002 and 1 625 operational sites in March 2003]
- CHBC organisations increased from around 400 to 892 organisations
- Ongoing STI/HIV and minor ailment support for 10 after hour roadside clinics targeting the long distance trucking industry
- 80 per cent of the public health facilities have a health worker trained in STIs
- Training of trainers (TOT) on the comprehensive approach (HIV/AIDS/STI and TB) completed
- 30 per cent of districts have implemented the District STI Quality of Care Assessment (DISCA) as monitoring and evaluation (M&E) tool
- National STI Baseline Assessment conducted, May 2003
- Male condom distribution increased from 250 million in 2000 to 350 million in 2002
- Male condoms are distributed in all 26 government departments. Female Condoms are distributed in addition to male condoms in 6 of the departments (23 per cent).
- Access to female condoms increased from 27 sites in 2000 to over 200 sites in 2002

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- Integration of VCT into Maternal and Child Health Care Services
- Implementation of the first Youth Risk Behavioural Surveillance Survey (BBS) in 2003

Cooperation between private and public services

- 360 Health Care Professionals from professional unions, organisations and associations trained in HIV/AIDS/STI and TB fundamentals, capacity building and HIV/AIDS/STI/TB and employment
- Provision of technical support to the mine sector on STI and TB
- Appointment of two traditional healers in the HIV/AIDS and TB directorate
- Department of Health trained 120 master trainers who in turn trained 429 Local Government Councillors and officials as an integration of HIV/AIDS at Local Government level

Unequal distribution of resources

- The conditional grant from HIV/AIDS to the provinces including expanding VCT and PMTCT will increase significantly (from R210 million in 2002/3 to R334 million in 2003/4)
- The Department aims to address the infrastructure issues relating to the provision of VCT services. The R90 million grant from Germany will allow for construction of counselling rooms at existing facilities
- Public service interdepartmental HIV/AIDS interventions
- 25 of 26 departments (96 per cent) have HIV/AIDS policies. Senior managers were appointed in 22 (85 per cent) of these departments. Half of the Government departments have a budget for their HIV/AIDS Programmes.
- Expanding the Partnership and Support Against AIDS (NGO Funding)
- Establishment of 30 new partners of Women's organisation

2.3.2.3 Tuberculosis

Tuberculosis is one of the leading causes of death in South Africa and is the most common opportunistic disease associated with HIV/AIDS. The South African Year Book 2002/03 states that the epidemic is growing by about 20 per cent a year and can be attributed to high levels of poverty, especially in the rural areas where 75 per cent of the poor reside and where health care services are under-developed and often inaccessible. A TB team has been set up at national level while all the provinces have TB co-ordinators. A reporting system which tracks the outcomes of all infected patients has been implemented countrywide. In June 2002, the number of Directly Observed Therapy (DOT) districts increased to 150. In January 2002 the Government launched the National Medium Term Development Plan for the National TB Control Programme. The plan aims at achieving the following goals by 2005:

- a cure rate of between 80-85 per cent;
- decreasing the treatment interruption rate to 10 per cent
- detecting 70 per cent of estimated new smear positive TB cases.

It aims to achieve these objectives through improving accessibility and efficiency of laboratory services. Table 9 is a compilation of data provided by provincial departments and shows percentages of infectious diseases in the provinces.

Table 9: Infectious Diseases

<i>Province</i>	<i>HIV prevalence estimates for 2002</i>	<i>STD s</i>	<i>TB</i>
EC	23.6	-	-
FS	28.8	5.0	0.6
GT	31.6		35
KZN	36.5	3.8	*
LO	15.6	6.3	0.3
MP	28.6	20	*
NC	15.9	-	-
NW	26.2	-	13.7
WC	12.4	2.7	0.9
National	26.5		

** denotes irrelevant information provided Source: Data compiled from STDs and TB of Provincial Departments of Health submitted to the SAHRC, HIV prevalence is sourced from Department of Health's 2003. National HIV and Syphilis Antenatal Sero-Prevalence Survey in South Africa: 2002*

2.3.2.4 Home-based care⁵⁰

Home-based care (HBC) comprises three legs: The Integrated Strategy on Children and Youth Affected/Infected with HIV/AIDS, Step-down Facilities, and Home-based Care Services. These programmes are intended to provide an integrated package of care to the chronically ill, the aged, HIV/AIDS and TB patients.

The table below summarises the distribution of HBCs.

Table 10: Distribution of Community and Home-based Care⁵¹

<i>Province</i>	<i>No. of CHBC projects</i>	<i>No. of beneficiaries</i>	<i>No. of caregivers</i>	<i>No. getting stipends</i>
EC	160	2 420	-	-
FS	60 per cent of towns	-	1 046	440 (R500 pm)
GT	69	28 616	1 470	-
KZN	142	89 199	17 212	7 404
LO	44	57 124	534	335
MP	65	-	-	-
NC	23	2 715	498	374 (R800 pm)
NW	162	17 931	1 133	147
WC	39	9 850	634	-

Source: National Department of Health Annual Report 2002/03

2.3.2.5 Provincial Sphere

2.3.2.5.1 HIV/AIDS Prevention and Treatment

The FSDoH reported that programmes for rapid HIV/AIDS testing and counselling were being finalised by the National Department of Health and would be instituted when these were completed. The LODOH province reported several programmes under the PMTCT roll out plan: however, no descriptions of these were provided.

A policy on the care of abandoned children brought in by police and those who were left behind in hospital wards by relatives indefinitely, was introduced which allowed these children to be admitted. A social worker should be notified to investigate the situation.

The roll out of Nevirapine under the PMTCT programme to all districts was extended beyond the two pilot sites in each province in compliance with the order made by the Constitutional Court. Antiretroviral therapy was also made available to survivors of rape and sexual abuse. Table 11 shows progress made in various programmes.

Table 11: Provincial Achievements in the PMTCT, VCT and HBC Programmes

<i>Province</i>	<i>PMTCT Achievements</i>	<i>VCT Achievements</i>	<i>Operational VCT Sites</i>	<i>HBC Achievements</i>
EC ⁵²	*	Personnel trained in 70 per cent of pilot sites	199	-
FS	-	Implemented in all five districts and 2 non-medical sites; Extensive training of volunteers and health care professionals; 15 763 HIV tests administered	149	-1 046 caregivers trained 60 trainers trained 410 NGOs registered
GT	100 per cent coverage for PMTCT 89 697 women tested since inception	84 VCT units operational; 40 000 people tested	80	-
KZN	56 per cent implemented	Four VCT established	109	*
LO	Systems in place in all six districts, 84 counsellors trained	*	401	-
MP	-	-	97	-
NC	Roll out of the PMTCT started December 2002 at three hospitals Provincial and district AIDS councils formed in five districts	93 VCT sites established in five districts 130 counsellors trained 455 professional nurses trained	87	
NW	*	*	256	Programmes established in five districts; 498 caregivers trained 377 caregivers receive R800 per month
WC	84 per cent of pregnant mothers have access to PMTCT programme	VCT implemented at medical sites 120 counsellors trained offering VCT at 150 medical sites	247	Training instituted in all regions

Source: Figures for PMTCT, VCT and HBC taken from responses from provincial departments to the SAHRC's protocols Operational VCT Sites from National Department of Health Annual Report 2002/2003

*- denotes no information provided; *denotes irrelevant information provided*

The NWDoH reported that its target was to reduce STDs by 30 per cent in five years. In 2001, only a 3,6 per cent reduction was recorded. No figures were given for this reporting period.

Since government responses did not, in the main, provide comprehensive and reliable statistics, the following information was obtained from *the Nelson Mandela / HSRC Study of HIV/AIDS: South African National HIV Prevalence, Behavioural Risks and Mass Media*.

HIV Prevalence

The study estimates the overall HIV prevalence in the South African population (over the age of two) to be 11,4 per cent. HIV prevalence among those aged 15-49 was 15,6 per cent.

Gender

Females accounted for 12,8 per cent of those testing HIV-positive, while 9,5 per cent of males tested positive. Amongst the youth (15-24), double the number of females (12 per cent) was infected as males (6 per cent). Women are biologically more susceptible to HIV infection than men. Men are also more effective at transmitting the virus as semen is more infectious than vaginal fluid. Women may also have undetected sexually-transmitted infections, which increase the risk of HIV-infection.

Race

HIV prevalence among Africans was highest (12,9 per cent). This can be explained by historical factors, such as labour migration and relocation, as well as the fact that more African people live in informal settlements.

The infection rate among whites was 6.2 per cent. This is considerably higher than countries with predominantly white populations such as the US, Australia and France, where prevalence among whites is less than 1 per cent. Prevalence among coloureds was 6.1 per cent and among Indians, prevalence was 1,6 per cent.

Table 12: HIV prevalence by sex and race

<i>Sex and race</i>	<i>N</i>	<i>HIV+(per cent)</i>	<i>C.I.</i>
Total	8 428	11,4	10,0-12,7
Male	3 772	9,5	8,0-11,1
Female	4 656	12,8	10,9-14,6
African	5 056	12,9	11,2-14,5
White	701	6,2	3,1-9,2
Coloured	1 775	6,1	4,5-7,8
Indian	896	1,6	0-3,4

Table 13: Provincial HIV prevalence

<i>Sex and race</i>	<i>N</i>	<i>HIV+ (per cent)</i>	<i>C.I.</i>
Total	8 428	11,4	10,0-12,7
Western Cape	1 267	10,7	6,4-15,0
Eastern Cape	694	6,6	4,5-8,7
Northern Cape	1 579	8,4	5,0-11,7
Free State	540	14,9	9,5-20,3
KwaZulu-Natal	626	11,7	8,2-15,2
North West	896	10,3	6,8-13,8
Gauteng	1 272	14,7	11,3-18,1
Mpumalanga	550	14,1	9,7-18,5
Limpopo	679	9,8	5,9-13,7

Age

The highest prevalence rate was among the 25-29 age group (28 per cent), followed by the 30-34 group (24 per cent). The prevalence rate for children 2-14 was unexpectedly high at 5.6 per cent and it remains unclear how these children were infected since transmission is through exchange of bodily fluids.⁵³

Locality type

People living in urban informal settlements have the highest HIV prevalence (21.3 per cent), followed by formal urban areas (12.1 per cent). Tribal areas have a rate of 8.7 per cent and farms 7.9 per cent.

The mobility and transient nature of life in informal settlements, rather than socio-economic status, makes those living in these areas most vulnerable to HIV. This is reflected in the finding that 23,5 per cent of men living in informal settlements reported more than one sexual partner in the past year, in comparison to 19,2 per cent in tribal areas, 10,2 per cent in urban formal areas and 8,2 per cent in farms. Youth (15-24) in informal settlements also showed a significantly higher rate of sexual experience (74 per cent) than their peers in rural areas (58,3 per cent) and formal urban areas (53,2 per cent).

There was no significant difference in HIV prevalence between those working (14,2 per cent) and not working (12,1 per cent). Wealthy Africans and less wealthy Africans had similar levels of risk.

Voluntary counselling and testing (VCT)

It was found that 18,9 per cent of respondents over 15 years of age had previously had an HIV test and were aware of their status. The main reasons for HIV testing however, were for insurance purposes, and in relation to pregnancy. It was also noted that nearly two thirds of those who were found to be positive in the study did not believe they were at risk of HIV infection.

There was high awareness of VCT services, although only one in five of those who were aware of services had made use of them. Concerns of people who had not been tested included confidentiality, cost and quality of services.

Behavioural changes

The study found that there have been significant changes in sexual behaviour in South Africa over the past four years, when compared with the 1998 Demographic and Health Survey. The number of women who had no current sexual partner had increased, and condom use has increased significantly. Amongst women aged 15-49, condom use at last sexual intercourse has more than tripled, from 8 per cent in 1998 to 28.6 per cent, and amongst women aged 20-24 it has increased from 14,4 per cent to 47 per cent.

Condom use amongst sexually active youth aged 15-24 is high, with 57,1 per cent of males and 46,1 per cent of females having used a condom at last sexual intercourse. This is supported by high levels of perceived access to condoms — with over 90 per cent of youth and adults reporting that they could obtain a condom if they needed one. Condoms were most likely to be obtained through the DoH's free condom programme from public sector clinics and hospitals.

Only 55.6 per cent of males and 57.9 per cent of females aged 15-24 had previously had sex, and there were very low levels of partner turnover. Of youth that were sexually active, 84,7 per cent reported that they had only one partner in the past year. For adults aged 25-49, the rate was 93,5 per cent.

Self-reported behaviour change as a result of HIV/AIDS was also high. Nearly half of all males and over a third of females over 15 years reported that they had changed behaviour. Steps taken included staying faithful to one partner, condom use, sexual abstinence and reducing the number of sexual partners.

The Report concluded :

It is important that a prevention and care strategy should include increased voluntary counselling and testing services, coupled with access to better nutrition, improved healthy living and access to treatment using antiretroviral therapy. Such a strategy would help to alleviate the plight of people living with HIV/AIDS

2.4 Legislative measures

2.4.1 National Sphere

The Medical Schemes Amendment Bill and the Occupational Diseases in Mines and Works Amendment Bill were promulgated into law during this period. Several other bills were tabled (see Table 14), notably the National Health and the Children's Bill.

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The table below summarises major legislative developments during the reporting period. The table and much of the discussion is based on an article in the SA Health Review 2002⁵⁴.

Table 14: Summary of Bills Drafted, and Passed in 2002/2003 and their key impacts⁵⁵table

<i>Bill</i>	<i>Drafted</i>	<i>Passed</i>	<i>Key Impact</i>
Mental Health Act no 17of 2002		*	Protects the interests of the mentally ill and provides for de-institutionalisation
Medical Schemes Amendment Bill (B37-2002)		*	Regulation of the Practice of Brokers Bill
Occupational Diseases in Mines and Works Amendment (B39-2002)		*	Owners of mines to paycompensation to workers who contract diseases while in their service within two years
Medicines and Related Substances Amendment Bill (B40-2002)		*	Provide for appointment of deputy registrars; regultions on marketing of medicines, council to licence manufacture, importation and exportation of medicines
The Nursing Amendment Bill	*		Updates nursing legislation in line with health policies adopted since 1994
Children's Bill	*		Will replace the Child Care Act No.96 of 1983 and provides for primary and secondary prevention approaches to support vulnerable children and families
Older Person's Bill B68-2003	*		Protects the rights of older persons against abuse

Source: *South African Health Review 2002*

2.4.1.1 The Mental Health Care Act 17 of 2002

This legislation was passed in June 2002. Its intended impact is to provide legal protection and recourse for the mentally ill and it serves to protect their interests. Provinces are now obliged to align their legislation and practices with nationally determined guidelines. The mentally ill, who often suffer neglect and stigmatisation, are now offered protection against abuse. The policy of de-institutionalisation of people into home- or community-based care programmes is under-funded and does not have the capacity to provide quality care for these people. To release the mentally ill into the care of families and communities who are already carrying the double burden of poverty and the ravages of AIDS serves to shift the responsibility of the State onto the shoulders of the people. De-institutionalisation may be an option in rich countries where families can carry the costs but it seems to be an additional burden for poor families in South Africa.

2.4.1.2 The Medical Schemes Amendment Act 62 of 2002

The amended Bill was adopted by Parliament in October 2002. The amendment provides for a definition of a “broker” and for the accreditation of brokers by the Council. In essence the Bill provides for the regulation of the practice of brokers – a gap in the principal Act. In the memorandum to the Bill the drafters provide reasons for the need to regulate brokers: “... there has been some lack of clarity on how medical schemes brokers should be regulated in their conduct of business, in particular, as to what extent they can be regulated by the Financial Services Board”. The Council for Medical Schemes agreed with the Financial Services Board in February 2002 on how to jointly regulate the conduct of business by medical schemes brokers, thereby ensuring that there is no inadequacy in such regulation.

2.4.1.3 The Occupational Diseases in Mines and Works Amendment Act 60 of 2002

The Bill was debated and passed by Parliament in October 2002. The amendment provides for owners of mines to pay compensation to workers who contract diseases while in their service. This is an important amendment given that employers often “walk away” from their employees who become sick from diseases contracted at work (cf. the asbestosis case currently being fought in the Royal Courts of England). This Act protects workers from third parties infringing on their rights to compensation.

2.4.1.4 The Medicines and Related Substances Amendment Act 59 of 2002

The objective of the Medicines and Related Substances Amendment Act is to amend the Medicines and Related Substances Act 101 of 1965. The amendments provided for:

- the appointment of deputy registrars of medicine;
- regulation by the Minister, after consultation with relevant stakeholders, of the marketing of medicines;
- recording, use and manufacture of certain scheduled drugs; and
- the Council to licence the manufacture, importation and exportation of medicines.

This Act serves to regulate the manufacture and marketing of medicines and related substances and to make them more accessible to the public in terms of prices. It protects the consumer from the high price structures of imported medicines.

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2.4.1.5 Regulations and notices promulgated during 2002

A large number of regulations and notices were promulgated during 2002.

To protect the public from malpractices and to promote high standards by a range of health professionals who were previously unregulated, regulations on the constitution of boards for the following health professional groupings were issued during 2002: The Professional board for Therapeutic Aromatherapy, Therapeutic Massage Therapy and Therapeutic Reflexology; Professional board for Homeopathy, Naturopathy and Phytotherapy; Professional board for Chiropractic and Osteopathy; Professional board for Ayurvedic and Chinese Medicine and Acupuncture.

Notices for the commencement of community service for a range of health professionals were also promulgated during 2002. These included: dietetics; clinical psychology; environmental health; occupational therapy; physiotherapy; radiography; and speech, language and hearing therapy. These health professionals are mostly only available to public sector health care users in urban areas, and even here they are in short supply. The extension of community service to these categories of health professionals should improve access to them in rural and underserved areas of the country in 2003 when this notice comes into effect.

2.4.1.6 Bills drafted during 2002

2.4.1.6.1 The National Health Bill

The Draft National Health Bill⁵⁶ was revised after public comment and it is hoped that it will be passed in 2003. Passage of the Bill will provide overarching framework legislation to regulate and ensure uniform policies and services across provinces, in line with all the constitutional provisions relating to health care. It concretises the vision outlined in the White Paper⁵⁷ for transformation of the health care system in South Africa. It also outlines structures and mechanisms for the progressive realisation of the right to health care.

It is interesting to note that while section 7 (2) of the Constitution provides for the State to respect, protect, **promote** and fulfil the right, section 3 (1) of the Bill states: “The Minister must, within the limits of available resources (a) endeavour to protect, promote, improve and maintain the health of the population”. While the Constitution places an obligation on the State in terms of section 7 (2), the Bill requires the Minister only to “endeavour”. In addition, the term “fulfil” as defined by the Committee of ICESCR has a different connotation to the terms “improve” and “maintain”.

A few key steps to create more certainty and to accelerate the full implementation of the District Health System (DHS) have also been taken and should be welcomed in view of the fact that the Constitution does not define the functions of municipal health services. A joint Department of Health and

Department of Provincial and Local Government technical team proposed a definition of municipal health services to the two respective ministers as well how to implement it and who should render the services. The proposal was accepted and included in the DHS chapter of the revised National Health Bill.

The proposals say that metropolitan and district municipalities should render municipal health services which are defined as environmental services, e.g. sanitation etc., with the exception of the control of malaria, hazardous substances and port health which will be provincial responsibilities. The proposal calls for these additional municipal services to come into effect after two years.

The Health Minister and other Members of the Executive Committee for Health (MINMEC) subsequently discussed the proposals related to the DHS in the Bill. The MINMEC made a range of decisions to strengthen the implementation of the DHS. These included:

- focusing on functional integration over the next two years;
- signing service level agreements between provinces and municipalities to improve efficiency and accountability; and
- a costing of services rendered by municipalities be urgently completed to assist the negotiations around the funding of municipal health services and primary health services in general.

2.4.1.6.2 The Nursing Amendment Bill

The Nursing Act No. 19 of 1997 is in the process of being reviewed and a Bill to replace the Act is being prepared. The South African Nursing Council (SANC) has recognised that the current Act is inadequate to meet the challenges facing the nursing profession to implement health policies adopted since 1994.

Changes to the Act are likely to be based on the recommendations made by a Committee appointed by the Minister to review the functioning of the professional boards. This implies that it is expected that 2003 should see amendments proposed to the legislation that governs all professional boards, e.g. the Health Professional Council of South Africa and the Pharmacy Council.

2.4.1.6.3 The Children's Bill

A draft bill has now been published and is expected to be tabled in Parliament for debate and passage in 2003. The Child Care Act 74 of 1983 has been under review for the past five years. While the 1983 Act focused on tertiary interventions and the institutionalisation of children in need of care, the new Bill provides for primary and secondary prevention approaches to support children and families in poverty and those otherwise at risk of vulnerability. This development has major implications for improvements in children's health and therefore for the whole health care system. The new Bill also envisages inter-

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sectoral co-ordination, with the Department of Health expected to play a role in implementing the Act.

Children's health care rights have been extended in the draft Bill as follows:

- Female genital mutilation or the circumcision of female children as a cultural practice is prohibited;
- Every child has the right to refuse to be subjected to virginity testing, including virginity testing as part of a cultural practice, and not to be subjected to unhygienic virginity testing;
- Every male child has the right to refuse circumcision, and not to be subjected to unhygienic circumcision; and
- Every child has the right to have access to information on health promotion and the prevention of ill-health and disease, sexuality, and reproduction; and confidentiality regarding his or her health status and the health status of a parent, care-giver or family member, except when maintaining such confidentiality is not in the best interests of the child.

2.4.1.6.4 The Older Persons Bill

The Bill is to be welcomed since it protects the rights of older persons and makes their abuse punishable by law. The Bill provides for

- special programmes for the development of older persons
- makes provisions for ensuring an enabling environment for the care of older persons
- protects their rights in facilities, and against abuse

2.4.2 Provincial Sphere

The EC, FS, KZN, and the NW Departments of Health reported no new legislative measures.

The GTDoH reported the following legislation:

- the GTDoH Ambulance Service Act No 6 of 2002 was passed, which provides for the regulation of ambulance service delivery and matters connected therewith;
- Ambulance Service Regulations were drafted;

- Amendment Regulations and Tariffs relating to Ambulances, Notice 2584 and 2982 of 2002, and 657 of 2003, were also passed; and
- participation in the finalisation of the National Health Bill

The NWDoH gave a detailed description of national legislation but failed to report on legislation passed by its own legislature. It did, however, mention that the Provincial Health Bill would be amended to conform to the National Health Act when it is passed, which is expected to occur during 2003.

2.4.3 Jurisprudence

The most notable development was the TAC case. The implementation of the Government's HIV/AIDS Strategic Plan 2000-2005, namely the PMTC Programme was challenged by TAC. The Constitutional Court, in 2002 confirmed the finding of the High Court which had found the Government's policy to limit Nevirapine to research and training sites to be in "breach of the States obligations under section 27(2) read with 27(1)(a) of the Constitution." The Court utilised the test of "reasonableness" as expounded by Justice Yacoob in the Grootboom case. In evaluating the policy to limit Nevirapine (an anti-retroviral drug) to research and training sites, the Court ruled that the "Government policy was an inflexible one that denied mothers and their newborn children ... the opportunity of receiving a single dose of Nevirapine" in public sector facilities outside the pilot sites.

The Court also ruled that "waiting for a protracted period" to make it available was "not reasonable" within the meaning of section 27(2) of the Constitution. The Court further ruled that the State is obliged to ensure that children are accorded protection contemplated by section 28. In this case, children born in public hospitals and clinics to mothers who are for the most part indigent and who require the protection of the State.

The Constitutional Court declared that:

a) Sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.

b) The programme to be realised progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.

c) The policy for reducing the risk of mother-to-child transmission of HIV as formulated and implemented by government fell short of compliance with the requirements in subparagraphs (a) and (b) in that:

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i) Doctors at public hospitals and clinics other than the research and training sites were not enabled to prescribe Nevirapine to reduce the risk of mother-to-child transmission of HIV even where it was medically indicated and adequate facilities existed for the testing and counselling of the pregnant women concerned.

ii) The policy failed to make provision for counsellors at hospitals and clinics other than at research and training sites to be trained in counselling for the use of Nevirapine as a means of reducing the risk of mother-to-child transmission of HIV.

Government was ordered without delay to:

- Remove the restrictions that prevent Nevirapine from being made available at public hospitals and clinics that were not research and training sites,
- Permit and facilitate the use of Nevirapine,
- Make provision for counsellors based at public facilities to be trained and
- Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

The Court did not rule on formula feed to be made available in the public health sector.

In effect the Court's decision obliged government to roll out the PMTCT programme in spite of the objections raised by government. It is also interesting to note that in the TAC case, the Constitutional Court's order to provide Nevirapine to all pregnant mothers and their babies was based on the concept of "reasonableness" rather than "minimum core entitlements" as defined by the Committee.

Another important case in which TAC was also involved was one regarding the pricing of ARVs in order to ensure that the right to life is placed before profiteering. In September 2002, the AIDS Law Project lodged a complaint to the Competition Commission of South Africa on behalf of TAC, COSATU, CEPPWAWU, a number of people living openly with AIDS, health workers treating people with AIDS and the AIDS Consortium.⁵⁸ The complainants alleged that GlaxoSmithKline and Boehringer Ingelheim (two giants of the pharmaceutical industry) were acting in violation of Competition Act 89 of 1998, by charging excessive prices for their ARVs and that this was directly responsible for the premature, predictable and avoidable deaths of people, including children living with AIDS. A comparative analysis of the price of patented drugs and generic medicines shows that even when allowance is made

for the cost of research and development, profits, licensing fees and incentives to develop new drugs, the prices of patented drugs remain excessive. This action gained much publicity and international support.

Although the resolution of this matter falls outside of this reporting period, it is however, worth noting that at the time of writing, this matter was resolved in favour of the Complainants.⁵⁹ The Competition Commission investigated the complaint and found that the drug prices were in fact excessive. It also expanded its investigation to include the allegation that the Respondents refused to grant generic drug manufacturers access to an essential facility, namely, the patent on Retrovir, Lamivudine, Combivir and Nevirapine. The Respondents had repeatedly refused to issue licenses to manufacture antiretroviral drugs to generic manufacturers in South Africa.

Before the Competition Commission could refer the matter to the Competition Tribunal for adjudication, the Respondents indicated that they would be willing to reach a settlement.

2.5 Budgetary Measures

2.5.1 National Sphere

The 2002 Budget Review places special emphasis on reducing poverty and vulnerability by funding social grants and increased interventions to address the impact of communicable diseases such as AIDS.

The budget was divided into three programmes:

1. Administration which refers to activities related to the overall management of the Department
2. Strategic Health Programmes which incorporate sub-programmes that focus on key health interventions such as HIV/AIDS, STIs and TB. The AIDS related sub-programme accounts for more than half of the programme's budget
3. Health Services

The following table summarises the appropriation statement for the NDoH:

Table 15: NDoH Appropriation Statement 2002/2003

<i>Programme</i>	<i>Revised Allocation R'000</i>	<i>Actual Expenditure R'000</i>	<i>Savings R'000</i>	<i>Expenditure as per cent of revised allocation</i>
Programme One - Administration				
Current	83 284	83 646	- 362	100 per cent
Capital	11 020	9 258	1 762	84 per cent
Subtotal	94 304	92 904	1 400	99 per cent
Programme Two - Strategic Health				
Current	1 344 273	1 324 795	19 478	99 per cent
Capital	3 046	1 258	1 788	41.00 per cent
Subtotal	1 347 319	1 326 053	21 266	98 per cent
Programme Three - Health Service Delivery				
Current	5 483 766	5 434 172	49 594	99 per cent
Capital	728 608	727 381	1 227	100 per cent
Subtotal	6 212 374	6 161 553	50 821	99 per cent
Grand Total	7 653 997	7 580 510	73 487	99 per cent

Source: Department of Health Annual Report 2002/2003 p82

From the above table, the total allocation to the NDoH was R7,65 billion, which is an increase of approximately R1 billion from the previous financial year (i.e. R6 736 441 000 for 2001/2002). There was 1 per cent underspending in 2002/2003 which is a slight increase in underspending from 2001/2002 (when only 0,003 per cent of the budget was unspent). According according to the NDoH, 1 per cent underspending is acceptable financial practice.

A study of the details for Programme 1, Administration as provided by the audited financial statement, reveals that the three major expenditure items were personnel, administration, and professional and special services which received allocations of R45 734 000, R20 237 000 and R10 782 000 respectively. Personnel costs in this programme still account for the major portion of this budget.

The budgets for the subprogrammes of Programme 2- Strategic Health Programmes is given in the table below:

Table 16: Programmes 2: Strategic Health Programmes

<i>Subprogrammes</i>	<i>Revised Allocation R'000</i>	<i>Actual Expenditure R'000</i>	<i>Savings R'000</i>	<i>Expenditure as per cent of revised allocation</i>
District Health Systems	2 555	2 476	79	97 per cent
International Liaison	37 177	31 376	5 801	84 per cent
SA Developing Communities	2 049	2 361	- 312	115 per cent
Health Monitoring & Evaluation	164 429	161 831	2 598	98 per cent
Maternal, Child & Women's Health	631 521	624 499	7 022	99 per cent
Medicines Regulatory Affairs	20 845	21 330	- 485	102 per cent
Mental Health & Substance Abuse	6 060	4 972	1 088	82 per cent
HIV/AIDS, STIs & TB	463 041	459 951	3 090	99 per cent
Pharmaceutical Policy	16 969	17 257	- 288	102 per cent
Medical Schemes	2 673	0	2 673	0 per cent
Total	1 347 319	1 326 053	21 266	98 per cent

Source: Department of Health Annual Report 2002/2003 p91

The syndromic management of HIV/AIDS, STIs and TB received the biggest proportion of this budget, followed by Maternal, Child and Women's Health and Health Monitoring and Evaluation. According to the NDoH, the over spending by individual sub-programmes has been small which, in combination with greater under spending, resulting in a small surplus. The HIV/AIDS cluster spent 99 per cent of its budget; under spending by the cluster for Maternal, Child and Women's health was largely as a result of a problem in filling of specialised medical positions. Fluctuations in the rand/dollar exchange rate accounted for the rand value of transfers for international commitments such as membership fees for the WHO. Overall, the Department spent 98 per cent of the funds allocated for Strategic Health Programmes.

The budgets for projects falling under Health Service Delivery Programmes is given in Table 17 below.

Table 17: Health Service Delivery Programme 2002/2003

<i>Programme</i>	<i>Revised Allocation R'000</i>	<i>Actual Expenditure R'000</i>	<i>Savings R'000</i>	<i>Expenditure as per cent of revised allocation</i>
Disease Prevention & Control	260 444	217 487	42 957	84 per cent
Hospital Services	5 884 943	5 885 086	-143	100 per cent
Human Resources	6 532	6 789	-257	104 per cent
Non-personal Health Services	58 201	51 157	7 044	88 per cent
Health & Welfare Negotiations	2 254	1 034	1 220	46 per cent
Total	6 212 374	6 161 553	50 821	99 per cent

Source: Department of Health Annual Report 2002/2003 p93

2.5.2 Provincial budgets⁶⁰

The provincial departments of health are responsible for key health care services delivery and receive the largest portion of the health vote.

2.5.2.1 Overall budget and expenditure trends- Key Features

According to the Intergovernmental Fiscal Review (IGFR) on health⁶¹, the expenditure by provincial health departments was around R33,2 billion in 2002/2003. The majority of South Africans are covered by the public sector⁶² which comprises 13.3 per cent of consolidated national and provincial non-interest expenditure.

The key features of the provincial health budgets are:

- Substantial increases for health services especially in the previously disadvantaged provinces
- Large increases in the Hospital Revitalisation Programme
- Strengthening in the HIV/AIDS Strategy
- R500 million rising to R1billion annually for a new system of rural incentives and scarce-skills strategy

Table 18: Health expenditure by province

	<i>2001/02 Actual Exp.</i>	<i>2002/03 Actual Exp.</i>	<i>per cent Growth 2001/02 to 2002/03</i>	<i>MTEF 2003/04</i>	<i>Per capita exp. including conditional grants</i>	<i>Exp. per capita as a per cent difference from the national average**</i>
	<i>R million</i>	<i>R million</i>	<i>per cent</i>	<i>R million</i>	<i>Rand</i>	<i>per cent</i>
Eastern Cape	3 892	4 377	12,4	5 118	668	-13,9
Free State	1 954	2 242	14,8	2 475	969	8,2
Gauteng	6 838	7 675	12,2	8 112	1580	52,3
KwaZulu-Natal	7 030	7 534	7,2	8 056	939	5,4
Limpopo	2 664	3 180	19,4	3 466	586	-27,3
Mpumalanga	1 457	1 712	17,6	2 102	635	-19,9
Northern Cape	517	604	16,7	737	876	1,6
North West	1 699	1 949	14,7	2 357	628	-21,7
Western Cape	3 706	3 964	7,0	4 430	1261	14,7
Total	29 757	33 238	11,7	36 852	911	

*Exp= Expenditure. *Per capita expenditure includes conditional grants. **These percentages exclude conditional grants.*

The nine provinces are responsible for the major portion of health care delivery and received a combined budget for health expenditure amounting to R33,2 billion in 2002/03 which is expected to rise to R36,9 billion in 2003/04, including conditional grants. Of this, about R6,0 billion was budgeted for out-of-hospital primary health care delivery at the clinic level.

Local Government also plays a role in relation to environmental health and clinic based primary health care services. Combined budgeted spending of the six largest municipalities, or metros, amounts to R1,1 billion in 2002-03.⁶³

2.5.2.1.1 Significant growth in health budgets

The steady increase in provincial health expenditure budgets, which started in 2000/01 is in order to strengthen the health sector and to intensify a range of specific programmes. There was an average increase of 12,7 per cent in 2001/02 which fell to 11,7 per cent in 2002/03. The average annual growth in real terms is around 2,6 per cent between 1999/00 and 2002/03 which is set to increase to 3.3 per cent between 2002/03 and 2005/06. Most of the provinces saw substantial increases in health expenditure budgets except for Gauteng and the Western Cape (two of the richer provinces) which remained more or less the same.

The percentage increase for the other provinces were as follows: Eastern Cape 2,7-12,4 per cent; Limpopo 5,5-19,4 per cent; Northern Cape 10,6-16,7 per cent; North West 8,8-14,7 per cent. Mpumalanga saw an increase of 30,4 per cent in 2001/02 and 17,6 per cent in 2002/03 while KwaZulu-Natal's health expenditure budget saw an increase of 21,8 per cent in 2001/02 and 7,2 per cent in 2002/03.

2.5.2.1.2 Expenditure per capita

The gap between provinces is still large. Gauteng and the Western Cape spend the largest amounts at R1 580 and R1 183 respectively, while the lowest per capita spent is in the Eastern Cape (R668), Limpopo (R586) and Mpumalanga (R635).⁶⁴ Although the gap between provinces remains large with Gauteng and the Western Cape spending the most per capita, the gap is set to narrow over the medium term because of the above average growth in allocations to the Eastern Cape, North West and Mpumalanga provinces. Significant increases in per capita spending are evident in Mpumalanga, Limpopo (albeit off a very low base) and North West with Limpopo still set at the lower end.

2.5.2.1.3 Reduction in personnel and capital expenditures

The IGFR Report on Health states that due to the continuing trend of reduction in the share of personnel expenditure (from 66,6 per cent in 1999/00 to 58,1 per cent in 2002/03)⁶⁵, more funds should be available to accelerate and improve delivery. However, over the medium term, the budget is earmarked to increase to ensure appropriate levels of health service providers and geographical

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distribution across provinces especially in the rural areas e.g. the doctor patient ratio for the Eastern Cape is 1 : 8 825 while that for Gauteng is 1 : 273. The strategy is aimed at increasing the rural allowance and to broaden its scope to a wider range of health professionals.⁶⁶

Another strategy is a scarce-skill one which is being devised to improve recruitment and retention of health professionals due to losses from high levels of emigration.⁶⁷

2.5.2.1.4 Non-personnel non-capital spending

These include medicines, laboratory services, surgical consumables and other supplies. Expenditure also shows a trend of growing substantially to reach 27,6 per cent in 2002/03 and is projected to increase over the medium term. However, higher price for blood products and the cost of pharmaceuticals tend to absorb a large proportion of this growth.

2.5.2.1.5 Capital expenditure

A major trend is the growth of capital expenditure since 2001/02 mainly due to the Hospital Revitalisation Grant which amounted to around R694 million. This grant targets the funding of strategic revitalization projects, such as upgrading, replacement and transformation of hospitals. The Nkosi Albert Luthuli Hospital in Durban and the Nelson Mandela Hospital in Umtata have been completed. The Pretoria Academic Hospital saw the first phase of work completed. National government funded about 50 per cent of the construction costs.

The following table represents the percentages of total health budgets spent by the provinces.

Table 19: Provincial Total Health Spending⁶⁸

<i>Province</i>	<i>% Revised Budget Spent 2001/02</i>	<i>% Revised Budget Spent 2002/03</i>
ECDoH	96,8	98,6
FSDoH	103,3	97,7
GTDoH	100,5	102,8
KZNDoH	104,3	101,4
LODoH	98,4	100,7
MPDoH	96,1	96,9
NCDoH	101,7	101,3
NWDoH	97,9	101,9
WCDoH	99,5	99,9
Aggregate	99,7	100,6

Source: IDASA :Provincial expenditure briefs for the financial year 2002/03⁶⁹

According to Vennekens-Poane's analysis consolidated overspending on recurrent health expenditure in 2001/02 further increased in 2002/03. With the exception of the MPDoH and FSDoH, all provinces overspent on their recurrent health budgets in the face of positive nominal growth in these budgets.

2.5.2.1.6 Health capital spending

Vennekens-Poane's concludes that although there was an increase in health capital budgets, spending in 2001/02 rose from 86,3 per cent to 86,6 per cent during the fiscal year under review. The figures point to continued under spending of the health capital budget resulting in increased under spending from R338 million in 2001/02 to R342 million in 2002/03.

Provinces such as the ECDoH, NCDoH and NWDoH with exceptionally rapid health capital budget growth, under spent significantly. The WCDoH, on the other hand, with a decreasing health capital budget, under spent by about 19 per cent. GTDoH and LODoH were the only provinces that over spent on the capital budget. In Gauteng, this was facilitated by a decreasing capital budget while in Limpopo, health capital spending increased at a faster rate than the budget. Under spending of the health capital budgets implies that provinces have not increased their capital spending capacity, which impacts negatively on their capacity for efficient service delivery.

The table below shows trend in expenditure on programmes.

Table 20: Trends in expenditure on health programmes

<i>Programme</i>	<i>2001/02 Actual Expenditure</i>	<i>per cent of Total Expenditure 2001/02</i>	<i>2002/03 Estimated Actual Expenditure</i>	<i>per cent of Total Expenditure 2002/03</i>
Administration	1 187	4 per cent	1 351	4 per cent
District Health Services	12 051	40 per cent	13 078	39 per cent
Emergency Health Services	812	3 per cent	1 290	4 per cent
Provincial hospitals	7 878	26 per cent	8 952	27 per cent
Central hospitals	5 022	17 per cent	5 243	16 per cent
Health Sciences & Training	652	2 per cent	851	3 per cent
Support services	417	1 per cent	546	2 per cent
Health facilities	1 542	5 per cent	1 833	6 per cent
Other	196	1 per cent	99	0 per cent
Total	29 757	100 per cent	33 238	100 per cent

The above table shows that the three programmes-District Health Services (which include PHC, HIV/AIDS, Nutrition and District hospitals), Provincial Hospitals and Central hospitals account for the major portion of provincial health spending. A key trend is the decline of spending on Central hospitals while Emergency Health Services, Health Facilities and Administration saw an increase in spending over the medium term as did the other programmes. Primary health care is expected to grow to R6 billion in 2003/04. This in line with government's goals to transform the health system away from secondary and tertiary care to PHC.

In the 2002/03 PHC budget, the estimated actual amount received by clinics was R2,7 billion, Community Health Centers R1,4 billion and Community Based Services R488 million. While the increases are to be welcomed, the amount for Community Based Services needs to be increased especially where communities are poverty stricken.

Table 21: Per capita Primary Health Care expenditure 2002/03 and 2003/04

<i>Province</i>	<i>Rand per capita 2002/03</i>	<i>Rand per capita 2003/04</i>
Eastern Cape	91	106
Free State	183	168
Gauteng	238	243
KwaZulu-Natal	163	174
Limpopo	70	75
Mpumalanga	122	148
Northern Cape	199	246
North West	145	172
Western Cape	213	237
Total	148	160

There are large inequities in PHC expenditure across provinces with the Eastern Cape, Limpopo and Mpumalanga again having the lowest per capita expenditure. This is partly due to greater reliance by rural provinces on district hospitals to deliver primary health care.

2.5.2.1.7 HIV/AIDS

Government increased funding from R345 million in 2001/02 to over R1 billion in 2002/03. This was to focus mainly in preventative measures such as life-skills, condom distribution, voluntary counselling and testing, prevention of mother-to-child transmission and support for the South African Aids Vaccine Initiative, co-funding for Lovelife and treatment for sexually transmitted infections. It also provided funding to strengthen management at provincial level.

2.6 Vulnerable Groups

Policies developed under maternal, child and women's health cater for women and children. In addition PMTCT and VCT cater for HIV positive mothers and neonates. The Children's Bill, when promulgated, will protect the health rights of children. Furthermore, the CHBC programme is designed to cater for the needs of people living with AIDS, and the mentally ill who are de-institutionalised and sent home to be cared for by community based organisations and older persons. The Older Persons Bill provides legal protection for their right to dignity and protection from abuse.

In spite of the fact that most provinces made a general statement that health care services are available to everyone without discrimination, it is evident from the reports that there is a lack of dedicated programmes that address special needs of the elderly, persons with disabilities, and other vulnerable groups. There are no specific interventions, nor dedicated budgets for the majority of the vulnerable groups identified in the SAHRC's protocols, such as child-headed households, girl-children, children with disabilities, homeless persons, AIDS orphans, street children, non-nationals (asylum seekers, refugees, permanent residents), unemployed persons, persons living in informal settlements, prisoners and historically disadvantaged groups. Persons living in rural areas are disadvantaged by poor access to PHC facilities as well as tertiary facilities and also trained caregivers and specialists. Although monetary incentives to retain staff in under-serviced areas (which was recommended in the last ESR report) have been introduced, the rural/urban divide exacerbates the inequities suffered by vulnerable groups who find themselves in conditions of dire poverty.

Furthermore, implementation difficulties prevent provinces from achieving their targets. For example, the number of assistive devices dispensed is far below the required numbers and no specific programmes for the elderly were reported.

3 CHALLENGES FOR REALISATION OF THE RIGHT TO HEALTH CARE

Key challenges faced by the national health system can be summarised as follows:

HIV/AIDS

- The biggest challenge facing Government is the scale of the HIV/AIDS pandemic and the implementation of the National Comprehensive HIV and AIDS Care, Management and Treatment Plan (The plan has various components including ARV treatment, nutritional support, strengthening of the health system including laboratory system, information system, monitoring and evaluation, pharmaco-vigilance, training and human resources, communications)
- Reduction of maternal mortality ratio and infant mortality rate due to AIDS and an increase in life expectancy to meet the Millennium Development Goals
- Provide on-going training and improvement of quality service delivery especially for women and children whose health status is affected by AIDS and compounded by poverty - more women are now dying of AIDS than men
- Scaling up of all targets so as to reach more beneficiaries incrementally
- Implement HIV/AIDS prevention for migrant labourers
- Ensure effective syndromic management of STIs
- Ensure appropriate practices in the private sector and medical insurance industry for the care and treatment of HIV positive clients
- Implement measures to facilitate adoption and psycho-social support of AIDS orphans
- Develop policy on the management of persons with mental illness who are HIV positive
- Increase the distribution and use of male and female condoms
- Preparation of Local Government support programme on HIV/AIDS
- Development of target specific material addressing the issues of stigma
- Integration of HIV/AIDS activities at national, provincial and local level
- Develop protocol for funding of CBOs, NGOs, in collaboration with UNICEF

The District Health System

- The DHS should be made operational as soon as possible
- Service level agreements (SLAs) between the provinces and local governments need to be operationalised and implemented so as to have a uniform standard of health care delivery in all the provinces as well as in the rural areas
- Provincial Departments of Health have not passed or amended their Provincial Health Acts to conform to the revised National Health Bill. Provinces have taken the view that they will focus on their provincial legislation once the national legislation is finalised. It is therefore anticipated that all provinces will be either amending their Provincial Health Acts or finalising Bills for passage in 2004, once the National Health Bill is passed into law.
- The implementation of the National Health Act in all the provinces

Monitoring and Evaluation

- Monitoring and evaluation systems to be improved
- More trained operators to collect data for the DHS required
- Monitoring and evaluation of programmes to be strengthened

Children's Health

- Children- IMCI strategy requires improvements ⁷⁰in
 - in case management skills of health staff through the provision of locally adapted guidelines on IMCI, and activities to promote their use
 - in the health system of effective management of childhood illnesses
 - in family and community practices with regard to prevention and managing illnesses
 - programmes for children, the disabled and other vulnerable groups to be put in place and implemented

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Hospitals and clinics

- Upgrading of hospitals and clinics to be accelerated and efficient quality care with adequate medical and other supplies be made available as soon as is reasonably possible
- Increase the number of mobile clinics and patient transport vehicles and efficient use of ambulances

Administration and Management Systems

- general systems improvement, human resources, procurement and financial management systems
- Managers need special training to be effective
- the high turnover of medical and professional staff to be addressed

Budgetary measures

- fraud and incompetent practices which hinder quality service delivery
- more efficient use of funding and available resources
- There is a need to improve management of funds to ensure that monies spent result in delivery of quality of care and not merely compliance with the PMFA .
- Inequities between the per capita amounts spent in the private and public sector and between provinces should see a narrowing of the gap over time in order that all should enjoy the highest standard of health care possible
- More monies have to be invested in infrastructure development, such as roads to make clinics accessible or provide patient transport. Where this is not immediately possible, well equipped mobile clinics should provide quality care as well be responsible for screening for TB, cervical and breast cancer especially in the rural areas and in informal settlements.

4 CRITIQUE OF MEASURES INSTITUTED

Since 1994, the government has put in place a single National Health System, drafted new policies and legislation to transform and modernise the national health system to be in line with constitutional requirements, international human rights instruments and WHO standards and norms.

Since there were no major policy developments during this reporting period, it was hoped to measure progress made in the implementation of the three key strategic programmes identified in 2.1. utilising the indicators developed by the NDoH.

4.1 The District Health Information System- Indicators

Most of the Departments failed to provide outputs/outcomes for indicators designed by both by the National Department of Health and also those by the SAHRC. They also failed to provide meaningful statistical data and information on budgets for programmes and projects requested by the SAHRC. Efforts to access these from the DG's office responsible for the District Health Information System met with no success. This is of great concern since the information required is available on their database. Furthermore, although the DHIS database is available at provincial level, these Departments too, failed to provide all the information requested. This leads us to surmise that provincial Departments have difficulty in accessing information which requires highly trained and skilled personnel to operate the system.

4.2 Reducing Morbidity and Mortality Rates in Women, Maternal and Children

The NDoH reported that due to financial constraints, some provinces did not implement the Maternity Case Record. Advanced training of doctors and midwives in reproductive health services was also hampered by financial constraints. Programmes for Advanced Midwifery and Neonatal Nursing Science have not been prioritised at provincial level. This impacts negatively on the inquiry into the causes of maternal deaths and points to poor management in this sector. The major cause for maternal deaths in South Africa are HIV/AIDS related and it is not acceptable that some provinces cannot keep records when the District Health Information System is already operational.

As regards Children's Health, the programmes in place record a lowering of infectious diseases. However, the infant mortality rate is recorded to have risen in South Africa and not fallen. Similarly, the maternal mortality ratio has risen – due mainly to the AIDS epidemic. These are important human development indicators whereby a country's development and health status are judged. So, despite the gains made in programmes designed to reduce morbidity and mortality, indicators used to measure a nation's health status reveal a reversal of trends. A comparison of figures from a study by the MRC in 2000⁷¹ and one by the Health Systems Trust show an increase rather than a decrease for infant and adult mortality per cent since 1996.

Table 22: Mortality Estimates for South Africa, 2000

<i>Indicator</i>	<i>Male</i>	<i>Female</i>	<i>Persons</i>
Infant mortality rate per 1000 live births)	62	56	59
Under 5 mortality rate (per 1000 live births)	98	91	95
Total deaths	303 081	253 504	556 585
Adult mortality (per cent)	49,4	35,7	42,9
Life expectancy at birth	52,4		

Source: Health systems Trust Review 2002 p439 Definitions: Infant mortality rate is the number of children less than one year old who die in a year, per 1000 live births. Under 5 mortality rate is the number of children under 5 years who die in a year, per 1000 live births.

Table 23: Mortality Estimates for Provinces, 1998 and 2002

<i>Province</i>	<i>Infant mortality (SADHS , 1998)</i>	<i>Infant mortality HST, 2002</i>
EC	61.2	72.0
FS	36.8	63.0
GT	36.3	46.0
KZN	52.1	68.0
LO	37.2	53.0
MP	47.3	59.0
NC	41.8	46.0
NW	36.3	56.0
WC	8.4	30.0
South Africa	45*	59

*Source: SADHS- SA Demographic Health Survey 1998 for infant mortality rate. Comparison of different sources revealed that the SADHS 1998 estimates for three provinces required some adjustment. * After adjustment the infant mortality rate for South Africa in 1998 was 45 per 1 000 live births. Infant mortality rate(IMR) is the number of deaths per 1 000 live births. HST- Health Systems Trust Review 2000, p438*

A comparison of IMR for 1998 and 2002 show an alarming increase in all the provinces and in the average for South Africa as a whole. The under five mortality rate has increased substantially and falls far short of the target of 50 by 2015 .

The maternal mortality rate has shown a steady increase in South Africa and can be attributed to AIDS-related deaths. According to Statistics South Africa, the

major cause of death in women (15-49) in South Africa is HIV/AIDS, followed by TB, pneumonia and influenza.⁷² Taking into account the deaths due to sepsis, bleeding and other causes such as delay in seeking help, it is obvious that improvements have to be made in maternity care, as well as in the education of mothers-to-be.

Data from the UN Human Development Report of 2003 indicate that there has been a reversal of these health indicators in South Africa which falls far short of the Human Development Index and WHO targets which call for a two-thirds reduction by 2015.

4.3 AIDS and TB

Both the NDoH and other academic studies have confirmed that the increase in these health status indicators is due to AIDs. The lack of treatment with ARVs has contributed significantly to early deaths from the disease and will continue for the next ten years when the disease will take its toll unless a comprehensive plan is implemented to roll out ARVs to all PLWAS immediately.

In its last ESR Report, the Human Rights Commission recommended that a National Action Plan for universal access to ARVs should be government's top priority and that the national budget should reflect this.⁷³ A technical task team of the National Treasury and the NDoH is working on the cost implications of an expanded response to the impact of AIDS on all sectors of society. In August 2003 the Cabinet convened a special meeting to consider the report of the Joint Health and Treasury Task team and decided that the NDoH should, as a matter of urgency, develop a detailed operational National Plan on an anti-retroviral treatment programme. The Department will be assisted by South African experts and specialists from the Clinton Foundation AIDS Initiative. The Plan was expected to be completed at the end of September 2003.⁷⁴

The Director of WHO, at the 13th International Conference on AIDS and Sexually Transmitted Infections in Africa (ICASA), declared the lack of access to ARV drugs a "global health emergency". The WHO has thrown out a challenge to the international community to support its target of providing anti-retroviral (ARV) treatment to three million people worldwide by the end of 2005. The TAC has been lobbying for more and better treatment of people living with HIV/AIDS. In partnership with the Congress of South African Trade Unions and others (COSATU,) they lodged a complaint to the Competition Commission of South Africa against two major pharmaceutical manufacturers namely GlaxoSmithKline (GSK) and Boehringer Ingelheim and their associates.⁷⁵ They argued that these manufacturers of AIDS drugs are pricing them beyond the reach of ordinary South Africans.

WHO's "3 by 5" plan, which aims to provide 3 million HIV-positive people with ARVs by the end of 2005, targets half of the six million people who need treatment now, and a fraction of the 40 million currently living with the virus. Although modest in numbers, the challenge represents a significant hurdle, given

the current state of global funding for AIDS and technical capacity. It is estimated that the “3 by 5” plan will cost at least US \$5 billion a year, but the WHO is conducting further in-depth studies to produce a more accurate figure. It is doubtful that South Africa can meet this challenge.

Government’s poverty alleviation programme, coupled with its food security programmes and social security grants, is aimed at improving the nutritional status of AIDS sufferers which should result in boosting their immune systems to fight the infection.

4.4 Tuberculosis

TB remains one of the main challenges facing the national health system and is on the increase due to the high prevalence of AIDS. Of the 4.7 million infected with AIDS, 1.7 million of these will eventually develop TB. There were 182 690 cases of pulmonary TB in 2002 according to the Annual Report.

The DOT programme in many provinces lacks capacity to ensure that medication is taken regularly and that the treatment regimen is completed. Full coverage of the country by the DOTS strategy should rapidly become a reality. Failure to complete the regimen results in an additional burden to both patients and the health system to provide medication to combat resistance by strains of TB.

4.5 Breast and Cervical Cancer

Most of the provinces have instituted preventive measures for two of the major causes of death in women - breast and cervical cancer - but the numbers of women screened have not reached the target levels, especially in the poorer provinces and in rural areas.

4.6 Violence against women

Violent abuse of women due to rape and domestic violence is one of the highest in the world. In spite of legislation to protect women, practical difficulties such as access to courts by victims of abuse and the poor conviction rate of abusers and rapists still remain one of the major challenges for the criminal justice system to ensure that women in South Africa are accorded the dignity and respect their gender is entitled to as valuable members of society.

4.7 Home-Based Care

The Home-Based Care programmes are underfunded and understaffed and lack trained caregivers. Many care givers are themselves unemployed and work in impoverished communities that are not able to produce the required resources to care for PLWAS, children orphaned by AIDS, the mentally ill and the elderly.

4.8 Programmes for the elderly

It is often difficult for the elderly to access to services due to infirmity or disability. Increased services with mobile clinics will assist the elderly to access care and also better home based care.

4.9 Cholera

While government is seen to act in areas where an outbreak of cholera occurs, this is not sufficient to prevent the recurrence of the disease which requires more stringent preventative interventions and intergovernmental cooperation to ensure access to clean drinking water coupled with efficient and sustained systems of sanitation.

4.10 Legislative measures

There have been notable developments in legislation which are aimed at the progressive realisation of the right to health care and comply with section 7 (2) of the Constitution which enjoins government to respect, protect, promote and fulfil the right in the Bill of Rights. These are the revision of the National Health Bill, the passage of the Mental Health Act, and the tabling of the Children's Bill. The latter two serve to protect the rights of these vulnerable groups. The Children's Bill and the Mental Health Act protect the rights of children and the mentally ill, respectively against abuse, and guarantees their right to dignity and other human rights as defined in the CRC, article 12 of the ICESCR, the African Charter for Human and People's Rights. The Children's Bill and the Mental Health Act serve to respect and protect their right to health.

The Medical Schemes Amendment Bill, the Medicines and Related Substances Amendment Bill and the amendment to the Occupational Diseases in Mines and Works seek to protect the rights of people against third parties, i.e. brokers, drug companies who impose high price structures, and owners of mines. Regulations and notices to regulate practitioners of complementary medicine are aimed at protecting the public from malpractices and recognising the positive health effects of complementary medicine.

Although the Revised National Health Bill clearly defines the rights and responsibilities of users and health care providers, it makes no mention of the patients' rights to dignity, equality and non-discrimination. The fact that South Africa ranks second only to Brazil in terms of disparity and unequal distribution of wealth, and that access to quality care and to life-saving drugs still remains the preserve of those who belong to private medical schemes, is disconcerting. The provision of services to the poor and those in dire need was highlighted in the court orders in both the *Grootboom* and *TAC* cases. Equity must be read to mean the provision of not only equal access to public health care facilities but also equity in the quality of care provided by the public sector. The fact that we have a two-tier system of health care in South Africa, one private and the other public, serves to highlight the fact that those who can afford it generally have access to better services.

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The National Health Bill makes provision for deploying doctors and pharmacists to areas where the need is greatest. This is to ensure that rural and under-serviced areas will receive better care. However, this has met with resistance by some sections of the health profession who maintain that their constitutional right to work in the place of their choice is being violated.

The Occupational Diseases in Mines and Works Amendment should be welcomed in so far as mine owners are now legally bound to pay compensation to workers who contract diseases while in their employ. However, the legislation does not cater for those who contracted asbestosis, silicosis and other occupational diseases in the past. The effects of past exposure are long-term and many people who have contracted these diseases in the past will not have any recourse to compensation.

The regulation of “complementary or alternative” medicine is also to be welcomed in view of charlatans and the un-prescribed intake of dietary supplements, which can lead to ill health. Practices by traditional healers should be recognised and brought in line with practices that are not harmful to the health and welfare of people especially where circumcision rites are concerned, which affect girl and boy children. There have been many reports of deaths of young boys during initiation rites due to surgery under non-sterile conditions.

The NDoH and many of the provinces promote the right to health care services by organising campaigns around particular issues such as ending violence against women and children, distributing relevant information and educating and training health workers and the public. On the positive side, behavioural changes with respect to AIDS prevention has been documented by the Nelson Mandela/SHRC study but clearly more education needs to be done to change attitudes and behaviour in an effort to raise the general health status in the country.

4.11 Budgetary Measures

The growth in allocations and expenditure is to be welcomed since it allows provinces to improve on service delivery. However, the per capita spending in the public sector is around six times less than that spent in private sector resulting in huge inequalities. This is one of the legacies of the apartheid era which government is endeavouring to change over time. The health budget comprises a large proportion of social spending and is set to grow over the medium term which shows governments commitment to improve the health status of South Africans.

Inequities across provinces is another factor which has to be addressed in more meaningful manner. The Eastern Cape, Limpopo and Mpumalanga show the lowest per capita expenditure spending for overall for health care as well as for primary health care.

HIV/AIDS

The large amount of funds injected into the AIDS programme is to be welcomed. Although the prevalence of HIV/AIDS does not show a substantial reduction, several researchers, have shown that behavioural changes are taking place amongst the youth. The rate of infection amongst young women still remains alarmingly high and more should be done to educate and assist women to prevent them contracting the disease. Cultural norms of male domination in sexual matters need to be urgently addressed.

5 RECOMMENDATIONS**5.1 Policies**

Policies need to be effectively evaluated and monitored and fault lines identified not only at the conceptual level but also in their implementation at provincial and local spheres. Where the need arises policies should be reviewed and adapted to changing demands and conditions so as ensure that targets are met in the short, medium and long term.

5.2 Legislation

It is recommended that the National Health Bill⁷⁶ be passed with immediate effect since this will allow the provinces to formulate a uniform health policy to conform to national legislation. Similarly, the Children's Bill, Older Persons Bill and other Bills should also be finalised since they protect vulnerable members of out society and also provide cheaper medicines to the public.

5.3 Budgetary Measures

The over spending and under spending in provincial health budgets should see stricter controls, and capital under spending must be curtailed.

Spending on infrastructure revitalisation, the delivery of quality PHC package, and transfer of funds to Metropolitan Councils should be speeded up so as to implement the DHS which has already been demarcated since 2000. Failure to do so results in confusion of roles and responsibilities, and withholding of essential services. population.

The District Health System and devolution of services to municipalities should be finalised so as to improve delivery of services by local structures. The budgets of local governments should reflect their new responsibilities.

Allocation of funds for health care in the provinces should be standardised by a formula which will ensure equitable service delivery in all the provinces. SLAs should be effectively operationalised as soon as possible.

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Government should accelerate its efforts in exploring different avenues to contain the price increases in the health sector including stimulating local production of medicines, sourcing cheaper suppliers, collective purchasing and improved management to ensure that price reductions are passed onto the public sector

Funding to communities who care for PLWAS, the elderly and the indigent should be increased substantially

There should be a dedicated budget for the housing and care of AIDS orphans and PLWAS

Provincial departments of health should have dedicated budgets for the care of older persons, persons with disabilities, and reproductive health care

5.4 HIV/AIDS/STIs/TB

The AIDS strategic intervention should receive priority status and South Africa should endeavour to meet the targets set by WHO's "3 by 5" Plan. The SAHRC recommended in its last ESR report, the universal rollout of ARVs to all people infected with HIV. After years of debate and delay, South African National Aids Council (SANAC) together with Cabinet has issued a directive to NDoH to devise a National Plan for the universal rollout of ARVs to all those living with AIDS. The decision by the Global Fund and more recently the European Union to fund AIDS programmes in Africa has to be welcomed since this will inject the necessary monies to save millions of lives. However, until a proper costing is done, it remains to be seen just how many PLWAS will receive adequate ARV treatment and nutrition and for what time period.

The integrated management of TB and HIV at the District and Primary Health Care level should receive further support, training and additional resources for effective management of these diseases.

Specific programmes should be designed to cater to the needs of vulnerable groups identified in the SAHRC's protocols such as street children, the elderly, AIDS orphans, refugees and asylum seekers, women and the indigent.

A National Action Plan for the universal rollout of ARVs to those infected with the HI virus should set and clear time frames for short-, medium- and long-term target to be achieved. Infrastructure, and training of doctors and other health care givers should be speed up .

5.5 Sanitation

Access to clean piped water and sanitation in poor communities, rural areas and especially in informal settlements should become a priority area for intergovernmental management and effective inter-departmental and cross-sectoral planning, e.g. closer co-operation between the Department of Water

Affairs and Forestry, Health, Environment, Social Services and local governments.

The classic public health lessons of the 19th century in Europe and the USA showed that the key public health interventions to improve population health status lie outside the health sector- i.e. the other determinants of health such as public sanitation, a clean and healthy environment, access to clean water, adequate housing, sufficient food and nutrition, and the enjoyment of other economic and social rights. The burden of avoidable disease and death is attributable to the failure to meet basic needs. For example, 50-70 per cent of lower respiratory infections, diarrhoeal disease, malaria and measles (the big killers) in childhood is due to undernutrition³. 88 per cent of diarrhoeal disease is due to unsafe water, sanitation and hygiene, and 99.8 per cent of deaths due to this risk factor take place in developing countries. Through malnutrition, poverty seriously impairs immune function making children more vulnerable to disease of all kinds.⁷⁷

5.6 Information Systems, Monitoring and Evaluation

The DHIS must be capacitated by employing more IT professionals. Data should be readily available and intelligible to managers and policy makers.. The progress of programmes and projects can only be assessed on reliable information Moreover, strategic plans, policy formulation and revision should be based on information that is accurate and easily accessible. Key indicators should be integrated with a Geographic Information System (GIS).

5.7 Capacity and numbers of health professionals

Government should devise plans for staff retention by providing better working conditions and incentives. Policies for staff retention must be put in place. Working conditions and terms of service should be made more attractive for health workers so as to minimise the loss of health care workers from South Africa.

It is imperative that capacity constraints in the public health sector be attended to with immediate effect. Recruiting and training of dedicated people in the health system must ensure that managers are empowered and systems put in place to ensure the seamless delivery of high quality care at all levels of the health system.

While it is not possible to judge at this stage whether South Africa will indeed meet the targets set out in the Millennium Development Goals or the WSSD targets, it is clear that there has been a retrogressive tendency in the most important health status indicators of a nation: life expectancy, infant mortality rate and maternal mortality ratio. The slow realisation of the importance of developing a national strategy to combat AIDS has taken its toll and is evidenced by the increased number of children dying before the age of five, the increase in

the maternal mortality ratio and a lowering of the life expectancy after the onset of the AIDS pandemic.

A tremendous burden has been placed on the State to introduce an equitable and functional national health service in the first 10 years of democracy. The outbreak of AIDS on such a vast scale has not made it possible for the State to concentrate all its resources on the effective delivery of policies and programmes aimed at establishing a single national health system based on equity and universal access. In addition, there is large scale of poverty, which makes the public system the first port of call for the majority who cannot afford private rates.

5.8 Inequalities

There exists large gaps in efficient service delivery of high quality to the majority of Black South Africans, who, because of the high levels of poverty cannot access an adequate standard of living for themselves. This is exacerbated by insufficient funding of programmes in spite of the fact that the envelope for social spending is more than 60 per cent of the national revenue. Lack of human capacity to successfully run projects and deliver basic services has been identified as a serious problem by both government and the SAHRC, but in spite of training programmes, this still remains a major obstacle to meet the health requirements of the majority of Black South Africans.

The task of assessing whether the State is progressively achieving its goals in facilitating and fulfilling its responsibilities for universal access to health care services is a more difficult one. To assess whether the right to health is being progressively realised, the test of reasonableness as defined by Justice Yakoob requires that the measures instituted be “co-ordinated, comprehensive, coherent, balanced and flexible”. The policies devised by the NDoH, which are in the main compliant with WHO goals, meet the test of reasonableness in general but there is a lack of co-ordination and uniform implementation at the provincial and local spheres of government. This may be due to the absence of an overarching national framework legislation and the resultant disparities in provincial legislation. Another factor is the slow progress of integrating services at district level.

The results of the study *Causes of Death in South Africa 1997-2001 (Statistics South Africa P0309.2)* show that the five leading underlying causes of deaths among South Africans were unspecified unnatural causes, ill-defined causes, TB, HIV and influenza and pneumonia, accounting for 40.9 per cent of deaths. The proportion of deaths due to HIV nearly doubled from 4.6 per cent in 1997 to 8.7 per cent in 2001. While the leading causes of deaths among African and coloureds were TB, HIV, influenza and pneumonia and unspecified causes, Whites and Indians tend to die of diabetes, ischaemic heart disease and cerebrovascular diseases.

While the measures instituted in this reporting period, comply with the test of “reasonableness” as defined by Justice Yakoob, it can be said that this is not true

for the AIDS policy which fact was attested to by the judgment in the TAC case which was referred to in the Introduction. In *Grootboom* case, Justice Yakoob stated that measures are deemed unreasonable if not implemented reasonably and do not take into account those in dire need. There still remain huge gaps between policy and effective implementation in many areas of quality care service delivery, disparities along class lines, urban and rural divides, between provinces and amongst “race” groups. In short, the road towards equity seems long and arduous.

The health needs of vulnerable groups such as the indigent, people living with AIDS and children orphaned by AIDS remain a major challenge to the health system whose needs have not been sufficiently addressed in terms of constitutional provisions and international human rights requirements.

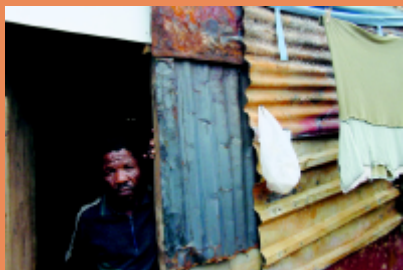
The enjoyment of the right to health by all is hampered by the legacy of unequal distribution of wealth, poverty, underdevelopment and HIV/AIDS – adverse factors that impede the delivery of quality care and equal access for all. It is hoped that the health care delivery will improve for the majority of South Africans in the short term and that ARVs are made available to all as soon as possible to stem the tide of the pandemic which is not only killing millions of people but will impact negatively on the development goals of the nation and raise serious security issues as well.

- 1 Government of the Republic of South Africa vs Grootboom 2001(1) SA 46 (CC).
- 2 The National Department of Health is responsible for policy formulation and setting guidelines, norms and standards which the provincial and local spheres of government are mandated to implement.
- 3 *The Universal Declaration of Human Rights*, (1948) article 25. which states that “Everyone has the right to an adequate standard of living for the health and well-being of himself and of his family...”
- 4 The “right to health care services” as provided for by the South African Bill of Rights does not encompass the scope of the “right to health” as defined by the UDHR, the WHO and article 12 of the ICESCR. However, the other determinants of health are provided for in the Constitution such as the right to adequate housing, food, education, social security, and land.
- 5 Overall health standards are improved by public health protection which are maintained by high standards of sanitation and a healthy environment. The right to a healthy environment is treated in the Environmental Rights report in this series.
- 6 See the 4th *Economic & Social Rights Report 2000/2002* of the South African Human Rights Commission for a discussion of “progressive realisation” and “available resources”.
- 7 *Limburg Principles on the Implementation of the International Covenant of Economic, Social and Cultural Rights* para 21.
- 8 The Bill of Rights provides for economic, social and cultural rights as well as civil and political rights against which the right to health care must be read. See Chapter Two of the Constitution.
- 9 *Vienna Declaration and Programme of Action* <http://www.unhchr.ch/huridocda/huridoca.nsf/A.CONF.157.23.En?OpenDocument1993>. Accessed November, 2003.
- 10 *General Comment No. 14 of Committee of ESCR* (2000) para 12.
- 11 *The Convention on the Elimination of All Forms of Discrimination Against Women* (1977) articles 12, 14, 16.
- 12 *The Convention on the Rights of the Child* (1989) articles 6, 23, 24 and similar provisions in the *African Convention on the Rights of the Child* (1960).
- 13 The Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases, adopted by the African Heads of State in April 2001; and the Ungass Declaration of Commitment on HIV/AIDS which was endorsed by the Special General Assembly Session in June 2001.
- 14 The Standard Minimum Rules for the Treatment of Prisoners (1957) sets out minimum health rights of detainees and prisoners. According to the UN’s Basic Principles for the Treatment of Prisoners (1990), “prisoners shall have access to health services available in the country without discrimination on the grounds of their legal status. The WHO’s Guidelines on HIV Infection and AIDS in Prison (1993) provides standards for dealing with HIV/AIDS in prisons.
- 15 *The Declaration on the Human Rights of Non-Nationals* (1985) article 8.
- 16 *General Comment No. 14 of Committee of ESCR*, (2000) para 44(3).
- 17 Minister of Health vs Treatment Action Campaign para 34
- 18 UN Doc.A/37/40 para 5.
- 19 Berger, J; Hassan, F; Heywood, M (eds.) (2003). *The Price of Life*. Johannesburg: AIDS Law Project and Treatment Action Campaign. 19-21.

- 20 In the TAC case, the Court stated that the “rights in the Constitution should not be construed as entitling everyone to demand that the minimum care be provided to them” and based its judgement on the basis of “reasonable” measures and implementation plans. See the 4th ESR Report for full details.
- 21 *General Comment No. 14 of Committee of ESCR, (2000) para 56.*
- 22 http://hdr.undp.org/reports/view_reports.cfm
- 23 <http://www.un.org/millenniumgoals/>
- 24 It is estimated that there are six million people infected with HIV/AIDS out of a total population of about 40 million in South Africa and there are 600 AIDs-related deaths every day.
- 25 HIV/AIDS affects the nation’s health system (overburdening it with patients), its social security system (increasing numbers of child-headed households, AIDS orphans etc.) and ultimately it affects the nation’s budget as money meant for development is utilised to combat and contain the pandemic.
- 26 http://www.who.int/mediacentre/events/HSD_Plaq_02.8_def1.pdf
- 27 See chapter on Health in the 4th ESR Report where these plans were outlined in detail.
- 28 The Integrated Nutrition Programme is discussed in the report dealing with the Right to Food in this series.
- 29 The National Department of Health failed to submit a report to the SAHRC on time. However, when a submission was made, their report was incomplete and much of the information requested was not supplied. Other sources of information were consulted to compile this report. For a description of existing policies and projects refer to the 4th Economic and Social Rights Report 2000/2002. Some further information was provided as a response to the second draft report in March 2004.
- 30 *The South African Year Book 2002/03.2003 Government Communication and Information System , Pretoria.*
- 31 The NDoH, ECDoH, KZNDoH, FSDoH, NCDoH & WCDoH did not report on this programme, or provide any statistics for the maternal mortality ratio.
- 32 South Africa Yearbook 2002/03 GCIS, Pretoria, 356
- 33 The figures for the maternal mortality ratio taken from different sources vary considerably i.e from the Reports to the SAHRC provided by provincial departments of health, their Annual Reports and the figures in the Second Report on Confidential Enquiries into Maternal Deaths in South Africa: 199-2001. The absence of reliable statistics makes it difficult for the Commission to assess the progress made in programmes. It also leads us to wonder how interventions can be made by health departments if they do not have reliable data?
- 34 South Africa Yearbook 2002/03 GCIS, Pretoria, 350
- 35 The NDoH’s Annual Report does not identify any problems in the delivery of IMCI, nor is there a provincial breakdown of the survey.
- 36 KwaZulu-Natal Department of Health Annual Report 2002/2003. KZN Department of Health, Pietermaritzburg. 36.
- 37 Health Systems Trust 2002. Health and Related Indicators p433-39
<http://new.hst.org.za/indic/indic.php/82/?mode=data> Accessed 3/03/2004
- 38 *Department of Health Annual Report 2002/2003(2003) p22 Pretoria.*
- 39 The NDoH did not elaborate which indicators were used nor on the outcomes of the process of integration between provincial and municipal services.

- 40 The figures for per capita PHC provided by the NDoH do not tally with those cited in the IGFR.
- 41 Refer to Guidelines for District Health Planning and Reporting under New Policies.
- 42 UNDP South Africa Human Development Report 2003 p 32
- 43 For details see the South African Human Rights Commission's Report: *Site Visits & Investigation, Eastern Cape Hospitals*. SAHRC, Johannesburg 2003. The report is based on interviews conducted by members of the Commission with Medical Superintendents, CEOs, chief nursing officers and patients.
- 44 Holy Cross Is one of the 18 pilot sites for the PMTC and PEP programmes.
- 45 The SAHRC Reported that most of the time staff members were tying up the lines with personal calls.
- 46 Of the two ambulances at St Elizabeth Hospital, only one was in working order.
- 47 Karl van Holdt "Baragwanath in Bandages" <http://free.financialmail.co.za/03/1219/currents/dcurrent.htm> accessed 2003. For a full report of NALEDI's study on Chris Hani Baragwanath hospital see the report titled "After apartheid decay or reconstruction? Transition in a public hospital." Karl van Holdt, Bethuel Maseramul & Mike Murphy. Personal communication with Karl van Holdt.
- 48 SAHRC 2003. *Final Report on the Inquiry into Human Rights Violations in Farming Communities*. Johannesburg. SAHRC.
- 49 See 4th ESR Report, pages 98 & 99 for a description of these programmes.
- 50 See the chapter on the right to social security in this series.
- 51 NDoH's Annual Report.
- 52 The ECDoH and NWDoH provided information for 2000-2001.
- 53 The study draws no conclusion on how these children were infected, but states that possible factors to be investigated are sexual abuse and exposure to infected needles.
- 54 Pillay, Y; Marawa, N; Proudlock, P. "Health Legislation." *South Africa Health System Review 2002. Health System Trust, Durban. P3-12.*
- 55 This table is adapted from the South African Health Review: www.hst.org.za/sahr/2002/chapter1.htm
- 56 See 4th ESR Report. At the time of writing (October 2003) The Revised Draft Bill has been sent to the provinces and the NCOP for discussion and it is hoped that it would be enacted before the end of 2003.
- 57 The White Paper on the Transformation of the Health Care System in South Africa. <http://www.gov.za/whitepaper/1997/health.htm>
- 58 The Price of Life: Hazel Tau and Others vs GloxoSmith Kline and Boehringer Ingelheim: A report on the excessive pricing complaint to South Africa's Competition Commission. July 2003. Law and Access Units of the AIDS law project and the Treatment Action Campaign.
- 59 Personal communication between Eric Watkinson of the SAHRC and Diane Terblanche of the Competition Commission, 30 April, 2004.
- 60 See Alexandra Vennekens-Poane *Budget Information Service* <http://www.idasa.org.za/bis/>
- 61 Intergovernmental Fiscal Review 2003 Chapter on Health <http://www.treasury.gov.za/documents.htm> Accessed March 2004. All figures and discussion is from the IGFR unless otherwise indicated

- 62 About 7 million of a total population of about 45 million are covered by medical aid schemes. Private health contributions were about R5 900 per beneficiary compared to an expenditure of R911 per person in the public health sector. Clearly there is a large disparity in the quality of services accessed.
- 63 In this Chapter, “2002-03” is used to denote the municipal financial year which runs from 1 July - 30 June. In contrast “2002/2003” denotes the national and provincial financial year from 1 April to 31 March.
- 64 The Eastern Cape, Limpopo, and Mpumalanga are the historically disadvantaged provinces.
- 65 This decline is mainly due to the declining trend in personnel numbers and the containment of growth in remuneration in recent years.
- 66 Allocating a rural allowance as an incentive to attract health workers to rural areas was recommended in the 4th Economic and Social Report.
- 67 Over 90 per cent of pharmacists, dentists and psychologists practice in the private sector. Health Systems Review 2002
- 68 Statement of the National and Provincial Governments’ Expenditures at March 31 2002 and 2003, National Treasury.
- 69 Alexandra Vennekens-Poane. Provincial expenditure briefs for the financial year 2002/03 <http://www.idasa.org.za/bis> Accessed June 2003.
- 70 These challenges were identified in the *South African Year Book 2002/03 p 350*
- 71 *Initial Burden of Disease Estimates for South Africa, 2000 (2003)* www.mrc.ac.za/bod/bod.htm accessed February, 2004
- 72 Causes of Death in South Africa 1997-2001 (2002) Statistics South Africa. Pretoria.
- 73 *4th ESR Report 2000/2002 (2003)* 133.
- 74 A National Plan was adopted in November 2003.
- 75 See note 59. The Competition Commission ruled in favour of the complainants.
- 76 At the time of writing the National Health Bill had not been promulgated into an ACT.
- 77 See CETIM Realisation of the Right to Health <http://www.Cetim/2003/03 ic 10w4.htm> Accessed 26 February, 2004.



housing

ECONOMIC AND SOCIAL RIGHTS
5TH REPORT 2002/3

THE RIGHT OF ACCESS TO ADEQUATE HOUSING

**5th Economic and Social Rights Report Series
2002/2003 Financial Year**

South African Human Rights Commission

21 June 2004

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INTRODUCTORY SECTION

The aim of the *Introductory Section* is to provide an outline of the common analytical framework used in the reports, briefly discuss the political and economic context of the year under review, and provide an integrated summary of the key findings and recommendations of all eight reports in the series. Details of the report production process are also included at the end of this introduction.

The 5th Economic and Social Rights Report follows a more user friendly format than previous reports. There are now separately bound, less bulky, reports on Land, Water, Environment, Food, Health, Social Security, Education and Housing. Each report has an executive summary to facilitate access to the main findings and recommendations. Issues that connect one right to another are highlighted in the body of each report to emphasise the interrelatedness and interdependence of the rights in the Bill of Rights of the Constitution of the Republic of South Africa Act 108 of 1996 (simply referred to as the Constitution throughout the reports).

A) Analytical Structure and Framework

Each report in this series follows a basic structure:

1. **Introduction:** a discussion of the meaning and content of the right with reference to the Constitution, case law and relevant international human rights instruments.
2. **Progress in the realisation of the right:** a factual description of measures instituted by government during the period under review and their impact, especially on vulnerable groups.
3. **Challenges for the realisation of the right:** a description of key challenges that hamper the realisation of the right, and in some cases, government's response to these challenges.
4. **Critique of measures instituted:** a consideration of some of the shortcomings of the measures instituted by government.
5. **Recommendations:** a set of recommendations that may encourage progressive realisation of the right as expeditiously as possible.¹

Each report consolidates information from various sources including: relevant government protocol responses, government Annual Reports and Strategic Plans, the Intergovernmental Fiscal Review, as well as research funded by government, international donors or other agencies.

¹ Some reports in the series end with a conclusion.

All reports employ the standard of reasonableness as laid down in the *Grootboom*² and *TAC*³ judgements of the Constitutional Court, in conjunction with relevant international human rights instruments.

The constitutional provisions pertaining to socio-economic rights require the State to “take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of [these rights]”.⁴ This requirement, read with the provision on the obligation of the State to “respect⁵, protect⁶, promote⁷ and fulfil⁸ the rights in the Bill of rights” in section 7(2) of the Constitution ensures an effective guarantee of socio-economic rights in South Africa. The judicial enforcement of these rights by the courts and the constitutional mandate of the South African Human Rights Commission to monitor and assess the observance of the rights by the State⁹ and non-State entities also contribute to the effectiveness of the constitutional guarantee of these rights.

The Constitutional Court has played a significant role in ensuring the effective guarantee of socio-economic rights in our country. On the obligation of the State, Judge Yacoob held in the *Grootboom* case:

*The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.*¹⁰

On the effective guarantee of basic necessities of life for the poor, Judge Yacoob further said:

2 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC)

3 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)

4 See sections 26(2), 27(2) and 29(2) of the Constitution.

5 Respect is a negative obligation, which requires the State to refrain from denying or limiting equal access for all persons to the enjoyment of the rights. This also means that the State should abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure which violates the integrity of the individual or which in any way interferes or limits his/her right to pursue the enjoyment of the rights in the Bill of Rights.

6 The obligation to protect places a positive obligation on the State to prevent the violation of any individual's rights by a third party.

7 The obligation to promote places a positive obligation on the State to create a conducive atmosphere in which people can exercise their rights and freedoms by promoting awareness of their rights through public education.

8 The duty to fulfil places a positive obligation on the State to institute active measures that enable each individual to access entitlements to the right and which cannot be secured through exclusively personal efforts. State parties are also obliged to provide a specific right when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. e.g. people in disaster situations or those in dire need.

9 See sections 184(1) and (3) of the Constitution.

10 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC) [24]

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.¹¹

On the role of the courts in ensuring that the State fulfils its role in giving effect to these rights and thus ensuring that there is an effective guarantee of these rights, Judge Yaccob said:

I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.¹²

A similar position was taken by the Constitutional Court in another seminal judgment, *Minister of Health and Others v Treatment Action Campaign and Others*, where the Court held:

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflicts our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.¹³

In outlining the role of the courts, the Court also stated:

The primary duty of courts is to the Constitution and the law...Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to do so.¹⁴

While there might be some criticism directed at the Constitutional Court pertaining to the determination of when there are no available resources for the State to fulfil its obligation pertaining to socio-economic rights, the courts, particularly the Constitutional Court, have and will continue to play an important role in ensuring that the provisions in the Bill of Rights are effectively guaranteed for our people.

¹¹ Ibid., [93]

¹² Ibid., [94]

¹³ *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) [36]

¹⁴ Ibid., [99]

B) The Political and Economic Context of the Year Under Review

The period under review, 1 April 2002 to 31 March 2003, followed the 11 September 2001 attacks and a 24% depreciation of the South African currency (Rand) near the end of 2001. Consumer Price Inflation, especially for goods and services bought predominantly by the poor, increased sharply to the highest level since 1994. Concerns were signalled to the Competition Commission about the impact of import parity pricing in several sectors of the economy, most notably in food production, processing and retailing as well as metals and engineering. Interest rates were raised in an attempt to curb inflation, with a subsequent dampening effect on the rate of economic growth in the latter part of the financial year. According to the Reserve Bank Quarterly Bulletin for March 2003, economic growth stood at a robust 3% in 2002.

As a result of prudent fiscal management, the government introduced a more expansionary Budget in February 2002. Total government expenditure increased from R262,6 billion in 2001/2002 to R291,8 billion in 2002/2003. Overall, the budget directed more resources towards reducing poverty and vulnerability, improving education and training, developing skills amongst the youth, building and enhancing physical infrastructure and basic municipal services, as well as making communities safer places to live, work and play.

It is also important to note that the February 2003 Budget provided for significantly greater expenditure than the previous year. Total expenditure was R331,7 billion for 2003/2004. The additional allocations accommodated substantial policy changes for all three spheres of government and also provided for *higher than anticipated inflation in 2002*.

By the end of the reporting period in March 2003, the Rand had appreciated by 18%. This created concern about the job losses that could arise out of an increase in import competition. Therefore, during the period under review, the goals of progressively realising economic and social rights took place in the context of significant macro-economic volatility, inflation and an expanding government budget.

C) Key Interrelationships Amongst Economic and Social Rights

The Right to Land

The State was responsible for achieving progressive realisation of the right to land during the reporting period. The Commission demonstrates that there was a year on year improvement in land delivery performance by the State, especially through the Land Restitution and Land Redistribution sub-programmes. Improvements in rural tenure reform were less noticeable.

Between 2000 and 2001 there were 12 094 settled Restitution claims, while in February 2002 there were approximately 32 000 settled claims. By March 2003, there were 36 488 settled claims recorded. Although the majority of these claims were in the urban areas, settled rural claims show a substantial increase. The people working on the Land Redistribution for Agricultural Development sub-programme delivered 103 682 ha against a target of 81 555 ha for the year under review. Whereas the Department had targeted to benefit 3 601 people, the programme ended up benefiting 6 170. Concerning

tenure reform, the State initially delivered 30 000 ha of land through 201 projects. Beyond that, the State is working towards bringing the Extension of Security of Tenure Act (ESTA) and Labour Tenants Act (LTA) together in the Consolidated ESTA/Labour Tenants Bill.

Throughout the report, the Commission reflects on the demand, voiced by landless people and others, that the pace of land redress is too slow and inattentive to vulnerable groups. The report recommends accelerating land reform to meet its new targets by relieving budgetary constraints and the associated problems of personnel shortages, lack of quality training and understandable communication; land acquisition; and improvements in monitoring and evaluation.

The Commission would also like to highlight that it was informed by the Department of Land Affairs that it was impossible to represent the racial and gender composition of land purchase transactions and repossessions, according to the size and value of land parcels.

The Right to Education

The right to education is analysed as a continuum of three bands of schooling- General Education and Training, Further Education and Training and Higher Education and Training. The State instituted measures to respect, protect, promote and fulfil the right to General Education and Training, and in the Commission's overall assessment, it succeeded in achieving progressive realisation of this right.

The Department of Education succeeded in ensuring that all targeted Early Childhood Development sites for children between the ages of five and six were operating. However, the Department acknowledges the challenge, which has budgetary implications, that only 13% of all children have access to the programme. In the context of a substantial increase in the rate of student enrolment in primary schools between 1994 and 2001, the National Department focused on further increasing access to General Education and Training through reviewing public school financing and the system of school fee exemptions. The report highlights the shortcoming that some schools and Provincial Departments of Education failed to make parents aware of the school fee exemption.

While progress was made in eliminating instances where learners are forced to receive education in environments that are not conducive to teaching and learning, the report emphasises that more needs to be done to address infrastructure backlogs, especially when it comes to water and sanitation. The Department also made progress in developing a redistribution model for personnel and operating expenditure that would achieve equality of teaching quality and equality of learning outcomes in the schooling system from 2003/2004 onwards. All stakeholders in education, including the SAHRC need to explore and come up with a definition of quality basic education which could be measurable and relatively easy to monitor.

Conditions in farm schools were identified as hinderance to progress in the realisation of the right to General Education and Training. The issue of street-children also has to be given some serious attention by all the relevant stakeholders. Amongst other recommendations to further observance of the right to General Education and Training,

the report calls for better-published medium term strategies and improved spending on Adult Basic Education and Training. In the 2001 Census, 4,5 million people aged 20 years and older did not have a formal education and 4 million people had primary schooling only.

Most of the developments in the Further Education and Training band met the Constitutional requirement to respect, protect, promote and fulfil the right. *Dinaledi*, the programme that seeks to improve participation and performance of learners from historically disadvantaged backgrounds in Mathematics, Science and Technology (MST), reportedly surpassed its target of 10% of students enrolling for MST in its first two years of implementation. The development of Recognition of Prior Learning (RPL) is another development that contributes to the realisation of the right to Further Education and Training. RPL recognises non-formal and/or non-academic education. RPL also stands to maximise learning opportunities for those without formal and/or academic qualifications to acquire formal qualifications in Further Education and Training institutions, which must all be registered with the State.

Areas where the State fell short of its obligations to progressively realise the right to Further Education and Training include: insufficient public education on school fee exemptions and insufficient Learner Support Materials and/or their late delivery. The report also highlights that participation rates in education by girl learners were being negatively affected by girls' involvement in income generating activities.

While Higher Education and Training is not explicitly recognised as a right in the Constitution, it obviously depends on the learning outcomes achieved in General and Further Education and Training. Here, there seems to be room for improvement as the average graduation rate for university and technikon students is 15%; less than half the ideal average of 33%.

Key challenges associated with the Higher Education and Training band include assisting potential students with subject selection choices and career guidance at school and university level, as well as lowering the high costs of accessing higher education and applying to different tertiary institutions. The report recommends ensuring that admission requirements to tertiary institutions are transparent and fair, promoting indigenous languages as academic/scientific/legal languages, mobilising funds for bridging courses and improving access for mature and post-graduate students, including part time students.

The Right to Water

Ever since 2001 and the introduction of Regulations Relating to Compulsory National Standards and Measures to Conserve Water, the State instituted a national measure to fulfil the right to water by supplying 6000 litres of free, clean water, per household per month, otherwise known as Free Basic Water.

During the reporting period, approximately 1,6 million people gained access to improved piped water supplies through Department of Water Affairs and Forestry's Community Water Supply and Sanitation Programme. Approximately 65 thousand toilets facilities were constructed during the reporting period under the same programme, but it should be noted that these figures exclude the large number of

sanitation facilities that were delivered as part of the State's housing programmes. Less than 530 000 households also benefited from water and sanitation projects through the Department of Provincial and Local Government's Consolidated Municipal Infrastructure Programme. Although the above indicates that the roll-out of water and sanitation infrastructure is proceeding towards the Department's medium delivery targets, the report raises concerns about the level of dysfunctional infrastructure and projects, especially in rural areas.

At the end of the reporting period in March 2003, access to Free Basic Water by poor people stood at 38% or approximately 12,2 million people. Access to Free Basic Water by non-poor households stood at close to 100% or approximately 14,2 million people. A large number of poor people (19,6 million) were still to receive their Free Basic Water allocation. Where Free Basic Water was not available, the average cost of 6 kilolitres (kl) was approximately R13 per month. The price for 6kl of life-line supply was highest in Limpopo province at approximately R19 per month. Gauteng and KwaZulu-Natal also had comparatively high average charges for life-line supplies where Free Basic Water services were not operational.

In order to remove these glaring inequities in Free Basic Water provision, the report calls for an urgent revision of the pricing system to include a significantly greater level cross-subsidisation from high volume water users to low volume users in the 0-6 kl range. More support and funding is required to assist municipalities with capacity problems in implementing Free Basic Water. During droughts, local governments should ensure that Free Basic Water supplies for domestic users are assured and that a situation cannot develop where agricultural, mining and industrial users are allocated large volumes of water at similar prices to low-volume users.

The report describes some aspects of the devolution of domestic water quality monitoring and testing from Provincial Departments of Health to local municipalities and calls for rapidly providing sufficient funds for water quality monitoring to prevent serious disease outbreaks and illness.

The report recommends that the Department of Water Affairs and Forestry (DWA) should take a leading role in making sure that farm dwellers, residents near commercial farms and poor households in rural and urban areas access clean water and proper sanitation services. DWA should also ensure that it develops and implements a plan to address the specific problems of water access experienced by people living with HIV/AIDS.

The report suggests that monitoring bodies should be created at local level to effectively monitor the implementation of policies and laws aimed at fulfilling the right of access to water. The report warns that monitoring will only be effective if monitoring bodies from local, regional and national spheres work together. Where possible and when possible, the Free Basic Water allocation should be increased to cater for higher levels of domestic water consumption. A 50kl water allocation per household per month would bring South Africa's Free Basic Water allocation into the 'low level of health concern' range defined by the World Health Organisation.

The Right to Health Care

The report on the right to health care focuses on key developments in three key health programmes of the State (Health Service Delivery, Strategic Health Programmes and Administration). Although the policy and legislative measures developed in the fiscal year under review can be said to be “reasonable” in their conception, there remain large gaps in implementing them in a manner such that all the provinces, urban and rural peoples, rich and the poor have equal access to the same high quality of care.

The three most important, and universally acknowledged, indicators to measure the health status of a nation are Life Expectancy at Birth, the Maternal Mortality Ratio, and the Infant Mortality Rate. Life expectancy has fallen from 56 years in 1996 to 52,5 in 2002 and is projected to fall to 47 by 2005. The infant mortality rate has increased from 45 in 1998 to 59 in 2002. This means that more children under the age of one died in 2002 as compared to 1998. The under five-mortality rate has risen from 61 in 1998 to 100 in 2002. Similarly, the maternal mortality ratio shows a steady increase since 1998 and is estimated to be 150 per 100 000 live births. The National Department of Health, as well as independent researchers, have concluded that this is due to HIV/AIDS related deaths.

The single most important challenge that government faces is the one posed by the AIDS pandemic and the high incidence of opportunistic diseases such as tuberculosis. It is estimated that about one tenth of the population of the population is infected with the HI virus i.e. close to 5 million people. The number of AIDS orphans is estimated to be one million. In a landmark case instituted by Treatment Action Campaign against the Minister of Health, the Constitutional Court, in 2002 confirmed the finding of the High Court that government’s policy to limit Nevirapine to research and training sites was in “breach of the States obligations under section 27(2) read with 27(1)(a) of the Constitution.” The report recommends that the Comprehensive National Aids Plan should be rolled out effectively in all the provinces so as to meet targets and timelines in order to substantially reduce new infections and to prolong the lives of those already infected.

In spite of the fact that policies and programmes directed at improving the health status of the country have been put in place such as the Integrated Management of Childhood Illnesses, the AIDS pandemic continues to be the single most cause of death in South Africa. This has placed an enormous strain on an already overburdened health system and undermines the efforts made by the State. This is compounded by the fact that the other economic and social rights, which contribute substantially to the health status of a nation, are also not fully enjoyed by the vast majority of poor South Africans due to the huge backlogs inherited from the past. Inadequate housing, poor sanitation, overcrowding, lack of clean drinking water, lack of efficiently run social services, insufficient nutrition and health education exacerbate the diseases of poverty. Moreover, a household that is affected by AIDS contributes to depleting the financial resources available to the family, thereby increasing the level of poverty.

government developed legislative and other measures to comply with its constitutional obligations in terms of section 7(2) of the Constitution. However, despite national policies and programmes, which, in the main comply with international standards and targets, the health care system has not been able to successfully deliver quality health

care on an equitable basis in all the provinces. Provinces do not spend the same amount per capita on health care delivery, and there is a serious lack of managerial capacity in the health system. The biggest challenge facing the efficient running of the health system is training managers to operationalise efficient systems especially for running clinics and hospitals where many problems have been identified. Efficient management systems in conjunction with effective engagement with labour should be operationalised with immediate effect in the public health sector so as to ensure that hospitals and clinics run well.

The report also recommends that there is a need to increase efforts in promoting preventative health measures by the State as well as by non-state actors. Programmes and policies should also be put in place to address the needs of the poor and vulnerable members of society, including a National Health Insurance System. Inequities in the health system such as intra- and inter-provincial health expenditures, access to clinics and hospitals, number of doctors, specialists, and nursing staff need to be addressed so as to give meaning to the constitutional right to universal and equal access to everyone. Finally, Departments of Health are strongly advised to improve their monitoring, evaluating, and reporting systems

The Right to Social Security

The Constitution provides that everyone has a right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The number of social assistance beneficiaries increased dramatically by 966 311 people from April 2002 to the end of March 2003, mostly as a result of increased registration for Child Support Grants for children up to the age of seven. By the end of March 2003, 5,6 million people were beneficiaries of social assistance, which mostly comprised of child support grants (2,5 million people), old age pensions (2 million people), disability grants (897 050 people) and foster care grants (133 309 people). The most rapid increases in uptake of social grants took place in Gauteng, Free State, KwaZulu-Natal, Mpumalanga and Limpopo. Take up rates were considerably lower in the Northern Cape, North-West, Eastern Cape and Western Cape.

Most provincial departments indicated that the allocated budget was not enough and that numbers of grant beneficiaries were constantly increasing, resulting in overspending for social security. However, the delivery of social services has not been efficient in some parts of the country as a result of administrative problems, lack of documentation as barriers to accessing grants, poor conditions at pay points, as well as corruption and maladministration.

As a result of rapid inflation in the cost of basic goods bought by the poor, in 2002/2003, the State moved swiftly to implement above inflation related increases in social grants. The old-age pension was increased by R20 to R640, the child-support grant increased by R10 to R140, the grant in aid increased from R120 to R130, the foster-care grant from R450 to R460, and the care dependency grant from R620 to R640.

The National and Provincial Departments of Social Development spent 90% of the R49 million allocated to the HIV/AIDS (home based/community based care) programme. The Home/Community Based Care programmes, through the collaborative work of

government, non-governmental organisations, including faith-based organisations, and communities have benefited 29 612 children orphaned or vulnerable to HIV/AIDS by the end of March 2003. The programme reached 75 000 children orphaned or vulnerable owing to HIV/AIDS since its inception in 2000.

The State also instituted new measures to further the right to social security, including disability assessment panels, a social relief of distress policy and the implementation of the National Food Emergency Scheme/Programme. Figures of the number of households that were assisted with food parcels in the pilot phase of the National Food Emergency Programme from December 2002 to the end of March 2003 range from 60 089 to 149 779.

The social security system at present does not cater for everyone and not everyone in need of social assistance is afforded such assistance. This is especially so for children in child headed households and children who live in the streets who sometimes engage in exploitative forms of labour. Some parents also fail to provide and take care of their children and put strains on the maintenance and social assistance systems.

The report recommends that the Department of Labour should take the International Labour Organisation's Decent Work for All Strategy forward in South Africa. It is also recommended that the relevant organs of State achieve better regulation of the insurance, health and maintenance systems. Particular attention should be paid to the coverage of old age pensions for workers in non-formal employment. The Department of Social Development is encouraged to continue fostering collaboration with all stakeholders, such as other government departments, Faith Based Organisations and Non-Governmental Organisations. The Basic Income Grant should continue to be considered as a viable option for addressing poverty in the country, especially amongst people of working age. The proposal to extend social assistance to all children in need (up to the age of 18), should also be kept alive.

The Right to Food

The report concludes that many people, and children in particular, had their right to food violated during the reporting period as they lost access to affordable food due to high prices and/or unreasonable plans devised and supervised by government. During the reporting period, 101 152 children were admitted to hospital with severe malnutrition and it was not possible for the Commission to state how many children died of malnutrition. However, it is alarming that case fatality rates for severe malnutrition in two under-resourced hospitals in the Eastern Cape ranged from 21% to 38%.

The report finds the National Department of Health's targets for reducing malnutrition to be unreasonable in their conception because the targets for 2000 and 2005 were virtually identical. The report also finds two elements of the Primary School Nutrition Programme to be unreasonable in their conception.

The first issue concerns the reduced allocation of resources to the programme in 2002/2003 as compared to 2001/2002. In 2001/2002 the total cost of the school food "meal" ranged from approximately 99 cents to R2.10. In 2002/2003, the maximum budgeted resource available per targeted learner per day was less than 67 cents. This is

clearly an unreasonable set of parameters for the programme to be improved to meet the higher standards set by Cabinet.

The second element of the programme that was unreasonable was the reduction in the targeted number of children who should benefit from the programme. In the context of increasing numbers of children enrolled in schools, the Primary School Nutrition Programme did reach 4,5 million children in grades R to 7, however this was 151 615 children less than the year before. The drop in the number of learners who were reached is connected with government reducing its target from 5,4 million learners in 2001/2002 to 4,9 million learners in 2002/2003 as well as rapid increases in the cost of food procured for the programme. A three month gap in the implementation of the programme in the Eastern Cape also reduced access to the programme.

Non-State actors appear to have fallen short in their observance of their positive obligations to fulfil the right to food. As one example, the Yiyo Lena sifted maize relief programme introduced by a group of companies is alleged to have sold relief maize packs at a 20% discount, despite that fact that the companies announced that the programme would entail a 50% discount.

High basic food prices during the reporting period, were partly attributable to inadequate safeguards on the South African Futures Exchange, where maize prices are formed. High prices for maize were passed on to low-income consumers, who could ill afford such dramatic basic food price increases for such a sustained period of time. The potential for market manipulation should have been prevented by the Johannesburg Securities Exchange when allegations of abuse were first signalled in 2002. The report identifies that there are weaknesses in the State's observance of its obligation to protect against fraud, unethical behaviour in trade and contractual relations.

There were some signs of improvement in the State's delivery of production support to emerging farmers and people who grow their own food. For example, the Comprehensive Farmer Support Package was instituted during the reporting period to assist land reform beneficiaries. However, it was implemented in some provinces only.

The LandCare programme, which is one of the major production support programmes from the National Department of Agriculture, was heavily underspent at 65% of the total conditional grant to provinces. There is also a significant gap in production support for rural restitution beneficiaries.

It was found that very few Provincial Department's of Agriculture were operating well funded programmes designed specifically to provide grants or revolving loans to support increased access by small scale and emergent farmers to production and/or marketing related infrastructure. Production support materials and learning support materials that are relevant to resource to poor farmers in water scarce areas were also not readily available.

On the whole, the report determines that the State absorbed the heavy burden of duty to achieve the progressive realisation of the right to food as expeditiously as possible, within its available resources. However, there was a crucial weakness in the measures to protect the right to food from being violated by non-State actors or third parties that need not be repeated in future.

The report suggests that there is a need for greater care in the preparation of strategic and financial planning targets so that they inspire civil society to marshal their resources in support of the progressive realisation of the right. The report recommends: public education to raise awareness of malnutrition, rolling out the Integrated Food Security Strategy at a provincial level, improving food safety, achieving better regulation of the food industry through State procurement, accelerating agrarian reform, and communication policy and legislative developments more effectively. Finally, the report supports the call for government, labour, community and business representatives to negotiate an agreement at the National Economic Development and Labour Council (NEDLAC) to ensure the right to food and quality job creation in the food industry.

The Right of Access to Adequate Housing

In order to fill some gaps in the housing policy framework, the State identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities for 2002/2003. Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to transport and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualised as a result of the *Grootboom* judgment and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control (e.g. disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety). The report highlights that it was not clear whether the Emergency Housing Policy should also cover people living in informal settlements, because they are living in intolerable circumstances. Social Housing projects demonstrate that socially, environmentally and sunshine conscious design principles can make a difference to the quality of State subsidised housing.

The State reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from Occupation of Land Amendment Bill and the commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000. With a view towards curbing discriminatory practices, the Act compels financial institutions to disclose information in their financial statements on home loan patterns according to categories of persons and geographic areas (both of which may be prescribed). The Community Reinvestment Bill confirmed the State's intention to increase private sector investment in the lower end of the housing market. The report highlights that the State was also attending to some aspects of the Housing Act 107 of 1997, as amended, in order to ensure that the Act, and its implementation, did not violate an individual's right to property in terms of the Constitution.

In terms of on-going policies and programmes, in 2002/2003, the State reported 203 288 houses completed or under construction, whilst the State approved 519 498 subsidies to households with a joint monthly income less than or equal to R3 500, or R1 500 if the house was built under the apartheid system. By the end of 2002/2003, the State reported that over 1,4 million houses had been delivered since 1994, whilst the number of families without houses (i.e. dwellings in backyards, informal dwellings, backyard dwellings in shared properties and caravans/tents) was reflected as 2 399 825- from the 2001 Census. The State also increased the subsidy amounts for the housing programme to keep pace with inflation and maintain the well-known quality and size of housing. Sixty-three projects were also completed as part of the Human Settlement Redevelopment Programme in order to correct imbalances and dysfunctionalities in

existing settlements that cannot be funded through the housing subsidy scheme (e.g. sports facilities, business hives, labour exchanges, cemeteries, parks and ablution blocks).

There was under expenditure on housing delivery amongst many provincial departments responsible for housing. Reporting on the constraints associated with underspending was not complete, but included the following in some cases: failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in the National Department approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the People's Housing Process and delays at the Deeds Office.

Comparing performance in relation to targets was a problem in that provincial information was reported in the format of the number of units completed *or* under construction. Nevertheless, Gauteng and Limpopo provinces stand out as the only provinces to show a reduction in units, whether complete or under construction, from 2001/02 to 2002/03. The Gauteng Department of Housing reported delivering 59% of the target in the incremental housing programme and 39% of the target in the Social Housing programme. A Customer Support Service in the province acknowledged 83 714 queries and responded to a further 11 774 by letter.

According to the National Department of Housing, in 2002/2003, 6 469 houses did not conform to the Department's construction and safety standards. The National Home Builders Registration Council's (NHBRC) Warranty Scheme was instituted to provide assurance to beneficiaries that houses built and financed through the housing subsidy scheme are of an adequate quality. After trying to resolve disputes about the quality of construction, a housing subsidy beneficiary can forward complaints to the NHBRC. However, the report highlights that public education is required to empower consumers to identify quality problems and make use of the complaint procedures of the NHBRC. The Mpumalanga Department of Housing also reported that building works inspectors from provincial government and local government monitored the work of contractors.

The report makes one urgent recommendation, namely: to establish the dedicated fund for acquiring well-located land for low-cost housing. Other recommendations include reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, interpreting the Peoples' Housing Process as a route for strengthening culturally adequate housing, creating an informed and supportive environment for whistleblowing, and ensuring effective participation in the delivery of housing. Specific attention is drawn to the plight of farmworkers and vulnerable groups, especially HIV/AIDS orphans and People with Special Needs.

The Right to a Healthy Environment

Section 24 of the Constitution establishes the right to environment in order to ensure the health and well-being of present and future generations. At its core, the right to environment aims to grant this benefit to everyone in South Africa, not just to the few. Although, translating this vision of the benefit of environmental health into reality has become increasingly complicated, ensuring that there are no violations of this right is as urgent as any violation of other rights in the Bill of Rights.

Analysts of data from South Africa's Global Atmosphere Watch station at Cape Point contend that continued emissions of greenhouse gases are cause for concern. Like many countries, South Africa is sensitive to global climate change and there are also occasions, especially in major urban areas, when more localised air pollution becomes a health threat.

By way of illustration, the Johannesburg *State of the Environment Report 2003* indicates that “while in many parts of Johannesburg, air quality is within acceptable standards, approximately 20% of the City, particularly dense settlements and lower income townships, experience severe air pollution, with ambient air pollution levels exceeding acceptable guidelines by approximately 20-30% particularly during winter when temperature inversions prevent emissions from dispersing.” The report goes further to state that “levels of particulate matter in certain townships can exceed the World Health Organisation standards by as much as 250% in winter.”

Progress in the realisation of the right to environment could not be very well monitored and observed by the Commission during the year under review because annual progress reports in terms of section 11 of the National Environmental Management Act 107 of 1998, were inaccessible at the time of writing. These progress reports should contain detailed information on the implementation of measures instituted to ensure the right to environment.

Nevertheless, the Commission did observe the growing influence of the Committee for Environmental Co-ordination through an interpretation of its review, and subsequent consolidation, of Environmental Implementation Plans and Environmental Management Plans submitted by relevant organs of State. These reports contain the planned and *aligned* outputs of national and provincial departments with an impact on, or management function over, aspects of the right to environment. The Commission also recognises that some Environmental Co-ordinating Committees were established at the provincial sphere, also for the purposes of alignment and co-operative governance.

Progress has been made, through the courts and other avenues, towards realising the procedural aspects of the right to environment (access to information, participation in decision-making processes, redress and remedy). The report includes several examples of objections and court applications lodged by Non-Governmental Organisations, with a view towards safeguarding environmental health in low-income areas. Despite these opportunities to access information and participate in decision making, some remedies for old violations could not be realised without concerted action on the part of the State. One example, is the case of workers with mercury poisoning, which first occurred many years ago. In March 2003, Thor Chemicals was served with a R60 million toxic chemical clean-up directive by the State.

On the substantive issue of waste management and pollution control, what was reported by government to the Commission fell short of what was expected in terms of the strategic objectives of the policy and strategy for pollution and waste management. The report highlights that there is still no clear understanding among the different mandate holders for this function of what they are required to do and as a result, implementation was not as effective as it could be. Having said this, there were positive developments during the period under review, including the introduction of waste buy-back centres

which address brown issues and could assist in strengthening the bargaining power of the very low income people who do the hard work of collection.

On the issue of Air Quality, the report acknowledges that progress was made in the Southern Industrial Basin through the focused action of the State and Community Based Organisations (CBOs) in linking asthma in school children to emissions, however there is an urgent need for national legislation to institute mechanisms and standards to effectively protect against pollution that threatens health and well-being, possibly including pollutant release and transfer registers.

Several new control measures were introduced to manage water pollution, including the second draft of the National Water Quality Management Framework Policy and the Waste Discharge Charge System. The Working for Water programme succeeded in protecting and preventing against water loss due to alien invasive plant species, however it was not clear how much of this work focused unfairly on commercial farmlands and not on areas inhabited by vulnerable sections of the population.

Most of the work by the State on inland as well as marine and coastal biodiversity and conservation was reasonable in as far as it related to tourism and the economic development of the country.

The report highlights that the challenges facing South Africa in terms of the right to a healthy environment include: allocating sufficient resources for progressive realisation of the right for the benefit of vulnerable groups; educating and training communities; ensuring that proper implementation systems are in place; ensuring effective co-operative governance; operating proper monitoring and evaluation systems.

The report recommends that while most policies and laws are in place or about to be instituted, there should be a quantum shift in focus towards implementation of measures to further the right to environment for vulnerable groups in a more decentralised way. Provincial government and local government should be resourced to concentrate their energies on implementation, in association with community based organisations that have already developed innovations to further the right, sometimes in the face of extreme resource scarcity.

The State has made valuable contributions to promoting the right to environment through for example, the “Bontle ke Batho” or the clean schools, wards and towns campaign; however, organs of State could do more to ensure that their own internal operations reflect implementation of the right to environment. For example, the Council for Scientific and Industrial Research (CSIR) implemented International Standards Organisation 14001 standards for handling and disposing of its own hazardous waste. This initiative by an organ of State seems to have afforded the CSIR the opportunity to gain some capacity and insight, which could be applied to other relevant contexts in the public or private sector within the South Africa.

The report also recommends that monitoring and evaluation systems need to be simplified where possible and improved. Annual progress reports in pursuit of targets and plans laid down in Environmental Implementation Plans and Environmental Management Plans should include a focus on the substantive aspects of the realisation of the right for vulnerable groups. The contents of the reports should also be widely

communicated so as to avoid conflict and encourage effective participation. The Committee for Environmental Co-ordination could also be complemented by the National Environmental Advisory Forum (NEAF) envisaged in the National Environmental Management Act 107 of 1998. This provision to encourage participation should be effected without delay.

D) Protocols and the Report Production Process

The production process for this report began with the SAHRC sending questionnaires, which are called protocols, to various organs of State for their comment in May 2003. The Commission then took some time to revise the protocols, which were resent to all relevant organs of State for comment and suggestions in June 2003. The response from relevant organs of State was not satisfactory; with the Department of Housing (Gauteng Province), the Department of Land Affairs and the Department of Water Affairs and Forestry being the only organs of State to respond. However, the Commission acknowledges that further work is required, in the next reporting cycle, to ensure that the protocols are improved for all spheres of government and parastatals.

The final protocols were sent to various organs of state (national and provincial government, parastatals, metropolitan and local councils) in July 2003, as mandated by section 184(3) of the Constitution. In future, the Commission will pay more attention to smaller municipalities by focusing field research on the implementation of programmes and projects at a local level.

The first deadline for the release of this Report was in December 2003. However, the Commission had major problems in getting timeous responses from organs of State and as a result, the Commission took a decision to subpoena several departments and postpone the release of the Report until sufficient information had been received (see summarised list overleaf).

SPHERE	INSTITUTION	DATE RESPONSE RECEIVED
2 - Provinces	GAU Social Services and Population Development	August 21, 2003
1 - National	NATIONAL Labour	August 29, 2003
2 - Provinces	EC Health	August 29, 2003
2 - Provinces	WC Agriculture	August 29, 2003
2 - Provinces	LIMPOPO Agriculture and Environmental Affairs	August 31, 2003
2 - Provinces	FS Health	September 1, 2003
2 - Provinces	NW Health	September 1, 2003
2 - Provinces	WC Social Services	September 1, 2003
2 - Provinces	EC Education and Training	September 5, 2003
2 - Provinces	GAU Health	September 5, 2003
2 - Provinces	KZN Agriculture and Environmental Affairs	September 9, 2003
4 -Parastatals	PARASTATAL Rand Water	September 9, 2003
2 - Provinces	KZN Traditional and Local Government	September 10, 2003
2 - Provinces	MP Local Govt and Traffic	September 10, 2003
2 - Provinces	NW Education	September 10, 2003
1 - National	NATIONAL Land Affairs	September 12, 2003
2 - Provinces	FS Social Welfare	September 12, 2003
2 - Provinces	GAU Housing	September 12, 2003
2 - Provinces	NC Health	September 12, 2003
2 - Provinces	NC Social Services and Population Development	September 12, 2003
1 - National	NATIONAL Agriculture	September 15, 2003
1 - National	NATIONAL Water Affairs and Forestry	September 15, 2003
2 - Provinces	EC Agriculture and Land Affairs	September 15, 2003
2 - Provinces	FS Education	September 15, 2003
2 - Provinces	GAU Education	September 15, 2003
2 - Provinces	MP Housing and Land Administration	September 15, 2003
2 - Provinces	WC Education	September 15, 2003
2 - Provinces	WC Environmental Affairs and Development Planning	September 15, 2003
2 - Provinces	WC Health	September 15, 2003
2 - Provinces	WC Housing	September 15, 2003
2 - Provinces	NC Agriculture Conservation and Environment	September 15, 2003
2 - Provinces	KZN Health	September 16, 2003
1 - National	NATIONAL Education	September 18, 2003
2 - Provinces	MP Health	September 18, 2003
2 - Provinces	NW Agriculture, Conservation and Environment	September 23, 2003
2 - Provinces	MP Social Services and Population Development	September 25, 2003
3 -Metropolitan Councils	METRO Greater Tswane Metropolitan Council	October 2, 2003
3 -Metropolitan Councils	METRO Nelson Mandela Metro Council	October 2, 2003
1 - National	NATIONAL Correctional Services	October 3, 2003
1 - National	NATIONAL Social Development	October 3, 2003
2 - Provinces	LIMPOPO Health and Welfare	October 3, 2003
2 - Provinces	EC Social Development	October 3, 2003
1 - National	NATIONAL Health	October 10, 2003
2 - Provinces	GAU Agriculture, Conservation, Environment and Land Affairs	October 10, 2003
4 -Parastatals	PARASTATAL Medicines Controls Council	October 10, 2003
2 - Provinces	FS Local Govt and Housing	October 29, 2003
1 - National	NATIONAL Housing	October 30, 2003
1 - National	NATIONAL Provincial and Local Government	October 30, 2003
1 - National	NATIONAL Environmental Affairs and Tourism	October 31, 2003
4 -Parastatals	PARASTATAL Agriculture Research Council	October 31, 2003
1 - National	NATIONAL Minerals and Energy Affairs	November 3, 2003
2 - Provinces	KZN Education and Culture	November 3, 2003
2 - Provinces	EC Housing, Local Government and Traditional Affairs	November 4, 2003
2 - Provinces	GAU Development Planning and Local Government	November 4, 2003
2 - Provinces	LIMPOPO Education	November 4, 2003
2 - Provinces	MP Agriculture, Conservation and the Environment	November 4, 2003
2 - Provinces	NC Local Govt and Housing	November 4, 2003
2 - Provinces	WC Planning and Local Govt	November 4, 2003
4 -Parastatals	PARASTATAL National Education Financial Aid Scheme	November 4, 2003
2 - Provinces	NW Developmental Local Government and Housing	November 5, 2003
3 -Metropolitan Councils	METRO Eastrand Metropolitan Council	November 5, 2003
4 -Parastatals	PARASTATAL Umngeni Water	November 5, 2003
3 -Metropolitan Councils	METRO Cape Town Metro Council	November 6, 2003
4 -Parastatals	PARASTATAL Medical Research Council	November 6, 2003
2 - Provinces	FS Agriculture	November 7, 2003
2 - Provinces	KZN Welfare and Pensions	November 7, 2003
2 - Provinces	LIMPOPO Local Govt and Housing	November 7, 2003
2 - Provinces	MP Education	November 7, 2003
2 - Provinces	NC Education	November 7, 2003
4 -Parastatals	PARASTATAL National Housing Finance Corporation	November 7, 2003
2 - Provinces	KZN Housing	November 14, 2003
3 -Metropolitan Councils	METRO eThekweni Metropolitan Council	November 17, 2003
4 -Parastatals	PARASTATAL Landbank*	November 17, 2003
4 -Parastatals	PARASTATAL Council for Scientific and Industrial Council*	November 18, 2003
2 - Provinces	FS Environmental, Tourism and Economic Affairs	November 19, 2003
3 -Metropolitan Councils	METRO Greater Johannesburg Metropolitan Council	December 17, 2003
2 - Provinces	NW Social Services**	

----- First deadline

----- Extended deadline

----- Subpoena hearings begin

----- Subpoena hearings end

* Extension granted as a result of communication problems

** No subpoena served, a letter explains the breakdown in communication

Most organs of State submitted their reports before they were meant to appear at a subpoena hearing. However, the North West Department of Social Services, Arts, Culture and Sport did not provide a response to the Commission as a result of problems with network cabling and the resignation of the personal assistant to the Acting HoD. The Department submits that it was not out of irresponsibility and deliberate disregard of the law that the Commission did not receive a report from the Department.

In order to improve the quality of the information, analysis and recommendations in the reports and to forge closer and better working relationships with government and non-governmental entities, a set of draft reports were released for comment to government and civil society before a National Input Workshop on 27-28 January 2004. Comments made at the workshop, and in writing, have been considered by each report writer.

A set of second draft reports were then made available to the Director General of the relevant national department in February 2003 to correct any remaining problems with factual information. Responses were received from the following departments: Water Affairs and Forestry, Minerals and Energy, Provincial and Local Government, Health, Social Development, Education, Land Affairs, and Housing. The final reports were also reviewed intensively within the Commission before being published.

E) Conclusion

One of the concerns acknowledged by the Commission about the monitoring process so far is that it still relies heavily on reports from government.

Furthermore, even though the Bill of Rights applies vertically and horizontally and binds State entities and non-State entities, the Commission has some capacity problems in extending its mandate to non-State entities, especially big corporations.

In the next reporting cycle, the Commission will place more emphasis on conducting its own primary research in addition to improving on the existing protocols for each right and making better use of annual report information as soon as it becomes available.

ACRONYMS

CC	Constitutional Court
CESCR	Committee on Economic Social and Cultural Rights
COSATU	Congress of South African Trade Unions
ECDH	Eastern Cape Department of Housing
ESR	Economic and Social Rights
ESTA	Extension of Land Tenure Act
FSDH	Free State Department of Housing
GDH	Gauteng Department of Housing
Habitat Agenda	United Nations Declaration on Human Settlements
HLAMDA	Home Loan and Mortgage Disclosure Act
HSRP	Human Settlement Redevelopment Programme
ICESCR	International Covenant on Economic Social and Cultural Rights
KZNDH	KwaZulu Natal Department of Housing
LTA	Land Tenure Act
MDH	Mpumalanga Department of Housing
MTEF	Medium-Term Expenditure Framework
NDH	National Department of Housing
NHBRC	National Home Builders Registration Council
NWDH	North West Department of Housing
PHP	Peoples Housing Process
PIE	Prevention of Illegal Evictions from and Unlawful Occupation of Land Act No 19 of 1998
PSN	People with Special Needs
RDP	Reconstruction and Development Programme
SAHRC	South African Human Rights Commission
SCA	Supreme Court of Appeal
TAC	Treatment Action Campaign
USN	Urban Sector Network
WDH	Western Cape Department of Housing

EXECUTIVE SUMMARY - THE RIGHT OF ACCESS TO ADEQUATE HOUSING

Constitutional Obligations

The Constitution provides for the right of access to adequate housing for everyone, including children and prisoners. Section 26 (2) puts an obligation on the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 26 (3) prohibits evictions from, and demolitions of, people's homes without an order of court, made after considering all relevant circumstances.

An interpretation of the standard of reasonableness from the South African landmark case *Government of Republic of South Africa and Others v Grootboom and Others* is considered. The essence of the Constitutional Court judgment in this case is that, where the state is required to progressively realise any socio economic rights, both its policies and implementation measures, must be reasonable.

An additional requirement of transparency is also provided from the *TAC* case which calls for a concerted, coordinated and co-operative national effort, in which government, in each of the three spheres, and the panoply of resources and skills of civil societies are marshalled, inspired and led. The Housing Act of 1997 provides housing objectives.

The South African Government has also committed its self to the Habitat Agenda of ensuring adequate shelter for all and making sustainable human settlement safer, healthier and more liveable, equitable and productive. The international instruments that are used in the report to assess progressive realisation of the right include the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states elements to be met when defining "adequate housing".

When the State came into power in 1994, it inherited a huge housing backlog, which remains a challenge in the year 2002/2003. In order to address the backlog, the State committed itself to build one million houses during its first term of office. By the year 1998/1999, about 721 813 houses were under construction or had already been completed. This was made possible by an estimated amount of R11,2 billion that was spent on housing between the 1994 –1999 year period. By the end of 2002/2003 the state had spent about R24,2 billion on the delivery of over 1,4 million houses. This and other instituted measures reflect as a response to the housing needs in South Africa and in compliance to the Constitution of the Republic of South Africa, in particular section 26 and section 7(2).

Notwithstanding the delivery of over a million houses, the housing situation for those living in conditions of poverty in the country serves as evidence that

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South Africa still has a long way to go. In each financial year, the state allocates some money in order to deal with such challenges. For the year under review, the Department of Housing received an amount of more than R4,2 Billion and also instituted various legislative and programmatic measures. The provincial budgetary allocation and other measures were carried out accordingly in order to increase delivery.

Progress in the realisation of the right of access to adequate housing

Most of the Departments involved in housing delivery focussed on the implementation of the already existing measures.

Respect

The report highlights that the State was attending to sections 10A and 10B of the Housing Act 107 of 1997, as amended, in order to ensure that the Act, and its implementation, did not violate an individual's right to property in terms of the Constitution.

Protect

The State reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from and Occupation of Land Amendment Bill and the commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill is a good response from the Housing ministry as it seeks to address an "unintended consequence" of the principal Act and therefore has the potential to reconcile the right not to be arbitrarily evicted and the Government's obligation to promote the rental housing sector.

The commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000 is with a view towards curbing discriminatory practices. The Act compels financial institutions to disclose information in their financial statements on home loan patterns according to categories of persons and geographic areas (both of which may be prescribed). The Community Reinvestment Bill confirmed the State's intention to increase private sector investment in the lower end of the housing market.

Promote

According to the National Department of Housing, in 2002/2003, 6 469 houses did not conform to the Department's construction and safety standards. The National Home Builders Registration Council's (NHBRC) Warranty Scheme was instituted to provide assurance to beneficiaries that houses built and financed through the housing subsidy scheme are of an adequate quality. After trying to resolve disputes about the quality of construction, a housing subsidy beneficiary can forward complaints to the NHBRC. However, the report

highlights that public education is required to empower consumers to identify quality problems and make use of the complaint procedures of the NHBRC.

Fulfil

In order to fill some gaps in the housing policy framework, the State identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities for 2002/2003. Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to transport and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualised as a result of the *Grootboom* judgment and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control (e.g. disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety). The report highlights that it was not clear whether the Emergency Housing Policy should also cover people living in informal settlements, because they are living in intolerable circumstances. Social Housing projects demonstrate that socially, environmentally and sunshine conscious design principles can make a difference to the quality of State subsidised housing.

In terms of on-going policies and programmes, in 2002/2003, the State reported 203 288 houses completed or under construction, whilst the State approved 519 498 subsidies to households with a joint monthly income less than or equal to R3 500, or R1 500 if the house was built under the apartheid system. By the end of 2002/2003, the State reported that over 1,4 million houses had been delivered since 1994, whilst the number of families without houses (i.e. dwellings in backyards, informal dwellings, backyard dwellings in shared properties and caravans/tents) was reflected as 2 399 825- from the 2001 Census. The State also increased the subsidy amounts for the housing programme to keep pace with inflation and maintain the well-known quality and size of housing. Sixty-three projects were also completed as part of the Human Settlement Redevelopment Programme in order to correct imbalances and dysfunctionalities in existing settlements that cannot be funded through the housing subsidy scheme (e.g. sports facilities, business hives, labour exchanges, cemeteries, parks and ablution blocks).

There was under expenditure on housing delivery amongst many provincial departments responsible for housing. Reporting on the constraints associated with underspending was not complete, but included the following in some cases: failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in the National Department approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the People's Housing Process and delays at the Deeds Office.

Comparing performance in relation to targets was a problem in that provincial information was reported in the format of the number of units completed or under construction. Nevertheless, Gauteng and Limpopo provinces stand out as the only provinces to show a reduction in units, whether complete or under construction, from 2001/02 to 2002/03. The Gauteng Department of Housing reported delivering 59% of the target in the incremental housing programme and 39% of the target in the Social Housing programme. A Customer Support Service in the province acknowledged 83 714 queries and responded to a further 11 774 by letter.

Overall Assessment

In its conclusion, the report acknowledges the efforts by the Housing Department. However, based on a number of challenges mentioned in the report for the year under review which, *inter alia*, include poor quality of houses, segmentation between various departments involved, lack of a comprehensive and coordinated response to the housing crisis for vulnerable groups, such as HIV Aids victims; lack of capacity at the municipality level, which has not been dealt with; an inability to spend budget votes; lack of adequate information from the departments when they report to the Human Rights Commission; it concludes that it is difficult to infer that there has been indeed a progressive realisation of the right to access to “adequate housing” as required by the Constitution. The report concludes that the Department of Housing is moving in the right direction and the more than 1.4 million houses built by the end of March 2003 should be acknowledged as a strong foundation, which the department can build on.

Challenges that were encountered during the year under review are discussed briefly. The report agrees that most of the challenges are common to most provincial departments. This is followed by the researcher’s critique of all the measures. This section balances the information from the above sections based on independent research and information received from the departments. The question of the reasonableness of the measures is dealt with in more detail. The overall picture, which stands out in this section is that most of the measures by the departments do not meet the required standards.

Recommendations

The report makes one urgent recommendation, namely: to establish the dedicated fund for acquiring well-located land for low-cost housing. Other recommendations include reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, interpreting the Peoples' Housing Process as a route for strengthening culturally adequate housing, creating an informed and supportive environment for whistleblowing, and ensuring effective participation in the delivery of housing. Specific attention is drawn to the plight of farmworkers and vulnerable groups, especially HIV/AIDS orphans and People with Special Needs.

1. INTRODUCTION

1.1 Constitutional Obligations

The Constitution provides for the right of access to adequate housing for everyone, including children¹ and prisoners.² Section 26 (2) puts an obligation on the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 26 (3) prohibits evictions from and demolitions of people's homes without an order of court made after considering all relevant circumstances.

South Africa has also developed its own jurisprudence pertaining to the definition of reasonableness of measures adopted by the State to realise the right of access to adequate housing. The Constitutional Court in *Government of RSA v Grootboom*, confirmed that housing means a lot more than just brick and mortar.³ In this regard the court said that access to adequate housing requires:

*available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.*⁴

Developments in the South African jurisprudence on socio-economic rights are also marked by the rejection of the “minimum core obligation” imposed on the State when realising socio-economic rights. When the Constitutional Court rejected the minimum core obligation in the *Grootboom* and *Treatment Action Campaign (TAC)* cases, it developed its standard of assessment of the standard of reasonableness.

The essence of the Constitutional Court's judgement in the *Grootboom* case is that where the State is required to realise a socio-economic right progressively, both government policy and other measures taken to implement that policy must be “reasonable”.

The following is the standard of reasonableness for assessing compliance with the State's positive duties.⁵

- The measures must be coherent, comprehensive, co-ordinated and directed towards the progressive realisation of the right and ensuring that public money is better spent. These must show proper co-operation between the different spheres of government (paragraph 41, 68).

- The measures “must be capable of facilitating the realisation of the right” (para 41).
- Mere legislation is not enough, policies and programmes must be reasonable “both in their conception and their implementation” (para 42).
- Considering housing problems in their social, economic and historical context, the programme must be “balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs”. A reasonable programme cannot exclude “a significant segment of society”. Conditions do not remain static and therefore the programme will require continuous review (para 43).
- The programme must include a component that responds to the urgent needs of those in desperate situations. Thus the State must “plan, budget and monitor the fulfilment of immediate needs and the management of crises ... This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need to receive it immediately” (para 68).

This standard was also reviewed in the *TAC* case to include an element of transparency.⁶

The magnitude of HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshalled, inspired and led. This can be achieved only if there is proper communication.

In order for it to be implemented optimally, a programme must be made known effectively to all concerned. For each measure to meet the Constitutional requirement of reasonableness, its contents must be made known appropriately (*TAC* para 123).

Importantly for this review, the South African government has committed to housing objectives which all the existing national housing programmes have to be based on, and which section 1 of the Housing Act, 107 of 1997 and the National Housing Code define as:

- the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas, allowing convenient access to economic opportunities, and to health, educational and social amenities.
- All citizens and permanent residents of the Republic shall, on a progressive basis, have access to:
 - permanent residential structures with secure tenure, ensuring internal and external privacy, and providing adequate protection against the elements; and

- potable water, adequate sanitary facilities and domestic energy supply.⁷

1.2 International instruments

In addition, the right to adequate housing is recognised in several international instruments⁸, which have paid considerable attention to the meaning of “adequate housing” and the duty of the State to realise this right. Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (herein referred to as the covenant) places a duty on State parties to “progressively” recognise or realise, “within its available resources”, the right of everybody to “adequate housing”. The Committee on Economic, Social and Cultural Rights stipulates key elements necessary for a meaningful enjoyment of this right.⁹ These include:

- security of tenure;
- availability of services, materials, facilities and infrastructure;
- affordable housing;
- habitable housing;
- accessible housing;
- location; and
- culturally adequate housing.

In line with other international instruments, South Africa’s housing policies are based on the United Nations Declaration on Human Settlements (Habitat Agenda). According to the Declaration, governments commit themselves to:

- ensuring adequate shelter for all and making sustainable human settlements safer, healthier and more liveable, equitable and productive;
- recognising the particular needs of women, children and youth for safe, healthy and secure living conditions;
- intensifying efforts to eradicate poverty and discrimination, promoting and protecting human rights and fundamental freedoms for all, and providing for basic needs, such as education, nutrition and life-span health care services, and adequate shelter for all;
- improving the living conditions in human settlements in ways that are consonant with local needs and realities, and ensuring full and equal participation of all women and men and the effective participation of youth in political, economic and social life;
- promoting full accessibility for people with disabilities, as well as gender equality in policies, programmes and projects for shelter and sustainable human settlement development; and

- making these commitments with particular reference to the more than one billion people living in absolute poverty and the members of vulnerable and disadvantaged groups identified in the Habitat Agenda.¹⁰

These are necessary commitments and conditions that have to be taken into account when assessing legal obligations to satisfy the right of access to adequate housing. The covenant is not yet a binding instrument for South Africa, since although the country has signed it, it still needs to ratify it. It is, however, used as a tool for guidance in this report.

2. PROGRESS IN THE REALISATION OF THE RIGHT

2.1 New Policies and Programme Measures

2.1.1 National Department of Housing

In her presentation to the Portfolio committee in May 2002, the Minister of Housing explained the Ministerial and Departmental priorities for 2002 as defined in the National Housing Policy and Strategy.¹¹

2.1.1.1 Medium Density Housing

This initiative responds to changes in the housing environment and redirects government's programmes towards a more needs-based response aimed at improving quality and promoting socially and economically integrated human settlements. It aims to promote higher residential densities in existing urban areas. It also looks at the identification and development of well-located State-owned land for medium density housing. It aims to focus on the integration of subsidies for medium density projects, improved access to socio-economic opportunities, and identifying and developing well-located State-owned land where public transport and appropriate employment are accessible. It will also contribute to inner city regeneration and the optimal utilisation of existing infrastructure

2.1.1.2 Rental Housing Policy Framework

This policy framework aims to provide access to rental housing for low- and middle-income groups who wish to live in temporary tenure arrangements and perhaps access individual subsidies in alternative locations. Because the starter-housing programme benefits mostly the low-income group, this might be misunderstood to imply that middle-income earners have been somewhat overlooked. Low-income and some middle-income groups do not qualify for credit extended by banks to build houses and they earn slightly more than the criterion for qualifying for a housing subsidy. In addition to this, not everybody wants to own a freestanding house. Some people, mainly because of work commitments and marital status, cannot afford to put up at one place for the rest of their lives. This policy has the potential to address these problems.

According to the former Minister of Housing, the following three challenges face this programme:

- Reducing and curtailing large financial deficits incurred on State rental stock;
- Contributing to city integration, urban renewal and restructuring; and
- Prioritising the mobilisation of the full spectrum of non-government investment and management of rental accommodations.

The rental policy clearly caters for people who have a regular income. This is due to the required operational expenses of rental units. For this reason, vulnerable groups with no source of income will not be able to qualify for it. This concern has also been raised by the UN HABITAT study on Rental Housing.¹² Making reference to Tribunal and Carr Gardens of Johannesburg, the study states that:

Certainly the first two projects to have been built in Johannesburg (Tribunal Gardens and Carr Gardens) do not cater for the really poor. In addition, the Johannesburg housing Company is hardly a typical social housing foundation in so far as it was established with a R40 million capital grant from the European Union.

None of the various schemes that form part of the central Johannesburg project really fit the original outlines laid down at the Job summit.

The trouble comes when the project is handed over and the housing association has to cope with all the problems with very low rents.

There appears to be no way the South African poor can afford good quality, inner-city accommodation. The Foundations cannot square the circle.

Rental housing in South Africa is still small. It is an essential option for the urban poor; however, these are challenges that have to be dealt with in order for it to serve its intended purposes.

2.1.1.3 Social Housing

The National Department has embarked on a social housing policy development programme that supports medium density rental housing. Social housing is aimed at improving quality of life and the integration of communities by providing affordable, high-standard, subsidised housing that will regenerate the area where the housing stock is located. This process is said to be managed by viable and sustainable, independent housing institutions that encourage the participation of residents in managing their own communities. Social housing policy's objective is to ensure viable and sustainable housing institutions to develop, administer and hold rental housing stock, aimed at low-

to-middle income families with earnings of between R1 500 and R7 500 per month.

During the year under review, the NDH aimed to finalise social housing policy and legislation. A specific goal is to establish 30 social housing institutions over five years and to develop 50 000 social housing units. About 351 units were developed to the tune of R300 million in New Town, Johannesburg, during the year under review. This is said to be contributing to the revival of the cultural precinct and the regeneration of the inner city of Johannesburg. About 318 units were built in the Shayamoya in KwaZulu-Natal.

Social housing has the advantage of creating different kinds of ownerships,¹³ including:

- **Housing co-operatives:** in co-operatives, residents have shared ownership.
- **Rental:** the institution owns the stock over a long period of time.
- **Instalment sale, sectional title, rent to buy:** sooner or later ownership shifts from institution to the resident-owner.

Although social housing has the potential to improve quality of life for poor people, research by Urban Sector Network (USN) shows that there are a number of shortcomings to be dealt with by social housing before constructing more structures.¹⁴

The negative outcomes of current social housing include:¹⁵

- lack of space for key amenities such as laundry, parking and refuse;
- poorly considered water and electric meters that are prone to damage;
- large amounts of decay in the fabric of the buildings (peeling plaster, broken or missing geysers and damp in the walls of the units);
- poor collections and huge arrears;
- little participation of the beneficiaries in planning;
- poor lighting which contributes to a lack of safety and security;
- concerns about unit design and unit size; and
- lack of community and social space (safe play areas for children, adequate and appropriate washing lines, etc).

Positive outcomes include:

the design of the co-operatives (Shayamoya in particular) which takes into account some basic green design principles (environmental sustainability) namely:

- north orientation;
- air ventilation through the housing units;
- covered veranda space providing suitable outdoor living spaces;
and
- good location, minimising tenants' transport costs.
- capacity building for beneficiaries in order for them to run the co-operatives, although the challenge to train them remains.

The main problem seems to be with the collection of rent and arrears. Reasons for the non-payment of rent included administrative failures.¹⁶ Social housing policy will have to take cognisance of the inability to pay because of HIV/AIDS and unemployment. In Shayamoya the report states that by October 2002, there was almost 100% non-payment.¹⁷ The reasons for the non-payment include the fact that tenants lose their jobs and some get very ill and die AIDS-related deaths. The failure to collect monthly rentals has serious implications for the sustainability of social housing.

Only Shayamoya appears to provide some access for elderly or disabled people on ground floor units. It is, however, not clear what forms of disabilities were catered for and how accessible these units were. The use of stairs only could be a problem for the aged and disabled.¹⁸ They also need to have access to other floors in order to interact with other tenants, if the objective of social housing is to encourage different communities to mix and not discriminate. There does not appear to have been a conscious effort to cater for people with special needs, and those earning less than R1 500 were not accommodated.

The USN, together with other organisations, has come up with a list of what social housing should do. This includes getting government subsidies to build housing for families with little money. It is in fact not clear what "little money" means as far as this element is concerned. Social housing should also be cheap enough so that people can pay for it at the start and in the future.¹⁹ So far social housing has been reported to cater for people who earn more than R1 500. This is a significant segment of the society, which should not be excluded. A reasonable programme cannot exclude a significant segment of society.²⁰

There is no doubt that the initial objective is innovative. Social housing provides those who can afford rentals at a comparatively low price. Some residents appear to take great pride in the internal quality of their units, and many improvements such as kitchen units and fittings have been made.

However, looking at the negative outcomes above, it must be noted that the objectives of improving quality of life for all and the integration of communities have not yet been realised. Providing the first floor for the elderly and disabled only in Shayamoya does not amount to integration yet, because this is just grouping a less able and disabled community together. This means that the programme still has to grapple with a number of issues in order to be balanced and flexible and eventually meet the constitutional requirement of reasonableness.

2.1.1.4 Emergency Housing Policy

The Minister acknowledged that this had been conceptualised as a result of the *Grootboom* precedent and recent floods. It was approved in the 2003/2004 financial year. Essentially, the main objective of this policy is to provide temporary assistance in the form of secure access to land and/or basic municipal engineering services and/or shelter in a wide range of situations of exceptionally urgent housing need through the allocation of grants to municipalities instead of housing subsidies to individuals.²¹ Allocation of grants to the municipality is a way forward towards improving co-operation and co-ordination between the levels of government. However, it has been acknowledged that many municipalities do not have capacity to institute measures initiated by national government. This programme does not indicate how it intends to deal with this challenge before allocating grants to municipalities. The failure to do this will mean non-compliance with requirements of a coherent, comprehensive, co-ordinated policy directed towards progressive realisation. It will also fail to ensure that public money is better spent as required by the judgement.

According to the Department, an urgent housing situation exists when the Director-General of the National Department of Housing or his/her nominee deems that a group of people, owing to situations beyond their control:

- has become homeless as a result of declared disasters caused by natural or extraordinary occurrences such as floods, strong winds, severe rainstorms and/or hail, snow, devastating fires, earthquakes and/or sinkholes or large disastrous industrial incidents, where assistance is required after the initial remedial measures have been taken in terms of the Disaster Management Act 57 of 2002 by the municipality or provincial government to alleviate the immediate crisis situation;
- has become homeless as a result of a disaster which is not declared but destitution is caused by similar occurrences;
- lives in dangerous conditions such as being situated below the hundred-year flood line or on land which is dolomitic, undermined at shallow depth, or prone to sinkholes and who in the opinion of the Director General or her/his nominee requires urgent assistance;
- lives in the way of engineering services or proposed services such as those for water, sewerage, power, roads or railways, or in reserves established for any such purposes and who in the opinion of the Director General or her/his nominee requires urgent assistance;
- is evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where in the opinion of the Director General or her/his nominee, pro-active steps ought to be taken to forestall such consequences;

- whose homes are demolished or threatened with imminent demolition, or situations where in the opinion of the Director General or her/his nominee, proactive steps ought to be taken to forestall such consequences;
- is displaced or threatened with imminent displacement as a result of a state of civil conflict or unrest, or situations where in the opinion of the Director General or her/his nominee, pro-active steps ought to be taken to forestall such consequences; or
- lives in conditions which in the opinion of the Director General or her/his nominee pose immediate threats to life, health and safety and require urgent assistance and is in a situation of exceptional urgent housing need, which can in the opinion of the Director General or his/her nominee, be reasonably addressed only in terms of this programme.

This policy is yet to be implemented, so the impact cannot be pronounced upon. It is, however, worth noting that the sustainability of this programme might be an issue, as the grant does not cover refuse removals, operations, maintenance and management of the development. The temporary nature of the programme presupposes a programme that will adequately help the situation at that moment. In this regard, if the sustainability of this programme is questionable, paragraphs 41 and 43 of *Grootboom* must be taken into consideration.

There is no doubt that the current housing situation in parts of South Africa needs urgent attention. There are people in desperate need who appear to be excluded from the programme's definition of "emergency circumstances". The Department has already mentioned that this programme was conceptualised as a direct response to *Grootboom*. A background to the judgement of the court is therefore appropriate.

When Yacoob J handed down the judgement, he stated that the central thrust of the housing development policy (Housing Act 107 of 1997) was on the need for housing development as defined in the Act.²² The Act made no express provision to facilitate access to temporary relief for people who had no access to land, no roof over their heads, living in intolerable conditions and in crisis because of natural disasters such as floods, fires, or because their homes are under threat of demolition.²³ Section 26 of the Constitution requires that any measure by government must be reasonable and in order to determine whether the national programme falls within this definition, one must consider whether a national housing programme that leaves out the immediate improvement of the circumstances of those in crisis can meet the test of reasonableness.²⁴ The absence of this component may have been accepted if the nationwide housing programme resulted in affordable houses for most people within a reasonably short time.²⁵ However, it was not the case. As a result, the immediate crisis was accordingly not met. This consequently resulted in pressure on existing settlements and land invasions by those in desperate need.

The conditions explained in the court judgement are similar to those observed by the Commission in several parts of the country, especially in informal settlements. Indeed, the scale of the housing problem in South Africa suggests that affordable houses for most of those in desperate need cannot be delivered within a reasonable period of time. If, therefore, this programme does not cater for this group defined in para 52 in *Grootboom*, “the desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme”.²⁶ The Commission is aware of the fact that the suggestion that emergency accommodation should also cover people living in informal settlements, as they are “living in intolerable situations”, is arguable. If this argument is legally valid, the State must consider it, for the failure to consider the argument will render the programme unreasonable.

2.1.1.5 National Home Builders Registration Council’s Warranty Scheme to the Housing Subsidy Scheme Financed Houses (NHBRC)

The main object of the NHBRC Warranty Scheme is, *inter alia*, to provide protection to housing consumers in respect of the failure of home builders to comply with their obligations in terms of the Housing Consumers Protection Measures Act No. 95 of 1998. Prior to April 2002, the NHBRC Warranty Scheme did not apply to houses developed through government’s housing subsidies. The Act provides for a mechanism by which the Minister may decide when the said warranty scheme shall apply to houses financed through the Housing Subsidy Scheme. It also provides for improved structural quality in the interest of housing consumers and the home building industry. Housing consumers can now forward complaints to the NHBRC if there are defects in their subsidised housing units and the builder is registered with the NHBRC. But consumers and home builders must try to resolve their differences in a reasonable manner if possible, before referring them to the NHBRC.

The NHBRC has a complaints procedure that aims to:²⁷

- assist the housing consumer by ensuring that home builders meet their obligations under the Act;
- assess applications made by housing consumers seeking assistance from the NHBRC for the rectification of the major structural defects; and
- detect contraventions of the Act requiring disciplinary action or prosecution.

The NHBRC deals with the following three types of complaints:

- Three months’ non-compliance period;²⁸
- One year roof leak;²⁹ and
- Five years’ major structural defects period.³⁰

The Council is well placed to protect the right of access to adequate housing, but it still needs to empower the consumers so that they understand and know what constitutes a defective structure. This includes the creation of simplified booklets on the obligations and standards that should be met by home builders.

2.1.1.6 Human Settlement Redevelopment Programme (HSRP)

This programme was instituted in the 1999/2000 financial year. It is aimed at assisting in improving the quality of human settlement through the identification and correction of imbalances and dysfunctions in such human settlements. The programme largely funds projects and activities that cannot be funded through formal, established government programmes.

According to the Department, in the financial year 2002/2003, the HSRP funded 63 projects in the nine provinces. This adding to the R105 999 991 worth of projects within previously disadvantaged human settlements identified as dysfunctional.

The programme has impacted on the physical, environmental, social and economic lives of the communities.

2.1.1.6.1 Physical

The HSRP assists with the development of infrastructure (social and engineering) as well as the upgrading of neighbourhood environments that enhances the daily lives of communities and contributes to their safety, security and access to minimum levels of services.

In Klipplaat (Ikwezi Municipality), the programme assisted the municipality to upgrade the sanitation system through the use of local labour. Through the upgrading of Altrek sports facility (Alexandra) and the construction of a labour exchange building within Imizamo Yethu informal settlement (Houtbay) the programme facilitates the construction and/or upgrading of essential community facilities where these are absent or in a dilapidated state.

2.1.1.6.2 Social and Economic Perspective

A number of projects, which have the potential to affect the income generation abilities of households directly, are funded through this programme. Examples of such projects include the construction of Mbekweni business hive and the upgrading of the informal business area in Piketberg (Bergrivier Municipality).

2.1.1.6.3 Environmental

The programme has provided funding for the upgrading of cemeteries and the development of ablution facilities in public open spaces as well as the development of parks within Alexandra.

2.1.1.6.4 Tenure/Ownership Problems

April 2002 – March 2003

The HSRP is funding the resolution of land ownership rights in Khayelitsha – Site C in respect of 3 468 sites/erven that are currently doubly occupied.

2.1.1.7 Adjustment of the Quantum of the Subsidy Amount to Keep Up with Inflation and Maintain the Quality of the Products

The year under review witnessed an increase in housing subsidy amounts. Table 1 illustrates the new amounts:

Table 1: Increase in the Subsidy Amount 2002/2003

<i>Income Category</i>	<i>Previous Subsidy</i>	<i>New Subsidy</i>
R0 to R1 500	R 16 000	R 20 300
R1 501 to R2 500	R 10 000	R 12 700
R 2 501 to R3 500	R 5 500	R 7 000
Old aged, disabled and indigent	R 16 000	R 22 800
Consolidation sub: up to R1 500	R 8 500	R 10 900
Consolidation sub: Old aged, disabled and indigent	R 8 500	R 13 400

Source: National Department of Housing Protocol

In line with the increase of the quantum above, the disabled variation amounts were increased, as follows:

Table 2: Disabled Variation Amount 2002/2003

<i>Disabled Category</i>	<i>Purpose of Variation</i>	<i>Existing Amount</i>	<i>Increased Amount</i>
A, B and C [Walking]	Access to house – 12m ² of paving and ramp at doorway	R720	R868
A, B and C [Walking]	Kick plates to doors	R300	R362
A, B and C [Walking]	Grab rails and lever action taps in the bathroom [enlargement of the area can be done at the expense of the rest of the house]	R1 100	R1 327
D [Hearing]	Visual door bell indicator	R700	R844

Source: National Department of Housing Protocol

The increase in these subsidies has potential to improve the quality of houses for the beneficiaries.

2.1.2 Provincial Departments of Housing

The provincial departments have implemented some of the programmes that do not flow from the national department. Those that have already been discussed at national level will not be discussed under the provinces. Measures implemented differ from province to province. Only three provincial departments complied with section 184(3) of the Constitution. These were the Gauteng Department of Housing (GDH), the Western Cape Department of

Housing (WDH) and the Mpumalanga Department of Housing (MDH). All the other provincial departments failed to meet the deadline for submission. Even though their responses were received late, the measures they took are discussed in this report.

Most of the departments focused on the implementation of existing programmes.³¹ These included:

- rural housing subsidy;
- project-linked subsidy;
- consolidation subsidy;
- institutional subsidy;
- relocation subsidy;
- integrated serviced land subsidy;
- hostel upgrading programme;
- people's housing process;
- rapid land release programme;
- social housing programme;
- disaster intervention programme; and
- right-sizing subsidy.

2.1.2.1 Gauteng Department of Housing

The strategic direction of the Gauteng Department of Housing (GDH) for 2002/2003 focused on four primary delivery thrusts. These were not new policy and programme measures.

2.1.2.1.1 Incremental Housing

The objective for this programme is to ensure:

- the rapid release of land for housing development;
- the provision of essential services like water and sanitation to thousands of people in townships and informal settlements;
- that thousands of households are provided immediately with security of tenure, thus reducing and eradicating informal settlements and squatting; and
- that community-based equity and energy and saving schemes are harnessed and encouraged.

The incremental housing programme has underperformed by 59%, only 17 009 houses were built, against a target of 28 817. The Department spent R1 169

million.³² The under-expenditure resulted because of a number of reasons. For instance, suitable land is essential for incremental housing but the Department only identifies land and develops that land by installing services; another project/programme then takes over. In most cases suitable land is difficult to find yet the departments involved are not working together in solving the problem. The underperformance of the Department demonstrates a lack of planning by it and the other departments involved. Given the housing backlog for Gauteng and the fact that it has the largest concentration of informal settlements, there is considerable pressure for this programme to deliver.

2.1.2.1.2 Social Housing

Social housing underperformed and delivered only 39% (1 996) of the 5 000 planned units.

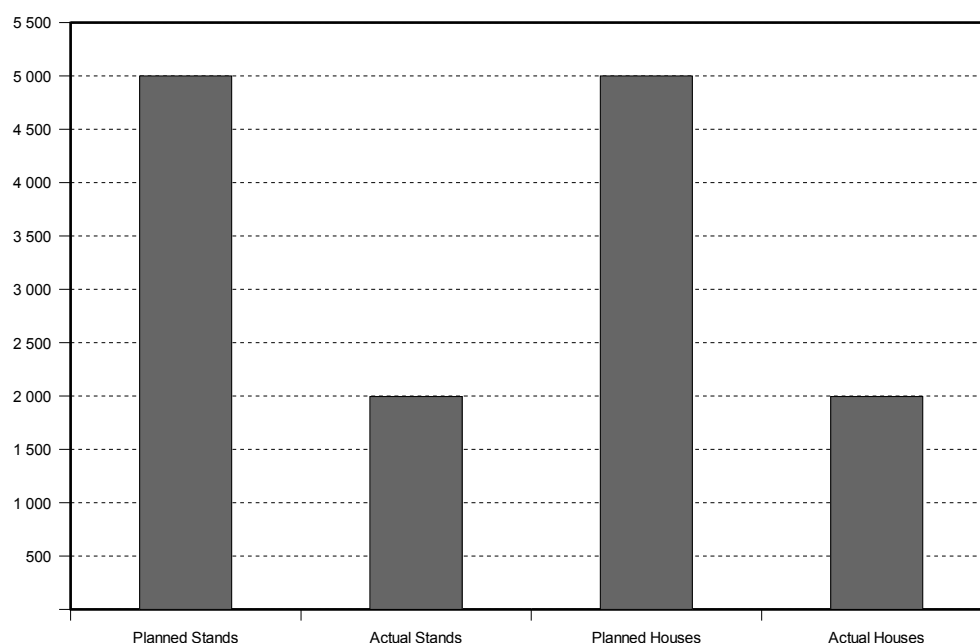


Figure 1: Gauteng Planned and Actual Social Housing Delivery 2002/2003

2.1.2.1.3 Urban Regeneration

The following targets have been set for this programme:

- Creation of sustainable communities;
- Provision of appropriate and affordable housing;
- Creation of safe and secure environments;
- Planned, well administered, transparent and accountable provision of services;

- Provision of quantity infrastructure such as roads, storm water drainages, sewer systems, etc;
- Provision of quality, sustainable social amenities, including schools, clinics, etc; and
- Promotion of local economic development and support for local entrepreneurs investing in the area.

There have been a number of achievements under this programme including:

- more than 600 houses built in Simunye (Westonaria) for the people of Bekkersdal;
- R55 million approved for 200 houses (social housing) and 3 000 stands for incremental housing in Kliptown, over the next three years; and
- good progress being made by the Alexandra Renewal Project.

The Gauteng Department of Housing promised 40 000 new houses providing shelter to 200 000 people, over the next six years. Over 3 000 informal structures have been removed over a period of two years and people have been relocated to other areas offering a better quality of life.³³

Despite the good progress reported in Alexandra a number of challenges persist. The following box highlights some of these challenges.

Box 1: Housing and living conditions in Alexandra

Alexandra is more than 91 years old and for all these years it has experienced problems of underdevelopment. By 2003 the same challenges continued to exist. These included overcrowding, high rates of unemployment, lack of basic facilities such as water and electricity, and people setting themselves up in the corners of their shacks to do business in order to make a living.

About 300 people still live in the Stiwetla section along the riverbanks of the Jukskei River. Very narrow pathways separate the overcrowded single room shacks. Pigs and dogs continue to forage in the piles of garbage on the streets.

In the Far East Bank, flats have been occupied illegally. The unemployed occupants believe that it is their right to occupy these flats as the State has failed to provide accommodation although they had been on the waiting list for more that seven years.

River Park was initially earmarked for people displaced by political violence in 1998. Some occupants pay rent while others do not and they have been threatened with eviction.

In a block of flats in section 12, Roosevelt, tenants said that most of them had lost their jobs after 1994 and consequently no longer paid rent. Some pay a contribution towards services, depending on how much money they can come by in a particular month.

Moreover, some of the new houses cannot be said to be permanent structures as stated in the policy documents and the Act as they are already falling down.

Because of the housing backlog in Alexandra residents decided to take over the Malboro transit village without obtaining permission to occupy the area.

Residents are concerned about the Gauteng Department of Housing's poor monitoring system. They say that contractors are being paid even though they have not finished their jobs and another is then hired.

Interviews conducted by Thandisizwe Diko, 14 October 2003, in Alexandra

2.1.2.1.4 Customer Support Services

The objective of the Department is to ensure that it becomes the first port of call for housing and accommodation related issues. It therefore aims to reach as many people as possible at ward level, community forums, burial societies, churches and in sports clubs within two years.

According to the Department the content of this interaction will be life skills and home ownership education, with a message about the need to save, to be a provider and to live a healthy life. This will in turn promote civil society participation and transparency in the delivery of services and eliminate fraud and corruption.

While this is necessary, the Department also has a constitutional obligation to promote the right of access to adequate housing by raising awareness and educating people about this right.

As far as resolving reported cases goes, the Department did not have much success. During the past 12 months, of the 91 028 cases lodged, a mere 540 (0,6%) were closed, leaving 90 488 (99,4%) pending. Customer Support Services did, however, acknowledge 83 714 cases including 11 774 responses to queries by letters.

2.1.2.2 Western Cape Department of Housing

Table 3 provides the targeted goals and actual goals attained through programmes and projects of the Western Cape Department of Housing (WCDH).

Table 3: Targeted and actual goals attained 2002–2003

<i>Programme/Project</i>	<i>Target Goal</i>	<i>Goal Achievement/Attained</i>
Project-linked subsidy	111 894 ³⁴	14 004 ³⁵
Consolidation subsidy	8 832	5 209
Institutional subsidy	6 939	689
Relocation subsidy	44	Not quantifiable
Integrated serviced land subsidy	655	Not quantifiable
Hostel upgrading programme	41 960	Not quantifiable
People's Housing Process	7 687	Not quantifiable

Source: Western Cape Department of Housing Protocol

In all these measures, although there is not clear explanation on how these measures cater for vulnerable groups, and why the inabilities to deliver against the targeted goals, the Department reported that it does cater for some vulnerable groups. The WCDH does not, however, state which programmes or projects cater for these groups. Instead it uses language such as, “all the programmes mentioned can accommodate or could have accommodated” vulnerable groups. The Department does state that it did not make fund allocations specifically for vulnerable groups. The Constitutional Court requirement is that the State must plan, budget and monitor the fulfilment of immediate needs and the management of crises. (para 68 of *Grootboom* as

previously mentioned) The failure of these programmes to cater specifically for these desperate groups is a possible violation of the right of access to adequate housing as explained through *Grootboom*.

2.1.2.3 Mpumalanga Department of Housing

The Mpumalanga Department of Housing (MDH) focused on implementation of existing programmes.

Table 4 shows targeted and actual goals attained through the programmes and projects of the MDH. Even though the Department states that most of these measures cater for some vulnerable groups, there are no specific objectives for this.

Table 4: Mpumalanga Department of Housing Goals achieved 2002/2003

<i>Programme / Project</i>	<i>Objectives</i>	<i>Goals achieved / attained</i>
Project-linked	Massive delivery that will benefit people who do not have their own stands and habitable houses	6 888 received their houses with full ownership
Consolidation	Provide housing to people who own sites that were previously serviced by the Independent Development Trust (IDT) and other public funding	28
Institutional Housing	Provide housing on rental basis through housing associations	222
Hostel Redevelopment	Transform the patriarchal environment and integrate hostels with existing settlement	232 (this may be translated to 696 families who benefited)
Individual/Contractor Based Individual Subsidy (CBIS)	Develop existing settlements. This programme is also referred to as <i>in situ</i> upgrading	1 049
Discount Benefit Scheme	Assist tenants and others to acquire ownership of State-financed rental housing	2 459
People's Housing Process	Full-scale delivery of housing through a principle of bigger and better houses.	386 (This may be translated to 1 930 family members who benefited, based on an average household of 5)

Source: Mpumalanga Department of Housing protocol

The Department increased its delivery for the year under review to 21 607 until January 2003. This increase is from 14 584 for the year 2001/2002. Despite the cut in the budget vote, from R451 246 000 (2001/2002) to R366 292 000 (2002/2003), this shows a commitment to address the housing backlog. The MDH addresses the needs of vulnerable groups as follows:

- **Children with disabilities (physical and mental):** This category of disabled children are catered for because their parents will get a R25 580 subsidy as compared to R23 100 for beneficiaries with able children.

- **Persons (excluding children) with disabilities (physical and mental):** These people also qualify for R25 580 as opposed to the R23 100 for which able people qualify.
- **Persons living in rural areas:** The Department reported a change of focus, with some 72% of all projects allocated to rural areas.

As far as the obligation to protect the right of access to adequate housing is concerned, the MDH reports to have monitored the quality of houses built by contractors through its building works inspectors. Municipal inspectors were also used to extend inspections. This shows an understanding of the obligation.

However, it is difficult, in the absence of specific targets, to measure success in meeting departmental targets. Table 4 as provided by the Department contains no specific targets.

2.1.2.4 KwaZulu-Natal Department of Housing

The KwaZulu-Natal Department of Housing (KZNDH) instituted the following measures:

- Interim Provincial Procurement Implementation Guidelines;
- Provincial Guidelines: Preparation Funding;
- Policy Guidelines: Procurement of Land and Professional Services – all subsidy mechanisms;
- Policy Directive on Non-Credit Linked Individual Subsidies; and
- Guidelines on Rural Development.

During the reporting period, KwaZulu-Natal reported a total of 19 991 households as homeless. A total of 14 291 are concentrated in urban settlement areas and 5 700 in rural settlements. According to the Department, during the year under review, 5 500 homeless persons (500 in rural and 5 000 in urban) were provided with shelter. The province has reported 34 018 households in informal settlements, (8 200 in urban and 25 818 in rural settlements). The guidelines such as the Interim Provincial Procurement Implementation Guidelines and Preparation Funding have reportedly expedited housing delivery to the homeless.³⁶ However, because these are new guidelines, the Department could not provide information on the impact of these guidelines.

On HIV/AIDS, the KZNDH has a policy of providing specialised housing to assist HIV-affected people and AIDS orphans. The province makes provision for transitional housing for adults infected with HIV/AIDS.

KwaZulu-Natal underspent its departmental budget for the year under review; it also underspent in the 2001/2002 financial year. Given the under-expenditure, outcomes of the instituted measures and indicators, the Department needs to and can improve on its delivery.

2.1.2.5 Free State Department of Housing

As far as policies are concerned, the Free State Department of Housing (FSDH) instituted special needs policy only, which caters for the housing needs of the disabled.

Table 5 indicates delivery on ongoing programmes/projects of the FSDH.

Table 5: Programmes/projects of the Free State Department of Housing 2002/2003

<i>Programme/project</i>	<i>Achievement or goals attained</i>
Project-linked subsidy	30 165 subsidies were allocated with significant amount being women driven
People's Housing Process	1 850 subsidies allocated, making up 22 projects. Due to the nature of the projects, units are at various stages of completion
Consolidation subsidy	A proposal is still under consideration for those beneficiaries who are on the database but received vacant erven only
Hostel upgrading programme	1 535 hostel units are still under construction
Right-sizing subsidies	Proposals were received from Thubelisha for 258 units in Welkom and 203 units in Sasolburg. All units have been completed
Discount benefit scheme	2 329 properties have been transferred to the beneficiaries

Source: Free State Department of Housing Protocol

2.1.2.6 Limpopo Department of Housing

The Limpopo Department of Housing (LDH) reported one new policy measure, the National Housing Policy on Disability Variations, which aims to make the housing environment user-friendly for the disabled. The Department instituted a number of existing programmes. These include the following programmes, which have not been mentioned previously.

2.1.2.6.1 Disaster and Emergency Management Services³⁷

This programme assists flood victims by providing flood relief. For the year under review the Department provided shelter and food to 2 213 disaster victims and distributed 630 tents to district municipalities.³⁸

2.1.2.6.2 Housing Development Programme

This programme provides safe and secure shelter for rural communities and shack dwellers. Under the programme, 14 320 housing units were constructed. Ownership of 645 properties was transferred under the Discount Benefit Scheme; there were infrastructural projects in five municipalities. Some 175 water, sanitation, road, and storm water projects were implemented under the Consolidated Municipal Infrastructure Programme (CMIP) to improve access to water, storm water and roads.³⁹

Other major projects included the launch of the Integrated Sustainable Rural Development Programme, an intergovernmental forum, a local government transformation conference and a housing summit.⁴⁰

Despite all the challenges mentioned by the Department in implementing its programmes, there has been progress. The Department has so far built 14 320 housing units through its Housing Development Programme. The response to the emergency crises through Disaster and Emergency Management Services has been a positive development.

2.1.2.7 Northern Cape Department of Housing

Northern Cape has the lowest population in the country. According to Census 2001, the province has a population of 822 727. The province also has the lowest number of informal dwellings (not in backyards) of 20 438.⁴¹ It has a sizeable backlog of 414 436 housing units⁴² which it has responded to by focusing on improving ongoing programmes. Even though the Northern Cape Department of Housing did not provide detailed information on the measures it has taken, it asserts that all the existing programmes and projects accommodate vulnerable groups.

2.1.2.8 North West Department of Housing

Through its rural housing programme, a total of 5 805 dwellings have been constructed in 23 housing projects in rural areas.⁴³ The North West Department of Housing (NWDH) reported a backlog estimate of 486 000. During the year under review the Department delivered 21 204 housing subsidies and 16 707 housing units.⁴⁴ It also reconstructed 501 dwellings that had been devastated by floods.⁴⁵ The outcome of the measures instituted by the Department is provided in Table 6. These are ongoing programmes/projects.

Table 6: Summary of the Outcomes of Measures Instituted by the NWDH 2002/2003

<i>Programmes/projects</i>	<i>Outcomes</i>
People's Housing Process	6 projects built or under construction – 1 853 subsidies
Developer-Driven Individual Subsidy Programme	25 projects completed or under construction – 2 922 subsidies
Rental Housing	Projects for people earning less than R3 500 are implemented under the Institutional Programme
Emergency Programme	13 projects completed or under construction – 413 subsidies
Rural Programme	12 projects completed or under construction – 12 634 subsidies
Project Linked Programme	77 projects under construction or completed – 102 365 subsidies
Consolidation Subsidy Programme	8 projects under construction or completed – 4 495 subsidies
Hostel Redevelopment Programme	12 projects under construction – 2 948 subsidies
Institutional Subsidy	7 projects under implementation – 4 950 subsidies

The Project Linked Programme is the largest programme in the province and comprises 97 urban and peri-urban projects valued at over R1,7 million.⁴⁶

2.1.2.9 Eastern Cape Department of Housing

According to Census 2001, the Eastern Cape Province has a population of 6 436 763, of which 5 635 079 are black Africans. The province has 31 205 informal dwellings/shacks in backyards and 135 567 informal dwellings/shacks not in backyards.⁴⁷ The Eastern Cape Department of Housing (ECDH) reported that there were 979 160 families without houses.

With the introduction of a R2 479 subsidy to beneficiaries, the Department focused more on the People's Housing Process in order to match this amount with sweat equity, as the majority of beneficiaries are not working.

Table 7 reflects the outcomes of programmes and projects instituted by the Department during the year under review.

The Department reported a total of 166 772 households in informal settlements. Of these 154 969 are black Africans. During the year under review, the Department delivered 47 188 housing units and 85 811 State subsidies.⁴⁸

Table 7: Programmes and Projects Instituted by the ECDH 2002/2003

<i>Programmes/projects</i>	<i>Achievements or goals attained</i>
Project-Linked Housing Subsidies	6 361 houses have been delivered within this subsidy instrument during the period under review, with a total expenditure of R76 million
Rapid Land Release Programme	Continuation of the programme with a second phase. This involves completion of 35 + 78 sites that have been approved. The top structure construction is included in the figure for Project Linked and People's Housing Process
Rural Housing Subsidies	A total of 137 housing units were constructed within this programme with an expenditure of R1,7 million
People Housing process	Through this programme 9 169 housing units have been completed, affording homes to the homeless. This expenditure amounts to R335 million
Institutional Subsidies	635 houses have been completed, at a cost of R21 million

2.2 Legislative Measures

Most of the following legislative measures during the period under review were instituted at national level.

2.2.1 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill

The Bill proposes to amend the principal Act, the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act No 19 of 1998 (PIE). The Act provides, *inter alia*, for the prohibition of unlawful eviction and procedures for the eviction of unlawful occupiers.⁴⁹ The amendment comes as a result of uncertainty on whether or not the PIE covers incidents of holding over.

The Amendment Bill had not been passed at the end of the review period. A critique of both the Bill and the principal Act is provided in section 4 of this report.

For the year under review it is appropriate to discuss the implications of the principal Act in line with the guarantee of section 26 (3) of the Constitution and more especially following the Supreme Court of Appeal Case of *Ndlovu v Ngcobo, Bekker and Another v Jika* 2003 (1) 113 (SCA). The importance of the Act is that if section 26 (3) of the Constitution is to have any impact on the common law, then that impact will have to be mediated through this legislation and others for circumstances to be said to be “legally relevant”.

Many people have been evicted from their homes or land since 1994. Most of them are unemployed. More than a million South Africans have lost their jobs since 1994 with the percentage of unemployed rising to 43%.⁵⁰ Many of these people have faced eviction because they cannot keep up bond repayments. Unemployment and an influx into the cities have caused homelessness, which in turn has resulted in an increased mushrooming of shacks for shelter.

Section 26(3) of the Constitution states that “no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances”. So all evictions that are carried out without a court order are unconstitutional and should be challenged accordingly.⁵¹ The Act reinforces the “court order” requirement⁵² and applies to the proceedings⁵³ for eviction against unlawful occupiers⁵⁴ (including persons who hold over) throughout South Africa. This was confirmed in *Ndlovu v Ngcobo*.⁵⁵

The matter in dispute in this case, which led to the amendment of the principal Act was whether the definition of “unlawful occupier” in section 1 of the principal Act covers (1) tenants who initially take up lawfully occupation of the land in terms of a lease agreement, but who refuse to vacate the land after lawful termination of the agreement; (2) mortgagors who default on their bond repayments and, after execution of the bond and transfer of the property to a third party, remain in occupation. The majority judgement answered these two questions in the affirmative. Despite acknowledging that the intention of the legislature in the Act was not clear, Harms JA held that “it cannot be discounted that Parliament, as it said, intended to extend the protection of the PIE Act to cases of holding of dwellings and the like”.⁵⁶ Until the amendment is passed, with the exception of evictions from commercial properties, proceedings for evictions must be brought under the PIE Act or other legislation dealing with the protection of tenants.

This Amendment Bill is a good response from the Housing ministry as it seeks to address an “unintended consequence” of the Act and therefore has the potential to reconcile the right not to be arbitrarily evicted and the Government’s obligation to promote the rental housing sector.

2.2.2 The Community Reinvestment Bill

This Bill was introduced in 2003. For the past few years, financial institutions⁵⁷ have been heavily criticised by government and other role-players for a lack of commitment to addressing the high levels of underdevelopment in South Africa. Specifically, the criticism is based on the failure of the institutions' policies to address the poor socio-economic conditions that prevail in African and coloured communities and that the implementation of their policies has had a largely discriminatory, rather than developmental impact. During the year under review, government re-affirmed that legislative interventions were necessary to increase private sector investment in the lower end of the housing market. This led to vigorous debates around the Community Reinvestment Bill.

Low- and medium-income earners are victims of financial exclusions by the finance sector as a result of, *inter alia*, their economic status and the areas in which they live, i.e. townships and rural areas. This emanates from the fact that they do not have access to affordable credit and adequate banking facilities and the banks' practice of "redlining" certain geographical areas, which involves a blanket refusal to grant mortgage bonds in certain areas because of their poor socio-economic status.

The State has a constitutional mandate set out in section 26 (2) of the Constitution to give effect to the right of access to adequate housing in South Africa. Government is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to adequate housing. This is a step in the right direction by the South African Government to achieve this mandate through making housing finance assistance available and by protecting the poor from unreasonable restrictions that impede their access to housing finances.

The Bill sets up some principles, targets and standards, which, *inter alia*, forbid redlining practices and encourages real investment in, and development of, poorer communities. Such developments are concerned with ensuring equitable access to resources and opportunities that have the potential to increase people's standards of living and remove the barriers that impede access to housing rights.⁵⁸ In order to achieve this, it sets up the following principles:

- Refraining from refusing home-loan finance purely on the grounds of the socio-economic characteristics of the neighbourhood in which the home is located;
- Refraining from the practice of redlining unless it is dictated by safe and sound business practices;
- Affording borrowers the necessary dignity, courtesy and honesty when discussing and processing applications for mortgage loans;
- Communicating transparently and openly with borrowers during all stages of negotiations;

- Ensuring that borrowers know the outcome of their applications and, if rejected, that they are furnished with reasons why their applications were unsuccessful; and
- Encouraging, where possible, a climate of saving among homeowners and borrowers and providing meaningful incentives to those who save.⁵⁹

Through this Bill, financial institutions have positive obligations to respond to the social and developmental needs of the country by providing home loans to low- and medium-income earners. If a financial institution is unable to meet the required standards⁶⁰ and targets,⁶¹ alternative measures must be adopted. These include:

- providing funding through prescribed wholesale lenders at a mutually agreed interest rate;
- purchasing such wholesale lenders' securities and debt issues; and
- providing funding directly to market lenders for them to make available for loans.⁶²

While this is a step forward by the Government towards the realisation of this right (pending the implementation of this Bill), it must be noted that, the term "sound and safe business principles" has brought about different interpretations of its meaning. For this reason, consensus needs to be reached on what constitutes a sound and safe business principle in the current dispensation, taking into account all relevant factors.

It is also important that the Government ensure that the process will not compromise the economy of the country by balancing all the interest of the parties involved. For example, the concern by the Banking Council that it has been providing assistance for eight years, which resulted in 65 000 repossessed houses and R236 million lost in five townships only in the Eastern Cape in 2001⁶³, highlights the need for a closer consideration of the process and a call for government and financial institutions to discuss issues arising from the Bill.

It should be understood that the Bill does not oblige the financial institutions to enter unreasonably into transactions without giving due regard to the risks involved. It specifically states that financial institutions must not provide home loans in certain circumstances.⁶⁴ The inclusion of this clause has been questioned by many role-players, such as COSATU. In its submission, it raised a concern that the inclusion of such an escape clause that permits redlining on the basis of undefined "safe and sound business practices" could easily allow the financial institutions to justify continued discriminatory practices.⁶⁵ Banks do need to accept an element of risk in investing in communities, which they have long neglected. If their practice amounts to a racist, unfair discriminatory and anti-developmental practice, the banks have to refrain from that and this escape clause will have to be closely monitored, or else it defeats the purpose. The Bill was put on hold in 2003 pending the outcome of the Financial Services Charter.⁶⁶

2.2.3 Home Loan and Mortgage Disclosure Act 63 of 2000 (HLAMDA)

This legislation came into effect at the end of 2002. The Act compels financial institutions in the business of providing home loans to disclose information on their home lending business in their financial statements.

2.2.4 Amendment to the Housing Act 107 of 1997

The Housing Amendment Act 4 of 2001 amended the Housing Act 107 of 1997 by the insertion of sections 10A and 10B. These sections were included to restrict the voluntary and involuntary sale of State-subsidised housing. The Amendment Act commenced on 1 February 2003, hence its relevance to this report.

The Department has acknowledged the following concerns with the implementation of these sections:

- The current sections 10A and 10B may well be unconstitutional (section 25 of the Constitution deals with an individual's right to property).
- The impact of the provisions are unjust in relation to persons who wish to improve their living conditions, or who have to relocate due to factors such as a change of employment.
- Its provisions are having a negative impact on the housing market as a result of the reluctance of financial institutions to offer loans to persons falling within the category protected by 10A and B, based on the fact that such institutions have no guarantees of recovering their risks. In order to comply with the constitutional obligations to respect, protect, promote and fulfil the right of access to adequate housing, amendments to the Housing Act of 1997 are being attended to, in particular, addressing the difficulties encountered with the implementation of sections 10 A and B.

2.2.5 Disestablishment of South African Housing Trust Limited Act No 26 of 2002

The disestablishment of the SA Housing Trust Limited Act was published in the *Government Gazette No 24146* on 5 December 2002 and came into operation on the same day. The Act disestablished the South African Housing Trust Limited, transferred the rights, assets, obligations and liabilities of the SA Housing Trust Limited to the Government of the Republic of South Africa and provided for matters in connection therewith.

2.3 Budgetary Measures

The aim of the various departments of housing is to determine, finance, promote, co-ordinate, communicate and monitor the implementation of policy for housing and human settlement. Access to housing and secure accommodation is an integral part of government's commitment to reduce poverty and improve people's quality of life. This requires a sustainable housing development process that will progressively provide adequate housing for all, as required by the Constitution. The Department of Housing therefore aims to ensure that every South African has access to a permanent residential structure, within sustainable human settlements, that guarantees privacy and adequate protection against the elements.⁶⁷

This section seeks to analyse the budgetary measures adopted during the year under review and their impact based on the constitutional requirements. Assessing budgetary measures has not been an easy task since the expenditure estimates of the Department in its Medium Term Expenditure Framework (MTEF) does not provide a breakdown of the allocated funds that the specific programmes, despite this being required for monitoring purposes.

2.3.1 National Sphere

In order to achieve these objectives, the National Department of Housing was appropriated R4 299 481 000. This amount includes allocation for conditional grants (R3 906 674 000) and excludes donor funding of R55 030 000. According to Table 8, the National Department made savings of R86 351 000. This amount was to be surrendered to the National Treasury. The Departments' explanation for this saving is that:

R12 522 000 can be attributed to savings as a result of overestimation of the amounts when the budgets were prepared due to various market factors such as interest rates and inflation forecasts expected at the time of budget preparation. An amount of R26 677 000 was suspended for transfer to National Treasury in accordance with the provision of the Disestablishment of the South African Housing Trust Act 26 of 2002.

Some of the costs are related to personnel, administration and the purchase of equipment.

Table 8: Total Departmental Allocation 2002/2003

Year	Total Dept. allocation R'000	Allocation as a % of the National Budget	Total Conditional Grants R'000	Total Donor Funding R'000	Projected Expenditure R'000	Actual Expenditure R'000
01/02	459 053	1,4%	3 325 958	54 530	3 785 013	3 721 240
02/03	392 805	1,5%	3 906 674	55 030	4 299 481	4 213 130

According to the Department, the under-expenditure reflected in Table 8 had a minimal impact. It refers to this as savings.

The HSRP is a pilot programme that aims to improve the quality of human settlements through the identification and correction of imbalances and dysfunctionalities within such human settlements. The Department reported that considering the objectives of the programme, the budget could be regarded as inadequate. It negotiated successfully with the National Treasury to increase the housing grant so as to maintain the amount of housing delivery while improving on the quality of the housing settlement. An increase of R300 million was granted in 2002/2003. There was an under-expenditure of R19 648 000 against projected expenditure.

Table 9: Human Settlement Redevelopment Programme (HSRP) 2002/2003

<i>Year</i>	<i>Total Dept. Allocation R'000</i>	<i>Allocation as a % of the National Budget</i>	<i>Total Conditional Grants R'000</i>	<i>Total Donor Funding R'000</i>	<i>Projected Expenditure R'000</i>	<i>Actual Expenditure R'000</i>
02/03	106 565	4,9%	106 000		212 565	192 917

The Department refers to these as savings. The failure to fill departmental posts and approving tenders only in the last quarter of the financial year causing projects to start late, which in turn resulted in some funds not being spent should not be referred to as savings because these funds were supposed to be used and they were never used. This is under-expenditure at the expense of the poor.

The poverty relief funding allocation came from the National Treasury and was not intended to fund the total cost of the Presidential Pilot Project on Rental Housing. These funds were to be augmented by housing subsidy funds, funds contributed by the private sector and labour as well as contributions from institutions like the Social Housing Foundation. The Department feels that the allocation to the project was not adequate considering a backlog of 2,2 million housing opportunities. According to the Department, the implementation of this project was delayed due to late finalisation of the financial model as well as additional Treasury requirements.

Table 10: Presidential Pilot Project on Rental Housing 2002/2003

<i>Year</i>	<i>Total Departmental allocation R'000</i>	<i>Allocation as a % of the National Budget</i>	<i>Actual expenditure R'000</i>
02/03	75 million (poverty relief funding)	1,7%	225 million was transferred to the NHFC, which is managing these projects on behalf of the Department

2.3.2 Provincial Sphere

2.3.2.1 Gauteng Department of Housing

Table 11: National Housing Subsidy

<i>Year</i>	<i>Total Conditional Grants Allocation</i>	<i>Projected Expenditure</i>	<i>Actual expenditure</i>
2001/2002	R716 300 448	R716 300 000	R702 328 817
2002/2003	R1 215 018 000	R1 215 000 000	R1 169 157 000

Source: 5th Protocol Response from Gauteng Department of Housing

Table 12: Alexandra Renewal Programme (ARP)

<i>Year</i>	<i>Total Conditional Grants Allocation in Rands</i>	<i>Projected Expenditure</i>	<i>Actual expenditure</i>
2001/2002	74 000 000	74 000 000	58 172 000
2002/2003	89 825 000	89 825 000	87 454 000

Source: 5th Protocol Response from Gauteng Department of Housing

Table 13: Human Settlements Programme

<i>Year</i>	<i>Total Conditional Grants Allocation in Rands</i>	<i>Projected Expenditure</i>	<i>Actual expenditure</i>
2001/2002	27 202 000	27 202 000	2 101 000
2002/2003	48 548 000	48 548 000	38 192 000

Source: 5th Protocol Response from Gauteng Department of Housing

The variance in the budget allocation from the national housing fund for the GDH was as a result of the provision made for inflation increases in the quantum of the housing subsidy. The total amount appropriated in the adjustments budget 2002/2003 may be explained as follows:

- Inflation increases of the subsidy quantum: R13 million;
- Appropriation for the first time of own income generated by the Gauteng Housing Fund since 1994: R320 million; and
- Unspent Conditional Grant related to the Job Summit Initiative of the National Department of Housing: R80 million

Even though the budget allocation of the GDH has progressively increased, the delivery of houses remains very low. This progressive increase in budget indicates a commitment to improving the housing situation. However, the increase in budget should be balanced with an increase in delivery. The GDH, with a housing backlog of 500 000, has delivered about 18 857 houses for the year under review. Gauteng declined from 348 288 (2000/01) to 20 233 houses

for (2001/02).⁶⁸ This should not be encouraged unless there is a reasonable explanation for the decline.

The GDH has also underspent for the above mentioned programmes due to slow progress on the implementation of these projects. The complex procurement systems of the local authority and the Department of Housing and in some cases, negotiations with the community, resulted in delays.

2.3.2.2 Western Cape Department of Housing

The Western Cape Department of Housing (WDH) reported underspending of total revenue as a result of posts not being filled in the Department. The Housing Conditional Grant was also underspent by 9%. The underspending of the Conditional Grant impacted on the ability of the Department to provide the maximum number of the beneficiaries with access to shelter. The Department did not provide reasons for underspending.

Table 14 illustrates expenditure on programmes and projects. For all these measures to be reasonable they must cater for vulnerable groups. Departments must provide adequate information on how these measures cater for these groups and what their impact has been.

These projects do not, however, provide any information on the impact of these measures for communities living in informal settlements in the Western Cape. In fact, according to the protocol response from the WDH, it does not know how many households live in the informal settlements in the Western Cape. According to *The Star* newspaper, there are about 119 informal settlements in the Western Cape; these contain about 142 706 households. The Department might thus be ignoring the rights of a significant sector of the Western Cape community.

According to the Department of Housing Strategic Plan, the Western Cape delivered 2 358 houses only at January 2003,⁶⁹ a mere two months before the end of the reporting period. This is a drastic drop from the 16 634 units delivered in 2001/2002, especially given that the budget was reported to be adequate. The Western Cape has a backlog of about 310 000 housing units. The decrease in delivery brings into question the reasonableness of the measures being taken to meet the backlog. Their impact can be very limited only especially since they do not specifically cater for informal settlements. They cannot, therefore, be said to be reasonable.

Table 14: Expenditure on Instituted Programmes/Projects 2002/2003

<i>Programme/project</i>	<i>Expenditure</i>
Project-linked subsidies	R 270 904 203
Consolidation subsidies	R 10 114 250
Institutional subsidies	R 388 087
People's Housing Process	R 41 551 184
Hostels upgrading	R 6 572 132
Credit-linked individual subsidies	R 3 105 500
Non-credit-linked individual subsidies	R 536 612
Relocation assistance	R 3 388 509
Old business (tenure upgrade maintenance of assets)	R 11 417 699

Source: 5th Protocol Response from Western Cape Department of Housing

2.3.2.3 Mpumalanga Department of Housing

The Mpumalanga Department of Housing (MDH) reported that underspending of the vote amounted to R15 269 000. This is 4,16 % of the R366 292 000 vote. According to the Department, this underspending was due to the fact that these projects were affected by legal constraints and were subject to legal matters from previous years. It must be noted that according to the 4th Economic and Social Rights Report of the Commission, the Department reported under-expenditure of 2,29% for the previous financial year. It will have to work on eliminating the under-expenditure, as it has implications for the progressive realisation of the right.

2.3.2.4 KwaZulu-Natal Department of Housing

The Department reported under expenditure of R163 518 000, or expenditure of R912 965 000 out of R1 076 483 000. The budgetary allocation towards programmes and projects was also underspent. It must be noted that the Department also underspent its budget for the year 2001/2002. According to the Department's protocol, the total departmental allocation was R964 250 000 and the actual expenditure was R837 141 000.

The Department believes that this did not have any negative impact on the realisation of the right. The under-expenditure may be attributed to the following reasons as forwarded by the Department:

- Funds allocated for capacity building were not spent as a result of tenders that were not finalised in time.
- Human Settlement Redevelopment Grant experienced difficulties with the non-submission of business plans by municipalities as well as a delay in the approval of projects by the National Department.
- The South African Housing Grant underspent due to a delay in the NHBRC contract being formalised in terms of low-cost housing project approval.

All the figures provided by the Department show under-expenditure of the budgets. The Department notes that despite under-expenditure, there has been a notable increase in subsidy amounts allocated per income bracket.

Table 15: Budgetary Allocation for Programmes and Projects in KwaZulu-Natal 2002/2003

<i>Programme</i>	<i>Allocation for programmes in projects</i>	<i>Total Conditional Grants Allocation</i>	<i>Actual expenditure</i>
Management Services	R70 206 000		R32 269 000
Corporate Services	R37 934 000	R53 867 000	R33 563 000
Planning, Legal Services & Information Management	R9 583 000		R7 130 000
Project Management	R896 585 000		R59 545 000
Integrated Municipal Support	R60 175 000		R59 545 000
Auxiliary & Associated Services	R2 000 000		R462 000

Source: KZN housing protocol

It should be noted that Table 15 as it was originally provided probably includes a typing error in that the project management programme more realistically had expenditure of R755 287 000 in 2002/2003.⁷⁰

2.3.2.5 Free State Department of Housing

The Department reported under-expenditure of R96 217 518 (33%) against a budget vote of R287 715 000. This resulted in a delay in the delivery of houses. The Department did not account for its under-expenditure.

2.3.2.6 Limpopo Department of Housing

The Department reported that the allocated budget was inadequate; it spent all of the R4 153 000 allocated to it.

The Head of the Department, PW Ramagoma, says that the rate of spending by the Department has improved from 84% and 92% in the past two years respectively. In the year under review it was 94%.⁷¹ The Department, however, feels that it is not receiving adequate allocations from National Level; it says that these allocations are based on census statistics that does not reflect the true status of the shortages in rural areas, and Limpopo province is predominantly rural. This thus disadvantages the province.

2.3.2.7 North West Department of Housing (NWDH)

Table 16: Conditional Grant from the Housing Fund 2002/2003

<i>Year</i>	<i>Total Conditional Grants Allocation</i>	<i>Total Donor Funding</i>	<i>Projected expenditure</i>	<i>Actual expenditure</i>
01/02	R25 898 4000		R258 984 000	R258 984 000
02/03	R323 872 000		R323 872 000	R306 000 000

Source: North West Department of Housing protocol

This Department reported under-expenditure of the conditional grant of R323 872 000 by R17 872 000 (6%). Under-expenditure was attributed to the following:

- Weak and under-capacitated municipalities (which are the project developers in the majority of cases in the Province) especially in respect of the requisite professional personnel. Related infrastructure delivery is the single most important negative factor impeding the faster and better delivery of adequate and quality housing.
- Mismanagement, incompetence, corruption, political intervention and nepotism at municipal level also impede the delivery of adequate and quality housing and related infrastructure.
- The constitutional requirement that Provinces must assist and/or even take over housing development functions where municipalities cannot effectively exercise their housing responsibilities is not possible, as most provinces require additional professional human resources and concomitant operational funding themselves.
- The very complex and all-inclusive nature of national housing policy impedes speedy and timeous delivery and expenditure.
- Delays experienced with the Deeds Office with the registration of transfer.
- The slow delivery associated with the People's Housing Process (PHP).

2.3.2.8 Eastern Cape Department of Housing

Since there is huge backlog in the province, the Department believes that the budget was not enough. Even though according to the Department, the expenditure levels improved during the year under review, the Department underspent its budgets vote of R1 221 072 000 by R376 471 000 as a result of rolling-over conditional grants from previous years. This affected the delivery of houses to the beneficiaries. The under-expenditure is attributed to capacity

constraints at municipal level. The Department has provided the following table for the National Housing Subsidy component of its expenditure.

Table 17: National Housing Subsidy - Budget Allocation Towards Programmes and/or Projects 2002/2003

<i>Year</i>	<i>Allocation for programmes and projects</i>	<i>Total Conditional Grant Allocation</i>	<i>Projected expenditure</i>	<i>Actual expenditure</i>
01/02	R508 011 025	R508 011 025	R580 011 025	R292 874 871
02/03	R508 806 000	R580 806 000	R580 806 000	R465 013 014

Source: Eastern Cape Department of Housing protocol

2.3.2.9 Northern Cape Department of Housing

The Department was allocated R75 809 000. Despite requests for it to provide its actual expenditure, nothing had been received by the time of writing.

Table 18: Budget of the Northern Cape Department of Housing 2002/2003

<i>Year</i>	<i>Total revenue in R'000</i>	<i>Total allocation in R'000</i>	<i>Projected expenditure R'000</i>	<i>Actual expenditure R'000</i>
01/02	144 743	65 475		65 475
02/03	172 486	75 809	75 809	

Source: Northern Cape Department of Housing protocol

2.4 Housing Delivery⁷²

According to the National Department of Housing's strategic plan for April 2003 to March 2006, from 1994/1995 up to January 2003 about 1 477 735 housing units had been delivered to qualifying beneficiaries or were under construction. According to this report, this meant that more than 5,6 million people had been assisted by the State with access to basic shelter. This number may have increased by the end of the financial year. Table 19 provides a mix of information from the strategic plan and updated figures from the National Department of Housing.

Table 19: Number of Housing Units Completed/Under Construction from 1994 to 2003

<i>Provincial Government</i>	<i>Number of units completed or under construction</i>			
	<i>1994/95 to 2000/01</i>	<i>2001/2002</i>	<i>2002/03</i>	<i>Total since 1994/95</i>
Eastern Cape	117 759	10 816	58 662	187 237
Free State	71 699	7 005	9 155	87 859
Gauteng	269 264	46 723	24 344	340 331
KwaZulu- Natal	206 670	14 379	24 485	245 534
Mpumalanga	68 860	14 584	21 649	105 093
Northern Cape	20 569	2 588	6 056	29 213
Limpopo	83 147	16 667	14 953	114 767
North West	87 684	13 885	23 784	125 353
Western Cape	148 376	16 634	20 500	185 510
Total	1 074 028	143 281	203 588	1 420 894

Source: National Department of Housing ABC Housing Statistics, 2003

Table 19 shows housing units completed or under construction from 1994 to 2003. Although other provinces show an increase during the year under review, some provinces such as Gauteng and Limpopo show a decline in delivery compared to the previous year.

2.4.1 General Indicators and the National Action Plan for Human Rights

The departments were requested to provide information on the state of housing both in rural and urban areas and for different racial groups. Table 20 highlights the state of housing as provided by the National Department of Housing.

Table 20: General Indicators and the National Action Plan for Human Rights

<i>Category</i>	<i>Total</i>	<i>Rural</i>	<i>Urban</i>	<i>African</i>	<i>Coloured</i>	<i>Indian</i>	<i>White</i>	<i>Proposed number</i>
Number of households granted State subsidies	519 498	(1)	(1)	(1)	(1)	(1)	(1)	-
Number of houses built by the State	203 288	(1)	(1)	(1)	(1)	(1)	(1)	-
Number of households that are eligible for subsidies	6 445 341	(2)	(2)	(2)	(2)	(2)	(2)	-
Number of shelters provided for older persons	109 344	(3)	(3)	(3)	(3)	(3)	(3)	-
Number of homeless persons	9 342 791	(4)	(4)	8 690 066	437 151	65 824	149 750	-
Number of shelters provided for homeless persons	(5)	(5)	(5)	(5)	(5)	(5)	(5)	-
Number of households in informal settlements	1 376 706	(6)	(6)	(6)	(6)	(6)	(6)	-
Number of households in illegal settlements or housing	(7)	(7)	(7)	(7)	(7)	(7)	(7)	-
Number of people on the housing waiting list	(8)	(8)	(8)	(8)	(8)	(8)	(8)	-
Average waiting period on the waiting list	(8)	(8)	(8)	(8)	(8)	(8)	(8)	-
Number of dwellings without access to safe and healthy drinking water	1 655 703	(1)	(1)	1 626 391	18 947	1 960	8 403	-
Number of dwellings without access to adequate sanitation facilities	4 538 364	(10)	(10)	4 398 631	120 181	4 429	15 123	-
Number of dwellings without access to electricity	3 390 434	(11)	(11)	3 275 359	99 783	3 420	11 872	-
Number of dwellings that did not conform to the departmental construction and safety standards	6 469	(12)	(12)	(12)	(12)	(12)	(12)	-
Number of families without houses	2 399 825	(13)	(13)	(13)	(13)	(13)	(13)	-
Number of informal settlements	1 066	(14)	(14)	(14)	(14)	(14)	(14)	-

Source: National Department of Housing Protocol

Notes: please refer to endnotes⁷³

2.5 Case Studies

Having discussed and analysed all the above mentioned measures by the national and provincial housing departments, the Commission drew on existing research material and conduct field work for case studies in order to substantiate its position on whether the measures adopted by the departments have progressively realised the right.

2.5.1 Case Study 1: *The Grootboom Judgement Two Years Later*

This case study is based on research by the Community Law Centre initiated in 2001. The paper provides a broad assessment of the implementation of the court orders in *Grootboom* and asks whether the formulation of the court orders have contributed to the lack of implementation of such orders.

2.5.1.1 Background

The Wallacedene community – herein referred as the respondents⁷⁴ (the community involved in the *Grootboom* case) lived in appalling conditions in an informal settlement – Wallacedene – in the Western Cape. Wallacedene lies on the edge of the municipal area of Oostenberg, which in turn is on the Eastern fringe of the Cape Metro. The community eventually illegally occupied private land earmarked for formal low-cost housing called “New Rust”. At the beginning of winter, they were forcibly and inhumanely evicted from this land and rendered homeless. The root cause of their problem was the intolerable conditions under which they were living while waiting to be allocated low-cost housing.⁷⁵

- Conditions under which most of the residents lived included:
- a quarter of the households had no income;
- more than two-thirds of households earned less than R500 per month;
- about half the population were children;
- they had no water, sewage or refuse removal services and only 5% of the shacks had electricity;
- the area was partly waterlogged and dangerously close to a main thoroughfare;
- Mrs Grootboom lived with her family and her sister’s family in a shack about 20 m²; and
- many had applied for subsidised low-cost housing but had been on the waiting list for seven years; despite several enquiries from the municipality, no definite answer was given on this⁷⁶.

The respondents sheltered on the Wallacedene sports field under such temporary structures as they could muster. Within a week the winter rains started and the plastic sheeting they had erected afforded scant protection. The next day the respondents' attorney wrote to the municipality and demanded that it meet its constitutional obligations and provide temporary accommodation to the respondents. The municipality responded that it had supplied food and shelter at the Wallacedene Community Hall to the respondents and that it was approaching the Western Cape government for assistance to resolve the problem. The respondents considered that the Community Hall provided inadequate shelter as it could house 80 people only.

2.5.1.2 The Cape of Good Hope High Court

Mrs Irene Grootboom and others made an application in 1999 to the Cape of Good Hope High Court (hereafter the High Court) for an order requiring the Government (herein referred as appellants⁷⁷) to provide them with temporary and adequate basic shelter or housing until they obtained permanent accommodation. They also sought an order directing the Government to provide their children with sufficient basic nutrition, shelter, health care services and social services.⁷⁸ The appellants were ordered to provide the respondents with shelter, potable latrines and a regular supply of water. The appellants challenged the correctness of that order.

2.5.1.3 The Constitutional Court

The Constitutional Court handed down a declaratory order on October 4 2000 as follows:

- Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of access to adequate housing.
- The programme must include reasonable measures such as, but not necessarily limited to, providing relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.
- As at the date of the launch of this application, the State housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in section 26(2) para (b) in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and living in intolerable conditions or crisis situations.⁷⁹

2.5.1.4 Objective of the Case Study

- To establish whether pursuant to the Constitutional Court Order of October 4 2000, there have been any measures adopted to implement the order.
- Whether those measures resulted in a significant improvement in the lives of the community of Wallacedene, who still reside in Wallacedene sports complex.
- Whether Western Cape Department of Housing (WCDH) complied with the Court's orders.
- Can the measures adopted during the year under review be said to be reasonable under the circumstances?

2.5.1.5 Implementation of the Court Order

In its focus on the implementation of the court orders, the paper says the following.

- At the time of writing, an interlocutory order had been implemented to a limited extent for the following reasons:
- From the R200 000 made available to the community for basic shelter each dwelling was allocated sheets for a roof, as well as one window and a door.
- Twenty toilets were erected on the sports field, along with taps. In contravention of the interim order, as at October 2001, the toilets were not being maintained by the municipality. As a result, at the time of writing, eight of the 20 toilets were not in working while the remaining 12 were being used by 2 800 community members, as well as members of the surrounding Wallacedene community comprising approximately 6 000 shacks.
- Ten taps were installed by the Oostenberg Municipality. Initially, they were fitted with a mechanism that required a token (costing 25c) to be inserted before 25 litres of water were released. However, this system did not work efficiently and the mechanism was eventually removed. As a result, the community presently has free access to water.
- The Wallacedene community constantly faced threats of fire because it did not have electricity and was forced to use candles.
- Dwellings were built very close to each other due to the limited space available, which had resulted in four serious outbreaks of fire since the issue of the interlocutory order. The fire hazard is aggravated by the fact that many shacks are located quite a distance from the area where the ten taps are situated. The result is that the fires are difficult to control and extinguish.

- They faced the possibility of contracting illnesses because of the waterlogged surface on which their dwellings were erected and a lack of sanitation. There was no refuse removal and it was dumped in the area surrounding the taps and in vacant land adjoining the sports field, creating unhygienic conditions. Under the interim order, both the Premier of the Western Cape and the Oostenberg Municipality were ordered to provide basic sanitation services.
- Because of the proximity of the dwellings to the sports field, members of the community repeatedly had to deal with damage caused by soccer balls hitting their shacks.

Wallacedene falls under Oostenberg Municipality and was reported on by the Department of Housing; however, it did not report on Wallacedene as one of the areas that benefited from its programmes and projects despite attempts by the Commission to get some information on the developments.

According to the study, by October 2001, the lives of the people in Wallacedene had not improved; the measures undertaken, cannot, therefore, be said to be progressively realising the right of access to adequate housing, and this necessitates urgent attention.

2.5.2 Case Study 2: A Community of Despair and Adversity – People with Special Needs (PSN)

2.5.2.1 Background

A special task team whose goal is to house PSN has completed an impressive 50 houses for the people who are seen by the rest of the community as outcasts.⁸⁰

This is a project started by the People with Special Needs Task Team in August 2002, and its main objective was to provide homes for those categorised as PSN. This includes partially and completely blind persons, the physically disabled, deaf and HIV positive persons.

The project was allocated R2,3 million by the Gauteng Department of Housing (GDH) for the construction of 100 houses – the first grant of its kind in South Africa. The land was secured for 500 houses. One hundred units were completed by the end of 2002.

2.5.2.2 The Problem

“The key aspect is to gain stability and to uplift the living standards of disabled people who don’t have a roof over their heads”.⁸¹ The “roof over their heads” might be a problem statement. Understanding “adequate housing” as provided in our Constitution is vital in the process of uplifting the living standards of the

PSN. Providing housing for people regardless of any circumstances does not just mean a wall and a roof over their heads, but adequate protection and suitable space for eating, sleeping, relaxing and family life. Yet community members in Lakeside Proper experience the following hardships:

- These are one-room units with a toilet, no bathroom and no special toilets for people in wheelchairs. But these rooms are just halls without compartments. There is therefore no privacy and they have to use curtains to partition their rooms.
- In the units visited, there are no ramps leading to these units. Although Makram Leaf, a developer, had said there are ramps to these one-roomed houses, they themselves have had to construct the ramps in order to have easy access to their units.
- The walls of other units are shaky; roofs leak; door handles and electricity boxes are too high for people in wheelchairs; inside walls are not plastered; floors and walls are badly cracked; toilet water supply systems leak; the road is still gravel yet wheelchair-bound occupants are expected to use it even when it rains; and there is no storm water drainage and no vegetation.

Even though this must be taken as an improvement on the previous housing condition of the disabled people, it would seem that the objectives and the vision of the project are blurred and will not be realised soon unless drastic measures are adopted. Instead of creating a community for PSN, a community of despair and adversity is mushrooming.

2.5.2.3 Towards a Solution

The situation in Lakeside Proper raises some serious concerns. It has only been a few months since these units have been completed and already there are serious problems. The construction of more units is underway; but should the project continue constructing defective homes for People with Special Needs? When these units have to be repaired, will it not be a waste of taxpayers' money? Is it not time for the process of housing the poor to focus on quality of the units rather than the quantity?

Leaf was quoted as saying "I think that the Government should be complimented because this time they definitely put their money where their mouth is". This suggests that the Government is progressively realising the right of access to adequate housing for people in desperate need. On the contrary, the state of the units and their quality suggests that the guidelines set out in *Grootboom* are not being realised.

Until such time that all these initiatives are in line with the requirements set in this guide, the country's vision to house the poor and PSN is not nearly about to be achieved. The requirement is that all these measures should be reasonable. This is the question that this project should answer. If the project does not stand the test of reasonableness, Leaf's compliment will have to be reserved until the project is reviewed.

While some of the achievements in Lakeside Proper may have complied with the requirements set out in the *Grootboom* judgement, it still must be proved that there was a conscious effort to comply with those. After visiting the site, the recommendation is that the GDH, the task team, civil society and local communities should review the objectives of this project and improve it. While the initial objective might have been appropriate, creating a disabled community by putting people with special needs in one place apart from the rest of the community should be discouraged.

3. CHALLENGES FOR THE REALISATION OF THE RIGHT

Despite the achievements at national, provincial and local levels, challenges remain in order to speed up housing delivery. Most of the challenges relate to the implementation of the planned measures.⁸² These include the following:

Discount Benefit Scheme

The problem has been that it is a requirement that the municipality has to provide a clearance certificate before any transfer of a property can be done and some municipalities do not want to issue such certificates unless all municipal service arrears have been paid.

The delay in the release of State-owned land as a result of land claims

Some land identified for housing development is under the subject of land restitution claims. This has delayed housing delivery.

Progress payment

Present progress payment milestones hamper delivery because completed houses cannot be paid for before they are registered, which causes serious under-expenditure to be registered and affects delivery negatively.

Municipalities and traditional authorities

There is lack of collaboration between local, rural municipalities and tribal authorities.

Corruption

According to the National Department of Housing, by the end of the year under review about 114 cases had been handed over to Gobodo Forensic and Investigative Accounting for investigation. As at January 2002, 33 such cases came from Limpopo Province, 1 from KwaZulu-Natal, 2 from Eastern Cape, 11 from Western Cape, 14 from Gauteng, 6 from Mpumalanga, 11 from North West, 3 from Northern Cape and 20 from Free State.

April 2002 – March 2003

The cases were categorised into fraud (25), corruption (13) and/or maladministration (63). During the course of the year an additional 13 cases were handed over, mainly by provincial housing departments.

This process has resulted in police dockets being opened in seven cases with recommendation for criminal charges; three arrests were also made.

All the remaining cases that were classified either as fraud or corruption cases have been referred to the Office of the Public Prosecutor for further investigation and necessary action.

Capacity within municipalities

Many municipalities do not have sufficient personnel dedicated to perform housing-related functions:

- Some beneficiaries could not be traced when they are expected to occupy their houses. The cause for this is that beneficiaries go to look for employment and decide to settle where they will be closer to their workplace.
- Municipalities did not understand their role as support organisations.
- Perceived delays and slow pace in the resolution and processing of lodged land claims for restitution.
- Policy clashes and contradictions between the Department of Land Affairs Land Acquisition Grant and the Housing Subsidy Grant, due to beneficiary overlaps.
- Ineffective enforcement of ESTA/LTA rights in the areas of illegal evictions and human rights' abuses on the farms.
- Contribution amount of R2 479 was a problem when it was introduced. Many departments have had to focus more on PHP for this reason.

4. CRITIQUE OF MEASURES INSTITUTED

According to Census 2001, South Africa has about 459 526 informal dwelling/shacks in backyards and about 1 376 706 informal dwellings/shacks not in backyards. Mostly the conditions in these areas are intolerable.⁸³ The highest concentration of households in informal settlements not in backyards is found in Gauteng followed by KwaZulu-Natal, North West, Free State, Western Cape, Eastern Cape, Mpumalanga, Limpopo and Northern Cape.⁸⁴ Figure 2 highlights the number of households in the informal settlements per province.

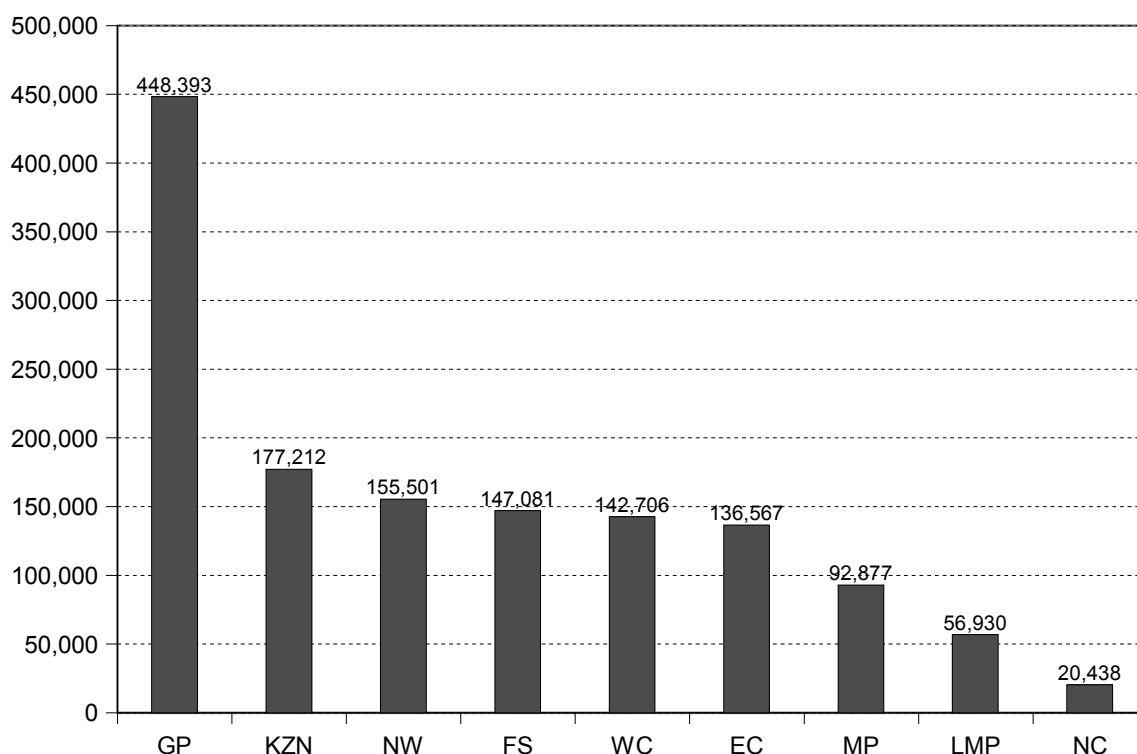


Figure 2: The number of households in informal settlements in each province

Source: The Star 14 October 2003

Given the statistics in Figure 2, this section seeks to determine whether or not measures adopted by the national and provincial government to meet the constitutional obligation to realise the right of access to adequate housing progressively are reasonable within the ambit of section 26 of the Constitution. The assessment is informed by the above mentioned international norms and standards, the requirements as set out by South African courts and some policy and legislative objectives that inform the process of housing in South Africa.

During the reporting period, most of the measures instituted by the Departments⁸⁵ to enhance housing delivery show an adjustment resulting in three shifts in emphasis. One shift was a need to balance the quantity of houses with the quality of houses being built since 1999. The second was an emphasis on the responsibility of beneficiaries by focusing on “people’s housing”. The third was the recognition of rental as a tenure option. These shifts show an element of flexibility in the measures – one of the elements of reasonableness. Whether or not the “progressive realisation” of the right of access to “adequate housing” has been achieved through this shift has not yet been determined.

4.1 Urban or Rural Focus

Based on all of the above mentioned measures it may be concluded that, during the year under review, circumstances have forced the State to move the focus

consciously away from the rural poor to the urban poor. The circumstances include a continuing problem of the cost of acquiring land for housing, which would ensure access to economic opportunities, transport and other services. Census 2001 estimates that in 1996, some 54% of the South African population was urbanised. This has increased to 57,5% or some 25,8 million people.⁸⁶

On the one hand, in provinces like Gauteng, this has forced the National Department and all other departments to focus on inner city programmes including urban renewal. This situation has been aggravated by the influx of refugees and illegal emigrants from neighbouring countries.

On the other hand, since housing is one of the few interventions by the State to place a physical asset directly in the hands of the poor, the programmes focusing on rural areas have been very slow in delivery. The majority of programmes have, however, focused on urban settlements.

It is not clear whether the majority of the poor people in rural and urban centres – most of whose income is below the poverty line – will participate in the majority of the programmes, as most seem to require a minimum contribution (R2 479). The departments will need to explain how the unemployed and poor benefit from these programmes.

The Commission is aware that those who cannot afford the financial contribution in People's Housing Process can contribute by building their own houses through sweat equity. The reality is that there are poor people who cannot offer any contribution because of poor health. However, the Department reports that certain people will be exempted from contributing in kind. The Commission supports this initiative. These include:

- persons classified as aged;
- disabled people; and
- people with health problems.

Circumstances to focus more on urban communities should not be used as an excuse to neglect people in rural areas. With exception of Mpumalanga (43%) and North West (57%) the percentage of the rural housing subsidy from 1994 to 2003 was 0%.

4.2 Failure to Achieve the Key Outputs, Indicators and Targets Set

Table 21 provides targets that were set up by the NDH for the year under review.⁸⁷ As can be seen, the NDH failed to meet half of the targets and failed to account for this.

Table 21: Key Outputs, Indicators and Targets Set by the National Department 2002/2003

<i>Sub-programme</i>	<i>Output</i>	<i>Output measure / indicator</i>	<i>Target</i>	<i>Reached or not reached</i>
National Housing Policy and Strategy	Rental housing policy	Rental housing policy and subsidy mechanism	In place July 2002	Not clear
Housing Framework Legislation	Regulations for Home Loan and Mortgage Disclosure Act	Timely finalisation of regulations	May 2002	No, since promulgation of regulations is delaying the Act
	Community Reinvestment Bill	Cabinet approval	April 2002	Introduced in 2003
	Monitoring of housing related legislation	Reports on compliance with regulations	Two reports per year	Not clear
	Draft of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill	Timely re-submission of the Act	February 2002	In October 2003 public comments were still being taken
Human Settlement Policy and Integration	International multilateral co-operation	Compliance with international agreements on human settlements	March 2003	Not clear
	Human settlement policy framework	A policy framework promoting sustainability	May 2002	Not clear

4.3 Under Expenditure

Most of the reasons reflected by housing departments for under-expenditure may be attributed to lack of strategic planning. They seem to be unable to distinguish between under-expenditure of the budget vote and a saving. A saving is realised where activities have been set up and implemented comprehensively at a cost less than was budgeted for. Under-expenditure occurs when activities are set up but there is a failure to spend the budget intended for those activities and the intended objectives are not attained. Departments need to improve their planning strategies.

4.4 Policy/Programmes and HIV/AIDS

For the year under review, it should be noted that there was no comprehensive housing response to people living with HIV/AIDS and disabled people. The requirement of reasonableness from the *TAC* case states that a programme should be made known effectively (*TAC* para 123).

Proper communication implies proper engagement at inter-departmental level. It means sorting out differences between the departments about institutionalisation of the people affected or infected with HIV/AIDS and/or the utilisation of their extended families.

These measures have not been met at either national or provincial level.

In 2000, a number of NGOs active in Pietermaritzburg were invited by the KwaZulu-Natal Department of Housing to a workshop, to seek their assistance in implementing housing programmes for people living with HIV/AIDS and AIDS orphans. The workshop report highlights a lack of consensus between the Welfare Department, the Department of Housing and the NGOs.⁸⁸

According to the report, the Department of Housing is promoting institutional care for AIDS orphans, whereas the Department of Welfare does not support institutional care except as a last resort. Given the scale of the pandemic, there is a need for a holistic and integrated response to it. So the Department of Housing, the Department of Social Development, and housing practitioners and development workers need to go beyond the provision of a simple shelter and must create a holistic environment where all the fundamental human needs are met. Additional space in homes of people who care for individuals either affected or infected by AIDS is vital in order to alleviate problems of overcrowding and sanitation, which may otherwise encourage the spread of opportunistic diseases. This will not be achieved unless these role-players comply with para 123 in the *TAC* case (mentioned previously) as a priority.

4.5 Census 2001 and Housing Delivery for 2002/2003

The Department in its indicators has reported on the number of households in informal settlements; number of homeless persons; number of households without access to safe and healthy drinking water; number of households without access to adequate sanitation facilities and electricity; and families without houses. The source of this information is Census 2001. For example, Census 2001 estimated that about 1 376 706 households lived in informal settlements. For the year under review, the Department also provided the same number of households in informal settlements as was estimated in Census 2001. This means that even though the reporting period is after 2001, the number of the households living in informal settlements has not increased or decreased.

An analysis of this could be that the Department does not have a proper monitoring mechanism to keep record of its work, or that the instituted measures during the year under review did not improve the living conditions of these vulnerable groups.

This is problematic as it means the Department does not keep proper track of the work it does. The Department needs to work with Statistics South Africa to update and monitor the impact that its measures have in the improvement of the lives of the poor.

4.6 Old Projects/Programmes v New Policy/Programme Directions

Although the National Department of Housing has realised its shortfalls and the effects on the lives of beneficiaries, in all the reported programmes, policies and projects, there is no express indication, either by the various housing departments or other role-players (such as banks) to rectify unsuccessful

projects. Instead, the Department continues to introduce and implement new policies without any research as to why the current programmes and project are not successful. For example, the controversy associated with bonded house projects such as in Phumula Gardens in Johannesburg, which was developed in 1994, and the issues around habitability of RDP houses have not been mentioned.⁸⁹ The fact is that beneficiaries – whose right to adequate housing has allegedly been compromised – still live in those houses because they do not have any choice. Yet some of the houses do not come close to being permanent structures as contemplated in the Housing Act and the Housing Code.

One challenge identified with bonded houses is the education of home owners. It is questionable whether beneficiaries are properly educated on home ownership before they commit themselves to buying a bonded house. Pieter Venter, ABSA National Manager, Segment Focus, when responding on this issue stated that “residents not only attend a three-hour interactive modular workshop but were also given borrower education material to take home with them at the end of which they were certified”. The materials are, however, written in English only. It must be borne in mind that the language in which the beneficiaries are addressed plays an important role. All the concerns raised must be attended to. Furthermore, the Department must carry out further research on the failure of the already running programmes and projects.

4.7 Policy/Programmes and Farm Workers

The South African Human Rights Commission’s Report of Farming Communities highlights the key challenges on farms in relation to the right of access to housing and makes recommendations. Clearly the programmes/policies and projects discussed above did not deal with the realisation of the right to adequate housing on farms. The situations on farms, according to the report, include:

- women being discriminated against in terms of the provision of housing because men are still regarded as the only possible head of the household;
- demonstrating little understanding of the rural context;
- clearly not grappling with the issues of farming communities;
- not resolving the issue of the provision of housing to individuals residing on private land;
- insufficient steps being taken to address housing for farm dwellers;
- unwillingness by the DOH and Department of Land Affairs to clarify where the responsibilities lie at departmental level; and
- lack of government planning at all levels for the provision of emergency accommodation, pending eviction.

The benchmark for reasonableness in *Grootboom* states that considering housing problems in their social, economic and historical context, the programme must be “balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs”. A reasonable programme cannot exclude “a significant segment of society”. Conditions do not remain static and therefore the programme will require continuous review (para 43). This requirement creates an opportunity for the National Department of Housing to review its measures continuously so that these can accommodate the farming community. The Department has not complied with the requirement for reasonableness in the sense that all the measures (policy/programmes and budget) do not make appropriate provision for attention to housing crises and to the “short, medium and long term needs” of the farming community. These have not, therefore, been reasonable and have not progressively realised the right.

4.8 Global Context and Housing

The housing industry operates within the context of the larger socio-political economy of the country and the globe, and there are many external factors that influence housing that are not easily controllable. In essence globalisation means privatisation. Privatisation of socio-economic rights such as housing may have both positive and negative outcomes. Negative outcomes include a situation where a wealthy corporate sector in South Africa focuses on those above the poverty line who can afford to buy houses; and the public sector focuses on the poor. South Africans should be concerned so that the State and its private partners do not exacerbate unfair social and class divides by prioritising South Africa’s standing in the global economy above the basic needs of its poorest citizens. (Harrison *et al.*, 2003:2).

5. RECOMMENDATIONS

5.1 Policy Coherence

“Institutional fragmentation has made it increasingly difficult to define boundaries in power and responsibility between spheres of government and between government departments, private and community sectors. As the number of agents involved in public policy have multiplied so the question of co-ordination has become more critical. Policy coherence essentially involves the integration of agendas between separate agencies, and common programme [s] across sectors” (Harrison, *et al.*, 2003:19). The realisation of the right of access to housing depends not only on the provincial and national departments of housing, but also on other departments. Thus problems in housing call for a coherent policy framework in order to allow collaborative work between departments and all other role-players in pursuit of a common agenda.

For example, the Department of Housing in its protocol reported that it believes that the provision of shelter for homeless people is a primary responsibility of

the Department of Social Development. This needs clarification in line with the Department of Housing's obligations in terms of the Housing Act.

The Department of Housing also advocates the institutionalisation of some vulnerable groups, whereas the Department of Social Development promotes the use of existing family units, such as extended families for HIV/AIDS victims such as orphans as a first resort and institutionalisation as a last resort. The Departments must discuss this issue.

5.2 People with Special Needs

The elements of reasonableness must be considered seriously, for without it projects will not muster the requirements of *Grootboom*. Those projects that have not taken these elements into account are in danger of falling short of these requirements. The NDH must take a leading role and empower those who are committed to assisting, like the Task Team for PSN. A good monitoring system for these projects will help to improve both the quality and sustainability of the projects. Failure to take these steps will inevitably result in a mushrooming community of despair and adversity.

5.3 Integration of Communities

The Department should guard against the mistake of disintegrating the existing communities in the process of assisting them. In the process of housing the HIV/AIDS victims, orphans, and the aged, an effort must be made to integrate them within the broader community.

5.4 Planning

Planning is a process of "dialogue between different systems of meaning in the search for areas of consensus, and should not be regarded as a technical procedure" but as consensus building through communication (Harrison, *et al.*, 2003:21). In a South African context with its enormous complexity and diversity, it must be accepted that modernist planning, which imposed frameworks, master plans and very little social interaction, is inappropriate. The National Department of Housing must consider adopting a communicative action approach, which encourages the involvement of all beneficiaries and those affected in its planning in order to promote difference and diversity while achieving integration. Strategies that emerge through a process of inter-discursive reasoning or argumentation are more likely to provide an enduring and effective basis for action than those arrived at through abstracted reasoning of a planner or that are imposed by a dominant actor (Healy, 1993:238).

Some reasons for under-expenditure on some programmes and projects both at national level and provincial levels reflect a lack of careful planning. The implementation of all the programmes, projects and legislative frameworks require a well thought-out planning and monitoring system to ensure the delivery of quality products.

5.5 Tribal Authorities and Land Availability

The most common explanation for slow delivery in rural areas is that traditional authorities are not willing to forgo their powers in respect of land allocation, administration and management. However, the National Department of Housing has reported that at the core of the problem is the issue of governance, which includes political and economic considerations. Indeed, a proper consultation process must be followed with all the parties involved in order to find an alternative form of redress where the land under claim has been identified for housing development.

5.6 Private Land Identified for Housing

Well-located land for housing development is essential for the realisation of the right of access to adequate housing. The National Department has proposed the establishment of a dedicated fund for acquiring well-located land for low-cost housing. These should be established as a matter of urgency.

5.7 Culturally Adequate Housing

The International Covenant on Economic, Social and Cultural Rights stipulates key elements necessary for a meaningful enjoyment of this right.⁹⁰ All these elements must be met by government for this right to be realised. Culturally adequate housing has not been considered in South Africa. Young (1990) defines “cultural imperialism” as “the universalisation of a dominant group’s experience and culture, and its establishment as the norm” (Harrison *et al.*, 2003:37). The kinds of houses being built across the country seem to follow the same style whether in rural, semi-urban or urban settlements. The National Department of Housing must attend to the concern that its housing development seeks to encourage cultural imperialism; it must make space for the fundamental features of basic human rights including diversity and mutual respect for difference. The People’s Housing Process has a potential of attending to this and therefore must be strengthened even though this process slows delivery.

5.8 Access to Information

Lack of access to information has, *inter alia*, resulted in unethical behaviour in housing development in South Africa. At both national and provincial levels, little progress has been made to stop these irregularities. It is, however, evident that the same public has suffered tremendous loss of confidence in the Department. An ideal housing industry will be one that is not sheltered by secrecy, corruption, repression and human rights’ abuses.

Housing must realise that secrecy and lack of accountability of financial institutions, developers and government officials have fuelled people’s misgivings. A raft of corrupt practices and inhumane irregularities in housing has undermined the livelihoods of millions of poor people. This calls for the

National Housing Department to find a better way of using legislation that promotes access to information. The Home Loan and Mortgage Disclosure Act (HLAMA) as mentioned above seeks to promote access to information⁹¹ and the Department must understand and operationalise the Promotion of Access to Information Act (PAIA) 2 of 2000. The Act aims, *inter alia*, to create a framework to allow the public access to the records that government holds on its behalf.⁹²

One of the major obstacles in the fight against corruption in housing is the reluctance of individuals to “blow the whistle” on corrupt activities for a number of reasons, including fear of retribution, being labelled *impimpis* or traitors, and lack of legal protection or support from government.⁹³ The Protected Disclosures Act 26 of 2000 encourages employees to report wrongdoings by employers or corrupt colleagues.⁹⁴ For this Act to be effective in the Department of Housing, three things must be observed. First, there must be the political will to confront a culture that scorns whistle-blowers. Second, employers in housing must be trained to implement a viable whistle-blowing policy that allows employees to raise concerns without fear of reprisal. Third, workers themselves must know and understand their rights under the law in order to be able to report misconduct in a proper manner⁹⁵.

These pieces of legislation should be implemented comprehensively to promote participation, curb corruption and promote accountability of all role-players in housing the poor.

5.9 Public Participation

Lack of participation has been mentioned a number of times in this report. It is not enough for the Department to mention participation without appropriate clarification of what it means. Participation could mean:

- manipulative participation;
- passive participation;
- participation by consultation;
- participation for material incentives;
- functional participation;
- interactive participation; or
- self-mobilisation.

There is no doubt that the participation of beneficiaries could improve the effectiveness of housing development. But not all of the above-mentioned types of participation are appropriate. Interactive participation and self-mobilisation are suitable for housing development processes in South Africa. In interactive participation, the DOH could ensure that beneficiaries and relevant NGOs participate in joint analysis, development of action plans and the formation or strengthening of local housing institutions. Their participation must be seen as a right, instead of a means to achieve project goals. These people must have a

say over local decisions and determine how available resources are used. In self-mobilisation the beneficiaries must participate by taking initiatives independently to change systems if needs be. (Pretty, 1995).

5.10 Eviction

After nine years of democracy and despite the existence of human rights values in South Africa, the use of violence, harassment and other tactics to facilitate eviction remains common. All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.⁹⁶ The practice of illegal and forced evictions should be vehemently condemned as a violation of human rights. The human cost involved in forced evictions must be analysed within a human rights framework. Evictions must always be avoided where possible.

5.11 Bonded Houses

As part of the education process on bonded houses, the hidden costs should be revealed and discussed in order to help prospective buyers to make an informed decision. Failure to do this should be challenged in terms of section 32 of the Constitution and the Promotion of Access to Information Act, for it is in the interest of the home owners to know about such.

It is also questionable whether the failure to provide information on these hidden costs is part of “sound business practice”. It should follow that the banks and other financial structures should also account if it is clear that, had the home owners been provided with the hidden information they would probably not have taken the bonded houses.

5.12 Farm Workers

Based on the finding of its report on housing for farm workers (see above), the SAHRC has made a number of recommendations:

- All the relevant departments should come together and create a policy document on the provision of housing, which clearly states where the responsibilities lie. This policy will need to be taken down to the provincial and local level for implementation.
- Furthermore, the policy and implementation plan must be submitted to the SAHRC.⁹⁷

6. CONCLUSION

The Department of Housing has embarked, since 1994, on a process of addressing a housing situation in which the poorest were housed in the most unfavourable conditions. During the year under review, the Department had focused on the implementation of this ongoing project, which continues to be a work in progress.

Despite the advances made, there are serious challenges in the implementation of programmes and projects. It is clear from housing legislation that the Government is committed to bettering the lives of the poor. Whether unintended or not, unfortunately the outcomes of some of these programmes and projects have given birth to results not entirely different from those under the system of Apartheid prior 1994; namely poor quality housing, small sizes, leakages, defective workmanship, cracks, and badly located areas.

The National Department of Housing has acknowledged these challenges and is engaged in addressing them. Even though the response is not clear, there appears to be a combined effort by all the relevant departments to rectify these problems.

As stated above, the South African landmark case on socio-economic rights (the *Grootboom* case) requires that where the State progressively realises a socio-economic right, both policy and the measures taken to implement that policy must be in line with the standard of reasonableness as set out in that judgement. It cannot be disputed that the measures adopted by the State on housing during the year under review still need to be improved on, and that the policy framework needs refining, in order to pass the test of reasonableness set out in this case.

During the year under review the Housing Ministry built 203 288 housing units.⁹⁸ The Department reported 9 342 791 homeless persons in South Africa. About 1 376 706 households live in informal settlements and 2 399 825 families are without houses. This is a major challenge for the Department and it has made some progress. However, based on the challenges facing the Department including: the poor quality of houses delivered; fragmentation between the various departments involved with and related to the delivery of housing, resulting in the lack of a comprehensive and co-ordinated response to the housing crisis for vulnerable groups such as HIV/AIDS victims; a lack of capacity at the municipality level which results in slow delivery and an inability to spend budget votes; and a lack of adequate information from the departments when they report to the SAHRC; it is difficult to say that there has been a “progressive realisation of the right of access to adequate housing” during the year under review, as defined in the *Grootboom* judgement.

This should not be understood to be suggesting that the Department of Housing is not moving in the right direction. It has laid a foundation from which it can build. The enormous housing challenges cannot be expected to be dealt with within nine years. This is work in progress and the Department must reflect on its shortfalls and celebrate its successes.

- 1 See section 28 (1) (c)
- 2 See section 35 (2) (e)
- 3 Government of Republic of South Africa and Others v Grootboom and Others 2001 (11) BCLR 1169 (CC).
- 4 Ibid., para 35
- 5 Ibid., para 34-44
- 6 Minister of Health and others v Treatment Action Campaign and others, 2002 (10) BCLR 1075 (CC), para 123
- 7 Section 1 of the Housing Act 107 of 1997
- 8 For a list of these instruments and treaties, refer to the 4th *Economic and Social Rights Report 2000/2002*, published by the South African Human Rights Commission, Chapter 2: Access to Adequate Housing, p21
- 9 General Comment No 4, para 8 of the Committee on Economic, Social and Cultural Rights, 1991.
- 10 Istanbul Declaration on Human Settlement, available online: www.unhabitat.org
- 11 Housing Priorities for 2002: brief by Minister, May 7 2002, available online: www.pmg.org.za
- 12 United Nations Human Settlements Programme (UN-HABITAT) *Rental Housing. An essential option for the urban poor in developing countries, 2003*. Available [online] www.unhabitat.org
- 13 *Social Housing Foundation: Guidelines for Making Social Housing Affordable* (2001) p7
- 14 *Evaluation of USN Co-operative Housing Models Report* (2002) Urban Sector Network
- 15 These problems are experienced across the Social Housing Sector
- 16 Some administrative staff do not have the necessary qualifications and skills to perform this mandate
- 17 Evaluation of USN Co-operative Housing Models, Ibid., p 14
- 18 See page 75 of the report
- 19 See footnote 13
- 20 See footnote 1 8
- 21 National Housing Programmes: *Housing Assistance in Exceptional Urgent Housing Situations*, Chapter 3
- 22 Grootboom, *op. cit.*, para 51
- 23 Ibid., para 52
- 24 Ibid., para 64
- 25 Ibid., para 65
- 26 Ibid.
- 27 National Home Builders Registration Council, Housing Consumers Brochure

- 28 If a complaint is related to three months' non-compliance, and a housing consumer has notified the home builder, the NHBRC will seek to resolve the complaint telephonically and through correspondence with the home builder. The NHBRC will pursue the home builder, so as to ensure that s/he complies with obligations to the housing consumer in terms of Section 13 (2)(b)(ii) of the Act, to rectify minor defects within three months of the date of occupation. The builder will undertake rectification of defects.
- 29 The home builder provides the housing consumer with a one-year warranty against roof leaks upon occupation of the home. If a housing consumer experiences a roof leak in a home within one year of the date of occupation, and the home builder has failed to respond to the complaint, the NHBRC will notify the home builder and seek an immediate response, failing which the NHBRC may issue a request for conciliation. It is the obligation of the home builder to rectify such defects notified to him/her by the housing consumer within one year.
- 30 In terms of Section 13 (2)(b)(i) of the Act, where a complaint from a housing consumer related, in the opinion of Council, to a possible major structural defect, the NHBRC may seek the home builder's response, and may request the prescribed refundable conciliation deposit from the consumer. The conciliation deposit will be refunded once the complaint has been dealt with, unless the complaint is found to be frivolous.
- 31 SAHRC, *4th Economic and Social Rights Report 2000/2002*, *op. cit.* p28
- 32 Gauteng Department of Housing, Annual Report 2002/2003
- 33 Annual Report, *op. cit.*
- 34 This is the total number of all goals attained for 33 municipal areas as reported by the Department.
- 35 Ibid.
- 36 KwaZulu-Natal Department of Housing Protocol (2002/2003)
- 37 Department of Local Government and Housing: Annual Report 2002/2003, p9
- 38 Ibid.
- 39 Ibid., p10
- 40 Ibid., p13
- 41 Statistics South Africa, 2001
- 42 Northern Cape Department of Housing Protocol
- 43 Ibid., p26
- 44 The Annual Report of the Department reflects 16 751 housing units which were delivered during the year under review.
- 45 Ibid., p4
- 46 Ibid.
- 47 Statistics South Africa, *op. cit.*
- 48 Eastern Cape Department of Housing Protocol
- 49 See the Preamble of this Act
- 50 Harrison, *et al.*; 2003, p41

- 51 Section 8 (4) states that “any person whose rights or interests have been prejudiced by contravention of section 8 (1) has the right to institute a private prosecution of the alleged offender”.
- 52 Section 8 (1) states “No person may evict an unlawful occupier except on the authority of an order of a competent court”. Section 8 (3) states that “any person who contravenes a provision of (1) ... is guilty of an offence and liable on conviction to a fine, or to imprisonment not exceeding two years, or to both such fine and such imprisonment”.
- 53 See Section 4 for “eviction of unlawful occupiers”, section 5 for “urgent proceedings for eviction”, and section 6 for “eviction at instance of organ of state”. These provisions have been amended in the draft amendment.
- 54 Section 1 of the PIE explains the term “unlawful occupier” as meaning a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act 62 of 1997 and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996. The draft amendment of the Act substitutes this definition by inserting that the definition of an unlawful occupier “excludes a person who having initially occupied with such consent thereafter continues to occupy once such consent has been withdrawn”. The draft amendment was published in August 2003 only, which is the period out of the 2002/2003 reporting period.
- 55 *Ndlovu v Ngcobo, Bekker and Another v Jika* 2003 (1) 113 (SCA) (para 5)
- 56 *Ibid.* para 23
- 57 Financial institution means any bank or mutual bank registered as such under the Banks Act 94 of 1990, or the Mutual Banks Act 124 of 1993, or any other registered institution whose business is, in full or in part, either the acceptance of deposit from the general public, the advance of credit to persons or both such acceptance and advance, with the security of registered mortgage bond or any other form of acceptance security, for the purpose of providing home loans.
- 58 ESR Review, *Economic and Social Rights in South Africa*, Community Law Centre (University of Western Cape)
- 59 See section 4 (1) of the Community Reinvestment (Housing) Bill of 2002
- 60 This refers to the performance, conduct and level of compliance that is prescribed by the Minister to a financial institution in attempting to meet its target.
- 61 This refers to that proportion of a financial institution’s book that is prescribed by the Minister for disbursement either directly or indirectly to low- and medium-income level households for housing purposes.
- 62 Section 4 (1)(h), of the Bill
- 63 *The Daily Dispatch*: Online reported the response from the Banking Council CEO Bob Tucker on Tuesday, August 6 2002. Also available [Online] <http://www.dispatch.co.za/2002/08/06/easterncape/BANK.HTM>
- 64 This includes: Lending without due regard to a borrower’s repayment ability, for low-income borrowers, making mortgage loans where the principal amount loaned is greater than the amount needed for housing purposes; and providing funding directly to niche market lenders to make available for end user loans. See section 4 (2)
- 65 COSATU 2002, Submission on the Draft Community Reinvestment (Housing) Bill
- 66 This does not fall within the period under review (April 2002/March 2003) and therefore will be discussed in the next reporting period.
- 67 Vote 17: Housing: 2002 estimates of National Expenditure, p372
- 68 Housing in Southern Africa, 2002
- 69 Department of Housing Strategic Plan: April 1 2003 to March 31 2006

- 70 See Kwazulu-Natal Treasury Documents on Income and Expenditure Expenditure for the South African Housing Fund.
- 71 Department of Local Government and Housing: Annual Report 2002/2003, p13
- 72 Since the inception of the housing subsidy programme in April 1994 to January 31 2003. Housing subsidies have been the primary mechanism to realise this right progressively in South Africa
- 73 1) The reporting format of the Housing Subsidy scheme does not provide for classification according to rural/urban as well as race. However, almost 50% of the 1,4 million houses built since 1994 were built in urban areas.
- 2) Projected figure of the number of households with monthly income less than and equal to R3 500. The data is only available at provincial level.
- 3) The information is based on subsidies allocated to persons aged 61 and older from 1994 to 2002.
- 4) This figure includes informal dwelling/shacks in backyard, informal dwellings/shacks not in backyard, house/flat/room in backyard, room/flat let not in backyard but on a shared property, tents, and caravans, excluding traditional dwellings. No data is available in terms of rural-urban split.
- 5) The provision of shelters is primarily the role of the Department of Social Development.
- 6) This figure is based on the census category “Households in informal dwelling/shacks not in backyard”.
- 7) No data is collected by the National Department of Housing on illegal settlements. This is a matter that is dealt with at the local sphere of government.
- 8) The average period of time spent by an individual on a waiting list varies from province to province. Only a few provincial governments keep waiting lists. Based on the provincial waiting lists available, the maximum period a person can be on a waiting list is six years.
- 9) This figure is for the number of households without access. It includes the Census 2001 categories: no access to flush, pit latrine, or bucket latrine (excluding access to other unspecified sanitation facilities). No data is available on the rural-urban split.
- 10) This figure is for the number of households without access. It includes the Census 2001 categories: no access to electricity (excluding access to gas, paraffin, candles or other sources). No data is available on the rural-urban split.
- 11) This figure represents all non-compliances for the year 2002/2003, as recorded by the NHBRC.
- 12) This information is not available at national level.
- 13) The figure comprises the Census 2001 categories, “House/flat/room in backyard”, “Informal dwelling shack in backyard”, “Informal dwelling /shack not in backyard”, “Room/flat let not in backyard but on a shared property”, “Caravan/tent”. The data is available at provincial level only.
- 74 Respondents include children and their parents
- 75 Government of the Republic of South Africa and others v Grootboom and others 001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), para 3
- 76 Ibid., paras 7 and 8
- 77 The first appellant was the National Government; the second one was the Premier of the Province of the Western Cape representing the Western Cape Provincial Government; the third was Cape Metropolitan Council; and the fourth was Oostenberg Municipality.
- 78 Grootboom, *op. cit.*, para 13

- 79 Ibid., para 99
- 80 Renay De Witt, *Creating Communities for people with special needs*, Housing in Southern Africa, December 2002
- 81 Renay De Witt, *Creating Communities for people with special needs*, Housing in Southern Africa, December 2002
- 82 These are taken from the response to protocols from the Departments of Housing.
- 83 *The Star*, Millions in SA reside in squatter camps – Minister, 14 October 2003
- 84 Statistics South Africa, *op. cit.*
- 85 This also includes the National Department of Housing even though it did not submit its report.
- 86 Statistics South Africa, *op. cit.*: investigation into appropriate definitions of urban and rural areas for South Africa: discussion document. Report No 03-02-20 (2001)
- 87 The Commission was also hoping that the NDH would provide reasons for failing to meet its own benchmarks, as they are vital for the realisation of the right of access to adequate housing.
- 88 Workshop Report: Speak out on Vulnerable Children, HIV/AIDS, and Housing, available [on line] <http://www.usn.org.za/speak-out%20report.htm>
- 89 Phumula Gardens is a private development of bonded houses that was developed by Homes for South Africa. The project began in 1994 and it was one of the first housing projects to take place after the new Government came into power. Previously disadvantaged groups were suddenly given the opportunity to purchase property. Many of them apparently jumped into homeownership without giving it a second thought. Many residents were not fully aware of the responsibilities and hidden costs that come with owning a home. As a result, banks repossessed many of the bonded houses. (Some 30 000 have been repossessed in South Africa during the last eight years.) Homes for South Africa lost in excess of one million rands due to vandalism. As Phumula Gardens residents feel that they have not been given their money's worth; the local government is also losing money because residents are refusing, or cannot afford, to pay for basic services.
- 90 For a more detailed discussion on the elements, see the General Comment No 4, para 8 of the Committee on Economic, Social and Cultural Rights, 1991. Can also refer to the *3rd Economic and Social Rights Report by the South African Human Rights Commission 1999/2000*, Chapter 6: Access to Adequate Housing, p250
- 91 Section 2 (1) of the Act provides that “Every financial institution must disclose the required information in its annual financial statement”.
- 92 PAIA, *A user guide for government administrators*, SAHRC Resource Manual, module one
- 93 Robin Hodess with Tania Inowlocki and Toby Wolfe, Global Corruption report (2003) *A special focus to access to information* by Transparency International, p17
- 94 Section 2 (1) of the Act provides that the objectives of the Act are:
- a) to protect an employee, whether in private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
 - b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and
 - c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer ...
- (3) Any provision in a contract of employment or other agreement between an employer and an employee is void in so far as it:

- a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or
- b) (i) purports to preclude the employee; or
- (ii) has the effect of discouraging the employee, from making a protected disclosure.

95 See note 60

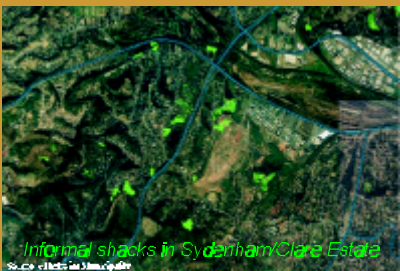
96 General Comment No 4 (1991) of the Committee on Economic, Social and Cultural Rights on the Right to Adequate Housing, para 8 (a)

97 The recommendations are discussed in detail in the report, pages 44 to 196

98 National Department of Housing Protocol



Source: La 4 Star



Informal shacks in Sydenham/Clare Estate
Source: eThekweni Municipality



land

ECONOMIC AND SOCIAL RIGHTS

5TH REPORT 2002/3

THE RIGHT TO LAND

5th Economic and Social Rights Report Series 2002/2003 Financial Year

South African Human Rights Commission

21 June 2004

PREFACE

In this 10th year of our young but thriving democracy, we are all engaged in some way or the other, in critically reflecting on the achievements we have secured over the past years as well as the unfinished work that lies ahead. In the context of the various rights guaranteed by our Constitution, they seek in their totality to ensure that the individual and the society are able to develop to their full potential and indeed that human rights becomes a central feature of our society. In this regard we have made much progress, and in the main, few argue against the notion that civil and political rights are well secured both in law and in practise.

However, the challenge that is situated at the heart of our Constitutional contract is how we advance social and economic rights and in so doing ensure that we advance the interests of the poor and those many who are still to enjoy the full benefits of our democracy. The inclusion of social and economic rights in the Bill of Rights was a clear articulation that democracy was as much about the right to vote, and of free expression and of association as it was about the right to shelter, the right to food, the right to health care, the right to social security, the right to education and the right to a clean and healthy environment.

The Constitution has tasked the Commission with a specific mandate to advance social and economic rights. In particular, section 184(3) requires that: “Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.”

A healthy and robust debate exists around these measures that the Constitution requires the State to take. In addition, the human rights discourse sees considerable contestation around issues such as the nature and scope of the right, the adequacy or otherwise of the measures taken and the meaning of the phrase ‘progressive realisation of rights.’ These are difficult issues and it is not always possible, nor may one say desirable, to always have consensus on them. In some instances the Courts have had to rule on them. We see this Report, however, not only as a contribution to those debates but also as a tool that can assist Government, Parliament and civil society in developing a critical understanding about social and economic rights and their implementation.

The modus operandi of the Commission in discharging its constitutional mandate to monitor and assess the observance of economic and social rights has in the main focussed on requiring organs of state to report to us on measures they have taken. This continues to pose several challenges, namely: to ensure that organs of State submit to the Commission reports that are timely, accurate and of good quality . We are pleased that good progress has been made on this front over the past year and the process of presenting draft reports to organs of state and civil society for comment has been most valuable to the Commission in finalising this report .

The launch of the 4th Economic and Social Rights report in April 2003 generated considerable interest and much debate and discussion on the Report ensued. We were invited by numerous parliamentary portfolio committees from the National Assembly and National Council of Provinces to present the Report. We certainly found the engagement with Parliament a very useful and mutually rewarding exercise. It provided the Commission with a unique opportunity to share its thinking and vision around its work

with Parliament while it enables us to better understand Parliament's expectation of the Report and its use to them as a tool in their work. There have been numerous valuable recommendations that have emerged from our presentations to Parliament which we are committed to giving effect to from our side.

So as we commence the beginning of the 2nd decade of our democracy the delivery of social and economic rights become crucial to the ongoing success of our nation and the entrenchment of a culture of human rights. It is certainly our hope, and the intention of this Report, to contribute to ensuring that the promise and the vision underpinning our Constitution is shared and enjoyed by all in our country.

Jody Kollapen

Chairperson - South African Human Rights Commission

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INTRODUCTORY SECTION

The aim of the *Introductory Section* is to provide an outline of the common analytical framework used in the reports, briefly discuss the political and economic context of the year under review, and provide an integrated summary of the key findings and recommendations of all eight reports in the series. Details of the report production process are also included at the end of this introduction.

The 5th Economic and Social Rights Report follows a more user friendly format than previous reports. There are now separately bound, less bulky, reports on Land, Water, Environment, Food, Health, Social Security, Education and Housing. Each report has an executive summary to facilitate access to the main findings and recommendations. Issues that connect one right to another are highlighted in the body of each report to emphasise the interrelatedness and interdependence of the rights in the Bill of Rights of the Constitution of the Republic of South Africa Act 108 of 1996 (simply referred to as the Constitution throughout the reports).

A) Analytical Structure and Framework

Each report in this series follows a basic structure:

1. **Introduction:** a discussion of the meaning and content of the right with reference to the Constitution, case law and relevant international human rights instruments.
2. **Progress in the realisation of the right:** a factual description of measures instituted by government during the period under review and their impact, especially on vulnerable groups.
3. **Challenges for the realisation of the right:** a description of key challenges that hamper the realisation of the right, and in some cases, government's response to these challenges.
4. **Critique of measures instituted:** a consideration of some of the shortcomings of the measures instituted by government.
5. **Recommendations:** a set of recommendations that may encourage progressive realisation of the right as expeditiously as possible.¹

Each report consolidates information from various sources including: relevant government protocol responses, government Annual Reports and Strategic Plans, the Intergovernmental Fiscal Review, as well as research funded by government, international donors or other agencies.

All reports employ the standard of reasonableness as laid down in the *Grootboom*² and *TAC*³ judgements of the Constitutional Court, in conjunction with relevant international human rights instruments.

¹ Some reports in the series end with a conclusion.

² Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC)

The constitutional provisions pertaining to socio-economic rights require the State to “take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of [these rights]”.⁴ This requirement, read with the provision on the obligation of the State to “respect⁵, protect⁶, promote⁷ and fulfil⁸ the rights in the Bill of rights” in section 7(2) of the Constitution ensures an effective guarantee of socio-economic rights in South Africa. The judicial enforcement of these rights by the courts and the constitutional mandate of the South African Human Rights Commission to monitor and assess the observance of the rights by the State⁹ and non-State entities also contribute to the effectiveness of the constitutional guarantee of these rights.

The Constitutional Court has played a significant role in ensuring the effective guarantee of socio-economic rights in our country. On the obligation of the State, Judge Yacoob held in the *Grootboom* case:

*The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.*¹⁰

On the effective guarantee of basic necessities of life for the poor, Judge Yacoob further said:

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to

3 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)

4 See sections 26(2), 27(2) and 29(2) of the Constitution.

5 Respect is a negative obligation, which requires the State to refrain from denying or limiting equal access for all persons to the enjoyment of the rights. This also means that the State should abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure which violates the integrity of the individual or which in any way interferes or limits his/her right to pursue the enjoyment of the rights in the Bill of Rights.

6 The obligation to protect places a positive obligation on the State to prevent the violation of any individual's rights by a third party.

7 The obligation to promote places a positive obligation on the State to create a conducive atmosphere in which people can exercise their rights and freedoms by promoting awareness of their rights through public education.

8 The duty to fulfil places a positive obligation on the State to institute active measures that enable each individual to access entitlements to the right and which cannot be secured through exclusively personal efforts. State parties are also obliged to provide a specific right when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. e.g. people in disaster situations or those in dire need.

9 See sections 184(1) and (3) of the Constitution.

10 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC) [24]

*ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.*¹¹

On the role of the courts in ensuring that the State fulfils its role in giving effect to these rights and thus ensuring that there is an effective guarantee of these rights, Judge Yaccob said:

*I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.*¹²

A similar position was taken by the Constitutional Court in another seminal judgment, *Minister of Health and Others v Treatment Action Campaign and Others*, where the Court held:

*The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflicts our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.*¹³

In outlining the role of the courts, the Court also stated:

*The primary duty of courts is to the Constitution and the law...Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to do so.*¹⁴

While there might be some criticism directed at the Constitutional Court pertaining to the determination of when there are no available resources for the State to fulfil its obligation pertaining to socio-economic rights, the courts, particularly the Constitutional Court, have and will continue to play an important role in ensuring that the provisions in the Bill of Rights are effectively guaranteed for our people.

B) The Political and Economic Context of the Year Under Review

11 Ibid., [93]

12 Ibid., [94]

13 *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) [36]

14 Ibid., [99]

The period under review, 1 April 2002 to 31 March 2003, followed the 11 September 2001 attacks and a 24% depreciation of the South African currency (Rand) near the end of 2001. Consumer Price Inflation, especially for goods and services bought predominantly by the poor, increased sharply to the highest level since 1994. Concerns were signalled to the Competition Commission about the impact of import parity pricing in several sectors of the economy, most notably in food production, processing and retailing as well as metals and engineering. Interest rates were raised in an attempt to curb inflation, with a subsequent dampening effect on the rate of economic growth in the latter part of the financial year. According to the Reserve Bank Quarterly Bulletin for March 2003, economic growth stood at a robust 3% in 2002.

As a result of prudent fiscal management, the government introduced a more expansionary Budget in February 2002. Total government expenditure increased from R262,6 billion in 2001/2002 to R291,8 billion in 2002/2003. Overall, the budget directed more resources towards reducing poverty and vulnerability, improving education and training, developing skills amongst the youth, building and enhancing physical infrastructure and basic municipal services, as well as making communities safer places to live, work and play.

It is also important to note that the February 2003 Budget provided for significantly greater expenditure than the previous year. Total expenditure was R331,7 billion for 2003/2004. The additional allocations accommodated substantial policy changes for all three spheres of government and also provided for *higher than anticipated inflation in 2002*.

By the end of the reporting period in March 2003, the Rand had appreciated by 18%. This created concern about the job losses that could arise out of an increase in import competition. Therefore, during the period under review, the goals of progressively realising economic and social rights took place in the context of significant macro-economic volatility, inflation and an expanding government budget.

C) Key Interrelationships Amongst Economic and Social Rights

The Right to Land

The State was responsible for achieving progressive realisation of the right to land during the reporting period. The Commission demonstrates that there was a year on year improvement in land delivery performance by the State, especially through the Land Restitution and Land Redistribution sub-programmes. Improvements in rural tenure reform were less noticeable.

Between 2000 and 2001 there were 12 094 settled Restitution claims, while in February 2002 there were approximately 32 000 settled claims. By March 2003, there were 36 488 settled claims recorded. Although the majority of these claims were in the urban areas, settled rural claims show a substantial increase. The people working on the Land Redistribution for Agricultural Development sub-programme delivered 103 682 ha against a target of 81 555 ha for the year under review. Whereas the Department had targeted to benefit 3 601 people, the programme ended up benefiting 6 170. Concerning tenure reform, the State initially delivered 30 000 ha of land through 201 projects. Beyond that, the State is working towards bringing the Extension of Security of Tenure Act (ESTA) and Labour Tenants Act (LTA) together in the Consolidated ESTA/Labour Tenants Bill.

Throughout the report, the Commission reflects on the demand, voiced by landless people and others, that the pace of land redress is too slow and inattentive to vulnerable groups. The report recommends accelerating land reform to meet its new targets by relieving budgetary constraints and the associated problems of personnel shortages, lack of quality training and understandable communication; land acquisition; and improvements in monitoring and evaluation.

The Commission would also like to highlight that it was informed by the Department of Land Affairs that it was impossible to represent the racial and gender composition of land purchase transactions and repossession, according to the size and value of land parcels.

The Right to Education

The right to education is analysed as a continuum of three bands of schooling- General Education and Training, Further Education and Training and Higher Education and Training. The State instituted measures to respect, protect, promote and fulfil the right to General Education and Training, and in the Commission's overall assessment, it succeeded in achieving progressive realisation of this right.

The Department of Education succeeded in ensuring that all targeted Early Childhood Development sites for children between the ages of five and six were operating. However, the Department acknowledges the challenge, which has budgetary implications, that only 13% of all children have access to the programme. In the context of a substantial increase in the rate of student enrolment in primary schools between 1994 and 2001, the National Department focused on further increasing access to General Education and Training through reviewing public school financing and the system of school fee exemptions. The report highlights the shortcoming that some schools and Provincial Departments of Education failed to make parents aware of the school fee exemption.

While progress was made in eliminating instances where learners are forced to receive education in environments that are not conducive to teaching and learning, the report emphasises that more needs to be done to address infrastructure backlogs, especially when it comes to water and sanitation. The Department also made progress in developing a redistribution model for personnel and operating expenditure that would achieve equality of teaching quality and equality of learning outcomes in the schooling system from 2003/2004 onwards. All stakeholders in education, including the SAHRC need to explore and come up with a definition of quality basic education which could be measurable and relatively easy to monitor.

Conditions in farm schools were identified as hinderance to progress in the realisation of the right to General Education and Training. The issue of street-children also has to be given some serious attention by all the relevant stakeholders. Amongst other recommendations to further observance of the right to General Education and Training, the report calls for better-published medium term strategies and improved spending on Adult Basic Education and Training. In the 2001 Census, 4,5 million people aged 20 years and older did not have a formal education and 4 million people had primary schooling only.

Most of the developments in the Further Education and Training band met the Constitutional requirement to respect, protect, promote and fulfil the right. *Dinaledi*, the programme that seeks to improve participation and performance of learners from historically disadvantaged backgrounds in Mathematics, Science and Technology (MST),

reportedly surpassed its target of 10% of students enrolling for MST in its first two years of implementation. The development of Recognition of Prior Learning (RPL) is another development that contributes to the realisation of the right to Further Education and Training. RPL recognises non-formal and/or non-academic education. RPL also stands to maximise learning opportunities for those without formal and/or academic qualifications to acquire formal qualifications in Further Education and Training institutions, which must all be registered with the State.

Areas where the State fell short of its obligations to progressively realise the right to Further Education and Training include: insufficient public education on school fee exemptions and insufficient Learner Support Materials and/or their late delivery. The report also highlights that participation rates in education by girl learners were being negatively affected by girls' involvement in income generating activities.

While Higher Education and Training is not explicitly recognised as a right in the Constitution, it obviously depends on the learning outcomes achieved in General and Further Education and Training. Here, there seems to be room for improvement as the average graduation rate for university and technikon students is 15%; less than half the ideal average of 33%.

Key challenges associated with the Higher Education and Training band include assisting potential students with subject selection choices and career guidance at school and university level, as well as lowering the high costs of accessing higher education and applying to different tertiary institutions. The report recommends ensuring that admission requirements to tertiary institutions are transparent and fair, promoting indigenous languages as academic/scientific/legal languages, mobilising funds for bridging courses and improving access for mature and post-graduate students, including part time students.

The Right to Water

Ever since 2001 and the introduction of Regulations Relating to Compulsory National Standards and Measures to Conserve Water, the State instituted a national measure to fulfil the right to water by supplying 6000 litres of free, clean water, per household per month, otherwise known as Free Basic Water.

During the reporting period, approximately 1,6 million people gained access to improved piped water supplies through Department of Water Affairs and Forestry's Community Water Supply and Sanitation Programme. Approximately 65 thousand toilets facilities were constructed during the reporting period under the same programme, but it should be noted that these figures exclude the large number of sanitation facilities that were delivered as part of the State's housing programmes. Less than 530 000 households also benefited from water and sanitation projects through the Department of Provincial and Local Government's Consolidated Municipal Infrastructure Programme. Although the above indicates that the roll-out of water and sanitation infrastructure is proceeding towards the Department's medium delivery targets, the report raises concerns about the level of dysfunctional infrastructure and projects, especially in rural areas.

At the end of the reporting period in March 2003, access to Free Basic Water by poor people stood at 38% or approximately 12,2 million people. Access to Free Basic Water by non-poor households stood at close to 100% or approximately 14,2 million people. A large number of poor people (19,6 million) were still to receive their Free Basic Water allocation. Where Free Basic Water was not available, the average cost of 6 kilolitres (kl)

was approximately R13 per month. The price for 6kl of life-line supply was highest in Limpopo province at approximately R19 per month. Gauteng and KwaZulu-Natal also had comparatively high average charges for life-line supplies where Free Basic Water services were not operational.

In order to remove these glaring inequities in Free Basic Water provision, the report calls for an urgent revision of the pricing system to include a significantly greater level cross-subsidisation from high volume water users to low volume users in the 0-6 kl range. More support and funding is required to assist municipalities with capacity problems in implementing Free Basic Water. During droughts, local governments should ensure that Free Basic Water supplies for domestic users are assured and that a situation cannot develop where agricultural, mining and industrial users are allocated large volumes of water at similar prices to low-volume users.

The report describes some aspects of the devolution of domestic water quality monitoring and testing from Provincial Departments of Health to local municipalities and calls for rapidly providing sufficient funds for water quality monitoring to prevent serious disease outbreaks and illness.

The report recommends that the Department of Water Affairs and Forestry (DWA) should take a leading role in making sure that farm dwellers, residents near commercial farms and poor households in rural and urban areas access clean water and proper sanitation services. DWA should also ensure that it develops and implements a plan to address the specific problems of water access experienced by people living with HIV/AIDS.

The report suggests that monitoring bodies should be created at local level to effectively monitor the implementation of policies and laws aimed at fulfilling the right of access to water. The report warns that monitoring will only be effective if monitoring bodies from local, regional and national spheres work together. Where possible and when possible, the Free Basic Water allocation should be increased to cater for higher levels of domestic water consumption. A 50kl water allocation per household per month would bring South Africa's Free Basic Water allocation into the 'low level of health concern' range defined by the World Health Organisation.

The Right to Health Care

The report on the right to health care focuses on key developments in three key health programmes of the State (Health Service Delivery, Strategic Health Programmes and Administration). Although the policy and legislative measures developed in the fiscal year under review can be said to be "reasonable" in their conception, there remain large gaps in implementing them in a manner such that all the provinces, urban and rural peoples, rich and the poor have equal access to the same high quality of care.

The three most important, and universally acknowledged, indicators to measure the health status of a nation are Life Expectancy at Birth, the Maternal Mortality Ratio, and the Infant Mortality Rate. Life expectancy has fallen from 56 years in 1996 to 52,5 in 2002 and is projected to fall to 47 by 2005. The infant mortality rate has increased from 45 in 1998 to 59 in 2002. This means that more children under the age of one died in 2002 as compared to 1998. The under five-mortality rate has risen from 61 in 1998 to 100 in 2002. Similarly, the maternal mortality ratio shows a steady increase since 1998 and is

estimated to be 150 per 100 000 live births. The National Department of Health, as well as independent researchers, have concluded that this is due to HIV/AIDS related deaths.

The single most important challenge that government faces is the one posed by the AIDS pandemic and the high incidence of opportunistic diseases such as tuberculosis. It is estimated that about one tenth of the population of the population is infected with the HI virus i.e. close to 5 million people. The number of AIDS orphans is estimated to be one million. In a landmark case instituted by Treatment Action Campaign against the Minister of Health, the Constitutional Court, in 2002 confirmed the finding of the High Court that government's policy to limit Nevirapine to research and training sites was in "breach of the States obligations under section 27(2) read with 27(1)(a) of the Constitution." The report recommends that the Comprehensive National Aids Plan should be rolled out effectively in all the provinces so as to meet targets and timelines in order to substantially reduce new infections and to prolong the lives of those already infected.

In spite of the fact that policies and programmes directed at improving the health status of the country have been put in place such as the Integrated Management of Childhood Illnesses, the AIDS pandemic continues to be the single most cause of death in South Africa. This has placed an enormous strain on an already overburdened health system and undermines the efforts made by the State. This is compounded by the fact that the other economic and social rights, which contribute substantially to the health status of a nation, are also not fully enjoyed by the vast majority of poor South Africans due to the huge backlogs inherited from the past. Inadequate housing, poor sanitation, overcrowding, lack of clean drinking water, lack of efficiently run social services, insufficient nutrition and health education exacerbate the diseases of poverty. Moreover, a household that is affected by AIDS contributes to depleting the financial resources available to the family, thereby increasing the level of poverty.

government developed legislative and other measures to comply with its constitutional obligations in terms of section 7(2) of the Constitution. However, despite national policies and programmes, which, in the main comply with international standards and targets, the health care system has not been able to successfully deliver quality health care on an equitable basis in all the provinces. Provinces do not spend the same amount per capita on health care delivery, and there is a serious lack of managerial capacity in the health system. The biggest challenge facing the efficient running of the health system is training managers to operationalise efficient systems especially for running clinics and hospitals where many problems have been identified. Efficient management systems in conjunction with effective engagement with labour should be operationalised with immediate effect in the public health sector so as to ensure that hospitals and clinics run well.

The report also recommends that there is a need to increase efforts in promoting preventative health measures by the State as well as by non-state actors. Programmes and policies should also be put in place to address the needs of the poor and vulnerable members of society, including a National Health Insurance System. Inequities in the health system such as intra- and inter-provincial health expenditures, access to clinics and hospitals, number of doctors, specialists, and nursing staff need to be addressed so as to give meaning to the constitutional right to universal and equal access to everyone. Finally, Departments of Health are strongly advised to improve their monitoring, evaluating, and reporting systems

The Right to Social Security

The Constitution provides that everyone has a right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The number of social assistance beneficiaries increased dramatically by 966 311 people from April 2002 to the end of March 2003, mostly as a result of increased registration for Child Support Grants for children up to the age of seven. By the end of March 2003, 5,6 million people were beneficiaries of social assistance, which mostly comprised of child support grants (2,5 million people), old age pensions (2 million people), disability grants (897 050 people) and foster care grants (133 309 people). The most rapid increases in uptake of social grants took place in Gauteng, Free State, KwaZulu-Natal, Mpumalanga and Limpopo. Take up rates were considerably lower in the Northern Cape, North-West, Eastern Cape and Western Cape.

Most provincial departments indicated that the allocated budget was not enough and that numbers of grant beneficiaries were constantly increasing, resulting in overspending for social security. However, the delivery of social services has not been efficient in some parts of the country as a result of administrative problems, lack of documentation as barriers to accessing grants, poor conditions at pay points, as well as corruption and maladministration.

As a result of rapid inflation in the cost of basic goods bought by the poor, in 2002/2003, the State moved swiftly to implement above inflation related increases in social grants. The old-age pension was increased by R20 to R640, the child-support grant increased by R10 to R140, the grant in aid increased from R120 to R130, the foster-care grant from R450 to R460, and the care dependency grant from R620 to R640.

The National and Provincial Departments of Social Development spent 90% of the R49 million allocated to the HIV/AIDS (home based/community based care) programme. The Home/Community Based Care programmes, through the collaborative work of government, non-governmental organisations, including faith-based organisations, and communities have benefited 29 612 children orphaned or vulnerable to HIV/AIDS by the end of March 2003. The programme reached 75 000 children orphaned or vulnerable owing to HIV/AIDS since its inception in 2000.

The State also instituted new measures to further the right to social security, including disability assessment panels, a social relief of distress policy and the implementation of the National Food Emergency Scheme/Programme. Figures of the number of households that were assisted with food parcels in the pilot phase of the National Food Emergency Programme from December 2002 to the end of March 2003 range from 60 089 to 149 779.

The social security system at present does not cater for everyone and not everyone in need of social assistance is afforded such assistance. This is especially so for children in child headed households and children who live in the streets who sometimes engage in exploitative forms of labour. Some parents also fail to provide and take care of their children and put strains on the maintenance and social assistance systems.

The report recommends that the Department of Labour should take the International Labour Organisation's Decent Work for All Strategy forward in South Africa. It is also recommended that the relevant organs of State achieve better regulation of the insurance, health and maintenance systems. Particular attention should be paid to the coverage of old

age pensions for workers in non-formal employment. The Department of Social Development is encouraged to continue fostering collaboration with all stakeholders, such as other government departments, Faith Based Organisations and Non-Governmental Organisations. The Basic Income Grant should continue to be considered as a viable option for addressing poverty in the country, especially amongst people of working age. The proposal to extend social assistance to all children in need (up to the age of 18), should also be kept alive.

The Right to Food

The report concludes that many people, and children in particular, had their right to food violated during the reporting period as they lost access to affordable food due to high prices and/or unreasonable plans devised and supervised by government. During the reporting period, 101 152 children were admitted to hospital with severe malnutrition and it was not possible for the Commission to state how many children died of malnutrition. However, it is alarming that case fatality rates for severe malnutrition in two under-resourced hospitals in the Eastern Cape ranged from 21% to 38%.

The report finds the National Department of Health's targets for reducing malnutrition to be unreasonable in their conception because the targets for 2000 and 2005 were virtually identical. The report also finds two elements of the Primary School Nutrition Programme to be unreasonable in their conception.

The first issue concerns the reduced allocation of resources to the programme in 2002/2003 as compared to 2001/2002. In 2001/2002 the total cost of the school food "meal" ranged from approximately 99 cents to R2.10. In 2002/2003, the maximum budgeted resource available per targeted learner per day was less than 67 cents. This is clearly an unreasonable set of parameters for the programme to be improved to meet the higher standards set by Cabinet.

The second element of the programme that was unreasonable was the reduction in the targeted number of children who should benefit from the programme. In the context of increasing numbers of children enrolled in schools, the Primary School Nutrition Programme did reach 4,5 million children in grades R to 7, however this was 151 615 children less than the year before. The drop in the number of learners who were reached is connected with government reducing its target from 5,4 million learners in 2001/2002 to 4,9 million learners in 2002/2003 as well as rapid increases in the cost of food procured for the programme. A three month gap in the implementation of the programme in the Eastern Cape also reduced access to the programme.

Non-State actors appear to have fallen short in their observance of their positive obligations to fulfil the right to food. As one example, the Yiyo Lena sifted maize relief programme introduced by a group of companies is alleged to have sold relief maize packs at a 20% discount, despite that fact that the companies announced that the programme would entail a 50% discount.

High basic food prices during the reporting period, were partly attributable to inadequate safeguards on the South African Futures Exchange, where maize prices are formed. High prices for maize were passed on to low-income consumers, who could ill afford such dramatic basic food price increases for such a sustained period of time. The potential for market manipulation should have been prevented by the Johannesburg Securities Exchange when allegations of abuse were first signalled in 2002. The report identifies

that there are weaknesses in the State's observance of its obligation to protect against fraud, unethical behaviour in trade and contractual relations.

There were some signs of improvement in the State's delivery of production support to emerging farmers and people who grow their own food. For example, the Comprehensive Farmer Support Package was instituted during the reporting period to assist land reform beneficiaries. However, it was implemented in some provinces only.

The LandCare programme, which is one of the major production support programmes from the National Department of Agriculture, was heavily underspent at 65% of the total conditional grant to provinces. There is also a significant gap in production support for rural restitution beneficiaries.

It was found that very few Provincial Department's of Agriculture were operating well funded programmes designed specifically to provide grants or revolving loans to support increased access by small scale and emergent farmers to production and/or marketing related infrastructure. Production support materials and learning support materials that are relevant to resource to poor farmers in water scarce areas were also not readily available.

On the whole, the report determines that the State absorbed the heavy burden of duty to achieve the progressive realisation of the right to food as expeditiously as possible, within its available resources. However, there was a crucial weakness in the measures to protect the right to food from being violated by non-State actors or third parties that need not be repeated in future.

The report suggests that there is a need for greater care in the preparation of strategic and financial planning targets so that they inspire civil society to marshal their resources in support of the progressive realisation of the right. The report recommends: public education to raise awareness of malnutrition, rolling out the Integrated Food Security Strategy at a provincial level, improving food safety, achieving better regulation of the food industry through State procurement, accelerating agrarian reform, and communication policy and legislative developments more effectively. Finally, the report supports the call for government, labour, community and business representatives to negotiate an agreement at the National Economic Development and Labour Council (NEDLAC) to ensure the right to food and quality job creation in the food industry.

The Right of Access to Adequate Housing

In order to fill some gaps in the housing policy framework, the State identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities for 2002/2003. Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to transport and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualised as a result of the *Grootboom* judgment and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control (e.g. disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety). The report highlights that it was not clear whether the Emergency Housing Policy should also cover people living in informal settlements, because they are living in intolerable circumstances. Social Housing projects demonstrate that socially, environmentally and sunshine conscious design principles can make a difference to the quality of State subsidised housing.

The State reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from Occupation of Land Amendment Bill and the commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000. With a view towards curbing discriminatory practices, the Act compels financial institutions to disclose information in their financial statements on home loan patterns according to categories of persons and geographic areas (both of which may be prescribed). The Community Reinvestment Bill confirmed the State's intention to increase private sector investment in the lower end of the housing market. The report highlights that the State was also attending to some aspects of the Housing Act 107 of 1997, as amended, in order to ensure that the Act, and its implementation, did not violate an individual's right to property in terms of the Constitution.

In terms of on-going policies and programmes, in 2002/2003, the State reported 203 288 houses completed or under construction, whilst the State approved 519 498 subsidies to households with a joint monthly income less than or equal to R3 500, or R1 500 if the house was built under the apartheid system. By the end of 2002/2003, the State reported that over 1,4 million houses had been delivered since 1994, whilst the number of families without houses (i.e. dwellings in backyards, informal dwellings, backyard dwellings in shared properties and caravans/tents) was reflected as 2 399 825- from the 2001 Census. The State also increased the subsidy amounts for the housing programme to keep pace with inflation and maintain the well-known quality and size of housing. Sixty-three projects were also completed as part of the Human Settlement Redevelopment Programme in order to correct imbalances and dysfunctionalities in existing settlements that cannot be funded through the housing subsidy scheme (e.g. sports facilities, business hives, labour exchanges, cemeteries, parks and ablution blocks).

There was under expenditure on housing delivery amongst many provincial departments responsible for housing. Reporting on the constraints associated with underspending was not complete, but included the following in some cases: failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in the National Department approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the People's Housing Process and delays at the Deeds Office.

Comparing performance in relation to targets was a problem in that provincial information was reported in the format of the number of units completed *or* under construction. Nevertheless, Gauteng and Limpopo provinces stand out as the only provinces to show a reduction in units, whether complete or under construction, from 2001/02 to 2002/03. The Gauteng Department of Housing reported delivering 59% of the target in the incremental housing programme and 39% of the target in the Social Housing programme. A Customer Support Service in the province acknowledged 83 714 queries and responded to a further 11 774 by letter.

According to the National Department of Housing, in 2002/2003, 6 469 houses did not conform to the Department's construction and safety standards. The National Home Builders Registration Council's (NHBRC) Warranty Scheme was instituted to provide assurance to beneficiaries that houses built and financed through the housing subsidy scheme are of an adequate quality. After trying to resolve disputes about the quality of construction, a housing subsidy beneficiary can forward complaints to the NHBRC. However, the report highlights that public education is required to empower consumers to identify quality problems and make use of the complaint procedures of the NHBRC. The

Mpumalanga Department of Housing also reported that building works inspectors from provincial government and local government monitored the work of contractors.

The report makes one urgent recommendation, namely: to establish the dedicated fund for acquiring well-located land for low-cost housing. Other recommendations include reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, interpreting the Peoples' Housing Process as a route for strengthening culturally adequate housing, creating an informed and supportive environment for whistleblowing, and ensuring effective participation in the delivery of housing. Specific attention is drawn to the plight of farmworkers and vulnerable groups, especially HIV/AIDS orphans and People with Special Needs.

The Right to a Healthy Environment

Section 24 of the Constitution establishes the right to environment in order to ensure the health and well-being of present and future generations. At its core, the right to environment aims to grant this benefit to everyone in South Africa, not just to the few. Although, translating this vision of the benefit of environmental health into reality has become increasingly complicated, ensuring that there are no violations of this right is as urgent as any violation of other rights in the Bill of Rights.

Analysts of data from South Africa's Global Atmosphere Watch station at Cape Point contend that continued emissions of greenhouse gases are cause for concern. Like many countries, South Africa is sensitive to global climate change and there are also occasions, especially in major urban areas, when more localised air pollution becomes a health threat.

By way of illustration, the Johannesburg *State of the Environment Report 2003* indicates that “while in many parts of Johannesburg, air quality is within acceptable standards, approximately 20% of the City, particularly dense settlements and lower income townships, experience severe air pollution, with ambient air pollution levels exceeding acceptable guidelines by approximately 20-30% particularly during winter when temperature inversions prevent emissions from dispersing.” The report goes further to state that “levels of particulate matter in certain townships can exceed the World Health Organisation standards by as much as 250% in winter.”

Progress in the realisation of the right to environment could not be very well monitored and observed by the Commission during the year under review because annual progress reports in terms of section 11 of the National Environmental Management Act 107 of 1998, were inaccessible at the time of writing. These progress reports should contain detailed information on the implementation of measures instituted to ensure the right to environment.

Nevertheless, the Commission did observe the growing influence of the Committee for Environmental Co-ordination through an interpretation of its review, and subsequent consolidation, of Environmental Implementation Plans and Environmental Management Plans submitted by relevant organs of State. These reports contain the planned and *aligned* outputs of national and provincial departments with an impact on, or management function over, aspects of the right to environment. The Commission also recognises that some Environmental Co-ordinating Committees were established at the provincial sphere, also for the purposes of alignment and co-operative governance.

Progress has been made, through the courts and other avenues, towards realising the procedural aspects of the right to environment (access to information, participation in decision-making processes, redress and remedy). The report includes several examples of objections and court applications lodged by Non-Governmental Organisations, with a view towards safeguarding environmental health in low-income areas. Despite these opportunities to access information and participate in decision making, some remedies for old violations could not be realised without concerted action on the part of the State. One example, is the case of workers with mercury poisoning, which first occurred many years ago. In March 2003, Thor Chemicals was served with a R60 million toxic chemical clean-up directive by the State.

On the substantive issue of waste management and pollution control, what was reported by government to the Commission fell short of what was expected in terms of the strategic objectives of the policy and strategy for pollution and waste management. The report highlights that there is still no clear understanding among the different mandate holders for this function of what they are required to do and as a result, implementation was not as effective as it could be. Having said this, there were positive developments during the period under review, including the introduction of waste buy-back centres which address brown issues and could assist in strengthening the bargaining power of the very low income people who do the hard work of collection.

On the issue of Air Quality, the report acknowledges that progress was made in the Southern Industrial Basin through the focused action of the State and Community Based Organisations (CBOs) in linking asthma in school children to emissions, however there is an urgent need for national legislation to institute mechanisms and standards to effectively protect against pollution that threatens health and well-being, possibly including pollutant release and transfer registers.

Several new control measures were introduced to manage water pollution, including the second draft of the National Water Quality Management Framework Policy and the Waste Discharge Charge System. The Working for Water programme succeeded in protecting and preventing against water loss due to alien invasive plant species, however it was not clear how much of this work focused unfairly on commercial farmlands and not on areas inhabited by vulnerable sections of the population.

Most of the work by the State on inland as well as marine and coastal biodiversity and conservation was reasonable in as far as it related to tourism and the economic development of the country.

The report highlights that the challenges facing South Africa in terms of the right to a healthy environment include: allocating sufficient resources for progressive realisation of the right for the benefit of vulnerable groups; educating and training communities; ensuring that proper implementation systems are in place; ensuring effective co-operative governance; operating proper monitoring and evaluation systems.

The report recommends that while most policies and laws are in place or about to be instituted, there should be a quantum shift in focus towards implementation of measures to further the right to environment for vulnerable groups in a more decentralised way. Provincial government and local government should be resourced to concentrate their energies on implementation, in association with community based organisations that have already developed innovations to further the right, sometimes in the face of extreme resource scarcity.

The State has made valuable contributions to promoting the right to environment through for example, the “Bontle ke Batho” or the clean schools, wards and towns campaign; however, organs of State could do more to ensure that their own internal operations reflect implementation of the right to environment. For example, the Council for Scientific and Industrial Research (CSIR) implemented International Standards Organisation 14001 standards for handling and disposing of its own hazardous waste. This initiative by an organ of State seems to have afforded the CSIR the opportunity to gain some capacity and insight, which could be applied to other relevant contexts in the public or private sector within the South Africa.

The report also recommends that monitoring and evaluation systems need to be simplified where possible and improved. Annual progress reports in pursuit of targets and plans laid down in Environmental Implementation Plans and Environmental Management Plans should include a focus on the substantive aspects of the realisation of the right for vulnerable groups. The contents of the reports should also be widely communicated so as to avoid conflict and encourage effective participation. The Committee for Environmental Co-ordination could also be complemented by the National Environmental Advisory Forum (NEAF) envisaged in the National Environmental Management Act 107 of 1998. This provision to encourage participation should be effected without delay.

D) Protocols and the Report Production Process

The production process for this report began with the SAHRC sending questionnaires, which are called protocols, to various organs of State for their comment in May 2003. The Commission then took some time to revise the protocols, which were resent to all relevant organs of State for comment and suggestions in June 2003. The response from relevant organs of State was not satisfactory; with the Department of Housing (Gauteng Province), the Department of Land Affairs and the Department of Water Affairs and Forestry being the only organs of State to respond. However, the Commission acknowledges that further work is required, in the next reporting cycle, to ensure that the protocols are improved for all spheres of government and parastatals.

The final protocols were sent to various organs of state (national and provincial government, parastatals, metropolitan and local councils) in July 2003, as mandated by section 184(3) of the Constitution. In future, the Commission will pay more attention to smaller municipalities by focusing field research on the implementation of programmes and projects at a local level.

The first deadline for the release of this Report was in December 2003. However, the Commission had major problems in getting timeous responses from organs of State and as a result, the Commission took a decision to subpoena several departments and postpone the release of the Report until sufficient information had been received (see summarised list overleaf).

SPHERE	INSTITUTION	DATE RESPONSE RECEIVED
2 - Provinces	GAU Social Services and Population Development	21 August 2003
1 - National	NATIONAL Labour	29 August 2003
2 - Provinces	EC Health	29 August 2003
2 - Provinces	WC Agriculture	29 August 2003
2 - Provinces	LIMPOPO Agriculture and Environmental Affairs	31 August 2003
2 - Provinces	FS Health	1 September 2003
2 - Provinces	NW Health	1 September 2003
2 - Provinces	WC Social Services	1 September 2003
2 - Provinces	EC Education and Training	5 September 2003
2 - Provinces	GAU Health	5 September 2003
2 - Provinces	KZN Agriculture and Environmental Affairs	9 September 2003
4 -Parastatals	PARASTATAL Rand Water	9 September 2003
2 - Provinces	KZN Traditional and Local Government	10 September 2003
2 - Provinces	MP Local Govt and Traffic	10 September 2003
2 - Provinces	NW Education	10 September 2003
1 - National	NATIONAL Land Affairs	12 September 2003
2 - Provinces	FS Social Welfare	12 September 2003
2 - Provinces	GAU Housing	12 September 2003
2 - Provinces	NC Health	12 September 2003
2 - Provinces	NC Social Services and Population Development	12 September 2003
1 - National	NATIONAL Agriculture	15 September 2003
1 - National	NATIONAL Water Affairs and Forestry	15 September 2003
2 - Provinces	EC Agriculture and Land Affairs	15 September 2003
2 - Provinces	FS Education	15 September 2003
2 - Provinces	GAU Education	15 September 2003
2 - Provinces	MP Housing and Land Administration	15 September 2003
2 - Provinces	WC Education	15 September 2003
2 - Provinces	WC Environmental Affairs and Development Planning	15 September 2003
2 - Provinces	WC Health	15 September 2003
2 - Provinces	WC Housing	15 September 2003
2 - Provinces	NC Agriculture Conservation and Environment	15 September 2003
2 - Provinces	KZN Health	16 September 2003
1 - National	NATIONAL Education	18 September 2003
2 - Provinces	MP Health	18 September 2003
2 - Provinces	NW Agriculture, Conservation and Environment	23 September 2003
2 - Provinces	MP Social Services and Population Development	25 September 2003
3 -Metropolitan Councils	METRO Greater Tswane Metropolitan Council	2 October 2003
3 -Metropolitan Councils	METRO Nelson Mandela Metro Council	2 October 2003
1 - National	NATIONAL Correctional Services	3 October 2003
1 - National	NATIONAL Social Development	3 October 2003
2 - Provinces	LIMPOPO Health and Welfare	3 October 2003
2 - Provinces	EC Social Development	3 October 2003
1 - National	NATIONAL Health	10 October 2003
2 - Provinces	GAU Agriculture, Conservation, Environment and LandA	10 October 2003
4 -Parastatals	PARASTATAL Medicines Controls Council	10 October 2003
2 - Provinces	FS Local Govt and Housing	29 October 2003
1 - National	NATIONAL Housing	30 October 2003
1 - National	NATIONAL Provincial and Local Government	30 October 2003
1 - National	NATIONAL Environmental Affairs and Tourism	31 October 2003
4 -Parastatals	PARASTATAL Agriculture Research Council	31 October 2003
1 - National	NATIONAL Minerals and Energy Affairs	3 November 2003
2 - Provinces	KZN Education and Culture	3 November 2003
2 - Provinces	EC Housing, Local Government and Traditional Affairs	4 November 2003
2 - Provinces	GAU Development Planning and Local Government	4 November 2003
2 - Provinces	LIMPOPO Education	4 November 2003
2 - Provinces	MP Agriculture, Conservation and the Environment	4 November 2003
2 - Provinces	NC Local Govt and Housing	4 November 2003
2 - Provinces	WC Planning and Local Govt	4 November 2003
4 -Parastatals	PARASTATAL National Education Financial Aid Scheme	4 November 2003
2 - Provinces	NW Developmental Local Government and Housing	5 November 2003
3 -Metropolitan Councils	METRO Eastrand Metropolitan Council	5 November 2003
4 -Parastatals	PARASTATAL Umngeni Water	5 November 2003
3 -Metropolitan Councils	METRO Cape Town Metro Council	6 November 2003
4 -Parastatals	PARASTATAL Medical Research Council	6 November 2003
2 - Provinces	FS Agriculture	7 November 2003
2 - Provinces	KZN Welfare and Pensions	7 November 2003
2 - Provinces	LIMPOPO Local Govt and Housing	7 November 2003
2 - Provinces	MP Education	7 November 2003
2 - Provinces	NC Education	7 November 2003
4 -Parastatals	PARASTATAL National Housing Finance Corporation	7 November 2003
2 - Provinces	KZN Housing	14 November 2003
3 -Metropolitan Councils	METRO eThekweni Metropolitan Council	17 November 2003
4 -Parastatals	PARASTATAL Landbank*	17 November 2003
4 -Parastatals	PARASTATAL Council for Scientific and Industrial Council	18 November 2003
2 - Provinces	FS Environmental, Tourism and Economic Affairs	19 November 2003
3 -Metropolitan Councils	METRO Greater Johannesburg Metropolitan Council	17 December 2003
2 - Provinces	NW Social Services**	

_____ First deadline

_____ Extended deadline

_____ Subpoena hearings begin

_____ Subpoena hearings end

* Extension granted as a result of communication problems

** No subpoena served, a letter explains the breakdown in communication

Most organs of State submitted their reports before they were meant to appear at a subpoena hearing. However, the North West Department of Social Services, Arts, Culture and Sport did not provide a response to the Commission as a result of problems with network cabling and the resignation of the personal assistant to the Acting HoD. The Department submits that it was not out of irresponsibility and deliberate disregard of the law that the Commission did not receive a report from the Department.

In order to improve the quality of the information, analysis and recommendations in the reports and to forge closer and better working relationships with government and non-governmental entities, a set of draft reports were released for comment to government and civil society before a National Input Workshop on 27-28 January 2004. Comments made at the workshop, and in writing, have been considered by each report writer.

A set of second draft reports were then made available to the Director General of the relevant national department in February 2003 to correct any remaining problems with factual information. Responses were received from the following departments: Water Affairs and Forestry, Minerals and Energy, Provincial and Local Government, Health, Social Development, Education, Land Affairs, and Housing. The final reports were also reviewed intensively within the Commission before being published.

E) Conclusion

One of the concerns acknowledged by the Commission about the monitoring process so far is that it still relies heavily on reports from government.

Furthermore, even though the Bill of Rights applies vertically and horizontally and binds State entities and non-State entities, the Commission has some capacity problems in extending its mandate to non-State entities, especially big corporations.

In the next reporting cycle, the Commission will place more emphasis on conducting its own primary research in addition to improving on the existing protocols for each right and making better use of annual report information as soon as it becomes available.

ACRONYMS

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention of Human Rights
ADR	Alternative Dispute Resolution
AgLAPC	Agriculture and Land Affairs Portfolio Committee
CCITP	Convention (169) Concerning Indigenous and Tribal Peoples
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CLRB	Communal Land Rights Bill
CPAs	Communal Property Associations
CRLR	Commission on Restitution of Land Rights
DFID	Department for International Development
DLA	Department of Land Affairs
ESR	Economic and Social Rights
ESTA	Extension of Security of Tenure Act
FIAN	Food First Information and Action Network
HSRC	Human Sciences Research Council
ICESCR	International Convention on Economic, Social and Cultural Rights
ILOSPC	International Labour Organisation Social Policy Convention
IPILRA	Interim Protection of Informal Land Rights Act
ISRDP	Integrated Sustainable Rural Development Programme
LCC	Land Claims Court
LRAD	Land Redistribution for Agricultural Development
LRBs	Land Rights Boards
LTA	Labour Tenants Act
MECs	Members of the Executive Committee
MTEF	Medium Term Expenditure Framework
NDA	Nkuzi Development Association
NGOs	Non-Governmental Organisations
PCUNFAO	Peasants Charter of the United Nations Food and Agricultural Organisation
PDoAs	Provincial Departments of Agriculture
PLAAS	Programme for Land and Agricultural Studies
PLROs	Provincial Land Reform Offices
RDP	Reconstruction and Development Programme
RDG	Restitution Discretionary Grant
SAHRC	South African Human Rights Commission
TAC	Treatment Action Campaign
UDHR	Universal Declaration of Human Rights
UNCCPR	United Nations Convention on Civil and Political Rights
UNDSPD	United Nations Declaration on Social Progress and Development
URP	Urban Renewal Programme

EXECUTIVE SUMMARY – RIGHT TO LAND

Constitution Obligations

The government has, since 1994, developed measures that would allow access to land, and ensure security of land tenure for our people. The land reform programme has taken the shape of land restitution which seeks to restore land to those that lost land as a result of colonial and apartheid legislation, and to compensate financially those who may not opt for the restoration of land; land redistribution is intended for residential and productive or agricultural purposes; and security of tenure is to allow tenure security for those who lack it.

Section 25 of the Constitution provides for equitable access to land, the right to reclaim the land lost through discriminatory laws and the right to security of tenure. Section 25(5) requires the government to take reasonable measures, within its available resources, to create conditions that enable citizens to gain equitable access to land. This right is viewed within the context of property rights protected under section 25(7) which provide that individuals or communities that lost rights to property due to discriminatory laws are entitled to restitution or comparable redress.

Progress in the realisation of the Right

Respect

To a great extent the DLA has moved toward instituting and adopting relevant measures, and it has had no reason to deny any person access to the right to land. The State, according to the obligation to respect the right to respect, should not prevent any deserving person from accessing, and enjoying, the right to land. The DLA adopted several measures during the reporting period.

Restitution

The Commission for Restitution of Land Rights (CRLR) instituted numerous projects and strategies. The Condonation of (restitution) Claims allows claimants to lodge claims under specific circumstances. For example, this accommodates claims not lodged in terms of the Restitution Act 22 of 1994, particularly claims lodged after the cut-off date of December 1998. Section 10(1) of the Restitution Act provides that the only other time that a claimant may lodge a late claim is when a community, or a generic part thereof, was not aware of the said claim by the cut-off date. Thus, there is a provision that claimants that had not registered “might” be accommodated through other land reform programmes.

The Value of a Rural Claims Guideline was instituted in 2002 to facilitate a meeting of interest between the DLA and the Community lodging a claim to consider the restitution options available. This guideline sought to do three things: a) to formalise the validation of rural land, and what process to follow in dealing with rural claims; b) to give room to discussion of restitution options

available to the community; and c) to set out procedures for the establishment of a legal entity, the valuation of property and the determination of the restitution award. The guidelines have been used since the beginning of the process of dealing with rural claims although discussions have not taken place in communities.

The Strategy to Deal with Claims on Forestry Land Conservation Areas and Land with Mineral Rights is implemented as part of an agreement (2002) with other relevant departments like Water Affairs, Forestry, as well as Public Works. Such an agreement was entered into to enable the Department to deal with high value complicated claims that involve forestry land, conservation areas, and land with mineral rights. Such lands would benefit claimants living around protected areas, forestry land, and land with mining rights.

Communication Strategy for Claimants and Other Stakeholders was established to inform claimants about the restitution process and the status of their claims. The objective of the strategy is to improve communication between the national Department and the nine provinces, by establishing a call centre for the validation campaign. The call centre will help to inform claimants about the restitution process, the status of their claims, claims made in terms of the settlement process, as well as challenges within the restitution process.

The objective of the Standard Settlement Offer Policy Guidelines project is to establish suitable alternatives for restitution packages with regards to urban claimants where people were dispossessed. Investigations have been underway for properties exceeding 3000m². It also seeks to institute a method to accelerate the settlement of urban restitution, where claimants are permanent in their current residence, and they only prefer financial compensation for their lost land rights.

Some time ago the DLA established the Settlement Planning Grant to assist poor communities to plan for the acquisition, settlement, and the development of land. It also facilitates the mobilisation of funds for beneficiaries, particularly with regard to proper planning of projects for negotiated settlements. This allowed for timely release of funds to ensure sustainability of settlements. Other institutions, for example, local authorities and non-governmental organisations are free to use this grant to support land reform activities. Select services, among others, legal and financial planning assistance, assistance with land purchases, as well as the establishment of a legal entity, benefit from the grant.

Post-Settlement Support

This policy, administered by CRLR, was established with the objective of ensuring proper planning for projects of settled claims. The initiative is a result of criticism against the absence of “after-care” programmes to assist settled individuals and communities. The Department of Land Affairs created the Post-Settlement Support Co-ordination Unit with a view to dealing with issues arising from all programmes of land reform, although the unit was part of the CRLR. The aim is to establish working relations with other government departments to

guarantee that beneficiaries receive necessary support, for example, housing and part of planning, after claims have been settled. Post Settlement Units have been established in all 9 Regional Land Claims Offices, with specific focus on development facilitation and coordination. These offices will coordinate development issues and develop skills and management capacity of claimants so that claimants may develop and sustain the projects by themselves.

The main legislative development with regard to the restitution programme is the introduction of the Restitution of Land Rights Bill (2003), which amends the Restitution of Land Rights Act 22 of 1994. The Restitution of Land Rights Bill, which was enacted in January 2004, empowers the Minister to acquire or expropriate land for restitution without a Court Order. Although no land has been expropriated yet, the law will greatly enhance and speed up delivery of land, as there will be no obstacles or resistance to acquiring land for restitution purposes.

Land Redistribution

With redistribution, Land Redistribution for Agricultural Development (LRAD) has been performing well so there was no need for adoption of any alternative measures. Rather, the DLA has moved to forge working relations with the Land Bank to make provisions to speed up redistribution and support LRAD projects. The land redistribution programme, whose implementation cuts across all land reform programmes, also continued alongside the implementation of commonage projects.

Land Tenure

The DLA has enacted the Communal Land Rights Bill. This Bill has been long in the making and was immersed in controversy. The Bill has moved toward the resolution of such controversy, which involved gender representation in land boards and the influence of traditional leaders in apportioning communal land. By enacting this Bill, the DLA seeks to eradicate discriminatory and illegal practices, and thus guarantee tenure security for vulnerable groups like women and children.

Protect

The restitution programme has shown to be consistent in its delivery. The number of settled claims has escalated. Between 2000 and 2001 there were 12 094 settled claims, while in February 2002 there were approximately 32 000 settled claims. By March 2003, there were 36 488 settled claims recorded. Although the majority of these claims were in the urban areas, settled rural claims show a substantial increase. Some claims are complicated and involved conservation land, namely, Mbila and Mabaso in Kwa-Zulu Natal (48 claims), and Dwesa Cwebe in the Eastern Cape (23 claims), 13 in Limpopo and 35 in Mpumalanga. While most restitution cases have been resolved, numerous others are still awaiting resolution. Generally, for the resolution process of these claims to be completed, the budget has to be increased, and recommendations have been

forwarded to that effect. Moreover, the State President has advised that the process be concluded by 2005.

The DLA's Directorate is developing a policy that would regulate the purchase and ownership of land by foreign investors. Having identified ways, as well as legislation, of producing a viable status quo report, the Directorate will involve the Departments of Home Affairs and Foreign Affairs to assist in drafting the reporting and finally developing the policy. This action will immensely help in protecting South African land from being bought by foreign investors and thus guarantee the availability of land for the landless vulnerable groups.

Although it is generally accepted that the land redistribution programme has been slow in delivery, its sub-programme, the Land Redistribution for Agricultural Development (LRAD), has been performing well. In the year under review LRAD has surpassed its own targets. For instance, it delivered 103 682 ha against the target of 81 555 ha. Whereas it had targeted to benefit 3 601 people, it ended up benefiting 6 170. Nonetheless, land redistribution remains slow, hence the DLA has extended its time to redistribute 25 million hectares by 2005, and 30% of rural land by 15 years, instead of the 5 year goal set by the Government in the Reconstruction and Development Programme (RDP). This may only be reached if the budget for the redistribution programme is increased.

Concerning tenure reform, the State initially delivered 30 000 ha of land through 201 projects. Beyond that, the State is working towards bringing the Extension of Security of Tenure Act (ESTA) and Labour Tenants Act (LTA) together in the Consolidated ESTA/Labour Tenants Bill. This Bill comes after the DLA realised that separately these pieces of legislation were, since their adoption, not effective. Its objective is to ensure that tenure measures with regard to eviction and tenure security protect labour tenants from arbitrariness.

Promote

Generally, there is still ignorance about the observance and application of the law. With regard to the restitution programme, the national office has a co-ordinating component that deals with issues that have direct implications for the restitution process in general. The Communication Strategy for Claimants and Other Stakeholders was established to inform claimants about the restitution process and the status of their claims. This would work in conjunction with the established call centres. For instance, national media would be used for briefings to inform the public about restitution issues.

With respect to land tenure rights the DLA has not adequately enhanced the understanding of the beneficiaries. It was found that various communities understood their rights differently. There are instances where landowners and public officials disregard ESTA. There is evidence that the DLA occasionally conducts workshops and rallies to educate beneficiaries on land rights. Monitoring mechanisms for restitution and tenure reform programmes are still to be tested.

Fulfil

Generally, the DLA has shown that it is developing (and/ or has developed and realised) measures under various programmes to reach its land reform goals. For example, the amendment laws such as the Restitution Act 22 of 1994 to empower the Minister to expropriate land without a Court Order will make DLA's work much easier. The consolidation of ESTA and LTA will help DLA deal with issues that affect the labour tenants in a concrete way.

Overall Assessment

While there is no question that land reform is slow, and generally still has a long way to go before all beneficiaries are satisfied, it is worth noting that the DLA has taken steps to institute measures to reach its goals. To a great extent the DLA met the requirements of reasonableness in 2002/2003. The DLA developed and adopted measures that will help it achieve many of its targets. This has been proven by the achievements of the land reform programmes. In this manner, the element of reasonableness as referred to in Grootboom judgment has been exemplified by the fact that not only were the measures conceived, but their implementation attests to their effectiveness. LRAD has, for instance, shown its effectiveness by being relevant to all three land reform programmes. For example, with regard to tenure, labour tenant applicants can obtain housing grants through LRAD.

The understanding by the DLA that it needed to amend certain pieces of legislation, for example the Restitution Act and to enact Communal Land Rights Bill, testifies to DLA's determination to have reasonable measures. The amendment of the Restitution Act empowers the Minister of Land Affairs to expropriate land. However, according to section 25(2)(b) of the Constitution, the courts will still decide on how much compensation would be given to the former owner of the expropriated property.

Meanwhile, the enactment of the CLRB makes it possible for all stakeholders in the communal land to have equitable access in land disposal. The adoption of other supporting measures, as in the case of restitution programme, is proof of follow-up by the State to install reasonable measures. Of course, some measures are fairly new and others are just under construction. Some, like ESTA and LTA have proved to be unreasonable in that they have so far failed to satisfy the needs of the vulnerable groups. However, efforts are underway to consolidate them. The fourth draft, called the Tenure Security Laws Consolidation and Amendment Bill was completed early in 2003, and is now awaiting the Minister's approval.

Even under the constraints of the budget, all three land reform programmes were able to deliver. It is envisaged that these budgetary hurdles will be resolved so that the DLA can meet its targets. Research indicates that the DLA will have to work toward developing personnel to enable it to speed up delivery, more so that millions of people are still without land.

April 2002 – March 2003

Recommendations

Several challenges are still facing land reform. In general they include the following: land acquisition, budgetary constraints, and capacity building. It is important that the State muster political will and put expropriation into practice to give effect to the Bill of Rights.

The DLA has reported personnel shortage for the last reporting periods. It is crucial that the Department train and deploy field workers to respond accordingly to issues, particularly where monitoring and evaluation of projects are concerned.

The SAHRC must also develop structures that would allow both it and the DLA to monitor certain legislation relevant to land rights.

1 INTRODUCTION

This report reviews key measures instituted by government to realise the right to access to land as provided in section 25(5) of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter the Constitution) read together with relevant provisions of international law, during the financial year April 2002 to March 2003.

The Government took as one of its priorities, the redress of inequalities in land ownership and tenure security that resulted from past racially discriminatory laws and practices. Since 1994 the Government has battled to weave ways of satisfying the need for land ownership and tenure security. The five-year plan by which the Government set out to redistribute land – the 1994 Reconstruction and Development Programme (RDP) – for instance, has not met its goals,¹ leaving millions of people without land of their own. Very little progress has been made towards land reform; it is estimated that 2,4% of South Africa's surface area was delivered in the past decade.² According to the Department of Land Affairs, there was a total of 28 900 km² of land delivered between 1994 to March 2003.³

The 1997 White Paper on South African Land Policy⁴ articulates the vision and implementation for land reform. The White Paper details Government's three land reform programmes as follows:

1. Land redistribution to facilitate access to land for residential purposes and agriculture;
2. Land restitution for compensation and restoration of land to victims of apartheid dispossession; and
3. A land tenure programme that seeks to guarantee tenure security to those whose tenure of land is legally insecure.

The objectives of the White Paper included the correction of past injustices; generating reconciliation and stability; the promotion of economic growth; and the improvement of the quality of life of people through the alleviation of poverty.

1.1 Developments in the Meaning and Content of the Right

Section 25(5) of the Constitution obliges the Government to “take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.” This means that the State must take measures to create conducive conditions for all citizens, including vulnerable groups, to have access to land.

The Constitution also obliges the State to compensate people and communities that were dispossessed of land and property after 1913. Section 25 (7) provides that “a person or community dispossessed of property post 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”⁵ The State may, in terms of section 25(8) take “legislative and other measures” to “achieve land, water and related reform”. The Constitution thus provides for equal access to land for all citizens, including

providing for “reforms to bring about equitable access to all South Africa’s natural resources”.⁶

The Constitution also provides for the protection of individual property rights. For instance, section 25 (1) guarantees the non-interference with another’s property without consideration of the “law of general application.” It states: “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”. According to section 25 (2) “property may be expropriated only in terms of the law of general application, a) for a public purpose or in the public interest; and b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

In the 2000 landmark *Grootboom*⁷ judgment, the Constitutional Court reiterated that the State must use its available resources to create favourable conditions to fulfil the right of access to housing, especially for those living in desperate circumstances. The court emphasised the notion of reasonableness for the State to meet its obligations. In addressing reasonableness as stipulated in section 25 (5), the court pointed out that the State must not limit itself to the mere adoption of measures; rather, reasonableness should be seen in the implementation of those measures. According to the *Grootboom* case, therefore, the measures adopted “... must be reasonable both in conception and their implementation. The formulation of programmes is only the first stage in meeting the State’s obligations...” and that “... an otherwise reasonable programme that is not reasonably implemented will not constitute compliance with the State’s obligation.”⁸

“Reasonableness” has become a recurrent feature in the South African *jurisprudence*. It is not surprising that reference to that theme was echoed in the *Treatment Action Campaign* (TAC) case. While TAC was concerned with a distinct subject surrounding the HIV/AIDS pandemic, the Court referred to other socio-economic rights, including land. The Constitutional Court stated that other than HIV/AIDS

*... the state faces huge demands in relation to access to education, land, housing, health care, food, water and social security. These are the socio-economic rights entrenched in the Constitution and the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them.*⁹

the position taken by the Constitutional Court flows from the Constitutional clauses that task the State with responsibility to provide reasonable measures toward gaining access to socio-economic rights.

The Constitutional Court’s interpretation of reasonableness of measures to be taken in the realisation of economic and social rights concurs with international norms and standards.

1.2 International Standards

The following international instruments are of relevance to the implementation of land reform in South Africa, within a human rights framework.

Although article 17 of the Universal Declaration of Human Rights (UDHR) of 1948 did not specifically mention land, it nonetheless included the right to property. For the Convention on Civil and Political Rights (UNCCPR), no reference to property is explicit, nor does the International Convention on Economic, Social and Cultural Rights (ICESCR) of 1976 touch on issues surrounding land.

However, the 1969 United Nations Declaration on Social Progress and Development acknowledged the utility of property and land, and advocated for land ownership that banished unequal rights to property.

The 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) seeks to protect the rights of women to access land and agrarian development initiatives. According to CEDAW, women should not be hindered in their quest to participate equally with men in the planning and implementation of rural and agricultural development. Further, women should have free access to credit and loan facilities, as well as resettlement schemes.¹⁰

The 1986 Declaration on the Right to Development promotes equity and equality in development, and is directly related to all issues pertaining to property, including land.

The 1991 Peasants Charter of the United Nations Food and Agricultural Organisation (PCUNFAO) promotes land tenure reform and land redistribution for landless vulnerable groups and emergent farmers. This charter regulates changes in customary tenure, and promotes community control over natural resources.

The International Labour Organisation Social Policy Convention (ILOSPC) of 1962 has the dual task of overseeing the arrangement of land tenancy and guaranteeing acceptable living standards for agricultural workers.

A number of articles (7, 13,14, 15, 16, 17, 18 and 19) of the ILO-linked Convention (169) Concerning Indigenous and Tribal Peoples (1989), which protects ownership of traditional land by indigenous communities and the right to access natural resources found in and on them.

Clauses in the African Charter on Human and People's Rights (1981) promote the lawful recovery, with compensation, of dispossessed property, thus guaranteeing the right to property. Article 14 seeks to guarantee the right to property, stating that the right to property 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 relevant laws.¹¹ Meanwhile article 22 states that everyone shall have the right to economic, social and cultural development.

Finally, the American Convention of Human Rights seeks to protect the right to use and enjoy property, and thus prohibits any deprivation of property without compensation.

2 PROGRESS IN THE REALISATION OF LAND RIGHTS

2.1 Policies and Programmes

There have been some considerable changes in the policies and programmes of land reform, particularly in the implementation of strategies and frameworks.

As pronounced in the White Paper on South African Land Policy (1997), three programmes drive land reform. The restitution programme seeks to return land or compensate people who have been dispossessed of their land through discriminatory laws since 1913. The redistribution programme seeks to create favourable grounds for the equal redistribution of land so that the historically disadvantaged landless people may acquire land through sub-programmes such as LRAD. On the other hand, land tenure reform is intended to secure tenure and thus resolve tenure conflicts.

2.1.1 Land Restitution

An impressive number of claims that came before the CRLR were settled. For instance, of the 79 694 valid claims, 36 489 were settled by 31 March 2003, although 43 205 remained unresolved. According to the CRLR, 30 012 claims were settled by March 2002.¹² During this reporting period, the Department recorded a total of 6 809 settled restitution claims, compared with 17 783 in 2001/2002, and a cumulative total of 40 323 settled claims since 1996.¹³ By December 2003 a total of 46 727 claims had been resolved, with approximately 17 000 involving land restoration and about 27 000 financial compensation.¹⁴ Meanwhile, about 29 000 claims were still to be settled. The majority of these claims were in the rural areas.

2.1.1.1 Claims Validation Project

A validation project was put in place to establish the validity of outstanding restitution claims in terms of the Restitution Act. The project was established with the view to investigate the circumstances of dispossession, property descriptions, and deeds research to determine if the lodged claims met acceptance criteria. This project was established in 2001, and the Minister of Agriculture and Land Affairs accepted its report in January 2003. According to the Commission on Restitution of Land Rights (CRLR), 30 012 claims were settled, while more than 37 000 others had been filed but were not on the priority list and their validity was unknown.¹⁵

By the end of March 2003 the CRLR had validated 36 940 claims through this project, and it aimed to finalise the validation of the remaining claims during the next financial year. The CRLR gives two reasons for the backlog: a) lack of capacity; and b) problems in verifying claimants, even after efforts were made to contact them.¹⁶ The CRLR planned to validate 33 290 claims by end of December 2002, acknowledging all valid claims and disregarding all invalid claims by March 2003.¹⁷

2.1.1.2 The Policy Guideline on Betterment of Claims

The Policy Guideline on Betterment of Claims, which facilitates settlement-negotiating processes, was adopted in 2002 to determine guidelines and options relating to claims on land lost during the apartheid era, particularly claims with regard to betterment removals. The Department of Land Affairs (DLA) made available a draft on the Restitution Policy on State Land claims in June 2002, and existing restitution policies were reviewed in September 2002.

2.1.1.3 Condonation of Claims

Condonation of (restitution) Claims allows lodging under specific circumstances, particularly where claims are lodged after the cut-off date of December 1998. That is, claimants would be permitted to lodge their claims regardless of the cut-off date remaining unchanged. The Commission for the Restitution of Land Rights (CRLR) has accommodated those claims that were not lodged in terms of the Restitution Act 22 of 1994.¹⁸

Many people were disappointed when on 19 February, 2004 the Minister of Agriculture and Land Affairs, Ms Thoko Didiza, announced the decision to halt late registration of 1 000 claims in the Eastern Cape. The decision came despite the fact that an estimated 2 million beneficiaries were allegedly victims of “an administrative error.”¹⁹

According to Section 10(1) of the Restitution Act 22 of 1994, the only time that a claimant may lodge a late claim is when a community, or a genuine part thereof, was not aware of the said claim by the cut-off date. According to reports, land restitution claimants that had not registered “might” be accommodated through other land reform programmes.

2.1.1.4 Value of a Rural Claims Guideline

This guideline, introduced in 2002, sought to formalise the way rural land is valued and what process the DLA has to follow in dealing with rural claims. Rural claims have not been embarked on in the way urban ones have been. The guideline further indicates that the DLA and the community that has lodged the claim should hold a workshop as early as possible so as to discuss the restitution options that are available to the community. This includes consideration of the community’s needs and the size of the community in relation to the claimed land. However, there is no evidence that such workshops have taken place.

Also, the guideline sets out procedures for the establishment of a legal entity, the valuation of property and the determination of the restitution award. The guidelines have been used since the beginning of the process of dealing with rural claims.

2.1.1.5 The Strategy to Deal with Claims on Forestry Land Conservation Areas and Land with Mineral Rights

This strategy is implemented as part of an agreement (2002) with other relevant departments like Water Affairs, Forestry, as well as Public Works. Such an

agreement was entered into so that the Department may be able to tackle complicated claims that involve forestry land, conservation areas, and land with mineral rights. Such lands would benefit claimants living around protected areas, forestry land, and land with mining rights.

According to the agreement, successful claimants shall, among other provisions, own land in title that has a notarial deed to restrict use based on the agreement; claimants who would be lessors, would agree to maintain current land use. There are claims that have been settled, which involved conservation land, namely, Mbila and Mabaso in Kwa-Zulu Natal (48 claims) , and Dwesa Cwebe in the Eastern Cape (23 claims), 13 in Limpopo and 35 in Mpumalanga.

2.1.1.6 Communication Strategy for Claimants and Other Stakeholders

The objective of the strategy is to improve communication between the national Department and provinces, by establishing a call centre for the validation campaign. The call centre will help to inform claimants about the restitution process, the status of their claims, claims made in terms of the settlement process, as well as challenges within the restitution process.

The national office has a co-ordinating component that deals with issues that have direct implications for the restitution process in general. For instance, national media would be used for briefings to inform the public about restitution issues.

2.1.1.7 Standard Settlement Offer Policy Guidelines

The objective of the Standard Settlement Offer Policy Guideline is to establish suitable alternatives for restitution packages with regards to urban claimants where people were dispossessed. Investigations have been underway for properties exceeding 3000m². It also seeks to institute a method to accelerate the settlement of urban restitution, where claimants are permanent in their current residence, and they only prefer financial compensation as compared to restoration of their lost land rights.

The Department was reviewing the Standard Settlement Offer during this reporting period. However no report has been released yet on its results.

2.1.1.8 Settlement Planning Grant

This Settlement Planning Grant²⁰ was established to assist poor communities to plan for the acquisition, settlement, and the development of land. It also facilitates the mobilisation of funds for beneficiaries, particularly with regard to proper planning of projects for negotiated settlements. This allowed for timely release of funds to ensure sustainability of settlements.

Other institutions, for example, local authorities and non-governmental organisations are free to use this grant to support land reform activities. There are select services that benefit from the grant, for instance, legal and financial planning assistance, land use and infrastructure planning, land valuation and survey, assistance with land purchases, as well as the establishment of a legal

entity. There are two main planning phases – the preliminary settlement and the detailed settlement – that may be financed through the grant.

2.1.1.9 Post-Settlement Support

This policy, administered by CRLR, was established with the objective of ensuring proper planning for projects of settled claims. The initiative is a result of criticism against the absence of “after-care” programmes to assist settled individuals and communities. The Department of Land Affairs created the Post-Settlement Support Co-ordination Unit with a view to confronting issues arising from all programmes of land reform, although the unit was housed in the CRLR. The aim is to establish working relations with other government departments to guarantee that beneficiaries receive necessary support, for example, housing and development planning, after claims have been settled.

This co-ordination, according to the Minister of Agriculture and Land Affairs, Ms Thoko Didiza, is critical and, as such, should involve concerned “... government departments and agencies, as well as civil society and the private sector ...”.²¹ For this purpose, Post Settlement Units have been established in all 9 Regional Land Claims Offices, with specific focus on development facilitation and coordination. These offices also develop capacity of claimants to ensure that they are able to develop projects by themselves, thus sustaining the projects.

2.1.1.10 Reference Manual

This four-volume manual comprises policy guideline and process documents that would assist in steering the implementation of the restitution programme. The Commission for the Restitution of Land Rights (CRLR) is continually developing and revising these policy guidelines as required.

Table 1: Lodged Rural Claims by December 2002

<i>Province</i>	<i>Rural Claims Lodged</i>
Mpumalanga	5 210
Limpopo	4 113
KwaZulu Natal	2 810
Gauteng	2 035
Northern Cape	2 000
North-West	1 472
Eastern Cape	801
Western Cape	595
Free State	101
National Totals	19 140

Source: DLA, Electronic Communication, 15 March 2004.

Table 1 represents the number of rural claims provincially. Provinces such as Mpumalanga, Limpopo, KwaZulu Natal and Northern Cape have the highest number of lodged rural claims, whilst the, Eastern Cape, Western Cape and Free State provinces have the lowest number of claims to be settled. The processing

of these claims depends on the availability of resources – land, funds, and personnel. The CRLR does not have a celebrated history in dealing with rural land restitution claims, as it had always concentrated on urban claims. There are indications, nonetheless, that rural claims were also attended to during the review period. For instance, rural claims (11 092) constituted 32% of all settled claims.²²

Unlike rural claims which are complicated by groups of people constituting a claim and often seeking land, urban claims are mostly financially based claims. These rural claims will prove to be a test of strength for the restitution CRLR.

2.1.2 Land Redistribution

2.1.2.1 Land Redistribution for Agricultural Development (LRAD)

The Department of Land Affairs has not instituted any new measures during the 2002/2003 financial year. Instead it has continued to implement Land Redistribution for Agricultural Development (LRAD), a sub-programme of the Land Redistribution Programme introduced during the 2001/2002 financial year.

LRAD was introduced with the objectives of providing rights and access to land, and redistributing white-owned commercial agricultural land to historically disadvantaged communities. According to the Department, during 2002/2003 LRAD focused on certain provincial projects to benefit women and the youth. Furthermore, LRAD was meant to serve a parallel role of sustainable development in addressing rural food security and income generation.

LRAD has a grant system which allows beneficiaries to access funds ranging from R20 000 to R100 000. For any funds to be awarded, applicants are required contribution, depending on their ability. A minimum own contribution of R5 000 can earn an applicant a grant of R20 000. This contribution may, however, also be in-kind, where the beneficiaries are required to sacrifice their labour. Those beneficiaries who are able to contribute R400 000 can access the maximum R100 000 grant. LRAD grants are an improvement to the Settlement Land Acquisition Grant (SLAG). Whereas SLAG granted households a flat R16 000 irrespective of how many adult beneficiaries are in the household, LRAD considered every individual adult.

This sub-programme has shown itself to be a successful instrument. It has achieved the targeted number of projects, and also reached additional beneficiaries during the year under review. There is evidence to show that many people have been engaged in one or more projects initiated under LRAD. More than 3 000 people, 2 950 of which are women, benefited from LRAD projects in the 2001/2002 financial year. The South African Human Rights Commission (SAHRC) *4th Economic and Social Rights Report* recorded that for the two years under review (2000/2002) there was a total of 2 681 beneficiaries (but did not specify how many beneficiaries were from the marginalised groups), who received a total of 60 000 hectares (ha) of land.²³

The Department of Land Affairs Annual Report (2002/2003) shows that 27% more land was delivered than promised under LRAD, and that 2 569 people more than the 3 601 targeted had benefited from this delivery.²⁴ Of the 6 170

beneficiaries, approximately 33% were labour tenants and farm workers, who acquired 22 474 ha of land out of the total of about 103 683 ha²⁵ delivered during the 2002/2003 financial year. The number of beneficiaries during 2002/2003 exceeds the number of beneficiaries in 2000/2001 and 2001/2002 combined.

The Department intended to extend the LRAD programme for implementation in the provinces over the 2002/2003 financial year. The idea was to acquire 308 farms constituting 80 363 ha of land, to benefit 4 208 marginalised groups, including women, youth and people with disabilities.²⁶ According to the Department, there are currently 729 LRAD projects – excluding projects that benefited from Land Bank funding.²⁷

The 189 projects that have been transferred via the Land Bank since 2001 have yielded 95 650 ha, which benefited 2 173 households, 909 of which were headed by females.²⁸ Most of these projects (120)²⁹ were transferred during 2002/2003 review year, yielding 77 207 ha to the benefit of 1 105 people. In total, only 400 000 ha of land have been transferred through LRAD, which the DLA regard as the ‘flagship’ of the redistribution programme.

2.1.2.2 Land Bank Assisted Projects

All the nine provinces reported having had Land Bank Assisted projects.³⁰ The Free State and Mpumalanga provinces are leading with 36 and 20 projects respectively (see Table 2). With more than 34 000 ha allocated to beneficiaries, Mpumalanga leads the rest of the provinces, followed by the Free State, which allocated a total of 31 136 ha. The Northern Cape trails at just over 15 000 ha and the Western Cape received the smallest number of projects (4), its allocated land amounting to 173 ha.³¹

Mpumalanga’s projects benefited more people (1 164), including youths (452), than any other province. The Free State followed with 259 beneficiaries that included 100 youths, and the Northern Cape had 248 beneficiaries that included 41 youths. Limpopo’s seven projects, which benefited 60 people, included only one young person.

Table 2: Land Bank Assisted Projects (2002-2003)

<i>Province</i>	<i>Number of Projects</i>	<i>Hectares</i>	<i>Number of Beneficiaries</i>	<i>Number of Women</i>	<i>Number of Youths <35 years</i>
Eastern Cape	10	4 581	41	Unspecified	21
Free State	36	31 136	259	Unspecified	100
Gauteng	11	1 073	19	Unspecified	16
KwaZulu-Natal	8	2 281	44	Unspecified	12
Limpopo	10	3 737	61	Unspecified	1
Mpumalanga	20	34 331	1 164	Unspecified	452
Northern Cape	6	15 677	148		41
North West	13	2 985	30	Unspecified	6
Western Cape	4	173	37	Unspecified	25
Total	116	94 974	1 783	n/a	674

Source: Department of Land Affairs Annual Report 2002–2003.

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It is obvious that more work has to be done to mobilise young people to take up projects in rural areas. There is a need to make young people aware of projects, where awareness has not been fostered.

According to the Land Bank, 143 141 ha were made available through 272 approved projects to 2 226 beneficiaries, while 104 032 hectares worth of land redistribution were awarded through grants, benefiting 2 298 people. Of the land awarded through grants, approximately 22 671 ha benefited 725 people in the North West Province, while 1 015 ha went to 28 beneficiaries in Gauteng.³² Compared with last year (2001/2002), the Land Bank reported more hectares of land delivered with respect to transferred projects in the present reporting cycle. For instance, only 2 203 ha of land were made available for projects during 2001/2002, while the Land Bank delivered almost 50 times that amount of land during 2002/2003.

The Land Bank-assisted projects cover a variety of enterprises, including dairy, poultry and livestock farming in general; cash crop production; sugarcane; hydroponics; bee-keeping; pastures; herbs; vegetables; peanuts; ecotourism; fruit and timber.

The Land Bank projects,³³ which are based on the Land and Agricultural Development Act 15 of 2002, benefited 905 people, 21 of whom were unemployed youth, and 152 women. These projects, which were mainly for agricultural business development, received funding of about R313 million.³⁴ The Land Bank also released R187,7 million through the Step Up (Micro Loan) programme to 40 905 unemployed persons and low-income and poverty-stricken groups (otherwise called the un-bankable group). By funding these vulnerable groups the Land Bank sought to create opportunities for all groups to have equitable access to finance.

While the Land Bank did not release records of land released for the projects during 2001/2002, it reports that in the 2002/2003 financial year 2 226 beneficiaries received 143 141 hectares. The 272 Land Bank projects spanned all the provinces, with the Northern Cape, Eastern Cape, North West and Mpumalanga receiving more land than Gauteng, KwaZulu-Natal, Free State and Limpopo.

A recent submission from the Land Bank sets out the financial value of the transferred land.³⁵

Table 3: Land Bank Transfer – with LRAD (2002-2003)

<i>Land Bank Transfer – With LRAD</i>					
<i>Provinces</i>	<i>Rand Value Transfer Loan Component</i>	<i>Rand Value Transfer LRAD (Grant)</i>	<i>Total no. of Loans transferred</i>	<i>Hectorage</i>	<i>Beneficiaries</i>
Western Cape	13 399 133	19 195 757	17	9 024	432
Eastern Cape	5 069 912	4 172 188	30	16 756	92
Northern Cape	2 010 900	1 391 067	6	4 225	32
Free State	9 984 485	11 392 402	55	20 255	245
KwaZulu Natal	19 433 000	8 816 963	25	6 815	138
North-West	39 634 744	37 223 106	36	22 671	725
Mpumalanga	22 633 000	20 358 720	31	18 577	552
Gauteng	3 610 500	1 577 361	15	1 026	28
Limpopo	24 955 379	6 284 838	13	5 521	64
TOTAL	140 731 053	110 412 402 ³⁶	228	104 868	2 308

Source: Land Bank. Mishack Maloba, Electronic Communication, 16 March 2004.

From Table 3 above only North-West, Limpopo, Mpumalanga and KwaZulu-Natal provinces received more money from the Land Bank loan component (with the exception of Limpopo with 64 beneficiaries) even though they received less land compared to the Eastern Cape, which benefited 92 people, and the Western Cape with 432 people. The largest number of loans went to the Free State (55), North-West (36), Mpumalanga (31) and the Eastern Cape (30).

However, other information is missing. For instance, without the total value of “own contribution” of each beneficiary, it is not easy to compute the amount of money ploughed into buying the property. Nonetheless, it is common cause that the bank will transfer funds to beneficiaries who have a substantial amount of property (or collateral) in the form of land and / or equipment.

2.1.2.3 Commonage projects

The Department has commonage projects earmarked for various marginalised communities, including women, youth and disabled people. The project was established under the Commonage Programme, which the Department reviewed during 2002/2003. However, less Commonage projects were registered in the period under review. Commonage land, which is acquired by the State for municipalities or local authorities, seeks to support the needs of poorer residents of a town who seek grazing land. Residents of a given town are allowed to acquire grazing rights, even if they do not own the land themselves.

There were more commonage projects (20) in the 2001/2002 reporting period than in the 2002/2003 financial year, during which 15 projects were recorded. While 584 people received only 14 600ha during 2001/2002,³⁷ there were 21 706 ha delivered during 2002/2003, benefiting 278 people, 115 of whom were women.³⁸ Table 4 indicates that more land was delivered in the Northern Cape (where landholdings are drier and larger), while more female beneficiaries came from the Eastern Cape province.

Table 4: Commonage Programme Per Province (2002/2003)

Province					
Eastern Cape	5	5614	63	63	na
Free State	na	na	na	na	na
Gauteng	1	187	32	12	na
KwaZulu-Natal	2	1 115	123	na	na
Limpopo	na	na	na	na	na
Mpumalanga	2	2 111	60 from 49 HH*	40 FHH**	na
Northern Cape	5	12 679	na	na	na
North West	na	na	na	na	na
Western Cape	na	na	na	na	na
Total	15	21 706	278	115	na

*Source: Department of Land Affairs Annual Report 2002-2003 na – no information available
HH - Households. ** FHH – Female-headed households*

Meanwhile, the Department has reported that it is “currently” (2002-2003) involved in 121 projects nationwide under the commonage programme nationally.³⁹

In their analysis of DLA annual reports (1996-2002), Megan Anderson and Kobus Pienaar counted 11 commonages, but only for the year 2002.⁴⁰ It follows, then, that if these data included 2003, as the DLA had, more commonage projects may have been recorded. A way must be devised for the DLA to verify and report on its data accurately.

The contradiction in these numbers makes it difficult for one to make an assessment. On this basis, it cannot be concluded whether or not the right has been progressively realised. It could have been expected that the newer version, which came much later than the annual report, would give an updated feature, that is, with more data testifying to progressive delivery. However, this has not been the case.

2.1.3 Tenure Reform

The DLA would like to speed up the programmes and resolution of labour tenant claims through land redistribution and restitution, respectively. As at December 2002, the DLA had redistributed 70 845 ha toward tenure reform land.⁴¹ Some of the land marked for tenure reform would come from the agricultural land in the custody of the Minister for Agriculture and Land Affairs.

There are outstanding labour tenant claims which still await resolution. Available estimates of the number of processed labour tenants applications, lodged in terms of the Land Reform (Labour Tenants) Act 3 of 1996, are

between 19 000 and 20 000.⁴² The majority of these applications were in Mpumalanga and Kwazulu-Natal. The DLA said that the resolved labour tenant claims (6 200) constitute 34% of all lodged claims.⁴³

Below is the testimony to how much the DLA has done with regard to tenure reform sub-programmes and project.

2.1.3.1 Farm Dweller Programme

The programme is aimed at securing tenure for, and the protection of, farm workers and labour tenants against illegal evictions. It also ensures that people who have been legally evicted are provided with alternative land. Beneficiaries of this programme, which falls under ESTA, include labour tenants and farm workers. The DLA did not provide data regarding implementation of this programme.

2.1.3.2 Proactive Land Acquisition Strategy

This strategy involves the policy direction on land acquisition and land for housing. The strategy cuts across all land reform programmes and focuses on a needs-based approach to land reform. This entails selection of suitable land before the beneficiaries are identified. The strategy targets historically disadvantaged groups in rural areas, informal settlements, women, persons with disabilities, unemployed and other poverty-stricken groups by identifying available for low-cost housing. The targeted date for the completion of this strategy was 15 November 2002. This strategy has been submitted for Ministerial approval, and no further information has been given to that effect.

2.1.3.3 Urban Renewal Programme

This programme seeks to alleviate poverty, meet basic needs, build capacity, and widen the economic base of stressed communities. With regard to the Urban Renewal Programme (URP), a number of townships with urban renewal projects, namely Galeshewe (Northern Cape), Alexandra and Bramfischerville (Gauteng), and Mdantsane and Potsdam (Eastern Cape) received land. Land has been acquired in the Western Cape province to initiate urban agriculture in Khayelitsha.

According to the DLA Director General, Dr. G.N. Mayende, R1.8 million was released “for surveys, sub-division, registration and infrastructure development in Potsdam.”⁴⁴ The two Gauteng projects yielded 176 ha of land that benefited 3180 people, of which 1750 were women.⁴⁵ Land was acquired at the value of R8 million for 5 500 households in Alexandra.

Meanwhile, the Department has earmarked 3 776 ha of land for the Urban Renewal Programme which would benefit 14 026 households.⁴⁶

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2.1.3.4 State Land Disposal

The State Land Disposal Policy was developed in June 2002 with the sole purpose of unleashing of State for land for agriculture. According to the policy on State land, the DLA should dispose of 669 000 ha of land in the custody of the State. For the year under review (2002-2003), the Department disposed of 9 397ha of agricultural State land under sale agreement, while 109 leases were up for purchasing option.⁴⁷ The land was disposed of through the Power of Attorney. Vesting of land was also lower than the targeted number of hectorage. The State had intended to vest 53 780 ha, but only 17 693 was vested in the period under review.⁴⁸ Guidelines for land administration were completed in April 2002. However, it has not been said how this policy has been operationalised yet.

2.1.3.5 Alternative Dispute Resolution (ADR)

The Alternative Dispute Resolution (ADR), which was conceived in 2002 and is in the process of development, will have a “proactive” and “preventative approach” and provide improved “dispute resolution mechanisms for tenure legislation and related conflicts”. The disputes attended through this process involve conflicts between the farmowners and the labour tenants where there are, for instance, illegal evictions or other manner of conflict arising from , for example, burial rights.

The development of the document on the ADR system was with a view to allay concerns that a proactive strategy on conflict resolution has not been desirably effective and preventative approaches had not been present. It resulted from the fact that access to legal support and the courts for vulnerable groups was lacking, so there was a need to develop a dispute resolution mechanism that would be supported by government, Nongovernmental Organisations (NGOs), landowners and land occupiers.

The document on the ADR system was due to be finalised by December 2003, and it was envisaged that it would be piloted in 2004. Nothing has been reported so far in the positive. It is expected that training will be provided in this regard and training materials developed.

2.1.3.6 Electronic Eviction System

The target date for the launch of the Electronic Eviction System was June 2002, with the aim of bringing about better ways of monitoring evictions. However, this target was not met, and the Department was by 2003 still in the process of redesigning the system. For it to be effective, this eviction system will involve different stakeholders who, in turn, will consider various issues relating to evictions. The system is still in the development stage and this affects the recording of the number of people who are victims of illegal evictions.

In addition, the DLA has conducted an investigation to find out the status of evictions, focusing on the measures adopted to deal with evictions in the provinces of the Free State, Mpumalanga, North West, and the Western Cape.

Of the recorded 719 eviction cases 283 went before the Land Claims Court (LCC) while the rest 436 eviction orders were reviewed under Section 19(3). Literature shows that there has been a radical decline in the number of eviction cases that come before the LCC.⁴⁹ This results from the fact that legal evictions are widely regarded as being weightier than illegal ones. Consequently, as opposed to the illegal ones, legal evictions have been clearly recorded, even though there are more reported illegal eviction cases that go to the DLA than do the legal ones. This is mostly because due to the fact that there is a lack of data monitoring systems.

2.1.3.7 Labour Tenant Act Claims

In the last three years since the 31 March 2001 deadline for lodgement of applications, the DLA embarked on a campaign that ended with the registration of an estimated 21 000 applications, 2 000 of which failed validation, with about 5 000 beneficiaries of transferred land.⁵⁰ The majority of these applications were from Mpumalanga (9 709) and KwaZulu-Natal (7 713).

Ruth Hall suggests that these figures may not be correct, saying that the DLA may have gone beyond its boundaries and disposed of the “invalid” applications. She thinks that the data from the DLA national office could be bloated since they do not tally with those from the provincial offices. According to Hall, “... the level of progress seems surprisingly high and is contradicted by information from DLA’s provincial offices and NGOs,” although she admits that “this is the best information available”.⁵¹

Because the process involves many applications, many people are expected to benefit. For instance, an estimated 250 000 labour tenants will be beneficiaries. It is anticipated that many others will follow as one application involves many people who form a project unit. Thus, in this sense, there are similarities between land restitution and tenure reform programmes.

There are 52 labour tenant projects that have so far been confined in KwaZulu-Natal and Mpumalanga. These projects are registered with the Communal Property Association (CPAs) and KwaZulu-Natal is due to establish 63 more in both the Tugela and the Midlands regions.

By 2003 the DLA had approved funds for the transfer of 27 949 ha of land to benefit 2 336 households belonging to 76 projects in KwaZulu-Natal.⁵²

2.2 LEGISLATIVE MEASURES

2.2.1 *Restitution of Land Rights Amendment Bill (2003)*

In its draft form, the Restitution of Land Rights Amendment Bill (2003) seeks to empower the Minister of Land Affairs to purchase, acquire in any manner, or expropriate land for the purpose of the restoration or award of such land. The motivation to draft such a Bill was to empower the Minister to expropriate land without a Court Order. This Bill was drafted because provisions in sections 35 (5A) and 42 D(1) of the Restitution of Land Rights Act 22 of 1994 that empowered the Minister to acquire or expropriate land for restitution without a

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Court Order were delaying the restitution process. This process was also limited to circumstances in which the Minister, in the absence of a Court Order, would expropriate land only where agreement had been reached between the parties who are interested in the claim.

Some stakeholders, particularly those in commercial agriculture, have challenged this provision, arguing that it gives the Minister undue power which he or she might use arbitrarily, hence the delay in its enactment. This challenge evidenced itself in the *Farmerfield* case in the Eastern Cape, where the argument was that expropriation should not happen without the owner's consent.⁵³ The Bill still has to address the issue of a particular piece of land, which may have been targeted for restitution, being used for land redistribution purposes instead.

Despite the expropriation provision in the Constitution, no land has yet been expropriated. Indeed, government is still exploring possibilities for expropriation. By March 2003, the Bill had not yet been finalised and was being reviewed by the Agriculture and Land Affairs Portfolio Committee (AgLAPC). Nonetheless, the Bill was passed into law in January 2004.

2.2.1.1 Spatial Information Infrastructure Bill (2003)

The Spatial Information Infrastructure Bill (2003) was also due to be submitted to Cabinet by August 2003. This Bill seeks to establish easy ways of accessing spatial information and land related information, the main objective of which is to assist in Land Reform. This helps in informing (provincial) land reform offices on the kind of land is available for land restitution, as well as land reform projects. Approximately 25 information stations had been installed and operationalised by mid-2002. The spatial information has great effect on land use management.

2.2.2 Land Redistribution

2.2.2.1 The Land and Agricultural Development Bank Act 15 of 2002

In June 2002, the Land and Agricultural Development Bank Act 15 of 2002 came into effect. This Act replaces the Land Bank Act of 1944. The new Act seeks to transform the Land Bank by establishing and creating the Land and Agricultural Development Bank. This bank will effect changes in the patterns of land ownership created by apartheid, by providing appropriate financial services to, and promoting greater participation in the agricultural sector by, historically disadvantaged persons.

Thus, this Act seeks to create conducive grounds for equitable redistribution, access to and ownership of land, and entrepreneurship. It is also geared towards enhancing “productivity, profitability, investment and innovation in the agricultural and rural financial systems”. Above all, it is hoped that the Act will foster conditions for employment and food security.

2.2.3 Tenure Reform

2.2.3.1 Communal Land Rights Bill, 2003

The Communal Land Rights Bill (CLRB) was gazetted on 14 August 2002, and was made law on 13 February 2004. It aims to clarify and strengthen the land tenure rights of people living in the communal areas. It also lays out a framework for the transfer of ownership and tenure security in the communal lands. The communal lands have been a point of contestation because of the ineffectiveness of laws that were meant to regulate tenure systems in these communal lands, most of which are in the custody of the State. Hence, the Minister of Agriculture and Land Affairs has the legal power to lease communal land or not.

The Bill has gone through a series of consultations, with the Department embarking on a publicity campaign. Media such as radio, newspapers and pamphlets, with instruction in all official languages were used in order to reach all stakeholders. Public comments on the Bill were submitted at the end of 2002.

The enacted Bill is implicit in guaranteeing tenure security for every deserving individual and community. Section 4(1) state that “a community or person is entitled to the extent and in the manner provided for in this Act and within the available resources of the State, either to tenure which is legally secure or to comparable redress...” The Act goes further to state that women would not be discriminated against because of their gender, and would have the same benefits as men. Thus, in its practice the Land Rights Bill will have to be compatible to its provision so as to merit reasonableness.

The Act appears to be all-inclusive with regard to the composition of land administration committees, which exclude traditional authorities. For instance, the Act provides that a member of the administration committee will commit him- or herself to serving the interests of vulnerable groups in the community, including women, children and the youth, the elderly and people with disabilities. This is an attempt to eradicate the unfairness that characterised the initial draft bills.

The composition of Land Rights Boards will reflect various affected members of the community, including child-headed households, persons with disabilities, female-headed households, and the youth. Thus, with regard to the registration of land rights, the decision is left entirely in the hands of the community.

The Communal Land Rights Bill (CLRB) will replace the Interim Protection of Informal Land Rights Act (IPILRA), which was a temporary measure seeking to protect the rights of people without tenure security in communal rights, while a long-term measure was being drafted. It is envisaged that the legislation would secure tenure to an estimated 2.4 million households (approximately 12 million people) “or 32% of the total population of the population located in 13% of the land surface of South Africa.”⁵⁴

The other envisaged aspect of the legislation is that it will accelerate delivery of the tenure reform programme and the development opportunities in the communal areas.

2.2.3.2 The Extension of Security of Tenure Act (ESTA) 29 of 1997

The Extension of Security of Tenure Act (ESTA) seeks to secure tenure rights for farm dwellers and protect them against arbitrary evictions. ESTA provides that eviction may not take place without a court order. It also lays down procedures through which evictions may take place, thus regulating the relationship between farmers and farm occupiers. For instance, the occupiers are expected to observe the conditions of their occupation, that is, that they are on the farm only because of the consent of the owner; should they violate these conditions, the owner will have the right to evict the occupiers. ESTA also allows occupiers to be visited on the farm by relatives, and gives them the right to maintain graves on the farm on which they are tenants.

ESTA also provides that farmers should provide alternative accommodation for those tenants and workers that are evicted from their farms. The SAHRC report on human rights violations in farming communities revealed that the unavailability of suitable and affordable land has resulted in “eviction crisis with people unwilling to leave the land, as they have nowhere to go.”⁵⁵ This has not been well received by the farmers, who have demonstrated a growing reluctance to provide decent accommodation for the evictees. Because ESTA does not have enforcement powers, evictions have continued. Thus, ESTA has not been able to protect the rights of farm dwellers in the manner intended.

2.2.3.3 Land Reform (Labour Tenants) Act of 1996

The Labour Tenants Act was intended to provide for the protection of labour tenants against arbitrary eviction, and create grounds for them to secure tenure rights so as to acquire land they are using or any suitable land. The Act entails all those people who live or who are permitted to use farmland for grazing, residence, or crop production, for which they offer their labour as compensation. The group include people who are descendant to former labour tenants on a given farm.

The right to such land is dependent on verification by the landowner to find out if, where there is a claim, the application is authentic. Claims to the land are similar to those in the restitution programme, where the Land Claims Court (LCC) will arbitrate between the claimant(s) and the landowner.

A revised strategy for processing the Land Reform (Labour Tenants Act) (LTA) applications under the Department’s Medium Term Strategic and Operational Plan 2002–2006, was expected by June 2002.

The Department has a draft Bill (the Consolidated ESTA/Labour Tenants Bill) that is aimed at fortifying both ESTA and LTA. The draft Bill, which was due to be gazetted by the end of 2003, is a response to the Minister’s directive to overhaul both pieces of legislation to grant independent tenure rights to occupiers.

2.3 Budget

2.3.1 The National Budget⁶⁶

Table 5 captures the Department's overall budget for the years 2001/2002 and 2002/2003. It indicates an increase in allocation from the previous financial year.

Table 5: Department of Land Affairs Budget Allocation (2002-2003)

<i>Year</i>	<i>Total Allocation in Rands</i>	<i>Actual expenditure in millions of Rands</i>
2001/2002	1 039 671 000	976 156 000
2002/2003	1 091 861 000	1 077 196 000

Source: Department of Land Affairs, electronic (e-mail) communication.

The total budget for land reform for the financial year 2002/2003 was R1 091 861 000, R52 million more than the previous year's overall land reform budget of R1 039 671 000. Of the total allocation during 2001/2002, R976 million was spent, leaving a surplus of R63 million. During the 2002/2003 financial year, total expenditure stood at R1 077 196 000, leaving close to R14 million unspent.

Most of the allocated amount was spent in 2002/2003. However, it remains that the unspent funds, no matter how paltry, could have been used towards other post-settlement projects.

2.3.2 The Budget for Land Restitution

The Land Restitution budget increased for the 2002/2003 financial year.

Table 6: Budget for Land Restitution (2002-2003)

<i>Year</i>	<i>Total Allocation in Rands</i>	<i>Percentage of total departmental allocation</i>	<i>Actual expenditure in millions of Rands</i>
2001/2002	311 042 000	30%	290 981 000
2002/2003	394 901 000	36%	394 265 000

Source: Department of Land Affairs, electronic (e-mail) communication.

The budget allocation for restitution has increased by R84 million from the previous financial year. This is in line with the Department's protocols, which indicated that this budget was inadequate, as evidenced by expenditure of almost 100% of the total programme allocation for the year in review. Consequently, the Department has not been able to meet the challenges facing the programme. The CRLR has estimated that it will need at least R1,2 billion to settle claims earmarked for 2003/2004,⁵⁷ and the same amount will be required for the 2004/2005 financial year.⁵⁸

Land restitution received about R395 million for the 2002/2003 financial year. The CRLR reports that the funds were used to acquire land, provide financial

compensation and allocate development grants.⁵⁹ This amount was inadequate; hence the budget for 2003/2004 financial year was raised to R800 million.

The budget for the restitution programme is broken down three ways. At the national level, the DLA had over R18 million for administration and R50 million was budgeted for personnel needs. A substantial amount of money, R77 million went to restitution regional offices, and R295 million was earmarked for restitution grants. This allocation indicates that most of the budget went toward management of projects.

Commissioner Tozi Gwanya of the CRLR has stated that for the restitution programme to be effective, there must be an injection of more money. He estimates that the Commission will need R1,2 billion “to finalise claims prioritised for this year (2002/2003)”.⁶⁰ Thus the success of the restitution programme, like all land reform, will depend largely on the availability of resources.

2.3.3 The Budget for Land Redistribution and Tenure Reform

Table 7 shows that less money was allocated in 2003 than in the previous financial year.

Table 7: Budget for Land Redistribution and Tenure Reform (2002-2003)

<i>Year</i>	<i>Total Allocation in Rands</i>	<i>Percentage of total departmental allocation</i>	<i>Actual expenditure in millions of Rands</i>
2001/2002	455 772 000	43,8%	443 534 000
2002/2003	417 632 000	38,2%	415 983 000

Source: Department of Land Affairs, electronic (e-mail) communication.

The 2002/2003 allocation for redistribution and tenure reform shows a reduction of over R42 million. This reduction could be a result of under-spending more than R12 million during the 2001/2002 financial year, and R97 million in 2000/2001. However, the reporting period under review shows that the budget was almost exhausted. Under spending in the past two financial years has affected the delivery of land in 2002/2003 negatively.

The budget for tenure reform is even meagre, and it seems there are no prospect for its increase in the short-term. Instead, the medium-term strategic and operational plan of the DLA indicates that tenure reform budget will continue to decline. For the year under review the programme received only R2.2 million for all its targets, while for 2002 and 2006 the DLA has committed R5.8 million to transfer 122 618 ha of land.⁶¹

This money is far less than the R442 million committed towards LRAD, more so that it includes funds to cater for the anticipated completion of ESTA and LTA cases. There were 2 220 completed ESTA and LTA cases during the year 2002-2003, which were the targeted number budgeted for, and benefitting 1 264 households.⁶²

3 CHALLENGES FOR THE REALISATION OF LAND RIGHTS

3.1 Restitution

Challenges facing the CRLR on the Restitution of Land Rights are numerous and generally fall under three streams: the number of outstanding unsettled claims; political pressures; and minimal resources.

To begin with, the CRLR still has over 30 000 claims which were not validated by the end of 2002. It is doubtful that the CRLR will be able to complete resolution of these claims on time. The time factor itself has become a pressing issue. The question remains as to how realistic it will be for the Commission to complete its work. Some of these claims are difficult to resolve in the sense that they involve familial and communal disputes. As though this was not enough, other people have waited till the last minute before they could lodge their complaints, and now that claimants are pushing the CRLR to speed up its priorities.

Perhaps the most daunting issue is political pressure. President Mbeki has implored the Commission to speed up its work, and have all restitution claims to be settled by 2005. On the other hand, some of the landless masses are impatient that delivery is slow and some non-governmental organisations (NGOs), like the Landless People's Movement, are already threatening land invasions.⁶³ Meanwhile, established commercial farmers are questioning government restitution efforts, particularly the Restitution Amendment Act. In effect commercial agriculture is against the fact that the Act empowers the Minister to expropriate land without prior agreement with owner and without a court order.

The challenge of lack of resources has been reported over the years, and the DLA is still struggling to overcome them. Thus, lack of qualified personnel and shortage of funding have impacted negatively on settlement of claims; landowners have set the price for land too high, while only few people are available for implementation and monitoring. This state of affairs is most likely to continue should the Commission fail to employ more qualified personnel. According to the CRLR, there were 91 posts that needed to be filled *immediately*. Although to date nothing has been reported to that effect, there are indications that this will soon change. The CRLR, through the Chief Land Claims Commissioner, Tozi Gwanya, disclosed that regional land claims offices needed to beef up the current number of employees in order to manage claimants and other stakeholders. To that effect, the Commissioner said:

... The Commission currently has 342 employees and thus approximately 40 people in each of the regional land claims commission offices. The commission actually needs 20 more people in each office in order to deal with the urgency of getting the job done in the time frames set.

In effect, there will be 180 new posts created. On the other hand, PLAAS disclosed that the Regional Land Claims Commissioners' offices in Limpopo and the Eastern Cape provinces are poorly staffed, to the extent that they are outsourcing services. However, that is a problem, too, as most contracted service providers are not skilled and their services cannot be effectively managed by few CRLR staff.⁶⁴

The low restitution budget has also contributed to the slow restitution progress. All the same, the CRLR is determined to mobilise more funds to complete all settlements by 2005. The DLA strategic plan (2002-2006) indicates that R1.9 billion will have been spent by the 2005/2006 financial year.

Various other factors in rural areas impede progressive realisation of land rights. For instance, illiteracy is rife among the majority of claimants, hence it takes considerable time and effort for the CRLR to secure the necessary documentation, such as death and marriage certificates, and affidavits.

3.2 Redistribution

The redistribution programme was introduced with the objective of transferring 30% of commercial agricultural land, estimated at 25 million hectares, within 5 years. However, because of challenges facing the programme -- having failed to reach the set target -- it was agreed that that objective be met by 2015. Generally, the land redistribution programme faces two major challenges, namely the transfer of land to the disadvantaged and overall economic development of the rural communities.

These two conditions are held to ransom by the scarcity of land. Commercial farmers own most of the land, and a small fraction is in the custody of the State. In many instances, these farmers are reluctant to release land to willing buyers. This is done to curtail aspiring emergent farmers. The purchase of land is market based and the sellers tend to overprice land, thus making it impossible for some buyers to acquire land. Because of that the government is at times also not able to purchase that land. With the powers to expropriate, however, the DLA will acquire more land.

Also, the DLA still has a task of unbundling the bureaucratic structures, which some sellers (White farmers) blame for prolonging the sale of land.

Another challenge has been the failure of projects due to inadequate post-transfer support. These projects have profound development implications, which affect among others, the “extension services, training and infrastructure” of rural beneficiaries. The situation is compounded by the fact that there seems to be no particular institution responsible for this service. As with restitution, funding for post-transfer projects, through the Restitution Discretionary Grant (RDG), has been scarce, due to the general inadequacy of the restitution budget.

Budget inadequacy has remained a challenge for land redistribution, and allocation for 2002/2003 was less than that of 2001/2002. For land redistribution, under-spending has been a dominant characteristic, although this changed in the last three years. During 2001/2002, for example, under-spending was reduced to R63 million. Meanwhile, research shows that the percentage of

capital spending for all land reform rose from 47% in 1997 to an estimated 77% in 2002.⁶⁵

Notwithstanding the paltry budget allocation for land reform, Provincial Land Reform Offices (PLROs) over-spent on their redistribution budgets. The Eastern Cape office spent R45.7 million beyond its budget. However, this almost nothing compared to the Western Cape's R102 million spent against the R48 million of its allocation.⁶⁶ It was impressive that by the end of 2002, these offices reported "over-committed" budgets for the period under review.⁶⁷ However, this over-commitment had some implications for some provinces. For instance, Western Cape's land reform office was bound to discontinue the processing of LRAD application.

Although acceleration in redistribution with respect to LRAD is evident, the DLA needs to allocate more funding for this programme to meet its targets. Disturbingly, the redistribution budget is set to decline further, although LRAD will continue to receive a greater proportion of the land redistribution and tenure reform budget. In the process other sub-programmes (especially tenure security) are sacrificed, hence they do not progress.

3.3 Tenure Reform

There are numerous challenges facing the tenure reform programme, but scarcity of land proves to be the most difficult. Without land there is nothing the DLA can do in the direction of tenure reform. Whether small or large, the idea of having their own land will satisfy labour tenants and farm dwellers, particularly women who are, in most cases, short-changed by customary relations. The fact that tenure reform has a low and declining budget makes realisation of tenure rights impossible. The DLA should strive to release some of the state landholdings to toward tenure reform.

Securing tenure rights for labour tenants and farm dwellers has also not been easy. Implementation of legislation has been weak because there is a lack of enforcement mechanisms, specifically in the area of evictions. ESTA and LTA, each of which has the objective of regulating and stopping evictions, have not been seen as working. Consequently, the level of evictions has increased as labour tenants and farm dwellers continue to be arbitrarily evicted by farm owners. The effectiveness of two pieces of legislation can be realised when their consolidation is accompanied by enforcement.

Linked to the point above is the fact that bureaucratic processes and lack of strong institutions constrain projects. For instance, the working relations forged between the DLA and municipalities to implement legislation have not been satisfactory. The dedication of efforts by other departments to promote LRAD projects works against advancement of issues relating to labour tenants and farm dwellers. For example, by effectively giving LRAD first preference, the Department of Agriculture in KwaZulu-Natal has overlooked the significance of other tenure reform projects.

There are many applications that still have to be finalised. To that effect, DLA has to separate tenure reform applications from those of restitution. Ruth Hall has deduced that this confusion is a result of opportunistic tendencies by tenants

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who after eviction they apply for restitution, or were frustrated by seemingly stagnant redistribution and restitution programmes.⁶⁸

These challenges⁶⁹ bear testimony to the fact that the tenure reform programme has not created an atmosphere conducive for labour tenants and farm dwellers to gain access to tenure rights.

4 CRITIQUE

4.1 Restitution

Prior to 2002/2003 more restitution work concentrated on urban claims, so that most settled claims have been urban-based, and involved mostly financial compensation. The challenge for the CRLR is to complete the remaining settlement of claims, most of which are in the rural areas.

Many people were disappointed when the Minister of Agriculture and Land Affairs, Thoko Didiza announced the decision to stop late registration of claims. This decision came despite the fact that approximately 2 million supposedly late applicants in the Eastern Cape were victims of “an administrative error.”⁷⁰ Lodgement by these claimants would require further amendment of the Restitution Act, so that all the remaining claims would be settled through other land reform programmes. However, with the impending deadline pressures for the restitution programme, amending the Act will mean the programme may not meet its target by 2005.

Land restitution legislation and programmes have not been implemented successfully. The CRLR has realised this, hence it amended the Restitution Act. Thus with the power to expropriate, the Minister is enabled to access the land held by commercial farmers who dictate terms by demanding excessive sale prices. This means that while restitution remains a mechanism of last resort, nothing now stops the Minister from getting land needed for reform.

One study revealed that should the restitution programme fail the implementation phase, South Africa risks rural land invasions. This study singles out areas such as KwaZulu-Natal, Limpopo, Mpumalanga, and Northern Cape as time bombs.⁷¹ Indeed, as has been pointed out earlier, the rural populations are growing impatient with the slow pace of reform.

Other critics have commented on the difficulty in resolving claims. Professor de Villiers (2003) cautions that land reform should not be a “claims-driven, litigious process” but should, through combined policies and programmes, be an effort geared towards assisting “the landless to gain access to, and successfully manage, land”.⁷² He points out that the difficulty lies in the mere restoration of land, without any development. He says that:

*A claims-driven process is ... difficult and even impractical to sustain as the sole basis for land reform. While restoration of rights is important, the emphasis should also be on development, sound justice and alleviating poverty – in other words development issues.*⁷³

Thus land reform should not be an end in itself; it must go beyond mere compensation or settlement, and bend towards economic empowerment of rural communities. The Department is moving towards that vision, albeit slowly.

Inadequate resources continue to hinder the progress of the restitution programme. For instance, R1.8 billion was spent between 1995 and 2003, while the budget for 2002/2003 was only R394 million. As it was illustrated above, for this programme to meet its objective there must a serious injection of funds.

Other critics have expressed their concerns. For instance, Nkuzi Development Association (NDA), working mainly in the Limpopo Province, has concluded that there is great need for the land restitution budget to be increased so that settlement of claims is accelerated, particularly for lands with agricultural implications. According to Lucas Mufamadi of NDA, restructuring agriculture “without land reform will not work ... it will amount to the government telling us there could be further agricultural development without land.”⁷⁴ NDA suggests that with current funding land restitution can take 150 years to complete.⁷⁵

Even though the DLA may meet its target to settle all the claims for the land lost between 1913 and 1993, resolving issues of land dispossessed before 1913 remain a challenge. The progress made so far is a far cry to the number of resolved claims, particularly that they have to be resolved within a year (2004/2005). Nonetheless, with the enactment of the Restitution Amendment Bill, and working within the limited resources as has been the case, we may say that there has been progress during the period under review.

4.2 Land Redistribution

Redistribution of land is for the most part still very slow, and the redistribution programme has thus contributed only minimally to land reform. The State has not met the targeted 30% of land it hoped to have redistributed as was initially hoped. The South African Human Rights Commission (SAHRC) and land activists acknowledge that redistributed land has only amounted to an estimated 2% since 1994, with less than 1% of the land in the hands of white commercial farmers having been redistributed. This slow pace is attributable to the unavailability of land and the unwillingness of some landowners to sell the land at reasonable prices.

Even so, the LRAD sub-programme has excelled for the past year, as it went beyond its set targets. However, it still has to match the delivery of land with viable projects and support systems so it can create a favourable environment for sustained development, especially among rural communities. There is criticism over the R5 000 that beneficiaries must contribute to qualify for LRAD grants. Other grants range from R20 000 to R100 000. Indeed, viewed superficially, such an amount could be seen as exerting unbearable pressure on the poor.

However, this criticism does not consider the other part of the LRAD grant requirement that gives an alternative for the poor. For instance, the LRAD grant applicants may contribute “in cash or in kind” to access the minimum grant. An in-kind contribution requires beneficiaries to contribute their labour in exchange for the minimum grant. However, what is not readily apparent is how long the

poor must contribute their labour before they are given access to the entry level R20 000 grant.

The willing-seller, willing-buyer option applied by Government in its effort towards land redistribution has also been criticised by civic organisations, some opposition political parties and academics. Primarily because the majority of the beneficiaries of land redistribution are poor, most of them will not benefit, as they do not have the financial resources to contribute in return for access to the grant. This approach, which has been supported by the World Bank, has not been successful anywhere in the world. The Food First Information and Action Network (FIAN) has determined that market-related approach to land reform fails in:

... societies in which the distribution of land is highly unequal; it rather contributes to the further marginalisation of landless peasants, indigenous people, peasant women and other groups that are extremely poor.⁷⁶

Whereas LRAD has been touted as having advanced land redistribution, its implementation largely took place within the first year (2001-2002) of its implementation. Besides the fact that it is financially strenuous for the poor people who might aspire to be commercial farmers, the LRAD has not taken into consideration other factors affecting vulnerable groups. According to Festus (2003), LRAD ignores the fact that domestic issues like fending for their families, and caring for HIV-positive and AIDS patients, burden landless women.⁷⁷ She asks: “What is the possibility of them saving R1 000 to contribute towards acquiring land?” Indeed, while women attempt to feed their households through farming, the lack of land is always a stumbling block.

Cross and Hornby (2002) report that women in KwaZulu-Natal say they and their children survived on “crop earnings ...once their husbands became unemployed”,⁷⁸ while women in the poorest provinces – Eastern Cape and Limpopo – are no longer able to produce food because of rising costs of food production and falling wages. These authors have determined that:

The rising costs of household production inputs, including ploughing, fertiliser and water, have dramatically shifted the cost structure and risk profile of household food production ... Many poor women respondents in these provinces bitterly lamented losing their cultivation option owing to rising costs and falling wage incomes. Poor families chose to cease food production because they face a cost-price squeeze, in which the costs of production are not matched by rising returns to household income. The higher the input costs, the higher the unsecured risk to the household, because a crop failure now represents not only lost labour time, but also the loss of production cost investments, which can average between R1 000 and R1 500 for a family that may have no other cash income, save a pension. Increasing numbers of poor rural households give up because they can no longer afford to take this risk.⁷⁹

In such cases, Government will be forced to subsidise households so they are able to produce their own food. At the same time, there must be efforts towards establishing a timeframe for the completion of land reform. In some instances, targets have been elusive. For example, whereas the DLA has targeted to deliver

approximately 70% of land within the 2002-2006 medium-term, there are indications that instead of the one third women were due to receive through LRAD, they would only be between 5% and 7% of all transferred land.⁸⁰

In the assessment of land activists there are 6 million landless people,⁸¹ yet the Government has not delivered all of the 25,5 million hectares it has promised to distribute since 1994.⁸² Thus, the initial commitment of the Reconstruction and Development Programme (RDP) to redistribute 30% of agricultural land is still far from being realised.

The weakness of land redistribution lies also in the ineffectiveness of post-settlement support of LRAD projects. The importance of the post-transfer support in land redistribution has been emphasised by the DLA since 1997. However, from year to year implementation has not materialised. This has been attributed to two factors. One is lack of adequate co-ordination efforts by the DLA, even though some arrangements exist where some institutions, for example the Provincial Departments of Agriculture (PDOAs), provide support particularly “in areas such as extension services, credit, training and infrastructure; the second factor involves the shortage of funds”.⁸³

Others think that the level of awareness serves as a shortcoming of the post-transfer support. In a study that it conducted in some provinces, the Human Sciences Research Council (HSRC) found that in most cases, the recipients of support did not even know the institutions they should go to after they have acquired land.⁸⁴

This lack of support after people had acquired land undermines any effort toward development. Another study revealed that some beneficiaries rely on rudimentary methods and experience gained from years of livestock farming. They complain that they hardly received any training, let alone “the simplest training of rearing cattle”⁸⁵ for commercial purposes.

Generally the budget has not favoured the PDOAs to make the post-transfer support projects meaningful. PLAAS gives the Eastern Cape PDOA as an example of how budget deficiency can hinder the progress of post-settlement support projects. According to PLAAS, most of the money budgeted for these projects goes to concerns other than the intended projects. Hence, the larger part of the allocated amount is reserved for salaries and staffing.⁸⁶

It is of great concern that despite the increase in overall budget, post-transfer support for LRAD beneficiaries will be compromised. The Comprehensive Farmer Support Programme, has during 2002/2003 parted with R1.8 million to provide post-settlement training to 1 865 LRAD beneficiaries.⁸⁷

Another area of concern is the people’s loss of interest in commonages, with almost half of the people that benefited during 2001/2002 accounting for beneficiaries during the year under review. A possible explanation of this drop in interest could be that while many rural residents want to benefit, they are migrating to the nearest cities.

Other people identified three reasons for the decline in interest in commonages:

- a) ignorance of beneficiaries about commonages;

- b) lack of demand for commonages; and
- c) absence of tradition of commonages.⁸⁸

Although there have been positive results in commonages used for agriculture, there is a sense of insecurity among those people in commonages that are far from towns. This question of distance has impacted negatively on capacity of managerial support.

The picture is not all that bleak, though. There are isolated areas where commonages are vibrant. Out of 9 provinces, 5 had projects, albeit few, that together delivered a total of 2 170 ha to 278 beneficiaries. Further, out of 1 million hectares transferred by 2003, more than 400 000 ha went toward commonage, with 67% of redistributed land in the Northern Cape, while the average percentage of land transferred to each province, excluding KwaZulu-Natal and Mpumalanga, comprised 16%.⁸⁹

The redistribution programme transferred only 2% of land to the municipal commonage programme in 2002. As such, with only about R13 million going towards municipal commonage in the next three years,⁹⁰ not much will be achieved in this direction. Anderson and Pienaar say that this is a result of de-emphasis of the commonage programme by the DLA due to policy shifts, resulting in some provinces, for example Northern Cape, making “the delivery of LRAD” a priority.⁹¹

While it is commendable that the DLA has put such measures in place, institutional support has not been forthcoming. It is hoped that the DLA will muster all relevant support so that it meets the provision of progressive realisation as stipulated in the decision of the Constitutional Court, with particular reference to *Grootboom*.

4.3 Tenure Reform

Tenure security legislation is supposed to minimise and, in the long run, eliminate the vulnerability of those who are deprived of tenure security. While the numerous pieces of legislation testify to DLA’s commitment to tenure reform, farm workers and labour tenants still do not enjoy secured tenure.

There are a number of factors that contribute to the slow pace in tenure reform. Foremost, there are issues concerning the new legislation, especially where communal property is concerned, officials tend to give little clarification of legislation to potential beneficiaries.

Some of the issues that hinder progressive realisation are at the community level, and arise from lack of official support and training. There is in particular the lack of training in understanding of rights directly affecting the beneficiaries. The extent of understanding and knowledge of the rights varies from one community to the next,⁹² as is explained in the passage below.

... In some places, people are moving towards greater clarity and knowledge of their rights, while in others increasing confusion and uncertainty is being experienced. Land reform interventions appear to have muddied issues in some cases, leading to gaps between practice and law, and confusion about who is

*entitled to what. In other cases, it is becoming clear that some issues are human and thus not easily open to policy interventions ...*⁹³

An earlier account by these two authors reveals that groups were clearer about their rights where a title deed for the transferred land was offered. However, some communities are at risk of losing their entitlements. Communities like the Khomani San, who almost lost their land to a creditor after being unable to repay a debt,⁹⁴ should be considered fortunate.

The State itself has not given tenure reform much institutional and financial support, but not many people have noticed this. This produced tenure systems that were shielded from external observation.⁹⁵

This is compounded by the fact that the Department is managing two programmes – tenure reform and land redistribution – concurrently. The Department insists that the two programmes are being managed in accordance with the allocation of resources.⁹⁶

However, this does not overlook the fact that tenure reform is still an issue of concern in the communal lands, particularly in the former homelands. Approximately ten years into democracy people living in the former homelands still have insecure tenure. This attests to the fact that the Bill is not being dealt with in a satisfactorily speedy manner.

Although minimal, the analysis of available information at the Land Claims Court (LCC) gives a clue to the progress in tenure reform. Of the 742 LCC cases 218 involve labour tenants. For the period under review (2002 only) there were 15 settled cases of labour tenants out of 121 LCC cases.⁹⁷ The LCC recorded the cases beginning with the first applications in 1996, and there are noticeable fluctuations in the numbers, which result from “the decline in the labour tenant cases.”

The decline does not indicate much, more so that in some cases applications are not disputed, and therefore there is no need to go before the LCC.

4.3.1 Evictions

According to the Department of Land Affairs protocol report, 799 eviction cases went before the Land Claims Court between 1998 and 2003. There were 48 cases in 1998; 139 in 1999; 188 in 2000; 190 in 2001; and 80 in 2003. This shows a marked decrease in 2003 compared to previous years.⁹⁸

There is no indication as to how many of these involved farm workers and how many were labour tenants. Also, the decrease in 2003 could not necessarily suggest that more work was being done to discourage evictions, as there are no records to corroborate those figures, particularly since many evictions go unreported.⁹⁹

Moreover, the alternative accommodation offered to evictees in terms of the legislation is not qualified – what standard is used to determine whether the alternative accommodation is of a desirable quality? Lack of proper monitoring systems on evictions in general makes it impossible to determine the quality of alternative accommodation.¹⁰⁰

The figures indicate that the LCC still handled a substantial number (136) of eviction cases between 2002 and 2003. At a recent launch of a book on land reform by Professor Bertus de Villiers in Johannesburg, Michelle Festus of the NLC expressed concern over the continued evictions despite the Extension of Security of Tenure Act (ESTA).

It must be borne in mind that, according to the Department of Land Affairs protocol report for the SAHRC *4th Economic and Social Rights Report*, there was no audit on illegal evictions. However, the Department had indicated in a discussion with SAHRC researchers that it was aware of “constructive evictions”¹⁰¹ of farm workers and labour tenants.

It is unacceptable that the Department does not have information on farm workers who have been illegally evicted. In fact, the general unavailability of eviction records in the Department is of great concern. The Department should take appropriate action toward a “fair and procedural” approach, and arrange for alternative accommodation for the evictees. It is hoped that the Electronic Eviction Monitoring System the Department is developing will improve eviction monitoring.

4.4 The Budget

There has been improvement in spending during the year under review, where about R14 million was not spent, a small amount compared to the 2000/2001 deficit of R152 million. Current spending trends indicate that the Department is using its allocated funds, although with an allocation below 0.5% of the total government budget, budgetary constraints remain a challenge.

While the Department of Land Affairs has received criticism for under-spending its budget allocation in the past, under spending is now very limited. The budget for land reform is still inadequate, although it has increased.

4.4.1 Restitution

The CRLC is set to spend over R812 million on restitution grants over the next three financial years, with R1,45 billion targeted to be spent during 2004-2005 financial year. But even this amount is not adequate; land reform will continue to be very slow, and the Department may not meet its targets.

Given the Commissioner’s request for R1,2 billion to complete the claims for one year, it would appear that in order to meet the 2005 proposed target, an amount of approximately R4 billion would be required. Others say that this amount may not be enough, given the cost of settlements. For example, Ruth Hall has determined that 50% of rural claims may cost approximately R10 billion to settle, “at an average of R250 000 each.”¹⁰²

The success of the restitution programme depends to a greater extent on the allocation of more funds and establishing a fair value of compensation paid for farms, buildings and equipment. Although the CRLR would like a budget of R1,4 billion for 2002 to 2006, its spending trends indicate that a budget of more than R10 billion would be required for the restitution programme to achieve its

goals. Inadequacy of financial resources has hindered the restitution progress. It is thus clear that the lack of resources is slowing the progress of restitution. According to Ruth Hall, though, the restitution budget has singularly matured by 521% since 1999, compared to an increase of 46% for all land reform.¹⁰³

It remains to be seen whether, with this increase in restitution budget, the CRLR will be able to resettle all claims, in light of the scarcity of land.

4.4.2 Redistribution and Tenure Reform

While the budget for restitution is set to increase, there is a marked decrease of the land redistribution and tenure programmes budget, particularly for the period in question.

According to the Department's Strategic Plan 2002–2006, a hectare of land costs R1 000. This means that it will require more funds for the Department to meet its goal of redistributing 30% of land by 2015.¹⁰⁴

Even though the Department is still operating on a low annual budget there has been a marked shift in spending, so that for the financial year 2002/2003, the Department spent nearly all of its allocated funds. The DLA spent 98% of its budget, with 79% going to land reform, the bulk of which was committed to LRAD funding. Because of the priorities and goals set by the Department to achieve 30% redistribution, it is foreseen that the total land reform budget will increase dramatically in future. So far the DLA's budget allocation still constitutes the lowest percentage of the national budget.

In reaching its conclusions on the *Grootboom* judgment, the Constitutional Court emphasised three elements -- progressive realisation, reasonableness of measures, and availability of resources. As we shall see below, these elements, while complementing one another, they may still be applied effectively one at a time under certain circumstances. Therefore, analysis of the fulfilment of the right is not necessarily dependent on satisfying all elements at the same time. Nonetheless, all these elements are important. For our analysis, these elements are treated each in turn.

4.5 Reasonableness of Measures

Reasonableness of measures is one of the elements to which the Constitution refers in order for the State to meet its obligations. Section 25(5) provides that the State adopt reasonable measures to create favourable conditions for access to the right to land. These measures may not be an end in themselves, but should be effective in their implementation.

As was noted above, there are measures that made enabled the DLA to deliver set targets, while others have failed to meet the test for reasonableness.

The implementation of LRAD is a good example of a reasonable measure. Since its adoption in 2001, more land has been redistributed to marginalized groups than in previous years.

Most legislative and programmatic measures, as well as projects, have not been operationalised in terms of their objectives. With respect to restitution,

settlement of claims has been slow, not only due to limited resources, but also because the Restitution Act did not empower the Minister to expropriate land without a court order.

Another example of unreasonableness of legislative measures would include ESTA and LTA, which have not been effective enough to facilitate tenure rights for labour tenants and farm dwellers. The measures cannot be considered convincing if they fail to satisfy the needs of vulnerable groups.¹⁰⁵

Of course other unreasonable measures would include those structures across all land reform programmes that were adopted but not supported, but resulted in beneficiaries not realising the right. As was put in *Grootboom* "... An otherwise reasonable programme that is not reasonably implemented will not constitute compliance with the State's obligation."¹⁰⁶

By not being implemented, even if they were adopted, they fail the test for reasonableness. The implementation of measures must take into consideration the role played by other sectors of the State. With land, other spheres of government play minimal roles with the main task of land reform being the competence of the national Department.

4.6 Availability of Resources

In accordance with section 25 (5) of the Constitution, the Court in *Grootboom* decreed that while it is expected that the State should mobilise adequate resources, it would not be held liable for not delivering due to lack of resources. The phrase "within available resources" implies that the State may only do what it can based on its allocation. Thus, "... failure on the part of the State to fulfil a socio-economic right due to lack of adequate resources is not, in itself, a violation of that right."¹⁰⁷ The resources in question include both personnel and material.

It is incumbent on the State to prove that all of its resources have been applied to achieve its stated objectives. Whereas over the years the DLA has had difficulty using its budgets, in this review year it almost exhausted the allocated funds.

Our analysis reflects that the DLA, although it spent almost all of its allocated funds, its budget was not enough to meet all set targets. However, taking each programme at a time, it can be seen that in some instances, the resources available to the DLA were put to use in a meaningful way. While resources for the restitution programme were limited, the CRLR was able to settle a substantial number of claims in 2002/2003.

In light of the ruling of the Constitutional Court, it is enough that the CRLR laboured "within its available resources" (that is, within budgetary constraints) for disadvantaged people to access land. In effect, non-delivery as a result of unavailability of resources is not necessarily a violation of the rights of beneficiaries to access land.

With reference to redistribution, the resources were scanty but money committed to LRAD projects yielded better results where LRAD delivered more than its targets. However, the same may not be said about tenure reform, which received the smallest allocation of all land reform sub-programme budgets.

It is important to note, however, that access to a right cannot happen at once to satisfy all persons, hence the Court ruled that realisation must be progressive. Thus, there is room for improvement of programmes and other measures.

The unavailability of resources across all the programmes, especially in view of the decreasing land reform budget in the midterm, poses a great obstacle for the landless to gain access. The land, which is a socioeconomic right that is to be accessed by vulnerable groups, and is equally a resource that the State must deliver to these groups, is scarce. The DLA has not been able to acquire enough of this resource to satisfy the landless masses, particularly with regards to programmes like restitution for which deadlines are nearing. Thus progressive realisation is impossible in the short-run.

4.7 Progressive Realisation

Progressive realisation means that the State must take meaningful steps towards the realisation of socio-economic rights over time. While the time period within which realisation should take place is not dictated to be short, it does not mean the State may indefinitely extend the time for the realisation of a given right.

The UN Committee on Economic, Social and Cultural Rights (UNCESCR) points out that progressive realisation should be directed with full appreciation of the circumstances prevailing in that given country. While it requires the State to move expeditiously toward realisation of rights, progressive realisation should provide a mechanism for "... flexibility... reflecting the realities of the real world and the difficulties involved for any country."¹⁰⁸

For the State to be perceived as respecting, protecting, promoting and fulfilling its obligations, it must be inclined towards the elimination of all legal, administrative, operational and financial obstacles that may interfere with its progress. The DLA is for the most part still battling with this qualifying factor of progressive realisation. Whereas policy measures such as LRAD have made great impact, with regard to redistribution as a programme, legislative hurdles, particularly with regard to tenure reform and restitution programmes, are being reconsidered.

From the analysis above we may conclude that since the DLA and its agencies realise the shortcomings of some of the applied measures and are striving to correct them, the Department has been moving in a progressive manner to make land rights accessible to vulnerable groups, specifically women and youth.

However, lack of support structures may render delivery through any measure ineffective because, land delivery alone is not enough. In its ruling in *Grootboom*, the Court said that housing implied more than just the structure.

*... It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing ... there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to housing...*¹⁰⁹

Therefore, by merely transferring land the DLA cannot be said to have fulfilled its obligations. It follows that the quality of that land should be enhanced by projects that will improve the livelihoods of the recipients.

Our analysis finds that the State has pulled together its efforts in adopting and implementing progressive measures towards land reform. With regard to the restitution programme, the DLA was able to settle more restitution claims even within very limited funds, hence the CRLR is proposing an increase in funding to meet the 2005 deadline to conclude the resolution of outstanding restitution claims. It is envisaged that with the Restitution Amendment Act (2004) in place, more land will be acquired to meet the demands of claimants seeking land compensation.

In terms of delivery in tenure reform, it is worth noting that the DLA is moving towards creating a conducive environment by consolidating ESTA and LTA. This will enhance the culture of observance of legislation, and thus better monitoring and delivery. This law will be able to remove all obstacles so progress may be realised.

Given the challenges faced by the DLA in the delivery of land, particularly where land is not readily available due to obstacles erected by the landowners, and the fact that there are measures adopted to expropriate land, the conclusion would be that in general the State has created an environment for progressive realisation of the right to access of land. The overall challenge would be whether the DLA will satisfy the targeted beneficiaries within the set deadlines.

4.8 Constitutional Obligations

There are a number of obligations to which actions of the State are subjected. According to Section 7(2) of the Constitution, these are: obligation to respect, obligation to protect, and the obligation to promote and fulfil.

The obligation to respect the right of access to land provides that the State should not under any circumstances, except where a general law of application states otherwise,¹¹⁰ prevent any person the right to access land. Thus, it follows that the State must endeavour to see to it that it creates an environment where everyone who needs land is awarded accordingly.

With regard to restitution in particular, the DLA has not awarded much land to victims of land dispossession, who were disadvantaged as a result of past discriminatory laws. There are projects in place to facilitate land restitution. For the most compensation has been financially based, although a sizeable number of land claims have been settled. In redistribution, the DLA has, through LRAD, disposed of tracts of land beyond the number of beneficiaries targeted for the review period.

By instituting the Claims Validation Project of the Restitution Programme to investigate the criteria of the lodged claims, the DLA would be able to distinguish between legitimate and illegitimate claims so that compensation may be given without any unfair discrimination. Related to this measure is the policy on post-settlement support to advance the economic well-being of the beneficiaries. These two measures are a testimony that the Department is

working hard to meet its constitutional obligations to respect the right to gain access to land. The Communal Land Rights Bill was instituted to ensure that communities and individual households gain that right.

The obligation to protect provides that the State must protect the rights of beneficiaries from violation by a third party. The obligation to protect was experienced in the State's ability to deliver land to the targeted beneficiaries. For the period under review, labour tenants and farm workers received over 30 000ha of land, through 201 projects. By bringing together ESTA and LTA into a consolidated Bill (the Consolidated ESTA/Labour Tenants Bill (2003)), the DLA realised that separately these measures were not meeting their objective. The Consolidated ESTA/Labour Tenants Bill will ensure that tenure measures relating to evictions and tenure security are such that they protect the rights from arbitrariness. ESTA has not had enforcement powers, so that evictions had continued, because landowners and members of the justice system failed to observe the legal requirements enshrined in ESTA.¹¹¹ The continued rate of delivery by LRAD testifies to the preparedness of the Department to satisfy people's demand for land.

The obligation to promote requires that the State create an environment wherein the rights and freedoms of given people by raising awareness of their rights through education. Our analysis has revealed that the DLA has not adequately enhanced the understanding of rights of land tenure beneficiaries with regard to tenure reform. For instance, that understanding is not equal in all communities, to the extent that there are gaps between law and practice. Also, there is still great ignorance about the observance and application of the laws even among public legal workers. For instance, many landowners do not respect ESTA. Although there is evidence of workshops and rallies conducted to educate beneficiaries about land rights, it remains to be seen how monitoring mechanisms for tenure reform and restitution programmes are to be operationalised.

The obligation to fulfil places a positive obligation on the State to adopt necessary measures to enable the beneficiaries of the right to realise the right. The DLA shows that it is moving towards adopting measures that will help various programmes to attain their goals of land reform. In the review period the DLA has shown that it is heading toward that direction. For example, laws like the Restitution Amendment Act to expropriate land where necessary, will make DLA's work much easier, particularly when the land is so scarce and expensive. By synthesising the provisions of both ESTA and LTA in the Consolidated ESTA/LTA Bill, the DLA is strengthening the tenure reform programme, in order to deal meaningfully with the issues directly affecting labour tenants like unfair or illegal evictions. The enactment of the Communal Land Rights Bill is an example of the DLA attempt to accord tenure security equally, without favour or discrimination. This Act protects victims of erstwhile discriminatory tenure laws, including vulnerable groups like women, from further illegal practices.

5 RECOMMENDATIONS

The limited resource base is slowing the land reform process. It is recommended that more money be allocated toward land reform programmes. So far as acquiring land is concerned, legislation alone is not enough. Therefore, Government must muster political will to make expropriation practical.

The continued shortage of personnel in the Department of Land Affairs is a concern in that it hinders the work of the Department. For the past three financial years the DLA has reported low human capacity. The Department must ensure that there are funds for recruitment and training of personnel not only to fill all vacant post, but to maintain structures to retain them as well. This would require an intensive capacity building programme directed particularly towards empowerment of rural youths.

It is recommended that the Department put in place effective support mechanisms to help resettled families and communities with the rehabilitation of their land so as to promote development and alleviate poverty. This will guarantee quality life for newly resettled populations.

The Department should train and deploy field workers to respond to situations as they occur, especially in ‘inaccessible’ areas where abuse and violation of the rights of farm workers and labour tenants go unreported. In this sense, not only would a record of incidents of violations or abuse be kept, but the monitoring and evaluation of reform would be facilitated. There is need also to empower the provincial offices of the Department of Land Affairs so they can draw plans and budgets for implementation to ensure that the State provide farm dweller populations with secure land of their own.

It is important that the Department submit information relevant to the required reporting period. While it is key to report information on the Medium Term Expenditure Framework (MTEF), for the purpose of analysis, it would help if yearly output were clearly spelt out.

The willing-seller, willing-buyer concept appears not to benefit the landless people, particularly those without a solid financial base. The practice creates a burden, not only for the landless poor, but also for the Government. It is instructive that other ways are explored that would deal with redistribution meaningfully. At present, the market-based concept favours emergent farmers, and thus tend to sacrifice the poor even if the contribution is paid in kind.

Measures like commencing the Subdivision of Agricultural Land Act Repeal Act 64 of 1998 and limits on the size of land-holdings in different agro-ecological zones need to be considered for their potential to make good quality land available to land reform beneficiaries. In this regard, there is a need to gain a better understanding of the land reform experiences in Brazil.¹¹²

The SAHRC must also find ways to develop monitoring structures that can liaise with the Department to enforce ESTA. It is not acceptable that even with legislation in place, people are subjected to arbitrary evictions.

The Proactive Land Acquisition is strategic in the sense that it applies across all land reform programmes, particularly where acquisition of land for

settlement and housing land are concerned. Thus, it is imperative that this strategy is implemented so that it complements the sub-programmes and support projects pertaining to settlements and housing.

6 CONCLUSION

Generally, land reform in South Africa has remained slow, and targets have yet to be met. This is mainly because land is scarce, and where it is available it tends to be expensive. The land in the country is mainly still in the hands of white commercial farmers who sell it expensively. This has prevented the state and emergent farmers to acquire the land. Thus, high land prices impact negatively on delivery. In some instances where the State has managed to convince commercial farmers to sell at reasonable prices, the land has been found to be infertile, or even uncultivable.

When considering the process of restitution over the past eight years, it appears that great progress has been made. This is so mainly because often there is no distinction made between land transfer and financial compensation. The cumulative nature of reporting on land reform tends to hide actual facts as they occur. If, in three years, seven projects were undertaken, but only one of those was established in the year under review, it is easy for a mistake to creep in. Thus, for accurate reporting, specific numbers have to be supplied for specific reporting periods. There is a need for more reliable data on delivery.

Given such issues, the minimal budget allocation for land restitution may not enable the programme to meet its goal of completing the settlement of claims. The budget for redistribution and tenure reform are also negligible, hence programmes and projects cannot be supported effectively.

There is approximately one year remaining before the 2005 deadline set by President Mbeki for the resolution of restitution claims. The concern remains that with minimal budget allocation for restitution, compared with the level and amount of work, the determination and intent of the CRLR to meet the President's directive will not be realised.

The report on restitution is based mainly on rural issues as opposed to urban ones. The reason for this is that urban claims have been quite manageable, as they had to do only with financial compensation. Redress for rural claims entail large tracts of land, which in some cases are not available. Hence, long periods of time are exhausted by negotiations between the State and landowners, particularly on the price of land. This is not in anyway suggesting that urban compensation has been completed; it is, rather, an indication that more work still needs to be done.

Although there have been a significant number of settled claims to date, restoration of land remains slow, with restored land amounting to approximately 2% of South Africa's total land area. With this pace, it is doubtful that the restoration programme will meet its target by 2005. It also remains a matter of speculation whether this programme will have significant effect given the uneven patterns of land ownership that benefit commercial farmers, mainly.

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It should be emphasised, though, that whereas the DLA has, in some instances, not fulfilled its mandate to deliver land as targeted, land reform has improved during the period 2002/2003.

Given the slow pace of land reform, it is important, therefore, that South Africa does not relax in improving the land reform process, in order to avoid problems in future. With approximately 70% of land in the control of a handful of commercial farmers, it is hard to ignore the fact that South Africa's land problem is bigger than that of its northern neighbour, Zimbabwe, whose commercial farmers owned a mere 23% of agricultural land.¹¹³

- 1 One of the main aims of RDP was to redistribute 30% of agricultural land over five years.
- 2 South Africa's land area is estimated by the Department of Land Affairs to be 1 219 090 km² (Statistics South Africa, Census in Brief 1996, third edition, 1999).
- 3 Department of Land Affairs, Electronic Communication, 15 March 2004.
- 4 White Paper on South African Land Policy, April 1997.
- 5 Section 25 (7) of the Constitution of the Republic of South Africa.
- 6 Section 25 (4) of the Constitution.
- 7 Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC).
- 8 Ibid. para 42.
- 9 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC), 2002 (10) BCLR 1033 (CC) par 94.
- 10 See for instance, article 14(2)h of the Convention on the Elimination of all Forms of Discrimination Against Women (1979).
- 11 See Article 14 of The African Charter on Human and Peoples' Rights, 1981.
- 12 In its last report, the South African Human Rights Commission (SAHRC) indicated that Idasa had disclosed that more 32 389 claims than were reported by the Commission during the same period.
- 13 Commission on Restitution of Land Rights, *Land Reform in South Africa, our Achievements, Issues and Challenges*, A paper delivered by Commissioner Tozi Gwanya, at Konrad-Adenauer-Stiftung, Johannesburg, August 15 2003.
- 14 Commission on Restitution of Land Rights. *Cumulative Statistics*. <http://land.pwv.gov.za/restitution>.
- 15 CRLR. 2003. *Annual Report April 2002-March 2003*, Commission on Restitution of Land Rights, p.6.
- 16 Ibid.
- 17 According to the Commission on Restitution of Land Rights 2002-2003 Annual Report, during 2002 there were 37 938 claims that were filed but had not been validated, thus were not on the priority list.
- 18 Section 10 of the Restitution of Land Rights Act 22 of 1994 provides that all people dispossessed of their land rights after June 1913 due to racially discriminatory laws and practices were entitled to compensation or restoration of their land pending settlement of their claims.
- 19 Marietie Louw. "No more land claims." [News24.Com](http://www.news24.com). 18 February 2004.
- 20 The grant was designed with a view to support all three land reform programmes – restitution, redistribution and tenure reform.
- 21 Ministry of Agriculture and Land Affairs, "Land Affairs Budget Vote Speech by the Minister of Agriculture and Land Affairs," Ms Thoko Didiza, MP, National Council of Provinces, Cape Town, 20 June 2002.
- 22 DLA. 2002. *Media Briefing, "Getting People Back to the Land"* by Dr. GP Mayende, the Director-General Department of Land Affairs, 03 December 2003, p. 8.
- 23 See SAHRC, *4th Economic & Social Rights (ESR) Report 2000/2002*, Johannesburg, April 2003, p.83.
- 24 Department of Land Affairs, *Annual Report 2002-2003*, National Office of the Department of Land Affairs, p.57.

- 25 Ibid., p.58. These data are different from those in the protocol sent to the Commission.
- 26 Ministry of Agriculture and Land Affairs, Land Affairs Budget Vote Speech by the Minister of Agriculture and Land Affairs, Ms Thoko Didiza National Council of Provinces, Cape Town, June 20 2002.
- 27 Department of Land Affairs. Protocol submission to SAHRC *5th ESR report*, 2003.
- 28 Ibid.
- 29 The DLA supplied a new number of LRAD Land Bank projects as 128.
- 30 Regrettably, it is not indicated whether these were LRAD or other projects. However, it is worth commenting that there has been more Land Bank involvement during the present reporting cycle than during any other year.
- 31 Department of Land Affairs. *Annual Report 2002-2003*. Pretoria, 2003.
- 32 These figures may suggest the number of applications approved, thus they may not necessarily be used as a measure for judging progressive realisation.
- 33 It is not clear how the Land Bank projects differ with Land Bank assisted projects as reported by the Department of Land Affairs; notice that the figures recorded by the two institutions are incongruent.
- 34 Protocol response from the Land Bank, dated October 31 2003.
- 35 Table 3 is a representation of the Land Bank's loan component in regard to LRAD land transfers.
- 36 Some records state that the Land Bank had by December 2002 approved LRAD grants worth R194m awarded to 1753 beneficiaries. See for instance, SAHRC. 2003. *Final Report on the Inquiry into Human Rights in Farming Communities*, Johannesburg, p. 19.
- 37 DLA. *Annual Report 2001/2002*. Department of Land Affairs, Pretoria, 2002.
- 38 DLA. *Electronic Communication*. Department of Land Affairs, Pretoria, August 2003.
- 39 It must be pointed out that the DLA has not supplied reliable data. These statistics, which came from the DLA's annual report, are contradicted by yet another set sent electronically from the Department. This version records 121 commonage projects, that transferred 502 505 ha of land to 5005 households, including 77 female-headed households.
- 40 Anderson, M and Pienaar, K. 2003. Evaluating land and agrarian reform in South Africa. Municipal Commonage. An occasional paper, No. 5. University of the Western Cape, Cape Town, p. 5.
- 41 DLA. 2002. *Media Briefing, "Getting People Back to the Land"* by Dr. GP Mayende, the Director-General Department of Land Affairs, 03 December 2003, p. 12.
- 42 Ruth Hall (*Farm Tenure*, p. 25) estimates that there are 19 416 applications, Mpumalanga (9 709) and Kwa-Zulu-Natal (7 713), having most, while Northern Cape had the least (15). The DLA claims that an estimated 20 000 applications were processed and resolved. (See Media Briefing, "*Getting People Back to the Land*").
- 43 DLA. 2002. *Media Briefing, "Getting People Back to the Land,"* p. 12.
- 44 Ibid., p. 18
- 45 DLA *Annual Report 2002-2003*, Department of Land Affairs, Pretoria, p. 67.
- 46 Ministry of Agriculture and Land Affairs, "Land Affairs Dept Budget Vote 2002/2003, NCOP", Address by the Minister of Agriculture and Land Affairs, Ms Thoko Didiza, at the Budget Vote of the Department of Land Affairs.
- 47 DLA. *Annual Report 2002-2003*. Department of Land Affairs, Pretoria, p. 58.

- 48 Ibid.
- 49 See for example, Ruth Hall. *Evaluating land and agrarian reform in South Africa. Rural restitution*. An occasional paper series, PLAAS, University of the Western Cape (September 2003), p. 6.
- 50 Ruth Hall. *Evaluating land and agrarian reform. Farm tenure*. An Occasional paper, No. 3. PLAAS, University of the Western Cape. Cape Town, p. 25.
- 51 Ibid. p. 25.
- 52 Ibid. p. 26.
- 53 See Ruth Hall. *Evaluating land and agrarian reform in South Africa. Rural restitution*. An occasional paper series, PLAAS, University of the Western Cape (September 2003).
- 54 DLA, *Electronic Communication*, March 2004.
- 55 SAHRC. 2003. *Final Report on the Inquiry into Human Rights Violations in Farming Communities*. South African Human Rights Commission, Johannesburg (August 2003), p. 62.
- 56 The DLA budget information does not include the budget for the provincial offices as, according to the DLA, land reform is the competency of the national office.
- 57 Commission on Restitution of Land Rights. 2003. *Annual Report April 2002-2003*, and Tozi Gwanya. "Land Reform in South Africa: Our Achievements, Issues and Challenges", Presented by the Chief Land Claims Commissioner at Konrad-Adenauer-Stiftung, Johannesburg (August 15 2003).
- 58 Ibid.
- 59 Ibid.
- 60 Ibid.
- 61 DLA. *Medium Term Strategic and Operational Plan 2002-2006*. Department of Land Affairs, Pretoria.
- 62 DLA. 2002. *Medium term strategic and operational plan, 2002-2006: Getting people back to the land*. Department of Land Affairs, Pretoria. Also cited in Ruth Hall, *Farm Tenure*. 2003, p. 35.
- 63 The Landless People's Movement has since the World Summit for Sustainable Development in August 2002 threatened to invade land. To date, other than demonstrations, no massive land occupations have taken place.
- 64 Ruth Hall. 2003, p. 19.
- 65 Jacobs, P. et al. 2003. *Evaluating land and agrarian reform in South Africa. Land redistribution*. An occasional paper, No. 1. University of the Western Cape. Cape Town, p. 8.
- 66 Ibid. p. 10.
- 67 Ibid. p. 8.
- 68 Ruth Hall. 2003. *Evaluating land and agrarian reform in South Africa. Farm tenure*. An occasional paper, No. 3. University of the Western Cape, Cape Town.
- 69 Ruth Hall has outlined several other challenges linked to these ones. See her report cited above for further reading.
- 70 Marietie Louw. "No more land claims – minister". [News24.com](http://www.news24.com). 18 February 2004.
- 71 Steyn, L. 2002. *Review of Land Occupation in South Africa*. Africa Groups of Sweden.

- 72 Bertus de Villiers (2003). *Land Reform: Issues and Challenges: A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia*. Johannesburg: Konrad Adenauer Foundation, p. 141.
- 73 Ibid., p. 142.
- 74 Russel Molefe. "Slow restitution a hurdle for growth." *Sowetan*. 26 September 2002.
- 75 Ibid.
- 76 FIAN Press Release. 2002 *World Bank and land policies under attack*. http://www.fian.org/english-wersion/arc_pr.htm Accessed 23 August 2003. Also quoted by Michelle Festus in "We are the Women, We Are the Land", a paper presented at Konrad-Adenauer-Stiftung, Johannesburg, 15 August 2003.
- 77 Michelle Festus (2003). "*We are the Women, We Are the Land*", a paper presented at Konrad-Adenauer-Stiftung, Johannesburg, 15 August 2003.
- 78 Cross, C. and D. Hornby (2002) *Opportunities and Obstacles to Women's Land Access in South Africa: A Research Report for Promoting Women's Access to Land Programme* at <http://www.nlc.co.za/pubs2003/womenlandaccess/wlatoc.htm> Accessed 3 June 2003.
- 79 Ibid, p. 47.
- 80 Department of Land Affairs. *Medium Term Strategic and Operational Plan 2002-2006*. Pretoria. See also, Jacobs, P. et al. 2003. *Evaluating land and agrarian reform in South Africa. Land redistribution*. An occasional paper, No. 1. University of the Western Cape. Cape Town, p. 9.
- 81 Note that Samantha Hargreaves and Ann Eveleth put seven million as the landless population in the urban areas, and 19 million as the total for landless rural dwellers.
- 82 Michelle Festus. 2003. "We are the Women, We Are the Land". A paper presented at Konrad-Adenauer-Stiftung, Johannesburg, 15 August, 2003.
- 83 Jacobs, P. et al. (2003). *Evaluating land and agrarian reform in South Africa: Land redistribution*. University of the Western Cape. Although R1 million has been put aside to monitor restitution programme's post-settlement support, no review has been done so far.
- 84 Human Science Research Council. 2003. *Land Redistribution for Agricultural Development: Case Studies in Three Provinces*. Integrated Rural and Regional Development.
- 85 Nelwamondo, Tendani C. 2003. *Land Redistribution for Agricultural Development for Sustainable Local Economic Development: Bophirima District Municipality: North West*. A Master's Thesis. Potchefstroom University.
- 86 Jacobs, P. et al. (2003). *Evaluating land and agrarian reform in South Africa: Land redistribution*. University of the Western Cape, p. 20.
- 87 Department of Agriculture. *Annual Report 2002-2003*. Department of Agriculture, Pretoria, 2003., p. 36.
- 88 Marc Wegerif, cited in Anderson M. and K. Pienaar. 2003. *Municipal Commonage. Evaluating land and agrarian reform in South Africa*. An occasional paper. No. 5, PLAAS. Cape Town.
- 89 Ibid, p. 1.
- 90 Ibid. This amount includes commonage, equities, and other Act 126 projects, as well as the implementation of LRAD.
- 91 Ibid, p. 6.
- 92 Tessa Cousins and Donna Hornby. 2003. "Communal property institutions: Adrift in the sea of land reform" in *Peacemeal Reforms and Calls for Action*. Stephen Greenberg (ed.), Development Update Vol. 44 No. 2, p. 134.

- 93 Ibid.
- 94 Ibid. For more information, see *Business Day* 25 September 2002.
- 95 Tessa Cousins and Donna Hornby. p. 140.
- 96 Meeting between DLA and SAHRC researchers, South African Human Rights Commission, Johannesburg, 22 September 2003. Indeed, redistribution and tenure reform programmes get a combined budget allocation.
- 97 See Ruth Hall for a complete LCC case table.
- 98 The information indicates that these numbers are per calendar year. It is difficult, therefore, to speculate how many cases were attended to during a specific financial year.
- 99 In some cases, the police dismiss the reports summarily, in favour of the landowners.
- 100 On 30 March 2004 Nkuzi Development Association and Social Surveys (Pty) Ltd conducted a consultative workshop (Eviction Survey Reference Programme) on the study to determine the extent and impact of displacement of former farm dwellers. It is from the results of this study that information on quality alternative accommodation will be determined.
- 101 Meeting between DLA and SAHRC researchers, South African Human Rights Commission, Johannesburg, September 22 2003.
- 102 Ruth Hall. 2003. *Evaluating land and agrarian reform in South Africa: Restitution*. An occasional paper series. PLAAS, University of the Western Cape, p. 30.
- 103 Ibid., p. 31.
- 104 Other estimates put the required amount at R2 billion. See for example, Department for International Development (DFID) Southern Africa. 2003. *A Scoping Study of Current Freehold and Farming Communities*. Final Report. McIntosh Xaba & Associates (Pty) Ltd. p. 26.
- 105 *Grootboom*, par 43-4.
- 106 Ibid, par 42.
- 107 Lahiff, E and Rugege S. "A critical analysis of land redistribution policy in the light of the *Grootboom* judgement." in *Law, Democracy & Development*. Vol 6 (2), p. 288.
- 108 General Comment No. 9, UN Committee on Economic, Social and Cultural Rights, E/C. 12/1998/24 par 9.
- 109 *Grootboom*, par 35.
- 110 See for instance, section 36(1) of the Constitution.
- 111 SAHRC. 2003. *Final Report on the Inquiry into the Human Rights Violations in Farming Communities* South African Human Rights Commission, Johannesburg, August 2003, pp. 9-10.
- 112 The Special Rapporteur on the Right to Food recommended that Brazil's projected law on limiting the size of landholdings should be implemented. See UN Special Rapporteur on the Right to Food, *Mission to Brazil*, E/CN.4/2003/54/Add.1, 3 January 2003.
- 113 See for instance, "Land reform is a bigger issue in SA than Zimbabwe", at http://www.sabcnews.com/Article/print_whole_story/0,1093,57024,00.html April 14, 2003, Accessed 30 July 2003.



social security

ECONOMIC AND SOCIAL RIGHTS

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THE RIGHT TO SOCIAL SECURITY

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PREFACE

In this 10th year of our young but thriving democracy, we are all engaged in some way or the other, in critically reflecting on the achievements we have secured over the past years as well as the unfinished work that lies ahead. In the context of the various rights guaranteed by our Constitution, they seek in their totality to ensure that the individual and the society are able to develop to their full potential and indeed that human rights becomes a central feature of our society. In this regard we have made much progress, and in the main, few argue against the notion that civil and political rights are well secured both in law and in practise.

However, the challenge that is situated at the heart of our Constitutional contract is how we advance social and economic rights and in so doing ensure that we advance the interests of the poor and those many who are still to enjoy the full benefits of our democracy. The inclusion of social and economic rights in the Bill of Rights was a clear articulation that democracy was as much about the right to vote, and of free expression and of association as it was about the right to shelter, the right to food, the right to health care, the right to social security, the right to education and the right to a clean and healthy environment.

The Constitution has tasked the Commission with a specific mandate to advance social and economic rights. In particular, section 184(3) requires that: “Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.”

A healthy and robust debate exists around these measures that the Constitution requires the State to take. In addition, the human rights discourse sees considerable contestation around issues such as the nature and scope of the right, the adequacy or otherwise of the measures taken and the meaning of the phrase ‘progressive realisation of rights.’ These are difficult issues and it is not always possible, nor may one say desirable, to always have consensus on them. In some instances the Courts have had to rule on them. We see this Report, however, not only as a contribution to those debates but also as a tool that can assist Government, Parliament and civil society in developing a critical understanding about social and economic rights and their implementation.

The modus operandi of the Commission in discharging its constitutional mandate to monitor and assess the observance of economic and social rights has in the main focussed on requiring organs of state to report to us on measures they have taken. This continues to pose several challenges, namely: to ensure that organs of State submit to the Commission reports that are timeous, accurate and of good quality . We are pleased that good progress has been made on this front over the past year and the process of presenting draft reports to organs of state and civil society for comment has been most valuable to the Commission in finalising this report .

The launch of the 4th Economic and Social Rights report in April 2003 generated considerable interest and much debate and discussion on the Report ensued. We were invited by numerous parliamentary portfolio committees from the National Assembly and National Council of Provinces to present the Report. We certainly found the

engagement with Parliament a very useful and mutually rewarding exercise. It provided the Commission with a unique opportunity to share its thinking and vision around its work with Parliament while it enables us to better understand Parliament's expectation of the Report and its use to them as a tool in their work. There have been numerous valuable recommendations that have emerged from our presentations to Parliament which we are committed to giving effect to from our side.

So as we commence the beginning of the 2nd decade of our democracy the delivery of social and economic rights become crucial to the ongoing success of our nation and the entrenchment of a culture of human rights. It is certainly our hope, and the intention of this Report, to contribute to ensuring that the promise and the vision underpinning our Constitution is shared and enjoyed by all in our country.

Jody Kollapen

Chairperson - South African Human Rights Commission

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INTRODUCTORY SECTION

The aim of the *Introductory Section* is to provide an outline of the common analytical framework used in the reports, briefly discuss the political and economic context of the year under review, and provide an integrated summary of the key findings and recommendations of all eight reports in the series. Details of the report production process are also included at the end of this introduction.

The 5th Economic and Social Rights Report follows a more user friendly format than previous reports. There are now separately bound, less bulky, reports on Land, Water, Environment, Food, Health, Social Security, Education and Housing. Each report has an executive summary to facilitate access to the main findings and recommendations. Issues that connect one right to another are highlighted in the body of each report to emphasise the interrelatedness and interdependence of the rights in the Bill of Rights of the Constitution of the Republic of South Africa Act 108 of 1996 (simply referred to as the Constitution throughout the reports).

A) Analytical Structure and Framework

Each report in this series follows a basic structure:

1. **Introduction:** a discussion of the meaning and content of the right with reference to the Constitution, case law and relevant international human rights instruments.
2. **Progress in the realisation of the right:** a factual description of measures instituted by government during the period under review and their impact, especially on vulnerable groups.
3. **Challenges for the realisation of the right:** a description of key challenges that hamper the realisation of the right, and in some cases, government's response to these challenges.
4. **Critique of measures instituted:** a consideration of some of the shortcomings of the measures instituted by government.
5. **Recommendations:** a set of recommendations that may encourage progressive realisation of the right as expeditiously as possible.¹

Each report consolidates information from various sources including: relevant government protocol responses, government Annual Reports and Strategic Plans, the Intergovernmental Fiscal Review, as well as research funded by government, international donors or other agencies.

¹ Some reports in the series end with a conclusion.

All reports employ the standard of reasonableness as laid down in the *Grootboom*² and *TAC*³ judgements of the Constitutional Court, in conjunction with relevant international human rights instruments.

The constitutional provisions pertaining to socio-economic rights require the State to “take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of [these rights]”.⁴ This requirement, read with the provision on the obligation of the State to “respect⁵, protect⁶, promote⁷ and fulfil⁸ the rights in the Bill of rights” in section 7(2) of the Constitution ensures an effective guarantee of socio-economic rights in South Africa. The judicial enforcement of these rights by the courts and the constitutional mandate of the South African Human Rights Commission to monitor and assess the observance of the rights by the State⁹ and non-State entities also contribute to the effectiveness of the constitutional guarantee of these rights.

The Constitutional Court has played a significant role in ensuring the effective guarantee of socio-economic rights in our country. On the obligation of the State, Judge Yacoob held in the *Grootboom* case:

*The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.*¹⁰

On the effective guarantee of basic necessities of life for the poor, Judge Yacoob further said:

2 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC)

3 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)

4 See sections 26(2), 27(2) and 29(2) of the Constitution.

5 Respect is a negative obligation, which requires the State to refrain from denying or limiting equal access for all persons to the enjoyment of the rights. This also means that the State should abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure which violates the integrity of the individual or which in any way interferes or limits his/her right to pursue the enjoyment of the rights in the Bill of Rights.

6 The obligation to protect places a positive obligation on the State to prevent the violation of any individual's rights by a third party.

7 The obligation to promote places a positive obligation on the State to create a conducive atmosphere in which people can exercise their rights and freedoms by promoting awareness of their rights through public education.

8 The duty to fulfil places a positive obligation on the State to institute active measures that enable each individual to access entitlements to the right and which cannot be secured through exclusively personal efforts. State parties are also obliged to provide a specific right when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. e.g. people in disaster situations or those in dire need.

9 See sections 184(1) and (3) of the Constitution.

10 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC) [24]

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.¹¹

On the role of the courts in ensuring that the State fulfils its role in giving effect to these rights and thus ensuring that there is an effective guarantee of these rights, Judge Yaccob said:

I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.¹²

A similar position was taken by the Constitutional Court in another seminal judgment, *Minister of Health and Others v Treatment Action Campaign and Others*, where the Court held:

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflicts our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.¹³

In outlining the role of the courts, the Court also stated:

The primary duty of courts is to the Constitution and the law...Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to do so.¹⁴

While there might be some criticism directed at the Constitutional Court pertaining to the determination of when there are no available resources for the State to fulfil its obligation pertaining to socio-economic rights, the courts, particularly the Constitutional Court, have and will continue to play an important role in ensuring that the provisions in the Bill of Rights are effectively guaranteed for our people.

¹¹ Ibid., [93]

¹² Ibid., [94]

¹³ *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) [36]

¹⁴ Ibid., [99]

B) The Political and Economic Context of the Year Under Review

The period under review, 1 April 2002 to 31 March 2003, followed the 11 September 2001 attacks and a 24% depreciation of the South African currency (Rand) near the end of 2001. Consumer Price Inflation, especially for goods and services bought predominantly by the poor, increased sharply to the highest level since 1994. Concerns were signalled to the Competition Commission about the impact of import parity pricing in several sectors of the economy, most notably in food production, processing and retailing as well as metals and engineering. Interest rates were raised in an attempt to curb inflation, with a subsequent dampening effect on the rate of economic growth in the latter part of the financial year. According to the Reserve Bank Quarterly Bulletin for March 2003, economic growth stood at a robust 3% in 2002.

As a result of prudent fiscal management, the government introduced a more expansionary Budget in February 2002. Total government expenditure increased from R262,6 billion in 2001/2002 to R291,8 billion in 2002/2003. Overall, the budget directed more resources towards reducing poverty and vulnerability, improving education and training, developing skills amongst the youth, building and enhancing physical infrastructure and basic municipal services, as well as making communities safer places to live, work and play.

It is also important to note that the February 2003 Budget provided for significantly greater expenditure than the previous year. Total expenditure was R331,7 billion for 2003/2004. The additional allocations accommodated substantial policy changes for all three spheres of government and also provided for *higher than anticipated inflation in 2002*.

By the end of the reporting period in March 2003, the Rand had appreciated by 18%. This created concern about the job losses that could arise out of an increase in import competition. Therefore, during the period under review, the goals of progressively realising economic and social rights took place in the context of significant macro-economic volatility, inflation and an expanding government budget.

C) Key Interrelationships Amongst Economic and Social Rights

The Right to Land

The State was responsible for achieving progressive realisation of the right to land during the reporting period. The Commission demonstrates that there was a year on year improvement in land delivery performance by the State, especially through the Land Restitution and Land Redistribution sub-programmes. Improvements in rural tenure reform were less noticeable.

Between 2000 and 2001 there were 12 094 settled Restitution claims, while in February 2002 there were approximately 32 000 settled claims. By March 2003, there were 36 488 settled claims recorded. Although the majority of these claims were in the urban areas, settled rural claims show a substantial increase. The people working on the Land Redistribution for Agricultural Development sub-programme delivered 103 682 ha against a target of 81 555 ha for the year under review. Whereas the Department had targeted to benefit 3 601 people, the programme ended up benefiting 6 170. Concerning

tenure reform, the State initially delivered 30 000 ha of land through 201 projects. Beyond that, the State is working towards bringing the Extension of Security of Tenure Act (ESTA) and Labour Tenants Act (LTA) together in the Consolidated ESTA/Labour Tenants Bill.

Throughout the report, the Commission reflects on the demand, voiced by landless people and others, that the pace of land redress is too slow and inattentive to vulnerable groups. The report recommends accelerating land reform to meet its new targets by relieving budgetary constraints and the associated problems of personnel shortages, lack of quality training and understandable communication; land acquisition; and improvements in monitoring and evaluation.

The Commission would also like to highlight that it was informed by the Department of Land Affairs that it was impossible to represent the racial and gender composition of land purchase transactions and reposessions, according to the size and value of land parcels.

The Right to Education

The right to education is analysed as a continuum of three bands of schooling- General Education and Training, Further Education and Training and Higher Education and Training. The State instituted measures to respect, protect, promote and fulfil the right to General Education and Training, and in the Commission's overall assessment, it succeeded in achieving progressive realisation of this right.

The Department of Education succeeded in ensuring that all targeted Early Childhood Development sites for children between the ages of five and six were operating. However, the Department acknowledges the challenge, which has budgetary implications, that only 13% of all children have access to the programme. In the context of a substantial increase in the rate of student enrolment in primary schools between 1994 and 2001, the National Department focused on further increasing access to General Education and Training through reviewing public school financing and the system of school fee exemptions. The report highlights the shortcoming that some schools and Provincial Departments of Education failed to make parents aware of the school fee exemption.

While progress was made in eliminating instances where learners are forced to receive education in environments that are not conducive to teaching and learning, the report emphasises that more needs to be done to address infrastructure backlogs, especially when it comes to water and sanitation. The Department also made progress in developing a redistribution model for personnel and operating expenditure that would achieve equality of teaching quality and equality of learning outcomes in the schooling system from 2003/2004 onwards. All stakeholders in education, including the SAHRC need to explore and come up with a definition of quality basic education which could be measurable and relatively easy to monitor.

Conditions in farm schools were identified as hinderance to progress in the realisation of the right to General Education and Training. The issue of street-children also has to be given some serious attention by all the relevant stakeholders. Amongst other recommendations to further observance of the right to General Education and Training,

the report calls for better-published medium term strategies and improved spending on Adult Basic Education and Training. In the 2001 Census, 4,5 million people aged 20 years and older did not have a formal education and 4 million people had primary schooling only.

Most of the developments in the Further Education and Training band met the Constitutional requirement to respect, protect, promote and fulfil the right. *Dinaledi*, the programme that seeks to improve participation and performance of learners from historically disadvantaged backgrounds in Mathematics, Science and Technology (MST), reportedly surpassed its target of 10% of students enrolling for MST in its first two years of implementation. The development of Recognition of Prior Learning (RPL) is another development that contributes to the realisation of the right to Further Education and Training. RPL recognises non-formal and/or non-academic education. RPL also stands to maximise learning opportunities for those without formal and/or academic qualifications to acquire formal qualifications in Further Education and Training institutions, which must all be registered with the State.

Areas where the State fell short of its obligations to progressively realise the right to Further Education and Training include: insufficient public education on school fee exemptions and insufficient Learner Support Materials and/or their late delivery. The report also highlights that participation rates in education by girl learners were being negatively affected by girls' involvement in income generating activities.

While Higher Education and Training is not explicitly recognised as a right in the Constitution, it obviously depends on the learning outcomes achieved in General and Further Education and Training. Here, there seems to be room for improvement as the average graduation rate for university and technikon students is 15%; less than half the ideal average of 33%.

Key challenges associated with the Higher Education and Training band include assisting potential students with subject selection choices and career guidance at school and university level, as well as lowering the high costs of accessing higher education and applying to different tertiary institutions. The report recommends ensuring that admission requirements to tertiary institutions are transparent and fair, promoting indigenous languages as academic/scientific/legal languages, mobilising funds for bridging courses and improving access for mature and post-graduate students, including part time students.

The Right to Water

Ever since 2001 and the introduction of Regulations Relating to Compulsory National Standards and Measures to Conserve Water, the State instituted a national measure to fulfil the right to water by supplying 6000 litres of free, clean water, per household per month, otherwise known as Free Basic Water.

During the reporting period, approximately 1,6 million people gained access to improved piped water supplies through Department of Water Affairs and Forestry's Community Water Supply and Sanitation Programme. Approximately 65 thousand toilets facilities were constructed during the reporting period under the same programme, but it should be noted that these figures exclude the large number of

sanitation facilities that were delivered as part of the State's housing programmes. Less than 530 000 households also benefited from water and sanitation projects through the Department of Provincial and Local Government's Consolidated Municipal Infrastructure Programme. Although the above indicates that the roll-out of water and sanitation infrastructure is proceeding towards the Department's medium delivery targets, the report raises concerns about the level of dysfunctional infrastructure and projects, especially in rural areas.

At the end of the reporting period in March 2003, access to Free Basic Water by poor people stood at 38% or approximately 12,2 million people. Access to Free Basic Water by non-poor households stood at close to 100% or approximately 14,2 million people. A large number of poor people (19,6 million) were still to receive their Free Basic Water allocation. Where Free Basic Water was not available, the average cost of 6 kilolitres (kl) was approximately R13 per month. The price for 6kl of life-line supply was highest in Limpopo province at approximately R19 per month. Gauteng and KwaZulu-Natal also had comparatively high average charges for life-line supplies where Free Basic Water services were not operational.

In order to remove these glaring inequities in Free Basic Water provision, the report calls for an urgent revision of the pricing system to include a significantly greater level cross-subsidisation from high volume water users to low volume users in the 0-6 kl range. More support and funding is required to assist municipalities with capacity problems in implementing Free Basic Water. During droughts, local governments should ensure that Free Basic Water supplies for domestic users are assured and that a situation cannot develop where agricultural, mining and industrial users are allocated large volumes of water at similar prices to low-volume users.

The report describes some aspects of the devolution of domestic water quality monitoring and testing from Provincial Departments of Health to local municipalities and calls for rapidly providing sufficient funds for water quality monitoring to prevent serious disease outbreaks and illness.

The report recommends that the Department of Water Affairs and Forestry (DWAf) should take a leading role in making sure that farm dwellers, residents near commercial farms and poor households in rural and urban areas access clean water and proper sanitation services. DWAf should also ensure that it develops and implements a plan to address the specific problems of water access experienced by people living with HIV/AIDS.

The report suggests that monitoring bodies should be created at local level to effectively monitor the implementation of policies and laws aimed at fulfilling the right of access to water. The report warns that monitoring will only be effective if monitoring bodies from local, regional and national spheres work together. Where possible and when possible, the Free Basic Water allocation should be increased to cater for higher levels of domestic water consumption. A 50kl water allocation per household per month would bring South Africa's Free Basic Water allocation into the 'low level of health concern' range defined by the World Health Organisation.

The Right to Health Care

The report on the right to health care focuses on key developments in three key health programmes of the State (Health Service Delivery, Strategic Health Programmes and Administration). Although the policy and legislative measures developed in the fiscal year under review can be said to be “reasonable” in their conception, there remain large gaps in implementing them in a manner such that all the provinces, urban and rural peoples, rich and the poor have equal access to the same high quality of care.

The three most important, and universally acknowledged, indicators to measure the health status of a nation are Life Expectancy at Birth, the Maternal Mortality Ratio, and the Infant Mortality Rate. Life expectancy has fallen from 56 years in 1996 to 52,5 in 2002 and is projected to fall to 47 by 2005. The infant mortality rate has increased from 45 in 1998 to 59 in 2002. This means that more children under the age of one died in 2002 as compared to 1998. The under five-mortality rate has risen from 61 in 1998 to 100 in 2002. Similarly, the maternal mortality ratio shows a steady increase since 1998 and is estimated to be 150 per 100 000 live births. The National Department of Health, as well as independent researchers, have concluded that this is due to HIV/AIDS related deaths.

The single most important challenge that government faces is the one posed by the AIDS pandemic and the high incidence of opportunistic diseases such as tuberculosis. It is estimated that about one tenth of the population of the population is infected with the HI virus i.e. close to 5 million people. The number of AIDS orphans is estimated to be one million. In a landmark case instituted by Treatment Action Campaign against the Minister of Health, the Constitutional Court, in 2002 confirmed the finding of the High Court that government’s policy to limit Nevirapine to research and training sites was in “breach of the States obligations under section 27(2) read with 27(1)(a) of the Constitution.” The report recommends that the Comprehensive National Aids Plan should be rolled out effectively in all the provinces so as to meet targets and timelines in order to substantially reduce new infections and to prolong the lives of those already infected.

In spite of the fact that policies and programmes directed at improving the health status of the country have been put in place such as the Integrated Management of Childhood Illnesses, the AIDS pandemic continues to be the single most cause of death in South Africa. This has placed an enormous strain on an already overburdened health system and undermines the efforts made by the State. This is compounded by the fact that the other economic and social rights, which contribute substantially to the health status of a nation, are also not fully enjoyed by the vast majority of poor South Africans due to the huge backlogs inherited from the past. Inadequate housing, poor sanitation, overcrowding, lack of clean drinking water, lack of efficiently run social services, insufficient nutrition and health education exacerbate the diseases of poverty. Moreover, a household that is affected by AIDS contributes to depleting the financial resources available to the family, thereby increasing the level of poverty.

government developed legislative and other measures to comply with its constitutional obligations in terms of section 7(2) of the Constitution. However, despite national policies and programmes, which, in the main comply with international standards and targets, the health care system has not been able to successfully deliver quality health

care on an equitable basis in all the provinces. Provinces do not spend the same amount per capita on health care delivery, and there is a serious lack of managerial capacity in the health system. The biggest challenge facing the efficient running of the health system is training managers to operationalise efficient systems especially for running clinics and hospitals where many problems have been identified. Efficient management systems in conjunction with effective engagement with labour should be operationalised with immediate effect in the public health sector so as to ensure that hospitals and clinics run well.

The report also recommends that there is a need to increase efforts in promoting preventative health measures by the State as well as by non-state actors. Programmes and policies should also be put in place to address the needs of the poor and vulnerable members of society, including a National Health Insurance System. Inequities in the health system such as intra- and inter-provincial health expenditures, access to clinics and hospitals, number of doctors, specialists, and nursing staff need to be addressed so as to give meaning to the constitutional right to universal and equal access to everyone. Finally, Departments of Health are strongly advised to improve their monitoring, evaluating, and reporting systems

The Right to Social Security

The Constitution provides that everyone has a right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The number of social assistance beneficiaries increased dramatically by 966 311 people from April 2002 to the end of March 2003, mostly as a result of increased registration for Child Support Grants for children up to the age of seven. By the end of March 2003, 5,6 million people were beneficiaries of social assistance, which mostly comprised of child support grants (2,5 million people), old age pensions (2 million people), disability grants (897 050 people) and foster care grants (133 309 people). The most rapid increases in uptake of social grants took place in Gauteng, Free State, KwaZulu-Natal, Mpumalanga and Limpopo. Take up rates were considerably lower in the Northern Cape, North-West, Eastern Cape and Western Cape.

Most provincial departments indicated that the allocated budget was not enough and that numbers of grant beneficiaries were constantly increasing, resulting in overspending for social security. However, the delivery of social services has not been efficient in some parts of the country as a result of administrative problems, lack of documentation as barriers to accessing grants, poor conditions at pay points, as well as corruption and maladministration.

As a result of rapid inflation in the cost of basic goods bought by the poor, in 2002/2003, the State moved swiftly to implement above inflation related increases in social grants. The old-age pension was increased by R20 to R640, the child-support grant increased by R10 to R140, the grant in aid increased from R120 to R130, the foster-care grant from R450 to R460, and the care dependency grant from R620 to R640.

The National and Provincial Departments of Social Development spent 90% of the R49 million allocated to the HIV/AIDS (home based/community based care) programme. The Home/Community Based Care programmes, through the collaborative work of

government, non-governmental organisations, including faith-based organisations, and communities have benefited 29 612 children orphaned or vulnerable to HIV/AIDS by the end of March 2003. The programme reached 75 000 children orphaned or vulnerable owing to HIV/AIDS since its inception in 2000.

The State also instituted new measures to further the right to social security, including disability assessment panels, a social relief of distress policy and the implementation of the National Food Emergency Scheme/Programme. Figures of the number of households that were assisted with food parcels in the pilot phase of the National Food Emergency Programme from December 2002 to the end of March 2003 range from 60 089 to 149 779.

The social security system at present does not cater for everyone and not everyone in need of social assistance is afforded such assistance. This is especially so for children in child headed households and children who live in the streets who sometimes engage in exploitative forms of labour. Some parents also fail to provide and take care of their children and put strains on the maintenance and social assistance systems.

The report recommends that the Department of Labour should take the International Labour Organisation's Decent Work for All Strategy forward in South Africa. It is also recommended that the relevant organs of State achieve better regulation of the insurance, health and maintenance systems. Particular attention should be paid to the coverage of old age pensions for workers in non-formal employment. The Department of Social Development is encouraged to continue fostering collaboration with all stakeholders, such as other government departments, Faith Based Organisations and Non-Governmental Organisations. The Basic Income Grant should continue to be considered as a viable option for addressing poverty in the country, especially amongst people of working age. The proposal to extend social assistance to all children in need (up to the age of 18), should also be kept alive.

The Right to Food

The report concludes that many people, and children in particular, had their right to food violated during the reporting period as they lost access to affordable food due to high prices and/or unreasonable plans devised and supervised by government. During the reporting period, 101 152 children were admitted to hospital with severe malnutrition and it was not possible for the Commission to state how many children died of malnutrition. However, it is alarming that case fatality rates for severe malnutrition in two under-resourced hospitals in the Eastern Cape ranged from 21% to 38%.

The report finds the National Department of Health's targets for reducing malnutrition to be unreasonable in their conception because the targets for 2000 and 2005 were virtually identical. The report also finds two elements of the Primary School Nutrition Programme to be unreasonable in their conception.

The first issue concerns the reduced allocation of resources to the programme in 2002/2003 as compared to 2001/2002. In 2001/2002 the total cost of the school food "meal" ranged from approximately 99 cents to R2.10. In 2002/2003, the maximum budgeted resource available per targeted learner per day was less than 67 cents. This is

clearly an unreasonable set of parameters for the programme to be improved to meet the higher standards set by Cabinet.

The second element of the programme that was unreasonable was the reduction in the targeted number of children who should benefit from the programme. In the context of increasing numbers of children enrolled in schools, the Primary School Nutrition Programme did reach 4,5 million children in grades R to 7, however this was 151 615 children less than the year before. The drop in the number of learners who were reached is connected with government reducing its target from 5,4 million learners in 2001/2002 to 4,9 million learners in 2002/2003 as well as rapid increases in the cost of food procured for the programme. A three month gap in the implementation of the programme in the Eastern Cape also reduced access to the programme.

Non-State actors appear to have fallen short in their observance of their positive obligations to fulfil the right to food. As one example, the Yiyo Lena sifted maize relief programme introduced by a group of companies is alleged to have sold relief maize packs at a 20% discount, despite that fact that the companies announced that the programme would entail a 50% discount.

High basic food prices during the reporting period, were partly attributable to inadequate safeguards on the South African Futures Exchange, where maize prices are formed. High prices for maize were passed on to low-income consumers, who could ill afford such dramatic basic food price increases for such a sustained period of time. The potential for market manipulation should have been prevented by the Johannesburg Securities Exchange when allegations of abuse were first signalled in 2002. The report identifies that there are weaknesses in the State's observance of its obligation to protect against fraud, unethical behaviour in trade and contractual relations.

There were some signs of improvement in the State's delivery of production support to emerging farmers and people who grow their own food. For example, the Comprehensive Farmer Support Package was instituted during the reporting period to assist land reform beneficiaries. However, it was implemented in some provinces only.

The LandCare programme, which is one of the major production support programmes from the National Department of Agriculture, was heavily underspent at 65% of the total conditional grant to provinces. There is also a significant gap in production support for rural restitution beneficiaries.

It was found that very few Provincial Department's of Agriculture were operating well funded programmes designed specifically to provide grants or revolving loans to support increased access by small scale and emergent farmers to production and/or marketing related infrastructure. Production support materials and learning support materials that are relevant to resource to poor farmers in water scarce areas were also not readily available.

On the whole, the report determines that the State absorbed the heavy burden of duty to achieve the progressive realisation of the right to food as expeditiously as possible, within its available resources. However, there was a crucial weakness in the measures to protect the right to food from being violated by non-State actors or third parties that need not be repeated in future.

The report suggests that there is a need for greater care in the preparation of strategic and financial planning targets so that they inspire civil society to marshal their resources in support of the progressive realisation of the right. The report recommends: public education to raise awareness of malnutrition, rolling out the Integrated Food Security Strategy at a provincial level, improving food safety, achieving better regulation of the food industry through State procurement, accelerating agrarian reform, and communication policy and legislative developments more effectively. Finally, the report supports the call for government, labour, community and business representatives to negotiate an agreement at the National Economic Development and Labour Council (NEDLAC) to ensure the right to food and quality job creation in the food industry.

The Right of Access to Adequate Housing

In order to fill some gaps in the housing policy framework, the State identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities for 2002/2003. Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to transport and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualised as a result of the *Grootboom* judgment and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control (e.g. disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety). The report highlights that it was not clear whether the Emergency Housing Policy should also cover people living in informal settlements, because they are living in intolerable circumstances. Social Housing projects demonstrate that socially, environmentally and sunshine conscious design principles can make a difference to the quality of State subsidised housing.

The State reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from Occupation of Land Amendment Bill and the commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000. With a view towards curbing discriminatory practices, the Act compels financial institutions to disclose information in their financial statements on home loan patterns according to categories of persons and geographic areas (both of which may be prescribed). The Community Reinvestment Bill confirmed the State's intention to increase private sector investment in the lower end of the housing market. The report highlights that the State was also attending to some aspects of the Housing Act 107 of 1997, as amended, in order to ensure that the Act, and its implementation, did not violate an individual's right to property in terms of the Constitution.

In terms of on-going policies and programmes, in 2002/2003, the State reported 203 288 houses completed or under construction, whilst the State approved 519 498 subsidies to households with a joint monthly income less than or equal to R3 500, or R1 500 if the house was built under the apartheid system. By the end of 2002/2003, the State reported that over 1,4 million houses had been delivered since 1994, whilst the number of families without houses (i.e. dwellings in backyards, informal dwellings, backyard dwellings in shared properties and caravans/tents) was reflected as 2 399 825- from the 2001 Census. The State also increased the subsidy amounts for the housing programme to keep pace with inflation and maintain the well-known quality and size of housing. Sixty-three projects were also completed as part of the Human Settlement Redevelopment Programme in order to correct imbalances and dysfunctionalities in

existing settlements that cannot be funded through the housing subsidy scheme (e.g. sports facilities, business hives, labour exchanges, cemeteries, parks and ablution blocks).

There was under expenditure on housing delivery amongst many provincial departments responsible for housing. Reporting on the constraints associated with underspending was not complete, but included the following in some cases: failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in the National Department approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the People's Housing Process and delays at the Deeds Office.

Comparing performance in relation to targets was a problem in that provincial information was reported in the format of the number of units completed *or* under construction. Nevertheless, Gauteng and Limpopo provinces stand out as the only provinces to show a reduction in units, whether complete or under construction, from 2001/02 to 2002/03. The Gauteng Department of Housing reported delivering 59% of the target in the incremental housing programme and 39% of the target in the Social Housing programme. A Customer Support Service in the province acknowledged 83 714 queries and responded to a further 11 774 by letter.

According to the National Department of Housing, in 2002/2003, 6 469 houses did not conform to the Department's construction and safety standards. The National Home Builders Registration Council's (NHBRC) Warranty Scheme was instituted to provide assurance to beneficiaries that houses built and financed through the housing subsidy scheme are of an adequate quality. After trying to resolve disputes about the quality of construction, a housing subsidy beneficiary can forward complaints to the NHBRC. However, the report highlights that public education is required to empower consumers to identify quality problems and make use of the complaint procedures of the NHBRC. The Mpumalanga Department of Housing also reported that building works inspectors from provincial government and local government monitored the work of contractors.

The report makes one urgent recommendation, namely: to establish the dedicated fund for acquiring well-located land for low-cost housing. Other recommendations include reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, interpreting the Peoples' Housing Process as a route for strengthening culturally adequate housing, creating an informed and supportive environment for whistleblowing, and ensuring effective participation in the delivery of housing. Specific attention is drawn to the plight of farmworkers and vulnerable groups, especially HIV/AIDS orphans and People with Special Needs.

The Right to a Healthy Environment

Section 24 of the Constitution establishes the right to environment in order to ensure the health and well-being of present and future generations. At its core, the right to environment aims to grant this benefit to everyone in South Africa, not just to the few. Although, translating this vision of the benefit of environmental health into reality has become increasingly complicated, ensuring that there are no violations of this right is as urgent as any violation of other rights in the Bill of Rights.

Analysts of data from South Africa's Global Atmosphere Watch station at Cape Point contend that continued emissions of greenhouse gases are cause for concern. Like many countries, South Africa is sensitive to global climate change and there are also occasions, especially in major urban areas, when more localised air pollution becomes a health threat.

By way of illustration, the Johannesburg *State of the Environment Report 2003* indicates that “while in many parts of Johannesburg, air quality is within acceptable standards, approximately 20% of the City, particularly dense settlements and lower income townships, experience severe air pollution, with ambient air pollution levels exceeding acceptable guidelines by approximately 20-30% particularly during winter when temperature inversions prevent emissions from dispersing.” The report goes further to state that “levels of particulate matter in certain townships can exceed the World Health Organisation standards by as much as 250% in winter.”

Progress in the realisation of the right to environment could not be very well monitored and observed by the Commission during the year under review because annual progress reports in terms of section 11 of the National Environmental Management Act 107 of 1998, were inaccessible at the time of writing. These progress reports should contain detailed information on the implementation of measures instituted to ensure the right to environment.

Nevertheless, the Commission did observe the growing influence of the Committee for Environmental Co-ordination through an interpretation of its review, and subsequent consolidation, of Environmental Implementation Plans and Environmental Management Plans submitted by relevant organs of State. These reports contain the planned and *aligned* outputs of national and provincial departments with an impact on, or management function over, aspects of the right to environment. The Commission also recognises that some Environmental Co-ordinating Committees were established at the provincial sphere, also for the purposes of alignment and co-operative governance.

Progress has been made, through the courts and other avenues, towards realising the procedural aspects of the right to environment (access to information, participation in decision-making processes, redress and remedy). The report includes several examples of objections and court applications lodged by Non-Governmental Organisations, with a view towards safeguarding environmental health in low-income areas. Despite these opportunities to access information and participate in decision making, some remedies for old violations could not be realised without concerted action on the part of the State. One example, is the case of workers with mercury poisoning, which first occurred many years ago. In March 2003, Thor Chemicals was served with a R60 million toxic chemical clean-up directive by the State.

On the substantive issue of waste management and pollution control, what was reported by government to the Commission fell short of what was expected in terms of the strategic objectives of the policy and strategy for pollution and waste management. The report highlights that there is still no clear understanding among the different mandate holders for this function of what they are required to do and as a result, implementation was not as effective as it could be. Having said this, there were positive developments during the period under review, including the introduction of waste buy-back centres

which address brown issues and could assist in strengthening the bargaining power of the very low income people who do the hard work of collection.

On the issue of Air Quality, the report acknowledges that progress was made in the Southern Industrial Basin through the focused action of the State and Community Based Organisations (CBOs) in linking asthma in school children to emissions, however there is an urgent need for national legislation to institute mechanisms and standards to effectively protect against pollution that threatens health and well-being, possibly including pollutant release and transfer registers.

Several new control measures were introduced to manage water pollution, including the second draft of the National Water Quality Management Framework Policy and the Waste Discharge Charge System. The Working for Water programme succeeded in protecting and preventing against water loss due to alien invasive plant species, however it was not clear how much of this work focused unfairly on commercial farmlands and not on areas inhabited by vulnerable sections of the population.

Most of the work by the State on inland as well as marine and coastal biodiversity and conservation was reasonable in as far as it related to tourism and the economic development of the country.

The report highlights that the challenges facing South Africa in terms of the right to a healthy environment include: allocating sufficient resources for progressive realisation of the right for the benefit of vulnerable groups; educating and training communities; ensuring that proper implementation systems are in place; ensuring effective co-operative governance; operating proper monitoring and evaluation systems.

The report recommends that while most policies and laws are in place or about to be instituted, there should be a quantum shift in focus towards implementation of measures to further the right to environment for vulnerable groups in a more decentralised way. Provincial government and local government should be resourced to concentrate their energies on implementation, in association with community based organisations that have already developed innovations to further the right, sometimes in the face of extreme resource scarcity.

The State has made valuable contributions to promoting the right to environment through for example, the “Bontle ke Batho” or the clean schools, wards and towns campaign; however, organs of State could do more to ensure that their own internal operations reflect implementation of the right to environment. For example, the Council for Scientific and Industrial Research (CSIR) implemented International Standards Organisation 14001 standards for handling and disposing of its own hazardous waste. This initiative by an organ of State seems to have afforded the CSIR the opportunity to gain some capacity and insight, which could be applied to other relevant contexts in the public or private sector within the South Africa.

The report also recommends that monitoring and evaluation systems need to be simplified where possible and improved. Annual progress reports in pursuit of targets and plans laid down in Environmental Implementation Plans and Environmental Management Plans should include a focus on the substantive aspects of the realisation of the right for vulnerable groups. The contents of the reports should also be widely

communicated so as to avoid conflict and encourage effective participation. The Committee for Environmental Co-ordination could also be complemented by the National Environmental Advisory Forum (NEAF) envisaged in the National Environmental Management Act 107 of 1998. This provision to encourage participation should be effected without delay.

D) Protocols and the Report Production Process

The production process for this report began with the SAHRC sending questionnaires, which are called protocols, to various organs of State for their comment in May 2003. The Commission then took some time to revise the protocols, which were resent to all relevant organs of State for comment and suggestions in June 2003. The response from relevant organs of State was not satisfactory; with the Department of Housing (Gauteng Province), the Department of Land Affairs and the Department of Water Affairs and Forestry being the only organs of State to respond. However, the Commission acknowledges that further work is required, in the next reporting cycle, to ensure that the protocols are improved for all spheres of government and parastatals.

The final protocols were sent to various organs of state (national and provincial government, parastatals, metropolitan and local councils) in July 2003, as mandated by section 184(3) of the Constitution. In future, the Commission will pay more attention to smaller municipalities by focusing field research on the implementation of programmes and projects at a local level.

The first deadline for the release of this Report was in December 2003. However, the Commission had major problems in getting timeous responses from organs of State and as a result, the Commission took a decision to subpoena several departments and postpone the release of the Report until sufficient information had been received (see summarised list overleaf).

SPHERE	INSTITUTION	DATE RESPONSE RECEIVED
2 - Provinces	GAU Social Services and Population Development	August 21, 2003
1 - National	NATIONAL Labour	August 29, 2003
2 - Provinces	EC Health	August 29, 2003
2 - Provinces	WC Agriculture	August 29, 2003
2 - Provinces	LIMPOPO Agriculture and Environmental Affairs	August 31, 2003
2 - Provinces	FS Health	September 1, 2003
2 - Provinces	NW Health	September 1, 2003
2 - Provinces	WC Social Services	September 1, 2003
2 - Provinces	EC Education and Training	September 5, 2003
2 - Provinces	GAU Health	September 5, 2003
2 - Provinces	KZN Agriculture and Environmental Affairs	September 9, 2003
4 -Parastatals	PARASTATAL Rand Water	September 9, 2003
2 - Provinces	KZN Traditional and Local Government	September 10, 2003
2 - Provinces	MP Local Govt and Traffic	September 10, 2003
2 - Provinces	NW Education	September 10, 2003
1 - National	NATIONAL Land Affairs	September 12, 2003
2 - Provinces	FS Social Welfare	September 12, 2003
2 - Provinces	GAU Housing	September 12, 2003
2 - Provinces	NC Health	September 12, 2003
2 - Provinces	NC Social Services and Population Development	September 12, 2003
1 - National	NATIONAL Agriculture	September 15, 2003
1 - National	NATIONAL Water Affairs and Forestry	September 15, 2003
2 - Provinces	EC Agriculture and Land Affairs	September 15, 2003
2 - Provinces	FS Education	September 15, 2003
2 - Provinces	GAU Education	September 15, 2003
2 - Provinces	MP Housing and Land Administration	September 15, 2003
2 - Provinces	WC Education	September 15, 2003
2 - Provinces	WC Environmental Affairs and Development Planning	September 15, 2003
2 - Provinces	WC Health	September 15, 2003
2 - Provinces	WC Housing	September 15, 2003
2 - Provinces	NC Agriculture Conservation and Environment	September 15, 2003
2 - Provinces	KZN Health	September 16, 2003
1 - National	NATIONAL Education	September 18, 2003
2 - Provinces	MP Health	September 18, 2003
2 - Provinces	NW Agriculture, Conservation and Environment	September 23, 2003
2 - Provinces	MP Social Services and Population Development	September 25, 2003
3 -Metropolitan Councils	METRO Greater Tswane Metropolitan Council	October 2, 2003
3 -Metropolitan Councils	METRO Nelson Mandela Metro Council	October 2, 2003
1 - National	NATIONAL Correctional Services	October 3, 2003
1 - National	NATIONAL Social Development	October 3, 2003
2 - Provinces	LIMPOPO Health and Welfare	October 3, 2003
2 - Provinces	EC Social Development	October 3, 2003
1 - National	NATIONAL Health	October 10, 2003
2 - Provinces	GAU Agriculture, Conservation, Environment and Land Affairs	October 10, 2003
4 -Parastatals	PARASTATAL Medicines Controls Council	October 10, 2003
2 - Provinces	FS Local Govt and Housing	October 29, 2003
1 - National	NATIONAL Housing	October 30, 2003
1 - National	NATIONAL Provincial and Local Government	October 30, 2003
1 - National	NATIONAL Environmental Affairs and Tourism	October 31, 2003
4 -Parastatals	PARASTATAL Agriculture Research Council	October 31, 2003
1 - National	NATIONAL Minerals and Energy Affairs	November 3, 2003
2 - Provinces	KZN Education and Culture	November 3, 2003
2 - Provinces	EC Housing, Local Government and Traditional Affairs	November 4, 2003
2 - Provinces	GAU Development Planning and Local Government	November 4, 2003
2 - Provinces	LIMPOPO Education	November 4, 2003
2 - Provinces	MP Agriculture, Conservation and the Environment	November 4, 2003
2 - Provinces	NC Local Govt and Housing	November 4, 2003
2 - Provinces	WC Planning and Local Govt	November 4, 2003
4 -Parastatals	PARASTATAL National Education Financial Aid Scheme	November 4, 2003
2 - Provinces	NW Developmental Local Government and Housing	November 5, 2003
3 -Metropolitan Councils	METRO Eastrand Metropolitan Council	November 5, 2003
4 -Parastatals	PARASTATAL Umngeni Water	November 5, 2003
3 -Metropolitan Councils	METRO Cape Town Metro Council	November 6, 2003
4 -Parastatals	PARASTATAL Medical Research Council	November 6, 2003
2 - Provinces	FS Agriculture	November 7, 2003
2 - Provinces	KZN Welfare and Pensions	November 7, 2003
2 - Provinces	LIMPOPO Local Govt and Housing	November 7, 2003
2 - Provinces	MP Education	November 7, 2003
2 - Provinces	NC Education	November 7, 2003
4 -Parastatals	PARASTATAL National Housing Finance Corporation	November 7, 2003
2 - Provinces	KZN Housing	November 14, 2003
3 -Metropolitan Councils	METRO eThekweni Metropolitan Council	November 17, 2003
4 -Parastatals	PARASTATAL Landbank*	November 17, 2003
4 -Parastatals	PARASTATAL Council for Scientific and Industrial Council*	November 18, 2003
2 - Provinces	FS Environmental, Tourism and Economic Affairs	November 19, 2003
3 -Metropolitan Councils	METRO Greater Johannesburg Metropolitan Council	December 17, 2003
2 - Provinces	NW Social Services**	

_____ First deadline
 _____ Extended deadline
 _____ Subpoena hearings begin
 _____ Subpoena hearings end

* Extension granted as a result of communication problems
 ** No subpoena served, a letter explains the breakdown in communication

Most organs of State submitted their reports before they were meant to appear at a subpoena hearing. However, the North West Department of Social Services, Arts, Culture and Sport did not provide a response to the Commission as a result of problems with network cabling and the resignation of the personal assistant to the Acting HoD. The Department submits that it was not out of irresponsibility and deliberate disregard of the law that the Commission did not receive a report from the Department.

In order to improve the quality of the information, analysis and recommendations in the reports and to forge closer and better working relationships with government and non-governmental entities, a set of draft reports were released for comment to government and civil society before a National Input Workshop on 27-28 January 2004. Comments made at the workshop, and in writing, have been considered by each report writer.

A set of second draft reports were then made available to the Director General of the relevant national department in February 2003 to correct any remaining problems with factual information. Responses were received from the following departments: Water Affairs and Forestry, Minerals and Energy, Provincial and Local Government, Health, Social Development, Education, Land Affairs, and Housing. The final reports were also reviewed intensively within the Commission before being published.

E) Conclusion

One of the concerns acknowledged by the Commission about the monitoring process so far is that it still relies heavily on reports from government.

Furthermore, even though the Bill of Rights applies vertically and horizontally and binds State entities and non-State entities, the Commission has some capacity problems in extending its mandate to non-State entities, especially big corporations.

In the next reporting cycle, the Commission will place more emphasis on conducting its own primary research in addition to improving on the existing protocols for each right and making better use of annual report information as soon as it becomes available.

ACRONYMS

CDG	Care Dependency Grant
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of all Forms of Racial Discrimination
COIDA	Compensation for Occupational Injuries and Diseases Act
CPS	Cash Payment Services
CSP	Comprehensive Social Protection
CRC	Convention on the Rights of the Child
CRSS	Committee for the Reconstruction of Social Security
CSG	Child Support Grant
FBOs	Faith Based Organisations
FCG	Foster Care Grant
ILO	International Labour Organisation
IFSNP	Intergrated Food Security and Nutrition Programme
IPEC	International Programme on the Elimination of Child Labour
MDGs	Millenium Development Goals
NEPAD	New Partnership for Africa Development
NFES	National Food Emergency Scheme
NGOs	Non Governmental Organisations
PAFOD	Pan African Federation of Disabled Persons
PRSPs	Poverty Reduction Strategy Papers
SAHRC	South African Human Rights Commission
UIF	Unemployment Insurance Fund
WSSD	World Summit on Sustainable Development

EXECUTIVE SUMMARY - SOCIAL SECURITY

Constitutional Obligations

Social security has been defined as a public support measure to address the consequences of sickness, maternity, occupational injury, unemployment, invalidity, old age and death, if they arise. The strands of social security considered in this report are social insurance and social assistance. Social insurance is based on contributions from employees and employers whereas social assistance is non-contributory.

The Constitution provides that everyone has a right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Children have the right to basic nutrition, shelter, basic health care services and social services. The right of access to social security is guaranteed to everyone. The notion of access implies that everyone is entitled to an enabling environment, which obliges the State to take specific action to safeguard the right. A positive obligation is imposed on the State to take reasonable legislative and other measures, to achieve progressive realisation of the right within available resources.

In the final analysis social security embraces protection against damage, and inadequate standard of living and provides a social safety net against destitution. The South African social security system has, been fragmented and exclusionary. Social assistance is only afforded to the elderly; persons with disabilities and children but not all children in need of assistance are afforded such assistance. Social insurance is labour oriented and coverage is extended to those in the formal labour sector. People with no social protection fall easily into poverty traps.

Progress in the realisation of the right to social security

Respect

The State was successfully challenged in court over its failure to respect the right to social security in the *Mashishi* and *Sibuye* cases.

Protect

The Department of Labour enacted the Unemployment Contributions Act 4 of 2002 and the Unemployment Insurance Act 63 of 2001. Both statutes came into effect in April 2002.

The Department of Labour has to be commended for striving towards making the lives of the most vulnerable in our society better. The inclusion of domestic workers and other workers in the Unemployment Insurance Fund, followed by the wide promotion and publicity through various mediums as well as the

April 2002 – March 2003

constant inspection of workplaces in order to protect workers is an indication of the effective, reasonable and expeditious manner in which the department respects, protects, promotes and fulfils its constitutional obligation.

The Minister of Labour determined two sectoral minimum wages in terms of the Basic Conditions of Employment Act 75 of 1997 during the reporting period. The first determination was for domestic workers, which became effective from 1 September 2002. The second determination was for farm workers and became effective on 1 March 2003. A major consideration in making both determinations was the high level of exploitation of domestic workers and farm workers, especially in rural areas and provinces next to our South African Development Community neighbours.

Promote

The social relief grant and the grant in aid have not been adequately promoted by the State in its social grant awareness campaigns. The Child Support Grant has been widely promoted, and the collaboration of the Department of Social Development and civil society has to be commended in advancing the rights of all in dire need.

Fulfil

During the reporting period, the National Department of Social Development and the provinces developed Disability Assessment Panels, drafted a Social Relief of Distress Policy, introduced the National Food Emergency Scheme/Programme and conducted Social Grants Awareness and Registration Campaigns. The Department of Social Development further reviewed the 1992 Social Assistance Act Regulations.

R28 billion was spent on social grants during the reporting period (2002/2003). The Poverty Alleviation Programme had an allocation of R100 million to support 416 projects. The National Food Emergency Scheme was allocated R230 million. The Disaster Relief Fund was allocated R49 million and R48 million was allocated for the HIV/AIDS programme. Most provincial departments indicated that the allocated budget was not enough and numbers of grant beneficiaries were constantly increasing, resulting in overspending for social security. Although there are still eligible beneficiaries of grants who are not receiving such grants, the number of beneficiaries accessing social grants has increased tremendously.

The social security system at present does not cater for everyone and not everyone in need of social assistance is afforded such assistance. This however does not mean that government is not committed to the progressive realisation of the right to social security. Social assistance grants are afforded to a large number of people and the numbers continue to increase, the child support grant has been extended to children who would be aged 14 years in 2005/2006. In

addressing poverty and unemployment, government has committed itself to reduce poverty by 2015. The Umsobomvu Youth Fund was established to create jobs and develop skills amongst the youth and Community Based Public Works Programmes were introduced as a measure to create employment and alleviate poverty with special focus on women, persons with disabilities and the youth.

Overall assessment

It may be concluded that there has not been much emphasis on the protection, promotion or fulfilment of the right to social insurance. Social and labour legislation in South Africa is exclusively extended to those who qualify as employees, thus excluding various groups of atypical workers who fall short of the employee qualification.

Most vulnerable and marginalised people in South Africans are either unemployed or atypically employed and therefore not covered by the occupational based social insurance schemes. Joblessness has increased from 15% to 30% since 1995, and there has been a rapid fall in real incomes from work, which has pushed more people into the informal sector and casual labour, and unemployment. These groups of people are denied access to social security.

Social exclusion, poverty, unemployment and the HIV/AIDS pandemic are challenges for the realisation of the right to social security. Human and budgetary constraints continue to be challenges in the realisation of the right to social assistance. The delivery of social services has not been efficient in some parts of the country as a result of administrative problems, lack of documentation as barriers to accessing grants, poor conditions at pay points, as well as corruption and maladministration. Children in child headed households and children who live in the streets are not adequately catered for and some engage themselves in exploitative forms of labour. Some parents fail to provide and take care of their children and put strains on the maintenance and social assistance systems.

Recommendations

The SAHRC would therefore recommend the introduction of the ILO's Decent Work for All Strategy and the Basic Income Grant, affording all children social assistance, better regulation of the insurance, health and maintenance systems and fostering the continuation of collaboration with all stakeholders, such as other government departments, and FBO's and NGO's.

1 INTRODUCTION

1.1 Meaning and Content

The concept of social security and the obligation of the State to provide for social security is a new phenomenon. Previously, individuals and their families had to provide their own adequate protection against risks.¹ The term “social security” was first used in the United States (the Social Security Act of 1935), and this Act initiated programmes to meet the risks of old age, death, disability and unemployment.² In New Zealand a 1938 Act brought together a number of existing social security benefits.³ In 1941 the term “social security” was used in the Atlantic Charter (a wartime document).⁴

Social security was established as a basic human right in the International Labour Organisation’s Declaration of Philadelphia (1944) and its Income Security Recommendation of 1944 (No. 67). There is no universally applicable definition of the concept of social security. However, the International Labour Organisation (ILO) has codified it through the Social Security (Minimum Standards) Convention of 1952 (No. 102). The Convention is used internationally as a basis to define social security. Therefore, social security is defined as a public measure to address the consequences of sickness, maternity, occupational injury, unemployment, invalidity, old age and death.

Some authors have seen the definition as too narrow, hence recent attempts to define social security no longer focus on the list of social risks that are covered, but define it as a set of policy instruments to elaborate certain aims. Social security can therefore be defined in terms of its aims and objectives. It is, therefore, defined as the set of policy instruments that are implemented to compensate for the negative consequences of a number of risks if they occur.⁵

The strands of social security are social insurance and social assistance. Social insurance is financed by contributions from employers and employees, and benefits accrue and are afforded to contributors. Social assistance is financed by the general revenue of the country and is afforded to those most in need.⁶

1.2 International Perspective

Social security is recognised as a basic human right and is upheld by various international instruments. The following declarations, covenants and conventions are relevant to extending social security:

- The Universal Declaration of Human Rights of 1948 (Articles 22 and 25);
- The International Covenant on Economic, Social and Cultural Rights of 1966 (Article 9);

- The Convention on the Elimination of all Forms of Discrimination Against Women [(CEDAW) (Article 11 (1)(e)];
- Convention on the Elimination of all Forms of Racial Discrimination [(CERD) (Article 5(e)(iv)];
- The Convention on the Rights of the Child (CRC) of 1989;
- The African Charter on the Rights and Welfare of the Child of 1990;
- The Equality of Treatment (Social Security) Convention of 1962 (No 118);
- The Maintenance of Social Security Rights Convention of 1982 (No 157);
- The Employment Promotion and Protection against Unemployment Convention of 1988 (No 168); and
- The Job Creation in Small and Medium Sized Enterprises Recommendation of 1998 (No 189).

Some of the instruments have linked social security to an adequate standard of living, and some have included both social security and social insurance as a benefit to individuals. The ILO Conventions have linked and combined social security and employment.

1.3 National Perspective

Section 27(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter the Constitution) provides that “*everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance*”.

Children are afforded the right to social security in sections 27(1)(c) and 28(1)(c) of the Constitution. Section 27(1)(c) includes adults and children, whereas section 28(1)(c) caters for children only. According to this section:

every child has the right to basic nutrition, shelter, basic health care services and social services.

The right to social security is guaranteed to everyone, including marginalised groups. The notion of access implies that everyone is entitled to an enabling environment, which obliges the State to take specific action to safeguard the right.

A positive obligation is imposed upon the State by section 27 of the Constitution and the extent of the obligation is defined by the following three key elements:

- the obligation to take reasonable legislative and other measures;
- to do so within available resources ; and
- the obligation to achieve the progressive realisation of access right to social security.

The State has been challenged for not affording social assistance to everyone in the *Khoza* and *Mahlaule* cases.⁷ Both cases were represented by the Legal Resources Centre on behalf of some residents in Limpopo. In the *Khoza* case some residents were unable to qualify for the State old pension grant because they were not citizens of South Africa, and in the *Mahlaule* case, non-citizen parents on behalf of their children were denied child care grants. The applicants, even though they were not South African citizens, were lawfully and permanently resident in South Africa, and their children were born in South Africa and met all the requirements to qualify for social assistance or a child support grant except for the citizenship requirement.⁸

Sections 3(c), 4(b)(ii) and 4B(b)(ii) of the Social Assistance Act 59 of 1992 as amended by the Welfare Laws Amendment Act 106 of 1997 were therefore declared unconstitutional and invalid because the sections precluded non-citizens from accessing social assistance.

In the final analysis, social security embraces protection against human damage, and provides an adequate standard of living and a social safety net against destitution. Although social security has to provide a safety net, most people, especially in developing countries, are excluded from social security. The social security systems are labour oriented and coverage is extended to the formal labour force.⁹ Those not in formal employment are excluded and do not qualify for social assistance. People with no social protection easily fall into poverty traps, especially if they are not catered for by the social assistance systems.

The challenge facing States is to extend social security to everyone and ensure that everyone has an adequate standard of living. This standard of living includes a life free from poverty and hunger. This is encapsulated in the Decent Work for All Strategy introduced by the ILO in 1999. The ILO through the Decent Work Approach aims to find ways to end social exclusion and enlarge opportunities for better jobs. Entitlement to social security by everyone is an essential feature of the Decent Work Approach.¹⁰

In order to eradicate poverty, and to promote human dignity and equality, State parties, rich and poor, committed themselves to a global effort through the

Millennium Development Goals, which emanated from the 2000 Millennium Declaration. The Millennium Development Goals serve as benchmarks for the assessment of progress. Each Millennium Development Goal is linked to economic, social and cultural rights, and the achievement of Millennium Development Goals is a step towards the full realisation of economic, social and cultural rights.¹¹

The Consolidated Report by the Committee of Inquiry into a Comprehensive System of Social Security (Taylor Report) 2002¹² is an advance because it provides a comprehensive attempt to bring together the different elements of a fragmented social security system to address, in a coherent and phased way, the constitutional and socio-economic challenges facing South Africa. The Committee indicated that the structure of the social security system in South Africa is unequal, exclusionary and inequitable. To address this, the Committee took into consideration the *Grootboom* judgement and recommended that social security policies and programmes must be reasonable both in their conception and their implementation. Therefore, vulnerable communities must be given priority by government, and their needs must be addressed effectively.

The Committee further recommended that social security laws should be amended to comply with international instruments.¹³ In defining the concept of social security, the Committee of Inquiry settled on the term “Comprehensive Social Protection” (CSP).

Comprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.

Comprehensive social protection is broader than the traditional concept of social security, and incorporates development strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State.¹⁴

2 PROGRESS IN THE REALISATION OF THE RIGHT TO ACCESS SOCIAL SECURITY

This section will analyse measures instituted by organs of State at national, provincial and local spheres. The measures analysed will include policy, programmes, and legislative and budgetary measures. The process of analysing measures and concluding on the progressive realisation of a right involves, *inter alia*, requesting and receiving information from State organs about measures instituted to realise the right progressively.

Responses were received from the National Department of Social Development, the National Department of Labour, the Gauteng Social Services and Population Development Department, the Northern Cape Social Services and Population Department, the Western Cape Social Services Department, the Mpumalanga Social Services and Population Development Department, the Free State Department of Social Development, the Department of Health and Welfare in Limpopo, the Department of Social Welfare and Population Development in KwaZulu-Natal and the Eastern Cape. As mentioned in the Common Introductory Section, the North West Department of Social Services did not respond.

2.1 Policies and Programmes

2.1.1 National Sphere

2.1.1.1 Department of Social Development

During the reporting period the National Department of Social Development developed disability assessment panels, drafted a social relief of distress policy and conducted awareness and registration campaigns about social grants.

The National Department of Social Development did not clarify that the policies were newly instituted. What came out clearly in the response was that the policies were worked on during the reporting period, which could mean that they were in place prior to the reporting period or that the policies were to be effected after the reporting period.

2.1.1.1.1 Disability Assessment Panels

The Department established and piloted Disability Assessment Panels during 2002 as an alternative to an examination by a district surgeon and an evaluation of the district surgeon's report by the pensions medical officer, for the assessment of disability when applying for disability grants and care dependency grants (CDGs). This was due to the fact that the evaluation by the pensions medical officer did not adequately take into account the social circumstances of applicants and resulted in delays in the processing of applications for disability grants. The Disability Assessment Panel consists of a rehabilitation therapist, a social security official, a representative from the disability sector or a reputable community member, and an additional member appropriate to the disability being assessed.

2.1.1.1.2 Draft Policy on Social Relief of Distress

The aim of the draft policy is to develop a framework for the implementation of the social relief of distress programme in a uniform and co-ordinated manner and ensure that social relief is provided to persons in desperate need and those

living in intolerable conditions or crisis situations. The framework to improve the system of social relief will be finalised in 2004.

2.1.1.1.3 Grant Awareness Campaigns

The Department of Social Development embarked on grant awareness and registration campaigns throughout the reporting period. The aim of the campaigns was to create awareness about social grants and to increase the uptake of beneficiaries.

2.1.1.1.4 National Food Emergency Scheme/Programme

The National Food Emergency Scheme (NFES), a sub-programme of the Integrated Food Security Strategy and Nutrition Programme (IFSNP), was announced by Cabinet in October 2002 and was piloted by the National Department of Social Development in December 2002 (the IFSNP, which is co-ordinated by the National Department of Agriculture is discussed at greater length in the report on the Right to Food in this series). The IFSNP was launched as a response to the famine in the Southern African region and increases in food prices within South Africa. It provides for a set of support measures, as follows:

provision of food parcels for three months to the poorest families who do not have any income or cannot afford R200 for food per month, intensification of the registration for social grants, acceleration of the school nutrition programme, provision of agricultural starter packs so that households can provide food for themselves, and the development of sustainable household and community food security.¹⁵

According to the National Department of Social Development, the pilot programme of the National Food Emergency Scheme included the following beneficiary selection criteria:

Geographic

- Rural and urban nodes plus provincial poverty pockets; and
- Rural and urban areas.

Social status

- Expenditure level below R300 per household per month;
- Vulnerable groups;
- Orphaned children and child-headed households;
- The elderly;
- People with disabilities;
- Female (nil-income) household heads;
- HIV/AIDS affected / infected.¹⁶

The number of households that were reached by the National Food Emergency pilot programme is shown in Table 1. The total number of households that benefitted from the pilot programme shown in Table 1 (60 089) does not concur with the statement in the National Department of Agriculture's Annual Report for 2003, which states that 149 779 households benefitted by March 2003.¹⁷

Table 1: Progress with delivering the NFES Pilot project during 2002/2003

<i>Province</i>	<i>No. of Households Assisted with food Parcels</i>	<i>Targeted output as of April 30 2003</i>	<i>% of Target reached by Pilot Programme</i>
Eastern Cape	3 463	35 000	10%
Free State	6 515	30 000	22%
Gauteng	1 160	5 000	23%
KwaZulu-Natal	5 865	30 390	19%
Mpumalanga	15 317	12 000	128%
Northern Cape	1 190	4 670	25%
Limpopo	10 455	50 890	21%
North West	15 317	72 000	21%
Western Cape	807	5 000	16%
Total	60 089	244 950	25%

Source: Pilot programme figures from the National Department of Agriculture protocol response 2003 and Targets for 30 April 2003 from Department of Social Development, Integrated National Business Plan for the National Food Emergency Scheme (NFES) for the 2003/04 and 2004/05 financial years.

2.1.1.2 Department of Labour

The National Department of Labour did not report any newly instituted measures.

2.1.1.2.1 *Provincial Sphere*

Gauteng, Mpumalanga, Free State, Eastern Cape and the Northern Cape instituted various policies and programmes during the reporting period. The Western Cape and KwaZulu-Natal did not institute any policy measures during the reporting period.

National Food Emergency Scheme/Programme

Three provinces, Gauteng, Mpumalanga and Free State reported that they instituted the Food Emergency Scheme/Programme. In Free State, the programme was implemented in December 2002, when food parcels were distributed to needy households with a monthly expenditure of less than R200 on basic necessities. In Gauteng and Mpumalanga the programme was launched in March 2003.

HIV/AIDS Policy

Gauteng introduced a policy on HIV/AIDS to ensure that infected people, who are unable to work owing to the severity of their illness, are eligible to apply for a disability grant. The Western Cape afforded people who are HIV positive access to a disability grant only if their medical condition deteriorates to an extent that renders them unable to work.

Medical Assessment Panels

The Eastern Cape established medical assessment panels to enable applicants of disability grants to be assessed not only by medical surgeons, who only look at physical and clinical aspects, but by a panel that considers economic and social aspects as well.

Registration Campaign

The Eastern Cape embarked on a registration campaign for social grants during the reporting period.

2.2 Legislative Measures

2.2.1 National Sphere

2.2.1.1 Department of Social Development

The Department of Social Development reported that the Social Assistance Act Regulations were reviewed.

2.2.1.1.1 Review of the 1992 Social Assistance Act Regulations

The National Department of Social Development reviewed the 1992 Social Assistance Regulations pertaining to eligibility for the Child Support Grant. According to the Regulations, the eligibility age for the child support grant is from birth to seven years. The Department of Social Development therefore proposed the extension of the age of eligibility to include all children up to the age of 14 years.¹⁸

2.2.1.2 Department of Labour

2.2.1.2.1 Unemployment Contributions Act 4 of 2002

The Department of Labour enacted the Unemployment Contributions Act 4 of 2002. This Act came into effect on 1 April 2002. It provides for the collection of contributions from both employers and their employees.

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2.2.1.2.2 Unemployment Insurance Act 63 of 2001 Act

The Unemployment Insurance Act enacted in 2001 also came into effect on 1 April 2002. This Act provides for the administration and payment of benefits to contributors in the event that they become unemployed. Beneficiaries benefit for 238 days, which is an increase in the number of benefit days, compared to the old Unemployment Insurance Act 30 of 1966, which provided for 121 days only.

2.2.1.2.3 Sectoral Determination for Domestic Workers and Farm Workers

This item is repeated in the Right to Food report in this series.

The Minister of Labour determined two sectoral minimum wages in terms of the Basic Conditions of Employment Act 75 of 1997 during the reporting period. The first determination was for domestic workers, which became effective from 1 September 2002.¹⁹ The second determination was for farm workers and became effective on 1 March 2003. A major consideration in making both determinations was the high level of exploitation of domestic workers and farm workers, especially in rural areas and provinces next to our South African Development Community neighbours.

2.3 Budgetary Measures

This section will outline the total allocation of the National Department of Social Development, its allocation towards programmes and projects as well as allocations for social assistance in provinces. The information was obtained directly from the government departments through protocols as well as information from other sources to supplement the inadequate information obtained from protocol responses.

2.3.1 National Sphere

2.3.1.1 National Department of Social Development

Table 2 reflects the total allocation of the National Department of Social Development and the allocations towards programmes. It should be noted that the 2001/2002 budget included an extraordinary allocation for backpayments of unpaid social security grants to beneficiaries, hence the major change in the Grant Systems Administration budget from 2001/2002 to 2002/2003.

Table 2: Department of Social Development Total Budget Allocation

<i>Programme</i>	<i>2002/2003</i>		<i>2001/2002</i>	
	<i>Revised allocation R'000</i>	<i>Actual Expenditure R'000</i>	<i>Revised allocation R'000</i>	<i>Actual Expenditure R'000</i>
Administration	150 242	149 918	43 105	43 165
Social Security Policy and Planning	7 348	6 976	5 410	5 138
Grant Systems Administration	79 217	70 499	2 104 253	2 098 362
Welfare Service Transformation	13 061	12 244	10 096	9 592
Development Implementation Support	391 178	390 764	73 227	72 997
Population and Development	9 205	9 009	6 066	6 038
Special Functions		14		
Total	650 251	639 424	2 242 157	2 235 292

Source: National Department of Social Development Annual Report 2002/2003

In accounting for variances the National Department of Social Development reported that there were savings made on professional and special services owing to unforeseen delays in the finalisation of planned projects. The Department also stated that the total budgetary allocation for the Department and the allocation for programmes and projects were adequate. There was underspending of the total revenue as well as underspending for programmes and projects.

The Department's budget allocations were based on demand for earmarked services. Vulnerable groups were afforded access to social grants through the child support grant, disability grant, old age pension grant; persons living with and those affected by HIV/AIDS were targeted through the allocation for the Home/Community Based Care, Counselling Services and Support as well as food supplements.

Child-headed households, unemployed persons, persons with low incomes and poverty-stricken persons, homeless persons, and persons infected with and those affected by HIV/AIDS benefited from the National Food Emergency Scheme. The allocation for Poverty Relief Programme enabled women in rural areas and informal settlements to partake in income-generating projects.

Table 3 shows the total allocation for various programmes for the period 2002/2003.

Table 3: Total Allocation for Specific Programmes 2002/2003

<i>Programme</i>	<i>Total allocation</i>
Social Grants	R28 billion (expenditure)
National Food Emergency	R230 million
Poverty Alleviation	R100 million
Disaster Relief Fund	R49 million
HIV/AIDS (Home/Community Care)	R46,5 million

Source: Department of Social Development Annual Report 2002/2003

R28 billion was allocated for social grants during the reporting period (2002/2003). The National Food Emergency Scheme was allocated R230 million. The Poverty Alleviation Programme had an allocation of R100 million to support 416 projects. The Disaster Relief Fund was allocated R49 million, which benefited 61 463 victims. The Emergency Relief Fund allocated R2,5 million to the Eastern Cape, R1,5 million to Limpopo and R1 million to Mpumalanga. The Home Based/Community Based Programme for children and families affected by HIV/AIDS was allocated R1,5 million for the national sphere and R46,5 million for the provinces.²⁰

The Department of Social Development was allocated R48 million for the HIV/AIDS programme. The provinces were then allocated R47,5 million, R37 million of which was spent by the end of February 2003. An amount of R1,6 million of the special allocation for the HIV/AIDS programme was kept in the account of the National Department for national projects, project management and administration costs for the 2002/2003 financial year.

During the reporting period, the old-age pension was increased by R20 to R640, the child-support grant increased by R10 to R140, the grant in aid increased from R120 to R130, the foster-care grant from R450 to R460, and the care dependency grant from R620 to R640. As the Department of Social Development states, the second round of increases only took effect from April 2003:

In 2002, two increases in social grants were announced, making a total of R1,5 billion available to the most vulnerable members of society. From April 2003, pension and disability grants increased by R60 to R70 a month while the child-support grant (CSG) rose by 14% to R160. In both cases these were above-inflation increases. The 2003 Budget set aside a total of almost R12 billion to facilitate the extension of this grant to more beneficiaries.²¹

2.3.2 Provincial Sphere

Table 4 shows the provincial budget allocations for social assistance grants. Table 5 shows the percentage of social grant expenditure as a percentage of the

total social development budget for each province. Gauteng and Western Cape spend a considerably lower percentage of their total budget on social grants.

2.3.2.1 Social Assistance Grants

Table 4: Provincial Social Security Budgetary Allocations

<i>Province</i>	<i>2001/2002 Allocation</i>	<i>2001/2002 Expenditure</i>	<i>2002/2003 Allocation</i>	<i>2002/2003 Expenditure</i>
Eastern Cape	4 355 733 000	4 355 733 000	5 523 716 000	6 043 820 000
Free State	1 321 207 000	1 293 328 863	1 842 683 000	1 873 759 551
Gauteng	2 198 763 000	2 304 216 000	2 921 897 000	3 207 219 000
KwaZulu-Natal	4 584 562 000	4 686 829 000	6 110 346 000	6 442 159 000
Limpopo*	-	-	-	-
Mpumalanga	1 440 510 000	1 421 098 000	1 915 783 000	1 877 766 000
Northern Cape	593 175 700	592 224 309	723 050 000	803 144 894
Western Cape	1 973 036 000	1 955 698 000	2 559 434 000	2 676 319 000

*Source: Protocol responses from the provinces Notes: *Limpopo did not furnish the required figures for the budget section.*

Table 5: Social Grants as a Percentage of Provincial Social Development Budgets

<i>Province</i> ²²	<i>Expenditure 2001/2002</i>	<i>Estimated Expenditure 2002/2003</i>
Limpopo	95,8%	96,3%
North West	88,6%	95,2%
Mpumalanga	93,4%	94,2%
Eastern Cape	94,2%	94,0%
KwaZulu-Natal	94,1%	94,0%
Free State	87,0%	86,6%
Northern Cape	90,2%	89,4%
Western Cape	79,2%	82,0%
Gauteng	81,5%	81,9%

Source: Treasury Presentation to the Portfolio Committee on Social Development, Financing of Social Grants, September 2003

The Eastern Cape reported that the variances (shown in Table 3) in the Department's budget for the periods 2001/2002 and 2002/2003 were based on the incremental rate of beneficiaries who were taken into the system each year, which is about 2–7% according to the inflation index and increases of potential applicants to be reached by the project. Since the budget was not adequate for the social security programme, the department was unable to embark on an outreach programme for the massive registration campaign in poverty-stricken rural areas. During the 2002/2003 period the department overspent on the allocated budget. The over-expenditure was addressed through using funds from programmes and services that were underspending, such as professional

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and special services. To address the overspending the Department introduced an Early Warning System.

In Mpumalanga the allocation for the periods 2001/2002 and 2002/2003 was not fully utilised.

KwaZulu-Natal reported that the over-expenditure in 2001/2002 was a result of limited resources that were made available by the Provincial Treasury as a result of the overall financial constraints in the province. The over-expenditure in 2002/2003 was caused by tariff increases, which became effective in October 2002 and were not adequately provided for, as well as the implications of the Appeals Board Sitings and the costs of paying grants to beneficiaries.

The budget for social assistance grants was not adequate, which resulted in overspending by the Department on the allocated budget for the programme. The funds for social grant payments have been far below than that which is required.

The shortfalls in the social security programme have been covered by the use of unspent budgetary allocations from other programmes. The unspent budget for suspended places of care pending fraud investigations was used to cater for shortfalls in the social security programme.

Gauteng reported that insufficient funds were received from the Provincial Treasury to meet the increase in the number of beneficiaries. However, the Provincial Treasury was approached for additional funds.

The department reported that the budget was adequate because savings in programmes were utilised to defray excess expenditure in other programmes. To address overspending the department has put strategic plans, business plans and measurable objectives in place to improve spending. Expenditure on each programme is monitored every month by the use of an In-Year Monitoring System.

The Western Cape reported that the variances in the budget are a result of the increase in the allocation from 2001/2002 to 2002/2003 owing to the increases in the grant amounts payable and beneficiary growth. The allocated budget for the period 2002/2003 was exceeded because it was not adequate. The department managed, however, to scale down on other activities to ensure that there were adequate funds available for social assistance. The department engaged in a consultative process with the National and Provincial Treasury on the impending over-expenditure of its allocation. To address the over-expenditure, stricter budgetary control measures were implemented, and the process and procedure in awarding grants was strengthened. The Provincial Treasury was informed on a monthly basis of the budget, and presentations were made to the Portfolio Committee, Budget Council and National

Departments of Treasury and Social Development. A special task team was appointed to review the application process and ensure strict control measures.

Free State reported that the budget was not adequate for the 2002/2003 financial year. Additional funds were requested from the Provincial Treasury, and grants were issued to qualifying beneficiaries. The Department overspent on the allocated budget. However, the shortfall was discussed with the Provincial Treasury and a formal letter was submitted to the Provincial Treasury requesting funds to cover the shortfall, which was granted. To address the overspending, the Department holds regular bi-laterals with the Provincial Treasury to discuss options of addressing the overspending.

2.3.2.2 HIV/AIDS Programme

Table 6 below shows provincial allocations and actual expenditure for the HIV/AIDS (home based/community based care) programme.

Mpumalanga and the North West had to roll out funds from the 2001/2002 financial years. As at 31 March 2003, Mpumalanga had an allocation of R7 million consisting of the R7 million allocated for 2002/2003 and a roll over of R174 thousand from the 2001/2002 financial year. The North West had an allocation of R6 million comprising the R5 million allocation for the 2002/2003 financial year and the roll over of R1 million from the 2001/2002 financial year. The total amount that was available for the HIV/AIDS programme at the end of March was R49 of which R44 million (90%) of that amount was spent.²³

Limpopo had already spent the total amount available by the end of February 2003. The Eastern Cape, Gauteng, Free State and the Northern Cape spent 100% of the available funds for the HIV/AIDS Programme at the end of March 2003.²⁴

There was underspending by some provinces. KwaZulu-Natal spent 59,51%, Mpumalanga spent 86,21%, North West spent 97,48% and the Western Cape spent 99,71% of the available allocation.²⁵

Table 6: HIV/AIDS Programme expenditure by the end of March 2003

<i>Province</i>	<i>Total Received R'000</i>	<i>Actual Expenditure R'000</i>
Eastern Cape	4 798	4 798
Free State	6 650	6 650
Gauteng	6 983	6 983
KwaZulu-Natal	8 644	5 144
Limpopo	3 135	3 135
Mpumalanga	7 251 (7 077 + 0 174)	6 251
Northern Cape	2 660	2 660
North West	6 812 (5 463 + 1 349)	6 640
Western Cape	2 090	2 084

Source: Department of Social Development Annual Report 2002/2003

The inadequate capacity to roll out the programme was the reason for underspending on the programme. In Mpumalanga, the delay in the receipt of an unpaid invoice from a service provider to ensure that the amount is paid prior to the end of the 2002/2003 financial year caused the underspending, whereas in the North West underspending was attributed to the administrative inefficiencies in spending the amount rolled over from the previous year.²⁶

2.3.2.3 Poverty Relief Allocations

In 2001/02 the department was allocated R50 million and in 2002/03 the department was allocated R100 million.²⁷ Of the R100 million R45,54 million was paid to projects at the end of January 2003 and R45,426 million was planned to be released in March and April 2003 totalling an amount of R90,97 million of the budget for 416 projects.²⁸ The remaining allocation of R9,03 million was set aside for administration and capacity building (R4,08 million); the development of a social finance capacity to address poverty (R3,6 million); and support for the integration of the disabled into the different Poverty Relief Projects (R1,35 million).

2.4 Indicators

2.4.1 Grant Indicators

By the end of March 2003, the number of social grant beneficiaries had increased tremendously from April 2002. In April 2002, the number of beneficiaries was just over four million and this increased to just over five million by the end of March 2003.²⁹ Over 2,7 million children were registered for the Child Support Grant by the end of March 2003.³⁰

Table 7 shows the number of beneficiaries of Social Assistance Grants.³¹ Table 8 shows the same indicators, except the information is drawn from the National Department of Social Development's Annual Report for 2002/2003.

Table 7: The Total Number of Social Grant Beneficiaries 2002-2003

<i>Grant Type</i>	<i>April 2002</i>	<i>March 2003</i>
Old Age Pension	1 903 042	2 000 041
Disability	694 232	897 050
Child Support	1 907 774	2 513 693
Care Dependency	34 978	56 150
Foster Care	95 216	133 309
Grant in Aid	10 332	12 279
War Veteran	5 266	4 629
Total	4 650 840	5 617 151

Source: Treasury Presentation to the Portfolio Committee on Social Development, Financing of Social Grants, September 2003

The largest difference in information between Table 7 and 8 relates to the number of child support grant beneficiaries in April 2002.

Table 8: Trends in the number of grant beneficiaries, by type of grant

<i>Grant Type</i>	<i>April 2002</i>	<i>April 2003</i>	<i>% Change</i>
Old Age Pension	1 936 553	2 009 419	3,8%
Disability	714 019	953 965	33,6%
Child Support	1 574 927	2 630 826	67,0%
Care Dependency	42 474	58 140	36,9%
Foster Care	90 680	138 763	53,0%
Grant in Aid	10 840	12 787	18,0%
War Veteran	5 324	4 594	-13,7%

Source: Department of Social Development Annual Report 2002/2003

Table 9 shows the number of beneficiaries of social assistance grants in each province.

Table 9: Beneficiaries of Social Assistance by Province 2002/2003

<i>Province</i>	<i>April 2002</i>	<i>March 2003</i>	<i>% Increase</i>
Eastern Cape	903 975	1 035 763	14,6%
Free State	275 018	356 518	29,6%
Gauteng	517 070	682 156	31,9%
KwaZulu-Natal	1 024 408	1 285 463	25,5%
Limpopo	646 972	784 082	21,2%
Mpumalanga	314 734	387 071	23,0%
Northern Cape	124 021	134 260	8,3%
North West	411 123	450 712	9,6%
Western Cape	433 520	501 126	15,6%

Source: Treasury Presentation to the Portfolio Committee on Social Development, Financing of Social Grants, September 2003

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Tables 9 and 10 show grant indicators (number of beneficiaries for social assistance grants) as reported by the National Department of Social Development and the provinces.

Table 10: The Total Number of Eligible Social Assistance Beneficiaries 2002/2003

<i>Grant Type</i>	<i>Eligible 2002/2003</i>	<i>Receiving 2002/2003</i>
Old Age Pension	2 014 795	2 009 419
Disability	943 676	953 965
Child Support	3 768 058	2 827 729
Care Dependency	80 203	58 140
Foster Care	168 661	138 763

Source: Protocol response from the National Department of Social Development

Observation

Tables 7 and 10 should have similar figures of grant beneficiaries; however, this is not the case because the Department of Social Development provided statistics beyond the reporting period. The figures in Table 7 (April 2003) are similar to those in Table 10 (beneficiaries receiving 2002/2003) except for beneficiaries receiving the Child Support Grant who are 2 827 729 in Table 10 and 2 630 826 in Table 8. The annual report states that “over 2,7 million children were registered for the Child Support Grant by the end of March 2003”.³² This could be attributed to estimates as a result of the increasing number of beneficiaries as well as estimated target beneficiaries.

The number of persons who received the disability grant was higher than the number of persons eligible for the grant. Since this is highly unlikely, the information could be inaccurate or could indicate problems with fraud. The persons who are eligible for grants include those in receipt and those not in receipt of the grant.

Grant indicators as reported by provinces

Gauteng provided high numbers of persons in receipt of the social assistance grants and low numbers of persons eligible for the grants, this is reflected in Table 11. The department indicated that the eligibility figures reflected in the table were projections made based on the number of applications received in the previous financial year and actually reflect the additional persons who may be added in the current year.

Table 11: Beneficiaries of Social Assistance by Province

<i>Province</i>	<i>Grant Type</i>	<i>Eligible</i>	<i>Receiving</i>
Eastern Cape	Old Age Pension	-	409 223
	Disability	-	212 324
	Child Support	-	377 634
	Care Dependency	-	11 020
	Foster Care	-	23 724
Free State	Old Age Pension	145 757	122 524
	Disability	129 000	74 298
	Child Support	534 000	150 000
	Care Dependency	5 200	2 474
	Foster Care	31 000	14 977
Gauteng	Old Age Pension	4 110	240 850
	Disability	51 200	111 703
	Child Support	245 066	304 246
	Care Dependency	3 837	6 984
	Foster Care	4 194	11 618
KwaZulu-Natal	Old Age Pension	-	416 851
	Disability	-	183 086
	Child Support	-	694 392
	Care Dependency	-	15 762
	Foster Care	-	31 559
Limpopo	Old Age Pension	-	-
	Disability	-	-
	Child Support	-	-
	Care Dependency	286 573	5 437
	Foster Care	5 437	-
Mpumalanga	Old Age Pension	164 986	141 677
	Disability	104 308	47 126
	Child Support	496 271	199 913
	Care Dependency	-	3 052
	Foster Care	-	3 468
Northern Cape	Old Age Pension	-	43 426
	Disability	-	-
	Child Support	-	-
	Care Dependency	-	-
	Foster Care	-	-
Western Cape	Old Age Pension	-	153 810
	Disability	-	109 486
	Child Support	-	196 472
	Care Dependency	-	5 382
	Foster Care	-	20 625

Source: Protocol responses from the provinces

2.4.2 Income Indicators

The National Department of Social Development indicated that 15 799 575 was the total number of persons with incomes inadequate to provide food and shelter during 2002/2003:

- 3 159 915 households had incomes inadequate to provide minimum food and shelter;

April 2002 – March 2003

- 13 660 545 persons had no source of income;
- 2 732 109 households had no source of income;
- 15 799 575 persons had incomes below the poverty line;
- 3 159 915 households had incomes below the poverty line;
- 5 148 934 households relied on social assistance;
- 2 827 729 children relied on social assistance;
- 3 768 058 children were eligible for social assistance;
- 7 976 663 persons benefited from the poverty alleviation programmes;
- 5 148 934 households benefited from the poverty alleviation programmes;
- 57 878 households were denied social assistance owing to administrative problems; and
- 289 390 persons were denied social assistance as a result of administrative problems.

Income Indicators as reported by the Provinces

Households that relied on social assistance as reported by the provinces:

- Free State – 460 000
- Gauteng – 650 000
- Northern Cape – 121 952

Households that had no income and/or receive inadequate income and receive no social assistance:

- Free State – 200 000
- Gauteng – 55 310

Children who relied on social assistance:

- Free State – 168 000
- Gauteng – 322 848
- Mpumalanga – 16 183
- Northern Cape – 57 000
- KwaZulu-Natal – 741 713

The number of children eligible for social assistance:

- Free State – 570 200
- Gauteng – 253 097

The number of children aged between seven and 18 who had no access to social assistance:

- Free State – 600 000

Number of children living in the streets:

- Gauteng - 2 500
- KwaZulu-Natal - 1 007
- Northern Cape - 336.

In Mpumalanga 1 354 237 persons had incomes inadequate to provide for minimum food and shelter, and 945 129 households had incomes inadequate to provide for minimum food and shelter. The number of persons with no source of income was 1 169 537, and 293 165 households had no source of income. 1 354 236 persons had incomes below the poverty line, and 945 129 households had incomes below the poverty line.

The Northern Cape had 33 340 persons with incomes inadequate to provide minimum food and shelter, and 16 670 households had incomes inadequate to provide minimum food and shelter. 2 780 persons have no source of income; 3 201 persons had incomes below the poverty line; 1 067 households have incomes below the poverty line; 51 693 children aged between seven and 18 years had no access to social assistance.

In KwaZulu-Natal 23 843 persons benefited from the poverty alleviation programmes, and 2 382 children received care at children's homes and secure care facilities.

2.4.3 Infrastructure Indicators

The National Department of Social Development reported that there 8 894 social grant payout points in total. The average distance to payout points was 5 km. 57% of the beneficiaries reside within 5 km from the payout point; 12% of the beneficiaries reside within 25 km from the payout point; and only 1% of beneficiaries reside within 50 km from the payout point. The average time taken by beneficiaries at payout points was two hours. In total 3 360 payout points did not have facilities for persons with disabilities, whereas 410 payout points did not have access to water and toilet facilities.

Table 12 provides the infrastructure indicators on a provincial basis.

Table 12: Provincial Social Security Infrastructure Indicators

<i>Category</i>	<i>Province</i>	<i>Total</i>
Number of Social Grant payout points	Gauteng	-
	Free State	176
	Limpopo	1 764
	Western Cape	293
	Northern Cape	206
	Mpumalanga	286
	Eastern Cape	2 726
	KwaZulu-Natal	2 609
Average distance to social grant payout points	Gauteng	-
	Free State	5 km
	Limpopo	5 km
	Western Cape	5 km
	Northern Cape	5 km
	Eastern Cape	5 km
	Mpumalanga	5 km
	KwaZulu-Natal	5 km
Average time taken at social grant payout point	Gauteng	-
	Free State	90 min
	Limpopo	2 hrs
	Western Cape	30 min
	Northern Cape	1 hr
	Eastern Cape	20 min
	Mpumalanga	1–2 hrs
	KwaZulu-Natal	30 min
Number of beneficiaries who reside within 5 km from the payout point	Gauteng	-
	Free State	174 600
	Limpopo	566 712
	Western Cape	470 117
	Northern Cape	106 000
	Eastern Cape	849 496
	Mpumalanga	-

Source: Protocol responses from provinces

In Gauteng all pay points have water and toilet facilities. In Mpumalanga 102 payout points lacked water, whereas 54 payout points had no toilet facilities.

The Eastern Cape Department of Social Services indicated that 80% of payout points were in rural areas and had neither toilet facilities nor facilities for persons with disabilities. This Department did not provide most of the information requested in the indicators section.

KwaZulu-Natal supplied information from a 2001 survey for the indicators section and there could have been more information after the survey.

2.5 The Impact of the Measures on Vulnerable Groups

South Africa has shown its commitment through the various measures instituted, which have had an impact on the lives of vulnerable and marginalised groups. While the indicators show that there is an increase in the number of beneficiaries, there are also high numbers of eligible grant beneficiaries who are not receiving grants. The high numbers of beneficiaries contribute to the over-expenditure on the allocated budgets by the various provinces.

The Government has committed itself to halving poverty by 2015. The New Partnership for Africa's Development (NEPAD), the United Nations Millennium Summit (2000) and the 2002 World Summit on Sustainable Development (WSSD) also advocate that States should reduce poverty by half by 2015.

2.5.1 Women, Youth and People with Disabilities

Government also embarked on a Community Based Public Works Programme, spearheaded by the Department of Public Works. The programme aims to alleviate poverty and has the rural poor as one of its main focus. The programme created 20 539 employment opportunities; 10 537 jobs were received by women; 9 614 jobs were received by youth; and persons with disabilities received 535 jobs.³³ The jobs received by youth and persons with disabilities included both males and females.

2.5.2 Children

2.5.2.1 Child Support Grant

Government has to be commended for putting children first and striving towards the advancement and promotion of children's rights. The Child Support Grant serves as a measure to alleviate poverty among children. Registration and awareness campaigns were embarked upon by government, and registrations for the Child Support Grant took place successfully. Government even went a step further by extending the Child Support Grant up to the age of 14 years by the year 2005/6.

2.5.2.2 Children living in the streets

Children living in the streets, like all other children, have the right to social security and social services. It is difficult to ascertain if these children enjoy their rights because State organs do not give much information about policies, programmes and projects aimed at realising the rights of these children. In the South African Country Report to the 2nd International Conference on Children and Residential Care in Stockholm (2003) it was indicated that although there is a lack of data on the number of street children, the number of children living on the streets increases gradually due to the impact of poverty and HIV/AIDS.

Places of safety and institutions such as shelters, drop in centres and children's homes cater for the needs of these children. However, not all children who live in the streets have access to these services.

In the South African Human Rights Commission, 4th Economic and Social Rights Report 2000/2002 at pg 216, it was indicated that:

“these children are denied access to most social services provided by the State. They do not have access to the CSG and all other forms of assistance such as the poverty alleviation programmes and projects that are afforded to all the children in the country. These children are unable to benefit from the Primary School Nutrition Programmes because they do not go to school and they cannot even access to basic health care services. They cannot access the CSG because there is no care giver and they also do not have the necessary documentation, such as birth certificates.”

2.5.2.3 Child-Headed Households

Children in these households, especially girls, compromise their education in order to take care of their siblings. The Department of Social Development has to be commended for implementing the National Food Emergency Scheme, using an allocation of R230 million to cater for vulnerable households, especially child-headed households. Since it was instituted in 2002/3 the programme has been rolled out to 244 00 households. The National Food Emergency Scheme is a good programme, which provides food parcels to households. However, its scope does not extend to the education and health of children in child-headed households, nor, in all cases, to enabling them to access Child Support Grants. There is a need for a more comprehensive programme to cater for all their needs.

2.5.2.4 Children infected or affected by HIV/AIDS

The Home/Community Based Care programmes through the collaborative work of government, non-governmental organisations, including faith-based organisations, and communities have benefited 29 612 children orphaned or vulnerable to HIV/AIDS by the end of March 2003.³⁴ The programme has

reached 75 000 children orphaned or vulnerable owing to HIV/AIDS since its inception in 2000.³⁵

2.5.2.5 Children and Juveniles in Prison³⁶

The number of children in prison increased during the reporting period. The Department of Correctional Services Annual Report 2002/2003 states that the number of infants and children in detention with their mothers increased from 194 in 2001/2002 to 208 in 2002/2003. The number of unsentenced juveniles in prison on the last day of March increased from 2 086 in 2001, to 2 311 in 2002 and 2 654 in 2003. The number of sentenced juveniles in prison grew less rapidly from 1 690 in 2001, to 1 782 in 2002 and 1 795 in 2003. Furthermore, the number of unsentenced Juveniles (under 21 years old) was 15 216 male and 293 female at the end of March 2003. According to the Department:

Despite measures to remove children from the Criminal Justice System, there are still instances where children are sent to prison as awaiting trial persons and sentenced offenders. The Department therefore established separate facilities for youths in prison to enhance their education, rehabilitation and development prospects. However, a large number of youths are accommodated in sections of adult prisons, but separately from adult offenders. Currently there are 13 Youth Correctional / Development Centres countrywide. Youth offenders in custody remain a major concern to the Department and the Department is doing everything in its power to reduce these numbers.³⁷

The Department of Correctional Services stated that 5 762 inmates had been to a Saturday/Sunday Court during 2002/2003³⁸ in order to reduce the overall unsentenced prisoner population, which stood at 55 500 people at the end of March 2002. Despite Saturday/Sunday courts, the overall unsentenced prisoner population grew to 58 144 by the end of March 2003. It was not clear how many unsentenced juvenile inmates were tried at Saturday/Sunday courts during the reporting period. The increase in the number of juvenile inmates, took place in the context of a rapid increase in the male and female adult inmate population, leading to unprecedented levels of overcrowding (78 507).

The Department's protocol response provides the following information in respect of HIV/AIDS in prisons as at 31 March 2002:

- prisoner population - 177 701
- prisoners with HIV/AIDS - 110 336, comprised of 5 618 females and 104 718 males, prisoners with HIV/AIDS 2,03%, prisoners with STDs 0,01%, prisoners with TB 1,2%,
- number of prisoners suffering from malnutrition 24, iron deficient prisoners = 43.³⁹

There were 23 174 learners, 317 teachers and 120 prisons where qualified educationalists render services.

The Department of Correctional Services reported that it was developing a new transformed white paper that focuses more on unit management, a restorative approach to justice to facilitate healing, rehabilitation missions and programmes, study and education as well as labour in prison.⁴⁰

2.5.3 Older Persons

Older persons in South Africa are afforded the right to social assistance through the State Old Age Pension Grant. This means-tested grant is the government's most effective poverty alleviation measure for the aged.⁴¹ Most aged persons have had a life of struggle, deprived of a proper education and excluded from labour laws⁴² and social protection. The majority of African elderly people have no other source of income.⁴³ As unskilled manual workers they earned low wages and did not contribute to private pension funds; thus most rely solely on the State Old Age Pension Grant.⁴⁴

The State Old Pensions Grant serves as a redistributive mechanism, which enables the survival of people in structurally vulnerable settings.⁴⁵ Julian May, in *Chronic Poverty and Older People in South Africa* is of the view that "in multigenerational families pensions are shared and the Old Age Pension Grant forms an important safety net for other members of older households. Estimates suggest that each social pension paid to a beneficiary supports five to six people in a household."⁴⁶

3 CHALLENGES FOR THE REALISATION OF THE RIGHT TO ACCESS SOCIAL SECURITY

Social exclusion, poverty, unemployment and the HIV/AIDS pandemic are challenges for the realisation of the overall right to social security. Human and budgetary constraints continue to be challenges in the realisation of the right to social security. The delivery of social services has not been efficient in some parts of the country as a result of administrative problems, lack of documentation as a barrier to accessing the grants and poor conditions that prevail at pay points.

3.1 Administration

In some instances the administration of social services also hampered the realisation of the right. These problems include people travelling for long distances to local welfare offices; waiting for hours before being attended to; and grants that were suspended or terminated with no reason given and without proper procedures being followed.⁴⁷ As a result of these administrative problems the Department of Social Development was prone to a number of legal actions instituted against it by the persons affected.

In the *Mashavha*⁴⁸ case, the Legal Resources Centre during the reporting period applied to the High Court (Transvaal Provincial Division) for an order to strike down the assignment of the power to administer grants in the provinces. This was after Mashavha waited for more than a year for his disability grant as a result of a long-standing practice in Limpopo to roll over applications for grants to the next financial year where the province has exhausted its budget. The High Court ruled that the assignment was improper, and was declared invalid in so far as it assigned the powers to the provinces, which delayed the process of receiving grants in 2003.

In the *Mashishi*⁴⁹ case decided during the reporting period, an interim order was obtained for the reinstatement and further prohibition of the State from stopping grants that were deemed temporary by the State, unless a lawful procedure that allowed for an appeal was followed and a proper test for a temporary grant was applied. Mashishi instituted action against the State after his disability grant was terminated. He had not been informed that his grant was temporary when he applied for it, nor was he informed when it was about to be terminated.

In the *Sibuye*⁵⁰ case, social grant recipients were declared dead and as a result their grants were stopped. Even though they protested that they were alive and showed their identity documents to the officials, they were referred to the Home Affairs Department to rectify the error. The grant recipients had to make new applications for identity documents to enable them to reapply for social grants. They were not told that they could apply to restore their grants or appeal against a decision to stop the grant; they were also not given the necessary forms, to enable them to apply for the restoration of grants or to appeal against the decision.

3.2 Documentation

Access to grants is also affected by the requirement of valid identity documents and birth certificates. This becomes a problem because some children do not have birth certificates and some adults have no identity documents and therefore cannot qualify for any social assistance grants.⁵¹

Evidence to this effect comes from a monitoring exercise by the South African Human Rights Commission (SAHRC) at social grant registration/payout points in some parts of the Eastern Cape, namely Bashee, Ngqeleni and Willowvale, from the 17–21 March 2003. This is supplemented by the SAHRC's Report on the Inquiry into Human Rights Violations in Farming Communities.⁵²

3.3 Government response to challenges

In addressing some of the challenges, the Committee for the Restructuring of Social Security (CRSS) was set up in 1996 to respond to the crisis in social

grants. The Committee recommended improvements to customer care as well as the privatisation of services.

The Cash Paymaster Service (CPS) and Allpay (private companies) were then contracts by government to pay out grants to social security grant beneficiaries. In the Eastern Cape, CPS and Allpay were granted a R180 million contract to pay out grants in the former Transkei. Despite the privatisation of services problems still persisted. The privatisation did not bring improvements to the grant recipients, because services were still not accessible and conditions at pay points were still appalling.⁵³ There were still long queues, and lack of shelter, water and toilet facilities at some pay points. Grant recipients were insulted by staff at pay points, and paymasters arrived late with machines breaking down. The problems were, *inter alia*, the long queues at pay points; venues that lack shelter, chairs, toilet facilities and water; and attitudes of paying staff.⁵⁴

A Social Security Agency Bill (2003)⁵⁵ has been enacted and it proposes to establish a Social Security Agency to address service delivery and the administration of grants.

3.4 Corruption and mismanagement

The National Department of Social Development reported cases of corruption and mismanagement in which some officials of the Department were receiving pensions on behalf of deceased beneficiaries. The National Department and provinces worked together to address this.

A Fraud and Compliance Unit was established to identify and investigate fraud, corruption and irregularities, and the National Directorate of Public Prosecutions (Scorpions) also investigated cases related to fraud and corruption. The Department was engaged in a process of purchasing data mining and analysis tools that will enable it to manipulate data on the data warehouse for the payment system to identify trends, anomalies and irregularities. In the Eastern Cape these cases were reported to the Departmental Inspectorate, the South African Police Services and the National Directorate of Public Prosecutions (Scorpions), resulting in arrests and convictions. In Gauteng notices were placed on newspapers requesting fraudulent beneficiaries to cancel the grants.

In KwaZulu-Natal an independent Special Investigation Unit investigated issues of fraud and corruption within the Department of Social Welfare and Population Development.

3.5 Challenges for the Department of Labour

The Department of Labour indicated that most (UIF) beneficiaries in rural areas received payments by cheques instead of cash because of the scarcity of banks in remote rural areas. Beneficiaries travel long distances to the nearest town

with a financial institution to cash these cheques. The Unemployment Insurance Fund has consulted with the Post Offices and TEBA Bank to enable beneficiaries to have more convenient and affordable access to their benefits.

4 CRITIQUE OF MEASURES INSTITUTED

The basic goal of our Constitution is that the basic needs of all in our society should be met effectively; the requirement of progressive realisation means that the State must take steps to achieve this goal. This means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.⁵⁶ There should be a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.⁵⁷

4.1 The Scope of Coverage

The social security system in South Africa is limited and exclusionary; the social insurance system does not provide coverage for those outside formal employment.⁵⁸ Social assistance measures also exclude many poor and vulnerable people. The main grants that are available are the Child Support Grant, Old Age Pension Grant, Disability Grant and the Foster Care Grant.

There were approximately 3,2 million households in the poorest expenditure category of R399 per month and less in September 2002 (see Figure 1). Pension and grants were the main source of income amongst the poorest households in 19% of cases as compared to wage income, which made up 44% of cases. This indicates that there are many working poor people and that there are sometimes problems in State social assistance reaching the poorest, mostly rural, remittance dependent and usually female-headed households. Importantly, 23% of households in the lowest income category had members that farm for food for own consumption. The percentage of households involved in farming for food rises to 24% in the second lowest expenditure category, despite the fact that the number of households receiving grants as the main source of household income increases dramatically to 33% of households.

Research in Mount Frere in the Eastern Cape, showed that only four of the 54 children who qualified for child support grants were able to access them. In that community, the poorest 25% of households live on R150 a month without social grants, but that would increase to R560 with grants.⁵⁹

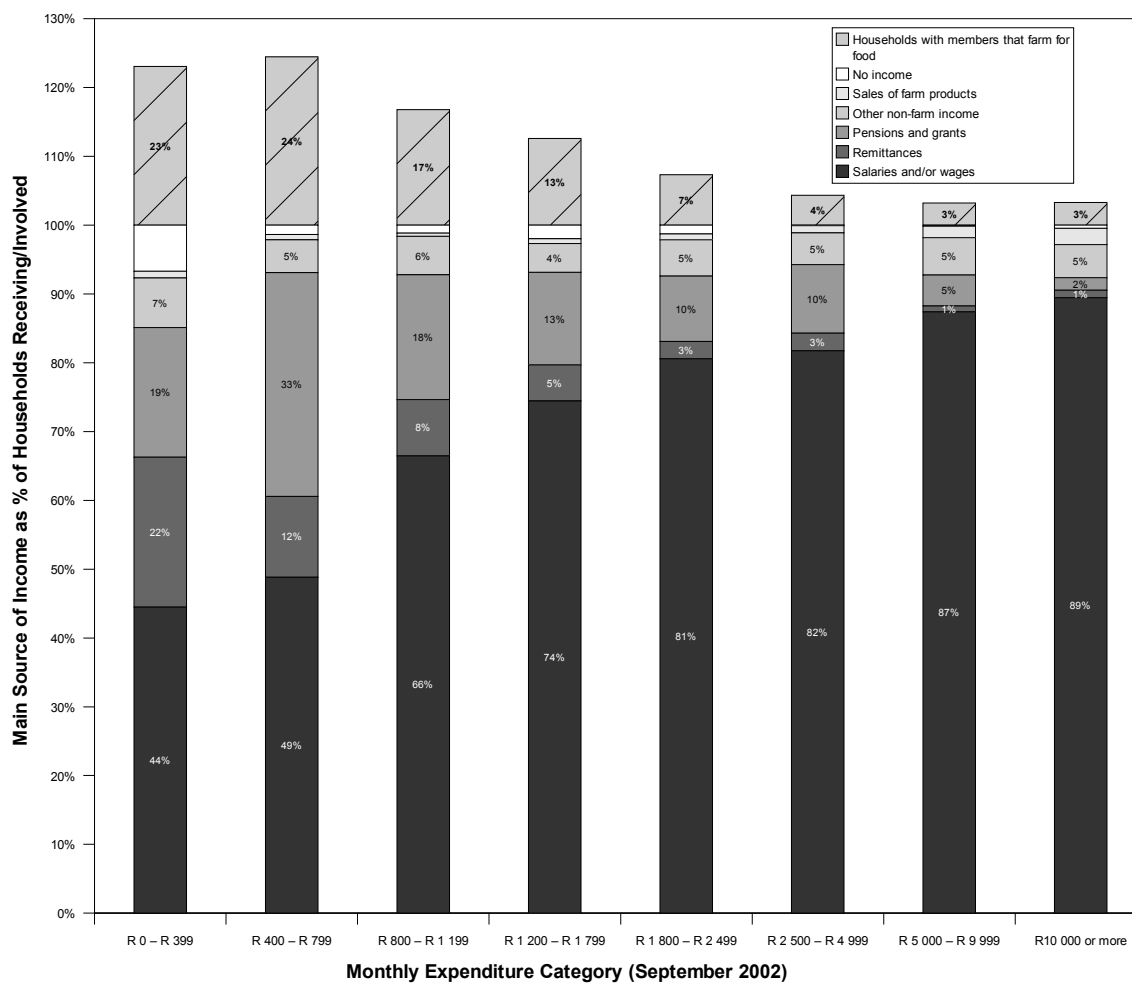


Figure 1: Main Sources of Household Income According to Monthly Expenditure Category in September 2002

Source: StatsSA, Labour Force Survey CD ROM September 2002
 Notes: Excludes missing cases

South Africa has an unequal society, many people have no wage income, and there is a wide divergence in the wages of those who work.⁶⁰ Poverty and unemployment are closely linked; the household wage income is a major determinant of inequality and poverty. Unemployment does not only affect the loss of income but also affects feelings of self-worth.⁶¹

Africans, especially blacks, are most affected by poverty in South Africa.⁶² This to a large extent may be attributed to the apartheid system. As a result of our history, millions of people have no houses, lack education and jobs, and there is little dignity when people live under those conditions.⁶³

All people have a right to an adequate standard of living for themselves and their family, thus poverty is a violation of human rights.⁶⁴ The right to be free from poverty includes, *inter alia*, the right to an adequate standard of living, the

right to work and receive wages that contribute to an adequate standard of living, the right to be free from hunger, and the right to have access to basic social services.⁶⁵

At the end of the reporting period, the official (narrow) unemployment rate was estimated to be 31.2%.⁶⁶ In March 2003 there was an estimated number of 29,6 million unemployed people aged between 15 and 65 years. Approximately 16,8 million were economically active while 12,7 million were not. Of the economically active, 11,6 million were employed and 5,3 million were unemployed. Full-time scholars made up 5,2 million of those not economically active; 1,2 million were full-time homemakers and 1,2 million were disabled or chronically ill; 1 million were either too young or too old to work; and 0,3 million were retired.⁶⁷

Of all the provinces, Limpopo had the highest unemployment rate.⁶⁸ Among their economically active population, 38,4% was unemployed in Limpopo, 35,5% in KwaZulu-Natal, 32,9% in the North West, 31,8% in the Free State, 31,5% in Gauteng, 30,5% in Mpumalanga, 30,2% in the Eastern Cape, 28,9 in the Northern Cape and 20,3% in the Western Cape.⁶⁹

Africans had the smallest percentage (62,3%) of persons employed within the formal sector and the highest percentage (25,6%) within the informal sector.⁷⁰ More than 90% of the Indian and white population were employed within the formal sector and 8,6% and 5,6% respectively were employed in the informal sector.⁷¹

Race

Africans had the highest unemployment rate in South Africa, whereas whites had the lowest rate. The unemployment rate for women exceeds that of men in all population groups. African unemployed women lead with 41.3% followed by 28.8% of Indian women, 23.9% of coloured women and 7.8% of white women. Unemployed African men were also in the lead with 33.1%, followed by 20,4% of coloured men, 18,2% of Indian men and 6,1% of white men.⁷² Low unemployment rates are found among Africans with high educational qualifications, including post-matric qualifications. The highest unemployment rates are found among those with educational qualifications between grades 8 and 12 for both males and females. At all educational levels the unemployment rates for women exceed those of men. The official unemployment rate for both men and women with no education was 19,6% and 22,6%.⁷³

In an attempt to address the question of unemployment, especially amongst the youth, the government established the Umsobomvu Youth Fund in January 2001 aimed at creating jobs and developing skills amongst the youth. The fund is made up of two integrated divisions, the Employment Programmes Division and Youth Entrepreneurship Division, which are divided into units that are further divided into programmes.

The Youth Fund has spent R470 million on 61 projects over the past two years, R200 million was allocated to Contact, Information and Counselling, R300 million to Skills Development and Transfer and R500 million to the Youth Entrepreneurship Programme.⁷⁴

4.2 Targeting

Anecdotal evidence regarding the implementation of the National Food Emergency Scheme highlights several problems:

- Problems in selecting target areas and having confidence that all deserving areas were reached;
- Insufficient funding compared with needs in target areas;
- A lack of clarity regarding qualifying criteria;
- Delays in procurement and a lack of clear policy regarding fair prices for basic foods purchased from the private sector;
- Incomplete connections, in some provinces, between the delivery of emergency food relief and mobile/out of office grant registration campaigns.

The details of how many and how well people benefited from the National Food Emergency Scheme are not clear. The timelines and effectiveness of the measures to address hunger and malnutrition in times of high prices and drought, should be considered alongside other possible courses of action, namely: reducing the pensionable age, better regulation of the food industry, and the phased introduction of a universal Basic Income Grant.⁷⁵

4.3 People with disabilities

The unemployment rate among people with disabilities is higher than that of able-bodied persons; black people have higher numbers of unemployment compared to whites with disabilities.⁷⁶ The poverty levels are also high among people with disabilities.

Disability is one of the major determinants of poverty, and people with disabilities are one of the poorest groups of society. The United Nations estimate that there are 7-10% of persons with disabilities in a country's population. Disability is the cause for poverty, and in a vicious cycle poverty leads to disability.⁷⁷ Persons with disabilities are thus disadvantaged by poverty caused by inadequate nutrition, poor sanitation and health care.⁷⁸ They are often denied access to existing social services and economic support because of physical barriers such as the absence of wheelchair-friendly ramps to buildings.⁷⁹ At pay points where there are no chairs, shelter, toilets and water, nor suitable conditions for persons with disabilities, they suffer the most because they are expected to wait in long queues after travelling long distances to the pay points.

Access to employment is an effective way of reducing the poverty faced by persons with disabilities and other vulnerable groups that are subjected to dire poverty. Social assistance carries with it an element of welfare and dependency. Among persons with disabilities there are those who are severely disabled who would permanently rely on social assistance and there are those who are capable of working. Mechanisms should thus be established that would provide these people with access to productive work.⁸⁰

Rule 3 of the United Nations Standard Rules provides that member states should ensure the provision of rehabilitation services to children, women and men with disabilities in order for them to reach and sustain their optimum level of independence and functioning. Member states should also ensure the development and supply of support services, including assistive devices for persons with disabilities and interpreter services, to assist them to increase their level of independence in their daily living, and to exercise both their rights as disabled people and their human rights as human beings. Persons with disabilities should be able to participate in the design of the organisation of rehabilitation services concerning themselves.

4.4 Atypical Workers

It may be concluded that there has not been much emphasis on the protection, promotion or fulfilment of the right to social insurance. Social and labour legislation in South Africa is exclusively extended to those who qualify as employees, thus excluding various groups of atypical workers who fall short of the employee qualification.⁸¹

Most vulnerable and marginalised people in South Africans are either unemployed or atypically employed⁸² and therefore not covered by the occupational based social insurance schemes.⁸³ Joblessness has increased from 15% to 30% since 1995, and there has been a rapid fall in real incomes from work, which has pushed more people into the informal sector and casual labour, and unemployment.⁸⁴ These groups of people are denied access to social security.

Those that are afforded social assistance can be prejudiced and deprived of their grants by unfair administrative actions. There are also a number of people who are eligible for social grants but because the information about grants is not disseminated to them, they are deprived of the grants. The social relief grant and the grant in aid have not been adequately promoted by the State in its social grant awareness campaigns. The Child Support Grant has been widely promoted, and the collaboration of the Department of Social Development and civil society has to be commended in advancing the rights of all in dire need.

4.5 Children

4.5.1 Child Support Grant

Although the CSG has been extended to include children aged 14 by 2005, the phasing in of the extension merely caters for children who are in the system and receiving the grant. Children such as those aged 12 prior to 1 April 2003 will never have access to the grant, as they will be over the age of 14 by 2005. At present children aged between 9 and 18 years have no access to the Child Support Grant.

4.5.2 The Care Dependency Grant and the Foster Care Grant

The Foster Care Grant and the Care Dependency Grant have not received as much publicity as the Child Support Grant has. The registration campaigns were selective and concentrated more on the Child Support Grant. The Foster Care Grant and the Care Dependency Grant are the most difficult to attain and the procedure is extensive. The Foster Care Grant involves a process that involves courts and social workers. The Care Dependency Grant involves medical professionals and social workers.

4.5.3 HIV/AIDS, Disability grants and Care Dependency Grants

According to the responses received from government, some provinces indicated that persons infected with HIV/AIDS were allowed to apply for the Disability Grant, only if they were in a condition that rendered them unable to work. However, nothing was reported about children infected with HIV/AIDS. A care-dependent child is defined as a child between the ages of one and 18 years who requires and receives permanent home care owing to his or her severe mental or physical disability. From this definition it could be deduced that a child infected with HIV/AIDS can qualify for the Care Dependency Grant in the terminal stages of the disease when permanent home care is required.

Children infected with HIV/AIDS as well as adults need specialised care to prolong their lives. The income support would be necessary at stages prior to the terminal stage because some may die before receiving the grants.

4.5.4 HIV/AIDS and Child Labour

A study on HIV/AIDS and child labour in the Sub Saharan Africa by the International Programme on the Elimination of Child Labour (IPEC)⁸⁵ found that the HIV/AIDS pandemic adds a new dimension to the problem of child labour. There are also a number of links to child labour. A burden is placed on girls, who often provide care and household services for the entire family when a parent becomes ill or dies. Children find themselves under pressure to work to assist their siblings in securing a livelihood and those engaged in the worst

forms of child labour are at risk of becoming infected and further spreading the disease.⁸⁶ Children who live in the streets often fend for themselves and in order to survive engage themselves in any activity that generates income.

Child labour, especially exploitative forms of child labour, pose serious threats to the work done by government in affording protection to children against exploitative and harmful labour. Children fall into this trap because they are excluded from the social safety nets (social assistance). Government can curb this by closing all the gaps and affording every child social security.

4.6 Social insurance

Social insurance covers joint contributions from the employer and the employee. This aspect of social security is not mandatory in other aspects such as old age pension but it is mandatory in aspects such as the Unemployment Insurance Fund and the Compensation for Occupational Injuries and Diseases at work.

The Department of Labour has to be commended for striving towards making the lives of the most vulnerable in our society better. The inclusion of domestic workers and other workers in the Unemployment Insurance Fund, followed by the wide promotion and publicity through various mediums as well as the constant inspection of workplaces in order to protect workers is an indication of the effective, reasonable and expeditious manner in which the department respects, protects, promotes and fulfils its constitutional obligation.

The non-mandatory forms of social insurance need to be regulated. Government should also promote the right of everyone to social insurance, encourage people to cover themselves against unexpected contingencies and ensure that employers contribute towards their employees provident or pension fund. This will reduce reliance on State social assistance.

5 RECOMMENDATIONS

The Millennium Declaration and the Millennium Development Goals (MDGs) establish the values that guide, amongst other things, global development, freedom, equality and tolerance. World leaders pledged to promote equality and the empowerment of people as effective ways to combat poverty, hunger and disease and to stimulate development that is sustainable using the MDG indicators.⁸⁷ The Government should move towards the goal of halving poverty by 2015, and tackle the problems of unemployment and exclusion from social security.

The State should implement the Taylor Committee recommendations and begin the process of a comprehensive social security system for all. The White Paper on Social Welfare provides for a comprehensive system:

April 2002 – March 2003

the general long-term objective is to have an integrated and comprehensive social security system supported by the collective potential of existing social and development programmes. This would be supported by a well informed public, which is economically self reliant, in a country which has active labour market policies aiming at work for all while accepting that all will not necessarily have formal employment. Where these broad goals cannot be met, social assistance should be a reliable and accessible provider of last resort. A comprehensive and integrated social security policy is needed to give effect to the Constitutional right to social security.

Owing to the high rate of poverty, inequality and exclusion from social security, the introduction of a Basic Income Grant could assist the poorest of the poor who are excluded from social security and social assistance to begin to escape poverty and have some form of income. The source of finance for the grant would be funds retrieved from the tax system from middle- and higher-income earners.

The Unemployment Insurance Fund (UIF) is a short-term measure aimed at protecting workers against the risk of unemployment. It does not, adequately afford coverage against unemployment as most people find themselves in situations that demand protection beyond two years. People who have been unemployed for long periods and those who have been retrenched have scant protection against long periods of unemployment. Therefore the State should extend the period of coverage to three years in the short term and ten years in the long term and increase the contribution fees if the need arises. Workers within the informal labour sector should also be afforded access to some form of protection against the risks connected with labour.

The social insurance system needs to be regulated particularly the aspects of old age/pension retirement coverage. This aspect is at present not mandatory and as such is not thoroughly regulated. The State has to ensure that employers comply with their responsibilities. This will also reduce the burden carried by the State in affording everyone social assistance. Reliance on social assistance will be reduced and only afforded to those who really need it.

The State should have a comprehensive system of social services to all vulnerable children. The SAHRC therefore once more recommends that the Child Support Grant be extended to all children up until the age of 18 years.

The maintenance system cannot only be a problem of the Departments of Justice and Constitutional Development and Social Development, communities should be involved. Parents should know about their obligations and responsibilities. The system has to be regulated properly and stringent measures should be applied where necessary.

The State should embark on effective awareness campaigns and inform the public about all the available grants. The application processes should be simplified. The Department of Social Development in partnership with the

Department of Health should introduce a comprehensive programme that will address income as well as health care needs.

The State should introduce mechanisms that will deter vulnerable and poor children from engaging in child labour. Measures be taken to give appropriate support to all children. A study should be undertaken by the State to enable the State to look at effective ways to cater for the needs of children living in the streets. The State should institute policies and programmes aimed at preventing and reducing the number of children living in the streets by re-integrating them into their families and also supporting such families financially. Thus government should devise measures that would look into the needs and rights of these children; and measures other than the National Food Emergency Scheme should be devised by the State to address hardships faced by children in child-headed households.

A comprehensive evaluation of the National Food Emergency Scheme is urgently required to assess its effectiveness in targeting and assisting the poorest of the poor on a sufficient scale and for a sufficient duration. According to the National Department of Agriculture's 2003 protocol response, the figures used for determining the size of the National Food Emergency Scheme should have been adjusted with more recent population and poverty indicators.

During the period under review the State has promoted the right to social assistance, however social security does not only encompass social assistance. The State has to make efforts aimed at promoting and protecting everyone's right to social insurance. The State has an obligation to institute measures aimed at fulfilling the right to social security. Some workers are not protected; for instance contract workers are not provided with social insurance. When some workers are retrenched they are thrown into poverty, which raises concern about an increased pool of unprotected people who will be forced to rely on social assistance when they reach retirement age. The Decent Work for All Strategy⁸⁸ should be taken into consideration by the Department of Labour in order to afford everyone coverage and social protection and enlarge opportunities for better jobs.

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Grants (84 085).

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- 26 Ibid.
- 27 Penny Parenzee, A Gendered Look at Poverty Relief Funds, Budget Information Services, Idasa Budget Brief No 129, April 2003.
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Source: Oxfam/Trócaire



Source: AFR 1 Fund



Source: Kivukwa Trust



water

ECONOMIC AND SOCIAL RIGHTS

5TH REPORT 2002/3

THE RIGHT TO WATER

**5th Economic and Social Rights Report Series
2002/2003 Financial Year**

South African Human Rights Commission

21 June 2004

PREFACE

In this 10th year of our young but thriving democracy, we are all engaged in some way or the other, in critically reflecting on the achievements we have secured over the past years as well as the unfinished work that lies ahead. In the context of the various rights guaranteed by our Constitution, they seek in their totality to ensure that the individual and the society are able to develop to their full potential and indeed that human rights becomes a central feature of our society. In this regard we have made much progress, and in the main, few argue against the notion that civil and political rights are well secured both in law and in practise.

However, the challenge that is situated at the heart of our Constitutional contract is how we advance social and economic rights and in so doing ensure that we advance the interests of the poor and those many who are still to enjoy the full benefits of our democracy. The inclusion of social and economic rights in the Bill of Rights was a clear articulation that democracy was as much about the right to vote, and of free expression and of association as it was about the right to shelter, the right to food, the right to health care, the right to social security, the right to education and the right to a clean and healthy environment.

The Constitution has tasked the Commission with a specific mandate to advance social and economic rights. In particular, section 184(3) requires that: “Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.”

A healthy and robust debate exists around these measures that the Constitution requires the State to take. In addition, the human rights discourse sees considerable contestation around issues such as the nature and scope of the right, the adequacy or otherwise of the measures taken and the meaning of the phrase ‘progressive realisation of rights.’ These are difficult issues and it is not always possible, nor may one say desirable, to always have consensus on them. In some instances the Courts have had to rule on them. We see this Report, however, not only as a contribution to those debates but also as a tool that can assist Government, Parliament and civil society in developing a critical understanding about social and economic rights and their implementation.

The modus operandi of the Commission in discharging its constitutional mandate to monitor and assess the observance of economic and social rights has in the main focussed on requiring organs of state to report to us on measures they have taken. This continues to pose several challenges, namely: to ensure that organs of State submit to the Commission reports that are timeous, accurate and of good quality . We are pleased that good progress has been made on this front over the past year and the process of presenting draft reports to organs of state and civil society for comment has been most valuable to the Commission in finalising this report .

The launch of the 4th Economic and Social Rights report in April 2003 generated considerable interest and much debate and discussion on the Report ensued. We were invited by numerous parliamentary portfolio committees from the National Assembly and National Council of Provinces to present the Report. We certainly found the

engagement with Parliament a very useful and mutually rewarding exercise. It provided the Commission with a unique opportunity to share its thinking and vision around its work with Parliament while it enables us to better understand Parliament's expectation of the Report and its use to them as a tool in their work. There have been numerous valuable recommendations that have emerged from our presentations to Parliament which we are committed to giving effect to from our side.

So as we commence the beginning of the 2nd decade of our democracy the delivery of social and economic rights become crucial to the ongoing success of our nation and the entrenchment of a culture of human rights. It is certainly our hope, and the intention of this Report, to contribute to ensuring that the promise and the vision underpinning our Constitution is shared and enjoyed by all in our country.

Jody Kollapen

Chairperson - South African Human Rights Commission

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INTRODUCTORY SECTION

The aim of the *Introductory Section* is to provide an outline of the common analytical framework used in the reports, briefly discuss the political and economic context of the year under review, and provide an integrated summary of the key findings and recommendations of all eight reports in the series. Details of the report production process are also included at the end of this introduction.

The 5th Economic and Social Rights Report follows a more user friendly format than previous reports. There are now separately bound, less bulky, reports on Land, Water, Environment, Food, Health, Social Security, Education and Housing. Each report has an executive summary to facilitate access to the main findings and recommendations. Issues that connect one right to another are highlighted in the body of each report to emphasise the interrelatedness and interdependence of the rights in the Bill of Rights of the Constitution of the Republic of South Africa Act 108 of 1996 (simply referred to as the Constitution throughout the reports).

A) Analytical Structure and Framework

Each report in this series follows a basic structure:

1. **Introduction:** a discussion of the meaning and content of the right with reference to the Constitution, case law and relevant international human rights instruments.
2. **Progress in the realisation of the right:** a factual description of measures instituted by government during the period under review and their impact, especially on vulnerable groups.
3. **Challenges for the realisation of the right:** a description of key challenges that hamper the realisation of the right, and in some cases, government's response to these challenges.
4. **Critique of measures instituted:** a consideration of some of the shortcomings of the measures instituted by government.
5. **Recommendations:** a set of recommendations that may encourage progressive realisation of the right as expeditiously as possible.¹

Each report consolidates information from various sources including: relevant government protocol responses, government Annual Reports and Strategic Plans, the Intergovernmental Fiscal Review, as well as research funded by government, international donors or other agencies.

¹ Some reports in the series end with a conclusion.

All reports employ the standard of reasonableness as laid down in the *Grootboom*² and *TAC*³ judgements of the Constitutional Court, in conjunction with relevant international human rights instruments.

The constitutional provisions pertaining to socio-economic rights require the State to “take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of [these rights]”.⁴ This requirement, read with the provision on the obligation of the State to “respect⁵, protect⁶, promote⁷ and fulfil⁸ the rights in the Bill of rights” in section 7(2) of the Constitution ensures an effective guarantee of socio-economic rights in South Africa. The judicial enforcement of these rights by the courts and the constitutional mandate of the South African Human Rights Commission to monitor and assess the observance of the rights by the State⁹ and non-State entities also contribute to the effectiveness of the constitutional guarantee of these rights.

The Constitutional Court has played a significant role in ensuring the effective guarantee of socio-economic rights in our country. On the obligation of the State, Judge Yacoob held in the *Grootboom* case:

*The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.*¹⁰

On the effective guarantee of basic necessities of life for the poor, Judge Yacoob further said:

2 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC)

3 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)

4 See sections 26(2), 27(2) and 29(2) of the Constitution.

5 Respect is a negative obligation, which requires the State to refrain from denying or limiting equal access for all persons to the enjoyment of the rights. This also means that the State should abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure which violates the integrity of the individual or which in any way interferes or limits his/her right to pursue the enjoyment of the rights in the Bill of Rights.

6 The obligation to protect places a positive obligation on the State to prevent the violation of any individual's rights by a third party.

7 The obligation to promote places a positive obligation on the State to create a conducive atmosphere in which people can exercise their rights and freedoms by promoting awareness of their rights through public education.

8 The duty to fulfil places a positive obligation on the State to institute active measures that enable each individual to access entitlements to the right and which cannot be secured through exclusively personal efforts. State parties are also obliged to provide a specific right when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. e.g. people in disaster situations or those in dire need.

9 See sections 184(1) and (3) of the Constitution.

10 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC) [24]

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.¹¹

On the role of the courts in ensuring that the State fulfils its role in giving effect to these rights and thus ensuring that there is an effective guarantee of these rights, Judge Yaccob said:

I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.¹²

A similar position was taken by the Constitutional Court in another seminal judgment, *Minister of Health and Others v Treatment Action Campaign and Others*, where the Court held:

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflicts our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.¹³

In outlining the role of the courts, the Court also stated:

The primary duty of courts is to the Constitution and the law...Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to do so.¹⁴

While there might be some criticism directed at the Constitutional Court pertaining to the determination of when there are no available resources for the State to fulfil its obligation pertaining to socio-economic rights, the courts, particularly the Constitutional Court, have and will continue to play an important role in ensuring that the provisions in the Bill of Rights are effectively guaranteed for our people.

¹¹ Ibid., [93]

¹² Ibid., [94]

¹³ *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) [36]

¹⁴ Ibid., [99]

B) The Political and Economic Context of the Year Under Review

The period under review, 1 April 2002 to 31 March 2003, followed the 11 September 2001 attacks and a 24% depreciation of the South African currency (Rand) near the end of 2001. Consumer Price Inflation, especially for goods and services bought predominantly by the poor, increased sharply to the highest level since 1994. Concerns were signalled to the Competition Commission about the impact of import parity pricing in several sectors of the economy, most notably in food production, processing and retailing as well as metals and engineering. Interest rates were raised in an attempt to curb inflation, with a subsequent dampening effect on the rate of economic growth in the latter part of the financial year. According to the Reserve Bank Quarterly Bulletin for March 2003, economic growth stood at a robust 3% in 2002.

As a result of prudent fiscal management, the government introduced a more expansionary Budget in February 2002. Total government expenditure increased from R262,6 billion in 2001/2002 to R291,8 billion in 2002/2003. Overall, the budget directed more resources towards reducing poverty and vulnerability, improving education and training, developing skills amongst the youth, building and enhancing physical infrastructure and basic municipal services, as well as making communities safer places to live, work and play.

It is also important to note that the February 2003 Budget provided for significantly greater expenditure than the previous year. Total expenditure was R331,7 billion for 2003/2004. The additional allocations accommodated substantial policy changes for all three spheres of government and also provided for *higher than anticipated inflation in 2002*.

By the end of the reporting period in March 2003, the Rand had appreciated by 18%. This created concern about the job losses that could arise out of an increase in import competition. Therefore, during the period under review, the goals of progressively realising economic and social rights took place in the context of significant macro-economic volatility, inflation and an expanding government budget.

C) Key Interrelationships Amongst Economic and Social Rights

The Right to Land

The State was responsible for achieving progressive realisation of the right to land during the reporting period. The Commission demonstrates that there was a year on year improvement in land delivery performance by the State, especially through the Land Restitution and Land Redistribution sub-programmes. Improvements in rural tenure reform were less noticeable.

Between 2000 and 2001 there were 12 094 settled Restitution claims, while in February 2002 there were approximately 32 000 settled claims. By March 2003, there were 36 488 settled claims recorded. Although the majority of these claims were in the urban areas, settled rural claims show a substantial increase. The people working on the Land Redistribution for Agricultural Development sub-programme delivered 103 682 ha against a target of 81 555 ha for the year under review. Whereas the Department had targeted to benefit 3 601 people, the programme ended up benefiting 6 170. Concerning

tenure reform, the State initially delivered 30 000 ha of land through 201 projects. Beyond that, the State is working towards bringing the Extension of Security of Tenure Act (ESTA) and Labour Tenants Act (LTA) together in the Consolidated ESTA/Labour Tenants Bill.

Throughout the report, the Commission reflects on the demand, voiced by landless people and others, that the pace of land redress is too slow and inattentive to vulnerable groups. The report recommends accelerating land reform to meet its new targets by relieving budgetary constraints and the associated problems of personnel shortages, lack of quality training and understandable communication; land acquisition; and improvements in monitoring and evaluation.

The Commission would also like to highlight that it was informed by the Department of Land Affairs that it was impossible to represent the racial and gender composition of land purchase transactions and repossessions, according to the size and value of land parcels.

The Right to Education

The right to education is analysed as a continuum of three bands of schooling- General Education and Training, Further Education and Training and Higher Education and Training. The State instituted measures to respect, protect, promote and fulfil the right to General Education and Training, and in the Commission's overall assessment, it succeeded in achieving progressive realisation of this right.

The Department of Education succeeded in ensuring that all targeted Early Childhood Development sites for children between the ages of five and six were operating. However, the Department acknowledges the challenge, which has budgetary implications, that only 13% of all children have access to the programme. In the context of a substantial increase in the rate of student enrolment in primary schools between 1994 and 2001, the National Department focused on further increasing access to General Education and Training through reviewing public school financing and the system of school fee exemptions. The report highlights the shortcoming that some schools and Provincial Departments of Education failed to make parents aware of the school fee exemption.

While progress was made in eliminating instances where learners are forced to receive education in environments that are not conducive to teaching and learning, the report emphasises that more needs to be done to address infrastructure backlogs, especially when it comes to water and sanitation. The Department also made progress in developing a redistribution model for personnel and operating expenditure that would achieve equality of teaching quality and equality of learning outcomes in the schooling system from 2003/2004 onwards. All stakeholders in education, including the SAHRC need to explore and come up with a definition of quality basic education which could be measurable and relatively easy to monitor.

Conditions in farm schools were identified as hinderance to progress in the realisation of the right to General Education and Training. The issue of street-children also has to be given some serious attention by all the relevant stakeholders. Amongst other recommendations to further observance of the right to General Education and Training,

the report calls for better-published medium term strategies and improved spending on Adult Basic Education and Training. In the 2001 Census, 4,5 million people aged 20 years and older did not have a formal education and 4 million people had primary schooling only.

Most of the developments in the Further Education and Training band met the Constitutional requirement to respect, protect, promote and fulfil the right. *Dinaledi*, the programme that seeks to improve participation and performance of learners from historically disadvantaged backgrounds in Mathematics, Science and Technology (MST), reportedly surpassed its target of 10% of students enrolling for MST in its first two years of implementation. The development of Recognition of Prior Learning (RPL) is another development that contributes to the realisation of the right to Further Education and Training. RPL recognises non-formal and/or non-academic education. RPL also stands to maximise learning opportunities for those without formal and/or academic qualifications to acquire formal qualifications in Further Education and Training institutions, which must all be registered with the State.

Areas where the State fell short of its obligations to progressively realise the right to Further Education and Training include: insufficient public education on school fee exemptions and insufficient Learner Support Materials and/or their late delivery. The report also highlights that participation rates in education by girl learners were being negatively affected by girls' involvement in income generating activities.

While Higher Education and Training is not explicitly recognised as a right in the Constitution, it obviously depends on the learning outcomes achieved in General and Further Education and Training. Here, there seems to be room for improvement as the average graduation rate for university and technikon students is 15%; less than half the ideal average of 33%.

Key challenges associated with the Higher Education and Training band include assisting potential students with subject selection choices and career guidance at school and university level, as well as lowering the high costs of accessing higher education and applying to different tertiary institutions. The report recommends ensuring that admission requirements to tertiary institutions are transparent and fair, promoting indigenous languages as academic/scientific/legal languages, mobilising funds for bridging courses and improving access for mature and post-graduate students, including part time students.

The Right to Water

Ever since 2001 and the introduction of Regulations Relating to Compulsory National Standards and Measures to Conserve Water, the State instituted a national measure to fulfil the right to water by supplying 6000 litres of free, clean water, per household per month, otherwise known as Free Basic Water.

During the reporting period, approximately 1,6 million people gained access to improved piped water supplies through Department of Water Affairs and Forestry's Community Water Supply and Sanitation Programme. Approximately 65 thousand toilets facilities were constructed during the reporting period under the same programme, but it should be noted that these figures exclude the large number of

sanitation facilities that were delivered as part of the State's housing programmes. Less than 530 000 households also benefited from water and sanitation projects through the Department of Provincial and Local Government's Consolidated Municipal Infrastructure Programme. Although the above indicates that the roll-out of water and sanitation infrastructure is proceeding towards the Department's medium delivery targets, the report raises concerns about the level of dysfunctional infrastructure and projects, especially in rural areas.

At the end of the reporting period in March 2003, access to Free Basic Water by poor people stood at 38% or approximately 12,2 million people. Access to Free Basic Water by non-poor households stood at close to 100% or approximately 14,2 million people. A large number of poor people (19,6 million) were still to receive their Free Basic Water allocation. Where Free Basic Water was not available, the average cost of 6 kilolitres (kl) was approximately R13 per month. The price for 6kl of life-line supply was highest in Limpopo province at approximately R19 per month. Gauteng and KwaZulu-Natal also had comparatively high average charges for life-line supplies where Free Basic Water services were not operational.

In order to remove these glaring inequities in Free Basic Water provision, the report calls for an urgent revision of the pricing system to include a significantly greater level cross-subsidisation from high volume water users to low volume users in the 0-6 kl range. More support and funding is required to assist municipalities with capacity problems in implementing Free Basic Water. During droughts, local governments should ensure that Free Basic Water supplies for domestic users are assured and that a situation cannot develop where agricultural, mining and industrial users are allocated large volumes of water at similar prices to low-volume users.

The report describes some aspects of the devolution of domestic water quality monitoring and testing from Provincial Departments of Health to local municipalities and calls for rapidly providing sufficient funds for water quality monitoring to prevent serious disease outbreaks and illness.

The report recommends that the Department of Water Affairs and Forestry (DWAf) should take a leading role in making sure that farm dwellers, residents near commercial farms and poor households in rural and urban areas access clean water and proper sanitation services. DWAf should also ensure that it develops and implements a plan to address the specific problems of water access experienced by people living with HIV/AIDS.

The report suggests that monitoring bodies should be created at local level to effectively monitor the implementation of policies and laws aimed at fulfilling the right of access to water. The report warns that monitoring will only be effective if monitoring bodies from local, regional and national spheres work together. Where possible and when possible, the Free Basic Water allocation should be increased to cater for higher levels of domestic water consumption. A 50kl water allocation per household per month would bring South Africa's Free Basic Water allocation into the 'low level of health concern' range defined by the World Health Organisation.

The Right to Health Care

The report on the right to health care focuses on key developments in three key health programmes of the State (Health Service Delivery, Strategic Health Programmes and Administration). Although the policy and legislative measures developed in the fiscal year under review can be said to be “reasonable” in their conception, there remain large gaps in implementing them in a manner such that all the provinces, urban and rural peoples, rich and the poor have equal access to the same high quality of care.

The three most important, and universally acknowledged, indicators to measure the health status of a nation are Life Expectancy at Birth, the Maternal Mortality Ratio, and the Infant Mortality Rate. Life expectancy has fallen from 56 years in 1996 to 52,5 in 2002 and is projected to fall to 47 by 2005. The infant mortality rate has increased from 45 in 1998 to 59 in 2002. This means that more children under the age of one died in 2002 as compared to 1998. The under five-mortality rate has risen from 61 in 1998 to 100 in 2002. Similarly, the maternal mortality ratio shows a steady increase since 1998 and is estimated to be 150 per 100 000 live births. The National Department of Health, as well as independent researchers, have concluded that this is due to HIV/AIDS related deaths.

The single most important challenge that government faces is the one posed by the AIDS pandemic and the high incidence of opportunistic diseases such as tuberculosis. It is estimated that about one tenth of the population of the population is infected with the HI virus i.e. close to 5 million people. The number of AIDS orphans is estimated to be one million. In a landmark case instituted by Treatment Action Campaign against the Minister of Health, the Constitutional Court, in 2002 confirmed the finding of the High Court that government’s policy to limit Nevirapine to research and training sites was in “breach of the States obligations under section 27(2) read with 27(1)(a) of the Constitution.” The report recommends that the Comprehensive National Aids Plan should be rolled out effectively in all the provinces so as to meet targets and timelines in order to substantially reduce new infections and to prolong the lives of those already infected.

In spite of the fact that policies and programmes directed at improving the health status of the country have been put in place such as the Integrated Management of Childhood Illnesses, the AIDS pandemic continues to be the single most cause of death in South Africa. This has placed an enormous strain on an already overburdened health system and undermines the efforts made by the State. This is compounded by the fact that the other economic and social rights, which contribute substantially to the health status of a nation, are also not fully enjoyed by the vast majority of poor South Africans due to the huge backlogs inherited from the past. Inadequate housing, poor sanitation, overcrowding, lack of clean drinking water, lack of efficiently run social services, insufficient nutrition and health education exacerbate the diseases of poverty. Moreover, a household that is affected by AIDS contributes to depleting the financial resources available to the family, thereby increasing the level of poverty.

government developed legislative and other measures to comply with its constitutional obligations in terms of section 7(2) of the Constitution. However, despite national policies and programmes, which, in the main comply with international standards and targets, the health care system has not been able to successfully deliver quality health

care on an equitable basis in all the provinces. Provinces do not spend the same amount per capita on health care delivery, and there is a serious lack of managerial capacity in the health system. The biggest challenge facing the efficient running of the health system is training managers to operationalise efficient systems especially for running clinics and hospitals where many problems have been identified. Efficient management systems in conjunction with effective engagement with labour should be operationalised with immediate effect in the public health sector so as to ensure that hospitals and clinics run well.

The report also recommends that there is a need to increase efforts in promoting preventative health measures by the State as well as by non-state actors. Programmes and policies should also be put in place to address the needs of the poor and vulnerable members of society, including a National Health Insurance System. Inequities in the health system such as intra- and inter-provincial health expenditures, access to clinics and hospitals, number of doctors, specialists, and nursing staff need to be addressed so as to give meaning to the constitutional right to universal and equal access to everyone. Finally, Departments of Health are strongly advised to improve their monitoring, evaluating, and reporting systems

The Right to Social Security

The Constitution provides that everyone has a right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The number of social assistance beneficiaries increased dramatically by 966 311 people from April 2002 to the end of March 2003, mostly as a result of increased registration for Child Support Grants for children up to the age of seven. By the end of March 2003, 5,6 million people were beneficiaries of social assistance, which mostly comprised of child support grants (2,5 million people), old age pensions (2 million people), disability grants (897 050 people) and foster care grants (133 309 people). The most rapid increases in uptake of social grants took place in Gauteng, Free State, KwaZulu-Natal, Mpumalanga and Limpopo. Take up rates were considerably lower in the Northern Cape, North-West, Eastern Cape and Western Cape.

Most provincial departments indicated that the allocated budget was not enough and that numbers of grant beneficiaries were constantly increasing, resulting in overspending for social security. However, the delivery of social services has not been efficient in some parts of the country as a result of administrative problems, lack of documentation as barriers to accessing grants, poor conditions at pay points, as well as corruption and maladministration.

As a result of rapid inflation in the cost of basic goods bought by the poor, in 2002/2003, the State moved swiftly to implement above inflation related increases in social grants. The old-age pension was increased by R20 to R640, the child-support grant increased by R10 to R140, the grant in aid increased from R120 to R130, the foster-care grant from R450 to R460, and the care dependency grant from R620 to R640.

The National and Provincial Departments of Social Development spent 90% of the R49 million allocated to the HIV/AIDS (home based/community based care) programme. The Home/Community Based Care programmes, through the collaborative work of

government, non-governmental organisations, including faith-based organisations, and communities have benefited 29 612 children orphaned or vulnerable to HIV/AIDS by the end of March 2003. The programme reached 75 000 children orphaned or vulnerable owing to HIV/AIDS since its inception in 2000.

The State also instituted new measures to further the right to social security, including disability assessment panels, a social relief of distress policy and the implementation of the National Food Emergency Scheme/Programme. Figures of the number of households that were assisted with food parcels in the pilot phase of the National Food Emergency Programme from December 2002 to the end of March 2003 range from 60 089 to 149 779.

The social security system at present does not cater for everyone and not everyone in need of social assistance is afforded such assistance. This is especially so for children in child headed households and children who live in the streets who sometimes engage in exploitative forms of labour. Some parents also fail to provide and take care of their children and put strains on the maintenance and social assistance systems.

The report recommends that the Department of Labour should take the International Labour Organisation's Decent Work for All Strategy forward in South Africa. It is also recommended that the relevant organs of State achieve better regulation of the insurance, health and maintenance systems. Particular attention should be paid to the coverage of old age pensions for workers in non-formal employment. The Department of Social Development is encouraged to continue fostering collaboration with all stakeholders, such as other government departments, Faith Based Organisations and Non-Governmental Organisations. The Basic Income Grant should continue to be considered as a viable option for addressing poverty in the country, especially amongst people of working age. The proposal to extend social assistance to all children in need (up to the age of 18), should also be kept alive.

The Right to Food

The report concludes that many people, and children in particular, had their right to food violated during the reporting period as they lost access to affordable food due to high prices and/or unreasonable plans devised and supervised by government. During the reporting period, 101 152 children were admitted to hospital with severe malnutrition and it was not possible for the Commission to state how many children died of malnutrition. However, it is alarming that case fatality rates for severe malnutrition in two under-resourced hospitals in the Eastern Cape ranged from 21% to 38%.

The report finds the National Department of Health's targets for reducing malnutrition to be unreasonable in their conception because the targets for 2000 and 2005 were virtually identical. The report also finds two elements of the Primary School Nutrition Programme to be unreasonable in their conception.

The first issue concerns the reduced allocation of resources to the programme in 2002/2003 as compared to 2001/2002. In 2001/2002 the total cost of the school food "meal" ranged from approximately 99 cents to R2.10. In 2002/2003, the maximum budgeted resource available per targeted learner per day was less than 67 cents. This is

clearly an unreasonable set of parameters for the programme to be improved to meet the higher standards set by Cabinet.

The second element of the programme that was unreasonable was the reduction in the targeted number of children who should benefit from the programme. In the context of increasing numbers of children enrolled in schools, the Primary School Nutrition Programme did reach 4,5 million children in grades R to 7, however this was 151 615 children less than the year before. The drop in the number of learners who were reached is connected with government reducing its target from 5,4 million learners in 2001/2002 to 4,9 million learners in 2002/2003 as well as rapid increases in the cost of food procured for the programme. A three month gap in the implementation of the programme in the Eastern Cape also reduced access to the programme.

Non-State actors appear to have fallen short in their observance of their positive obligations to fulfil the right to food. As one example, the Yiyo Lena sifted maize relief programme introduced by a group of companies is alleged to have sold relief maize packs at a 20% discount, despite that fact that the companies announced that the programme would entail a 50% discount.

High basic food prices during the reporting period, were partly attributable to inadequate safeguards on the South African Futures Exchange, where maize prices are formed. High prices for maize were passed on to low-income consumers, who could ill afford such dramatic basic food price increases for such a sustained period of time. The potential for market manipulation should have been prevented by the Johannesburg Securities Exchange when allegations of abuse were first signalled in 2002. The report identifies that there are weaknesses in the State's observance of its obligation to protect against fraud, unethical behaviour in trade and contractual relations.

There were some signs of improvement in the State's delivery of production support to emerging farmers and people who grow their own food. For example, the Comprehensive Farmer Support Package was instituted during the reporting period to assist land reform beneficiaries. However, it was implemented in some provinces only.

The LandCare programme, which is one of the major production support programmes from the National Department of Agriculture, was heavily underspent at 65% of the total conditional grant to provinces. There is also a significant gap in production support for rural restitution beneficiaries.

It was found that very few Provincial Department's of Agriculture were operating well funded programmes designed specifically to provide grants or revolving loans to support increased access by small scale and emergent farmers to production and/or marketing related infrastructure. Production support materials and learning support materials that are relevant to resource to poor farmers in water scarce areas were also not readily available.

On the whole, the report determines that the State absorbed the heavy burden of duty to achieve the progressive realisation of the right to food as expeditiously as possible, within its available resources. However, there was a crucial weakness in the measures to protect the right to food from being violated by non-State actors or third parties that need not be repeated in future.

The report suggests that there is a need for greater care in the preparation of strategic and financial planning targets so that they inspire civil society to marshal their resources in support of the progressive realisation of the right. The report recommends: public education to raise awareness of malnutrition, rolling out the Integrated Food Security Strategy at a provincial level, improving food safety, achieving better regulation of the food industry through State procurement, accelerating agrarian reform, and communication policy and legislative developments more effectively. Finally, the report supports the call for government, labour, community and business representatives to negotiate an agreement at the National Economic Development and Labour Council (NEDLAC) to ensure the right to food and quality job creation in the food industry.

The Right of Access to Adequate Housing

In order to fill some gaps in the housing policy framework, the State identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities for 2002/2003. Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to transport and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualised as a result of the *Grootboom* judgment and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control (e.g. disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety). The report highlights that it was not clear whether the Emergency Housing Policy should also cover people living in informal settlements, because they are living in intolerable circumstances. Social Housing projects demonstrate that socially, environmentally and sunshine conscious design principles can make a difference to the quality of State subsidised housing.

The State reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from Occupation of Land Amendment Bill and the commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000. With a view towards curbing discriminatory practices, the Act compels financial institutions to disclose information in their financial statements on home loan patterns according to categories of persons and geographic areas (both of which may be prescribed). The Community Reinvestment Bill confirmed the State's intention to increase private sector investment in the lower end of the housing market. The report highlights that the State was also attending to some aspects of the Housing Act 107 of 1997, as amended, in order to ensure that the Act, and its implementation, did not violate an individual's right to property in terms of the Constitution.

In terms of on-going policies and programmes, in 2002/2003, the State reported 203 288 houses completed or under construction, whilst the State approved 519 498 subsidies to households with a joint monthly income less than or equal to R3 500, or R1 500 if the house was built under the apartheid system. By the end of 2002/2003, the State reported that over 1,4 million houses had been delivered since 1994, whilst the number of families without houses (i.e. dwellings in backyards, informal dwellings, backyard dwellings in shared properties and caravans/tents) was reflected as 2 399 825- from the 2001 Census. The State also increased the subsidy amounts for the housing programme to keep pace with inflation and maintain the well-known quality and size of housing. Sixty-three projects were also completed as part of the Human Settlement Redevelopment Programme in order to correct imbalances and dysfunctionalities in

existing settlements that cannot be funded through the housing subsidy scheme (e.g. sports facilities, business hives, labour exchanges, cemeteries, parks and ablution blocks).

There was under expenditure on housing delivery amongst many provincial departments responsible for housing. Reporting on the constraints associated with underspending was not complete, but included the following in some cases: failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in the National Department approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the People's Housing Process and delays at the Deeds Office.

Comparing performance in relation to targets was a problem in that provincial information was reported in the format of the number of units completed *or* under construction. Nevertheless, Gauteng and Limpopo provinces stand out as the only provinces to show a reduction in units, whether complete or under construction, from 2001/02 to 2002/03. The Gauteng Department of Housing reported delivering 59% of the target in the incremental housing programme and 39% of the target in the Social Housing programme. A Customer Support Service in the province acknowledged 83 714 queries and responded to a further 11 774 by letter.

According to the National Department of Housing, in 2002/2003, 6 469 houses did not conform to the Department's construction and safety standards. The National Home Builders Registration Council's (NHBRC) Warranty Scheme was instituted to provide assurance to beneficiaries that houses built and financed through the housing subsidy scheme are of an adequate quality. After trying to resolve disputes about the quality of construction, a housing subsidy beneficiary can forward complaints to the NHBRC. However, the report highlights that public education is required to empower consumers to identify quality problems and make use of the complaint procedures of the NHBRC. The Mpumalanga Department of Housing also reported that building works inspectors from provincial government and local government monitored the work of contractors.

The report makes one urgent recommendation, namely: to establish the dedicated fund for acquiring well-located land for low-cost housing. Other recommendations include reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, interpreting the Peoples' Housing Process as a route for strengthening culturally adequate housing, creating an informed and supportive environment for whistleblowing, and ensuring effective participation in the delivery of housing. Specific attention is drawn to the plight of farmworkers and vulnerable groups, especially HIV/AIDS orphans and People with Special Needs.

The Right to a Healthy Environment

Section 24 of the Constitution establishes the right to environment in order to ensure the health and well-being of present and future generations. At its core, the right to environment aims to grant this benefit to everyone in South Africa, not just to the few. Although, translating this vision of the benefit of environmental health into reality has become increasingly complicated, ensuring that there are no violations of this right is as urgent as any violation of other rights in the Bill of Rights.

Analysts of data from South Africa's Global Atmosphere Watch station at Cape Point contend that continued emissions of greenhouse gases are cause for concern. Like many countries, South Africa is sensitive to global climate change and there are also occasions, especially in major urban areas, when more localised air pollution becomes a health threat.

By way of illustration, the Johannesburg *State of the Environment Report 2003* indicates that “while in many parts of Johannesburg, air quality is within acceptable standards, approximately 20% of the City, particularly dense settlements and lower income townships, experience severe air pollution, with ambient air pollution levels exceeding acceptable guidelines by approximately 20-30% particularly during winter when temperature inversions prevent emissions from dispersing.” The report goes further to state that “levels of particulate matter in certain townships can exceed the World Health Organisation standards by as much as 250% in winter.”

Progress in the realisation of the right to environment could not be very well monitored and observed by the Commission during the year under review because annual progress reports in terms of section 11 of the National Environmental Management Act 107 of 1998, were inaccessible at the time of writing. These progress reports should contain detailed information on the implementation of measures instituted to ensure the right to environment.

Nevertheless, the Commission did observe the growing influence of the Committee for Environmental Co-ordination through an interpretation of its review, and subsequent consolidation, of Environmental Implementation Plans and Environmental Management Plans submitted by relevant organs of State. These reports contain the planned and *aligned* outputs of national and provincial departments with an impact on, or management function over, aspects of the right to environment. The Commission also recognises that some Environmental Co-ordinating Committees were established at the provincial sphere, also for the purposes of alignment and co-operative governance.

Progress has been made, through the courts and other avenues, towards realising the procedural aspects of the right to environment (access to information, participation in decision-making processes, redress and remedy). The report includes several examples of objections and court applications lodged by Non-Governmental Organisations, with a view towards safeguarding environmental health in low-income areas. Despite these opportunities to access information and participate in decision making, some remedies for old violations could not be realised without concerted action on the part of the State. One example, is the case of workers with mercury poisoning, which first occurred many years ago. In March 2003, Thor Chemicals was served with a R60 million toxic chemical clean-up directive by the State.

On the substantive issue of waste management and pollution control, what was reported by government to the Commission fell short of what was expected in terms of the strategic objectives of the policy and strategy for pollution and waste management. The report highlights that there is still no clear understanding among the different mandate holders for this function of what they are required to do and as a result, implementation was not as effective as it could be. Having said this, there were positive developments during the period under review, including the introduction of waste buy-back centres

which address brown issues and could assist in strengthening the bargaining power of the very low income people who do the hard work of collection.

On the issue of Air Quality, the report acknowledges that progress was made in the Southern Industrial Basin through the focused action of the State and Community Based Organisations (CBOs) in linking asthma in school children to emissions, however there is an urgent need for national legislation to institute mechanisms and standards to effectively protect against pollution that threatens health and well-being, possibly including pollutant release and transfer registers.

Several new control measures were introduced to manage water pollution, including the second draft of the National Water Quality Management Framework Policy and the Waste Discharge Charge System. The Working for Water programme succeeded in protecting and preventing against water loss due to alien invasive plant species, however it was not clear how much of this work focused unfairly on commercial farmlands and not on areas inhabited by vulnerable sections of the population.

Most of the work by the State on inland as well as marine and coastal biodiversity and conservation was reasonable in as far as it related to tourism and the economic development of the country.

The report highlights that the challenges facing South Africa in terms of the right to a healthy environment include: allocating sufficient resources for progressive realisation of the right for the benefit of vulnerable groups; educating and training communities; ensuring that proper implementation systems are in place; ensuring effective co-operative governance; operating proper monitoring and evaluation systems.

The report recommends that while most policies and laws are in place or about to be instituted, there should be a quantum shift in focus towards implementation of measures to further the right to environment for vulnerable groups in a more decentralised way. Provincial government and local government should be resourced to concentrate their energies on implementation, in association with community based organisations that have already developed innovations to further the right, sometimes in the face of extreme resource scarcity.

The State has made valuable contributions to promoting the right to environment through for example, the “Bontle ke Batho” or the clean schools, wards and towns campaign; however, organs of State could do more to ensure that their own internal operations reflect implementation of the right to environment. For example, the Council for Scientific and Industrial Research (CSIR) implemented International Standards Organisation 14001 standards for handling and disposing of its own hazardous waste. This initiative by an organ of State seems to have afforded the CSIR the opportunity to gain some capacity and insight, which could be applied to other relevant contexts in the public or private sector within the South Africa.

The report also recommends that monitoring and evaluation systems need to be simplified where possible and improved. Annual progress reports in pursuit of targets and plans laid down in Environmental Implementation Plans and Environmental Management Plans should include a focus on the substantive aspects of the realisation of the right for vulnerable groups. The contents of the reports should also be widely

communicated so as to avoid conflict and encourage effective participation. The Committee for Environmental Co-ordination could also be complemented by the National Environmental Advisory Forum (NEAF) envisaged in the National Environmental Management Act 107 of 1998. This provision to encourage participation should be effected without delay.

D) Protocols and the Report Production Process

The production process for this report began with the SAHRC sending questionnaires, which are called protocols, to various organs of State for their comment in May 2003. The Commission then took some time to revise the protocols, which were resent to all relevant organs of State for comment and suggestions in June 2003. The response from relevant organs of State was not satisfactory; with the Department of Housing (Gauteng Province), the Department of Land Affairs and the Department of Water Affairs and Forestry being the only organs of State to respond. However, the Commission acknowledges that further work is required, in the next reporting cycle, to ensure that the protocols are improved for all spheres of government and parastatals.

The final protocols were sent to various organs of state (national and provincial government, parastatals, metropolitan and local councils) in July 2003, as mandated by section 184(3) of the Constitution. In future, the Commission will pay more attention to smaller municipalities by focusing field research on the implementation of programmes and projects at a local level.

The first deadline for the release of this Report was in December 2003. However, the Commission had major problems in getting timeous responses from organs of State and as a result, the Commission took a decision to subpoena several departments and postpone the release of the Report until sufficient information had been received (see summarised list overleaf).

SPHERE	INSTITUTION	DATE RESPONSE RECEIVED
2 - Provinces	GAU Social Services and Population Development	August 21, 2003
1 - National	NATIONAL Labour	August 29, 2003
2 - Provinces	EC Health	August 29, 2003
2 - Provinces	WC Agriculture	August 29, 2003
2 - Provinces	LIMPOPO Agriculture and Environmental Affairs	August 31, 2003
2 - Provinces	FS Health	September 1, 2003
2 - Provinces	NW Health	September 1, 2003
2 - Provinces	WC Social Services	September 1, 2003
2 - Provinces	EC Education and Training	September 5, 2003
2 - Provinces	GAU Health	September 5, 2003
2 - Provinces	KZN Agriculture and Environmental Affairs	September 9, 2003
4 -Parastatals	PARASTATAL Rand Water	September 9, 2003
2 - Provinces	KZN Traditional and Local Government	September 10, 2003
2 - Provinces	MP Local Govt and Traffic	September 10, 2003
2 - Provinces	NW Education	September 10, 2003
1 - National	NATIONAL Land Affairs	September 12, 2003
2 - Provinces	FS Social Welfare	September 12, 2003
2 - Provinces	GAU Housing	September 12, 2003
2 - Provinces	NC Health	September 12, 2003
2 - Provinces	NC Social Services and Population Development	September 12, 2003
1 - National	NATIONAL Agriculture	September 15, 2003
1 - National	NATIONAL Water Affairs and Forestry	September 15, 2003
2 - Provinces	EC Agriculture and Land Affairs	September 15, 2003
2 - Provinces	FS Education	September 15, 2003
2 - Provinces	GAU Education	September 15, 2003
2 - Provinces	MP Housing and Land Administration	September 15, 2003
2 - Provinces	WC Education	September 15, 2003
2 - Provinces	WC Environmental Affairs and Development Planning	September 15, 2003
2 - Provinces	WC Health	September 15, 2003
2 - Provinces	WC Housing	September 15, 2003
2 - Provinces	NC Agriculture Conservation and Environment	September 15, 2003
2 - Provinces	KZN Health	September 16, 2003
1 - National	NATIONAL Education	September 18, 2003
2 - Provinces	MP Health	September 18, 2003
2 - Provinces	NW Agriculture, Conservation and Environment	September 23, 2003
2 - Provinces	MP Social Services and Population Development	September 25, 2003
3 -Metropolitan Councils	METRO Greater Tswane Metropolitan Council	October 2, 2003
3 -Metropolitan Councils	METRO Nelson Mandela Metro Council	October 2, 2003
1 - National	NATIONAL Correctional Services	October 3, 2003
1 - National	NATIONAL Social Development	October 3, 2003
2 - Provinces	LIMPOPO Health and Welfare	October 3, 2003
2 - Provinces	EC Social Development	October 3, 2003
1 - National	NATIONAL Health	October 10, 2003
2 - Provinces	GAU Agriculture, Conservation, Environment and Land Affairs	October 10, 2003
4 -Parastatals	PARASTATAL Medicines Controls Council	October 10, 2003
2 - Provinces	FS Local Govt and Housing	October 29, 2003
1 - National	NATIONAL Housing	October 30, 2003
1 - National	NATIONAL Provincial and Local Government	October 30, 2003
1 - National	NATIONAL Environmental Affairs and Tourism	October 31, 2003
4 -Parastatals	PARASTATAL Agriculture Research Council	October 31, 2003
1 - National	NATIONAL Minerals and Energy Affairs	November 3, 2003
2 - Provinces	KZN Education and Culture	November 3, 2003
2 - Provinces	EC Housing, Local Government and Traditional Affairs	November 4, 2003
2 - Provinces	GAU Development Planning and Local Government	November 4, 2003
2 - Provinces	LIMPOPO Education	November 4, 2003
2 - Provinces	MP Agriculture, Conservation and the Environment	November 4, 2003
2 - Provinces	NC Local Govt and Housing	November 4, 2003
2 - Provinces	WC Planning and Local Govt	November 4, 2003
4 -Parastatals	PARASTATAL National Education Financial Aid Scheme	November 4, 2003
2 - Provinces	NW Developmental Local Government and Housing	November 5, 2003
3 -Metropolitan Councils	METRO Eastrand Metropolitan Council	November 5, 2003
4 -Parastatals	PARASTATAL Umngeni Water	November 5, 2003
3 -Metropolitan Councils	METRO Cape Town Metro Council	November 6, 2003
4 -Parastatals	PARASTATAL Medical Research Council	November 6, 2003
2 - Provinces	FS Agriculture	November 7, 2003
2 - Provinces	KZN Welfare and Pensions	November 7, 2003
2 - Provinces	LIMPOPO Local Govt and Housing	November 7, 2003
2 - Provinces	MP Education	November 7, 2003
2 - Provinces	NC Education	November 7, 2003
4 -Parastatals	PARASTATAL National Housing Finance Corporation	November 7, 2003
2 - Provinces	KZN Housing	November 14, 2003
3 -Metropolitan Councils	METRO eThekweni Metropolitan Council	November 17, 2003
4 -Parastatals	PARASTATAL Landbank*	November 17, 2003
4 -Parastatals	PARASTATAL Council for Scientific and Industrial Council*	November 18, 2003
2 - Provinces	FS Environmental, Tourism and Economic Affairs	November 19, 2003
3 -Metropolitan Councils	METRO Greater Johannesburg Metropolitan Council	December 17, 2003
2 - Provinces	NW Social Services**	

----- First deadline

----- Extended deadline

----- Subpoena hearings begin

----- Subpoena hearings end

* Extension granted as a result of communication problems

** No subpoena served, a letter explains the breakdown in communication

Most organs of State submitted their reports before they were meant to appear at a subpoena hearing. However, the North West Department of Social Services, Arts, Culture and Sport did not provide a response to the Commission as a result of problems with network cabling and the resignation of the personal assistant to the Acting HoD. The Department submits that it was not out of irresponsibility and deliberate disregard of the law that the Commission did not receive a report from the Department.

In order to improve the quality of the information, analysis and recommendations in the reports and to forge closer and better working relationships with government and non-governmental entities, a set of draft reports were released for comment to government and civil society before a National Input Workshop on 27-28 January 2004. Comments made at the workshop, and in writing, have been considered by each report writer.

A set of second draft reports were then made available to the Director General of the relevant national department in February 2003 to correct any remaining problems with factual information. Responses were received from the following departments: Water Affairs and Forestry, Minerals and Energy, Provincial and Local Government, Health, Social Development, Education, Land Affairs, and Housing. The final reports were also reviewed intensively within the Commission before being published.

E) Conclusion

One of the concerns acknowledged by the Commission about the monitoring process so far is that it still relies heavily on reports from government.

Furthermore, even though the Bill of Rights applies vertically and horizontally and binds State entities and non-State entities, the Commission has some capacity problems in extending its mandate to non-State entities, especially big corporations.

In the next reporting cycle, the Commission will place more emphasis on conducting its own primary research in addition to improving on the existing protocols for each right and making better use of annual report information as soon as it becomes available.

ACRONYMS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CMAs	Catchment Management Agencies
CMIP	Consolidated Municipal Infrastructure Programme
CRC	Convention on the Rights of the Child
CWSS_P	Community Water Supply and Sanitation Programme
DPLG	Department of Provincial and Local Government
DTMC	Durban Transitional Metropolitan Council
DWAF	National Department of Water Affairs and Forestry
GISSIP	Gauteng Integrated School Sanitation Programme
ICESCR	International Covenant on Economic, Social and Cultural Rights
KZN	KwaZulu-Natal
LHWP	Lesotho Highlands Water Project
MIG	Municipal Infrastructure Grant
NEDLAC	National Economic Development and Labour Council
PHAST	Participatory Hygiene and Sanitation Programme
RDP	Reconstruction and Development Programme
SABS 241	South African Bureau of Standards 241
SALGA	South African Local Government Association
SMME's	Small Micro and Medium Enterprises
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
WATSAN	Water and Sanitation Act

EXECUTIVE SUMMARY – THE RIGHT TO WATER

Constitutional Obligations

The right of access to water is enshrined in the Constitution in Sections 27(1) (b) and 27(2). Section 27(1)(b) of the Constitution states that everyone has the right to have access to sufficient food and water. Section 27(2) of the Constitution states that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to water. Basic sanitation is dealt with in Section 24(a) of the Constitution which states that everyone has the right to an environment that is not harmful to their health or well-being.

The right of access to water is also provided in various international instruments. The key international instruments within which the right of access to water is enshrined are the ICESCR, UNESCR, CRC and CEDAW. Article 11, paragraph 1, of the ICESCR recognises the right of everyone to an adequate standard of living which includes accessibility and availability of adequate housing, food and clothing. The right to water falls under this article as it guarantees an adequate standard of living particularly since it is one of the most fundamental conditions for survival.

General comment no.15 (2003) of the UNESCR recommended that before any action that interferes with the right of access to water is carried out by the State party or third party, the relevant authority must ensure that such actions are performed in a manner warranted by law, compatible with those affected and that comprises of the (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies.

Article 24, paragraph 2 of the CRC states that State parties are required to combat diseases and malnutrition through the provision of nutritious food and clean drinking water. Article 14, paragraph 2 of the CEDAW requires that State parties that are signatories shall ensure that women have full enjoyment of the right to adequate living conditions-particularly with water supply.

Progress in the Realisation of the Right of Access to Water

In terms of Section 7(2) of the Constitution the State must respect, protect, promote and fulfil the rights in the Bill of Rights. Alternatively, the State parties that are signatory to the ICESCR must respect, protect, promote and fulfil the rights enshrined in the International Bill of Rights. To achieve the obligations the State is obliged to take appropriate measures within a shortest period of time to ensure that everyone has access to sufficient water.

Respect

At the time of reporting, information about the actions that were taken to avoid disconnection of water supply to households and the construction of dams next to the river on which the communities depend, were not provided for by DWAF and the DPLG. This indicates that not much has been done with regard to respecting the right of access to water by DWAF and the DPLG at the time of reporting.

However, at municipal level only E-thekwini municipality introduced the flow limiter and restrictor technology policy to enable access to 6000 litres at no cost to all domestic users including those who were in arrears in order to eliminate the problem of disconnecting water supply to households. This policy was targeted to poor households. However, given that it was introduced at the time of reporting no estimates on the number of households who benefitted from this policy were available. Other municipalities in other provinces have not indicated actions that they have undertaken for eliminating the problem of disconnecting water supply to households.

Protect

Protecting the right of access to water means that government must prevent any violations of any individual's right which might be as a result of water pollution and unaffordable price increases by a third party. At the time of the reporting, DWAF and the DPLG failed to provide information on the actions they have taken with regard to protecting the violations of the right by the third party. This indicates that less attention is given to protection of the right of access to water. Rand Water at the time of the reporting had increased prices that might be regarded as unaffordable in order to payout the owed debts, and yet neither DWAF nor DPLG did something about such an action by Rand Water.

Promote

Promoting the right of access to water means that government should create a conducive atmosphere in which people can exercise their rights and freedoms by promoting awareness of their rights through public education. During the reporting period, DWAF conceptualized and promoted the Water Conservation: 2020 Water Education Programme vision in schools. The scope and nature of the programme has been extended beyond water conservation which focuses on quantities to include quality issues, sanitation, curriculum development in schools and integration of water knowledge through recreational/arts and cultural programmes. The programme was to encourage more children, especially rural based children, to take an interest in water related issues. However, estimates on the number of schools who benefitted from this programme was not provided by DWAF and the DPLG.

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In addition, during the reporting period, E-thekwini municipality has extended the community education and awareness programme to further educate and inform communities and learners on water and sanitation issues. Other municipalities have failed to provide information on its programme of action with regard to promoting the right of access to water.

Fulfil

Fulfilling the right of access to water means that the government should institute active measures that enable each individual to access entitlements to the water rights, which cannot be secured through exclusively personal efforts. In other words government should thus, take all steps within available resources to realise the right of access to water.

During the reporting period, DWAF, the DPLG and municipalities have committed themselves to fulfilling the right to water in a progressive manner. In terms of water supply and sanitation, this was done by providing access to basic water and sanitation through the implementation of the Community Water Supply and Sanitation Programme, Free Basic Water Policy, the Consolidated Municipal Infrastructure Programme; establishment of the Municipal Infrastructure Grant; revision of Water Service Policy and initiation of a New Strategic Framework on Water Services and Free Basic Sanitation Policy.

The introduction of the Free Basic Water Policy was a realisation by government that there are many South Africans who cannot afford to pay for services so essential for health and basic needs. Its vision is to ensure that everyone that has access to water infrastructure will be able to benefit. 57% of the total population in South Africa received an amount of free basic water at the end of March 2003 (25 litres per person per day or 6000 litres per households per month).

The Consolidated Municipal Infrastructure Programme (CMIP) provides capital grants to municipalities in order to fund the installation of new infrastructure and the provision of services and/or upgrading the existing infrastructure and the provision of services, particularly for low-income groups. During the year under review 530 000 people of South Africa benefited from the water and sanitation projects that were supported by CMIP.

The Municipal Infrastructure Grant intends to assist the poor to gain access to infrastructure by fully subsidising the capital costs of providing basic services to poor households through distributing funding for municipal infrastructure in an equitable, transparent and efficient manner. The Free Basic Sanitation Policy aims to promote affordable access by poor households to a basic level of sanitation service. However, these policies are still at their refinements stage.

The revision of Water Service Policy facilitated integration, co-ordination and consistency, and served to accelerate the delivery of the Water Service Programme whilst the new strategic framework gave consideration to the provision of 50l per person per day, where suitable.

Overall assessment

Notwithstanding positive developments during the reporting period, marginalised and vulnerable groups continue to face a vicious combination of inferior access to water, discrimination, higher prices, greater chances of using contaminated water and inadequate sanitation. This is because the laws and policies in the country fail to respect, protect and promote the right to clean water as a human right. In addition, there are a few monitoring bodies to ensure the equitable implementation of water policies that provide redress for violations of the right of access to water as evidenced by international instruments and the *Grootboom* judgment. The *Grootboom* judgment states that the State should take reasonable legislative and other measures to achieve the progressive realisation of the right within its available resources.

Laws and policies thus continue to provide scant protection for vulnerable people in South Africa. During the reporting period, pricing policy and Free Basic Water Policy were not implemented as intended. Many municipalities continued to formulate prices for 0-6 kilolitres and households consuming between 21-60 kilolitres per month at levels higher than the industrial users. In times of water shortage (during drought season) there were sometimes problems with allocating water to domestic users and the poor people were the first sector of the population to bear the brunt of these conditions. Poor water quality for many poor households was also a life-threatening problem as is the non-provision of effective sanitation in rural areas. According to the International Commission of Jurists, “ failure to perform any of these....obligations (respect, protect, promote and fulfil) constitutes a violation of the right.

This clearly pose some concerns with regard to the reasonableness of the measures instituted during the reporting period. Water Service Policy which has been revised during the reporting has not been able to achieve its main goal, that is, to ensure that the poor households receive a sustainable service. However, with proper implementation and guidelines to guide municipalities the Revised Water Service Policy might be regarded as a reasonable measure that can pass the reasonableness test.

Free Basic Policy has been a success since its inception and is in line with Section 27(1)(b) of the Constitution which states that everyone has the right to sufficient water. However, households using communal taps and pre-paid metered taps seem not to be benefiting from this policy. If implemented as required (6000 litres per households per month) in rural areas where households rely on communal taps and 50 litres per person per day for larger

families, this policy can be regarded as a reasonable measure that can pass the reasonableness test as evidenced in the Grootboom judgement.

As for sanitation, implementation of the previous policy was successful. The poor were not able to access adequate sanitation facilities, mostly urban and suburban people benefitted. MIG is possibly a positive measure that requires proper implementation. If it can be implemented as required (benefiting household earning less than R1 100, farm dwellers and small businesses owned by poor households), it can be regarded as a measure that can pass the reasonableness test.

The occurrence of these recurring problems is attributed to the fact that national government faces difficulties or challenges with regard to: monitoring executed measures; the provision of free basic water; service sustainability; provision of water to farm dwellers and residents near farmers; and the provision of sanitation services. Local government experienced difficulties with regard to implementation of measures instituted during the financial period 2002/2003.

Recommendations

The strategy outlined in this document is designed to make recommendations about policies that are already in place in order to stimulate the progressive realisation of the right of access to water by different spheres of government. The key recommendations are as follows:

- DWAF should create monitoring bodies at local level (municipality level) to effectively monitor the implementation of policies and law aimed at fulfilling the right of access to water. Monitoring will be effective if and only if monitoring bodies from local, regional and national levels can work together. In addition, the successful monitoring of the right of access to water could be made possible by a new venture capital fund and an array of new and existing support structures.
- DWAF, together with DPLG, should provide support both financially and at policy level to provincial departments and municipalities. These spheres should make use of MIG to provide additional funds to the provincial departments and municipalities that are in dire need. Regarding guidelines, the formulation of guidelines which will be responsible for the implementation of the new policies and programmes instituted is required. In that way, provincial departments and municipalities will get enough support financially and policy wise from DWAF and the DPLG.

- Government should make use of the pre-paid meters either through private pre-paid meters or communal pre-paid metres that work with a token. These pre-paid metres must be set to provide 6 000 litres free automatically to each household at the beginning of each month. By doing this government will be able to control the total amount consumed, provide free 6 000 litres and also provide 50l per person per day where suitable. This should be accompanied by the provision of funds for the installations of these metres to municipalities through MIG.
- The functionality of infrastructure in place should be the priority of DWAF in order to achieve the goal of providing free basic water to all. The functionality of the infrastructure should go along with the improvement in the sustainability of services within municipalities. This can be made possible through the provision of sufficient funds by DWAF and the DPLG and employment of skilled workers and managers within municipalities.
- The pricing mechanism has to be in line with the user-pay principle, the cross-subsidisation principle and the regulations made in schedule 4(2) of the water service Act which oblige the water institution to take into account the differences (tap water supply or communal tap water supply) within areas when setting prices. The payments of water should largely depend on the quantity used taking into account the free basic water. This being the case, DWAF should continue to combat the issue of privatisation among municipalities. This can be done through penalising municipalities who engage in such activities as a matter of first resort. Also, combating privatisation in retailers should be looked into carefully to respect the right of access to water by everyone. During drought season, local government should factor in the scarcity value when allocating water to avoid a situation where domestic users are left without water whilst agricultural users, mining and industries are given more water at the same price.
- Government should provide funds for capacity building with regard to water quality to municipalities. Also, government should see to it that domestic water quality and testing are the responsibility of municipalities rather than the provincial governments.
- DWAF should take a leading role in making sure that farm dwellers, residents near farmers and poor households access clean water and proper sanitation services. Also DWAF should see to it that programme of action for HIV/AIDS infected

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workers within schemes and infected households within municipalities are in place.

- Finally, the document recommends renewing the focus of water and sanitation policies and laws on the poor. Careful attention must be given to the intended beneficiaries of the established policy. Sometimes established water and sanitation policies and legislation end up benefiting the rich instead of the poor.

1 INTRODUCTION

1.1 South African Constitutional and National Water Legislative Provisions

Section 27(1)(b) of the Constitution of the Republic of South Africa, Act 108, 1996 (hereafter the Constitution) states that “everyone has the right to have access to sufficient food and water”. Basic sanitation is provided for in section 24(a) of the Constitution where it states that “everyone has a right to an environment that is not harmful to their health or well-being”.

Part B of Schedule 4 of the Constitution vests the responsibility for potable water supply, domestic waste-water and sewage disposal systems in local sphere of government. While the structure of the local governments have the responsibility for managing their own water reticulation, sanitation and tariff systems, in reality these spheres can only choose to source water from dams in their jurisdiction (which are few and far between), recycle water or purchase bulk water supplies from regional Water Boards, who in turn, purchase water from the National Department of Water Affairs and Forestry (DWAf).

The National Water Act of 1998¹, establishes the National Government, acting through the Minister of Water Affairs and Forestry, as the public trustee of the nation’s water resources, with the power to regulate the use, flow and control of all water in the republic.² According to DWAf, the National Government has the Constitutional responsibility to “support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions, and also has the authority to see to the effective performance by municipalities of their functions ... by regulating the exercise by municipalities of their executive authority”.³ In practical terms, DWAf issues guidelines and regulations in terms of the Water Service Act, which municipalities must comply with. The Water Services Act 108 of 1997 aims to create a “developmental regulatory framework within which water services can be provided”.⁴ The Act defines water service institutions and a policy document defines their roles and responsibilities.⁵

During the reporting period, a technical assessment of various private sector offerings with a view towards supplying measuring equipment *en masse*, was published. Furthermore, by 8 June 2003 all water service institutions must have fitted a suitable water volume measuring device or volume controlling device to all user connections provided with water supply services.⁶ However, the report felt a need to discuss regulation and guidelines published in the previous year as they were still used within municipalities during the reporting time. In 2001, regulations made under section 9(1) and 73(1)(j) of the Water Service Act in June 2001 provided that every person in South Africa should be able to access a minimum of 25 litres (*l*) of potable water per day or 6 kilolitres (*kl*) per household per month, at a minimum flow rate of not less than 10 *l* per minute, within 200 meters of a household, with an effectiveness such that no

consumer is without a supply for more than seven full days in a year.⁷ The Compulsory National Standards therefore provide for 25 l per day to households of eight people and up to 50 l per day for households of 4 people.⁸

Significantly the conservation regulation states that a water services institution must have a consumer service to which non-compliance with the regulations can be reported.⁹

As for sanitation, the conservation regulations provide that the minimum standard for basic sanitation services is the provision of appropriate health and hygiene education, and a toilet which is safe, reliable, environmentally sound, easy to keep clean, well ventilated, and which provides privacy and protection against the weather, keeps smells to a minimum, and prevents the entry and exit of flies and other disease-carrying pests.

The conservation regulations also provide for water quality by stating that water service institutions must compare the results obtained from the testing of the samples with *SABS 241: Specifications for Drinking Water* or the *South African Water Quality Guidelines* published by DWAF. If the results indicate that the water poses a health risk, the Director General of DWAF and the head of the relevant Provincial Department of Health must take steps to inform consumers by providing: a warning, the reasons for the health risk, any precautions to be taken by consumers, a time-frame within which safe quality water will be provided.

The National Water Act 36 of 1998 also gives effect to the quality of water resources (water courses, surface, and groundwater bodies, wetlands and estuaries). This is significant because a large number of households in South Africa derive water directly from natural sources.¹⁰ Overall, the National Water Act 36 of 1998¹¹ aims to:

ensure that South Africa's water resources are protected, used, developed, managed and controlled in a sustainable and equitable manner for the benefit of all persons.

Section 10(1) of the Water Service Act empowers the Minister of Water Affairs and Forestry to set national norms and standards for tariffs charged for the delivery of water. The tariff regulations¹² create a regulatory framework, which seeks to standardise water tariffs for the effective management of all water services. The water tariff regulations provide that norms and standards, in respect of tariffs for water services, may differentiate on equitable basis between different users, water services and geographic areas, taking into account the socio-economic and physical attributes of each area when providing water services.

In general, the tariff regulations propose that sufficient revenue should be raised to recover almost all the costs of delivering water services (i.e. excluding

the costs of grants subsidies and donations) at the same time ensuring that all households have access to basic water supply and basic sanitation.

With a view towards ensuring a basic supply to all households, the regulations make provision for municipal rates and taxes or transfers from national or provincial government or transfers from any other source to be used to subsidise tariffs. Importantly the tariff regulations also state that:

A water services institution must consider the right of access to basic water supply and the right of access to basic sanitation when determining which water services tariffs are to be subsidised.

Customer installations designed to deliver an uncontrolled volume of water must support the viability and sustainability of water supply services to the poor and discourage wasteful or inefficient water use. If this is done through applying a progressive block tariff structure, the tariffs for the highest consumption block must discourage high water use.

The tariff regulations also provide that the tariffs for the provision of sanitation services to households must support the viability and sustainability of sanitation services to the poor, recognise the significant public benefit of efficient and sustainable sanitation services, and discourage usage practices that may degrade the natural environment.

1.2 Relevant Case Law

Both Constitutional and legislative provisions on the right to water have been given effect by the Constitutional Court and High Courts in South Africa. In practice, the Constitutional and legislative provisions has been used to make judgements on cases of violation of the right to access of water.

The first judgment on the violation of the right of access to water together with other socio-economic rights was on the case of *Government of the Republic of South Africa and others v Grootboom and others in 2000*.¹³ Although the *Grootboom* case centred on the right of access to housing, it emphasised that socio-economic rights are interrelated and interconnected and that in order for a government policy to pass the test of reasonableness as elaborated upon in the *Grootboom* judgment case, a policy aimed at providing access to a right cannot be aimed at long-term statistical progress only but it should benefit the targeted people (poor households).

Furthermore, the Constitutional Court placed an emphasis on co-operative governance between the different spheres of government in an effort to avoid mere finger pointing. The Constitutional Court also placed a specific responsibility on National Government to ensure that its water service delivery enables local government to deliver potable water and sanitation services. Basically, the *Grootboom* judgment dealt with the positive obligation on the state to achieve the progressive realisation of the socio-economic right and not

with the negative obligation to refrain from interfering with the socio-economic right.

Other judgments were on the cases of *Manquele v Durban Transitional Metropolitan Council (DTMC)*¹⁴ and *Residents of Bon Vista Mansion v Southern Metropolitan Local Council*¹⁵ which dealt with the negative obligation on the State to achieve the progressive realisation of a right. Both of these cases deal with the disconnection of water supply to households and the judgement of this two cases took place in 2001 and 2002. *Manquele* case judgement took place in 2001 whilst *Bon Vista* case judgement took place in 2002 .

The *Manquele* case was about a 35-year-old woman with seven children who fell into arrears on her water account. She was given written notice and allowed to make representation to the Council before her water supply was disconnected. The woman approached the Durban High Court for an order declaring the disconnection illegal. The woman argued that the by-law was inconsistent with the Water Services Act in that the discontinuation resulted in her being denied access to a basic water service because she was not able to pay for it.

The Durban High Court focused on the validity of the by-law rather than the justification for the disconnection. The Court stated that in the absence of a regulated minimum standard of water supply, it could not enforce the right to basic water supply in terms of the Water Service Act of 1997. At the time of the judgment the conservation regulations prescribing the content of basic water supply did not exist. As such, the judgment indicated that the interpretation of sections 3 and 4(3) of the Act without the conservation regulations concerned policy matters that fell outside the purview of the Court's role and function. The Court was therefore satisfied with the procedure taken by the DTMC in accordance with its by-law, which did not fall foul of section 4(3)(a) or (b) of the Act.

Moreover, the Court ruled that given that the applicant chose not to limit herself to the water supply provided to her free of charge, but continued to consume additional quantities, the Court removed her from the ambit of those who could prove that they are unable to pay for basic services. Therefore, the Court supported the decision taken by the DTMC to discontinue services to the woman due to the fact that she failed to pay. According to De Visser et al¹⁶ it is regrettable that the Court could not entertain sections 27(1)(b) and 28(1)(c) of the Constitution in light of the fact that she had seven children.

The *Bon Vista Mansions* case was about the disconnection of water supply to the residents of a block of flats in Hillbrow because of the non-payment of arrears. The residents obtained an interim order against the municipality to restore their water supply. The Court ruled that:

water supply may not be discontinued if it results in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.¹⁷

The onus is therefore currently on the person to convince a water service authority that a disconnection is denying them their right to sufficient water, which stands in some contrast to the *Manquele* judgment where the person had no right to prove this in the first place.

Again, the report felt a need to include previous year's judgment as they are still relevant to the water problems of this financial year.

1.3 International Instruments and Statements

Internationally, the right to adequate clean water and sanitation is explicitly recognised in a wide range of international instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the International Convention on the Elimination of All forms of Discrimination against Women (CEDAW).¹⁸

Article 11, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to an adequate standard of living, which includes the accessibility and availability of adequate housing, food and clothing. The right to water was not clearly indicated in this article but it was assumed that this right falls under Article 11, paragraph 1, as it guarantees an adequate standard of living, particularly since the right to water is one of the most fundamental conditions for survival.

During the reporting period, the United Nations Economic and Social Council released *General Comment No. 15* on the right to water, which recommended that:

Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person's failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water.¹⁹

The United Nations Committee on Economic, Social and Cultural Rights also took note of the:

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*commitment in the 2002 World Summit on Sustainable Development Plan of Implementation to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water (as outlined in the Millennium Declaration) and the proportion of people who do not have access to basic sanitation.*²⁰

During the reporting period, the World Health Organisation also released a report on *Domestic Quantity, Service Level and Health*, where it provided an analysis on the relationship between the level of water service provision and the level of health concern (see Table 1).²¹

Table 1: World Health Organisation requirements for water service levels to promote health

<i>Service Level</i>	<i>Access Measure</i>	<i>Needs met</i>	<i>Level of Health Concern</i>
No access (quantity collected often below 5 l/c/d)	More than 1000m or 30 minutes total collection time	Consumption – cannot be assured Hygiene – not possible (unless practised at source)	Very high
Basic access (average quantity unlikely to exceed 20 l/c/d)	Between 100 and 1000m or 5 to 30 minutes total collection time	Consumption – should be assured Hygiene – handwashing and basic food hygiene possible; laundry/bathing difficult to assure unless carried out at source)	High
Intermediate access (average quantity about 50 l/c/d)	Water delivered through one tap on-plot (or within 100m or 5 minutes total collection time)	Consumption – assured Hygiene – all basic personal and food hygiene assured; laundry and bathing should be assured	Low
Optimal access (average quantity about 100 l/c/d)	Water supplied through multiple taps continuously	Consumption – all needs met Hygiene - all needs should be met	Very low

Source: Howard and Bartram, Domestic Water Quantity, Service Level and Health, 2003

Notes: South Africa's basic service level standards are similar to the basic access level

Article 24, paragraph 2 of the CRC states that State parties are required to combat diseases and malnutrition through the provision of nutritious food and clean drinking water.²² Article 14, paragraph 2 of the CEDAW requires that State parties that are signatories shall ensure that women have full enjoyment of the right to adequate living conditions – particularly to water supply.

Similarly, a wide range of international statements from the Mar del Plata Action Plan (1977), New Delhi Statement (1990), Dublin Statement (1992), Copenhagen Declaration (1995), Marrakech Declaration (1997), International Conference on Water and Sustainability (1998), Hague Declaration (2000) and

United Nations Commissions on Human Rights (2002)²³ recognise the right to an adequate clean water and sanitation service that can be accessed by all citizens of States within a reasonable distance of their living quarters.

In 1977, the Mar del Plata Action Plan stated that all people, whatever their stage of development and their social and economic conditions, should have the right to have access to drinking water in quantities and qualities equal to their basic needs. The 1990, 1995, 1997 and 1998 statements state that everyone has the right to have access to clean water and sanitation.

In 1992, 2000 and 2002, the Dublin Statement, Hague Declaration and United Nations Commissions on Human Rights stated that everyone has the right to have access to enough safe water at an affordable cost in order to have a healthy and productive life.

2 PROGRESS IN THE REALISATION OF THE RIGHT

2.1 New National Policies and Programmes

2.1.1 Review of Water Service Policy

During the reporting period DWAF reported that it has initiated a review of the Water Services Policy. The main objective of the review was to produce a water service framework that would assist in guiding the water service sector for the next 10 years.²⁴ According to the Department, the review process facilitated integration, co-ordination and consistency, and served to accelerate the delivery of the water service programme.²⁵ The strategic framework was publicised in September 2003.²⁶

2.1.2 The Municipal Infrastructure Grant Policy

The Department of Provincial and Local Government (DPLG) established the Municipal Infrastructure Grant (MIG) based on the consolidation of six Municipal Infrastructure Conditional Grants during the period under review. The MIG is the merger of the Consolidated Municipal Infrastructure Programme (CMIP), the Local Economic Development Fund, the Water Service Capital Grant, the Community Based Public Works Programme, the building for Sports and Recreation programme, and the Urban Transport Grant. The overall objective of this policy is to assist the poor to gain access to infrastructure in order to improve their opportunities to engage in the economy. This policy thus has the overall objective of removing the backlog with regard to access to basic municipal services for the poor over a 10-year period, while at the same time promoting economic development through employment creation and enterprise development.

Basic municipal services refer to the minimum level of service required to provide the access necessary to ensure the health, safety and well-being of the

community.²⁷ The basic minimum level of service includes adequate access to water supply, sanitation, roads, protection from storm water and sufficient attention to the disposal of household refuse. The inclusion of electricity in the basic minimum level of service is at the discretion of the municipality.

Specifically, this policy has the key objective of fully subsidising the capital costs of providing basic services to poor households through distributing funding for municipal infrastructure to municipalities in an equitable, transparent and efficient manner, in order to:

- maximise developmental outcomes;
- enhance developmental capacity of municipalities; and
- provide a mechanism for the co-coordinated pursuit of national priorities with regard to basic service infrastructure programmes.

Moreover, the municipal infrastructure grants aims to target the poor, who are defined as households earning less than R1 100/month, farm dwellers and to a limited extent, businesses run by individuals who are poor and that are located in municipalities in poor areas.²⁸

All spheres of government are responsible for the implementation of the MIG. With regard to capacity building, the MIG is concerned with the project level capacity building i.e. for internal employees, contractors and the public.

Allocations of funds will be based largely on the sectoral assessment of infrastructure gaps. However, in order to ensure that the funds are used specifically for infrastructure, the DPLG has decided that specific medium term targets will be set for splitting the MIG funds received by municipalities between sectors.

Monitoring of the implementation of this policy will occur at two levels; through an information management system and the performance of the municipalities with regard to the implementation of MIG. These policy refinements are still fairly new and the impact on poor households has not yet been felt.

2.1.3 Free Basic Sanitation Policy

DWAF initiated a process to develop a Free Basic Sanitation Policy after the reviewing of Water Service Policy. The aim of the Free Basic Sanitation Policy is to promote affordable access by poor households to a basic level of sanitation service. According to the Compulsory National Standards of the Water Service Act, a basic minimum standard is the provision of appropriate health and

hygiene education, and a toilet which is safe, reliable, environmentally sound, easy to keep clean, well ventilated, and which provides privacy and protection against the weather, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests. During the reporting period, strategies for household sanitation, farm worker and clinic sanitation and the eradication of the bucket system were clarified in order to facilitate programme rollout and to address specific issues. The clarification of these programmes has enabled the relevant authorities to deliver sanitation services more effectively. This programme was targeted at needy households, farm workers, clinic personnel and patients.

2.2 New Provincial Policies and Programmes

2.2.1 KwaZulu-Natal Drought Relief Programme

During the reporting period, only KwaZulu-Natal Department established a new policies. Other eight provinces and the municipalities did not established any new policies. The Department of KwaZulu-Natal established the Drought relief program whose main aim is to provide emergency water and sanitation services to vulnerable households during drought. The programme catered for low-income groups, poor people living in rural areas and female-headed households.

2.3 Indicators

2.3.1 National Indicators of Water and Sanitation Infrastructure Delivery

Water infrastructure

In terms of water service policy of 1997, the Department of Water Affairs and Forestry has the responsibility for setting minimum reporting requirements for Water Service Authorities and Water Service Providers with a view towards monitoring their performance and providing support. Information supplied by DWAF demonstrates that a substantial increase in access to water infrastructure took place during the reporting period. Statistics from the Department of Water Affairs and Forestry's 2002/2003 Annual Report show that 86% of the people in South Africa had access to improved water infrastructure in March 2003 compared with 83% in March a year before. Other statistical estimates from DWAF to the end of March 2003 show that the level of access to improved water supply infrastructure could be as high as 89% of the population. The number of people with access to improved water infrastructure (piped water) grew at a rate of 6% from 2002 to 2003 as compared to an overall population growth rate of 2% for the same period.

Table 2: The water infrastructure backlog to March 2003

	<i>Version 1 Mar-03 (Millions of people)</i>	<i>Version 2 Mar-03 (Millions of people)</i>
Total population	46,6	46,2
Water in house or in yard		28,3
Standpipes less than 200m		6,7
Standpipes further than 200m and boreholes		6,2
Subtotal – improved to high level of service	40,2 (86%)	41,2 (89%)
Unacceptable – river, pool, dam, stream	6,4	5

Sources: Version 1 DWAF Annual Report 2002/2003 page 12, Version 2 - DWAF Water Supply Perspective, Census 2001 updated to March 2003

Notes: These figures reflect access to infrastructure, not necessarily effective services e.g water quality, flow & sustainability

According to DWAF's Annual Report for 2002/2003, 2,4 million people gained access to improved water infrastructure during the year. However, the response to South African Human Rights's protocol for 2002/2003 from DWAF shows that the number of people who gained access to improved (piped) water supplies through the DWAF-Community Water Supply and Sanitation (CWSS) in 2002/2003 was 1 565 118. The gap of approximately 834 882 people that remains may have been supplied with access to infrastructure by other departments, namely: DPLG through CMIP for bulk infrastructure, the Department of Housing for housing projects, and the Department of Public Works, which focuses on schools and clinics. The rapid pace of water infrastructure delivery lies behind DWAF's confidence that the 6,4 million person backlog in access to water services infrastructure (that existed in March 2003) will be eliminated by 2008. However, estimates of the backlog in access to water infrastructure vary.

Sanitation infrastructure

When it comes to basic sanitation, DWAF's new water strategic framework of 2003 mentioned that by the year 2010 all South Africans must have access to sanitation facilities that are functional. The DWAF's 2002/2003 Annual Report shows that 63% of the South African population had access to basic sanitation infrastructure in March 2003 compared with 60% in March a year before. DWAF's 2002/2003 Annual Report indicated that approximately 1,6 million people gained access to improved sanitation infrastructure between March 2002 and March 2003. The rate of increase in sanitation infrastructure from 2002 to

2003 was 5%, as compared to an overall population growth rate of 2%. However, the response from DWAF's protocol indicated that for 2003, 65 105 households (not individuals) had toilets delivered to Reconstruction and Development Programme (RDP) standards under the DWAF-CWSS programme. Similar to water services infrastructure, estimates of the backlog in access to sanitation infrastructure vary.

Table 3: The sanitation infrastructure backlog to March 2003

	<i>Version 1 Mar-03 (Millions of people)</i>	<i>Version 2 Mar-03 (Millions of people)</i>
Flush toilet (connected to sewer or septic tank)		24
Ventilated Improved Pit Latrine (VIP)		4.1
Sub-total	29.2 (63%)	28.1 (61%)
Unacceptable, none, pit latrine, buckets, chemical	17.3	18.1
Total population	46.6	46.2

Sources: Version 1 DWAF Annual Report 2002/2003 page 12, Version 2 - DWAF Water Supply Perspective, Census 2001 updated to March 2003

Notes: These figures reflect access to infrastructure, not necessarily effective services. 1,8 million people were using the bucket system within the unacceptable category

Water and Sanitation Service Quality

For both water and sanitation, DWAF is at pains to point out that the figures on access to infrastructure do not necessarily reflect effective services in terms of quality, flow and sustainability. The actual impact of rapid infrastructure delivery is therefore difficult to assess because there is insufficient information on the percentage of infrastructure that is functional or dysfunctional. Only 100 out of 185 local governments provided information on their perceptions of the reliability and quality of water services delivery. Table 4 shows that service reliability and quality is high in metropolitan areas and formal areas in towns, but rural service reliability is a major problem. Since only local governments with better capacity reported to DWAF, its Annual Report stated that the actual situation might be worse than reflected in Table 4.

Table 4: Service quality as reflected by a sample of information provided by local governments

<i>Perspective</i>	<i>Percentage of local governments meeting reliability of service</i>	<i>Percentage of local governments meeting service quality</i>
Rural	47	56
Urban-formal towns/cities	91	89
Metro	99	94
National	75	78

Source: DWAF Annual Report 2002/2003

Functionality and sustainability of water projects has always been a problem in rural areas of South Africa. Due to unsustainable projects there are problems in continuing delivery. Sustainability is defined in terms of the present and future functioning of water projects to meet community needs. In addition sustainability is defined in terms of successful operations and maintenance, adherence to basic RDP standards (which is the 25l per person per day), free basic provision and social inclusion. At the moment there is insufficient information on the percentage of projects that are functional or dysfunctional. However, the Human Sciences Research Council (HSRC)²⁹ found that out of 23 projects sampled in KwaZulu-Natal in late 2002, 10 were sustainable or functioning at RDP standards (43.4%), 8 were working, but problematic and the remaining 5 (21.7%) were not working.

In addition, an address by the then Premier of Mpumalanga in 2002 indicated that in the Nkangala District, which includes the former Kwandebele area and part of the former Bophuthatswana areas, people have in the last four to five years at times stayed without water for up to three months in a year due to the fact of unsustainable water projects. In most cases, those projects that are unsustainable are not implemented according to the RDP standards. Hemson, 2002 indicated that there are high levels of unserved people in KwaZulu-Natal because projects are not implemented to RDP specifications.

The unsustainability of these water projects results from the fact that the consumption level among people served by rural water projects is low. For example, HSRC indicated that level of consumption among people served by rural water projects in KwaZulu-Natal is very low and in many water projects rules apply to limit consumption to certain hours of the day or by other means. The reason for very low consumption is attributed to the poverty and destitution of many communities and a distinction needs to be made between the better-off, poor and very poor to ensure successful and continuing delivery.

Local Indicators of Water and Sanitation Infrastructure Delivery

Only the Nelson Mandela Metropolitan Municipality provided reasonable information on the water and sanitation backlogs in its jurisdiction. The response indicates that 10 thousand households had access to piped water inside their dwellings in 2002/2003. Approximately, two thousands households at the time were using river, pool, dam and stream water. These households fall under the unacceptable level defined by DWAF. The majority of households had access to communal standpipes less than 200m from their dwellings, whilst few had access to communal standpipes further than 200m away from their dwellings.

Table 5: The water infrastructure backlog in Nelson Mandela Metropolitan Municipality

<i>Source</i>	<i>Number of households</i>
Water in house or yard	10 000
Communal standpipes less than 200m	253 000
Communal standpipes further than 200m	400
Unacceptable-river, pool, dam, stream	2 060

Source: Nelson Mandela Municipality protocol, 2002/2003

For sanitation, 236 thousand households had access to flush toilets inside their homes at the time of the reporting. Approximately 72 thousands households had no toilets or had pit latrines, bucket and chemical. No one had access to ventilated pit latrines in this municipality during the reporting period.

Table 6: The Sanitation Infrastructure Backlog in the Nelson Mandela Metropolitan Municipality

<i>Source</i>	<i>Number of households</i>
Flush toilet	236 000
Ventilated pit latrines	0
Unacceptable-none, pit latrine, bucket, chemical	71 900

Source: Nelson Mandela Municipality protocol, 2002/2003

Note: Flush toilet refers to number of flush toilet installed inside and outside the house.

2.4 Ongoing Policies and Programmes

2.4.1 Community Water and Sanitation Programme

During the period under review, DWAF continued to implement the Community Water Supply and Sanitation programme (CWSS-P), which targets urban and rural communities that require sustainable water and sanitation infrastructure.

As shown in Figure 1, approximately 1,6 million people gained access to improved piped water supplies during the reporting period through DWAF’s CWSS-P. From 1994 to the end of the 2002/2003 financial year, 8,8 million people gained access to piped water infrastructure through the CWSS-P. Despite this level of infrastructure delivery since 1994 up to the year under review, the number of people who gained access to improved water infrastructure varies greatly from province to province. The majority of people who gained access to improved water infrastructure during the reporting period were from KwaZulu-Natal, Limpopo, Eastern Cape, North West and Mpumalanga. During the year under review a much smaller number of people gained access to piped water infrastructure through CWSS-P in the Free State, Western Cape and Northern Cape.

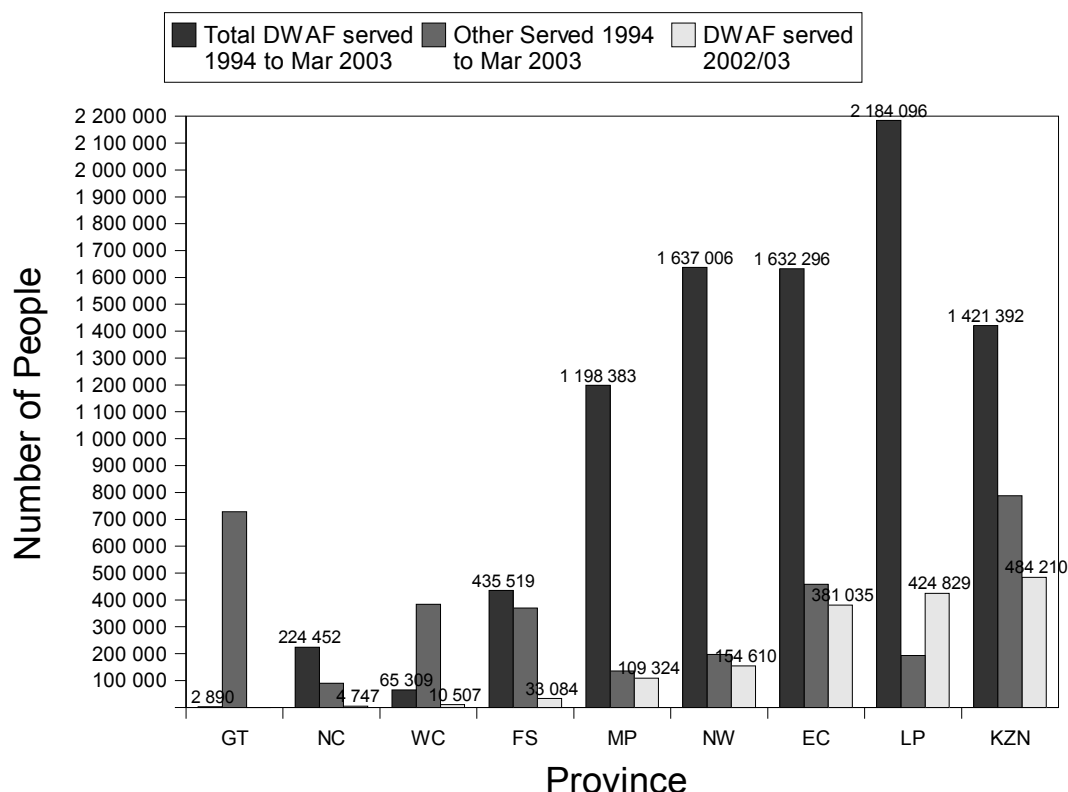


Figure 1: Access to piped water infrastructure through the CWSS-P

Source: DWAF Protocol Response 2002/2003

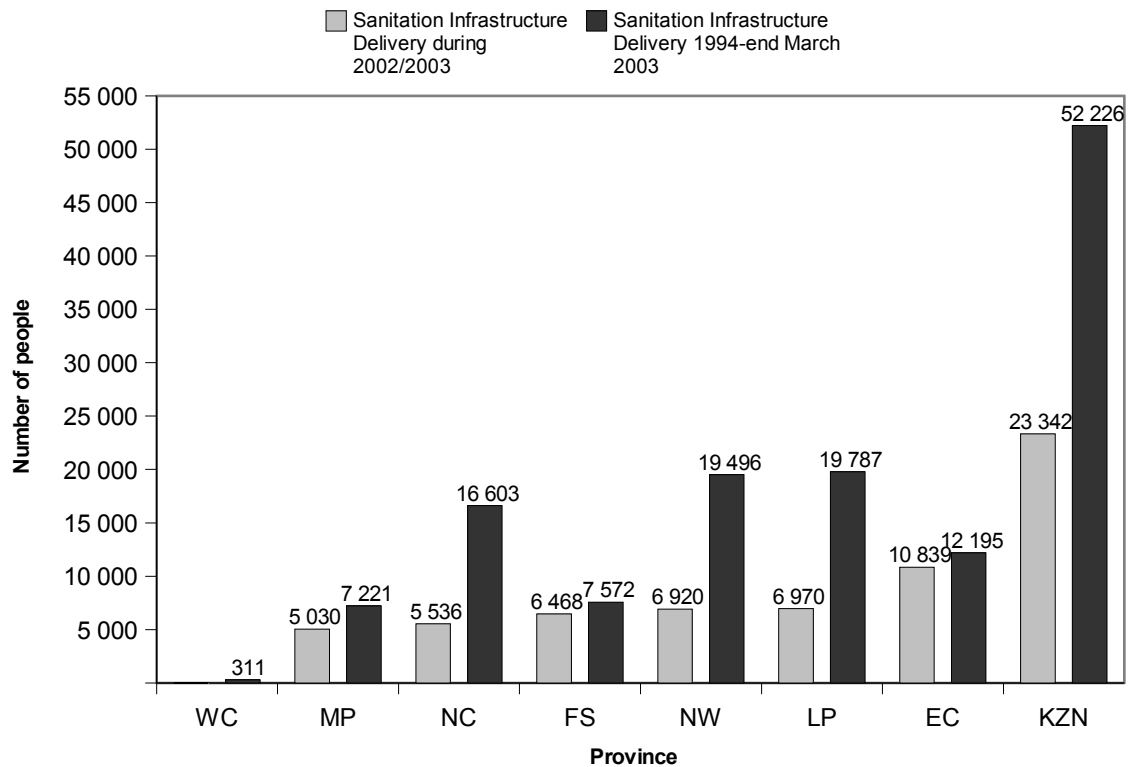


Figure 2: Access to sanitation infrastructure through the CWSS-P

Source: DWAF Protocol Response 2002/2003

Approximately 65 thousand toilets facilities were constructed during the reporting period (Figure 2). From 1994 to the end of the 2002/2003 financial year, 135 thousand toilet facilities were constructed. While only a few toilet facilities were constructed in the Western Cape during the reporting period, it is clear from Figure 2 that the pace of delivery picked up during the 2002/2003 financial year as compared to the pace since 1994 to the end of March 2002. In the case of the Eastern Cape, Free State, and Mpumalanga more than half of all the toilet facilities built since 1994 to the end of March 2003, were built during the 2002/2003 financial year. For both water and sanitation, the CWSS-P does not operate in Gauteng.

2.4.2 The Consolidated Municipal Infrastructure Programme

The Consolidated Municipal Infrastructure Programme (CMIP) provides capital grants to municipalities in order to fund the installation of new infrastructure and services or upgrade infrastructure and services, particularly for low-income groups.³⁰ CMIP is driven by DPLG and managed by each of the provinces of South Africa to address the backlogs in each of the municipalities within its province. During the period under review, the following results were achieved.

The DPLG determined various targets to be achieved under CMIP. DPLG targeted technical support to weaker municipalities to assist them with implementation of the programme during the reporting period. The DPLG set out to deliver 150 water projects, 60 sanitation projects and 50 roads projects of which 50% were going to be in rural areas and 50% were going to be in urban areas; beneficiaries of 450 000 households per annum; employment opportunities and provision of training to 30% men, women and youth and the utilization of 300 Small Micro Medium Enterprises (SMME's) per annum.³¹ Compared to its targets, the DPLG reported impressive delivery of 460 water projects, 280 sanitation projects and 450 roads projects of which 51% were in an urban area and 49% were in rural areas. These projects benefited 530 000 people.³² However, the DPLG failed to provide a reason for this achievements.

Provincial Departments in Mpumalanga, Limpopo, Northern Cape, Western Cape, Gauteng and KwaZulu-Natal made use of CMIP funds to reduce the water and sanitation infrastructure backlogs within their boundaries during the reporting period. Five Provincial Departments provided information on the delivery of water and sanitation infrastructure during the reporting period.³³ Owing to the format of information provided to the South African Human Rights Commission it was not possible to provide a reliable description of water and sanitation projects and beneficiaries by these five departments. Many of the projects are multi-year projects at different stages of delivery. There is also a risk of double counting in relation to the number of beneficiaries because the project lists include both bulk infrastructure (e.g. sewage treatment works) and household reticulation infrastructure (e.g. pipes along streets for household connections).

2.4.3 Gauteng Province Department of Development Planning and Local Government

During the reporting period the Gauteng Department of Development Planning and Local Government continued to implement two programmes/projects, namely the removal of bucket system and the provision of clean water and sanitation for all communities in Gauteng. These programmes/projects were based on the July 2001 Gauteng Executive Council resolution whose purpose was to ensure adequate access to clean water and sanitation for all in Gauteng by March 2006. According to the Department, removal of buckets in all Gauteng communities aimed to ensure a healthy life style and restore the dignity of people.

There was a water or sanitation backlog of 459 thousands households in Gauteng at the end of the 2002/2003 financial year. The Department reported that 495 000 households in Gauteng province did not have access to water or sanitation in 2001. However, DWAF provided the figure of 254 628 as the backlog for water or sanitation in 2001. 40 thousands households in formal areas and some families living in farmland benefited from water and sanitation

infrastructure delivery during the reporting period. Also, this program led to the removal of 4 thousands bucket systems from households and some families living in farmlands. Specifically, the program catered for all the historically disadvantaged groups in Gauteng especially low-income groups, female-headed households and rural areas.

2.4.4 Free Basic Water

During the reporting period, the DWAF disseminated revised policy, guidelines and tools necessary for the provision of free basic water to all municipalities. Provincial support units assisted local government to expand free basic water delivery. Estimates from the DWAF's Annual Report 2002/2003, show that 75% of all municipalities provide free basic water services.

Table 7: Municipalities offering Free Basic Water

<i>Institution</i>	<i>Total no of municipalities</i>	<i>No of municipalities providing FBW</i>		<i>Total Population (Millions)</i>	<i>Population with FBW services (Millions)</i>	
Free State	21	20	95%	2,9	2,8	97%
Gauteng	13	12	92%	8,4	7,8	93%
Western Cape	30	29	97%	4,4	3,9	89%
Northern Cape	31	26	84%	0,9	0,5	56%
North West	27	20	74%	3,8	2,0	53%
Mpumalanga	27	18	67%	3,3	1,4	42%
KwaZulu-Natal	55	34	62%	9,5	4,0	42%
Limpopo	27	18	67%	6,1	2,0	33%
Eastern Cape	43	29	67%	7,4	2,0	27%
National*	274	206	75%	46,6	26,4	57%

Source: Department of Water Affairs and Forestry Annual Report 2002/2003

Notes: * Sum errors in the original table have been corrected here.

Approximately 57% of the South African population had access to free basic water services (Table 7), whilst 38% of the poor population had access to free basic water services (Table 8). 38% indicates that out of 31 869 268 poor people, only 12 239 210 poor people had access to free basic water. In the Limpopo Province, **none of the 4 725 895 poor people benefited** from Free Basic Water Services, whilst in Mpumalanga province **37 424 poor people out of 2 399 635 poor people** benefitted. Estimates in Tables 7 and 8 clearly

indicate that the total number of non-poor who benefitted from FBW are more than the total number of poor who benefitted.

Table 8: Poor households with Free Basic Water (FBW) as of March 2003

<i>Province</i>	<i>Poor Population</i>	<i>Poor population receiving FBW</i>	<i>Poor population still to receive FBW</i>
Northern Cape	593 811	389 227	204 584
Western Cape	2 146 136	1 757 367	388 769
Free State	2 105 537	1 517 401	588 136
Gauteng	4 759 069	3 891 377	867 692
North West	2 682 552	635 792	2 046 760
Mpumalanga	2 399 635	37 424	2 362 211
Eastern Cape	5 625 055	1 633 151	3 991 904
KwaZulu-Natal	6 831 578	2 377 471	4 454 107
Limpopo	4 725 895	0*	4 725 895
Total	31 869 268	12 239 210	19 630 058

*Source: Information supplied by the DWAF on 11 February 2004. Following the first round of comments, DWAF officials argued that the original data supplied by DPLG was incorrect and that it was ultimately derived from DWAF in any case. * According to DWAF 86 000 poor people gained access to FBW in May 2003, increasing to 441 366 by January 2004.*

Water service backlogs in poor urban areas are estimated at 10%, while in poor rural areas they are estimated at 39%.³⁴ 20% of the poor population in the Western Cape, Gauteng and Free State provinces were without free basic water, while 78% of the poor population in the remaining (mostly rural) provinces were without free basic water. This shows that the Free Basic Water policy was implemented more widely in Gauteng, the Western Cape and the Free State as compared to other provinces.

Neither DWAF nor DPLG was able to indicate what poverty line was used in the calculation of the poor and non-poor population. The SAHRC was actually advised to use the figures in Table 8 with circumspection by DWAF.³⁵

2.4.5 Pricing policy

DWAF provided a summary of the water tariff figures that were provided to them by 125 Water Service Providers (Table 9). Table 7 shows that where free basic services were **not** offered, the average cost of 6 kilolitres (kl) was approximately R13 per month. The price for 6kl of life-line supply was highest in Limpopo province at approximately R19 per month. Gauteng and KwaZulu-Natal also had comparatively high charges for life-line supplies where free basic water services were not operational. Where free basic water services are available, the cost of 6kl or slightly more should be zero.³⁶

Table 9: Average Municipal Retail Tariffs adjusted to 2003

<i>Province</i>	<i>0–6kl</i>	<i>7–20kl</i>	<i>21–60kl</i>	<i>>60kl</i>	<i>Industrial</i>
NC	R1,91	R2,34	R2,74	R2,89	R3,12
WC	R2,52	R2,56	R3,18	R3,55	R3,56
MP	R2,12	R2,85	R3,39	R3,57	R3,72
EC	R2,15	R2,71	R2,55	R2,67	R3,68
NW	R2,11	R2,84	R3,32	R3,80	R4,57
LP	R3,18	R3,01	R4,15	R5,66	R3,00
KZN	R3,08	R3,54	R4,46	R4,63	R4,64
FS	R1,07	R4,20	R4,45	R4,59	R4,30
GT	R3,13	R4,78	R5,03	R5,57	R4,72
Average	R2,18	R3,06	R3,52	R3,85	R3,40

Source: Information supplied by the DWAF on 11 February 2004; Industrial tariffs from DWAF Annual Report 2002/2003

Notes: Block 0-6 kl is the average of tariffs excluding Free Basic Water

The poor and working class spend a higher percentage of their income on water than the wealthy. In October 2000, the lowest expenditure group spent approximately 1,8% of all their expenditure on water, whilst the very high expenditure group spent approximately 1,6%.³⁷ In September 2002, the Labour Force Survey estimated that approximately 3,2 million households earned less than the R399 per month. Many households in this income category could reasonably define a monthly charge of R7 for 6kl as unaffordable. A further 2,9 million households earned between R400 and R799 per month. Many households in this income category could similarly define monthly charges of R14 for 6kl as unaffordable. Anecdotal evidence suggests that water affordability is a serious problem, which can force indigent households to access water from sources that are hazardous. This underlines the importance of extending Free Basic Water services as soon as possible.

On the face of it, Table 9 suggests that in some provinces, domestic water tariffs appear to be progressive in the sense that high volume water users pay slightly more per kilolitre of water used. However, the SAHRC was not able to compare water tariffs with the actual costs of installing different levels of service and ensuring their continued operation. Service levels range from no-pressure (Windy Windy) systems to high-pressure systems, which are now much more costly to construct and maintain than in the past. From the information available to the SAHRC at the time of writing it was therefore not possible to conclude whether high volume users cross-subsidise low volume users in any way or if pricing policies approach being equitable. The same is

true for cross-subsidisation from industrial and commercial water users to domestic users.³⁸

2.4.6 Bulk Water and Service Delivery Parastatals

During the year under review Rand Water's sales volumes increased by 6% from 1 232 938 mega litres to 1 307 577 mega litres as a result of high temperatures, low rainfall, urban growth and new mining activity. Rand Water's profit grew by a considerable 45% to R281 million in 2003. The increase in profit arose mainly from a 16% growth in revenue linked to increased sales of water to municipalities. While Rand Water's profit margin grew from 7,8% in 2002 to 9,7% in 2003, municipalities were expected to eventually sell water to consumers at 0,5% below inflation.³⁹ The profits appear to have been used to reduce Rand Water's net interest bearing debt to equity from 0,75 to 0,53.

These financial developments took place at the same time as Johannesburg Water issued appeals to consumers to keep their water usage to a minimum and to refrain from non-essential water use (e.g. gardening and re-filling swimming pools) as a result of soaring temperatures and low rainfall since the end of the winter period, which triggered abnormally high water gardening activities.⁴⁰

Umgeni Water adopted a strategic plan to give effect to the need for the organisation to play its role in increasing access to water services. Their strategy is to adopt a phased approach by first focusing on eliminating the backlogs within their own area of supply. In addition, Umgeni Water plans to continuously improve customer satisfaction while growing and developing their customer base, increase access to water, sanitation and related services through partnerships, conserving scarce natural resources and reducing environmental impacts in their operations, continually improving their financial strength and becoming a winning, responsive and learning organisation that is the employer of choice in the long term.

At the moment, the instituted measures by Umngeni Water benefited rural areas through the provision of water services. As far as Umgeni Water are concerned, it met the obligations outlined in the Constitution⁴¹. Umgeni Water indicated that they are restructuring in order to ensure that the end consumer does not pay too hefty a tariff when they finally receive water, and to provide bulk customers with a value-driven service.

2.4.7 Piped Water Quality and Environmental health

DWAF indicated that 88% of metropolitan councils professed that they met water supply quality requirements and due to lack of information it is not known of the compliance of water supply quality requirements in other municipalities.⁴² Water quality requirements are specified in the South African

Bureau of Standards code 241 of 2001.⁴³ The percentage of municipalities meeting supply quality drops sharply to 45% when it comes to urban-formal towns/cities. No information was provided in DWAF's Annual Report for 2002/2003 about rural water supply quality. However, information from Umgeni Water indicates that rural water quality can be problematic especially when chlorination systems fail:

By far the greatest non-compliance was for the rural community water supply schemes where sixteen of the nineteen sites failed the microbiological compliance. The main reason for the poor microbiological compliance was a lack of adequate disinfection with chlorine. Umgeni Water has been acting as Implementing Agent for rural community water supply schemes on behalf of DWAF and various District Municipalities.⁴⁴

All Provincial Departments of Health responded to the environmental rights protocol and most provided some information on their water quality monitoring / sanitation activities. Table 10 below provides a summary of the limited information made available by each provincial department:

Table 10 below seems to indicate that environmental health functions related to water quality and sanitation suffered some set-backs during the reporting period. A new monitoring system based on a standard set of environmental health performance indicators was instituted for local municipalities to comply with.

Table 10: The Water Quality and Sanitation Activities of Provincial Departments of Health

<i>Province</i>	<i>Information provided on water quality / sanitation achievements</i>
North West	Bacteriological and chemical tests were performed using SABS <i>SA Water Quality guidelines, Volume 1 Domestic Use, 1996</i> .
Free State	A quarterly water quality monitoring programme was implemented. Section 30 areas in terms of the Health Act 60 of 1977 will be transferred to category C municipalities on 1 July 2004.
Mpumalanga	619 SABS water tests and 52 cholera tests were conducted. 432 residential chlorine tests were completed and remedial action was taken. 15 000 bottles of bleach were distributed to people who were admitted by health system as suffering from diarrhoea. 590 chlorine tablets were distributed. 25 000 chlor floc sachets were distributed. 25 Jojo tanks were erected at health facilities. 9 'pro-forma' toilets were erected to demonstrate their use to the community. The process of devolving health care services to local government affected staff morale negatively. Limited human resources meant that monitoring work could not be done. This, in addition to a shortage of transport and computer equipment, posed a health risk to the communities.

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<i>Province</i>	<i>Information provided on water quality / sanitation achievements</i>
Northern Cape	Data collection was not carried out by all municipalities and it only started in 2003. Environmental health district forums were established to strengthen co-operation between the Department and service rendering municipalities.
Gauteng	The Department implemented the Gauteng Integrated School Sanitation Programme (GISSIP) which focused on farm schools as well as the Participatory Hygiene and Sanitation Transformation (PHAST) methodology.
KwaZulu-Natal	PHAST was instituted as a new policy. 48 Environmental Health Practitioners were trained in the sanitation methodology. 15 household sanitation projects and 53 school projects were supported with PHAST methodology. A sanitation project aimed to reach 7 422 households, but it was not clear whether this was achieved or not. 1 200 households were provided with 40 toilets. 30 water quality samples were taken.
Eastern Cape	Clinics were upgraded to meet basic sanitation standards.
Western Cape	-
Limpopo	-

Source: Provincial Departments of Health Environmental Rights Protocols 2003

(-)-this indicates that the information was not provided for in this province

2.4.8 Cholera Prevention Strategy

The main objective of the National Cholera Strategy is to assist in the containment of cholera outbreaks, to prevent the spread to non-affected areas, and to minimise the likelihood of future outbreaks.⁴⁵ Only KwaZulu-Natal provided information on this policy. At the cost of R49 million a cholera prevention strategy was designed and implemented, which focuses on emergency water and sanitation programmes.⁴⁶ This strategy is targeted to benefit recipients for a short period of time. The KwaZulu-Natal Department did not provide estimates about the impact of this strategy. However, the cholera prevention strategy was designed to help the municipalities to prevent the spread of water-borne diseases to low-income groups, poor households without access to basic water services and historically disadvantaged groups.

2.5 New National Legislative Measures

DWAF indicated that the Water Services Act would be amended after the *Strategic Framework for Water Services* was formally adopted. The intention to amend the Act was signalled as early as June 2000 with the publication of the *Introductory Policy Note Regarding Regulation of Water Service Providers*. The amendments to the Water Service Act are necessitated by the fact that the Water Service Act was largely based on the Water and Sanitation White Paper published in 1994 and that there have been substantial changes in the local government policy system (e.g. indigence policy) and finance system. Some of the key issues that may be expected in the amendments include:⁴⁷

- i) the structures and methods through which regulations concerning water service providers will be implemented
- ii) the relationship between the National Water Act and Water Service Act
- iii) the role of Water Boards in the achievement of regional scale in service provision and as a competitive public alternative to promote efficiency in the sector
- iv) the regulation of Water Boards and the rules governing the establishment by them of joint ventures and other corporate entities
- v) the approach to regulation of Water Service Providers, particularly with respect to the regulation of tariffs and rates of return outlined in section 19 of the Act
- vi) possible amendments to section 10(2)(b) and (c) of the Act (i.e. those sections dealing with limitations on surplus or profit and limitations on use of income generated from the recovery of charges)
- vii) possible amendments to section 19(2) of the Act (i.e. the requirement that a Water Service Authority may only enter into a contract with a private service provider *after* it has considered all known public sector providers which are willing and able to perform the relevant functions)
- viii) technical issues such as the use of words ‘licence’ or ‘permit’ instead of the word ‘contract’ to reduce the potential for litigation and whether ‘joint venture’ should be referred to separately from other agreements in the Water Services Act.

2.5.1 Water Services Provider Contract Regulations

After tabling a set of draft regulations in the National Economic Development and Labour Council (NEDLAC) in 2001, DWAF promulgated *Water Service Provider Contract Regulations* under section 19(5) of the Water Service Act on 19 July 2002.⁴⁸ Section 19 of the Act deals with contracts and joint ventures with water services providers.

The contract regulations provide guidelines on contracts between Water Service Authorities (municipal government) and Water Service Providers (public, private or mixed entities, or municipal government itself).

2.6 New Provincial Legislative Measures

2.6.1 Water and Sanitation (WATSAN) Act

The objective of this Act is to co-ordinate all water and sanitation strategies/initiatives in the province. It was indicated that the draft is currently in the provincial parliamentary process and a State Law Advisor's certification of the draft has been obtained. The anticipated piece of the legislation is based on the Water and Sanitation policy.

2.7 Budgetary Measures

2.7.1 Department of Water Affairs and Forestry CWSS-P

In the reporting period, the total amount allocated to the DWAF-CWSS-P programme was R1 009 million and actual spending was R1 463 million. When donor funds are included, there was a small percentage of overspending. More money was allocated to the sanitation programme in August 2002 to supplement the acceleration of its implementation. Approximately R520 million was spent on sanitation. The experienced variance was accommodated and spent as required in the 2003 financial year. However, the money allocated to sanitation programmes was under-spent by way of government appropriations. As for adequacy, Table 11 indicates that funding was adequate and was assisted by supplemental donor funds. A recommendation was made by the Department that in future, government should provide more funding for the projects if the targets of 2008 and 2010 are to be met.

Table 11: CWSS-P Budgetary Measures

<i>Year</i>	<i>Allocation for programme in R'000</i>	<i>Conditional Grants in R'000</i>	<i>Total donor funding in R'000</i>	<i>Projected expenditure in R'000</i>	<i>Actual expenditure in R'000</i>
2001/02	921 753	921 753	228 108	1 139 898	1 181 089
2002/03	1 009 283	1 009 283	300 280	1 433 343	1 463 638

Source: DWAF's protocol, 2002/2003

There was overspending in two financial years. This overspending was mainly due to the need to accelerate the delivery of services to rural communities that do not have adequate water and sanitation. To address this overspending, the Department expressed a commitment to continue to manage its budget within the normal parameters laid down by the National Treasury. The programmes' budget was targeted at female-headed households and low-income groups living in rural and informal settlements.

2.7.2 Department of Provincial and Local Government-CMIP

The total allocation for CMIP projects was R1 799 million during the reporting period. This amount was more than what was allocated to CMIP projects in the previous financial year. In the previous financial year and that was R1 034 million. According to the DPLG, the amount of R1 797 million in the form of conditional grants is the total allocation for the CMIP and includes provision for water services and other infrastructure. The total conditional grant increased by approximately R797 million rand from the previous financial year.

Table 12: CMIP budgetary allocations - Overall

<i>Year</i>	<i>Revised Total CMIP Allocation for programme in Rands</i>	<i>Actual Total CMIP Expenditure in Rands</i>	<i>Total CMIP Expenditure as a % of revised allocation</i>	<i>Actual Expenditure on CMIP water projects</i>
2001/02	1 033 773 000	1 000 234 000	96,8%	448 000 000
2002/03	1 799 097 000	1 797 255 000	99,9%	751 000 000

Source: Department of Provincial and Local Government, Annual Report 2002/2003 p76-77. Actual expenditure on CMIP water projects from DPLG Protocol Response 2003

2.7.3 Mpumalanga Province Department of Local Government, Traffic Control and Traffic Safety

Government allocated a CMIP amount totalling R3,5 million to the Mpumalanga Provincial Department of Housing and Local Government. No variances occurred as the Department spent the entire amount allocated to them. Nevertheless, the Department mentioned that they are in need of additional funding in the form of conditional grants in order to provide adequate water to communities. This is because the allocated funds were insufficient to ensure complete realisation of the right of access to water. To acquire more funds, the Department submitted a request for increased funding for the next period.

Table 13: CMIP budgetary allocations - Mpumalanga

<i>Year</i>	<i>Allocation for Programme/project in Rands</i>	<i>Projected Expenditure</i>	<i>Actual Expenditure</i>
2001/2002	3 402 000	3 402 000	3 402 000
2002/2003	3 500 000	3 500 000	3 500 000

Source: Mpumalanga Province Department of Local Government, Traffic Control and Traffic Safety's protocol, 2002/2003

2.7.4 Limpopo Province Department of Local Government and Housing

Limpopo Department was not allocated the funds through CMIP from the national government, instead the Department got a conditional grant of R258 million, which is more than the R136 million rand of the previous financial years. The actual expenditure was the same as the total conditional grants of this Department.

Table 14: CMIP budgetary allocations - Limpopo

<i>Year</i>	<i>Conditional Grants</i>	<i>Projected Expenditure</i>	<i>Actual Expenditure</i>
2001/2002	94 405 000	94 405 000	94 405 000
2002/2003	178 813 000	178 813 000	178 813 000

Source: Limpopo Province Department of Local Government and Housing's protocol, 2002/2003

2.7.5 KwaZulu Natal Department of Traditional and Local Affairs

For KwaZulu-Natal, government allocated a CMIP amount totalling R 400 361 188 for the period under review. As a result, minor variances occurred, as the budget was under spent. This was attributed to minor delays that occurred during the project implementation phase. The Department addressed the under-expenditure by rolling over funds to the next financial period, in order to continue implementation of projects without any impact on service delivery. Moreover, the Department made a concerted effort to commit all allocations for the year by timeously approving projects to be implemented. Nevertheless, the allocated budget was found to be inadequate to address the backlog in water and sanitation services in the province. To avoid this inadequacy in the periods following, the Department made an application for an additional amount of money to the national and provincial treasuries.

Table 15: CMIP budgetary allocations – KwaZulu-Natal

<i>Year</i>	<i>Allocation for programme/project in Rands</i>	<i>Projected expenditure</i>	<i>Actual expenditure</i>
2001/2002	206 350 000	211 349 000	206 350 000
2002/2003	400 361 188	386 330 494	400 361 188

Source: KwaZulu Natal Department of Traditional and Local Affairs's protocol, 2002/2003

2.7.6 Western Cape Province Department of Local Government

In the Western Cape Province, the Department of Local Government was allocated an amount totaling R39,76 million. There was no variance because the Department spent the entire allocated amount. The budget allocated was, however, regarded as inadequate but the Department failed to indicate what measures it put in place to address this impact therefore. Moreover, the Department failed to indicate the impact that budget inadequacy had on the realisation of the right in question.

Table 16: CMIP budgetary allocations – Western Cape

<i>Year</i>	<i>Allocation for programme / project in Rands</i>	<i>Projected expenditure</i>	<i>Actual expenditure</i>
2001/2002	12 580 000	12 580 000	12 580 000
2002/2003	39 760 000	39 760 000	39 760 000

Source: Western Cape Province Department of Local Government's protocol, 2002/2003

2.7.7 Northern Cape Province Department of Housing and Local Government

This Department failed to indicate the total departmental budget allocated to them. However a total conditional grant of R57 million was received, which amounted to more than the grants received in the previous period.⁴⁹ No variances occurred as the Department had spent the entire allocated budget. Moreover, the Department did not experience any over- or under spending during this period. Nothing was said about the adequacy of the budget. For a complete provincial breakdown, see Table 12.

Table 17: CMIP budgetary allocations – Northern Cape

<i>Year</i>	<i>Projected Expenditure</i>	<i>Actual Expenditure</i>
2001/2002	36 000 000	36 000 000
2002/2003	57 000 000	57 000 000

Source: Northern Cape Province Department of Housing and Local Government's protocol, 2002/2003

2.7.8 Gauteng Department of Development Planning and Local Government

The Gauteng Department of Development Planning and Local Government allocated R70 million for water and sanitation projects and reported that 100% of the funds were spent. Nevertheless, the Department mentioned that they are in need of additional funding in the form of conditional grants in order to make adequate provision of water to communities. This is because the allocated funds were insufficient to ensure complete realisation of the right of access to water. To acquire more funds, the Department has since submitted a request for increased funding for the next period.

Table 18: CWSS-P Budgetary Allocations - Gauteng

<i>Year</i>	<i>Allocation for Programme/project in Rands</i>	<i>Projected Expenditure</i>	<i>Actual Expenditure</i>
2001/2002	R50 000 000	R50 000 000	R50 000 000
2002/2003	R70 000 000	R70 000 000	R70 000 000

Source: Gauteng Department of Development Planning and Local Government's protocol, 2002/2003

3 CHALLENGES FOR THE REALISATION OF WATER RIGHTS

Although progress has been made with regard to the establishment of policies and law, DWAF revealed that the following challenges remain:

- DWAF's difficulties in monitoring instituted measures;
- provision of free basic water to communal tap and prepaid meter tap users;
- sustainability of water services in rural areas;
- roll-out of sanitation programmes in rural areas;
- the process of transferring capital grants to local municipalities;
- provision of water to farm dwellers remains a challenge to DWAF; and
- monitoring local implementation of CMIP by local government and DPLG

Other sources indicate that the elimination of water privatisation and the long distance walk to the tap is still a challenge to DWAF.

3.1 Department of Water Affairs and Forestry (DWAF)

3.1.1 *Monitoring Difficulties*

DWAF reported that as much as it has improved numerous internal and external monitoring networks in place, it is difficult for them to monitor the progress of realising the right of access to water. This is because, provincial departments and local governments provides less quality information to DWAF. Instead of providing information based on the recommended reporting standard, these spheres provide information that does not conform with the reporting standard determined by DWAF. In most cases little information is provided to DWAF. This is because there is still a gap in the management of information at provincial and local government levels.

3.1.2 *Free Basic Water Policy*

Although the implementation of free basic water policy shows signs of success, DWAF's strategic framework revealed that there are some difficulties particularly with regard to:⁵⁰

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- the provision of infrastructure necessary to provide free basic water to poor households;
- the development of a subsidy that will benefit needy households being the previously disadvantaged, poor and vulnerable people;
- the equitable treatment of large households and multiple households sharing one communal tap; and
- the collection of revenue over and above the free basic water allocation.

In addition, South African Local Government Association (SALGA) reported that the development of indigence policies⁵¹ for poor households remains a challenge to DWAF.

3.1.3 Sanitation policy

At the time of the reporting period, the Department indicated that monitoring of the implementation of sanitation policy was the main challenge. This is because the reporting system of local government on the provision of sanitation services is poor and there is little information on how municipalities are providing sanitation services to poor households. In addition, the strategic framework indicated the provision of sanitation infrastructure, the increase of the sanitation subsidy to the municipalities and the aims of making sanitation a national campaign where the government and the communities are all involved as the Department's future challenges.

3.1.4 Service sustainability

In his speech in September 2003 the then Minister of Water Affairs Mr. Ronnie Kasrils mentioned that many people had asked whether the water and sanitation systems DWAF had built were working as intended.⁵² This report has already highlighted the case study research on dysfunctional infrastructure and projects in KwaZul-Natal. The challenge that DWAF faces is to make sure that the systems function as intended. According to the then Minister, all the achievements in providing services turn to dust if the Department cannot make the systems to work.⁵³

Although the Department has asked the Human Science Research Council and the Water Research Commission to determine the extent of the functionality of water projects funded by DWAF, the challenge for the Department now is to focus on strengthening local government and its management to ensure that the delivery of water services is effective.⁵⁴

3.1.5 Allocation of Funds

DWAF's Annual Report for 2002/2003 states that the evolving financial framework for local government continued to pose considerable challenges. The Intergovernmental Fiscal Review mentioned that this is because part of the capital grant and operational subsidy is provided directly to municipalities, whilst another part is allocated indirectly as allocations-in-kind to fund investments in, and operation of, specific water projects in that municipality.⁵⁵ During the reporting period, there was an intensive engagement with National Treasury, DPLG and SALGA over arrangements for financing new infrastructure, the operation of existing systems and their transfer to local government. Amongst other things, DWAF intends to transfer R999 million on basic water and sanitation infrastructure to municipalities in the coming financial year.⁵⁶

However, the challenge lies in the process of transferring the funding system to local municipalities since many of them are incapacitated. The Estimates of National Expenditure 2004 revealed that the process of transferring water services delivery and operations to water services authorities (local governments) will only be implemented in eight to ten years time.⁵⁷ SALGA reported that a dedicated grant to fund the transfer programme is welcomed as it would provide better planning, transparency and accountability.⁵⁸

3.1.6 Service Delivery to Farm Dwellers and Former Homelands next to Farmers

As indicated in the SAHRC's *Final Report on the Inquiry into Human Rights Violations in Farming Communities* of August 2003, securing an independent water supply to farm dwellers and investing State resource on a private land in order to supply water services to farm dwellers, remains a challenge for DWAF.⁵⁹ To tackle this challenge, DWAF has referred the matter to local government to make arrangements with the farm owner with a view towards providing free basic water to farm dwellers. DWAF suggested that an agreement be entered into with landowners to provide water to those people who reside on their land and has already drafted an agreement with farm owners to regulate the provision of water services to farm dwellers.⁶⁰

In addition, the provision of water to residents near commercial farms remains a challenge to DWAF. It is common in South Africa for people in the former homelands who live next to large scale irrigation farms to be without sufficient water.⁶¹

3.1.7 Water Resource Management

With regard to water resource management, DWAF Strategic report of 2003-2004 gave an indication that the Department is finding it difficult to implement the provisions of the National Water Act including⁶²:

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- Establishment of the catchments management and water user associations;
- Establishing a National Water Resource Strategy which will set out the procedures, guidelines and overall strategy for managing water resources;
- Developing and testing a strategy for compulsory water licensing to facilitate equitable access to water resources for previously disadvantaged communities;
- Enhancing water use efficiency;
- Ensuring compliance with dam safety regulations and enhancing public safety at water resource installations;
- Investigating and implementing appropriate institutional arrangements for the optimal management of the interdepartmental Working for Water programme, which may result in the transfer of the programme to another department;
- Building national capacity to monitor the state of water resources so that accurate information is used in decisions about the use and management of water; and
- Investing the creation of a National Water Resources Infrastructure Agency to manage and develop national infrastructure.

According to Schreiner, 2003, Catchment Management Agencies (CMAs) will be the vehicles to meet poor peoples' basic water consumption needs as well as productive water needs linked to economic empowerment and the protection and expansion of water use under growing competition for the scarce resource.⁶³ However, the challenge is to speed up the progress of establishing CMAs. Moreover, SALGA's presentation to the Portfolio Committee on Water Affairs and Forestry, 2003 noted the process of CMAs but has a concern with regard to the governance of CMAs and the role of the local sphere of government in the CMAs.⁶⁴

3.2 Department of Provincial and Local Government (DPLG)

3.2.1 Monitoring of Policies and Laws Implemented at Municipal Level

During the reporting period, DPLG reported that they were experiencing various challenges in monitoring the implementation of policies by local

government. This was attributed to the fact that municipalities, especially rural municipalities, lack technical support, significant revenue bases and capacity to deliver infrastructure and that MIG provides for basic services only.

DPLG stated that during the reporting period, integrated governance was given priority and the system of intergovernmental relations was stabilised.

SALGA reported that the implementation of policies and laws were not joint within spheres of government. On that note SALGA proposed a joint implementation to continue through the establishment of Joint Response Teams and common provincial transfer action plans. Moreover, SALGA had concerns with regards to the adequacy of consultation between municipalities and DWAF in the development of the White Paper on Basic Household Sanitation and the national strategy.

3.3 Provincial and Local government

3.3.1 Implementation Difficulties

DWAF reported that both provincial departments and local government experienced difficulties with regard to the implementation of measures instituted during the period under review.

3.3.1.1 Provincial Government

At provincial level, DWAF indicated that implementation difficulties were mainly attributable to a lack of adequate cooperative governance and dedicated capacity. Different departments at provincial level were using different approaches and standards. According to DWAF, the inconsistency was clearly seen in the implementation of the sanitation programme, especially when it came to the level of subsidisation and the maximum unit costs. However, the standards and funding criteria were revised to set a common approach for the sector and a programme with top-down mobilisation was to be proposed.⁶⁵

DWAF reported that the community-driven sanitation policy required dedicated capacity at provincial and local level if the 2010 target for eradicating the backlog in service delivery was to be achieved. An additional requirement for the national eradication of the bucket sanitation system was identified and policies and guidelines were under development during the reporting period.

However, different provincial departments provided different reasons for their implementation difficulties. The KwaZulu-Natal Department of Traditional and Local Affairs reported that implementation difficulties arose from delays in projects as a result of technical capacity problems, inefficient procurement policies and shortages of skilled people and contractors. The Department indicated that due to political indecision, many projects in the province could not be agreed to timeously and the procurement policy of municipalities slowed down the appointment of suppliers and contractors.

In view of solving these problems, the Department of KwaZulu-Natal province decided to assist through close liaison with municipal managers in order to finalise decisions on projects, provide training to contractors in the construction industry to improve their skills, promote SMME's, employ and train local labour in construction skills, and operationalise capacity support programmes.

The Mpumalanga Department of Local Government, Traffic Control and Traffic Safety reported that during the implementation of policies, legislation, programmes and projects, lack of capacity in certain municipalities and poor workmanship by some of the service providers were experienced. The Department intends to institute capacity building programmes and interventions in some municipalities in order to tackle these difficulties.

3.3.1.2 Local Government

While the local governments have made significant progress with respect to addressing backlogs and extending services, they face many constraints, including:

- huge infrastructural disparities which require municipal expenditure far in excess of the revenue currently available within local areas; and
- inequalities, including substantial variations in capacity with some municipalities having little or no pre-existing institutional foundations to build on as a result of apartheid.

DWAF indicated that project implementation was sometimes accelerated to address the backlogs in a local authority area. This acceleration tended to ignore some of the softer issues that may affect the sustainability of the projects in the long-term. The acceleration of infrastructure implementation can lead to operational problems after commissioning and transfer to local government.

At project level, the DPLG had experienced major capacity challenges especially in newly developed municipalities in rural areas, which were unable to attract adequately skilled people in CMIP and Local Government Equitable Share programmes.

With respect to CMIP, the DPLG worked very closely with the provincial departments of local government, who set up programme management teams to support municipal capacity development. The teams have initiated a number of interventions from engaging the services of consultants to developing mentorship programmes to organising a range of training programmes.

That being the case, the Intergovernmental Fiscal Review 2003 reported that at a local level most houses in rural areas are often 200m apart from each other and in some cases the delivery point is further than 200m. This makes it difficult for the municipality to achieve the government's objective of ensuring access to water within 200 metres of all households.⁶⁶

Nevertheless, DWAF has developed several strategies and policies to address these implementation difficulties, which include:⁶⁷

- policies and guidelines for increased sanitation subsidies including full infrastructure costs;
- carrying out audits and project visits to determine deviation from standards and advise on policy amendments;
- aligning DWAF's business planning processes with that of DPLG and CMIP;
- supporting local government with strategic guidance, technical expertise, capacity building and training;
- promoting the alignment of the Department's Strategic Plan and the service delivery targets thus making sure that the development of the new strategic plan of the Department is in line with the water service delivery targets already set.

As mentioned above, additional guidelines on the eradication of bucket sanitation system were under development. DWAF indicated that it may also have its own capacity problems when it comes to understanding the work and functioning of local government.

4 CRITICAL ANALYSIS OF THE MEASURES INSTITUTED

Policies and legislation instituted in the reporting period are positive but have some limitations with regard to rural water supply and sanitation. As for water supply, limitations of these measures are clearly seen in water supply and sanitation infrastructure delivery, free basic water services, the pricing of water supply, the quality of water, the allocation of water among competing users during drought periods, provision of water to farm dwellers and residents next to farmers as well as monitoring of these policies. With regard to sanitation, the limitations of the policies and legislation lie in the provision of sanitation service delivery.

4.1 Water and Sanitation Infrastructure

Considerable progress was made by DWAF, the DPLG and local governments with regard to the investment in infrastructure necessary to provide basic water and sanitation services. During the reporting period, 86% of the population has access to water supply infrastructure whilst 63% of the population has access to sanitation infrastructure. Although these spheres should be commended for investment in infrastructure, a lot has to be done with regard to the functionality of the infrastructure installed. The number of systems that were functional and dysfunctional was not known. Local government failed to report on the functionality of the systems.

Lack of information about the functionality and dysfunctionality of the current infrastructure put the SAHRC in an awkward situation as an assessor. With data on the functionality and the dysfunctionality of the infrastructure (projects and taps), the SAHRC would be in a better position to assess the actual impact of the infrastructure on the poor and also assess whether spheres of government are progressively providing access to water as stipulated in section 27 (1)(b) of the Constitution. This underlies the importance of providing data on the functionality and dysfunctionality of infrastructure by local governments and DWAF in the future.

The perception of the Commission is that most systems are dysfunctional especially in rural areas. This is because the then Minister of Mpumalanga indicated that in rural areas of Mpumalanga households spend almost three months without water as a result of the dysfunctionality of infrastructure. Also, HSRC indicated that in KwaZulu-Natal projects out of 23 projects, most projects especially groundwater projects were not working.⁶⁸ This raises a concern because 4 million poor people rely on groundwater. Dysfunctionality of the systems therefore indicates that the majority of the poor are unable to access sufficient clean water. Water from boreholes is regarded as cheaper and of better quality as compared to surface water.⁶⁹

In its strategic framework, DWAF is confident that by 2008 all South African must have access to water facilities that are functional, whilst by 2010 all South Africans must have access to sanitation facilities that are functional. However, less is said about the way to achieve this targets. The problem of dysfunctionality of facilities is and has always been the major problem in rural areas, rural settlements and townships. The dysfunctionality problem is attributed to poor maintenance, which is a result of financial difficulties experienced by the local municipalities.

This is mainly because municipalities find it difficult to raise enough revenue to maintain the infrastructure. The equitable share of funds allocated to municipalities is also not enough to cover the provision of free water, maintain the municipality itself and maintain the infrastructure in place. There is a need for DWAF to provide a guidelines, which will clearly indicate the way in which the dysfunctionality problem will be minimized as soon as possible.

4.2 Free Basic Water policy

Since the establishment of this policy, the implementation of Free Basic Water Policy has been progressive. This policy has been implemented successfully in certain municipalities in certain provinces as a result 75% of the local and metro municipalities provided free water during the reporting period. Almost 93% of the total population in Free State, Gauteng and Western Cape has access to free basic water whilst 42.2% of the population in Northern Cape, North West, Mpumalanga, KwaZulu-Natal, Limpopo and Eastern Cape has access to free basic water. The rapid implementation of this policy and its success in several municipalities gives the Department the confidence that by the year 2005 all municipalities will be implementing the policy.

In spite of DWAF's confidence in this policy, a number of problems have been identified. The majority of people benefiting from this policy seems to be urban rather than rural-based. This is clearly seen in Table 4, which indicates the disparities among provinces that are predominantly rural and urban with regard to the number of people benefiting from the Free Basic Water policy. In practice, training officers from the SAHRC found that in one of the rural areas in Mpumalanga, a municipality provides 4l per person per day instead of 25l per person per day. Moreover, HSRC (2002) found that the tendency in social reform is for somewhat better-off and more organised to benefit first (the inverse equity hypothesis) and there is evidence of this in the social exclusion of the poorest in the implementation of the free basic water programmes. Similarly, water service backlogs in poor urban areas are estimated at 10% while in poor rural areas they are estimated at 39%. It appears that the majority of people that got disconnected from the consumption of free basic water are mostly rural people as they are unable to afford water given their employment and socio-economic status. This indicates that the issue of equality as stipulated in the Water Service Act should receive more concerted attention.

In addition, the provision of free basic water through communal taps and stand pipes seems impractical. In most rural areas the whole community uses one communal tap or stand pipes and these communities spend hours queuing for water. At the end of the day most families end up with 50 litres for the whole family. Hence, the provision of water through communal taps and stand pipes seem impractical. E-thekwini municipality indicated that the use of standpipes clearly provides free basic water to households and even more than the defined basic level (6kl per household per month). Unless, there is monitoring by either the Traditional Chief or the municipality itself there is no guarantee that indeed these households do get free basic water.

The use of pre-paid meter in communal taps does help in providing free basic water to households each month. However, these pre-paid meters prevent the consumption of free basic water to households who cannot afford to pay a specified amount per month. This violates their rights. For example in Gathoka section, Ga-Mothapo village in Limpopo province, households use pre-paid card and those who cannot credit the card, use water from the Dam, which according to their inspection is not clean. Each household is expected to pay R10 per month.

This indicates that households with access to water infrastructure (communal taps) lack access to 6000 litres per households per month. A need for municipalities to make sure that each household has access to 6000 litres per month is required. DWAF's strategic framework is willing to accommodate the provision of high basic level services (50l per person per day) where suitable. Accommodating the basic needs of the most needy groups i.e. large families is a positive step forward to realizing the right to sufficient water as stated in section 27 (1)(b) of the Constitution. Also, by allocating more funds and using the MIG to support high basic level provision of water to poor households over time, the Department will be achieving its role as evidenced in the *Grootboom* judgment.

However, the strategic framework failed to provide the guidelines under which the local government would operate in the provision of free high basic level of water services. Moreover the framework failed to provide the guidelines with which monitoring of the implementation of the high basic level policy would be made possible. Also the issue of equality when allocating 50 litre per person per day was not clearly indicated in the framework. Without a procedure to be followed, and the monitoring and redressing of inequity, the implementation of the high basic level service will end up being given to the rich instead of the poor. Guidelines, monitoring and redressing inequity is necessary to achieve the Department's goal of providing high basic level water services where possible.

4.3 Pricing

According to regulations made in schedule 4(2) of the Water Service Act of 1997 in July 2001 under section 10(1), the water service institution, must when setting tariffs for providing water services to households, differentiate, where applicable, between at least the levels of services outlined in the following subsections:

- a) the supply of water to a household through a communal water service work;
- b) the supply of water to a household through a water service work or consumer installation designed to provide a controlled volume of water;
- c) the supply of water to a household through a water services work or consumer installation designed to provide an uncontrolled volume of water; and
- d) the provision of sanitation services to a household not connected to a sewer

DWAF requires local municipalities to provide information based on the above subsections with regard to tariffs. However, at the moment, the municipalities seem not to be following this guideline. Municipalities are charging higher prices to households in rural areas. This raises a concern about the way the guideline is being used at the municipal level, specifically in relation to communal taps versus private taps. From a practical situation it seems as if the water service authority sets the same tariff for both the private users and the communal tap users. In other words, the water service sector fails to apply the regulations made in Schedule 4(2) as stated in the Water Service Act. Differentiation of tariffs between private tap users and communal tap users is necessary in order to achieve equity.

In addition, the average water price for industrial users is lower than the average price of domestic sector. The average price for industrial users is supposed to be higher than the domestic sector average price. Having said that, the water boards seem to price consumer higher prices in order to repay their loans thus denying the poor their right to water. During the reporting period, the total debt of Water Boards and Irrigation Boards was estimated at R269 508 million. To repay this debt these boards tend to increase the cost of water for domestic users. Increasing of costs by Water Boards prevents consumers to enjoy their full right to water. This raises a concern on the effectiveness of the monitoring by DWAF and the provincial government as stated in section 155 (6)(a) and 155(7) of part B of Schedule 4 of the Constitution of the Republic of South Africa.

4.4 Cross Subsidisation

Cross subsidisation was introduced to assist in making the free basic water policy operational. The notion was that rich households would pay more for higher levels of water consumption to cross subsidise a free supply of 6000 litres a month to poor households. It was discovered that in cases where the ratio of the rich population is higher than the ratio of poor population in the country, it would be possible to operationalise cross subsidisation. However, in the areas where the ratio of rich households is less than the ratio of poor households, cross subsidisation is difficult to operationalise, especially in the deep rural areas that do not see a great deal of sales.

The concern is whether the cross subsidisation is being used in areas where the ratio of rich people is higher than the ratio of poor people. As indicated previously, at the time of reporting it was unclear whether cross-subsidisation in urban areas was being used. Judging from the price estimates from DWAF (Table 9), cross-subsidisation in urban areas is not being used widely. Free basic water is still priced in some areas. Furthermore, the price for industrial users is lower than for domestic users consuming between 21-60 kilolitres. As for the cross subsidisation between commercial farmers and small farmers, it is impossible for us to determine whether it is operational due to a lack of information. A need to operationalise the cross subsidisation in urban areas without privatising water is necessary.

4.5 Privatisation

During the reporting period, both DWAF and the DPLG failed to report on the issue of water privatisation. At the time of reporting, information about privatised water in the country was not available. Privatisation of water is still a problem that requires more concerted attention by DWAF. At local level, municipalities especially in rural areas, experience very low water consumption volumes, which compromise the sustainability of the municipality. Most of these municipalities, just like Nelspruit's Mbobela Municipality and Dolphin Coast Municipality, tend to make partners with the private sector without abiding by the water service framework agreement which states that the public sector is the preferred deliverer of services in order to remain sustainable.

Moreover, privatisation often is looked into from a municipal perspective rather than a retail perspective. The cost of bottled water is expensive in most provinces. For example, in Limpopo, a bottle of 250ml of water costs R14. There is also the problem that bottled water may be almost identical to tap water in some cases. In February 2004, *This Day* newspaper, revealed that a Rand Water Microbiologist reported that Coca-cola's bottled water "BonAqua" was comparable to tap water. DWAF and the DPLG need to pay more careful attention to the issue of privatisation of water.

4.6 Allocation of Water during Drought Season Among Competing users

Conflict between users in the provinces grows every day, as the amount of water available for use in certain areas is smaller than the demand. An example is the Steelpoort river basin in the Limpopo province, where conflict exists between agriculture and mining. During drought, when taps dry up or water is only available once or twice a week, the conflict worsens. This is attributed to poor management, and compounded by a lack of communication to households by municipalities. Such a behaviour leads to situations where poor households have to go back to consuming dirty, unsafe water. Local government needs to address this issue and institute a drought policy in order to combat this problem. In addition during droughts periods domestic users using water between 21-60 kilolitres and more continue to consume more water at the same price. Scarcity value is not factored in when pricing these groups.

4.7 Provision of Water Services to Farm Dwellers and Residents near the Farm

Most households in South Africa are situated next to large commercial irrigated farms especially in former homelands. These households lack access to clean adequate water. The challenge is to provide clean water to these households. DWAF is engaged in some agreements with farm owners with the aim of providing water to farm dwellers. However, DWAF failed to indicate the type of agreement it has entered into with the farm owners. The agreement process between the farm owners and DWAF seem to be slow. There is a need to speed up the adoption of suitable agreements in order to realise the water rights of farm dwellers with regard to water.

4.8 Provision of Sanitation Services

Progress in the provision of sanitation services is currently slow. Urban people have access to sanitation services, whilst rural people are still in the dark with regard to sanitation services. In other words, at the moment section 24 (a) is violated as vulnerable people continue to live in the environment that is harmful to their health or well-being. The government has taken a step forward by initiating a process to establish free basic sanitation. However, much still needs to be done with regard to the provision of basic sanitation. Provision of basic sanitation always requires infrastructure and education by the local government. Poor sanitation has negative impacts on the health of households, without education the diseases related to sanitation will not decline over time. DWAF indicated in their strategic framework that careful consideration is required when choosing a technology, education, health and increasing funds for subsidies.

4.9 Water Quality

According to the Centre of Rights on Housing and Evictions, the right to water entitles everyone to sufficient, safe, physically accessible and affordable water for personal and domestic use.⁷⁰ At the moment, only the better-capacitated municipalities are able to meet the required water supply quality. In rural areas, municipalities are often unable to do so. A need to capacitate the rural municipalities in order for them to meet the required level of service quality is necessary. More funds should be allocated to capacitate municipalities to ensure a reliable water supply quality. Moreover, monitoring the perceived quality is also required.

4.10 Budget allocation

Concerning the utilization of limited resources, provincial and local municipalities have utilised their entire CMIP allocations, however these allocations were not only spent on the provision of access to water. However, DWAF should be commended for allocating more money to sanitation programmes to supplement the acceleration of implementation, as priority has been given to the implementation of water projects over the years. Water and sanitation are interlinked and interdependent. Provision of both services at the same pace will reduce health risks for all the South Africans.

According to the response provided by DWAF to the SAHRC protocol, (2003), approximately R520 million was spent on sanitation and over 135 toilets were built during the reporting period. This increase in spending indicates that the Department is aware of the slow rate of progress regarding the implementation of sanitation programmes compared with the number of water projects implemented. According to the *Grootboom* judgment, a reasonable measure involves ensuring that the appropriate financial resources are also available.⁷¹ The Department under spent the amount allocated to it by way of government appropriations. This is not acceptable and is recognised as such in the *Grootboom* judgment and other international instruments. The Department should have used its available resources in order to achieve maximum results for both programmes effectively.

Budget allocations towards CMIP and free basic water, DPLG was allocated more money than in previous financial years, but underspent the funds allocated for CMIP and free basic water. According to the DPLG protocol report, 2003, the reason for this underspending is the lack of capacity in local government. At the same time, the unspent budget gets re-appropriated from the DPLG and this creates problems in the following financial years, as the budget consequently decreases, with less money available to spend.

The DPLG is, however, committed to using the unspent amount in the next financial year and also to solving the underspending problem through amending

the National Treasury requirements. Nevertheless, less spending is not acceptable because the majority of rural communities lack access to free basic water and have serious infrastructural constraints. This shows that the DPLG did not realise the interrelation between the spending of the budget and the provision of water supply and infrastructure services. The DPLG should see to it that the allocated amount is used to its maximum extent.

Provincially, KwaZulu-Natal and Western Cape departments exhausted the entire amount allocated to them during the reporting period. No variances were experienced. These Departments should be commended for progressively realising the right of access to water. However, these departments remain in dire need of funding for CMIP projects. Departments in Mpumalanga and Gauteng provinces did not spend all the money allocated to them, experiencing minor variances. Unfortunately other departments in other provinces and municipalities failed to provide information on their budget allocations.

4.11 Monitoring of Instituted Measures

Overall, DWAF together with DPLG have established various policies and laws in order to achieve progressive realisation of the right to water. At the same time local governments have engaged themselves in providing water and sanitation services to households. However, the provision of water and sanitation services seems to be unequal in the sense that rich households benefit more than the poor.

This is mainly attributed to lack of effective monitoring body at local, provincial and national level. At the time of reporting DWAF indicated they were not in a good position to monitor given the financial stress that they are in.⁷² At the same time DWAF indicated that they have developed monitoring programmes, but these programmes do not seem to be working effectively according to DWAF. DWAF indicated that the information gaps that exist hampers their ability to monitor. There is a need for effective monitoring of the progressive realisation of the right to access water.

4.12 Linking HIV/AIDS and Water Resource Management

Evidence indicates that HIV/AIDS has an impact on water resource management in Southern Africa.⁷³ Water resource management involves both the protection of water resources and the provision of water to users in a timely manner. The HIV/AIDS epidemic leads to high mortality rates especially of the economically active population, skilled workers and household heads.⁷⁴ This can lead to a situation where the managers in water schemes have incorrect information about the population growth and demographic density in most Southern African countries. Incorrect information about the demographic distribution and the population growth rates leads to inaccurate planning with regard to ensuring that the reasonable demands for water by each user are met

in a timely manner. Thus, incorrect information prevents construction schedules from matching water demand profiles.

In the wake of the HIV/AIDS epidemic the inability to pay increases and it becomes harder and harder for local government to collect rates from the services rendered⁷⁵. This is because economically active people die, especially working head of the households with proper income and as a result, the households lose the income permanently. In case where relatively rich people die from this epidemic, the issue of cross subsidization is non-operational and in cases where skilled people die, productivity declines and therefore service provision is poor. For example, it has been observed that in cases where skilled water treatment engineers are infected, their productivity declines and the chances of providing unclean water is high in the scheme.⁷⁶

The HIV/AIDS impact has increased the demand for water. Infected mothers demand more water for breast-feeding and households require water to take care of patients, as their immune system becomes weak.⁷⁷

Nevertheless, neither DWAF nor the provincial and the local government provided information about the impact of HIV/AIDS on local government. Also, little information about the programme of action for HIV/AIDS in water schemes is available. This gives the SAHRC the impression that the Department gives too little consideration to the impact of HIV/AIDS epidemic on water resource management. Information about the impact of HIV/AIDS and the programme of action will help the SAHRC to assess what the Department is doing about the impact that HIV/AIDS has on the provision of water and sanitation at local level.

4.13 Distance from the household to the nearest communal tap

Regulations made under section 9(1) and 73(1)(j) of the Water Service Act provide that every person in South Africa should be able to access a minimum of 25 litres (*l*) of potable water per day or 6 kilolitres (*kl*) per household per month, at a minimum flow rate of not less than 10 l per minute, *within 200 meters of a household*, with an effectiveness such that no consumer is without a supply for more than seven full days in a year . Although at the time of reporting, information about people who still suffer from the long distance when collecting water, many people, especially those living apart from each other, are still collecting water from a distance more than 200m from their dwellings. Provision of water infrastructure within 200m from the dwellings is still a challenge faced by DWAF, the DPLG and municipalities. Walking long distance to collect water has health impacts. DWAF together with the municipalities should see to it that water is provided within 200m from household's dwellings.

5 RECOMMENDATIONS

5.1 Water and Sanitation Infrastructure

To solve the problem of dysfunctional facilities, DWAF should develop a guideline that indicates the way in which the functionality of these facilities by local government would be achieved by 2008 and 2010. Making infrastructure work should be the government's priority. Consideration should be given to providing more funds to local government through the MIG. At the same time, good management of financial resources and employment of skilled managers to manage the finance and the daily activities of the municipality is required from the local government in order to continuously maintain the facilities.

5.2 Free Basic Water Policy

DWAF has to provide a guideline with which local government can provide high basic level services where suitable. This will provide relief to those households (vulnerable people) in need of water for their basic needs instead of the rich. The Department should develop a comprehensive procedure, which local government can adopt in order to provide high basic level services where suitable. In addition, the Department must encourage and provide funds to local government to conduct research on the income level and size of families within villages in their administrative boundaries. This will help them to understand how many people need high basic level service and how many need a basic level service.

The Department must encourage local government to make use of the water limiter technology to supply free basic water to the most needy groups to avoid disconnection of 6000l per month. For larger the families DPLG must ensure that additional funds are provided, together with an equitable share, in order to provide a high basic level of service. Local governments must make sure that they implement the high basic level policy as outlined in the guidelines prepared by the Department.

5.3 Pricing

DWAF should restructure the pricing method to cater for poor people who consume between 0kl and 6kl in order to realise the right of access to water. This can be done by allocating free basic water to everyone on a monthly basis and charge them an amount that goes beyond 6kl. Monitoring of pricing among users is necessary to create equality among users. Moreover, the Department must regulate the pricing methods of retailers for bottled water and penalize water boards that increase prices to cover their debts. Finally, the Commission requires the provision of actual costs of installing different levels of services to compare the cost with the tariffs to assess the continued operations of facilities and the level of cross-subsidy from high volume to low income users.

5.4 Cross subsidisation

In principle, the SAHRC see some scope for cross-subsidisation from higher and lower volume users. Considering estimates in Table 9, the gap between the tariffs for higher and lower volume water users appears to be too little. According to the user pay principle, the more you consume the more you pay. If this was the case, the gap between low volume users and high volume users should be wider. Looking at the gap between these users, it indicates that the high-volume users are still paying less than what they consume especially those watering their gardens and owning swimming pools. In most cases, high-volume users are not as price sensitive as low- volume users, therefore increasing the price of water for high-volume users to create a balance between these users will be desirable and would therefore cater for cross subsidisation.

5.5 Provision of Sanitation Services to Poor Households

DWAF should capitalise on the provision of sanitation infrastructure, and services as water and sanitation are interlinked and interdependent. However, the provision of sanitation infrastructure and services requires a collaborative effort from all spheres of government and households. Government should see to it that more funds are provided for the sanitation programme in order to accelerate the provision of sanitation facilities to poor households. Both the DPLG and DWAF, on the other hand, should ensure that they accelerates the development of positive measures to reduce sanitation backlogs in poor communities.

Government thus needs to ensure that the Free Basic Sanitation policy is implemented fully in the coming years. DWAF should devise promotional measures that will inform poor people about the importance of hygiene. To ease the process of providing free basic water other than promotioanl approach , local government should encourage households and communities to practice correct hygiene that would not jeopardizes their health and the health of the community. In this regard everyone would be viewed as a role-player in water and sanitation

5.6 Water Quality

Together with the DPLG, DWAF should provide sufficient funds to local municipalities for capacity purposes. This will speed up the process of improving the service quality in rural municipalities.

5.7 Allocation of Water Services during Drought Season Among Competing users

With regard to allocations of water among competing users, a water management and allocation policy developed by the Department should cater

for equality in the allocation of water among different users. This can be done through the determination of the economic value of water, which will help in allocating water among users efficiently and equitably. In the meantime, local governments should make use of the emergency policy during drought episodes. Progress in the development of drought policy is required.

It is recommended that during drought episodes, municipalities together with DWAF and the DPLG should factor in the scarcity value of water when setting prices. By doing that, municipalities will be able to provide water to poor households and minimize the problem of scarcity during drought.

5.8 Budgetary Allocations

There seems to be a problem with regard to the water quality functions. Referring to (Table 1) the water quality functions is currently with demoralised Provincial Departments of Health since the function is in the process of being devolved to local government. Attention to the water quality functions is necessary as this is an urgent problem. In addition the DPLG should provide more funds for capacity building, especially for water quality to local government. Without funds, local governments will fail to provide water supply and sanitation infrastructure, free basic water and free high level basic water services.

5.9 Monitoring of Instituted Measures

Government should see to it that its monitoring programmes in place are implemented effectively. To effectively monitor the right of access to water an integration in all spheres of government is required. Collaboration between the three spheres of government in the delivery of water is insufficient it needs to be strengthened. This means that the inter-governmental relations framework needs to be established, refined and clarified and efforts must be made to make it work more efficiently and effectively.

Government can encourage this integration by creating small monitoring body at local government. At the moment information is only collected from national and regional networks for monitoring purposes. With information networks at local level working together with the national, provincial and regional networks, the right to water will be monitored effectively. This method of monitoring will ensure that local governments provide water service delivery fairly, ensuring that both the poor and the rich have access to 25l of free water. Moreover, it would ensure that the policies on water limiter technology and pricing are applied as required.

5.10 Linkages between HIV/AIDS and Water Resource Management

The only way in which the DWAF can deal with the impact of HIV/AIDS is to develop a programme of action with regard to HIV/AIDS for skilled workers in

the water schemes. In a Treatment Action Campaign (TAC) case judgment, it was decided that in case where the mothers are unable to access nevarapine, they should use the breastfeeding substitutes like bottled milk. However, the case indicated that for this substitute to be successful, the mothers must have access to resources like the provision of clean water. This is not the case in most rural areas of South Africa and therefore this indicates that the transmission of HIV/AIDS to children are prevalent in such cases. The programme of action should therefore cater for the infected skilled workers in the schemes and also the households suffering from HIV/AIDS. The programme of action for HIV/AIDS issue is another solution to the problem of the provision of water in South Africa.

5.11 Distance from the household to the nearest communal tap

DWAF together with the DPLG and municipalities should come up with a way in which they can provide communal taps within these area that can comply with the regulation made under section 9(1) and 73(1)(j) of the Water Service Act.

5.12 Constitutional Obligations with Respect to Water Rights

Based on the critical analysis and the recommendations, DWAF, its regional offices, the DPLG, local government and bulk water providers have not fully met their constitutional obligations. Section 7(2) of the Constitution states that the State must respect, protect, promote and fulfil the rights in the Bill of Rights of which the right of access to water. With regard to respecting, promoting, protecting and fulfilment the following took place during the reporting period:

5.12.1 Respect

E-thekwini water has adopted a water limiter policy in order to refrain from interfering with people's access to water. This policy provides free basic water to every households and limits the consumption over and above the defined basic level. However, the use of water limiter seems not to be applicable in most municipalities in the country. This indicates that most municipalities are still interfering with people's access to water through disconnecting their water supply where payment for water cannot be realised. From the response provided by DWAF and DPLG, DWAF nor DPLG seems not to be doing much with regard to making sure that all the municipalities adopt the same policy as the E-Thekwini municipality.

5.12.2 Protect

rotecting the right of access to water means that government must prevent any violations of any individual's right which might be as a result of water

pollution and unaffordable price increases by a third party. At the time of the reporting, DWAF and the DPLG failed to provide information on the actions they have taken with regard to protecting the violations of one's right by the third party. This indicates that less attention is given to protection of the right of access to water. From the Rand Water's response to the SAHRC's protocol, it clearly indicated that Rand Water at the time of the reporting had increase price that might be regarded as unaffordable in order to payout the owed debts. And yet neither DWAF nor DPLG did something about such an action by Rand Water.

5.12.3 Promote

Promoting the right of access to water means that government should create a conducive atmosphere in which people can exercise their rights and freedoms by promoting awareness of their rights through public education. During the reporting period, DWAF conceptualized and promoted the Water Conservation: 2020 Water Education Programme vision in schools. The scope and nature of the programme has been extended beyond water conservation which focuses on quantities to include quality issues, sanitation, curriculum development in schools and intergration of water knowledge through recreational/arts and cultural programmes. The programme was to encourage more children especially rural based children in water related issues. However, estimates on the number of schools who benefitted from this programme was not provided for by DWAF and the DPLG.

In addition, during the reporting period, E-thekwini municipality has extended the community education and awareness programme to further educate and inform communities and learners on water and sanitation issues. Other municipality have failed to provide information on its programme of action with regard to promoting the right of access to water.

5.12.4 Fulfil

DWAF has taken positive measures, towards fulfilling the right of access to water. For example, the National Water Service Act of 1997, the Free Basic Water policy and Free Basic Sanitation policy, which are aimed at ensuring that all South Africans have equitable access to effective, affordable, economical and sustainable water and sanitation services have been instituted. DWAF has set the minimum quantity at 25 litres per person per day, and the minimum cartage distance at 200m. Although this is considered to be the minimum requirement for direct consumption, food preparation and personal hygiene, it is not adequate for a full, healthy and productive life. What continues to be of major concern and a challenge to the State, is ensuring that the poor and previously disadvantaged and marginalized groups benefit from law and policy measures directed at them. This can be done by making available resources that are directed towards addressing their plight. DWAF has further developed a consolidated municipal infrastructure service, by putting proper infrastructure

in place in order to improve the water supply services and sanitation services. During the reporting period DWAF was phasing-out all the bucket systems in use and introducing water-borne sanitation facilities in communities.

The DPLG has also taken positive measures to fulfil its water provision obligations and continues to support the Free Basic Water policy, CMIP, the Household Sanitation programme and the Cholera prevention strategy, together with a drought relief programme to provide clean water and sanitation to the poor, rural communities, and those people living in informal settlements, in order to address high incidences of disease such as cholera and diarrhoea. Although much effort has been made to address the backlogs on water and sanitation services, DWAF, its regional offices and the DPLG need to focus water and sanitation policies and law on the poor. This can be done through monitoring of policies and law measures that are developed for the poor like Free Basic Water Policy.

6 CONCLUSION

Overall, DWAF, its regional offices and the DPLG have realised the right of access to water partially, not fully. However, Government is still faced with several challenges in terms of discharging its obligations pertaining the realisation of access to water. While much has been done to realise the right to water, it is not enough. An adequate monitoring framework is a pre-requisite for sustainable water and sanitation development. Moreover, amendments of free basic water policy to accommodate large number of previously disadvantaged, poor and vulnerable families, and the provision of adequate funds should be the government priorities to ensure that the right to have access to water is realised progressively.

- 1 The aim of reporting on this Act and other regulations which were established before the reporting period is to indicate the roles of all spheres in the water sector and some regulations that still apply in the municipalities.
- 2 Department of Water Affairs and Forestry, *Annual Report 2002/2003*, p16.
- 3 Department of Water Affairs and Forestry, *Annual Report 2002/2003*, p16.
- 4 Ibid,.
- 5 Department of Water Affairs and Forestry, *Introductory Policy Note regarding Regulation of Water Service Providers*, Government Gazette, 21310, 30 June 2000.
- 6 Ibid,. Regulation 13.
- 7 Department of Water Affairs and Forestry, *Regulations relating to compulsory national standards and measures to conserve water*, Government Notice R509, Government Gazette, No. 22355, 8 June 2001
- 8 According to Census 2001, there were approximately 620 000 households with 9 or more members. There were approximately 380 000 households with 10 or more members meaning that, with the 6 k/ limit, the standards for these households are 20 l per day or less.
- 9 Department of Water Affairs and Forestry, *Regulations relating to compulsory national standards and measures to conserve water*, Government Notice R509, Government Gazette, No. 22355, 8 June 2001, Regulation 16.
- 10 According to the 2001 Census, 1,3 million households derived water from a dam, pool, or stagnant water, river or stream, spring or non-specified source. Ninety-nine percent of people accessing water from these sources were African.
- 11 The Act was amended in 1999 by the National Water Amendment Act of 1999 No. 45. <http://www.gov.za/acts/1999/a45-99>.
- 12 Department of Water Affairs and Forestry, Norms and standards in respect of tariffs for water services in terms of section 10 (1) of the Water Services Act (Act no. 108 of 1997) Government Gazette, 22472, 20 July 2001
- 13 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC)
- 14 Manquele v Durban Transitional Metropolitan Council (2001) JOL 8956 (D)
- 15 Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR 625 (W).
- 16 Jaap De Visser, Edward Cottle and Johann Mettler, *Realising the right of access to water: Pipe dream or watershed?*, Community Law Centre
- 17 Ibid,. para 26
- 18 See U.N.T.S. No 14531, vol. 993 (1976), p3 for Article 11, para 1 of International Covenant on Economic, Social and Cultural Rights.
- 19 United Nations Economic and Social Council, *General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2002/11 26 November 2002
- 20 Ibid,.
- 21 Howard, Guy and Bartram, Jamie, *Domestic Water Quantity, Service Level and Health*, World Health Organisation 2003
- 22 See General comment No 15 (2002) on the Economic, Social and Cultural Rights of Water, paras 4 & 5.

- 23 *Water and Sanitation in the World's cities* (2003). United Nations, www.unhabitat.org
- 24 See Department of Water Affairs and Forestry protocol on the right to sufficient and clean water for the period of April 1 2002–March 31 2003
- 25 *ibid.* Policy and legislative measures section, p1
- 26 Strategic Framework for Water Services, 12 September 2003. Department of Water Affairs and Forestry.
- 27 As stated in the MIG programme manual of September 2003
- 28 Department of Provincial and Local Government Report on Municipal Infrastructure Grant policy, 2003
- 29 Hemson, D (2002). *The Sustainability of community water projects in KwaZulu- Natal*. Human Sciences Research Council.
- 30 See *4th Economic and Social Report, 2002/2003*, South African Human Rights Commission, p386-387
- 31 DPLG Presentation To The Portfolio Committee Infrastructure Investment, 10 March 2003
- 32 *Ibid.*,
- 33 The KwaZulu-Natal Department of Traditional and Local Affairs, Limpopo Department of Local Government And Housing, Gauteng Department of Development Planning and Local Government, Western Cape Province Department of Local Government, Northern Cape Province Department of Housing And Local Government.
- 34 See DPLG protocol, Policies and legislation measures section, p1
- 35 See DPLG protocol, Policies and legislation measures section, p12
- 36 It is important to note that DWAF's strategic framework released in September 2003 mentions that when a user consumes up to 7kl instead of just 6kl, the water service authorities would not request the consumer to pay for an extra 1kl. However, if the user consumed an amount way in excess of 6kl, then the water service authorities would request the consumer to pay for the extra.
- 37 Statistics South Africa, Consumer Price Index (CPI) 2000 weights (Historical metropolitan and other urban areas), Statistical Release P0141.5, 28 February 2002
- 38 According to Colin Marx "It is worth noting that even the policy on free basic water contained the provision that municipalities should keep tariffs to commercial and industrial users as cost-reflective as possible to minimise cross-subsidisation." See *South Africa's experience in the privatisation of its water and sanitation services*, Report prepared for WaterAid, February 2002
- 39 Impumelelo, South Africa's Top 300 Empowerment Companies, 4th Edition, 2003/2004
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- 43 The SANS 241 / SABS 241:2001 - Drinking water standard (approved on 23 February 2001) "specifies three classes of water, defined in terms of physical, biological, organoleptic and chemical requirements, that are suitable for delivery as drinking water. These classes are: an ideal (class 0) classification that is closely comparable to current international standards for water quality; class I, that is considered to be acceptable for lifetime consumption; and class II, that is considered to represent the minimum acceptable quality for various maximum consumption periods." www.stansa.co.za

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