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3rd Economic & Social Rights Report

1999 / 2000

Executive Summary

• Education • Social Security • Water • Food • Health •

CHAPTER ONE

THE THIRD MONITORING CYCLE

1 BACKGROUND

The Constitution requires the state to “respect, protect, promote and fulfil the rights in the Bill of Right.”¹ In terms of section 184(1)(c) of the Constitution, the South African Human Rights Commission (hereinafter the Commission) is required to monitor and assess human rights. Section 184(3) provides that "each year, the Human Rights Commission must require relevant organs of state to provide 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."

The South African Human Rights Commission has established a monitoring system in respect of the above. The system has been in place since 1997 and this is the third Report covering the period 1 April 1999 to 31 March 2000. The third set of protocols was distributed from 30 June 2000 to 7 July 2000 to fulfil the requirements of section 184(3) of the Constitution referred to above. The data obtained was used to compile the Report, which has to be submitted to Parliament.

2 DEVELOPMENT OF PROTOCOLS

In preparation for the third reporting cycle the researchers in the Research and Documentation Department of the Commission developed the protocols. The Commission organised a national workshop to discuss the third reporting cycle on 29 March 2000, which was attended by relevant organs of state and organs of civil society. Organs of state were sent copies of the draft protocols beforehand in order to enable them to prepare for the workshop. The objectives of the workshop were to discuss:

- the reporting process in line with section 184 (3) of the Constitution.
- questions, comments and suggestions made by organs of state and organs of civil society on the monitoring process and the contents of the protocols.

The comments and suggestions from the workshop were incorporated into the protocols for further refinement. Thereafter the protocols were sent to relevant national and provincial government departments from 31 June 2000 to 7 July 2000. The relevant government departments were given until 31 August 2000 to submit their responses to the Commission.

¹ Section 7(2) of the Constitution Act 108 of 1996.

3 CONTENT AND FORMAT OF THE PROTOCOLS

The protocols for the third cycle had six sections. The sections were designed to monitor and assess the measures taken by organs of the state to respect, protect, promote and fulfil economic and social rights and the outcomes of current measures to realise economic and social rights. A copy of a protocol is included as an Appendix to this report. The protocols are divided into the following sections:

- Policy measures
- Legislative measures
- Budgetary measures
- Outcomes
- National Action Plan²
- Monitoring systems³
- Additional information⁴

Questions in the protocols required detailed information on measures implemented in the reporting period, as well as an explanation of the way the measures provided for the obligations to respect, protect, promote and fulfil relevant economic and social rights. Specific questions were also asked on special considerations in the measures that were given to socially and economically vulnerable groups. These groups included:

- persons living in rural areas
- persons living in informal settlements
- homeless persons
- female-headed households
- women
- children
- persons with disabilities
- older persons
- persons living with HIV/AIDS
- previously disadvantaged racial groups including indigenous groups

An explanatory memorandum meant to assist government departments in preparing their responses was prepared and attached to the protocols. The memorandum stated the Commission's mandate, explained concepts used in the protocols, and outlined the format of the responses. The departments were required to prepare and send the reports in both hard copy and electronic form.

² The National Action Plan for the Promotion and Protection of Human Rights lists challenges, which have to be addressed by government department. Therefore indicators were developed in that regard.

³ Refer to internal systems which government departments have put in place to determine progress in the realisation of economic and social rights.

⁴ Organs of state were also required to provide additional information on the realisation of economic and social rights that the above sections have not covered.

The rights covered by the third cycle of protocols were:

- Education, including basic and further education
- Environment
- Food, including basic nutrition
- Health care, including basic health care services for children
- Housing
- Land
- Social Security and Social Assistance, including social services for children
- Water

4 THE DISTRIBUTION PROCESS

To facilitate the monitoring process, letters were written to relevant Cabinet Ministers, Premiers and Members of Executive Councils (MECs) in the provinces. The purpose of the letters was to inform Ministers, Premiers and MECs about the Commission's economic and social rights monitoring process. The Directors-General at the National level and Heads of Departments in the provinces were sent protocols and were required to provide names of contact persons from their relevant departments who would liaise with the Commission on various issues pertaining to the protocols.

Follow-up telephone calls were made to confirm whether all the targeted officials had received the protocols. The contact persons were advised to contact the Research and Documentation Department if they required clarity on the content of the protocols. Correspondence between the Commission and organs of state was recorded and kept by the Commission.

The departments were given two months to compile appropriate responses to the protocols. The due date for the submission of the responses was 31 August 2000. Some government departments requested extensions in writing for the submission of the responses. Written requests for extensions were accepted and extensions for the period up to 15 September 2000. However after this date some departments still had not submitted their reports. The Commission decided to write letters to Cabinet Ministers, Premiers and MECs of the respective departments, which had failed to meet the second deadline for the submission of the reports. Cabinet Ministers, Premiers and MECs responded that they would follow up with the relevant departments and in the interim required an extension for the submission of the reports. A third due date of 31 October 2000 was given as the last and final date for submission for all departments that had not submitted their responses.

Some departments such as the national Department of Finance reported that they did not receive the protocols. In these instances, and where such

reports were found to be valid, the protocols were then faxed or e-mailed again to those departments.

5 SUBMISSION DATES FOR THE RESPONSES FROM GOVERNMENT DEPARTMENTS

Out of 68 departments that had been sent protocols, only 15 submitted their reports within the required time. The following were the submission dates for both national and provincial departments.

Table 1 Dates of receipt of responses from national government departments

National Departments	Date received
1. Provincial and Local Government	30 August 2000
2. Agriculture	1 September 2000
3. Environmental Affairs	15 September 2000
4. Water Affairs and Forestry	15 September 2000
5. Education	19 September 2000
6. Social Development	29 September 2000
7. Correctional Services	11 November 2000
8. Health	14 November 2000
9. Housing	14 November 2000
10. National Treasury	10 January 2001
11. Land Affairs	31 January 2001

Table 2 Eastern Cape Province

Department	Date received
1. Agriculture and Land Affairs	29 August 2000
2. Welfare	13 September 2000
3. Finance	05 October 2000
4. Environment	06 October 2000
5. Housing and Local Government	28 November 2000
6. Education and Training	15 February 2001
7. Health	22 February 2001

Table 3 Free State Province

Department	Date received
1. Environmental Affairs and Tourism	30 August 2000
2. Finance	31 August 2000
3. Health	31 August 2000
4. Social Welfare	31 August 2000
5. Agriculture	04 September 2000
6. Housing and Local Government	04 October 2000
7. Education	26 October 2000

Table 4 Gauteng Province

Department	Date received
1. Health	31 August 2000
2. Social Services and Population Development	04 September 2000

Department	Date received
3. Finance	06 September 2000
4. Education	02 October 2000
5. Agriculture and Land Affairs	09 January 2001
6. Environment	09 January 2001
7. Development Planning and Local Government	09 January 2001
8. Housing	31 January 2001

Table 5 KwaZulu-Natal Province

Department	Date received
1. Housing	30 August 2000
2. Finance	30 August 2000
3. Health	11 September 2000
4. Social Services and Population Development	25 October 2000
5. Agriculture and Environment	25 January 2001
6. Traditional Affairs and Local Government	30 January 2001
7. Education and Culture	23 February 2001

Table 6 Mpumalanga Province

Department	Date received
1. Health	30 August 2000
2. Finance	19 October 2000
3. Housing and Land Administration	10 October 2000
4. Agriculture, Conservation and Environment	12 October 2000
5. Education	31 October 2000
6. Social Services and Population Development	26 January 2001
7. Local Government and Traffic	26 January 2001

Table 7 Northern Cape Province

Department	Date received
1. Housing and Local Government	01 September 2000
2. Education	11 September 2000
3. Health	15 September 2000
4. Finance	19 October 2000
5. Agriculture, Conservation and Environment	18 January 2001
6. Welfare	19 January 2001

Table 8 Northern Province

Department	Date received
1. Housing and Local Government	16 October 2000
2. Finance	08 December 2000
3. Health and Welfare	16 January 2001
4. Agriculture and Environment	16 January 2001
5. Education	Matter still pending ⁵

Table 9 North West Province

Department	Date received
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⁵ The Department had made an undertaking that it will appear on the scheduled date but failed to appear or give reasons for not appearing. As a result the panel that presided over the hearing made a ruling that the matter be referred to the Director of Public Prosecution. The matter was indeed referred and is still pending.

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Department	Date received
1. Agriculture and Environment	06 September 2000
2. Social Services and Population Development	15 September 2000
3. Developmental Local Government and Housing	25 October 2000
4. Health	31 January 2000
5. Education	07 February 2001
6. Finance	12 February 2001

Table 10 Western Cape Province

Department	Date received
1. Health and Welfare	30 August 2000
2. Economic Affairs, Agriculture and Tourism	30 August 2000
3. Finance	31 August 2000
4. Housing and Local Government	31 August 2000
5. Environmental and Cultural Affairs	29 September 2000
6. Education	06 October 2000

6 THE SUBPOENA PROCESS

There were still outstanding reports after the 31 October 2000 deadline. The Commission therefore decided to issue subpoenas against the departments that failed to submit their reports by the 31 October 2000 deadline.

The subpoenas were issued on the 23 November 2000.⁶ The subpoenas required those departments to appear before the Commission in their respective provinces. The hearings were scheduled as follows:

Table 11 Hearings Scheduled for 09 and 10 January 2001, National

National Department	Director-General
Land Affairs	Dr Mayende
National Treasury	Ms. Ramos

Table 12 Hearing Scheduled for 09 and 10 January 2001, Gauteng

Department	HODs
Development Planning and Local Government	Mr. Mavuso
Agriculture, Conservation and Environment	Ms. Hannekom
Housing	Mr. Buthelezi

Table 13 Hearing Scheduled for 12 January 2001, North West

Department	HODs
Health	Dr Gosnell
Education	Dr Karodia

⁶ The Commission's messenger served the subpoenas for the Gauteng Province and those for national departments. The Commission's Provincial Co-ordinators served the subpoenas for Northern Province and KwaZulu-Natal and the Sheriffs served subpoenas for the North West, Northern Cape, Mpumalanga and Eastern Cape provinces.

Finance	Mr. Tjie
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Table 14 Hearing Scheduled for 16 January 2001, Northern Province

Department	HODs
Welfare	Mr. Thobejane
Education	Prof. Nengwenkhulu
Agriculture, Land and Environment	Mr. Masikwa

Table 15 Hearing Scheduled for 19 January 2001, Northern Cape

Department	HODs
Welfare	Mrs. Standaar
Nature Conservation, Agriculture and Environment	Dr. Nombekela

Table 16 Hearing Scheduled for 30 January 2001, KwaZulu-Natal

Department	HODs
Traditional and Local Government	Adv. Raubenheimer
Agriculture and Environment	Mr Strauss
Education and Culture	Mr de Bruin ⁸

Table 17 Hearing Scheduled for 1 February 2001, Eastern Cape

Department	HODs
Education and Training	Mr. Qokweni
Health	Mr.Mjekevu

Table 18 Hearing Scheduled for 6 February 2001, Mpumalanga

Department	HODs
Social Services and Population Development	Mr Mabilo
Local Government and Traffic	Mr Vilane

As a result of the subpoenas, some departments submitted their reports before the scheduled hearing dates while others submitted on the dates of the hearings. The KwaZulu-Natal department of Agriculture and Environment was exempted from the hearing because it reported that it had submitted its report before the second deadline (15 September 2000) and produced proof to that effect. The subpoena was therefore withdrawn. The Commission concluded that all the departments that did not submit their reports on the last extended deadline and had thus been subpoenaed had to appear in the hearings, irrespective of whether they had submitted their reports prior to the hearings. The Commission's view was that failure to submit the report on the set dates constituted non-compliance with section 184(3) of the Constitution, and that those organs of state that failed

⁷ He was not available on the scheduled date, hence the hearing was postponed to the above-mentioned date.

⁸ Ibid.

to comply, should appear for a hearing to provide reasons for failing to submit the report on time.

7 SUBPOENA HEARINGS

The reason of having the hearings was twofold:

- For departments to account for their failure to comply with the request of the Commission as set out in Section 184(3) of the Constitution of South Africa
- To submit to the Commission reports as required in terms of section 184(3) and any other relevant information

7.1 Procedure at the Hearings

The hearings were held in different provinces. Commissioner McClain who is responsible for Economic and social rights was present in all the hearings. Commissioners responsible for the various provinces chaired the hearings.

Table 19 Chairpersons for the hearings in the Provinces

Commissioner	Province
Ms Mabusela	Gauteng
Ms Tlakula	North West
Mr Kollapen	Northern Province
Mr Wessels	Northern Cape
Mr Manthata	Eastern Cape
Mr Govender	KwaZulu-Natal
Ms McClain	Mpumalanga

At the commencement of the proceedings the chairperson outlined the procedure, aims and objectives of the hearing. The Commission through its legal team led evidence outlining the steps taken by the Commission in soliciting information or reports from government departments in terms of section 184(3) of the Constitution. The government departments were also requested to submit the full and correct report of the responses to the protocols at the hearing. After all information and evidence had been presented, the respondents were allowed to make concluding statements. The hearing was thereafter adjourned for a short break to allow the panel to deliberate on the evidence presented. After reconvening, the chairperson handed down the ruling requiring government departments to submit plans of action on measures they will take to avoid appearing before the Commission's hearing in future.

8 EVALUATION OF THE RESPONSES

8.1 Methodology

The actual process of evaluating responses from government departments began in April 2001. The Commission through the Research and Documentation Department evaluated responses from government departments. The government responses formed the basis of the entire

evaluation process. However prior to the evaluation of government responses to the protocols, the Commission conducted independent research. This involved the Commission finding out any relevant information for the year under review relating to the rights to be analysed. The information solicited from government and non-governmental organisation reports, journals and the websites was used to supplement and verify the information from government departments.

9 THE STRUCTURE OF THE REPORT

There are some structural differences between the second and third economic and social rights reports. The third report has an overview section, which precedes the section on the analysis of responses from organs of state. The overview section serves two main purposes; the first part of the overview elucidates on the meaning of the socio-economic right under discussion. The reason for including this part is the growing realisation on the part of the Commission that there continues to be a need to shed meaning on the nature of the rights. The second part of the overview highlights key developments that took place during the reporting period.

The analysis section in the respective chapters has the following subsections:

- Policy measures, programmes and related services
- Legislative measures
- Budgetary Measures
- Outcomes
- National Action Plan
- Monitoring

Each of the above sections, with the exception of the monitoring section is further subdivided into the following subsections:

- Summary of Measures
- Critique
- Recommendations

The subsection on the summary of the measures provides a synopsis of the different measures instituted by government departments during the year 1 April 1999 to 31 March 2000. In instances where insufficient information was provided by government departments other sources were used to supplement the information.

One of the concerns raised with the second economic and social rights report was that the critique focussed heavily on reporting by organs of state, and did not provide an assessment of the measures. In this report therefore, a distinction is made between the critique that is directed at reporting by the state and critique channelled towards the policies, programmes and legislation instituted. The same is the case with the

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section on recommendations in that some recommendations relate to areas where organs of state need to improve reporting, and others concentrate on the content of measures to realise the rights.

The first part of the critique section analyses the information provided in terms of the questions asked in the protocol, and whether any information was provided. The second part of the critique analyses the measures in terms of meeting the constitutional obligations as informed by the relevant norms and standards, including international instruments. The section also examines whether the measures progressively realise the right, and the reasonableness and effectiveness of the measures.

The first type of recommendations deal with whether organs of state have provided the required information and assesses the quality of the responses. The second one outlines the challenges that should be addressed, and steps that need to be taken in order to meet the Constitutional obligations of the right concerned. The section also highlights actions that need to be undertaken by the departments to progressively realise the right.

CHAPTER TWO

SOCIAL SECURITY, SOCIAL ASSISTANCE AND SOCIAL SERVICES FOR CHILDREN

PART A: OVERVIEW

1 INTRODUCTION

The social security system in South Africa has a long history of fragmentation due to the discriminatory practices of apartheid. The result was inconsistencies in the levels of benefits and quality of service delivery among the different 'race' groups, with the black population suffering the greatest discrimination as beneficiaries of social security.

Children also suffered the harsh reality of apartheid where they bore the brunt of political violence, forced removals and high rates of urbanisation. Destruction of the family that resulted partly from the migrant labour system had negative impacts on the social and psychological development of children. The results of these processes included the prevalence of child labour, poverty and homelessness amongst children, drug abuse, gangsterism and child prostitution.

In their first two reports to the Commission, relevant organs of state responsible for social security, reported that efforts had been made to establish a unified system of social security, transform it from a welfare-based to a developmental model, improve the system of delivery and expand the outreach of social security benefits. Measures taken to improve the lot of children included rehabilitation services for those in conflict with the law, and changes aimed at achieving equity in financial support to children from poverty-stricken environments.

This chapter reviews legislative and other measures instituted by national and provincial departments of social welfare during the 1999/2000 financial year to realise the right of access to social security; and children's right to social services.

2 CONSTITUTIONAL OBLIGATIONS

The rights of access to social security and social services are contained in ss 27 and 28 of the Constitution.¹ The principal provision is s 27(1)(c) that states that 'everyone has the right of access to social security including if they are not able to support themselves and their dependants, appropriate

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

social assistance.² Section 27(2) goes further to state 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 social security and social assistance. While the above-mentioned section refers to social security and social assistance for everyone, s 28(1)(c) provides for the right of children to social services.

2.1 Social security and social assistance

In order to understand the differences between social security, social assistance and social services it would be useful to explore these concepts so as to understand the different categories of benefits they provide.

Social security is closely linked to the industrial revolution and, more specifically, the transformation of economic and social institutions, from an agrarian to a wage- labour economy that created economic insecurities for the aged, disabled and people who did not have the means to earn an income, and could also not rely on extended family networks due to the emergence of the nuclear family.

The earliest form of social security under the said circumstances, established in Germany during the latter half of the 19th century, was a contributory scheme, through which employers and employees made regular contributions during periods of employment.³ These contributions could then be relied upon as a source of income during periods of unemployment. This original form of social security has increasingly come to be known as social insurance, the basic idea of which is that it is contributory, involving employees and employers. Over the years, the system was extended to cover old age pensions, which were financed from taxes. This latter form of social security has come to be known as social assistance or social welfare, and has evolved to be non-contributory schemes specifically targeted at the elderly, the disabled and other categories of people who may not have had the opportunity to contribute to a form of social insurance. Systems of social security have become highly differentiated, meaning that social insurance and social assistance are only two in a range of other categories.

Against the above, it is appropriate to define social security as a range of mechanisms that are put in place to mitigate against possible loss of income resulting from unemployment, disability, pregnancy, old age and other related circumstances that result in either temporary or permanent loss of income. These mechanisms come in a number of forms, of which social insurance and social assistance are just two.

The right of access to social security is widely recognised in numerous international and regional human rights instruments. The most widely cited

² Ibid s 27(1).

³ M Schneinin 'The right to social security' in A Eide et al (eds) *Economic, Social and Cultural Rights; A Textbook* (1999) 159.

instrument regarding social security, are standards defined and developed by the International Labour Organisation (ILO). The ILO views social security as public benefits offered to compensate for defined types of risks contained in the Social Security (Minimum Standards) Convention of 1952 (No. 102).⁴ This Convention identifies nine forms of social security. These are: Medical care (Part I); Sickness benefit (Part II); Unemployment benefit (Part III); Old age benefit (Part IV); Employment injury benefit (V); Family benefit (Part VI); Maternity benefit (Part VII); Availability benefit (Part VIII); and Survivor's benefit Part (IX).

States are obliged to accept at least three of these branches to ratify the Convention.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the right of access to social security in articles 9, 10 and 11.⁵ Article 9 makes provision for social security as a whole, while Article 10 addresses social security in the context of the protection of the family and benefits covering maternity leave for women. Article 11(1) deals with the right to an adequate standard of living, and includes social assistance.

Social security within the discussion of the adequate 'standard of living' has received considerable attention in the general discourse on economic, social and cultural rights. For instance, in the context of the discussion on the right to food, according to Eide, the right to property serves as the basis for the improvement of the standard of living, such as the use of land for subsistence farming. In the absence of property, people have to rely on the right to work as a means of improving their standard of living. Should neither property nor work produce sufficient income for the adequate standard of living, the right of access to social security provides the fallback or supplementary benefit.⁶ This line of thinking is particularly critical for the present discussion in that it brings a slightly different angle to the original discussion that confines social security to instances where there is complete lack of income. Seeing social security as a means towards a decent standard of living could justify the extension of social security even in circumstances where there is a source of income,⁷ which may have been defined as insufficient to meet a defined standard of living, as has been argued in some contexts in South Africa.⁸

One of the continuing biases in definitions and classifications of social security is the confinement of the responsibility for the provision of social

⁴ The *Social Security (Minimum Standards) Convention* of 1952 (No. 102) of the International Labour Organisation.

⁵ Articles 9, 10 and 11 of the International Covenant on Economic, Social and Cultural Rights.

⁶ A Eide 'The right to an adequate standard of living including the right to food' in A Eide et al (eds.) *Economic, Social and Cultural Rights: A Textbook* (1999) 95.

⁷ Such as would be the case with people with meagre incomes in the informal sector.

⁸ L Mashava 'Introduction to the right of access to social security A Compilation of Essential Documents on the right of access to social security (2000) 4 *Economic and Social Rights Series* 17.

security to the state. Social security has become synonymous with welfare, a system involving transfers of mainly financial benefits by the state. It is this bias that the South African White Paper on Social Welfare attempts to address in its definition of social security. The White Paper defines social security as public and private measures ‘that provide cash and in-kind benefits or both, first in the event of an individual's earning power permanently ceasing, being interrupted, never developing, being interrupted, or being exercised only at an unacceptable social cost and such persons being unable to avoid poverty, and second in order to maintain children.’⁹

Moving from the above definition that recognises both private and public arrangements for the provision of social security, the White Paper goes on to indicate that social security in South Africa falls into four main categories: private savings, social insurance, social assistance and social relief. Through private savings, individuals make their own provisions for risks that may result in loss of income. Social insurance comprises joint contributions by employers and employees, examples of which are pension or provident funds. Social assistance, is a non-contributory, means-tested form of social security, and is delivered as grants.¹⁰ The social assistance programme is currently administered to the most vulnerable members of society including the aged, persons with disabilities, and children. Though social assistance is not aimed at meeting the total needs of the recipients, it is a means to enable the most basic needs to be met. Social relief is emergency contributions during crisis situations.

2.2 Social services for children

⁹ White Paper on Social Welfare (1997) 48.

¹⁰The current forms of social assistance in South Africa are:

- old age pensions payable to women who are 60 years and older, and to men who were 65 years and older.
- disability grants payable to people who are 18 years and older, who were disabled for six months and more who cannot support themselves because of the nature of their disability and other reasons.
- war veterans grants are paid to people from the age of 60 and older, who once served in the South African army during certain wars, such as the Anglo-Boer War (1899-1902), the Zulu uprising (1906), the First World War (1914 – 1918), the Second World War (1939 – 1945) or the Korean War (1950 – 1953), and who are unable to maintain themselves due to physical and/or mental disability.
- the Child Support Grant is payable to a primary caregiver who cares for a child or children (up to a maximum of 6 children) who are under the age of seven. The caregiver can be the mother, father, grandparent, relative, friend or other, of the child or children.
- Foster Child Grant: this is for children who are placed in the care of a person who is not their parent, such as the grandparent.
- a person who is already in receipt of a grant but needs full-time care from someone else can apply for a Grant-in-aid. This is a limited additional amount of money over and above the grant or pension.

Section 28(1)(c) refers to social services for children. It is important however, to realise that the provision of what would be referred to as social services, is over and above children's right of access to social security but more so, social assistance, mainly in children's capacity as dependants. An understanding of what were social services for children has to be deduced from provisions made in international instruments.

Social services for children include those services that are: targeting children suffering from physical and mental violence, injury or abuse; protecting and assisting children temporarily or permanently separated from their families; assisting children with mental and physical disabilities; protecting children from economic exploitation, drug abuse and sexual exploitation; and promoting the recovery and social acceptance of children from abuse.¹¹ It is important to note that the primary responsibility for the care of children lies with the family and that the provision of social services is considered a measure of last resort. This position is also consistent with the Convention on the Rights of the Child that states in Article 27 (3) that the family has the fundamental responsibility to protect the welfare of the child, but in circumstances where the family is unable to do so, the state must assist.¹²

Based on the above, certain categories of children are singled out as being particularly deserving of special measures. These include disabled children, juveniles in conflict with the law, etc. As regards disabled children, and as spelt out in the African Charter on the Rights and Welfare of the Child, the following apply:

- the mentally and physically disabled child has the right to special protection necessary for moral and physical needs. The protection should ensure his [her] dignity, promote his [her] self-reliance and active participation in the community
- assistance shall be provided to those taking care of disabled children¹³

Rule 79 of the Rules for the Protection of Juveniles Deprived of their Liberty requires that juveniles should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release.¹⁴ Rule 80 requires that steps be taken to lessen prejudice against juveniles. As part of this arrangement, assistance should be provided to juveniles in amongst other things, the provision of sufficient assistance for self-maintenance upon release in order to facilitate successful integration. The Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)¹⁵ are even more specific about social

¹¹ K Malherbe 'Social Welfare Rights' in S Liebenberg et al (eds) *Economic and social rights for South Africa* (2000) 326.

¹² Article 27(3) of the Convention on the Rights of the Child (1989).

¹³ Article 13 of the African Charter on the Rights and Welfare of the Child (1990).

¹⁴ Rule 79 of the Rules for the Protection of Juveniles Deprived of their Liberty.

¹⁵ Guideline 45 of the Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).

services for juveniles. In the area of social policy, Guideline 45 requires government agencies to give priority to a number of services, including measures to prevent drug abuse. Guideline 45 states that institutionalisation should be a measure of last resort, and criteria authorising institutionalisation should be clearly defined and limited to very dire situations. These are situations wherein children suffer from:

- sexual, physical and emotional harm by parents or guardians
- neglect, abandonment and exploitation by parents or guardians
- danger of physical and moral damage due to the behaviour of parents or guardians
- manifestation of serious psychological danger to the child and neither the parents and guardians nor non-residential community services being able to provide support

2.3 Vulnerable groups

According to s 27(1) of the Constitution, everyone has the right to have access to social security. It is those members of society, who are not able to provide for themselves and their families, who should also receive social assistance. A number of groups have been singled out as being specially deserving of special measures, which could either be negative to remove obstacles to access, or positive measures to provide assistance where people are not on their own, able to do so.

Among the groups that have received special attention are women, migrants, the disabled, the aged and children. The International Covenant on the Elimination of All Forms of Racial Discrimination prohibits racial discrimination in the enjoyment of the right to social security.¹⁶ The International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires that the right of access to social security and social assistance be provided to women without discrimination.¹⁷ The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families requires that migrants also receive equal treatment as far as social security is concerned.¹⁸ In addition, migrant workers in a regular situation should enjoy certain complementary rights to social security benefits and services. The African Charter on Human and People's Rights¹⁹ states that the aged and the disabled shall have the right to special measures of protection in keeping with their physical or moral need.

¹⁶ Article 23 of the International Covenant on the Elimination of All Forms of Racial Discrimination, (1965).

¹⁷ Ibid Article 11(1) (c).

¹⁸ Articles 45 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

¹⁹ Article 18 of the African Charter on Human and People's Rights (1981).

In interpreting s 9 of the International Covenant on Economic, Social and Cultural Rights mentioned above, the Committee on Economic, Social and Cultural Rights has spelt out what states have to do for some of the above-mentioned vulnerable groups. According to the Committee, State Parties must:

- take appropriate measures to establish general regimes of compulsory old age insurance, starting at a particular age.²⁰
- establish a retirement age that is flexible, depending on the occupation performed and the working ability of elderly persons, taking into account, demographic, social and economic factors.²¹
- guarantee the provision of survivors and orphans' benefits on the death of the breadwinner who was covered by social security, or receiving a pension.²²
- institute non-contributory old age benefits or other assistance for all persons, regardless of their sex, who find themselves without resources after attaining a certain age specified in national legislation. Special consideration should be given to women on the understanding that they spent a considerable amount of time during their income-earning period caring for their families without engaging in remunerated activity.²³

With regard to persons with disabilities, the Committee has stated that security and income maintenance schemes are of particular importance to people with disabilities. States should ensure the provision of adequate support to persons with disabilities who, owing to disability of disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities. Such support should reflect the special need for assistance and other expenses often associated with disability. In addition, as far as possible, the support provided should also cover individuals, (who are overwhelmingly female), who undertake the care of a person with disabilities. Such persons are often in need of financial support.

3 KEY DEVELOPMENTS FOR THE YEAR UNDER REVIEW

The developments that took place during 1999/2000 need to be contextualised within the apartheid legacy that continues to define the problems that have to be dealt with. These problems include constitutional problems that are raised by existing institutional arrangements for the provision of social security resulting in lack of synergy between the non-contributory social assistance and the contributory social insurance, the fragmented nature of institutional arrangements within the state machinery

²⁰ Ibid Article 27.

²¹ Ibid Article 28.

²² Ibid Article 28.

²³ Ibid Article 20, 21 and 30.

to deliver social security, and equity issues in the delivery of social security.

The first of these issues is a constitutional one and revolves around the comprehensiveness of the social security system. One of the observations consistently made about the South African system of social security is that the system is too biased towards those who are formally employed, and leaves the majority of poor people outside the realm of the formally employed without a form of social security. For a long time, the unemployed, domestic workers, people employed on farms, people with exceedingly low incomes in the informal sector, refugees and asylum seekers remained uncovered by a form of social security. This has tended to raise key constitutional issues as s 27(1) clearly states that 'everyone' has a right to have access to social security. By not enforcing social security on the part of employers of domestic workers and farm-workers to contribute towards a form of social security, the state failed to ensure that everyone has access to social security. By remaining inattentive to the majority of people concentrated in the informal sector with exceedingly low incomes, the state has failed to identify people whose income does not allow them to support themselves and their dependants and are thus deserving of social assistance. The state has thus not sufficiently played its part in the progressive realisation of the right.

The exclusionary nature of the social security system is made all the more obvious when both social security and social services for children are points of focus. The recently established Child Support Grant caters for children up to the age of six. Section 28(3) of the Constitution defines a child as a person under the age 18 years. The fact that children, from the ages of seven to 18 are excluded from existing forms of social security raises a constitutional issue.

The Department of Social Development (DSD), reported in its submission to the SAHRC prior to the reporting period,²⁴ that it is able to reach approximately 3 million people, when it is estimated that about 49 percent (approximately 20 million)²⁵ of the people in South Africa, can be regarded as being poor.

Closely related to the above-mentioned issue is lack of co-ordination in the provision of the various components of the social security system. Responsibilities for the delivery of the social security system are dispersed across a number of agencies of the state without effective co-ordinating mechanisms between social insurance on the one hand, and social assistance on the other hand. The Department of Social Development administers a significant form of what has been defined as social assistance, which is mostly, grants. The Department of Labour administers unemployment and occupational types of social security, wherein; employees and employers make contributions into a pool of

²⁴ SAHRC. *Second Economic and Social Rights Report* (2000).

²⁵ J May *et al.* *Poverty and Inequality Report* (1999).

funds. The Department of Health is responsible for health insurance. The Department of Transport is responsible for the Road Accident Fund, whereas some of the responsibilities as regards social services for children are shared between the Departments of Social Development, Justice and Constitutional Development, and Correctional Services. Such a proliferated set of institutional arrangements continues to raise fundamental issues of the degree to which efficiency, synergy and effectiveness can be achieved in the way social security and social services are delivered in South Africa. Activities in the area of social insurance need synergy with those in the area of social assistance. For instance, those agencies of the state that render social assistance, need to know levels of income, rates of unemployment and people covered by social insurance, to best target social assistance to those with the greatest need.

The social security system in South Africa is also lacking in its redistributive element, further raising equity issues, although in the last few years some efforts were made to address some of these shortcomings, especially in the area of health insurance. While it could be argued that social assistance is redistributive in that it is a system financed from collected taxes and made available to the poor, social insurance has tended not to have sufficient legislative and other measures to effectively entrench redistributive elements. For instance, unemployment insurance has exempted the relatively well-paid members of the national workforce from contributing to the schemes.²⁶ It could be argued that for the system to really play its role, everybody has to contribute in favour of the poor. In the area of health insurance for instance, the state passed the Medical Schemes Control Act 131 of 1998 to specifically prevent the introduction of schemes in the private sector that exclude the poor, the aged and the sick.

Other problems that have bedevilled the system include corruption and, maladministration. The above-mentioned scenario has resulted in deserving beneficiaries being unfairly removed from lists, under spending of allocated budgetary resources and other problems.

Since the coming into being of the new democratic dispensation, government has been grappling with the reform of the social security system. Some of the initiatives in this regard have been reported in both the 1st and 2nd Economic and Social Rights Reports. In a nutshell, and confining the picture to activities undertaken by the national and provincial Departments of Social Development, the social welfare policy is contained in the White Paper on Social Welfare released in 1997. The document proposed a shift towards developmental social welfare, which emphasises helping people to help themselves, wherein welfare, and in the words of the department, will no longer be seen as handouts. As part of this shift, the department has started to reprioritise budgets, human resource development and the review of statutory bodies.

²⁶ The Unemployment Insurance Fund Act of 1966 was amended in 2000 to make provision for everybody to contribute to the Unemployment Insurance Fund.

Developments that took place during the reporting period were a continuation of what had happened before the reporting period.

3.1 Policy developments

SOCIAL SECURITY AND SOCIAL ASSISTANCE

During the reporting period, key developments that took place were in three areas namely, policy measures aimed at achieving integration in the overall system of social security, improvement of service delivery and a specific focus on vulnerable groups. In trying to achieve integration and co-ordination, a Ten-Point Plan was developed; a Committee on Comprehensive Forms of Social Security was appointed; and a Financing Policy was formulated. A plethora of measures were also put in place to improve administration, achieve flexibility in the provision of services to beneficiaries, improve financial management and improve systems for informing the public about social security, and implement the Poverty Alleviation Strategy. The vulnerable groups that received specific attention were persons with disabilities and older persons.

The Ten-Point Plan, which is a five-year plan, attempts to develop a comprehensive system for the delivery of social assistance services in order to harmonise and streamline a range of activities by departments responsible for the delivery of social welfare services. It aims at developing ethics for the delivery of welfare services, a poverty alleviation strategy, the reduction of violence against women and children, and also encompasses other problem areas such as HIV/AIDS, youth criminality, equity in service provision, and persons with disabilities.

The Committee on Comprehensive Forms of Social Security was established to investigate ways in which the overall social security system can be improved.

Financing policy is aimed at transforming the budgeting system towards an outcome-based system, which can be aligned to strategic priorities of the relevant departments. Part of the policy is directed at ensuring that the outcomes of government activity in the provision of welfare services are clearly spelt out to facilitate assessment of the effectiveness of spending. The specific elements of the financing policy are the desire to meet government's agenda to eliminate imbalances in the provision of welfare services, include organisations previously excluded from financial support from the state, and build the capacity of delivery organisations.

Social security and social assistance measures mentioned above demonstrated the commitment of the state to progressively realise the right to social security. Even at the implementation point the measures, together with measures introduced earlier, showed some positive movements. For instance, whereas in the 2nd Economic and Social Rights Report, the national Department of Social Development reported that its

social security measures, were able to reach 2,8 million people, the figure rose marginally to 3 million people during the reporting period.

However, a number of issues remained. The first is continuing lack of administrative capacity on the part of some provincial departments to deliver effective and efficient social security services. Although there was a progressive realisation of the right, the actual increase in the rate of delivery was so marginal that the full realisation of the right remained distant.

During the reporting period, a programme was developed through which the Minister of Social Development visited the nine provinces to observe on a first-hand basis, the delivery of social security services. Through the visit, he identified a number of problems that were symptomatic of the current state of the delivery of social security. These include problems with:

- payment of pensions by contractors
- re-registration of pensioners
- lack of capacity to implement Poverty Alleviation Programmes
- poor infrastructure for service delivery
- lack of appropriate strategies to address the needs of people infected with and/or affected by HIV/AIDS²⁷

SOCIAL SERVICES FOR CHILDREN

As regards social services for children, the key developments that took place included the National Strategic Framework for Children infected with and/or affected by HIV/AIDS, the Draft Child Protection System, the Victim Empowerment Programme, and the Secure Care Programme.

As part of the Ten Point Plan mentioned above, the National Strategic Framework for Children infected and affected by HIV/AIDS was intended to provide Home-Based Care and Community-Based Care for these children. In line with the provisions of the CRC, the policy of the state is that of keeping children within family units, hence the specific focus of the framework towards Home-Based Care. The Draft National Children Protection System was developed to protect children from abuse. Specific areas of focus were protection from violence, Internet child pornography, child labour and abuse of children in child-headed households. The Victims Empowerment Programme was developed as a counselling facility for children and women who suffered abuse.

3.2 Legislative developments

SOCIAL SECURITY AND SOCIAL ASSISTANCE

²⁷ Department of Social Development *Estimates of Expenditure for 2001 - key objectives, policy developments, spending trends, outputs and service delivery indicators (2001)*.

A number of legislative developments occurred during 1999/2000. The most important of these were the Developmental Welfare Governance Bill and the Status of Older Persons Bill.

The Developmental Welfare Governance Bill aims to establish appropriate arrangements for a relationship between the Minister of Social Development and the non-governmental welfare sector to ensure that the objectives of the White Paper for Social Welfare as regards transformation and equity in welfare services were achieved equally within government and the broader welfare sector. The main problem that the measure attempts to address is lack of proper co-ordination between the state and the non-governmental sector that renders welfare services. The main object of the Bill is to make provision for the establishment and constitution of the contemplated new council that shall be known as the South African Developmental Welfare Council (the 'Council').

The Status of Older Persons Bill aims to enshrine the rights of older persons to care and protection from harm in law, whether they were cared for in the home or in residential care facilities. The Bill seeks to provide redress for any persons who may require it, more importantly the Bill seeks to prevent the abuse of older persons by providing appropriate mechanisms for public complaint and oversight.

The legislative measures mentioned above were positive. One is aimed at addressing institutional co-operation between the state and organs of civil society, while also addressing equity in accessing state financial assistance by previously excluded organs of civil society. The other measure is particularly important as it focuses on a vulnerable group namely older persons identified earlier.

SOCIAL SERVICES FOR CHILDREN

The most important legislative developments that took place in the area of social services for children were the Child Care Amendment Act 13 of 1999 to amend the Child Care Act of 1983 and the implementation of the Maintenance Act 99 of 1998.

The Child Care Act of 1983 was amended, while the regulations of the Act were also passed. The amendments were made to provide for: a right of appeal against certain orders relating to children;²⁸ the establishment of secure care facilities;²⁹ the revocation of the power of the Minister to transfer certain pupils and children to any institution, custody or supervision mentioned in Article 290 of the Criminal Procedure Act of 1977;³⁰ prohibition of commercial sexual exploitation of children³¹ and to

²⁸ Section 2 of the Child Care Act of 1983.

²⁹ Section 3.

³⁰ Section 4.

³¹ According to the Act, in s 5, persons who procure children as commercial sex workers and those who allow their premises to be used for such activities were liable for prosecution.

make further provision for the estimation of a person's age in certain proceedings.³²

The Maintenance Act is meant to assist mainly women, in securing maintenance for children. The Act provides for the appointment of maintenance investigators in order to improve effectiveness in the investigation of maintenance-related cases.³³

The measures introduced for children were also positive, although there remain gaps in the implementation of the measures. For instance, despite legislative reform, there is growing evidence of increase in the rate of sexual assault on children.

3.3 The Budget

During the reporting period, the Department of Social Development received R17 billion. Over 60 percent of this budget was spent on the care of the aged and 24 percent on the care of the disabled.

The Annual Report (1999/2000) of the Department states that over 1,8 million pensioners were reached through pension grants by 31 March 2000. The number of beneficiaries could easily have been five times more than the reported figure due to the multiplier effect of social grants.

The reporting period saw an improvement in the utilisation of financial resources targeted at children. During 1998/1999, it was noted by the Auditor-General that out of a budget of R18,3 million allocated for the child support benefits, only R2 million was spent. As a result, by March 1999, only 45 000 children out of the estimated 378 000 target were reached. However, during 1999/2000, there was an increase in the number of beneficiaries. Thus, in 1999/2000 a budget of R18 million was allocated for child support benefits and a total of 314 209 children reached.³⁴

According to Table 1 below, KwaZulu-Natal received the highest allocations towards social welfare, followed by the Eastern Cape and Gauteng. The lowest allocations were in the Northern Cape, followed by Mpumalanga and the Free State.

Table 1 Provincial allocations towards social security

PROVINCE	AMOUNT
Eastern Cape	R 3 676 418
Free State	R 1 222 181
Gauteng	R 2 452 427
KwaZulu-Natal	R 3 796 905
Mpumalanga	R 1 061 417
Northern Cape	R 601 178
Northern Province	R 2 132 705
North West	R 1 397 705

³² Section 6.

³³ See Department of Welfare *Annual Report (1999-2000)*.

³⁴ *Ibid.*

4 CONCLUSION

The national Department of Social Development took measures to improve service delivery and paid attention to the specific needs of beneficiaries. Even in terms of delivery, there is evidence that there is an increase in the number of people benefiting from social security. For instance, there was an increase from 2,8 million during the 1998/1999 financial year to 3 million during the 1999/2000 reporting period. There was also improved access to the Child Support Grant, from an outreach of 45 000 to more than 300 000.

There however, remain a number of challenges that have to be dealt with. There is a pressing need for the achievement of synergy in both the non-contributory and contributory forms of social security. In particular, the Social Development departments at both the national and provincial spheres need to monitor performance on contributory forms of social security, in order to best target assistance to those people who are not able to support themselves and their dependants, and thus need social assistance.

PART B: ANALYSIS OF REPORTS FROM ORGANS OF STATE

This part of the chapter analyses the reports that were sent by national and provincial departments of Social Development, as responses to the protocol prepared by the Commission. These national and provincial departments, were required to provide information on policy, legislative and budgetary measures that they have put in place to realise the right of access to social security, and social services for children. Moreover, they were required to provide information on what is referred to in this document, as outcomes, which are essentially, key indicators that are relevant to the determination of the realisation of the right of access to social security and social services for children. With regard to policy and legislative measures in particular, the Commission required departments to report on the degree to which the measures addressed the constitutional obligations of the state in s 7(2) vis-à-vis the Bill of Rights, namely the obligation to respect, protect, promote and fulfil the right of access to social security and social services for children. Departments were also required to report on the special considerations that had been given to vulnerable and marginalised groups as identified in the protocol. As regards budgetary measures, departments were required to provide information on reasons for variances if any, whether budgetary allocations were adequate, the impacts of inadequacies, and measures put in place to cope with the impact of inadequacies.

SOCIAL SECURITY AND SOCIAL ASSISTANCE

1 POLICY MEASURES

1.1 National Sphere

The measures that were instituted by the national and provincial departments of social development during the reporting period flow from the White Paper on Social Welfare released in 1997. The White Paper attempts to develop a sustainable and equitable system for the delivery of social security, which in this instance, comes mainly in the form of what had been referred to as social assistance. In the 2nd Economic and Social Rights Report, measures instituted by the Department of Social Development have mainly focused on human resources development through training of staff on the Batho Pele Principles, the development of norms on service delivery, research towards addressing the needs of persons with disabilities, and tightening of eligibility criteria for social assistance grants in order to ensure better targeting to those in need.

During the reporting period of 1999/2000, government's efforts focused on addressing issues of integration of the contributory and non-contributory forms of social security, improved service delivery, and specific attention was also paid to the special needs of some of the vulnerable groups.

Integration of the social security system

In the area of strategically integrating the system, the key measures instituted by the national department were the Ten-Point Plan; the appointment of a Committee of Inquiry into a Comprehensive Social Security; and the Financing Policy.

The Ten Point Plan

The Ten-Point Plan was developed as a framework through which the Department of Social Development could harmonise a range of activities. The Plan was the outcome of a National Consultative Process that took place in 1999. The purpose of the process was to solicit views of the various stakeholders, as a mechanism for improving responsiveness in the rendering of welfare services. The outcome of the process was the Ten-Point Plan 'Mobilising for a Caring Society: People First for Sustainable Development' which outlined the following priorities over the coming five years:

- Restoration of care and human development
- The implementation of a sustainable poverty alleviation strategy
- The development of an integrated social security system that links both the non-contributory and contributory forms of social security, with an emphasis on priorities of the vulnerable, and reducing dependency on non-contributory forms of social security
- The development of mechanisms to respond to the brutal effects of violence towards children and women, and effective strategies to deal with perpetrators
- The development of a national strategy to reduce the numbers of youth in conflict with the law, within the framework of the National Crime Prevention Strategy, and promote youth development
- Making social welfare services accessible and available to people in rural, peri-urban and informal settlements; as well as ensuring equity in service provision
- Redesigning services for persons with disabilities in ways that promote their human rights and economic development
- Commitment to co-operative governance that includes working with different spheres of government and civil society
- Training, educating, re-deploying and employing a new category of workers in social development to respond to the realities of South Africa's crisis

The Committee of Inquiry into Comprehensive Forms of Social Security

The Committee of Inquiry into Comprehensive Forms of Social Security was identified in the Ten-Point Plan as a priority. It arises out of the need to integrate the non-contributory and contributory forms of social security. The Committee reports to an inter-ministerial Committee representing the Ministries of Social Development, Labour, Transport and Health, and is tasked with developing a comprehensive social security policy to enable

all South Africans to have access to social security. The Committee has invited stakeholders in the social security sector and members of the public, to make submissions on the appropriate concept of social security for South Africa.

The Financing Policy

According to the Financing Policy, budgeting for service delivery would be based on outputs and outcomes. The Policy would enable the analysis and allocation of resources according to stated purposes and the achievement of results.³⁵ It aims to:³⁶

- meet the government's agenda to address and eliminate current imbalances in services to citizens and service organisations previously excluded from financial assistance from the state
- target financing to the highest strategic priorities
- promote the equitable distribution of finance, services and infrastructure
- facilitate the emergence of a network of accessible services for all in need
- include flexible financing options
- promote the capacity and sustainability of organisations

Improvements in service delivery

While the measures mentioned above were intended to achieve integration in the overall social security system, there was also a range of measures whose overall thrust was the improvement of the delivery of social security services. The delivery of social services has been an issue of considerable concern, and there is sufficient evidence to show that there are intractable problems therein. For instance, the Minister of Social Development conducted provincial visits in 2000. These visits were intended to gain a first hand impression of the way social security under the department was being implemented. The visits highlighted a number of problems experienced at the point of delivery. These problems include:

- payment of pensions by contractors
- re-registration of pensioners
- lack of capacity to implement Poverty Alleviation Programmes.
- poor infrastructure for service delivery
- lack of appropriate strategies to address the needs of people infected and affected by HIV/AIDS

It was in the light of the above that the measures were instituted. The actual measures were:

³⁵ D Burger *South African Yearbook* (1999) 407.

³⁶ *Ibid.*

- The development of policy guidelines on the review of grants to implement a transparent and fully disclosable process and procedures to beneficiaries
- The development of a policy framework for inter-provincial movement of beneficiaries to enforce beneficiaries' constitutional right to receive a service that is most accessible
- Publication and dissemination of booklets in several languages, informing potential and actual beneficiaries of the grants that are available and the procedures for application. Radio has also been used to communicate this information to the public
- The establishment of an Operations Centre (Help Line), to respond to enquiries about grants. The department also assists people whose payment status has changed, by checking its database and referring people to the relevant provincial department
- Upgrading of existing pensions payment systems to ensure that bona fide beneficiaries are paid the correct amount and on time. The department was developing a new pension payment and information system to improve service delivery
- New procedure manuals have been developed by the department to ensure correct application of policies and procedures by social security officials. Provincial social security officials receive training to ensure that they assess and process applications efficiently and effectively
- The department provided provinces with infrastructure, staffing and technological assistance to identify and process applications for the Child Support Grant
- Improvement of the financial management capacity in the national and provincial departments of Social Development
- A comprehensive audit of welfare infrastructure, including pension pay-points. The audit was expected to be completed in 2001

Focus on vulnerable groups

There were also measures that addressed the needs of specific vulnerable groups that are beneficiaries of social security. The specific groups that received attention were persons with disabilities and the elderly. In the 2nd Economic and Social Rights Report, the department reported that it commissioned research into eligibility criteria for awarding grants to persons with disabilities. One of the results of this was the development of a strategy on social security to persons with disabilities to incorporate a social model of assessment. With regard to the elderly, the Minister appointed a Committee of Inquiry into Abuse and Neglect of the Elderly in March 2000.

1.1.1 The instituted measures and constitutional obligations

Although the department reported that its measures affected constitutional obligations, no supporting information was provided. According to the department, the measures were reasonable and effective in meeting constitutional obligations. During the reporting period, approximately 3 million South Africans received social security on a monthly basis,

effectively targeting 7 percent of the country's poorest and most vulnerable persons. The targeted persons were categorised in the following way:

- 70 percent of older persons
- 40 percent of persons with disabilities
- 30 percent of children were expected to receive benefits by 2002

According to the department these grants are South Africa's single, most effective, poverty relief programme - for every grant paid to a beneficiary, four other family members benefit from the income.

1.1.2 Special considerations given to vulnerable groups

The instituted measures gave special considerations to the following groups:

- ***persons living in rural areas and informal settlements:*** the means test for the Child Support Grant is lower for this category of persons. High illiteracy rates in rural areas require that information dissemination be conducted in a sensitive and fully accessible manner
- ***female-headed households:*** the Child Support Grant was implemented to supplement incomes of female-headed households. However, the department conceded that there needed to be more work in this area to ensure more benefits to female-headed households
- ***unemployed persons:*** there were no dedicated benefits for unemployed persons
- ***persons with disabilities:*** there is a grant for both adults and children with disabilities. There is also access to insurance programmes such as Workmen's Compensation, Sickness Benefits, the Road Accident Fund and the Unemployment Insurance Fund
- ***low-income groups:*** the social security programme is means tested, thereby targeting people with low or no income
- ***older persons:*** women who are 60 years and over and men who are 65 years and over who meet the means test qualify for social grants
- there is no specific social grant for ***women***
- there is no specific social grant for ***homeless persons***
- persons with HIV/AIDS qualify for disability and Care Dependency Grants if they meet the criteria
- there were no special social grants for ***previously disadvantaged groups***
- ***refugee and asylum seekers:*** there were no social grants for refugees and asylum seekers as the regulations require that beneficiaries be South African citizens resident in South Africa

1.1.3 The implementation of the measures and problems experienced therein

The implementation of policy is the responsibility of provincial departments. However, access to information on the part of eligible beneficiaries, is central to the success of the implementation process. According to the department, there has been considerable success with information dissemination on the Child Support Grant but problems arose due to lack of infrastructure and human resources capacity. Most of the policy measures mentioned above were in the early stages and therefore not much could be said about implementation yet.

1.2 Provincial Sphere

The Gauteng, North West and Northern Province Departments did not report on any new policy measures, except to mention that they continued to implement the Social Assistance Act 59 of 1992. However, the Free State, Mpumalanga, Northern Cape and the Western Cape reported that they instituted policy measures during 1999/2000.

The Free State Department instituted the following measures under the Poverty Alleviation Programme:

- Poverty Relief Programme/National Funds
- Kick Start Programme Provincial Departmental Funds
- Welfare Empowerment/Book Packaging/Funds from the Department of Education through the Tender process
- Flagship/National Funding
- Projects for the Elderly/ABSA Funding

This department also developed an Integrated Provincial Poverty Alleviation Strategy which aims to reduce poverty from 63 percent to 45 percent by 2020 and was planned for piloting from 2001 in the former Qwa-Qwa and the southern Free State, which have the highest levels of poverty in the province.

Programmes instituted by the Mpumalanga Department of Social Services, Population and Development were the following:

- the improvement of service delivery for the next five years
- Service Level Agreement for the Cash Payment Contractor
- Declaration of Service Standards by the MEC to communities
- launching of the Operation Dignity for Older Persons in the Province and establishment of Task Teams in this regard
- recognition and empowerment of volunteers in the form of Pensioner Committees
- development of plans to access conditional grants pertaining to the reengineering of social security

In the Northern Cape, the department developed a policy document on ageing. This includes the prevention of abuse of elder persons.

In the Western Cape, the department introduced a policy of ensuring that all clients at the district offices and counter services are attended to on a daily basis.

1.2.1 Measures and constitutional obligations

Only Gauteng and Mpumalanga provided useful information on instituted measures and constitutional obligations. The Mpumalanga Department reported that protection of the right entails steps to prevent third parties from violating the rights of beneficiaries, for example the dismissal and suspension of government officials, and employees of contracted firms, for fraud. With regard to the obligations to promote and fulfil the right, the department stated that emphasis had been placed on exploring alternative ways of accessing social security benefits, including the Child Support Grant (CSG). The number of beneficiaries using alternative delivery methods instituted during the reporting period increased from 54 100 to 57 458. The improvement was even more noticeable in the case of the Child Support Grant; there were 746 applications at the beginning of the reporting period; the figure was 25 270 at the end of the reporting period. Nevertheless, the department was still facing backlogs and was thus mobilising individuals, NGOs and the private sector for assistance.

The Gauteng Department stated the people had been assisted through home visits where it was not possible for people to access social security. Moreover, existing legislation aimed at prevent unauthorised access by third parties, to social security. The department also established decentralised service offices, and Service and Satellite Points to facilitate access to social security. Improved service delivery was reported: the majority of the elderly had been reached with a one percent annual growth, while decentralisation has also improved service delivery. The Communication Strategy had, in respect of the Child Support Grant, resulted in an increase of more than 1 000 percent since April 1999.

1.2.2 Special considerations given to vulnerable groups

Several provinces did indicate special considerations given to vulnerable groups. Regarding people in rural areas, the Gauteng Department cited the decentralisation of services as one effective mechanism to reaching out to rural areas.

The Mpumalanga Department reported that it was increasing its service points to be more accessible to rural areas while the Northern Cape Department reported that it held workshops in these areas. The same responses were given as regards people in informal settlements. The exception was the Western Cape Department that reported that counter services were being provided in informal settlements.

There was no specific information provided on special consideration given to low-income groups, homeless persons and women. With regard to people with HIV/AIDS, the Gauteng Department reported that people with

full-blown AIDS were entitled, in terms of the Social Assistance Act of 1992, to disability grants. Given the fact that the Social Assistance Act is a national legislation, it can be assumed that the same is the case in other provinces, although other provinces made no specific mention of the Act. The Northern Cape Department reported that there was a separate programme, addressing the needs of people with HIV/AIDS. However, no information on the content of the programme was given. Neither the national nor the provincial departments made provisions for refugees and asylum seekers since they do not qualify.

1.2.3 The Implementation of the measures and difficulties experienced therein

On the question of the implementation of the measures and the difficulties experienced by service delivery departments there were diverse responses. The Free State Department conducted a situation analysis to identify poverty gaps, indicators and community needs that became the basis for the identification of poverty (geographical) areas, development criteria and procedures for funding. Difficulties experienced in the process included limited budget, corruption, lack of administrative capacity, and difficulties of reaching rural areas.

In Gauteng, the following difficulties were experienced: budgetary constraints, lack of infrastructure in rural and informal settlements, poor infrastructure and inadequate human resources and equipment.

Mpumalanga implemented its measures through education campaigns via the media, pamphlets, poster materials, community meetings and the MEC's speeches to communities. However, shortage of funds compromised the sustainability of these campaigns. Also problematic were budgetary constraints, infrastructure problems especially in rural areas, and pressures resulting from increased demand for the CSG.

In the Northern Province, the department organised meetings, workshops and awareness campaigns. Difficulties arose in the translation and interpretation of policy documents into local languages.

The North West Department identified the transition to a new development paradigm, lack of Information Management Systems and financial and physical resources as major implementation difficulties.

In the Northern Cape, the measures were implemented through public meetings and workshops. There was no report of any difficulties experienced.

The Western Cape Department organised quarterly meetings with divisional heads of Social Security to report on progress with the realisation of social security, and the use of feedback mechanisms with beneficiaries on social security services.

1.3 Critique

At the national sphere, there were gaps in reporting. Firstly, in identifying policy measures, the national department did not describe the measures instituted, the rationale for the measures, and the aims of the measures. Without this information, it is difficult to assess the degree to which policy measures are addressing the progressive realisation of the right of access to social security.

As regards the way measures address constitutional obligations and their reasonableness and effectiveness, there is little appreciation of the actual meanings of the four obligations³⁷ in that responses either do not address the question at all, or do so at such a level of generality, that it is difficult to meaningfully assess the effectiveness of the measures. Whereas this problem is more pronounced at the national sphere, some provincial departments, such as Gauteng and Mpumalanga do demonstrate an understanding of their constitutional obligations.

The national department responded appropriately to the issue of the effectiveness of its policy measures, by providing quantitative information about the level of outreach of its social security services. Where information is lacking with regard to effectiveness, is in the flagship programmes. These programmes were at the heart of the proposed shift towards developmental social welfare. Their performance is pivotal to the overall potential of this form of social welfare. That information is unfortunately, also not being provided at the provincial sphere, except in Gauteng and Mpumalanga, which to a limited extent provided quantitative information on the level of outreach of their programmes.

What continues to be a problem is lack of information on the way the instituted measures give special considerations to vulnerable groups. Organs of state need to realise that these groups do require special considerations and that they were required to report on this.

At the national sphere, the department is instituting a plethora of measures to progressively realise the right of access to social security. Measures being introduced by the Free State, Mpumalanga the Northern Cape and the Western Cape Departments are also commendable. In the case of the Free State, work currently being done towards poverty alleviation would provide a useful context within which social security could be targeted. Other provinces could learn from this kind of initiatives.

However, there is no demonstration yet, that the national department is taking measures to address other key constitutional issues. The social security system in the country, does not adequately address the needs of the unemployed. There is no indication from the responses from the

³⁷ This is irrespective of the fact that the Commission sends, as an attachment to the protocol, an Explanatory Memorandum that explains what each of the obligations is about. The Commission also informs government Departments that when they require additional information, they may contact the Commission.

national department as to which measures were being put in place to address the obligations to respect, protect, promote and fulfil the right. There is also a need to address issues of poor people concentrated in the informal sector, whose meagre incomes prevent them from enjoying a decent standard of living.

The national department needs to be commended for introducing measures to improve service delivery, especially with regard to pension payoffs. Gauteng, Northern Cape, the Western Cape and Mpumalanga should also be noted for the efforts they were making in improving service delivery. What was missing from the responses were measures that deal with corruption and fraud in particular, except in the case of Mpumalanga, where specific measures were reported. As stated in the overview, corruption, fraud and theft were serious issues that have compromised the realisation of the right of access to social security.

It is unsatisfactory that measures aimed at addressing poverty reach only 3 million people when poverty statistics point to about 20 million people living below the poverty line. The fact that 2, 8 million beneficiaries were reported in the previous reporting period of 1998/1999, means that there has not been any significant quantitative increase in the number of people being reached by policy measures aiming to address poverty. It is unsatisfactory that only 40 percent of people with disabilities were reached when it has been widely reported that people with disabilities have difficulty securing employment and other economic opportunities.

Progress made by Mpumalanga and Gauteng in expanding social security benefits such as the Child Support Grant needs to be commended and supported.

The argument raised by the national department that for every single grant paid to a beneficiary, four other family members benefit, needs to be considered against the impact such a spread of the grant is having on the per capita allocation for individuals within households. When the grant monies are spread too thinly, per capita allocations were significantly reduced, resulting in less than satisfactory enjoyment of the right per person.

Regarding vulnerable groups, the fact that the unemployed, women and homeless persons were not given special considerations remains problematic. The recent Grootboom judgement has raised the important issue of the needs of people in crisis situations and the need for government policies to take the needs of these groups into consideration.

That the national department has difficulty supporting provincial departments in terms of capacity building is serious cause for concern, especially amidst well-documented instances of lack of institutional capacity, and the department's own admission that the success of service delivery is dependent on institutional capacity at the provincial sphere. The

budget information presented later in this Chapter suggests that national allocations towards supporting provincial capacity building were declining.

1.4 Recommendations

It is recommended that government departments briefly describe the measures instituted in their reports; indicate how these address particular problems, and the goals and objectives of the measures. This would facilitate the Commission's work in assessing the progressive realisation of the right of access to social security.

Organs of state need to specifically report on the way measures affect constitutional obligations spelt out in s 7 (2) of the Constitution. There is a need to show how reasonable and effective the measures are. As far as the effectiveness of the measures is concerned, and wherever possible, there is a need to provide quantitative information to show if there has been any progress made towards the realisation of the right of access to social security.

Organs of state should report on vulnerable groups, and where this is not feasible, reasons for not doing so should be given. This is especially the case after the Grootboom judgement, which specifically stated that measures aimed at realising socio-economic rights, cannot be considered effective if they do not take into consideration the needs of people in crisis situations.

Government should attend to the constitutional issues raised by the exclusion of potential beneficiaries from existing forms of social security and social assistance. As maintained in the preceding section, the social security system is biased towards the needs of the formally employed.

There is a need for more policy measures, legislation and increases in budgetary allocations for the continued reduction in the number of people in poverty situations. The needs of the unemployed, refugees and asylum seekers, domestic workers, people with low wages in the informal sector, farm workers and women in general require special consideration

At the provincial level, there is an urgent need to build capacity so as to enable them to be effective service delivery agents. Infrastructure in rural areas and informal settlements should also be improved.

2 LEGISLATIVE MEASURES

The national and provincial departments of Social Development did not provide information on legislative measures instituted in 1999/2000.

2.1 Critique

The response from the DSD is unsatisfactory as it left out key legislation passed during the reporting period which research conducted by the SAHRC established. These were:

- Closed Pension Fund Amendment Act 41 of 1999, which amended Article 9 of the Closed Pension Fund Act 197 of 1993. The amending legislation provides for the extension of the state's remaining financial obligations to the Closed Pension Fund to include the payment of interest and to provide for an alternative method of payment.
- Government Notice No 20237 of June 30, 1999. The Minister of Welfare and Population Development (now called Social Development) has, in terms of the Social Assistance Act 59 of 1992, with the concurrence of the Minister of Finance, announced and increase in social grants with effect from July 1, 1999.³⁸

The following pieces of legislation were to be tabled in Parliament before March 2000:

- The Developmental Welfare Governance Bill aims to establish appropriate arrangements for a relationship between the Minister of Welfare and the non-governmental welfare sector to ensure that the objectives of the White Paper for transformation and equity in welfare services were achieved equally within government and the broader welfare sector. In attempting to redress past inadequacies of governance mechanisms and imbalances in service delivery, the White Paper for Social Welfare (S 26 of Chapter 3) acknowledges the need for appropriate, legitimate, transparent and effective governance mechanisms. An envisaged governance structure should be viewed as one of the critical and strategic mechanisms to facilitate meaningful and relevant civil society participation in policy, legislation, programmes and social services activities. The provisions of this Bill are part of the overall transformation of the welfare system from a purely residual to a developmental one. A structure is advocated that will promote maximum influence of political decision-making, and maximum dialogue between the Ministry and the developmental welfare sector. The main object of the Bill is to make provision for the establishment and constitution of the contemplated new Council that shall be known as the South African Developmental Welfare Council (the 'Council').³⁹
- The Status of Older Persons Bill aims to enshrine the rights of older persons to care and protection from harm in law, whether they were cared for in the home or in residential care facilities. The Bill seeks to provide redress for any persons who may require it, more importantly the Bill seeks to prevent the abuse of older persons by providing appropriate mechanisms for public complaint and

³⁸ See Government Gazette Vol. 408 June 30, 1999 for the figures.

³⁹ See Article 2 of the Bill.

oversight. The Bill will be a further step in the deracialisation of services and institutions for older persons.

- The Disaster Relief Fund Bill seeks to rationalise several pieces of legislation dealing with disasters and emergencies, to create a coherent framework for the administration of funds.

The Department of Social Development has noted the need to effect amendments to the Social Assistance Act 59 of 1992. This is based on the general overview of the Social Assistance Act that indicates that social assistance provision in South Africa is not comprehensive and integrated. The Department of Social Development has appointed a task team to review social assistance legislation and regulations, and the following areas were identified:

- The availability of medical officers to assess disability is lacking in rural areas.
- The assessment process is duplicative and expensive. A medical officer provides a medical report that must be confirmed by a pensions medical officer.
- There are no uniform objective assessment procedures. Assessment of disability is highly subjective and varies from one medical officer to another.
- There is a great deal of bribery and corruption in the issuance of reports.
- Medical Officers complain of threats to their lives if they do not issue favourable reports.
- There are several problems in the administration of the disability grant. For example, the definition of disability is broad in interpretation but narrow in scope.

None of the provinces adequately answered questions on the constitutional obligations and special considerations given to vulnerable groups. According to the *Grootboom*⁴⁰ decision, the measures instituted must consider the plight and conditions of people in desperate circumstances and those who are living in conditions of poverty.

3 BUDGETARY MEASURES

The welfare budget is administered through provincial departments. There were special allocations (conditional grants) such as the Poverty Relief Fund, HIV/AIDS allocation, Improvement in Social Security, Implementation Support for the Child Support Grant, Integrated Justice System, the Flagship Programme and the Victim Empowerment Programme.

⁴⁰ *Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC)

3.1 National Sphere

During the reporting period, the budgetary allocation rose in nominal terms from R449 870 000 to R526 877 000. However, the budget was expected to be reduced to R412 424 000 for the fiscal year 2000/2001. Particularly alarming is under-spending in the 1998/1999 financial year considering that more than 40 percent of the population are poor.

Social security

In nominal terms, the budgetary allocation towards social security went down during the reporting period from R16 800 466 during the 1998/1999 financial year, to R16 776 516 in the 1999/2000 reporting period.

According to the department, variances in the budget allocations arise as a result of the rapid rise in population growth, the rise in number of the aged, the increase in disability because of the spread of chronic illnesses, and migration patterns of older persons and the unemployed.

The department indicated that in the economically more vibrant provinces such as Gauteng, Mpumalanga and the Free State, the budget allocation appeared to be adequate. However in the poorer provinces like the Eastern Cape, the Northern Province and KwaZulu-Natal where dependency ratios and unemployment rates were high, budget allocations were inadequate.

With regard to the question of whether there were problems experienced as a result of the inadequacy of the budget, the department reported that a number of provincial departments experienced problems due to insufficient funds. In some instances provinces had to delay payments to beneficiaries to avoid over-spending.

With regard to the question of measures taken by the department to deal with inadequacies, the department indicated that, submissions have been made to both national and provincial treasuries, MINMEC and the Ministers' Committee on the Budget (MINCOMBUD) to consider the revision of certain policy decisions.

Old Age Pension

The budgetary allocations towards Old Age Pensions are shown in the Table below. There was a marginal increase in budgetary allocations during the reporting period. There was also over-spending on the Old Age Pension budget.

Table 2 Budgetary allocations for Old Age Pension

YEAR	TOTAL ALLOCATION IN RAND(S)	ALLOCATION AS A % OF THE DEPARTMENT'S TOTAL BUDGET	ACTUAL EXPENDITURE IN RAND(S)
1998-1999	10 043 817 000	56.14	10 081 614 000
1999-2000	10 275 625 000	53.00	10 567 693 000
2000-2001	11 320 201 000	59.10	

The department indicated that the same information given for variances, adequacy and the measures taken to address inadequacies in the Social Security Programme allocation is also applicable to the case of Old Age Pensions.

Social Assistance

The budgetary allocations towards social assistance are shown below. There was a slight increase in the budget towards social assistance. However, the department under-spent on the budget.

Table 3 Budgetary allocations towards Social Assistance (subsidies to non-government organisations for the provision of welfare services)

YEAR	TOTAL ALLOCATION IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
1998-1999	781 867 000	799 353 000
1999-2000	843 566 000	824 475 000
2000-2001	874 823 000	

The Social Assistance budget was increased in nominal terms from R 781, 867, 000 to R 843, 566, 000 from the 1998/1999 to the 1999/2000 financial year. It was expected to be increased to R 874, 823, 000 in the 2000/2001 financial year.

The department reported that, the budget allocation for social assistance as a proportion of the total welfare budget has remained constant over a three-year period. On budget adequacy, the department indicated that, the budget for social assistance is not adequate to match the demand for services.

On the measures instituted by the department to address problems, the department indicated that submissions have been made to both national and provincial treasuries, MINMEC and the Minister's Committee on the Budget (MINCOMBUD) to consider the revision of certain policy decisions.

Disability Grants

Budgetary allocations towards disability grants went down in nominal terms during the reporting period. Moreover, there was under-spending on this allocation.

Table 4 Budgetary allocations for Disability

YEAR	TOTAL ALLOCATION IN RAND(S)	ALLOCATION AS A % OF THE DEPARTMENT'S TOTAL BUDGET	ACTUAL EXPENDITURE IN RAND(S)
1998-1999	4 316 124	24.0	4 326 633
1999-2000	4 277 262	23.7	4 135 814
2000-2001	4 416 312	22.5	

While the budget allocation has been relatively stable over a three-year period, there was a high degree of variability in expenditure at the provincial level. The impact of the budget on accessibility was in the process of being investigated. There is a high volume of temporary disability beneficiaries who move in and out of the system. There were class action litigations in the Eastern Cape, North West and several hundred cases in KwaZulu-Natal, by beneficiaries because of inaccessibility and violation of fundamental rights.

Poverty Alleviation Programme

An additional R40 000 000 was added to the R202 500 000 funds rolled over from the Poverty Alleviation Funds allocated during the 1998/1999 Financial Year. The department did not spend all the money allocated towards the Poverty Alleviation Programme, although there was a significant improvement from the previous Financial Year where only R0, 5 million of the allocated R203 million was spent.

Table 5 Budgetary allocation towards Poverty Alleviation Programmes

YEAR	TOTAL ALLOCATION IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
1998-1999	203 000 000	500 000
1999-2000	40 000, 000 plus roll-over of 202 500 000	205 000 000
2000-2001	120 000 000 plus roll-over of 37 800 000	

The department indicated that, given high levels of poverty in the country and the large number of requests and proposals received by the national and provincial Departments of Social Development for poverty relief funding, the budget allocation is not adequate. On measures instituted to address problems created by budgetary constraints, the Department indicated that it focused on improving the overall management of the Poverty Relief Programme. Measures introduced included:

- providing dedicated staffing for the Poverty Relief Programme
- strengthening the oversight role of MINMEC on the Poverty Relief Programme
- streamlining administration and decision-making, in particular, devolution of project selection to the provincial Departments
- consideration of more varied forms of disbursements through faith-based organisations and the NGO sector

The Department indicated that, decisions on the funding of poverty relief projects give special considerations to all groups, except refugees and asylum seekers.

3.2 Provincial Sphere

The implementation of social security and social assistance takes place at the provincial sphere of government. Allocations at the provincial sphere

of government are shown in the Table below. Except for Mpumalanga and the Western Cape, all provincial budgets went up from the 1998/1999 Financial Year to the reporting period. During the reporting period, the provinces of Gauteng, the Northern Province and the North West variably under-spent on their budgets. The Northern Cape and the Western Cape over-spent on their budgets.

Table 6 Budgetary allocations of Provincial departments

PROVINCE	YEARS	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS
Free State	1998/1999	1 202 000 000	
	1999/2000	1 222 181 000	
	2000/2001	1 260 328 000	Pending 31/3/2001
Gauteng	1998/1999	2 334 653 000	2 295 364 000
	1999/2000	2 452 427 000	2 424 653 000
	2000/2001	2 630 038 000	
Mpumalanga	1998/1999	1 093 436 000	1 086 521 000
	1999/2000	1 067 153 000	1 155 776 000
	2000/2001	1 214 328 000	
Northern Cape	1998/1999	566 199 000	665 199 574
	1999/2000	601 178 000	689 832 011
	2000/2001	634 270 000	
Northern Province	1998/1999	2 063 110 000	2 031 193 000
	1999/2000	2 352 467 000	2 328 767 000
	2000/2001	2 547 782 000	
North West	1998/1999	1 300 000 000	1 299 072 000
	1999/2000	1 387 707 000	1 377 770 000
	2000/2001	1 446 480 000	
Western Cape	1998/1999	2 244 849 000	2 192 108 000
	1999/2000	2 213 011 000	2 194 860 000
	2000/2001	2 266 381 000	2 266 381 000

Social security

Budgetary allocations towards social security are shown in the Table below.

Table 7 Budgetary allocation towards social security

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS
Free State	1998/1999	1 074 393 798	
	1999/2000	1 088 954 620	
	2000/2001	1 118 497 000	
Gauteng	1998/1999	1 920 003 000	1 911 758 000
Mpumalanga	1998/1999	997 158 000	1 021 129 000
	1999/2000	979 073 000	1 079 044 000

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDBS	ACTUAL EXPENDITURE IN RANDBS
	2000/2001	1 117 468 000	
	1999/2000	1 966 969 000	1 975 454 000
	2000/2001	2 108 798 000	
Northern Cape	1998/1999	505 263 000	598 489 000
	1999/2000	538 991 000	627 791 000
	2000/2001	563 444 000	
Northern Province	1998/1999	1 971 653 000	1 965 856 000
	1999/2000	2 249 673 000	2 231 923 000
	2000/2001	2 417 633 000	
North West	1998/1999	1 212 190 000	1 200 000 000
	1999/2000	1 293 880 000	1 308 278 000
	2000/2001	1 345 177 000	
Western Cape	1998/1999	1 889 050 000	1 862 709 000
	1999/2000	1 844 919 000	
	2000/2001	1 879 387 000	

According to the Table, budgetary allocations towards social security increased in nominal terms during the reporting period. However, the Free State and Northern Province Departments under-spent on their budgets. All other departments over-spent on their social security budgets.

Variiances: Reasons given for variances include fluctuations in social security growth of all grant types and the phasing in of the CSG. Difficulties have been experienced with the projected growth, leading to under-funding in the case of Mpumalanga.

The Northern Cape Department pointed out that, overpayments were not being retrieved timeously, as there were no structures in place; there were no proper review mechanisms.

The Northern Province and the North West departments did not respond to the question. There were no variances in the Western Cape.

Budget adequacy: All the provinces except the Western Cape reported that the budgetary allocation towards social security were inadequate.

Special considerations given to vulnerable groups: Gauteng and KwaZulu-Natal Departments did not respond to this question.

The department in the Free State indicated that the vulnerable groups have benefited from the grants as mentioned in the Social Assistance Act 59 of 1992.

Mpumalanga reported that social grants were regarded as the most effective re-distribution mechanism to the poor and vulnerable.

The Western Cape Department was more specific about the way vulnerable groups were given special considerations in the design of the budgets. It mentioned the following issues:

- growth rates in *rural areas* were taken into account when drafting the budget
- all 14 district offices take *informal settlements* into account when input is required for budget drafting
- with the phasing out of the State Maintenance Grant, no further provisions were made for *female-headed households*
- due considerations were given to the circumstances of *unemployed persons* within the social relief allocation
- special considerations were given to the growing numbers in *disability* grant applications
- the majority of social grant applications were normally targeted at *low-income groups*. The analysis of the 1996 census statistics enables the department to make projections on the number of applications from the low-income groups
- applications for grants for *the aged* form the greater part of the social assistance budget
- due considerations were given to the circumstances of *homeless persons* within the social relief allocation
- special provision has been made for *HIV/AIDS* within the grants for the disabled and care dependent people
- no provision has been made in the budget for *previously disadvantaged racial groups including indigenous groups*
- *refugees and asylum seekers* have provision in the social relief allocation

Old age pensions

According to the information provided by provincial departments, all the provinces that reported had increases, in nominal terms, from the 1998/1999 to the 1999/2000 financial year. All the provinces that provided information, also over-spent on their old age budgetary allocation.⁴¹

Table 8 Budgetary allocation towards old age pensions

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDBS	ACTUAL EXPENDITURE IN RANDBS
Free State	1998/1999	664 061 000	612 143 396
	1999/2000	654 292 000	680 923 726
	2000/2001	707 466 000	Pending 31/3/2001
Gauteng	1998/1999	1 161 633 000	1 317 957 000
	1999/2000	1 213 652 000	1 388 448 000

⁴¹ The Western Cape Department did not provide information on actual expenditure for the reporting period. (2000) 17.

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDBS	ACTUAL EXPENDITURE IN RANDBS
Free State	1998/1999	664 061 000	612 143 396
	2000/2001	1 449 773 000	
Mpumalanga	1998/1999	726 331 000	747 320 000
	1999/2000	729 201 000	851 257 000
	2000/2001	745 955 000	
Northern Cape	1998/1999	214 344 000	
	1999/2000	244 024 000	230 439 000
	2000/2001	269 725 000	253 029 000
Northern Province	1998/1999	1 661 337 000	1 644 724 000
	1999/2000	1 976 295 000	2 156 801 000
	2000/2001	1 955 651 000	
North West	1998/1999	890 000 000	
	1999/2000	898 000 000	
	2000/2001	920 128 000	
Western Cape	1998/1999	834 821 000	831 479 000
	1999/2000	898 331 000	
	2000/2001	940 622 000	

Variances: Only Mpumalanga, the Northern Cape and the Western Cape's departments provided information on variances.

Mpumalanga reported that, during the 1998/1999 financial year the department processed the backlog of all old age grants.

In the Northern Cape, the rate of admittance exceeded resources made available for purposes of the payment of old age grants.

The Western Cape indicated that, there were no variances.

Budget adequacy: The Free State and the North West Departments did not respond to the question on the adequacy of budgetary allocations towards old age pensions.

The Northern Province and the Western Cape reported that the allocations were adequate.

The Northern Cape reported that the budgeted allocation was not adequate as it was not always clear how many pensioners were going to come onto the system as compared to the exit rate.

Gauteng and Mpumalanga reported that the allocations were inadequate. In both instances, the result was over-spending on the old age pension. In Mpumalanga, the measure put in place to address the problem was to inform the Provincial Cabinet and Treasury, although it was not indicated what the outcome of such a measure was. The Gauteng Department attempted to deal with the situation through a re-registration process that resulted in the removal of some beneficiaries who did not qualify for the grants.

None of the provincial departments provided information on how the budgetary measures gave special considerations to vulnerable groups.

Social Assistance

The Free State's allocation towards social assistance remained at a figure of R5, 000, 000 from the 1998/1999 to the 1999/2000 Financial Year. Gauteng, Northern Province and the Western Cape's departments had nominal increases in budgetary allocations. Mpumalanga and the Northern Cape's departments had budget declines.

Table 9 Budgetary allocations towards Social Assistance

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS
Free State	1998/1999	5 000 000	224 749 000
	1999/2000	5 000 000	209 070 000
	2000/2001	5 200 000	Pending 31/3/2001
Gauteng	1998/1999	200 058 000	201 479 000
	1999/2000	216 638 000	218 173 000
	2000/2001	237 236 000	
Mpumalanga	1998/1999	44 589 000	31 949 000
	1999/2000	36 412 000	32 123 000
	2000/2001	34 272 000	31 254 000
Northern Cape	1998/1999	26 962 000	20 509 000
	1999/2000	26 430 000	22 392 000
	2000/2001	28 232 000	
Northern Province	1998/1999	26 256 000	23 529 000
	1999/2000	28 926 000	23 703 000
	2000/2001	26 503 000	
North West	1998/1999		
	1999/2000	39 200 000	38 900 000
	2000/2001	42 358 000	
Western Cape	1998/1999	943 000 000	5 245 078
	1999/2000	4 554 000	4 554 000
	2000/2001	3 465 000	

Variances: Only Gauteng and Mpumalanga provided information. Gauteng stated that there were no variances and that funds were allocated in terms of the Medium Term Expenditure Framework.

The Mpumalanga Department reported that, actual budgets allocated for the 1998/1999 and 1999/2000 financial years were less than the amounts voted for. Under spending was largely due to cost curtailment measures introduced to cater for projected social security over-spending.

The Western Cape indicated that variances were due to the greater number of disasters that occurred during the 1998/1999 financial year.

The Gauteng Department reported that the budgeted allocation was adequate. Mpumalanga stated that, despite under-spending, the allocated budget was not adequate. There were several, new services and extensions that could not be catered for due to inadequate funds.

The Northern Cape indicated that the budget was adequate in that all services that were budgeted for could be financed in the reporting period and that under-spending was a result of shortage of personnel to implement other programmes.

The North West did not respond to the question and the Western Cape indicated that, the budgeted allocation was not adequate for the provision of social assistance due to the unforeseen nature of the disasters.

Budget adequacy: Only Gauteng, Mpumalanga and the Western Cape reported on problems that resulted from budget inadequacy.

In Gauteng, the implementation of the Financing Policy was giving the department the opportunity to redirect funds away from areas where services were rendered in the past, to those with inadequate services.

In Mpumalanga, the Financing Policy could not be fully implemented as all new services were geared towards benefiting the previously disadvantaged groups and introducing community based services.

The Western Cape indicated that they did not experience any problems as the shortfall was made up from savings in the department.

Disability Grants

The Northern Province did not provide any information on budgetary allocations towards disability grants. During the reporting period, allocations went down in the Free State and Mpumalanga. There were nominal increases in Gauteng, the Northern Province, the North West, the Northern Cape and the Western Cape. As is shown in the Table below, the Northern Cape only provided the budget for the reporting period. Although budget allocations were increased during the reporting period, all the provinces except Mpumalanga and the North West, under-spent on their disability grant budgets.

Table 10 Budgetary allocations towards disability grants

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDB	ACTUAL EXPENDITURE RANDB
Free State	1998/1999	255 150 000	234 978 548
	1999/2000	247 708 000	218 806 637
	2000/2001	245 328 000	Pending 31/3/2001
Gauteng	1998/1999	481 247 000	362 000 000
	1999/2000	503 758 000	386 720 000
	2000/2001	419 717 000	
Mpumalanga	1998/1999	186 565 000	186 543 000
	1999/2000	151 387 000	151 387 000

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE RANDS
	2000/2001	211 576 000	
Northern Cape	1998/1999	108 694 000	203 377 000
	1999/2000	129 299 000	203 377 000
	2000/2001	140 397 000	269 000 000
North West	1998/1999	270 000 000	289 000 000
	1999/2000	289 653 000	269 000 000
	2000/2001	285 777 000	289 000 000
Western Cape	1998/1999	533 253 000	
	1999/2000	561 762 000	
	2000/2001	597 521 000	

Variances: The Free State, Mpumalanga and North West Departments did not provide the necessary response.

Gauteng indicated that a saving was generated on the budget for grants for the disabled.

The Northern Cape reported that there has been a skewed expenditure trend due to doctors putting people who were not able to work and not disabled, onto the system for purposes of getting an income.

The Western Cape indicated that there were no variances.

Budget adequacy: The Free State, Northern Cape and North West departments did not respond to the question on budget adequacy.

Gauteng, Mpumalanga and the Western Cape reported that the budget was adequate. None of the provincial departments except the Northern Cape provided information on problems encountered as a result of budget inadequacy. The Northern Cape Department has undertaken a re-registration process that was intended to eliminate corruption and fraud.

None of the provincial departments provided information on how the budgetary measures gave special considerations to vulnerable groups.

Poverty Alleviation Programmes

Budgetary allocations towards the Poverty Alleviation Programmes went down in the Free State, Gauteng, Mpumalanga and the Western Cape. They were increased in the Northern Cape and the North West.

Variance: In the Free State, inflation and the number of potential beneficiaries accounted for variances. Gauteng and the Northern Cape received additional funding from the national Department of Welfare.

Budget adequacy: On whether the budgeted allocation was adequate, Gauteng indicated that the provincial budget was strengthened from the

Poverty Relief Programme as administered by the national Department of Social Development.

Mpumalanga Department reported that:

- **the extent and complex nature of poverty, would require a much more substantial budget than has been allocated thus far**
- **strategies currently employed to alleviate poverty were not developmental in nature: instead they were closely informed by the social relief model.**
- **the fact that this is a conditional grant from National Treasury implies that provincial allocations were determined at the national and not provincial sphere.**

The Northern Cape indicated that, the annual allocation for poverty alleviation programmes has been inadequate for addressing poverty throughout the province. The North West and Western Cape departments did not respond to the question.

On whether the department encountered problems, the Free State Department reported that not all projects for which applications for funding were received could be funded. Gauteng and the Western Cape indicated that this was not applicable to them. Mpumalanga reported that they experienced problems, as the department could not support all applicants. According to the Northern Cape Department no funds were allocated for the monitoring and support of the Poverty Alleviation Programmes.

The Free State Department reported that additional funds were requested from Treasury, and the national department provided conditional funds in order to deal with problems created by budget inadequacies. Gauteng indicated that they were responsible for implementing the Financing Policy, which is one of the most important policy instruments for the fundamental transformation of both service delivery and financing. The Mpumalanga Department indicated that, the matter was being discussed at MINMEC by Heads of Department and efforts were being made to achieve better co-ordination by working in clusters. The Northern Cape reported that, the national department allocated R1, 3 million for the reporting period in order to allow the province to help project participants with capacity building and administration. The North West and Western Cape Departments did not respond to the question.

No useful information on how budgetary allocations gave special considerations to vulnerable groups was provided.

3.3 Critique

Inadequate reporting remains an area of concern with government departments not giving full effect to s 184 (3) of the Constitution.

The national Department of Social Development reported that it informed MINMEC about budget inadequacy. However, the department did not report on what courses of action were undertaken by MINMEC to address the crisis. Moreover, it is also necessary for the department to report on whether the problem of budget inadequacy was addressed. The same is true for the Mpumalanga Department, which also reported that it notified the MEC and the provincial Treasury about budget inadequacy, but did not report on the outcome of such notification.

While it is understandable that the national budget would remain low, as implementation is mainly undertaken at the provincial sphere, it is unacceptable that national budgetary allocations were going down. If regard is had to the nature of functions to which the national budget is applied, it becomes clear that this budget can only grow. For instance, one of the functions of the national department is capacity building of provincial departments. In fact, the national department has reported that the degree to which the right of access to social security was realisable, is substantially dependent on the institutional capacity of provincial departments; it was those provincial departments that have institutional problems that have amongst other things, difficulties applying available financial resources. The national department therefore, needs to expand capacity to support these provincial departments. This capacity building would require resources, including financial resources.

The observation by the national department that the budget is inadequate in poorer provinces calls for continued acceleration of the reprioritisation of government's financial resources in favour of poorer provinces. As was noted in the policy section, such provinces also have institutional capacity problems, that prevent optimal utilisation of financial resources where they are available, hence continuing under-spending. The immediate implication of this scenario is that the provision of financial resources should be accompanied by the provision of capacity building.

In line with the observation made in the overview section, the national department has also noted the close relationship between poverty and unemployment. However, government has the responsibility of going beyond simply noting this relationship. This point further highlights the need for social security measures that particularly attempt to deal with the problem of unemployment. As was noted in the policy section, no special considerations were given to the unemployed in the design of social security policy measures.

The fact that delaying payments to beneficiaries is one of the strategies that an organ of state such as the Mpumalanga Department can implement to prevent over-spending is a serious cause for concern. This is in view of the fact that beneficiaries of social security belong to poorest sections of society. Delays in receiving benefits would thus have devastating consequences on the enjoyment of other socio-economic rights. This is clearly unacceptable.

The marginal increase towards old age pensions is disappointing when it was reported in the policy section that government is able to reach only 70 percent of the elderly. It is important to note that the elderly belong to a segment of society that faces enormous economic and social hardship as a result of lack of income. Measures aimed at providing income to the elderly are thus of the utmost urgency for the elderly. Over-spending on the old age grant, as was evidenced in the Northern Cape, Gauteng and Mpumalanga bears testimony to the level of need for this type of grant.

Under spending, both at the national and provincial spheres of government, is one of the most serious threats to the progressive realisation of the right of access to social security. National government has under spent on the Social Assistance and Poverty Alleviation Programmes, while some provincial departments have also under-spent on some of their programmes. Under spending on the Social Assistance budget is highly unacceptable especially given the well-articulated statement that government's resources towards social security are limited. The Maastricht Guidelines have clearly spelt out that a state has to demonstrate that it is using its resources efficiently in order to invoke the 'limited resources' argument. For the department this is clearly unacceptable as the Social Assistance budget is directed at assisting financially, organisations involved in the provision of social services. That this budget has declined across most provinces during the reporting period is even more concerning. The fact that many organisations are experiencing financial difficulties, when government is not spending the money is cause for concern. Continuing under spending on the Poverty Alleviation Programme is perhaps the biggest threat to the realisation of the right of access to social security, given the centrality of poverty alleviation within the policy framework for social development. Provincial departments in Gauteng, the Northern Province, the North West and the Northern Cape also under-spent on their overall departmental allocations. The Free State and the Northern Province under-spent on their social security allocation. Provincial departments in the Free State and Mpumalanga also under-spent on their disability grant.

The national budgetary allocation towards disability went down. This was the case even in the Free State and Mpumalanga. This happens at a time when the national department reports that it was able to reach only about 40 percent of persons with disability. This becomes even worse when class action and litigation against government are taken into consideration.

As noted above, some provincial departments experienced difficulties executing management tasks necessary for the effective and efficient application of resources towards the realisation of the right of access to social security. One such example is the Northern Cape Department, which had difficulty planning for the financial year, and was thus unable to estimate required resources for the coming financial year.

3.4 Recommendations

Government needs to provide information for all the columns that were provided for in the protocol. It is particularly necessary that information on inflation adjusted per capita allocations be given as this will have the necessary benefit of showing especially, provincial variations.

Where both national and provincial departments institute measures to deal with budget inadequacy, they also need to report on the effectiveness of the adopted measures.

Government needs to increase amongst other things, financial resources towards institutional capacity for financial management, as this will have the desired effect of improving resource utilisation.

More attention needs to be devoted to providing financial assistance towards the unemployed. It can be hoped that the Inter-Ministerial Committee into Comprehensive Social Security would amongst other things focus on the needs of the unemployed.

The national department should develop guidelines that spell out actions that could be taken to cope with financial difficulties. This could help avoid the adoption of measures such as delaying payment to avoid over-spending, which are clearly unacceptable.

Government needs to be particularly sensitive to the impact of financial decisions on the realisation of the right of access to social security. In areas such as old age pensions and social assistance, the impact of budget cuts could be particularly disastrous given the dire poverty situation in which the elderly find themselves.

The issue of under-spending especially towards poverty alleviation requires urgent attention on the part of government.

The issue of disability grants, and the financial resources directed towards the disabled requires attention on the part of government.

4 OUTCOMES

4.1 National Sphere

Most of the information required on income indicators was not provided. The only information the national department could provide was that there were 4 671 647 people with no source of income, and an average of 3 million people receiving social security. The department specifically stated that it is not able to provide information, as SOCPEN (payment system) was not designed to provide the information.

There were 2 657 714 persons eligible for disability grants of which only 601 886 were receiving disability grants. The department stated that there were 746 278 males and 1 726 869 females eligible for old age pension. Of the more that 2, 4 million eligible for old age pensions, more than 1,8 million were receiving pensions. The department further reported that it was not able to provide the information on the number of people not receiving grants. The only way of coming close to providing such information was to subtract the number of beneficiaries on SOCPEN from the number of applicants. Even if that were to be done, it would only provide information about people who were aware of the social security benefits and would thus not cover the entire spectrum of eligible people. With regard to the Poverty Alleviation Programme in particular, the department reported that the figure provided represents the number of groups that applied for funds, and that the actual number of beneficiaries could be higher.

Table 11 Indicators - Grants (as at April 2000)

VULNERABLE GROUPS	TOTAL
Number of persons eligible for disability grants	2 657 714
Number of persons receiving disability grants	601 886
Number of persons eligible for old age pension grants	Male: 746 278 Female: 1 726 869 Total: 2 473 147
Number of persons receiving old age pension grants	1 863 762
Number of persons benefiting from poverty alleviation programmes	25 956 (estimate)

With regard to requested information on the indicators for infrastructure the national Department of Social Development indicated that, the total number of social grants pay-out points was 7 000; 4 900 in rural areas and 2 100 in urban areas.

4.2 Provincial Sphere

The only provinces that provided information were the Free State, Gauteng, Mpumalanga, Northern Cape, North West and the Western Cape. However, the information provided was insufficient.

All the departments failed to provide information on indicators other than the number of people receiving grants. The Free State Department indicated that there were 178,585 persons receiving social security. The Northern Cape Department of Social Services reported that the total number of persons receiving social security was 105 746. The Western Cape's Department of Social Welfare and Population Development stated that the number of persons receiving social security was 319 586.

The Table below reflects indicators on grants. Gauteng reported that there were 62 711 persons eligible for disability grants. The Western Cape had the highest number of persons receiving disability grants (89 464). Gauteng had the highest number of persons eligible for old age grants (228 129). The lowest number of persons receiving old age grants was the Northern Cape at (667). Gauteng also had the highest number of persons

benefiting from poverty alleviation programmes (6 000), followed by the Northern Cape at 2 496. The only other province that indicated the number of people benefiting from poverty alleviation programmes was the Northern Province (1 040).

Table 12 Indicators - grants

VULNERABLE GROUPS	FREE STATE	GAUTENG	MPUMALANGA	NORTHERN CAPE	WEST. CAPE
Number of persons eligible for disability grants	Unknown	62 711	Unknown		
Number of persons receiving disability grants	30 357	62 711	32 635	30 873	89 464
Number of persons eligible for old age grants	Unknown	228 129	Unknown	42 203	
Number of persons receiving old age grants	111 118	228 129	129 335	667	144 830
Number of persons benefiting from poverty alleviation programmes	Unknown	6 000	1 378	2 496	

Provincial departments appeared to have difficulty providing information on the number of people eligible for the grants and other services provided by the departments, making it difficult to tell the number of people that were not receiving these grants.

The Free State Department reported that it did not know the number of people eligible for disability grants in the province. However, the number of people receiving the grants was 30 357. Also not known was the number of people in the province, who were eligible for old age pensions; the number of people receiving old age grants was 111 118. What appeared even strange was that the province did not have information on the number of people benefiting from poverty alleviation grants, despite the department having reported in the policy section that it is introducing measures to drastically reduce the level of poverty in the province.

Like the Free State, the Mpumalanga Department did not have information on the number of people eligible for disability and old age grants. What the department knew was that 32 635 and 129 335 people were benefiting from the disability and old age grants respectively.

The Gauteng Department reported that it was able to provide grants to all the people who were eligible for them. According to the department, 6 000 people in the province were benefiting from poverty alleviation programmes.

Although the Northern Cape Department did not have information on the number of people eligible for disability grants, it did have some information on other indicators. The department reported that there were 30 873 people in the province receiving disability grants. Of the 42 203 people eligible for old age grants, only 667, which is about 1, 5 percent, were receiving old age grants. The department went further to report that 2 496 people and 1 040 households were benefiting from poverty alleviation programmes.

Only Mpumalanga, the Northern Cape and the Western Cape provided information on infrastructure. The majority of pay points in Mpumalanga (434) were concentrated in the rural areas, compared to 48 in urban areas. Although the Northern Cape and Western Cape Departments could not provide the urban/rural breakdown of information on infrastructure pay points, they individually reported that in the province as a whole, there were 234 of these points.

Table 13 Mpumalanga Indicators - Infrastructure

	Total	Rural	Urban
The number of social grants pay-point points	482	434	48
The average time taken by beneficiaries at social grant pay-point points before receiving the payment		5hrs	5hrs
The average distance to social grants pay points		3 km	4 km
Number of beneficiaries who reside within the following distances from social grant pay			
a. 5 km radius	185 260	177 458	7 802
b. greater than 5 km radius	4 519	893	3 626
c. greater than 25 km radius	None	None	None
d. greater than 50 km radius	None	None	None

According to the Mpumalanga Department, in rural areas, the average distance to social grants pay points was 3 km compared to 4 km in urban areas. The Northern Cape and Western Cape figures were 15 km in both urban and rural areas. The average time it took beneficiaries at pay points was 5 hours for both urban and rural areas. No other provincial department provided this information.

Table 14 Northern Cape Indicators - Infrastructure

	Total	Rural	Urban
Number of social grant pay-point points	234		
The average distance to social grants pay points.	3km	3km	3km
The average time taken by	15min	15min	15min

	Total	Rural	Urban
beneficiaries at social grants pay-point points before receiving payment.			
Number of beneficiaries who reside within the following distances from social grant pay-point points:			
a. 5km radius	105 746		
b. Greater than 5 km radius			
c. Greater than 25 km radius			
d. Greater than 50 km radius			

There were 234 grant pay-point points in the Northern Cape. The average distance to these was 3 km. The average time taken by beneficiaries at social grants pay-point points before receiving payment was 15 minutes. A total of 105 746 of beneficiaries resided within 5 km away from the pay-point point.

Table 15 Western Cape Indicators - Infrastructure

	Total	Rural	Urban
Number of social grants pay-out points	365		
Average distance to social grants pay-out points			
Average time taken by beneficiaries at pay-out points before receiving payment	15 min	15 min	15 min
Number of beneficiaries who reside within the following distances from social grant pay-out points:			
a. 5 km radius	70%	70%	70%
b. greater than 5 km radius	20%	20%	20%
c. greater than 25 km radius	5%	20%	20%
d. greater than 50 km radius	5%	5%	5%

As demonstrated in the Table above, the total number of social grants pay-points points was 365. The average time taken by beneficiaries before receiving payment was 15 minutes. In both the rural and urban areas 70 percent of beneficiaries resided within a 5 km radius away from pay points, 5 percent resided within a radius greater than 25 km. About 20 percent of beneficiaries resided in an area greater than 5 km away in both rural and urban areas. About 5 percent resided in areas greater than 50 km away from pay points.

4.3 Critique

Both the national and provincial departments responsible for the realisation of the right of access to social security were clearly not providing information needed to assess the degree of the realisation of the right. What is particularly unacceptable is for the national department not even to analyse existing information by simply comparing the number of

applicants and those of successful applicants as they were found on SOCPEN. The grounds given is that this information will not give a full picture, as there were people who were not aware of the grants, and would thus not be captured through the information system. Comparing these two sources of information would have been a useful start from which the department could assess the degree to which people who were aware of the grants were able to access them alongside strategies to raise awareness around the existence of the grants.

For provincial departments to lack information as basic as the number of people who were eligible for social security should be noted with disapproval. Provincial departments were responsible for the implementation of the policy of the state. It is difficult to see how this role can be played effectively if government does not have sufficient information to assess the degree of progress with implementation. Government has said in a number of policy documents that it purports to target its support to the vulnerable members of society who lack access to sources of income. It seems inconceivable that policy can be planned on effective ways of providing this form of support, without a basic idea of who the vulnerable are, where are they and what type of support they need. Provincial departments were therefore required to develop the required Information Management System to collect this information.

What is particularly unsatisfactory was that the Free State Department was not able to provide poverty statistics, yet it reported that it intended to reduce, through its Poverty Alleviation Programmes, the rate of poverty in the southern Free State, as this is the poorest section of the province. It is not clear how targets can even be set when there is no baseline information.

The claim by Gauteng that it was able to provide grants to all eligible people in the province is questionable since the same province was not able to provide information on the number of eligible people.

It is highly unacceptable that of the estimated 2,5 million people classified as being eligible for disability grants, only more than 600 000 were receiving disability grants. This is particularly unacceptable, when regard is had to the fact that the department reported in its response to questions on budgetary measures that allocations towards disability decreased in some provinces. Under the prevailing situation of many people being eligible for disability grants and not receiving the grants, financial resources towards disability can only be increased, and not reduced. A similar observation can be made about old age grants in that where nominal increases were observed, they were so marginal as to become grossly negligible when measured against needs in the external environment, let alone inflationary pressures.

It seems ironic that Gauteng should have the highest number of beneficiaries on the Poverty Alleviation Programme, when Gauteng does not have the highest level of poverty in the country.

4.4 Recommendations

It is important for organs of state to realise the need for factual information in the assessment of the progressive realisation of the right of access to social security. This information needs to form part of the report to the South African Human Rights Commission.

Information on income is particularly necessary, as income is one of the critical indicators of the level of need for social assistance in particular. While it could be the case that there are other agencies such as Statistics South Africa that are generating these types of statistics organs of state should at least have access to this information as it is critical to the design of measures to realise the right of access to social security.

Lack of information on the number people eligible for social assistance on the part of government is unacceptable and thus requires active measures to correct.

The non-provision of information on available infrastructure for service delivery requires immediate correction, as this is key to monitoring changes in service delivery.

5 MONITORING

5.1 National Sphere

The national Department of Social Development reported that it utilised the following mechanisms for monitoring the progressive realisation of the right of access to social security:

- regular meetings with provincial heads of Social Security to review measures and address problems that arise
- regular meetings with provincial heads of department and the national department to monitor progress on the initiatives and make recommendations to MINMEC
- monthly reports from SOCPEN provide information on the number of grants, beneficiaries and amounts paid

In addition to information available from SOCPEN, the department collected information from provinces on a range of issues. The information was entered onto NISWELL on the basis of which an annual report was prepared. According to the department, capacity constraints in the provinces often meant that the required information was not provided.

5.2 Provincial Sphere

In the provinces, fairly similar arrangements were in place as regards monitoring.

Mpumalanga reported that it relied on information from district offices. The offices provided information on the number of applications received, applications approved and those rejected, as well as reasons for rejecting applications. Reliance was placed on SOCPEN.

In addition to what Mpumalanga reported, Gauteng also mentioned that the Head Office had a dedicated Monitoring and Evaluation Team. The department also used feedback from beneficiaries through a consultant, in order to assess how delivery was experienced on the ground.

The Northern Province Department reported that Social Security Payment Services and Inspection Sections went to pay-points on a monthly basis to monitor and assess access to social security. Regional and district managers also monitor beneficiaries' access to social security.

In the Western Cape, there was established, a Directorate called Customer Service, to monitor and evaluate the right of access to social security.

5.3 Critique

It is apparent that monitoring systems especially at the provincial sphere of government were under-developed. The information at their disposal was limited and this requires attention.

SOCIAL SERVICES FOR CHILDREN

1 POLICY MEASURES

1.1 National Sphere

The national Department of Social Development instituted the following policies and programmes as measures for the period under review:

- HIV/AIDS Policy
- Draft Child Protection System
- Victim Empowerment Programme

National Strategic Framework for Children Infected with and/or Affected by HIV/AIDS

The Framework was developed in response to the alarming increase of HIV/AIDS infections in the child population in South Africa. This framework programme was developed in collaboration with the Departments of Health and Education to provide Home-Based Care and Community-Based Care for children who were infected and/or affected by HIV/AIDS. The preferred welfare policy was to keep children or families and in communities rather than in institutions. The department indicated that there were no grants that were specifically earmarked for the care of children affected by and/or infected with HIV/AIDS. The only grants that could be applied for were the Foster Care Grant, Child Support Grant and the Care Dependency Grant.

Draft Child Protection Strategy

The draft Child Protection Strategy was developed to respond to the needs of children (for protection from abuse and exploitation) and was to be completed in 2000/2001. The Strategy would focus on protecting children in areas such as, and cases of child abuse; Internet child pornography; child labour; and exploitation and abuse experienced by children in child-headed households.

The Victim Empowerment Programme

The Victim Empowerment Programme helped children and women who were victims of abuse by providing them with counselling. There were 52 projects operating in different provinces.

1.1.1 Special considerations given to vulnerable groups

- There was a policy that provided services to *street children* and aimed to ensure that appropriate ecological and developmental services were rendered to children living in the streets. The department did not

mention the name of the policy nor did it explain the nature of ecological and developmental services rendered to street children

- While departmental policies did not specifically target *female-headed households*, the policies gave priority through service delivery to female-headed households
- The Care Dependency Grant was introduced in 1996 to cater for *children with disabilities*
- The Draft Child Protection Strategy and the Victim Empowerment Programme give special considerations to *children who have been abused and neglected*
- The National Strategic Framework protected children infected with and/or affected by HIV/AIDS
- The Child Support Grant placed emphasis on *children from previously disadvantaged racial groups*. The policy was aimed at redressing past inequalities, whereby Africans were excluded from receiving the State Maintenance Grant
- *Refugees and asylum seekers* were excluded from the Child Support Grant

1.2 Provincial Sphere

The provincial departments except Gauteng, the Free State and the Northern Cape instituted no new policy measures.

The Free State developed a policy on the Child Support Grant, which addressed the needs of poor children. The department reported that the instituted policies aimed to ensure the protection, respect and promotion of the rights of children. In responding to the effectiveness and reasonableness of the policy measures, the department reported that the instituted policies were reasonable but not always effective due to lack of human and financial resources.

Measures instituted by the Gauteng Department were the following:

- Interim Policy Recommendations on the Transformation of the Child and Youth Care System
- Policy on street children services
- Policy on the registration of child care facilities, including children's homes and shelters for street children

The department reported that the measures instituted were reasonable but not always effective. This was due to the fact that the realisation of children's rights to social services was reliant on inter-sectoral collaboration by several departments. Departments were not moving at the same pace in implementing policy. The availability of probation officers/social workers at courts contributed to increasing the diversion and restoration of more children to the care of their parents or relatives. The Intersectoral Committees on Youth in Conflict with the Law assisted in fast tracking and addressing the blockages.

The Northern Cape Department established the Marcus Mbetha Secure Care Centre, which accommodates youth between the ages of 14-18 years awaiting trial, to prevent them from being kept in police and prison cells. The department also established a Group Foster Home for Youth at Risk, and Homeless Children Alliance to co-ordinate services for homeless children. The Group Foster Home was a community-based structure to provide developmental services to children/youth that are economically or behaviourally troubled.

1.2.1 Special considerations given to vulnerable groups

It was the North West, Northern Cape, KwaZulu Natal and Mpumalanga that provided information on special considerations given to vulnerable groups.

In the North West, efforts were made to ensure that children living in rural areas and informal settlements receive services in line with the instituted policies. Appropriate services were rendered to children living in the streets. All policies included children with disabilities, and poor children were linked to programmes such as the Child Support Grant and the school nutrition programme. Children with HIV/AIDS from previously disadvantaged communities were not discriminated against or excluded from the policies. As for physically, psychologically and sexually abused children, policies aimed to ensure immediate protection in a comprehensive, developmental and strength-based manner.

The Northern Cape Department established 6 Regional Offices, 13 Satellite Offices, 22 District Offices and 34 Service Points for children living in rural areas. The Adolescent Development Programme and services such as crèches and other related service centres were initiated specifically for children in informal settlements. A partnership between the department and the Homeless Children Alliance was established to render service to homeless children. The department subsidised two shelters for homeless children that accommodated 53 children. Caregivers and parents of children with disabilities could access the Care Dependency Grant, and children from low-income groups had access to the Child Support Grant and Poverty Relief Programmes.

The KwaZulu Natal Department reported that the Child Support Grant and Poverty Alleviation Programmes were made available to children living in rural areas, children living in informal settlements and children from low-income groups. Homeless children were placed in places of safety in order to provide them with shelter. Street children were subsidised, to provide an environment that encouraged the rehabilitation and development of street children. Foster children were provided with services by the department or subsidised NGOs. Accessibility influenced the availability of services in rural areas.

The Mpumalanga Department reported that social services were accessible to most children. However, effort was needed to reach the disadvantaged.

Where there were no social workers, non-profit organisations were encouraged to reach out to all areas. Three children's homes situated in Belfast, Perdekop, Balfour and places of safety in Kriel and Nelspruit were facilities for children provided by the department.

1.2.2 Difficulties experienced in implementing measures

The Free State Department reported that the rural nature of the province and lack of personnel were the difficulties faced by the department.

The North West Department was faced with a problem of lack of resources.

The Gauteng Department reported that all stakeholders implemented the instituted measures through training and capacity building; and awareness campaigns.

The foster placement of children with their grandparents and insufficient resources at the disposal of the Mpumalanga Department were difficulties faced by the department.

The Northern Cape reported that lack of financial and human resources was the main difficulty experienced by the department. The collection and capturing of statistics was also a problem.

1.3 Critique

The responses provided by the departments were inadequate. Policies and programmes mentioned were identified but not fully described. The intended objectives of the policies were not mentioned. Responses by the various departments suggest that the constitutional obligations to respect, protect promote and fulfil were not understood.

Crucial grants which affect the right of the child to social services such as the Child Support Grant, the Care Dependency Grant and the Foster Care Grant were neglected and received minimal attention from the departments. All these suggest that the provisions of the Convention on the Rights of the Child were not properly implemented. The Convention provides that State Parties shall recognise for every child the right to benefit from social security including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with national laws.⁴² The benefit should, where appropriate be granted, taking into account the resources and circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an applicant for benefits made by or on behalf of the child.⁴³

⁴² Article 26 (1) of the Convention on the Rights of the Child, 1989.

⁴³ Article 26 (2) of the Convention on the Rights of the Child, 1989.

There was a need for provincial departments to provide information on the number of foster care facilities established in the province, and the number of children that benefited from services provided in foster care facilities.

The same goes for the programme for youth awaiting trial. Reports did not explain how the affected children were being assisted through the instituted policies and programmes. There was no indication of whether the instituted measures were reasonable and effective, and how they assisted in advancing the right to social services for children.

The respective departments did not provide information on steps taken to implement the programme of action. Vulnerable groups were not given special considerations by the departments especially children from rural areas and informal settlements, those affected by HIV/AIDS, as well as children of refugees and asylum seekers.

A study of the situation and special needs of children in child-headed households showed that government (social security/welfare) does not seem to be helpful in facilitating the provision of social services. Nor was government visible and proactive in collaborating with other role players and in communicating on how social services can be accessed.⁴⁴ Children in child-headed households were not in a position to apply for child care grants without the assistance of an adult.⁴⁵

The denial of access to the Child Support Grant, has severe consequences in that children end up being faced with poverty; discrimination; stunting and hunger; lack of supervision and care; child labour; early marriage; educational failure; poor housing, exploitation; psychological problems and lack of adequate medical care.⁴⁶

The Committee on the Rights of the Child made recommendations to the effect that South Africa should ensure efforts to make possible the implementation of the principle of non-discrimination embodied in Article 2 of the Convention, particularly in relation to vulnerable groups. The Child Support Grant should thus be expanded or alternative programmes developed to support disadvantaged children up to the age of 18 years who are still in school, and take effective measures to ensure the continuation of support programmes for economically disadvantaged families.

1.4 Recommendations

Departments should identify policies and programmes and give detailed explanations. Responses should be provided in full and be relevant to the questions asked.

⁴⁴ Nelson Mandela Children's Fund *Report on: A Study into the Situation and Special Needs of Children in Child Headed Households (2001)* 19.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

The national department should formulate policies in accordance with the provisions of the Convention on the Rights of the Child. The policies should accommodate all the children as defined in the Constitution. Grants that were afforded to children should be reviewed; the amounts of the Foster Care Grant and the Child Support Grant should be equal. The Child Support Grant should enable children from child-headed households to be able to claim directly for themselves with the assistance of the social workers, where there is no adult relative to assist. Support grants should be extended to children infected with and/or affected by HIV/AIDS.

2 LEGISLATIVE MEASURES

2.1 National Sphere

The DSD passed regulations under the Child Care Act 74 of 1983 in 1999.⁴⁷ The department reported that the legislative measures were consistent with the Constitution and the UN Convention on the Rights of the Child. However, the Constitutional Court has found the Child Care Act to be unconstitutional, as it does not allow South African children to be adopted by non-South Africans. The DSD further reported that the legislative measures apply to all South African citizens, and were implemented through provincial Departments of Welfare, and NGOs. The department experienced budgetary constraints in the implementation of the measures.

The department reported that the instituted measures respected the right to social services for children, through involving children in the drafting of Child Care legislation. The purpose of this consultation process was to gather the views of children on the proposed revision of the child care law, and was required to compare and contrast with the views of adults.

2.2 Critique

The national DSD did not provide satisfactory information or legislative measures. There were been significant developments during the reporting period, which were not covered in the responses. The responses from the provincial departments were unsatisfactory. Neither was there an attempt to structure the responses according to the format of the protocol. It was also disappointing to note that the responses did not capture the two prominent questions that were important for the monitoring of economic and social rights by the Commission. These are the constitutional obligations in terms of s 7(2), and the impact of the measures on the lives of vulnerable groups living in abject poverty. These two aspects were supposed to be reflected clearly so that it could be determined whether there has been the realisation of the right as contained in the Constitution. As such, information received from the few provinces was not helpful for monitoring purposes.

⁴⁷ See the Department of Social Development *Annual Report* Chapter 5 (1999-2000).

The DSD did not provide information on significant legislative developments that took place during the reporting period. Nevertheless there were significant amendments to the Child Care Act 74 of 1983, which deserve attention. The Child Care Act was amended for the second time in March 1999 by the Child Care Amendment Act 13 of 1999 which was passed to provide for the following:

- A right of appeal against certain orders relating to children⁴⁸
- Establishment of secure care facilities⁴⁹
- To revoke the power of the Minister to transfer certain pupils and children to any institution, custody or supervision mentioned in s 290 of the Criminal Procedure Act 55 of 1977⁵⁰
- Prohibition of commercial sexual exploitation of children⁵¹
- To make further provision for the estimation of a person's age in certain proceedings⁵²

The Minister initiated the above-mentioned amendments together with the Minister of Justice, who requested the South African Law Commission to appoint a Project Committee to review the Child Care Act. The Committee was responsible for drafting a comprehensive child care statute. The aim was to draft comprehensive child care legislation that should be compatible with the provisions of the South African Constitution, the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The Department of Welfare is the principal of the Child Care Act of 1983 and is represented on the Project Committee.

The Maintenance Act 99 of 1998, which was to be implemented in November 1999 and the Domestic Violence Act 116 of 1998 were legislative measures not mentioned in the responses.⁵³ The 1998 Maintenance Act, which repealed the Maintenance Act of 1963, was aimed at addressing problems experienced by thousands of people, especially women in accessing maintenance payments. The Act provides for the appointment of maintenance investigators who will help maintenance officers in performing their duties effectively. The Maintenance Act is in the interest of children. The Domestic Violence Act came into effect in 1999 and it addresses violence in the family and the home. The DSD was supposed to provide information on how the enacted pieces of legislation were being implemented.

It is unacceptable for the DSD to assert that the implementation of legislative measures had an impact on all children without explaining what

⁴⁸ Section 2 of the Child Care Amendment Act 13 1999.

⁴⁹ *Ibid* s 3.

⁵⁰ *Ibid* s 4.

⁵¹ According to the Act, in s 5, persons who procure children as commercial sex workers and those who allow their premises to be used for such activities were liable for prosecution.

⁵² Act 13 1999 (note 48 above) s 6.

⁵³ See *Northern Cape News* September (1999) 10.

that impact is according to the vulnerable groups of children identified in the protocol. It is a reality that children come from different backgrounds, and need specialised government interventions to address their special needs.

Only Gauteng, Northern Cape and Western Cape provincial departments provided useful responses on legislative measures.

In spite of the positive attempts made by the Department of Social Development to reform child care legislation, it was reported that child abuse cases have increased.⁵⁴ This happens in spite of the existence of a strategy to address child abuse and neglect.⁵⁵ Provinces also embarked on the process of developing integrated protocols for child abuse and neglect. The development of a protocol document on child protection was finalised and launched in the provinces during 1999. Active participation was taking place amongst role-players on an inter-sectoral basis and in each province a provincial Child Protection Committee established. Training was provided on the effective management of child abuse. The biggest challenge the government is facing is to implement these measures within an integrated legislative framework.

Since provincial departments did not provide information on measures instituted, there can be no discussion on those measures. The three provinces that responded to the protocol mentioned the Child Care Act 74 of 1983. However, their responses did not show how this Act was being implemented in the provinces. Neither did they make reference to amendments to the Act.

2.3 Recommendations

Adequate information on the legislative measures has to be provided. The respective departments should provide information on the reasonableness and effectiveness of the enacted legislation. The national department has to enact legislation that specifically addresses the right to social services for children. The national as well as provincial departments need to implement the Correctional Services Act to provide for children awaiting trial, and the Child Care Act and the Domestic Violence Act properly.

3 BUDGETARY MEASURES

3.1 National Sphere

The total budgetary allocation of the department is given in the section on social security. What follows below is the departmental allocation to the various programmes, and is shown in the Table below.

⁵⁴ Department of Welfare Annual Report (note 33 above).

⁵⁵ The Department has appointed a working group to develop this strategy, and the strategy was submitted to the Department in 1997.

Table 1 National Budgetary allocation

PROGRAMME	YEAR	ALLOCATION IN RANDB	ACTUAL EXPENDITURES IN RANDB
Poverty Alleviation	1998/1999	203 000 000	5 000 000
	1999/2000	40 000 000	205 000 000
	2000/2001	120 000 000	-
Child Support Grants	1998/1999	302 467 000	227 085 000
	1999/2000	417 898 000	362 893 000
	2000/2001	555 072 000	-
Foster Care Grants	1998/1999	226 482 000	270 148 000
	1999/2000	268 044 000	268 791 000
	2000/2001	307 193 000	-
Care Dependency Grants	1998/1999	60 629 000	48 877 000
	1999/2000	81 330 000	82 075 000
	2000/2001	68 727 000	-
Secure Care Facilities	1998/1999	12 661 000	4 976 000
	1999/2000	7 701 000	7 478 000
	2000/2001	1 223 000	-

During the reporting period, budgetary allocations towards the Child Support, the Foster Care and the Care Dependency Grants went up. It was the poverty alleviation and the child care facilities allocations that went down. There was under-spending on the Child Support Grant and Secure Care Facilities.

The Department's Poverty Allocation Programme provided funds to over 2000 projects. The projects include the following:

- *Operation Hunger R2 m*
- *Working for Water Child Care Project R3.5 m*
- *Starfish Trust Youth Development R6 m*

Variances in the allocation were explained by rollovers from previous years. In 1999/2000, about R10 million was suspended from the budget due to rollovers. The department reported that the allocation was not enough given the high level of poverty in the country, and demands placed on the budget. To improve the situation the department focused its efforts on improving the overall management of the Poverty Relief Programme, and strengthening the oversight role of MINMEC on the Poverty Relief Programme. The funding does not aim to exclude any of the categories of vulnerable groups.

As far as the allocation towards the Child Support Grants went, the department maintains that the allocation was not going to be sufficient, as there was an increase (in excess of 1000 percent) in the number of recipients of the grant. The department undertook awareness campaigns on the grants to parents from rural areas and informal settlements. Children from other categories were catered for in the Foster Care Grant. The department foresaw pressure on the allocation towards Foster Care Grants due to an increase in the number of AIDS orphans. There was already overspending during the 1998/1999 and 1999/2000 financial years.

The department attributed variances in the Care Dependency Grant to the movement of beneficiaries in and out of the system. Beneficiaries over 18 years of age who should be out of the system but still benefited also absorbed the funds further.

Allocation towards secure care facilities was a once-off conditional grant to provinces for building new structures for secure care facilities or expanding existing places of safety. Variances reflected progress made by each province in completing the establishment of secure care facilities. The allocation was adequate for the establishment of one centre per province. Provincial departments used their own funds for the establishment of additional centres. The centres would be used to divert children in conflict with the law from adult correctional facilities. They were intended to house all child offenders irrespective of their background.

The response also stressed that the programmes applied to all categories of vulnerable groups.

3.2 Provincial Sphere

Child Support Grant

The provincial departments, in the Table presented below gave information of allocations towards the Child Support Grants. The Free State did not provide information on this allocation.

Table 2 Allocation for Child Support Grants

PROVINCES	YEAR	ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS
Gauteng	1998/1999	28 000 000	856 000
	1999/2000	26 441 000	22 885 000
	2000/2001	65 469 000	-
KwaZulu Natal	1998/1999	50 112 000	18 811 359
	1999/2000	48 750 000	22 674 820
	2000/2001	50 112 000	41 923 472
Mpumalanga	1998/1999	18 596 000	365 000
	1999/2000	22 778 000	20 244 000
	2000/2001	63 436 000	-
Northern Cape	1998/1999	10 000 000	-
	1999/2000	25 920 000	84 333 982
	2000/2001	45 360 000	-
Northern West	1998/1999	-	1 806 000
	1999/2000	-	3 750 192
	2000/2001	-	48 432 270
Western Cape	1998/1999	2 118 000	1 957 000
	1999/2000	9 416 000	9 416 000
	2000/2001	48 224 000	-

All the provinces that reported experienced nominal increases in the Child Support Grant. There was marked under spending on the Grant, with KwaZulu Natal spending less than half of what was allocated.

Variations: In Gauteng, variations were due to the initial low intake of the grant recipients, which was increased to over 53 000 children by March 2000. KwaZulu Natal indicated that the variance in its allocation was due to the Child Support Grant being paid out to old age pensioners. The province also blames the slow uptake of the grant on lack of information about the grant in the community. After an information campaign, the department foresees an over spending.

Mpumalanga also indicated that a slow uptake of the grant led to initial variations in the allocation.

Northern Cape indicated that the budget allocation was adequate; in that it was possible to accommodate more than the intended beneficiaries.

The North West gave information on the actual expenditure and not the total allocation. There was pressure on the grant due to an increase of about 300 percent. The problems were overcome by redesigning services and developing appropriate community structures.

Care Dependency Grants

Provinces as shown in the Table below, gave allocations towards Care Dependency Grants. The Free State and KwaZulu Natal did not provide information on the section for the Care Dependency Grant.

Table 3 Allocation for Care Dependency Grants

PROVINCES	YEAR	ALLOCATION IN RANDB	ACTUAL EXPENDITURE IN RANDB
Gauteng	1998/1999	9 394 000	8 612 000
	1999/2000	9 394 000	8 156 000
	2000/2001	14 000 000	-
Mpumalanga	1998/1999	2 056 000	2 056 000
	1999/2000	4 091 000	5 201 564
	2000/2001	6 703 000	-
Northern Cape	1998/1999	117 000	-
	1999/2000	286 000	3 943 293
	2000/2001	3 187 000	-
Northern West	1998/1999	20 440 000	20 000 000
	1999/2000	23 000 000	22 400 000
	2000/2001	34 000 000	11 289 172
Western Cape	1998/1999	11 699 000	11 698 000
	1999/2000	18 540 000	18 540 000
	2000/2001	11 000 000	-

Northern Cape indicated that the allocation was inadequate against actual expenditure; it was also not adequate because of the deficit in the budget. The inadequacy caused delays in approving expenditures, and over spending. Problems were overcome by instituting strict financial controls. The rest of the provinces gave the allocations without explaining variations and impacts.

Foster Care Grants

The allocation towards Foster Child Grants by various provincial departments is presented in the Table below. The Free State did not provide the required information on the allocation for this specific programme.

Table 4 Foster Child Grants

PROVINCES	YEAR	ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS
Gauteng	1998/1999	47 657 000	44 684 000
	1999/2000	51 761 000	49 805 000
	2000/2001	59 550 000	-
KwaZulu Natal	1998/1999	30 701 000	18 811 359
	1999/2000	21 136 000	26 701 069
	2000/2001	30 701 000	15 075 885
Mpumalanga	1998/1999	8 171 000	8 145 000
	1999/2000	11 065 000	10 338 465
	2000/2001	12 804 000	-
Northern Cape	1998/1999	-	-
	1999/2000	-	-
	2000/2001	-	-
Northern West	1998/1999	42 836 000	43 000 000
	1999/2000	54 847 000	54 847 000
	2000/2001	77 640 000	1 583 200
Western Cape	1998/1999	95 025 000	95 045 000
	1999/2000	95 000 000	-
	2000/2001	110 000 000	-

KwaZulu Natal explained the under spending during the 1998/1999 financial year in terms of the widespread utilisation of Maintenance Grants instead of the Foster Care Grant. However there was over spending due to the phasing out of maintenance grants and more utilisation of foster care placements. Mpumalanga did not account for variances in its allocation. The province maintained that the allocation was adequate. However there had to be provision made for the impact of HIV/AIDS.

Secure Care Facilities

Various provincial departments provided information on allocations towards secure care facilities. The provinces of KwaZulu Natal, Eastern Cape and Mpumalanga did not provide information on their respective allocations.

Table 5 Secure Care Facilities Grants

PROVINCES	YEAR	ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS
Free State	1998/1999	300 000	-
	1999/2000	1 700 009	-
	2000/2001	2 240 000	-
Gauteng	1998/1999	27 575 000	25 464 079
	1999/2000	50 832 000	39 508 000
	2000/2001	57 253 000	-

PROVINCES	YEAR	ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS
KwaZulu Natal	1998/1999	-	-
	1999/2000	-	-
	2000/2001	-	-
Mpumalanga	1998/1999	-	-
	1999/2000	-	-
	2000/2001	3 200 000	3 200 000
Northern Cape	1998/1999	17 393 879	-
	1999/2000	15 982 925	-
	2000/2001	17 544 617	-
Northern West	1998/1999	-	-
	1999/2000	4 922 000	4 000 000
	2000/2001	-	-
Western Cape	1998/1999	29 427 000	-
	1999/2000	41 405 000	-
	2000/2001	52 897 000	-

Adequacy: There was only one centre in the whole of the Free State province, hence the department's view that the allocation was adequate to run one centre. The North West on the other hand, maintained that the allocation was not adequate because of the high number of children in centres. In the Western Cape the budgetary allocation presented above was used to build the first secure care facility for the province. An amount of R37 849 000 was used for other places of safety.

3.2.1 Special considerations given to vulnerable groups

All provinces indicated that all the programmes applied to all children who qualify for the grant. This meant that children in all categories would benefit.

3.3 Critique

None of the provinces answered the protocol in full, nor provided the information according to the format of the protocol. Under reporting and the omission of information only show that departments do not have the kind of information required due to the non-existence of a proper monitoring system.

The national department must be commended for its reasonable attempt at alleviating poverty. It is important that the state address the cause of poverty in its efforts towards social development.⁵⁶ The allocation indicates a laudable increase in the actual slice of the total allocation.⁵⁷ The reasonable allocation was however marred by lack of effective utilisation. There has been under spending in previous years. The fact of the under spending detracts from the reasonableness of the allocations. There has to be effective utilisation of resources. Under spending is not reasonable because it also affects the effectiveness of the allocation.

⁵⁶ Generally, see the Copenhagen Declaration on Social Development (1997).

⁵⁷ From 45 percent in 1998/1999 to 47 percent in 2000/2001.

Allocations towards Foster Care Grants and Care Dependency Grants were unsatisfactory. They failed to grasp the full impact of AIDS on the budget. Research shows that South Africa has at least 420 000 AIDS orphans.⁵⁸ There was no specific allocation for the care of AIDS orphans whether in foster care or in centres of care. There was also no indication of the impact of the allocation on child-led households. Research reveals that extended families often charged with caring for AIDS orphans experience difficulty coping.⁵⁹ The allocation would need to support the families or organisations that take care of these orphans. The allocations need to consider children in varying circumstances.⁶⁰ A measure that does not consider persons in varying circumstances fails to realise the right of those persons. The allocation fails in this regard because it leaves out a certain sector of society. There is a responsibility on the state to realise the right to social services for children.

The Committee on the Rights of the Child made recommendations to South Africa's first report to the Committee. The recommendations stipulate that South Africa should pay full attention to the full implementation of Article 4 of the Convention by prioritising budgetary distributions to ensure the implementation of the economic, social and cultural rights of children to the maximum extent of its available resources and where needed, within a framework of international co-operation.⁶¹

Provinces fund programmes to help realise the right of children to social services. The basic requirement on the state to take steps to facilitate the realisation of the right is fulfilled. The measures in the allocations towards various programmes were reasonable; they represent an endeavour, a deliberate state action aimed at meeting the state's obligation.

The reasonableness of the measures is brought into question by the actual implementation. Reasonableness requires that the measures be implemented effectively. The obligation is to have effective measures that achieve goals. For the measures to be effective the state must set itself certain targets and allocate resources towards reaching the targets. Failure by the state to respect and fulfil the right detracts from the realisation of the right.

The national and provincial allocations seem not to fully consider the impact of HIV/AIDS on the provision of social services for children. There is no clear intention to allocate budgetary resources towards the care of HIV-positive children, AIDS orphans, and child-headed households. Departments should consider these new challenges. An allocation that does not take these children into account, is unreasonable and ineffective, and consequently does not realise the right to social services for children.

⁵⁸ Nelson Mandela Children's Fund (note 44 above) 12.

⁵⁹ *Ibid.* 13.

⁶⁰ See the judgment in the case of *Government of RSA and Others v Grootboom and others* 11 BCLR 2000 1169.

⁶¹ See www.unhchr.ch/tbs/docs.nsf.

The North West province reported that only male children use the secure care facilities. There should be an effort to avoid gender discrimination.

3.4 Recommendations

There should be proper prioritisation in order to ensure effective utilisation of budgetary allocations. Allocations should consider new problems and challenges such as AIDS orphans and child-led households. For poverty alleviation initiatives the departments should work together. The provinces should follow the format of the protocol and answer all the questions. The provinces should put their funds to maximum use. There should be more co-ordination between the national and provincial departments. Equal access to resources and social benefits should be encouraged.

4 OUTCOMES

National and provincial departments were required to provide information on indicators for social grants and economic and infrastructure indicators. Social Grants include the Child Care Grants, Foster Care Grants, Care Dependency Grants and the number of children receiving care in Secure Care Facilities. Economic indicators entail the number of children in households with incomes below the poverty line, and the number of children receiving social assistance. Infrastructure indicators refer to the number of Social Grants pay-points and the time and distance taken by beneficiaries to the pay-point points.

4.1 National Sphere

Social Grants (1999/2000)

The national department reported that 235 050 Child Support Grants were provided to 314 209 children as at March 2000. The monthly average of children eligible for Foster Care Grants was 48 232, of which 18 914 were receiving assistance through the Care Dependency Grant, and children eligible/receiving care at children's homes as at August 2000. The national department only provided information on the number of children who could be accommodated in secure care facilities, instead of the number that had the facilities during the year under review.

The department did not report fully on the number of children receiving social grants. It only reported that the number of white children in children's homes was disproportionately large. The number of children receiving the Child Support Grants increased. Out of the total 580 371 children, 456 911 were beneficiaries as at August 2000.

Economic Indicators

The national department provided information on economic indicators. There were 572 263 children receiving social security benefits. This number can be broken down into:

- CSG: 314 209
- SMG: 189 391
- Foster: 48 233
- Care Dependency: 20 430

Infrastructure Indicators

The department only provided information relating to the number of social grants pay-points, which was 7000 in total; 4 900 in rural areas and 2 100 in urban areas. Pay-points exclude payments made through the Post Office and banks. The national and provincial Departments of Social Development did not have systems or the capacity to undertake monitoring at pay-points.

Information from other sources shows that by the end of the period under review, there were approximately 70 000 children in foster care while 15 000 children were in 186 residential care facilities. There was a growth in the number of Foster Care and Care Dependency Grants.⁶²

4.2 Provincial Sphere

The Table below shows the figures provided by provincial departments. The Free State, North West and KwaZulu-Natal Departments of Social Development did not provide information on the outcome section

Table 6 Indicators - Social Grants

	PROVINCE	TOTAL
Number of children eligible for assistance through child support grants	Gauteng	1 032 769
	Mpumalanga	210 000
	Western Cape	27 900
Number of children receiving assistance through child support grants	Gauteng	53 214
	Mpumalanga	25 270
	Northern Cape	12 825
	Western Cape	10 835
Number of children eligible for assistance through foster grants	Gauteng	6 065
	Western Cape	13 817
Number of children eligible for assistance through care dependency grants	Gauteng	2 237
	Western Cape	2 730
Number of children receiving assistance through care dependency grants	Gauteng	2 500
	Mpumalanga	889
	Northern Cape	664
	Western Cape	2 730
Number of children eligible for care at children's homes and secure care facilities	Gauteng	1 677

⁶² D. Burger. *South African Yearbook (2000/2001)* 453.

	PROVINCE	TOTAL
Number of children receiving care at children's homes and secure care facilities	Gauteng	1 673
	Mpumalanga	492
	Northern Cape	180

The Mpumalanga Department of Social Development provided information on race and gender. Out of the total number of 492 children receiving care in children's homes and secure care facilities, 270 were females, and 222 were males. About 195 were African, 19 Coloured, 5 Indian and 273 White.

Economic Indicators

Provincial departments did not respond to this section.

Indicators Infrastructure

The provinces responded to the section on indicators for infrastructure as shown in the Table below.

Table 7 Indicators - Infrastructure

	PROVINCE	TOTAL	URBAN	RURAL
Number of social grants pay-points	Gauteng	395	-	-
	Mpumalanga	482	48	434
	Northern Cape	234	-	-
	Western Cape	356	-	-
The average distance to social grants pay-points (in km)	Gauteng	5	-	-
	Mpumalanga	-	4	3
	Northern Cape	3	3	3
	Western Cape	5	-	-
The average time taken by beneficiaries at social grants pay-points before receiving the payment	Gauteng	30 min	-	-
	Mpumalanga		5 hrs	5 hrs
	Northern Cape	15 min	15 min	15 min
	Western Cape	15 min	-	-
Number of beneficiaries who reside within the following distance from social grants pay points				
a) 5 km radius	Gauteng	Majority	-	-
	Mpumalanga	185 260	7 802	177 485
	Northern Cape	105 746	-	-
	Western Cape	70%	-	-
b) Greater than 5 km radius	Gauteng	-	-	-

	PROVINCE	TOTAL	URBAN	RURAL
	Mpumalanga	4 519	3 626	893
	Northern Cape	-	-	-
	Western Cape	20%	-	-
c) Greater than 25 km radius	Gauteng	-	-	-
	Mpumalanga	-	-	-
	Northern Cape	-	-	-
	Western Cape	5%	-	-
d) Greater than 50 km radius	Gauteng	-	-	-
	Mpumalanga	-	-	-
	Northern Cape	-	-	-
	Western Cape	5%	-	-

The Free State, KwaZulu-Natal and North West Departments did not provide information on indicators related to infrastructure.

5 NATIONAL ACTION PLAN

5.1 National Sphere

The national Department of Social Development failed to provide information.

5.2 Provincial Sphere

Most provincial departments did not respond to this section and those that responded provided information that was not useful for the analysis of the realisation of the right to social services for children.

5.3 Critique

The national department did not provide the required information concerning the outcomes section. Provincial departments provided no information relating to economic indicators.

The information below, drawn from other sources shows the status of the right to social services for children.

Table 8 Comparison of the Child Support Grant take-up rates 1998/1999 to 1999/2000⁶³

PROVINCES	APPLICATIONS 1998/1999	REGISTRATION IN RELATION TO TARGET	APPLICATIONS 1999/2000	REGISTRATION IN RELATION TO TARGET	GROWTH

⁶³ Budget Brief No.47 *Quarterly Sectoral Report: Welfare* (2000).

PROVINCES	APPLICATIONS 1998/1999	REGISTRATION IN RELATION TO TARGET	APPLICATIONS 1999/2000	REGISTRATION IN RELATION TO TARGET	GROWTH
Eastern Cape	5 552	0.57%	58 541	21.00%	20.43%
Free State	1 310	0.35%	22 303	15.70%	14.50%
Gauteng	2 861	25.00%	56 436	176.00%	151.00%
KwaZulu Natal	7 501	10.00%	80 879	33.00%	23.00%
Mpumalanga	718	0.28%	35 358	42.00%	41.72%
North West	1 430	0.34%	35 284	29.00%	28.56%
Northern Cape	2 050	55.00%	9 498	96.00%	41.00%
Northern Prov.	2 249	0.30%	64 799	31.45%	31.15%
Western Cape	3 043	27.00%	10 835	33.00%	6.00%

The 1996 Census data indicates that approximately 500 000 children were eligible for the Care Dependency Grant. Of this number, only about four percent were receiving the grant.⁶⁴

The take up rate for the CSG has been particularly low even against projected figures. The Eastern Cape was of particular concern where only 30 997 out of the targeted 241 000 for the 1999/2000 financial year were reached. Only 53 000 out of the 186 000 targeted poor children were benefiting from the CSG in KwaZulu Natal during the 1999/2000 financial year. In the Northern Cape, the target take-up of 9400 for the Child Support Grant was exceeded by 92 for the 1999/2000 financial year.⁶⁵

The availability of census data on age and household income, combined with the rural/urban distinction, makes it possible to estimate the number of children who were eligible for the child support grant. The Financial and Fiscal Commission (FFC) estimates that in mid-1999, there were just over four million children eligible for the grant. According to the latest SOCPEN data 144 000 children were receiving the grant. This low take up rate (3.6 percent) reflects the fact that this was a new type of grant and was not well known or understood by potential recipients.⁶⁶ This therefore means that awareness-raising campaigns about the Child Support Grant were necessary to ensure that the right to social services for children was promoted and realised.

There was no data available on the number of children who should qualify as recipients of the Foster Care Grant. Based on the FFC's estimate of the number of eligible children, only about a quarter of those eligible was receiving Foster Care Grants.⁶⁷

5.4 Recommendations

Departments at the national and provincial sphere should provide adequate information to enable effective evaluation. The Department of Social Development should develop a National Information System, to

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Financial and Fiscal Commission Preliminary Recommendations for 2001 Consultation document February 2000 57.

⁶⁷ Ibid 58.

enable the department to have information on the number of children that have access to social services. Provincial departments responsible for social services should have uniform systems for monitoring progress and the realisation of the right to social services.

6 MONITORING

6.1 National Sphere

To monitor and assess the realisation of the right to social services for children, the department used regular meetings with provincial officials involved in the implementation of statutory and other services to children. There were regular meetings between heads of provincial and the national departments to monitor progress in the initiatives and to recommend policy changes to MINMEC. The monthly reports from SOCPEN provided information on the number of grants, beneficiaries and amounts paid; this contained information on grant payments.

The department collected information from provinces. This information was entered into the NISWEL Information System and an annual publication compiled. Information from Statistics South Africa was used. The national department maintained a database on adoptions, national councils and non-profit organisations.

6.2 Provincial Sphere

The Free State Department provided that internal departmental mechanisms and measures used to monitor the realisation of the right to social services for children were: the collection of key statistical information, assessment of individual case file and Ministerial inquiries.

Statistics were collected through the PIMWEL Information System in terms of the care for children and protection services to children. These statistics were collected on a monthly basis from the service office of the Department of Social Welfare, child care facilities and private welfare organisations.

The North West provided that the information gathering mechanisms were weak and that the department was attempting to develop a more effective welfare Information Management System.

The Mpumalanga Department provided that during the period under review mechanisms and measures to monitor and assess the realisation of the right to social services for children were not available. Nonetheless, the department was in the process of strengthening this function.

In Gauteng, measures in place to monitor and assess the right of children to social services were evaluation mechanisms such as the Developmental Quality Assessment, inspections, daily statistics on children awaiting trial,

monthly statistics on children diverted from the criminal justice system and quarterly inspections at the facilities. Statistics were collected in terms of the Child Care Act of 1983.

The Western Cape Department was in the process of developing a comprehensive database for children.

The Northern Cape Department used constant community meetings addressed by the MEC, as mechanisms for monitoring and assessing the realisation of the right to social services for children.

6.3 Critique

Information from other sources shows that the National Information System for Social Welfare (NISWEL) collects and disseminates data for the management of the welfare system at the national sphere. All provinces operate information systems that accommodate the needs of NISWEL.⁶⁸ From the information given above, it is clear that there is a monitoring system in place but what is difficult to understand is the fact that the national as well as the respective provincial departments failed to provide data on the realisation of the right to social services for children in the outcomes section.

6.4 Recommendations

The national department should formulate a monitoring system that will collect all the information from provincial departments. Reliable monitoring systems need to be developed in the provinces that do not have such systems.

⁶⁸ Burger (note 35 above) 450.

PART C: CONCLUSION

Against the reports provided by the national and provincial departments, and independent research conducted by the Commission, a number of conclusions can be made about government's reporting and the realisation of the right of access to social security and social assistance, as well as the children's right to social services.

Firstly, government's reporting still requires improvement, in order to enable the Commission to assess the realisation of the right of access to social security. This is so at the national sphere but particularly, at the provincial sphere. Government's reports are still not comprehensive. As regards legislative measures there were several legislative measures that were central to the realisation of the right of access to social security that the national and some provincial departments failed to mention in their reports. In addition, government is not providing information on critical budgetary issues, especially that which will facilitate provincial comparisons. Government still fails to provide basic information about the level of poverty in the country, yet the measures reported have as their key focus, poverty alleviation. It also became clear from the report on the monitoring systems currently in place that critical information was not being collected.

Secondly, in spite of the fact that national department is instituting policy measures to address the right of access to social security, its efforts were not matched by supporting measures at the provincial sphere of government, to develop more locally-based policy measures, except in the Free State where some effort was being made to develop the poverty alleviation strategy. The progressive policy measures of government were unfortunately not matched by the requisite financial resources to concretise government's commitment to the realisation of the right of access to social security. During the reporting period, some cuts occurred in critical programmes. Moreover, lack of financial management results in the under-utilisation of available financial resource, hence the prevalence of under-spending. However, and especially with regard to the Poverty Alleviation Programme, some progress with the utilisation of financial resources was noted. There is still a lot that government should do to specifically pay attention to groups identified in the protocol as deserving of special consideration in the design of policy, legislative and budgetary measures. Such an effort would require the development of reliable baseline information in order to develop a factual basis on the extent of the problem, which could then serve as the basis for the design of the measures.

However, the feedback systems were not well developed to provide a clearer picture of the degree of the impact of these measures. The limited information that is available, suggests that at the current pace of delivery there is still a long way to go before the state fully realises the right of access to social security and social assistance.

The Child Support Grant will need to be extended to all the children and should be accorded to children according to the needs of a particular child. The need for a reliable information system cannot be over emphasised, it is not only a duty on the part of the state to capture information concerning the rights of the child to social services but it is an obligation. From this information the state will be in a position to monitor the realisation of the right and also be in a position to comply with constitutional obligations. The alarming number of child sexual abuse cases is a constant reminder that children are not enjoying their right to social services. The best interests of the child should be of paramount importance in every matter concerning the child. The courts should be the upper guardian of the child.

ABBREVIATIONS

CEDAW	- International Convention on the Elimination of All Forms of Discrimination Against Women
CRC	- Convention on the Rights of the Child
CSG	- Child Support Grant
DSD	- Department of Social Development
FFC	- Financial and Fiscal Commission
ICESCR	- International Covenant on Economic, Social and Cultural Rights
ILO	- International Labour Organisation
MINCOMBUD	- Ministers' Committee on the Budget
NISWEL	- National Information System for Social Welfare
NGO's	- Non Governmental Organisations
SMG	- State Maintenance Grant
UN	- United Nations

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CHAPTER THREE

THE RIGHT TO EDUCATION

PART A: OVERVIEW

1 INTRODUCTION

The post-1994 government inherited an education system riddled with inequalities. The system was racially fragmented and characterised by a disproportionate distribution of resources with former white schools receiving more resources than schools of other racial groups. Multiple education authorities caused duplication and inefficiency. The system was also marked by lack of properly qualified educators for the vast majority of learners. Higher education was mostly restricted to the relatively well off families with the majority of students not having the means to access higher education.

The national Department of Education (NDE) received a constitutional mandate to put measures in place to realise the right to education. In its previous report to the South African Human Rights Commission, the department reported that it had instituted several policies and legislation towards the realisation of the right to education.

This chapter assesses information provided by national and provincial Departments of Education on measures instituted during 1999/2000. The analysis seeks to find out whether the measures contributed to the realisation of the right to education.

2 CONSTITUTIONAL OBLIGATIONS

Education rights are contained in s 29 of the Constitution. Section 29 (1) enshrines and protects the right to basic and further education for everyone.¹ The section provides that the state has to make further education progressively available and accessible. Accessibility means that the state should move towards removing barriers, including discrimination, to further education. Where reasonably practicable everyone is entitled to receive education in the language of his or her choice.² The right to education may be realised at an independent

¹ Section 29 (1) of the Constitution of the Republic of South Africa Act 108 1996 provides that “everyone has the right - (a) to basic education, including adult basic education.
(b) to further education, which the state through reasonable measures, must make progressively available and accessible”.

² Section 29 (2) provides that “everyone has the right to receive education in the official language or languages of their choice in public institutions where that education is reasonably practicable. 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 -

educational institution that may be subsidised by the state.³ Independent institutions should not be subjected to undue restrictions relating to finance. The fact that the state subsidises these institutions should not jeopardise their academic freedom.

The right in s 29 must be understood in the light of the aim of education. Education must be aimed at the full development of the human personality and instil a sense of dignity. It should also be aimed at enabling all persons to participate effectively in a free society.⁴ In the first instance, education should confer the ability to appreciate and exercise human rights; it should also develop learners' ability to make political and civil choices. Secondly, education should confer the necessary skills to enable recipients to enjoy and appreciate human existence, and participate in the economy. To this end, the content of the curricula forms an important part of the right to education and should provide the necessary skills to participate fully in society.

The right to education imposes an obligation on the state to put in place and maintain an education system, with educational programmes available in all its forms and at all levels.⁵ The state has to take steps to ensure that there are functioning educational institutions with education programmes and educators throughout its territory. The state has to build schools, employ educators and set curricula. Institutions and programmes should be accessible, that is, barriers to these institutions and programmes must be removed, for example, the removal of discrimination due to affordability or physical disability.

The education system should have the object of making education available, accessible, acceptable and adaptable. These elements apply to both basic and further education. Availability means that functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State Party. All institutions and programmes should have buildings or other protection from elements, sanitation facilities for girls and boys' safe drinking water; trained teachers; teaching materials; libraries; laboratories and computers.⁶

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- (a) equity
 - (b) practicability
 - (c) the need to redress the results of past racially discriminatory laws and practices."

³ Section 29 (3) provides " Everyone has the right to establish and maintain, at their own expense, independent private educational institutions that-

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standard at comparable public educational institutions."

Subsection 4 goes on to provide that " Subsection 3 does not preclude state subsidy for independent educational institutions."

⁴ Article 13 of the International Covenant on Economic, Social Cultural Rights (1966).

⁵ General Comment 13 (1999) para 6.

⁶ General Comments 13 (1999) para 6 (a).

Accessibility has three dimensions: non-discrimination, physical, economic accessibility. This means education institutions and programmes should be accessible to everyone without discrimination, and education institutions have to be within acceptable perimeters and be affordable to all.⁷ Where there are barriers the state should work towards removing them. To combat discrimination the state should outlaw discriminatory practices. One of the mechanisms to create equal opportunities is to make basic education compulsory and free, and eliminate differential treatment of learners that does not serve the public interest or purpose.⁸ Nonetheless, differential treatment of learners would be permissible for the purpose of securing adequate advancement of learners from certain groups who require special protection for them to be able to enjoy the right.⁹

Acceptability means the form and substance of education provided should be relevant, culturally acceptable and be of good quality. Adaptability means education should be flexible enough to adapt to societal changes, and the needs of learners within their diverse social and cultural settings.¹⁰

2.1 Basic education

Section 29(1)(a) enshrines the right to basic education, including adult basic education. The national qualification framework of the South African Qualification Authority defines basic education as education grades between R and 9. Adult basic education refers to education targeted at adults who lack basic education. The White Paper on Education defines basic education as a flexible concept to be defined so as to meet the learning needs appropriate to age and experience of the learner, and should also provide access to nationally recognised qualifications.¹¹ To this end, basic education should provide learners with minimum learning tools.

In line with the provisions of international instruments, the South African School Act states that education between grade R and 9 is compulsory, but unlike international instruments, falls short of stating that it is free.¹² In terms of international instruments, basic education should not only be compulsory but also free. Basic education should be compulsory so as to confer on young children basic skills and the appreciation of human rights. Denying young children basic education because their parents cannot pay

⁷ Ibid para 6 (b).

⁸ Article 4 Convention Against Discrimination in Education (1960).

⁹ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) para 39.

¹⁰ Ibid Para 6 (c) and (d).

¹¹ G E Devenish *A Commentary on the South Africa Bill Rights* (1999) 398.

¹² The following instruments provides for compulsory basic education:
Article 11 (3) of African Charter on the Rights and Welfare of the Child
Article 13 (2) of International Covenant on Economic, Social and Cultural Rights
Article 28 of the Convention on the Rights of the Child
Article 26 (1) of the Universal Declaration of Human Rights

for it detracts from the general aims of education and the obligation to make it compulsory.

The Committee on Economic, Social and Cultural Rights has stated that compulsory primary education means that “neither parents, guardians nor the state are entitled to treat as optional the decision of whether the child should have access to primary education.”¹³ Basic education equips children with necessary skills that shape their understanding of human worth. The impact of the denial of basic education on young children would mean that society and parents deny their children the means of survival and ability to exercise other rights.

The Committee has gone further to state that primary education should be free; alternatively the state has to move progressively to make it free.¹⁴ The Committee on the Convention on the Rights of the Child (CRC) interprets free basic education to mean that basic education should be made accessible to all children; accessible meaning free from barriers, especially financial barriers.¹⁵ To this end, the state should monitor the costs of education and discourage high costs of basic education, by taking responsibility for basic education and making it free to all. In appropriate circumstances, the state should act to keep the costs of basic education within the limits of the majority of its citizens through funding or subsidisation of schooling.

Basic education, unlike further education does not have an internal limitation of progressive realisation and limited resources. The state is obliged to ensure that every child within the school going age has access to primary education. The Committee further stated that a state cannot escape the unequivocal obligation to adopt a plan of action on the grounds that resources are not available. If the state is lacking in financial resources, the state could appeal to the international community for assistance.¹⁶ This means that lack of resources is not a justifiable ground for failure to take measures to realise the right to basic education; the state should pay due priority to the fulfilment of the right.

2.2 Further education

Section 29(1)(b) provides for the right to further education, which has to be progressively available and accessible. It comprises Further Education and Training (FET) and higher education. The National Qualifications Framework (NQF) defines FET as grade 10 to 12. The Constitution uses the phrase “progressively available”, which has the same underlying principles and meaning attached to the phrase “progressive realisation.” This means the state has to move swiftly towards ensuring that further education is accessible to everyone within available resources. Article

¹³ General Comment 11 (1999) para 6.

¹⁴ *Ibid* para 10.

¹⁵ UNICEF *Implementation Handbook for the Convention on the Rights of the Child* (1998) 378.

¹⁶ General Comment 11 (Note 13 above) para 9.

13(2)(c) of the ICESCR provides that further education should be made equally accessible to all, based on available capacity, and through every appropriate means. Even with this limitation the state has an obligation to take reasonable measures to make the right progressively available and accessible to everyone. The Committee on Economic, Social and Cultural Rights has stated that 'reasonable measures' means that the state must demonstrate that the measures are "deliberate, concrete and targeted as clearly as possible" towards meeting its obligations.¹⁷ The state has to show that it has a plan in place for the implementation of FET and higher learning institutions and the funding thereof. In the South African context, the state should continue to fund institutions of higher learning without compromising their independence; it should also fund students to facilitate access to higher education.

The Committee interprets progressive realisation to mean that the state is obliged 'to move as expeditiously and effectively as possible towards' the provision of the right to education.¹⁸ Under no circumstances shall states have the right to defer indefinitely, efforts to ensure the full realisation of the right. On the contrary, State Parties are obliged to begin immediately to take steps to fulfil their obligations under the Covenant.¹⁹

The Limburg Principles provide that the obligation of progressive achievement requires the effective use of available resources.²⁰ This means that whether the financial resources increase or decrease the state still has to progressively realise the right. The state is expected to move and shift resources according to needs. This would require that state funds be directed at increasing access for excluded groups. The state should also work towards having an FET system in place and increase the number of non-represented groups such as women, disabled people and African people. The Principles further provide that progressive implementation can be effected not only through increasing resources, but also by the development of societal resources necessary for the realisation of economic and social rights.²¹ This would mean that the state should train and maintain educators and build infrastructure.

In the case of the *Government of the Republic of South Africa and Others v. Grootboom and Others* the Constitutional Court indicated that the rate at which the right is achieved as well as the reasonableness of the measures employed are governed by the availability of resources.²² In delivering the judgement, the Court noted that the Constitution does not require the state to do more than its available resources permit. However the state must move towards progressively realising the rights in the Bill of Rights, by

¹⁷ General Comment 3 (1990) para 2.

¹⁸ Ibid para 9.

¹⁹ International Court of Justice *Economic Social and Cultural Rights: A compilation of essential documents* (1997) 82.

²⁰ Limburg Principles (note 9 above) para 23.

²¹ Ibid para 24.

²² *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR (CC) para 45.

having a comprehensive plan that considers all circumstances, where necessary the state should prioritise and shift resources accordingly.²³

3 KEY DEVELOPMENTS FOR THE YEAR UNDER REVIEW

3.1 Policy developments

The following were the key policy developments that took place during the year under review for both basic and the further educations bands:

- The development of the Draft White Paper for Adult Basic Education and Training (ABET)
- HIV/AIDS Policy
- Assessment Policy
- Education White Paper 3 – A Programme for the Transformation of Higher Education

Adult Basic Education

The Draft White Paper for ABET was released for public comment during the year 2000. The White Paper provides a policy framework for ABET implementation and support.²⁴ The Multi Year Implementation Plan (MYIP) has already been developed to help expand the number of public adult education learning centres.²⁵ The National Multi-Year Implementation Plan for Adults Education and Training Accreditation and Provision, is a plan to implement the vision of ABET. The Plan has provisions based upon principles and practices of equity, redress, development, reconstruction, access, integration, partnership, sustainable use of resources, a flexible curriculum, outcome based standard of attainment, the recognition of prior learning and cost effectiveness.²⁶ The measure is aimed at reducing the rate of illiteracy and innumeracy amongst adults.

HIV/AIDS policy

The policy on HIV/AIDS was instituted to manage the impact of HIV/AIDS. The policy intends to provide HIV/AIDS education and to prevent discrimination against people affected by and/or infected with HIV/AIDS. The policy prohibits medical testing of learners, students or educators. Learners, students and educators who are HIV-positive are not compelled to disclose their HIV/AIDS status. However, the department does support voluntary disclosure of HIV/AIDS status. Schools are required to take steps to eliminate the risk of transmission of the virus on school premises.

Assessment policy

²³ Ibid para 45.

²⁴ D Burger (ed) *South Africa Yearbook* (2000/01) 435.

²⁵ Ibid.

²⁶ Ibid 439.

The policy on school assessment was introduced, to address the problem of excessive repetition and dropout rates by learners.²⁷ The policy has shifted the emphasis from relying on year-end exams to continuous performance appraisal. The policy ensures access for other learners in that learners already in school do not take room for other learners when they repeat a grade. As the learners move up they create room for others thereby facilitating access.

Education White Paper 3 - Higher Education

The Education White Paper 3 seeks to transform higher education. This entails the incorporation of colleges, including education, agriculture and nursing colleges into the higher education system; and the merging of universities and technikons. This was deemed necessary to avoid duplication and waste of resources in the provision of higher education. There will also be the aligning of curricula of various institutions. The policy will create a coherent higher education system. It intends to promote the widening of learning areas that will include previously disadvantaged groups. The policy envisages to promote representivity.

3.2 Legislative developments

There were no major legislative developments relating to basic education and FET that took place during the year under review. Both the basic education and FET sectors saw amendments that did not add anything substantive to principal legislations. The draft ABET Bill and draft regulations for the National ABET Board were publicised during the year under review. The Bill is intended to provide a legislative framework for ABET implementation.

The higher education sector did experience a positive development with the passing of the National Student Financial Aid Scheme Act 56 of 1999. The Act seeks to establish a National Student Fund and to provide for its management and administration. The National Student Fund will grant loans and bursaries to eligible students at public higher education institutions. Another provision in the Act relates to measures of recovering loans from students.²⁸

3.3 The Budget

In the year 1999/2000 the national Department of Education was allocated a total budget of R46, 84 billion. R40, 23 billion was directed towards costs for college, primary and secondary school education, and R6, 61 billion was for universities and technikons.²⁹

²⁷ The Eradication of Poverty - Education at <http://www.polity.org.za/govdocs/reports/welfare/chapter2.html>. Site visited on 10/10/2000.

²⁸ National Financial Aid Scheme Act at <http://www.polity.org.za/govdocs/legislation/1999/act56.pdf>. Site visited 30/08/2001.

²⁹ Burger (note 24 above) 432.

In terms of the new budgetary system, provinces now allocate approximately 89 percent of their education budget. In 1998, a Review Team noted that the 1998/1999 provincial budgets were not financially and educationally realistic. On average, the education budget takes up 40 percent of the provincial budget, while 90 percent of the allocation is spent on personnel. The Review Team encouraged the reduction of the ratio over a period of time to 80:20 for better investment in non-personnel functions. For the interim, the Team proposed that the budget should shift progressively from 90:10 to 85:15 until the year 2005. This would allow the departments to retain educationally defensible staffing levels.³⁰

For the year 1999/2000 some of the provincial budgets have reflected the proposed shift, but the poorest provinces still showed a serious retrogression as regards non-personnel functions. This retrogressive allocation means that schools are still subjected to inadequate supply of learning materials and equipment. The skewed budgetary allocation also affected the school-building project and other capital works, particularly in poor rural provinces, which have inherited massive infrastructure backlogs.³¹

4 CONCLUSION

The national and provincial departments have taken steps to help realise the right to education. Examples are: the HIV/AIDS, funding and assessment policies. The provincial departments were in the process of implementing national policies; for example, Gauteng implemented the HIV/AIDS policy.

The measures instituted by the state are reasonable in that they are deliberately aimed at fulfilling the right to education, and are a first step in the progressive realisation of the right. Because the Constitution speaks of progressive realisation, the results can only be measured over time. However, progressive realisation imposes an obligation to move as expeditiously and effectively as possible towards the realisation of results.³² The NDE has done so by putting in place measures to facilitate the realisation of the right; provincial departments have also assisted with the provision of education. Research shows that numbers of learners have increased in 1999 to 12 313 899 and that the learner/teacher ratio has decreased to 32:8.³³

The measures are supported by budgetary allocations for implementation. Clearly there is a need to move quickly because of the backlog in education. Research shows that 13 262 schools have a shortage of classrooms, 3 293 have no toilets, 16 815 are without telephones, 15 911

³⁰ Ministry of Education *Status Report for the Minister of Education-June 1999* at <http://www.polity.org.za/govdocs/reports/education/statusreport.html>. Site visited 24/10/2000.

³¹ *Ibid.*

³² General Comment 3 (note 17 above) para 9.

³³ There were 12 071 355 learners with a learner/teacher ratio of 33:5 in 1998.

lack electricity and 6 503 have no water within walking distance. The department further reported that 8 141 195 learners are residing beyond a 5 km radius from schools.

There is a need to move expeditiously to provide facilities for education.

PART B: ANALYSIS OF REPORTS FROM ORGANS OF STATE

The national and provincial Departments of Education responded to questions in the protocols requiring information relating to the realisation of the right to education.

BASIC EDUCATION

1 POLICY MEASURES

1.1 National Sphere

The NDE stated that the report submitted was an update of the previous year's report. However, the section on policy measures was not sufficiently updated. The NDE only reported on Tirisano as one of the programmes instituted during the year under review.

Tirisano

Tirisano was a call for action made by the Minister of Education in July 1999. It is an implementation plan for a five-year period between 1999 and 2004. The plan was meant to ensure that existing policies were carried out with a sense of urgency and commitment to their success. Tirisano is also a tool for monitoring progress of existing policy. Tirisano focuses on nine priority areas.³⁴ The nine points intend to expedite implementation and delivery in education. Tirisano takes as urgent the delivery of education, and was a response to huge backlogs in education relating to lack of infrastructure, illiteracy rate and properly qualified educators. The call will see to it that learners in our schools receive education, and that quality was adhered to.

1.2 Provincial Sphere

Provincial departments instituted policy measures and programmes in line with national policies on the right to basic education. The Table below shows policies implemented by various provincial departments during the reviewing period. The Table shows that only four provinces reported on the policy measures instituted during the year under review. The reports

³⁴ Department of Education *Annual Report 1999* (1999) 12. The nine points are the following

- promoting co-operative government
- reduce illiteracy among adults in five years
- making schools centre of community life
- ending physical degradation of South African schools
- developing the professional quality of the teaching force
- urgent measure for dealing with HIV/AIDS
- implementing a responsive and unified higher education system
- creating a systematic FET
- implementing the outcomes-based education

by other provinces were either not specific to the year in question or contained no information on policy measures at all.

Table 1 Policies instituted at provincial level

INSTITUTED POLICY MEASURES	PROVINCES THAT HAVE INSTITUTED THE POLICY MEASURES
HIV/AIDS Policy	<ul style="list-style-type: none"> • Eastern Cape • Gauteng • Western Cape
Admissions Policy for Ordinary Public Schools	<ul style="list-style-type: none"> • Eastern Cape • Free State • Gauteng
National Norms and Standards for School Funding	<ul style="list-style-type: none"> • Eastern Cape • Gauteng • Western Cape
ABET Policy	<ul style="list-style-type: none"> • Eastern Cape • Northern Cape • North West • Western Cape

HIV/AIDS policy

The Eastern Cape, Gauteng and the Western Cape reported on the HIV/AIDS policy in their respective provinces.

The Eastern Cape formulated policy and strategies to address sex education and teenage pregnancy, as well as the HIV/AIDS policy.

Gauteng began the implementation of the National Policy on HIV/AIDS and has ensured that schools have the necessary equipment to deal with the safety of learners and educators in relation to exposure to HIV/AIDS by making available, first aid kits to disadvantaged schools. The department instituted a programme on teenage pregnancy. The programme was meant to address the provision of education to pregnant learners, including the right to attend both ordinary and hospital schools. The programme would ensure that learners complete the grade for the year in a safe environment.

In the Western Cape, para-educational services funded some of the expenses incurred for the primary school pilot project on HIV/AIDS, and School Aids Week.

Admission policy

The Gauteng, Eastern Cape and Free State Departments of Education instituted the Admission Policy.

During 1999, the GDE embarked on a process to ensure the implementation of the Admission Policy for access to public schools. The policy also addresses the rights and concerns of learners with special education needs in ordinary public schools. The policy also makes

provision for non-citizens.

The Free State circulated leaflets that provided information on the requirements and obligations for admission to public schools. The policy forbids the use of any form of testing for admission to public school. It also forbids refusal of admission if parents are unable to pay the required school fees.

The ECDE implemented the Admission Policy; and experienced a 20 percent drop in the enrolment of under-aged learners.

National Norms and Standard for Funding Public Schools

ECDE, GDE and WCDE reported on the national norms and standards for funding. The implementation of the National Norms and Standards for the Funding of Schools began during 1999.

The ECDE reported that the Norms and Standards for the Funding of Schools assisted with the registration of former Model C schools as Section 21 company schools, making them eligible for funding from the department.³⁵ The Eastern Cape reported that the funding policy has provisions for exemption from paying school fees for persons who cannot afford to pay.

In Gauteng the Norms and Standards was to be implemented at the beginning of April 2000. During 1999, the Poverty Survey was conducted to develop the Poverty Index that will be used to determine the level of funding for schools. A policy for the exemption of payment of school fees was instituted in 1998 as a mechanism for dealing with financial barriers to accessing basic education.

ABET policy

The Eastern Cape, Northern Cape, North West and Western Cape Departments of Education reported on programmes and policies in support of the national ABET programme. In the Eastern Cape a programme to transform night schools into Public Adult Learning Centres (PALC) was implemented. The PALC provide education for levels 2-7 in terms of the NQF instead of the matric and junior certificate. The Eastern Cape PALC has governing councils made up of educators, learners and community members. Through Adult Literacy Centres, adults were able to access education and improve their qualifications. The Ikhwelo Project was promoting skills development for adult learners in the province.

The Northern Cape Department of Education (NCDE) reported that no new policies had been instituted. However the department was implementing existing policies and programmes, such as the ABET policy and the Northern Cape Province Multi Year Implementation Plan (1998).

³⁵ A Section 21 Company is a company operating not for gain or profit.

The North West Department of Education (NWDE) reported that it had implemented the ABET Multi-Year-Plan and Policy. The department also reported that after the Ithuteng Campaign in the North West most people became aware of the provisions of ABET in the province.³⁶ Through training on OBE most people also became aware of their right to basic education in the policy formulation, governance and delivering ABET in the province.

The Western Cape Education Department's Adult Basic Education and Training adapted its Interim Policy and the Procedures for Community Learning Centres so that more adults could gain access to basic education.

1.2.1 Measures and constitutional obligations

The Eastern Cape reported that it respected the right to ABET by establishing Public Adult Learning Centres. The Admission Policy was effective in reducing the number of under aged learners.

The Free State took a non-tolerance stance towards discrimination in the province, especially racial discrimination. The Admission Policy was effective as it improved enrolment of other races in formerly whites-only schools.

The GDE indicated that the HIV/AIDS policy and the Teenage Pregnancy initiative protect the freedom of HIV-positive and pregnant learners against discrimination.

Rural schools in the Western Cape were established near learners' places of residence.

1.2.2 Vulnerable groups

Departments maintained that policies and programmes implemented paid special attention to needs of socially vulnerable groups. The Admission Policy and the National Norms on Funding Schools make special provision for learners from poor backgrounds. The Admission Policy forbids schools from refusing admission to a learner for failure to pay fees, while the funding policy provides for exemption of poor learners from paying fees. The policy also makes provision to fund schools from poor communities.

The HIV/AIDS policy addresses issues of discrimination against HIV positive learners and educators disallowing refusal of admission based on the learner's HIV status.

Refugee learners were also catered for by the Admission Policy. ABET policy takes care of adult learners or learners not in the mainstream

³⁶ The Department did not specify as to which category of people is being referred to.

education system. The policies in the education system did take the situation of vulnerable groups into account. All the measures mentioned above were particularly sensitive to learners with disabilities and female learners.

1.3 Critique

The response provided by the NDE was unsatisfactory. The department did not provide information on policies even though it had said the report was an update of the previous year's response. Numerous policies and programmes were instituted which the department could have reported on.

The measures that were instituted during the year 1999/2000 by the NDE, but not included in the report were the following:

- Admission Policy for Ordinary Public Schools
- HIV/AIDS policy for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions
- Assessment Policy
- National Norms and Standards for School Funding

Admission Policy for Ordinary Public Schools

This policy aims to achieve regularity in the progress of age cohorts through the school cycle, and curb the abuses of under age and over age enrolment.³⁷ The statistical age norm was outlined as the grade number plus 6, for example Grade 1+6 = 7. The policy provides uniform norms for the age of admission and brings uniformity into the process of admission into public schools across all provinces. The purpose of this policy was to provide a framework for all the provincial departments of education and governing bodies for developing the admission policy for schools.

A full audit of provincial readiness conducted by a consortium of consultants contracted by the Department of Education with the European Union support indicated that the Free State, Gauteng, KwaZulu-Natal, Northern Cape and Western Cape would be ready for full implementation of the policy in January 2000. Mpumalanga, North West, the Eastern Cape and Northern Province were not ready, with the latter two being particularly behind schedule.³⁸

HIV/AIDS policy

The national Department of Education (NDE) did not provide information on HIV/AIDS Policy. Other sources indicated that the NDE launched the

³⁷ Department of Education (note 34 above) 132.

³⁸ Minister of Education Report to the President at http://www.education.gov.za/Policies_Reports/Admission_ord_Public_Schools.htm. Site visited on 10/04/01.

HIV/AIDS Policy in September 1999. The crucial provisions of this policy are:³⁹

- non-discrimination of learners, students and educators infected with HIV
- the protection of confidentiality of learners and educators infected with HIV
- a safe school environment and HIV/AIDS education at all levels

This policy seeks to contribute towards promoting effective prevention and care within the context of the public education system. The premise of the policy was that learners, students and educators with HIV/AIDS will increasingly form part of the population of schools and institutions. The policy was therefore meant to protect all the learners in these circumstances through the promotion of equality and non-discrimination. No learner, student (or parent on behalf of a learner or student) or educator was compelled to disclose his or her HIV status to the school, institution or employer.

The policy also has provisions for all schools to implement universal precautions to eliminate the risk of transmission of all blood-borne pathogens, including HIV, in the school environment. The universal precautions were based on the assumption that in situations of potential exposure to HIV, all persons are potentially infected and all blood should be treated as such. All blood, open wounds, sores, breaks in the skin, gazes and open skin lesions, as well as body fluids and excretions, which could be stained or contaminated with blood, should be treated as potentially infectious.⁴⁰

Assessment policy

The assessment policy, which came into effect in 1999, applies to learning in the General Education and Training Band of the National Qualifications Framework (NQF) and grades R-9 in school education, and all four levels of Adult Basic Education and Training.⁴¹ The policy was developed in response to a need to phase in assessment practices compatible with the newly introduced Outcome Based Education. The approach was aimed at assisting students with learning problems.

According to this policy pupils have to meet expected levels of performance to be promoted from one grade to the next. Pupils should not spend more than four years in each phase and should, as a rule, progress with their age group. Continuous assessment will include a written and practical test at the end of the year. The process of assessment will involve a partnership between educators, students, parents and education support

³⁹ EPU *Quarterly Review of Education and Training* in South Africa Vol. 7 No.2 (2000) 19.

⁴⁰ Draft Education Policy on HIV/AIDS at

<http://www.education.pwv.gov.za/HIVAIDS/AIDSPolicy.htm>. Site visited on 10/04/01.

⁴¹ National Department of Education Assessment Policy

<http://www.polity.org.za/govdocs/regulations/1998/reg98-1718.html>. Site visited on 12/07/2000.

services. These education support services will include occupational and speech therapists and psychologists. In exceptional circumstances pupils who fail to meet expected levels of performance at the end of the year will be allowed to repeat that year. Learners experiencing problems need not repeat the year, they could receive additional support in a particular learning programme. Gifted children will also be identified and allowed to advance more rapidly through the education system.⁴² The policy will keep room available for the admission of learners into educational institutions.

National Norms and Standards for School Funding

The policy was meant to direct public funding to schools in a manner that promotes equity and redress, and contributes to the overall quality of education.⁴³ The main objective of the policy was to ensure that public funds for public schools were paid on a progressive scale according to need.

The Norms entail provincial education departments directing 60 percent of their non-personnel and non-capital resources towards the poorest 40 percent of the schools in the province. Schools were divided into five categories, based on needs. The poorest 20 percent receive 35 percent of resources, while the richest 20 percent of schools receive 5 percent of the resources available to provincial education departments. The NDE has set out certain categories according to which eligible, independent schools were subsidised.

Most of the provincial departments that reported on the policies and programmes instituted during the reporting period did not provide details on the measures. The departments failed to report on when the policies or programme were instituted, what the policy or programme entails, the purpose of instituting the policies and programmes and whether the policies and programmes fulfil their objectives and goals. The effectiveness of the policies or programmes to realise the right to basic education, including Adult Basic Education was not clearly stated. Most of the departments failed to indicate clearly the considerations given to vulnerable groups by the instituted measures.

The information provided suggests that no specific provisions were made to ensure that those previously disadvantaged enjoy the right to basic education, including the right to adult basic education. None of the provinces reported on a policy that ensures that the homeless and street children were afforded the right to basic education. Non-citizens (refugees and asylum seekers) seem to be receiving little attention because the responses had very little to report on them.

1.3.1 Critique of the Measures

⁴² Ibid.

⁴³ Department of Education (note 34 above) 47.

Admission policy

The Admissions Policy for Ordinary Public Schools should save government millions of rands because of the decreasing number of learners for grade R. The policy has shifted the burden onto parents to provide for childcare for their children who were below seven years. If there were a properly organised and affordable early childhood development system, there would not be a serious problem with the Admissions Policy. This is because the gap that has been created by the inaccessibility of early childhood development centres and the new age norm for grade R has infringed on the right to have access to basic education.

The department asserts that the policy is in accordance with international practice, and was justifiable on the grounds of the children's development level. Parents have expressed dissatisfaction with this new policy. Others pleaded for exceptions to the rule, whether on grounds of special aptitude, expectation or convenience. However, the department announced to the public that there would be no exception to the rule. The NDE stated that there was no test or criterion that could be applied equitably to judge special cases; all children would thus be treated equally.⁴⁴ During 2001 this became a subject of a court case in the Constitutional Court; the dispute being whether the age limit creates barriers to learning.

HIV/AIDS policy

The social and personal impact HIV/AIDS will have on learners, students and educators needs careful consideration. As the pandemic continues to spread a large number of learners and educators will be sick or dealing with illness or bereavement in the family, having lost parents, siblings or other close relatives. This also means schools will be severely affected by absenteeism, illness and death.⁴⁵ Therefore the department's policy on HIV/AIDS was a positive step towards dealing with the pandemic. The policy also protects the rights of those infected, by ensuring that any public institution of learning does not discriminate them against.

The provisions of the policy respect, protect, promote and fulfil the realisation of the right to basic education.

National Norms and Standards for Funding Public Schools

The policy ensures that the most needy schools receive the most funding. The provision shows departments' commitment to redressing the inequalities of the past, especially for previously disadvantaged schools.

⁴⁴ Minister of Education *Report on Education to the President* at <http://www.polity.org.za/govdocs/reports/education/report30-11-99a.html>. Site visited on 27/09/00.

⁴⁵ Department of Education Status Report for the Minister of Education -June 1999 at <http://www.polity.org.za/govdocs/reports/education/statusreport/html>. Site visited 24/10/2000.

Other sources have indicated that there were problems faced by provincial departments in implementing the policy. Funding according to the policy was in terms of three categories of expenditure, namely maintenance of school buildings, municipal services and utilities, and learner support materials. Therefore for learner support materials the schools should provide a basic package of R100 per learner. In most instances there were not enough funds for schools to provide the amount for the basic package. Thus priority was given to the most needy.⁴⁶

The challenge faced by provincial departments was to identify the most needy learners; they were required to produce a resource-targeting table, which was based on schools ranking to enable the progressive redistribution of funding to poor schools. The ranking of schools for each province has been complicated by the discrepancy between schools' rankings on the "poverty of the community" factor versus the "poverty of the school" factor. The flexibility of the policy on the definition of the "poverty of the community" has resulted in different interpretations being used by provincial departments. This resulted in inconsistencies in the allocation of funds across the provinces.

Clearly the policy was reasonable in its conception; the intention was to shift resources to where they were needed most. Implementation seems to pose problems in that provinces deviate from the set norms and standards, and also lack skilled numerical and statistical analysts.⁴⁷

1.4 Recommendations

There was a clear non-reporting by NDE; the department reported on measures reported in its previous report and also neglects to report on new developments that took place during the year under review. The department should report on policies instituted during the period under review. The reports should provide detailed information on policy measures instituted. In reporting on policies that are already in existence at the time of reporting, the departments should report on the effectiveness of the policies and whether they fulfil the intended purpose.

HIV/AIDS education must be intensified to save learners and educators from the ravages of this pandemic. Educators need to be well informed about the HIV/AIDS epidemic for them to be better able to teach about it. The NDE should seriously consider introducing sexuality education as part of the curriculum at an early stage.

The NDE needs to motivate for more expenditure on COLTS and the National School Building Programme for the continuation and acceleration of upgrading schools in terms of basic provisions. The NDE must develop strategies for the improved implementation and monitoring of COLTS.

⁴⁶ Redistribution of School Funding at <http://www.idasa.org.za/bis/briefs/brief48.htm>. Site visited 14/06/2001.

⁴⁷ Department of Education (note 34 above) 50.

The implementation of policies and programmes of the departments of education should prioritise the needs of vulnerable groups and the marginalised. More support by provincial departments to ECD centres is necessary to eliminate exploitation within the sector.

Tirisano is a good programme, which should be used as a tool with which existing policies could be evaluated and monitored.

The NDE should take effective measures to ensure that primary education is free to all.

2 LEGISLATIVE MEASURES

2.1 *National Sphere*

The NDE did not provide information on any new legislative measures; it just repeated legislation passed in previous years.

2.2 *Provincial Sphere*

Most provincial departments have adapted national to their respective provinces. However these legislative measures were outside the year under review and will not be discussed here.

In the Free State, the Free State Schools Education Act 2 of 2000 was passed. The Free State Act continues in the same principles as the national Schools Act. School Management Teams and School Governing Bodies were trained in the interpretation and implementation of the two laws.

The North West department has only provided measures instituted for the realisation of the right to Adult Basic Education. According to the report, the ABET Directorate in NDE has instructed ABET provincial heads to produce the ABET Bill which was expected to be promulgated at the end of 2000.

2.3 *Critique*

The response for the period under review was similar to the one submitted for the 1998/1999 reporting period.

Responses did not follow the format of the protocol. Questions on the right to basic education were mixed with the ones on further education. It should be noted that these are two distinct constitutional rights. The department was supposed to provide information on each of the rights.

Although the NDE has not reported on any legislative measures instituted during the year under review, independent research has shown that there

were two Acts passed. These were:

- Education Laws Amendment Act 48 of 1999
- Draft ABET Bill and Draft Regulations for the National ABET Board

The Education Laws Amendment Act amended various Acts relating to education in general. The amendments related to the South African Certification Council Act 85 of 1986, National Education Policy Act 27 of 1997, South African Schools Act 84 of 1996 and Employment of Educators Act 76 of 1998. The amendments related mainly to compositions of Boards and Councils and procedures.

The Draft ABET Bill sought to provide the legislative framework for the implementation of ABET policy.

It is unacceptable that more than half of the provinces has not submitted responses. It should also be emphasised that the provincial departments that failed to provide information have committed a serious violation of their constitutional obligation. Section 184(3) refers to all relevant organs of state, which include provincial departments.

The provincial departments that have responded did not provide satisfactory reports. To a large extent, the reports were not detailed. Only the Free State and Western Cape mentioned their own provincial legislation. Since provinces are responsible for implementing national legislation, provincial departments were supposed to have provided information on how they implemented such legislation. It is important though, that each province should have its own legislation adapted to provincial conditions.

It has been established, on the basis of research, that all provinces have passed their own legislation that regulate matters relating to education.⁴⁸ It is therefore incumbent upon provincial departments to provide information on those laws, and their impact on the constitutional right to basic education.

It should be acknowledged that the Constitution creates a positive obligation on the state to provide basic education, which includes adult basic education. The existence of the Education Amendment Act fulfils the requirement to have in place, legislative and other measures that are aimed at satisfying the right to education.⁴⁹ The Act passed during the year under review does not deviate from the state responsibility; it advances the purposes and objectives of the various principal Acts it amends. The Act is reasonable in that it does not constitute barriers to education. The Act is reasonable and does respect, protect, promote and fulfil the right to education.

⁴⁸ Butterworths Regional Legislation Service.

⁴⁹ General Comment 3 (note 17 above) para 3.

The publication of the ABET Bill also goes further in helping to realise the right to education. The Bill would ultimately provide a legislative framework for ABET implementation. The essence of making adult basic education a separate right is borne from the fact that there are differing educational needs for children and adults. In terms of international standards, basic education (fundamental education) extends to children, youth and adults, including older persons.⁵⁰ This requires that appropriate curricula and delivery systems be made available to learners of all ages.

There have been significant legislative developments in South Africa since the 1994 constitutional dispensation. However, there is still a high level of illiteracy and poor quality of education in the country, with 43 percent of children and 17 percent of youth being illiterate.⁵¹ The South African Schools Act does not provide basic education free, but only makes it compulsory for children between seven and 15 years to attend school. The Convention on the Rights of the Child provides that primary education should be compulsory and free to all.⁵² South Africa, as a State Party to the CRC, is obliged to comply with the CRC by making basic education free to all. Free and compulsory basic education will improve the level of literacy among the youth and children and enable adults and teenagers to participate freely and meaningfully in a democratic society.

The South African Schools Act of 1996 does not make provision for the respect of the right to basic education at private schools. It only provides that admission to public schools cannot be refused on the basis of inability to pay fees.

The responses from provincial departments did not provide adequate information on legislative measures. Though the Free State and Western Cape did provide information on their own legislation, they did not explain the impact of the legislation on the right to basic education. There has been no explanation of the impact of the South African Schools Act and how it was implemented in the provinces.

2.4 Recommendations

The right to basic education should be understood to include the right to adult basic education. This is in line with the Constitution and international law. The department should expedite legislative measures on ABET.

The NDE should provide separate reports on the right to basic education and further education. This is imperative for the purposes of assessing the status of each of these rights. The Constitution provides each of these rights as a separate right.

⁵⁰ See note 13 above.

⁵¹ UNESCO et al South Africa Report: Education for All 2000 Assessment (1999). See also the Overview Section *supra*.

⁵² Note 12 above.

3 BUDGETARY MEASURES

3.1 National Sphere

The information provided by the NDE on budgetary allocations showed that the allocation for education, as a percent of the GDP has decreased over the past three years. The allocation as a percent of the GDP, has decreased from 0,91 percent in 1998/1999 to 0,89 percent for 1999/2000. The budget allocation in real monetary terms is shown in the Table below.

Table 2 Total Allocation for Education

YEAR	TOTAL ALLOCATION	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
1998-1999	6 857 702 000	6 857 702 000	6 469 535 000
1999-2000	7 224 260 000	7 224 260 000	7 111 602 000
2000-2001	7 513 708 000	7 513 708 000	-

Table 2 indicates that the allocations for the NDE have increased over a period of three years. The Table also reveals a tendency to utilise less than the allocated amount by the department.

Budget adequacy: The NDE indicated that the allocation was not adequate, and that there was pressure for additional spending on education for redress, new services, demographic factors and the rationalisation process.

Due to the inadequate budget allocation the department encountered problems, especially with schools that had massive infrastructure backlogs. The inadequate budget has also resulted in inability to provide supplies and Learning Support Materials (LSM). The problem was worsened by the fact that +/-85 percent of the education budget was spent on personnel, and only +/-15 percent was available for non-personnel expenditure.

The NDE further stated that the massive inefficiencies in the system worsened budgetary inadequacies. For the year under review, the NDE secured a conditional grant of R272 million from Treasury in order to assist provincial departments to improve their management and professional services. Improving the management services would assist in reducing inefficiencies. The funds were also used in numerous projects in implementing some of the policies and programmes.

The additional grants that the NDE received were used in the most disadvantaged provinces such as the Eastern Cape, Free State, KwaZulu-Natal, Mpumalanga and the Northern Province. Although these provinces take precedence, other provinces were also considered.

Early Childhood Development

The budgetary allocation for ECD has increased from the previous year's allocation of R2, 880 million to R3, 900 million. However there is an

anticipated decrease in the allocation for the year 2000/2001 where approximately R2, 008 million will be allocated for ECD.

HIV/AIDS

Budgetary allocation for education on HIV/AIDS has increased from R34 000 in 1998/1999 to R300 000 for the financial year 1999/2000. According to the NDE the increase in the allocation was expected to continue for the year 2000/2001, to approximately R31, 295 million.

Adult Basic Education

Information from the NDE indicates that budgetary allocation for adult basic education will only begin in the year 2000/2001. For that year approximately R2, 233 million will be allocated for adult basic education.

The NDE did not account for variances in the budget allocation, and stated that the reason for not accounting for variances was that budgetary allocation for programmes was the responsibility of the provincial departments. Only the provincial departments were in the position to provide information on the budgetary allocation, expenditure and variances.

3.2 Provincial Sphere

Information provided by provincial departments of education on budgetary measures has been summarised in the Table below.

Table 3 Total budgetary allocations

PROVINCE	YEARS	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
Eastern Cape	1998/1999	6 910 311 000	6 584 959 000	6 584 959 000
	1999/2000	7 063 108 000	6 616 410 000	6 616 410 000
	2000/2001	7 187 095 000	7 297 132 000	5 458 589 000
Free-State	1998/1999	2 614 071 000	2 612 095 000	2 612 095 000
	1999/2000	2 847 392 000	2 785 296 000	2 785 296 000
	2000/2001	2 950 518 000	2 994 343 020	-
Gauteng	1998/1999	6 057 862 000	6 057 862 000	6 045 193 000
	1999/2000	6 475 246 000	6 475 246 000	6 310 203 000
	2000/2001	6 835 485 000	6 835 485 000	-
KwaZulu-Natal	1998/1999	6 869 000 000	-	7 123 820 000
	1999/2000	7 477 000 000	-	7 298 555 000
	2000/2001	7 840 000 000	7 840 464 000	-
Mpumalanga	1998/1999	2 665 130 000	-	2 624 320 000
	1999/2000	2 795 417 000	-	2 809 361 000
	2000/2001	2 817 630 000	3 000 000 000	-
Northern Cape	1998/1999	811 443 000	-	858 227 000
	1999/2000	838 328 000	-	850 828 000
	2000/2001	914 289 000	962 131 000	-
North West	1998/1999	3 096 125 000	3 315 668 000	3 195 735 000
	1999/2000	3 273 309 000	3 484 926 000	3 407 764 000
	2000/2001	3 517 050 000	3 517 050 000	3 517 050 000

Education rights

PROVINCE	YEARS	TOTAL ALLOCATION IN RANDB	PROJECTED EXPENDITURE IN RANDB	ACTUAL EXPENDITURE IN RANDB
Western Cape	1998/1999	3 866 195 000	3 866 195 000	3 866 195 000
	1999/2000	3 740 658 000	3 740 658 000	3 740 658 000
	2000/2001	4 038 644 000	4 038 644 000	-

The Eastern Cape, Free State, KwaZulu-Natal and Northern Cape did not provide information on the per capita allocation for all programmes and services. Only Gauteng, Mpumalanga, Northern Province and the Western Cape provided the per capita allocation for some of the programmes as represented in the Table below.

Table 4 Per capita allocation per province

PROVINCES	YEARS	PER CAPITA ALLOCATION IN RANDB
Gauteng	1998/1999	3 546
	1999/2000	3 790
	2000/2001	4 025
Mpumalanga	1998/1999	2 785
	1999/2000	3 012
	2000/2001	3 117
North West	1998/1999	2 842
	1999/2000	2 976
	2000/2001	3 190

The Table shows that the per capita allocations in the three provinces were very similar.

The Eastern Cape, Gauteng, KwaZulu-Natal, Mpumalanga, North West and Western Cape did not provide reasons for the variances in the budget allocation for most of the programmes. The Free State Department of Education stated that due to savings for the year 1999/2000 on personnel expenditure and outstanding commitments an amount of R43, 825 was rolled over to the 2000/01 financial years.

The Northern Cape Department of Education reported that the variances in the total allocation were due to over-expenditure on personnel, mainly attributed to excess of educators that were still in the system.

Early Childhood Development

Gauteng and Mpumalanga provinces did not provide information on budgetary allocation for ECD. Information from the provinces that reported on the budget has been summarised in the Table below:

Table 5 Budget allocations on ECD

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDB	PROJECTED EXPENDITURE IN RANDB	ACTUAL EXPENDITURE IN RANDB
Eastern Cape	1998/1999	4 386 641	-	4 386 641
	1999/2000	5 052 077	-	5 052 078
	2000/2001	4 287 423	-	-
Free-State	1998/1999	500 000	-	-
	1999/2000	2 612 000	2 024 000	2 024 000

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
	2000/2001	2 678 000	2 678 000	-
KwaZulu-Natal	1998/1999	4 000 000	-	4 045 219
	1999/2000	4 800 000	-	4 744 101
	2000/2001	4 800 000	4 800 000	-
Northern Cape	1998/1999	2 144 000	-	2 008 000
	1999/2000	3 559 000	-	3 392 000
	2000/2001	3 401 000	3 401 000	-
North West	1998/1999	3 597 000	3 507 000	-
	1999/2000	3 507 000	3 507 000	-
	2000/2001	3 507 000	3 507 000	3 507 000
Western Cape	1998/1999	2 306 000	2 306 000	2 306 000
	1999/2000	3 490 000	3 490 000	3 490 000
	2000/2001	2 734 000	2 734 000	-

The Western Cape Department of Education provided information on ECD for children with special education needs. The budget allocation increased from R4, 000,000 in 1998/1998 to R4, 100,000 for the financial year 1999/2000. A further increase to R4, 200,000 was also anticipated for the year 2000/2001. The Western Cape reported that it spent a total of R20, 000 per capita for each year in the past three years, for early childhood development for learners with special education needs. For early childhood development for ordinary education the WCDE had a per capita allocation of R634 in the year 1999/2000, which was slightly more than R489 for the year 1998/1999. A decrease was foreseen for the year 2000/2001 when a per capita amount of R427 was to be allocated.

In the Free State the variance for 1998/1999 was due to a nominal fee that was provided for the launch of a pilot project, which was not implemented. In 1999/2000 the variance was a result of non-government organisations that had not been paid in the financial year.

As already mentioned above, provincial departments were requested to indicate whether the allocated funds were adequate for the provision of early childhood development programmes. The Eastern Cape reported that the funds were insufficient, because the province has approximately 1 million children between the ages of 0-6 years the majority of who lived in rural areas. The Free State also reported that the funds were inadequate because ECD requires vast amounts of funding. KwaZulu-Natal also reported that budget allocation for ECD was insufficient because it only catered for subsidies to 250 sites. The funding only targeted grade R (6 years old) learners and no funding was allocated for children from birth to 6 years.

Asked whether any problems were experienced due to the budgetary constraints, the Eastern Cape reported that with the inception of the admission policy, many 6-year-old children were excluded from schooling. These children had no place to go to because most areas did not offer grade R, and the department using the limited budget allocation managed

to open 246 pilot schools for grade R. Problems experienced by the Free State Department of Education due to budget constraints included offering ECD services to only 87 pilot sites and 104 grade R classes. Proper management and control of the pilot project sites were also impossible because of insufficient personnel. Some of the problems encountered by KwaZulu-Natal include providing early childhood development to only 80 000 children, out of a total of 240 000 children who were 6 years old. Other problems included lack of personnel for proper implementation and monitoring and lack of meaningful expansion of services.

Provincial departments were asked whether any measures were taken to address the problem of inadequate budgetary allocation for this programme. The Eastern Cape indicated that it formed partnerships with organisations such as DIFD, USAID, Swiss Agency, Shoma and the Telkom Foundation in order to receive funding. Measures that were taken by the Free State Department of Education included the formation of an ECD Council to develop policy and plan for future developments. The department also developed a draft action plan for the implementation of grade R. Some of the measures taken by KwaZulu-Natal to address budget constraints include accessing funding from donors for training educators, provision of additional personnel and improvement of facilities. The projects catered for learners in rural areas, informal settlements and learners with disabilities. No special considerations were given to refugees and asylum seekers.

The Northern Cape Department of Education reported that budget allocation for ECD for grade R was inadequate, because the department was unable to purchase toys and meals for children in the centres. Parents were asked to provide meals and toys for their children.

In the North West the budgetary allocation was inadequate for providing a sustainable intervention strategy and the development of the early childhood development sector.

The Western Cape reported that the budget was insufficient for ECD-ELSEN, because more schools were needed but could not be built. Although not clearly stated that the budget was inadequate, the WCDE highlighted the fact that with additional funding, more children could be reached. Funding from other sources assisted in alleviating some of the problems.

Education on HIV/AIDS

Very few provinces provided information on the budgetary allocation for education on HIV/AIDS. The North West department did not provide information on budget allocation for education on HIV/AIDS. Western Cape reported that funding and the budget for HIV/AIDS was controlled by the national Departments of Health and Education, as well as the European Union, and that the money had not been released yet. Information on the provinces that reported has been summarised in the Table below.

Table 6 Budget allocation for Education on HIV/AIDS

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
Eastern Cape	1998/1999	-	-	-
	1999/2000	-	-	-
	2000/2001	4 500 000	2 000,000	1 775 000
Free-State	1998/1999	10 000 000	-	-
	1999/2000	10 000 000	2 200 000	2 200 000
	2000/2001	1 000 000	1 000 000	-
Gauteng	1998/1999	2 500 000	2 500 000	1 779 895
	1999/2000	4 000 000	4 030 000	3 446 000
	2000/2001	6 300 000	6 300 000	-
KwaZulu-Natal	1998/1999	-	-	-
	1999/2000	-	-	-
	2000/2001	4 600 000	-	-
Mpumalanga	1998/1999	-	-	-
	1999/2000	123 000	-	154 000
	2000/2001	2 400 000	2 473 000	-
Northern Cape	1998/1999	-	-	-
	1999/2000	-	-	-
	2000/2001	1 000 000	1 000 000	-
North West	1998/1999	-	-	-
	1999/2000	1 000 000	1 000 000	1 000 000
	2000/2001	4 793 000	4 793 000	4 793 000

Only the Mpumalanga department provided information on per capita allocation for education on HIV/AIDS, and R0, 45 was allocated in 1999/2000. The per capita amount was scheduled to increase to R8, 65 during 2000/2001.

The Eastern Cape had no budget allocation for HIV/AIDS until the year 2000, hence no information could be provided. Lack of funding resulted in the department being unable to carry out effective HIV/AIDS education. However, during the year 1999/2000 the ECDE formed partnerships with the Departments of Health and Welfare and some initiatives were taken to promote education about HIV/AIDS.

Since the Free State was one of the provinces where the pilot project for Life Skills and HIV/AIDS education for the year 1999/2000 took place, funding for the department from the NDE was sufficient. The pilot project targeted schools in rural areas, the homeless, low-income groups and previously disadvantaged communities.

In Gauteng the variance in the allocation was due to late allocation and accessing of funds for the year 1998/1999. For the year 1999/2000 R1 000 was allocated to each primary and secondary school respectively in order to kick-start the school based Life Skills/ HIV/AIDS activities.

In the Northern Cape Department of Education, the unit dealing with HIV/AIDS education was only established at the beginning of the year 2000. The department further reported that the allocation was insufficient and as a result monitoring of HIV/AIDS and Life Skills education was not done.

The department also had a shortage of educators due to budget constraints. Measures taken by the department to address the problem of inadequate staff included lobbying for donor funding for projects not covered by the allocation of the department.

Primary Education

Most provincial departments provided information on budgetary allocation for primary education. Only Gauteng, Mpumalanga and Northern Province did not provide information. Budgetary allocation for the other provinces is summarised in the Table below.

Table 7 Budget allocation for Primary Education

PROVINCE	YEARS	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
Eastern Cape	1998/1999	2 653 569 000	2 653 369 000	2 653 369 000
	1999/2000	2 804 901 000	2 804 901 000	2 804 901 000
	2000/2001	3 187 005 000	3 187 005 000	2 410 072 000
Free-State	1998/1999	1 041 396 000	1 041 396 000	1 057 254 000
	1999/2000	1 102 528 000	1 102 528 000	1 087 735 000
	2000/2001	1 125 025 000	1 132 917 000	-
KwaZulu-Natal	1998/1999	3 715 137 000	-	3 593 443 507
	1999/2000	3 805 730 000	-	3 873 893 999
	2000/2001	4 109 289 000	4 109 289 000	-
Northern Cape	1998/1999	326 724 000	-	313 833 000
	1999/2000	333 224 000	-	323 727 000
	2000/2001	488 868 000	-	-
North West	1998/1999	1 579 380 000	1 669 735 000	1 604 494 000
	1999/2000	1 671 636 000	1 756 711 000	1 701 521 000
	2000/2001	1 771 641 000	1 771 641 000	1 771 641 000
Western Cape	1998/1999	1 762 038 000	1 762 038 000	1 762 038 000
	1999/2000	1 733 892 000	1 733 892 000	1 733 892 000
	2000/2001	1 832 203 000	1 832 203 000	-

The North West province allocated a per capita amount of R2 332 for 1999/2000. The amount had decreased from a per capita allocation of R2 403 during 1998/1999. According to the North West department the amount was to increase to R2 466 for the financial year 2000/2001.

Per capita allocation for primary education for learners with special educational needs for the WCDE was R2 000 for the past three years. The allocation for learners in primary school was R3 324 for 1999/2000, whereas in 1998/1999 the department had spent R3 646. A slight increase was envisaged for the year 2000/2001 when R3 394 per capita will be allocated.

According to the information received from the Eastern Cape Department of Education, the increase in budget allocation resulted in an increase in allocation for primary education. Nevertheless, the department stated the amount was insufficient. As a result of budget constraints most primary schools lacked essential resources such as books and stationery. This made it impossible to implement OBE. Due to budget constraints some

schools had overcrowded classrooms, which also made it impossible to implement OBE.

ECDE could also not provide sufficient training to educators. Measures instituted by the ECDE to deal with budget constraints included lobbying for more funds for the year 2000/2001. The Imbewu project redesigned training for educators to be able to handle the classroom situation. Most of the departments' funds were spent in rural areas as the province was largely rural.

Funding for primary education was also insufficient in the Free State. In order to address this problem the department requested additional funding from the Provincial Treasury and the national Department of Education. The insufficient budget resulted in the department spending on current commitments only.

The Department of Education in KwaZulu-Natal reported that budget allocation for primary education fell far short of the required amount. As a result, the province had a high learner/educator ratio compared to all other provinces, and many supervisory and advisory posts were frozen. To try and address this problem the KZNDE directed funding to the most needy schools in the province. The redeployment and rationalisation process in the province had ensured that disadvantaged areas were better staffed. In the North West Department of Education also reported that the budget allocation was insufficient to afford quality education. The Northern Cape Department of Education reported that funding for primary education, including donor funds was sufficient for the provision of LSM and training.

The Department of Education in the Western Cape was the only one that provided information on the variances in the budget for primary education. The variance for 1998/1999 to 1999/2000 in the budget was due to the drop in enrolment as a result of the new admissions policy for grade one. For 1999/2000 to 2000/2001 the variance was a result of salary increases.

Adult Basic Education

The Gauteng and Mpumalanga Department of Education did not provide information on budget allocation for Adult Basic Education. Information on budget allocation for provincial departments on adult basic education programmes has been summarised in the Table below.

Table 8 Budget allocation for Adult Basic Education

PROVINCE	YEARS	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
Eastern Cape	1998/1999	99 773 000	99 772 000	50 000 000
	1999/2000	109 469 000	108 469 000	102 600 000
	2000/2001	967 772 000	95 900 000	-
Free-State	1998/1999	13 220 000	12 220 000	19 340 000
	1999/2000	43 868 000	43 868 000	28 704 000
	2000/2001	43 872 000	43 872 000	-

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PROVINCE	YEARS	TOTAL ALLOCATION IN RANDBS	PROJECTED EXPENDITURE IN RANDBS	ACTUAL EXPENDITURE IN RANDBS
KwaZulu-Natal	1998/1999	14 708 000	-	14 708 000
	1999/2000	20 316 000	-	20 316 000
	2000/2001	31 592 000	31 592 000	-
Northern Cape	1998/1999	6 393		2 572
	1999/2000	4 508	-	4 111
	2000/2001	4 537	4 537	-
North West	1998/1999	33 568 000	48 857 000	51 403 000
	1999/2000	35 595 000	39 618 000	46 157 000
	2000/2001	41 200 000	41 200 000	41 200 000
Western Cape	1998/1999	15 879 000	13 951 000	13 951 000
	1999/2000	13 800 000	18 097 000	18 097 000
	2000/2001	14 747 000	14 713 000	-

The only provinces that provided information on per capita allocation ABET was the North West and Western Cape. Per capita allocation in the North West was reported as R653 for the year 1998/1999, and increased to R693 for 1999/2000. An increase to R801 for the year 2000/2001 was expected. The Western Cape spent R856 during the year 1999/2000, which was slightly more than the previous year's allocation of R711, but more than the R647 allocation for the year 2000/2001.

According to the Eastern Cape, programmes for ABET were suspended during 1998/1999, while priority was given to other programmes. However for the year 1999/2000 the department found it difficult to implement the programme due to budget constraints. The Public Adult Learning Centres did not have the necessary equipment and learning materials. Lack of resources made it difficult for district co-ordinators to effectively run the programme, hence some learners dropped out. Measures taken by the department to address the budgetary constraints include applying for funding from USAID, SIDA and the European Union.

The KwaZulu-Natal department reported that although the budget for ABET was inadequate, it was in keeping with the department's present capacity to provide such education. To address the problem of lack of facilities, the department has requested that school-governing bodies allow the facilities to be used for adult basic education.

Funding was also insufficient for the Northern Cape and the department had to decrease the number of educators and cut down on the hours for tuition for adult learning centres. Due to budget constraints the department had to solicit funding in order to be able to purchase LSM and the development of educators.

Due to budget constraints in the North West, ABET did not reach the targeted audience. In the Western Cape insufficient budget has resulted in shortage of staff. However additional funding was received from business through partnerships formed with the department.

3.3 Critique

The national, as well as most provincial Departments of Education failed to provide information on the questions asked. There was no information provided relating to the reasons for the variances in the budget allocation, per capita allocation and projected expenditure, funds received from other sources and information on specific programmes. National and provincial departments did not answer questions relating to budgetary allocations giving special considerations to vulnerable groups. Although departments were asked to provide reasons for the lack of information, most of them did not do so.

The NDE reported that a conditional grant was made available to provincial departments for improving management and professional services. The department gave no indication on whether that money was used efficiently. When such funds were made available to provincial departments, there should be proper monitoring to ensure that the funds are used effectively and efficiently.

The North West Department of Education did not provide the actual amount spent for the financial year 1998/1999 and 1999/2000 on the ECD programme. Lack of information made it impossible to make a meaningful assessment of expenditure on the provision of ECD.

Generally the allocation of the budget to the provinces showed a nominal increase in terms of the total allocation and for some of the programmes.

Under/over spending: the information provided by the NDE indicated that not all the allocated funds were spent for the year 1999/2000, and even for the year 1998/1999. The information provided by the NDE for the year 1998/1999 showed that approximately R388 167 of the total allocation was not spent. In the year 1999/2000 the department did not spend approximately R112 658. This has serious implications for the provision of the right to education, especially when the same department claims that the allocation was inadequate for addressing backlogs in the provision of facilities. Information on the total budget allocation from the provincial departments indicated that the Eastern Cape, Free State, Gauteng and KwaZulu-Natal under-spent for the year 1999/2000 as indicated in Table 2 above.

The trend to under spend was also evident in the different programmes. The Free State, KwaZulu-Natal and Northern Cape departments under spent on the Early Childhood Development programme. Of the three provinces KwaZulu-Natal failed to spend an amount of R55 899 during the year 1999/2000. The KZNDE did not provide any reasons for under spending and yet according to its report not all the children could be reached, and there were insufficient personnel for proper implementation of the programme. Information on primary education also showed that provinces such as the Free State and Northern Cape under spent. No

reasons were given.

The expenditure trend of the total budget allocation of departments such as Mpumalanga, Northern Cape and North West showed over-spending for the period from 1998 to 2000. There was also over-spending by the KwaZulu-Natal and North West on primary education.

Under spending or over-spending exhibits that the department did not follow proper monitoring procedures. The fact that this went on shows that little attention was paid to the public finance management requirements

Personnel expenditure: the disproportionate allocation of the budget between personnel and non-personnel functions was the main cause of many problems. Information from the report of the Auditor-General indicated that the Minister of Education had declared that the acceptable norm for personnel expenditure should not exceed 80 percent of the departments' total allocation.⁵³ The report further indicated that departments must begin readjusting budget allocation, and that by the year 2005 all provincial departments should have achieved the target of 85 percent. The Table below suggests that most provincial departments were still struggling to rationalise personnel budgets.

Table 9 Personnel budgets as a percentage of the total budget at the provincial sphere

PROVINCE	1998/1999	1999/2000	2000/2001
Eastern Cape	92.0	85.9	90.9
Free State	80.0	88.0	85.7
Gauteng	86.5	88.6	88.4
KwaZulu-Natal	91.2	89.5	89.6
Mpumalanga	90.6	89.8	91.0
Northern Cape	84.3	82.7	83.9
Northern Province	91.2	94.0	90.1
North West	90.3	90.9	91.4
Western Cape	87.7	88.9	87.3

The Table above indicates that not much progress has been made towards reaching the set norm. Provincial departments need to reduce the proportion of personnel costs, to enable improved financing of non-personnel education services whose distribution was inadequate and inequitable.

Provinces need to rationalise personnel expenditure, whilst trying to provide sufficient educators for schools. Some schools still have insufficient educators, especially those teaching essential subjects such as mathematics, science and accounting;⁵⁴ whilst other schools have

⁵³ Auditor-General Summarised findings of Performance Audits conducted at certain Provincial Education departments at http://www.agsa.co.za/Reports/Performance%20Audit/RP45_2001.doc. site visited 13/06/2001.

⁵⁴ Ibid 6.

educators who have to work with limited resources to make the classroom environment conducive to teaching and learning.⁵⁵

The NDE has tried through its rationalisation process to ensure equal distribution of educators to all provinces, with emphasis on rural areas. However, slow progress has not improved the situation. There are still some schools that still have a shortage of educators. There was a farm school in the North West, which had no science teacher for almost half the school year, while the biology and history teacher came late for work.⁵⁶ Budget cuts also meant that vacant posts could not be filled.

Maladministration: Not only do the provincial departments encounter budget constraints due to the inadequate budgetary allocation, but also inefficiencies have made matters worse. The NDE has acknowledged that inefficiencies in the system have worsened the situation. Other sources revealed that inefficient procurement and distribution systems and the problematic tendering processes have caused the delays in delivering LSM on time.⁵⁷ Some schools receive their books very late in the year.

The failure by most provincial departments to update their leave records has resulted in the loss of millions of rands. The Auditor-General's report revealed that absenteeism amongst educators without proper leave forms submitted has affected teaching in schools, and cost provinces such as Mpumalanga millions paying for educators who only spend 27-56 percent official hours teaching compared to the stated norm of 85 percent.⁵⁸ The Eastern Cape and Gauteng departments were also experiencing the same problem of paying for educators who were absent from school most of the time. This problem of absenteeism impinges on the enjoyment of the right to education for learners, where learners were without a teacher for a long time because the principal was not given enough time to organise a substitute teacher.

Per capita allocation: the information provided by the provincial departments on the per capita allocation indicated that although the North West was allocated more funds, Mpumalanga still spent more (R3 012) per capita than the North West province at R2 976 per capita. The information provided on the ABET programme in terms of the total budget allocation, the WCDE received far less than the NWDE. However, the Western Cape still spent less per learner than the North West province for adult education for the year 1999/2000. The allocation was R711 per learner in the Western Cape and R963 per learner in the North West. According to the Norms and Standards for School Funding, schools should be funded according to their needs. Nevertheless, most provincial education departments were challenged by the size of total redress funding, given

⁵⁵ Oxfam International *Education – Break the Cycle of Poverty*, 239.

⁵⁶ 'Conditions in schools' *The Educators Voice* (2000), June/July, 14.

⁵⁷ Department of Education (note 34 above) 59.

⁵⁸ This was the norm set and published in Circular No. 154 of 1998.

the small share of non-personnel expenditure.⁵⁹ This constraint restricted the ability of provincial departments to effect meaningful distribution of redress funds to the majority of poor learners.

The A-Gs report also highlighted the fact that huge variances in the per capita allocation across provinces for education were due to over-age and under-aged learners at schools. Approximately 369 964 over-aged and under-aged learners were admitted to schools from 1996 to 1998 costing the departments R524 million.⁶⁰

The number of learners who repeat their grades also increased the burden on the per capita budget allocation.⁶¹ Therefore the remedial programmes that have been proposed by the Assessment Policy would greatly assist in ensuring that the number of children who repeated grades greatly reduced overtime. Hence it was important that the necessary institutional arrangements for the proper implementation and monitoring of the Assessment Policy be put in place.

Information from other sources reveals that the formula used to allocate the educational component of the equitable share to provinces was based on the distribution among the provinces of children between the ages of seven and eighteen. For the 1999/2000 financial years, 40 percent of the total equitable share to provinces was targeted towards education.⁶²

The total amount of money necessary to meet educational standards varies across and within provinces. The difference was to a large extent influenced by the environment and conditions in schools and the family backgrounds of the children. In some provinces a substantial proportion of learners were under the age of seven or over the age of eighteen.⁶³ The under- and over-age enrolment has had the effect of reducing resources available to educate school age learners.⁶⁴

Early Childhood Development: the government has a policy on ECD and for the year under review the departments allocation showed an increase from the previous years allocation of R2, 880 million to this years allocation of R3, 900 million. What was of concern was the envisaged decrease in the allocation for the year 2000/2001, where R2, 008 million was to be allocated for ECD. The NDE failed to indicate how the funds were allocated to the different provincial departments. Especially in view of the fact that in the previous section on policy, other sources reported that there was very limited assistance on early childhood development by government. One would assume that with the new

⁵⁹ Auditor-General Summarised findings of Performance Audits conducted at certain Provincial Education departments at http://www.agsa.co.za/Reports/Performance%20Audit/RP45_2001.doc. Site visited 13/06/2001.

⁶⁰ Ibid.

⁶¹ Financial and Fiscal Commission Recommendations (2001-2004) 27.

⁶² Ibid 27.

⁶³ Note 61 above, 28.

⁶⁴ Ibid.

admissions policy resulting in more children being out of school, more funds would be made available for early childhood development. The report from the NDE did not mention anything about ECD for learners with special education needs, and whether this budget includes provision for such. Early intervention services and facilities are important for learning and development, especially for learners with special education needs.

The WCDE should be commended for providing information on the budget allocation for ECD for learners with special education needs. None of the provinces seemed to have that information.

HIV/AIDS policy: in the year 1998/1999 the NDE had not fully set aside resources for the implementation of this policy. The increase from R34 000 to R300 000 for the year 1999/2000 attests to commitment to addressing this problem.

Provincial budget allocation for education on HIV/AIDS as indicated by Table 6 above has been very minimal. Most provinces were thus unable to fully implement the policy.

The Gauteng Department of Education stated that an amount of R1 000 was allocated to each school for activities on HIV/AIDS. However, no indication was given as to whether the funds were supplementing already existing funds in schools or the R1 000 was the only money schools were dependent on for such activities.

Adult Basic Education and Training: the high illiteracy rate of 17 percent for young adults and 33.4 percent for the youth has made the provision of adult basic education a priority. Combating illiteracy is a priority for both the ABET policy and Tirisano, hence the NDE started allocating funds for the implementation of the ABET policy. Lack of budgetary allocation for the financial year 1998/1999 and 1999/2000 suggests that the provision of adult basic education had not been given much attention in terms of implementation. Only until the year 2000/2001 when funds will be allocated for adult basic education can one assume that government was moving more towards the implementation of the policy.

3.4 Recommendations

It appears that provincial departments have a problem with spending budgets effectively. The departments should follow the Public Finance Management Act when they deal with the allocations. The NDE should incapacitate provincial departments so that they have better administration; spend resources effectively and efficiently. Where provinces fail the NDE should take over the administration of the budget.

For an equitable share of the budget, education allocation should be calculated on a per capita share per province taking geographic and demographic factors into account. There should be constant review of the

expenditure process so as to identify shortfalls and facilitate implementation of corrective measures.

Provincial departments must develop measures that will assist in increasing the proportion of non-personnel expenditure. Management training should also encompass financial management for improved management of schools and resources available.

4 OUTCOMES

4.1 National Sphere

The departments were required to provide information on the number of children in ECD and primary schools. They were also required to provide information on learner/educator ratio and to be specific on the Net Enrolment Ratio and Gross Enrolment Ratio. The departments were also required to provide information on the number of primary schools and ECD centres and their conditions.

The NDE reported that there were 223 417 learners accessing early childhood development in the country. The number includes both pre-primary learners attached to schools and those in separate pre-primary/ECD centres.

In providing information on primary education the NDE reported that there were 8 085 136 learners that had access to primary school education. Of those, 3 973 829 were females and 105 390 were learners with special education needs. The average learner/educator ratio at primary schools was 35:1.

The Net Enrolment Ratio (NER), which is the number of appropriately aged learners who were in primary school as a proportion of the corresponding age group in the population is 88 percent. The total Gross Enrolment Ratio (GER), which is the number of learners enrolled in primary school as a proportion of the appropriate age group in the population, is 106 percent. The NER and GER for females as reported by the NDE are 63 percent and 95 percent respectively.

The NDE reported that there were 294 566 learners who were receiving adult basic education. Of that total, 200 882 were female learners. The learner /educator ratio for learners receiving adult education is 18:1 for males and 19:1 for females.

According to the NDE approximately 15,7 percent of children between the ages of 6-14 years were out of school in the country as a whole. The following Table shows the breakdown of the different categories of out-of-school children:

Table 10 Out-of-School Children

CHARACTERISTIC	PERCENTAGE
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CHARACTERISTIC	PERCENTAGE
Residence: Urban	11.4
Rural	19.1
Population group: Africans	17.3
Coloureds	9.4
Indians	4.5
Whites	9.3
Provinces: Eastern Cape	18.8
Free State	11.3
Gauteng	12.0
KwaZulu-Natal	16.5
Mpumalanga	15.6
Northern Cape	14.6
Northern Province	18.0
North West	17.8
Western Cape	9.9
Gender: Males	16.6
Females	14.9

The Table shows the percentage of learners not attending school according categories relating to population group, gender and province.

The information on general indicators showed that the adult literacy (15-18 years) rate was 83.3 percent, 85.4 percent amongst females and 81.1 percent amongst males. The Adult literacy rate for persons aged 18 years and above was 66.6 percent, 65.9 percent and 67.4 percent for females and males respectively.

Approximately 4 719 489 learners had access to feeding schemes for the year 1999/2000. The number of learners for the year 1998/1999 was 4 830 098 and 5 021 575 for 1997/1998, thus showing a decrease in the number of learners receiving assistance through this programme. This may be explained by the decline in the number of primary school learners from 8 046 455 in 1998/1999 to 7 928 844 in 1999/2000.

4.2 Provincial Sphere

The only provincial education departments that provided information for the outcomes section were the Free State, Gauteng, Mpumalanga, Northern Cape and the Eastern Cape. The information was insufficient.

Early Childhood Development

The Eastern Cape Department of Education had 8 473 learners with access to ECD. The Northern Cape Department of Education reported that it had approximately 58 550 learners in Grade R-3, and 2 131 learners in informal settlements and rural areas. The Western Cape Department's report indicated that there were over 200 ECD learners with special education needs. The number of these learners in informal settlements and previously disadvantaged racial groups was 28. There were 90 000 eligible learners for ECD.

Primary Education

The information on the number of learners in primary school in the provinces showed that the Eastern Cape has 1 321 523 and the Free State has 746 669 learners. Of those learners in the Free State 338 267 were females, 492 801 were from the rural areas and 11 471 were learners with special needs. In addition to this information the FSDE indicated that there were 34 339 learners over the age of 15 in primary school. Of those, 17 887 were females and 22 703 were from rural areas. The number of learners from previously disadvantaged racial groups was 671 669 in total, 349 267 of which were females, 44 301 were from rural areas and 6 147 were learners with special needs. In the Northern Cape there were 93 922 learners in primary school, 46 429 of these were females. The number of learners from previously disadvantaged racial groups was 78 731, and 41 321 were females.

Information received from the Western Cape Department of Education indicates that there were 604 534 learners in primary schools. Of those, 298 546 were females. The Net Enrolment Ratio for learner's aged 7-13 was 0.95 percent and 0.95 for females. The Gross Enrolment Ratio for learners aged 7-15 was 1.0 and 0.99 for females. The department reported separately on primary education for learners with special education needs. The learner/educator ratio for ELSEN primary schools was 1:12. The number of learners was approximately +/-11 000, and the pass rate for learners per grade was 90 percent. The number of children completing school above the normal age of 15 was +/-100 percent. The schools have +/-75 percent learners from previously disadvantaged racial groups. Only the Western Cape provided information on the number of learners in prison, which was 403.

With regard to information on the learner/educator ratio, the Eastern Cape Department of Education reported that for primary schools the ratio was 37:1, whereas in the Free State it was 30:1. In the Northern Cape the learner/educator ratio was 31:1, for females it was 15:1, in the rural areas the ratio was 13:1, and for learners with special education needs, 11:1. The Western Cape had a learner/educator ratio of 25:1 in primary schools.

Adult Basic Education and Training

Information provided by the Eastern Cape Department of Education on adult basic education showed that there were 65 538 adult learners in the provinces. Of that total, 21 491 were learners from rural areas, 43 547 were learners from urban areas and 46182 were females. In the Free State there were 12 288 adult basic education learners and 8 076 of this number were females; the total number of disabled learners was 35.

In the Northern Cape the number of learners receiving adult basic education was 6 000, and of those 3 600 were from rural areas and 3 780 were females. The Northern Cape Department of Education reported that there were 900 learners in informal settlements, of those 540 were learners

from rural areas, 570 were female learners. According to the Northern Cape Department of Education there were 2 580 unemployed learners, of those 1 548 were from rural areas and 1 625 were females.

The Western Cape Department of Education reported that there were 25 493 learners receiving adult basic education, of those 17 706 were in the urban areas and 7 787 in rural areas. The number of learners in informal settlements was 8 996, of those 8 732 were in urban areas and 264 in the rural areas.

In the Eastern Cape the learner/educator ratio was reported as 1:36. The number of learners from informal settlements was approximately 21 496 learners who come from townships where informal areas were closely adjacent to the centres. Information from the Northern Cape indicates that the learner/educator ratio was 1:25, for urban areas the ratio was 1:30 and 1:20 for rural areas.

School Feeding Programme

The Eastern Cape Department of Education reported that feeding programmes assisted 967 331 learners, who were from previously disadvantaged racial groups. Of those, 258 000 were from informal settlements. In the Free State 7 958 learners were from rural areas and 21 454 were from urban areas who benefited from the feeding programme. The Northern Cape Department of Education reported that 1 183 555 learners benefited from the feeding programme. Within that total 49 275 were learners from urban areas and 69 065 were from rural areas. The WCDE did not provide information on the feeding programmes.

General Indicators

The provincial departments of education were required to provide information on the literacy rate for persons below 15 years of age, 15 to 18 years and persons aged 18 and above. The departments were also required to provide information on school going children who were not able to attend school.

Most of the provinces provided the literacy rate as a whole number and not as a percentage. The Eastern Cape was one of those provinces which reported that 65 638 persons aged 18 years and above were literate. Within that total 46 182 were females and 18 856 were males. The Free State has 963 persons aged between 15 and 19 years. Of that total, 593 were females and 370 were males. In Mpumalanga 53 percent of the adult population were illiterate.

The Northern Cape Department of Education reported that for persons below the age of 15 years, 65 percent of them were literate.

4.3 Critique

Information on the number of learners in ordinary public schools (Primary and Secondary) that was provided by the NDE was similar to the information provided in the 1998/1999 reporting period. Most of the statistics remained unchanged. The NDE used data from the 1996 schools register of needs. This makes it difficult to assess whether there has been progressive realisation of the right. Information on early childhood development, primary education, adult basic education, feeding programme for previously disadvantaged racial groups, refugees and asylum seekers was not provided. The NDE also failed to indicate the pass rate per grade on primary education.

Most provincial departments failed to respond to questions in the protocol. Lack of information on the outcome section questions the effectiveness of the measures instituted by the departments. KwaZulu-Natal indicated that all the statistics for the outcomes section were unavailable. The North West Department of Education did not provide the information for the outcome measures but indicated that would provide the information at a later stage. The Free State, Gauteng, Mpumalanga, Northern Cape and the Eastern Cape Departments of Education provided insufficient information.

The Gauteng Department of Education reported on outcomes but did not provide all the information on basic education. The department did not have information on the literacy rate; stating that statistics were not available.

Although the KwaZulu-Natal Department of Education had reported that statistics were not available for the outcome section, information on the learner/educator ratio for primary education was provided. The same ratio was reported for females, and for learners with special needs the ratio was 10:1. Information on the number of children excluded due to lack of school fees, as well as the number of children excluded due to lack of school uniforms was not provided.

The learner/educator ratio increased from 30.1 in 1997 to 33.1 in 1999, showing that there was an increase in the number of learners.

Lack of information from KwaZulu Natal made it impossible to assess the realisation of the right. Other provinces provided incomplete information, especially with regard to vulnerable groups.

The learner: educator ratio showed an increase in the number of learners. Mpumalanga was the only province, which showed a ratio above 38:1. The other provinces show an average of 32:1. Gauteng had the lowest ratio of 25:1. However there was no corresponding increase in the number of educators or the number of classrooms, meaning that there were few educators for an increasing number of learners and shortage of classrooms for these learners.

The information provided by provincial departments, shows that the number of female learners receiving education was increasing.

The Department of Education was not performing its duties efficiently to realise the right to education. There was slow progress in redressing past inequalities because the number of children out of school from learners living in rural areas was higher than for urban areas. The majority of the learners were Africans, the previously disadvantaged and most vulnerable.

The Eastern Cape Department of Education provided inconsistent and unreliable information on ABET. This kind of information is not acceptable. Immediate action has to be taken by the Mpumalanga Department of Education to address the serious problem of illiteracy, which affects half the population in the province.

4.4 Recommendation

The section on outcomes reveals that provinces did not have information on many of the questions asked. This shows that the monitoring system is not functioning properly. The departments should keep proper information systems so that they are able to produce data that is requested.

5 NATIONAL ACTION PLAN (NAP)

5.1 National Sphere

Information provided by the department on the National Action Plan indicates that there were 27 066 schools in the country. Of this total 13 262 had a shortage of classrooms, 3 293 schools had no toilets, 16 815 had no telephones, 15 911 had no electricity and 6 503 had no water within walking distance. The department further reported that 8 141 195 learners were residing beyond the 5 km radius from schools.

Information on facilities that contribute to the quality of education showed that 25 226 schools had no computers, 25 506 had no laboratories, 73,5 percent had no libraries and 13 345 had no access to recreational facilities.

5.2 Provincial Sphere

The provincial departments were requested to provide information on the total number of schools, those in disrepair, and those with lack of services and infrastructure. Information received from provincial reports on the total number of schools is summarised in the Tables below.

Table 11 Total numbers of schools

PROVINCE	TOTAL	URBAN	RURAL
Free-State	2 533	999	1 543
Gauteng	529	495	34
KwaZulu-Natal	5 969	4 742	1 227
Mpumalanga	2 317	-	2 317

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PROVINCE	TOTAL	URBAN	RURAL
Northern Cape	485	366	119
North West	2 322	1 871	451
Western Cape	1 509	-	-

Information provided on the number of schools with buildings in disrepair indicated that the Free State had 216, and of those 182 were in urban areas and the remaining 34 in rural areas. In KwaZulu-Natal there were 1 528 schools in a state of disrepair. Of these, 1 352 were in urban areas, and the remaining 176 were in rural areas. According to the report provided by the Mpumalanga Department of Education there were only 58 schools in a state of disrepair, all of which located in rural areas. The North West province has 145 schools in disrepair, and of those 107 were in urban areas and 38 in rural areas. The Northern Cape only had 7, 2 in urban areas and 5 in rural areas. The Western Cape has the second highest number of schools in disrepair at 706. The GDE provided a complete breakdown in terms of the nature of the disrepair in the Table below.

Table 12 GDE Schools in Disrepair

CHARACTERISTICS	TOTAL	URBAN	RURAL
Roof	382	319	63
Windows	263	203	60
Doors	377	307	70
Walls	264	216	48
Floors	349	295	54

Most provinces still had a shortage of classrooms due to inadequate allocation as indicated in the previous section on budgetary measures. Only the GDE reported that there were no schools with classroom shortages. In the Free State there were 243, of that total 172 were in urban areas, whilst 71 were in rural areas. KwaZulu-Natal had more schools with a short supply of classrooms with 3 671, more than half (3 106) were in urban areas and only 262 were in rural areas. The Mpumalanga province only had 782 schools in rural areas that have class shortages. In the North West there were 1 579 schools that have class shortages, and 1 317 were in urban areas, with the remaining schools found in rural areas. The Northern Cape had only 26 schools with class shortages, of which 7 schools were in urban areas and 19 in rural areas. The Western Cape had 186 schools with classroom shortages.

Only Gauteng and Mpumalanga Departments of Education provided information on schools that have inadequate textbooks. There were 114 such schools in Gauteng and 2 317 in Mpumalanga. Of the ones in Gauteng 104 were in the urban areas and only 10 in the rural areas, whilst in Mpumalanga all the schools were in the rural areas.

There was very little information provided on learners that reside beyond the 5km radius from schools. In Mpumalanga there were 15 220 learners and in the North West there were 168 201 learners that resided beyond this radius.

5.3 Critique

From the information provided many schools still had inadequate facilities for proper learning and teaching, compromising the quality of education received by learners in these schools. The information provided by the NDE is outdated, whilst most of the provinces indicated that the departments do not collect the information requested. The quality of education depends on the conditions in the learning institutions, and the realisation of the right to basic education is hampered by appalling conditions. The long distances to school exclude many children from education. Lack of access to water in schools, and inadequate toilet facilities pose health risks to children, and also create a deterrent to enrolment and a poor learning environment.⁶⁵

Basic education includes the elements of availability, accessibility, acceptability, and adaptability.⁶⁶ The element of availability is not sufficiently met by the Department of Education as seen from information in the outcomes section. The information showed that out of a total number of 27 000 learners, only 2000 had access to laboratories, computers and libraries.

Accessibility requires that those education institutions and programmes be accessible to everyone without discrimination, within the jurisdiction of the state party.⁶⁷ Learners from rural areas are not within easy access of the school, and have to walk long distances to school. Problems like these affect the rights of learners to enjoy the right to basic education and they need to be addressed as a matter of urgency. It is also unfortunate to find information from the Departments of Education indicating that Africans from rural areas top the list of dropouts. Although no reason was provided for this, an assumption can be made that long distances is one of the reasons for the high dropout rate, especially for girl children.

The Copenhagen Declaration provides that there should be formulation of national strategies for the eradication of illiteracy and universalisation of basic education, which includes early childhood education, primary education and education for the illiterate in all communities.

The right to basic education cannot be achieved as long as there are still children who are subjected to inadequate access to teaching materials, shortage of classrooms, lack of access to library facilities, lack of access to laboratories, lack of access to computers and schools without electricity or telephones.⁶⁸ Budgetary allocations should be geared towards the provision of basic infrastructure, facilities and learning materials.

5.4 Recommendation

⁶⁵ Ibid 239.

⁶⁶ General Comment 13 (note above 5) para 6.

⁶⁷ Ibid.

⁶⁸ Financial Commission (note 61 above).

Education rights

The situation in most primary schools is not conducive to learning. departments should move swiftly to address this problem; wherever possible they should move funds to the provision of infrastructure for education. Where appropriate the departments should engage other state departments in providing infrastructure.

FURTHER EDUCATION

1 POLICY MEASURES

The NDE was asked to provide information on the measures it has instituted to help with the progressive realisation of the right to further education. The response indicated that most of the policy measures and programmes instituted with regard to basic education are also applicable to further education. Therefore measures discussed under basic education will not be discussed again in this section.

1.1 National Sphere

The NDE did not provide information on policy measures or programmes instituted during the year under review which were specific to further education.

1.2 Provincial Sphere

Most provincial departments of education were in the process of implementing the national policy on further education. Only the Eastern Cape, Gauteng, KwaZulu-Natal, Northern Cape, and North West Departments of Education provided information on further education. The national policy on whole school evaluation was still being developed at the national sphere and it had not yet filtered down to the provinces.

Education White Paper on FET

The Eastern Cape Department of Education (ECDE) reported that it started implementing the policy on further education institutions, (these being secondary schools and colleges). The ECDE was also in the process of implementing the national and provincial strategy for further education and also reorganising the FET sector.

Information provided by the Gauteng Department was not specific to the FET policy. The information was on secondary schools, excluding colleges. The department reported on the programme called the Education Action Zones and Poorly Performing Schools, which dealt with the improvement of learning opportunities in secondary and feeder schools. The other programme reported was the Senior Secondary Improvement Programme, which was aimed at improving learner performance in subjects such as Mathematics, Physical Science, English Second Language, Biology and Accounting.

The KwaZulu-Natal Department of Education reported that they had only started planning towards the establishment of the FET sector. Mpumalanga Department of Education was still drafting its policy on further education. The Northern Cape Department of Education appointed a task team that had already identified secondary schools, comprehensive schools and

technical colleges as targets for the initial stage of the FET transformation process.

The North West Department of Education (NWDE) produced a detailed plan for the promotion of the FET sector.⁶⁹ The plan included the setting aside of schools and colleges as FET institutions. To promote further education the NWDE earmarked generous funding for the recruitment of tutors for the FET institutions. The department was also to encourage partnerships with institutions of higher learning. The measures would benefit school going children, out of school youths, young adults and the broader community.

The Western Cape also introduced the draft FET legislation in the provincial legislature. The draft legislation introduces policy on merger of technical colleges and other institutions of further education, and the formation of a Trust to promote access to technical colleges and to provide new sites in previously under-serviced areas.

1.2.1 Measures and constitutional obligations

The GDE reported that its Teenage Pregnancy initiative, which allows pregnant learners to continue with their schooling, along with HIV/AIDS policy promote access for learners in those categories.

MDE guidelines on FET were developed in such a way that the Constitutional right of learners was respected and protected.

NWDE reported that its FET sector did respect, protect, promote and fulfil the right to education because colleges increased their intake of needy students. Accommodation at these colleges was offered at reasonable costs.

1.2.2 Special considerations given to vulnerable groups

GDE reported that all its policies and programmes applied equally to all learners and focus on redress and equity for disadvantaged communities.

NWDE indicated that accommodation at college was reasonably priced for learners from rural areas and where possible it provided satellite colleges. For people living in informal settlements the NWDE supported community-based FET institutions in Rustenburg and Mabopane. NWDE also catered for the disabled learners by providing career oriented FET programmes in their schools. For learners from low-income groups the NWDE have available, a bursary and skills enhancement programmes that may lead to self-employment and income generation.

⁶⁹ Department of Education *Further Education and Training Policy Research Proposal and Business Plan* (2000).

1.3 Critique

As already mentioned the NDE provided the same information as in the 1998/1999 report for the policy section. The report failed to mention important developments that took place during the year under review. Research reveals that the following measures were instituted.

- Education White Paper 3 - A Programme for the Transformation of Further Education and Training
- National Policy on Whole School Evaluation

Education White Paper on FET

The White Paper establishes government's policy on further education and training. Its main aim is to re-conceptualise further education and training, and align it with the needs of the country and the economy. The objective of the White Paper is to provide a broad range of learning areas and interests for learners, and redefine the role of technical and community colleges to become progressive further education and training institutions. The National Board for Further Education and Training was appointed to devise strategies to implement the Paper.⁷⁰ The White Paper states that for the next five years (starting from 1998), the provincial departments will develop policy and targets for the senior secondary phase of schooling. During this period individual schools will be required to develop their missions and plans as provided for in the South African Schools Act (SASA).⁷¹

The transformation process will, for the interim not affect the funding of schools, as all schools would still continue to be funded in terms of the National Norms and Standards for School Funding determined by SASA. For the interim, partnerships between schools and further education colleges will be encouraged for the sharing of resources, and the creation of meaningful opportunities for learners in the sector. One of the short to medium term goals of the White Paper was the inclusion of support services and counselling, which are central to the FET system. The NDE has also initiated a review of the Youth/Community Colleges Programme to align it with the Further Education and Training Policy.⁷²

The NDE indicated that FET did not intend to exclude any group of learners. The policy was aimed particularly at including learners from rural areas and female learners in study fields.

The further education and training system is a very significant part of education. The sector is important for the social, economic and human resource development of the country. In the overview section it was

⁷⁰ Ibid.

⁷¹ South African Schools Act 84 of 1996.

⁷² Department of Education (note 69 above).

mentioned that education must be relevant to needs of learners and society, and must help promote a person's sense of dignity and enable all persons to participate effectively in a free society. The transformation is geared to making further education relevant for the needs of the country. It also attempts to expand the field of further education to include a large number of learners. It maintains three bands of education in the education system in various forms.

The right to education has implications for the enjoyment of all human rights. Hence the Committee stated that the right to receive education imposes an obligation on the state to develop and maintain a system of education at all three levels in all its form.⁷³ The White Paper shows the state's commitment to providing quality education at different levels for a wide variety of learners.

The provisions of the White Paper respect and protect learners' right to receive education in the field they choose. The Paper is conceptually reasonable in that it brings into the mainstream learners other than those in the conventional academic fields. This fulfils some of the essential elements of education, which are the provision of acceptable and relevant education at the three levels. Presently the effectiveness of the policy is difficult to measure due to the fact that provinces are only beginning to implement the policy. Therefore the impact of the transformation cannot be assessed at this stage.

The measure was also reasonable in that it considers learners from various backgrounds. The White Paper intends to extend the FET to rural areas. It also seeks to help learners from poor backgrounds and female learners. The White Paper also considers learners with disabilities by including their training in the mainstream FET.

Policy on Whole School Evaluation

The NDE was in the process of developing quality management and quality assurance policy framework for schools.⁷⁴ The policy was being developed due to lack of a national system for evaluating the performance of schools and to complement the already existing quality assurance process. The Whole School Evaluation process would be used for maintaining and controlling standards, evaluating performance, and advising and supporting schools in their continual efforts to improve their effectiveness.

The approach was built upon interactive and transparent processes that recognise good schools and support weak ones. These processes included school self-evaluation, ongoing district-based support, monitoring and development, and external evaluations conducted by the supervisory units. The school evaluation reports that will be compiled

⁷³ General Comment 13 (note 5 above) para 6.

⁷⁴ National Policy on Whole School Evaluation, at http://www.education.pwv.gov.za/Policies_Reports/policies/Whole_School_Ev.htm. Site visited on 28/03/2001.

during the process will be used for future reviews and serve as important tools for self-evaluation at all levels.

The Northern Province Education Department did not report at all on the right to education whereas the Free State and Western Cape Departments of Education did not provide information on policy measures for further education. Lack of information made the task of assessing the progressive realisation of the right difficult.

Reasonable measures must be determined in light of the different roles of different spheres of government. The national sphere has to provide a framework for policy and implementation while the provincial sphere has to put in place measures in accordance with the national framework in order to help facilitate delivery.⁷⁵ Failure to co-ordinate measures this way diminishes the reasonableness of the measures.

The national policy on Whole School Evaluation ensures that learners receive quality education and within acceptable standards. The policy is reasonable in as far as it attempts to improve and maintain an acceptable standard in the quality of education, especially through assisting vulnerable schools. The measure protects, promotes and fulfils the right to education, because it aims to put in place a monitoring mechanism, which will reveal shortfalls in schools so that appropriate corrective measures are taken.

Most provincial departments are in one way or another moving towards transforming further education. However, due to the fact the most provinces are still at the early stages of transforming the FET sector, implementation has not begun or it is still slow, hence the ineffectiveness of the measures. However the existence of the policy on FET at the provincial spheres helps in the progressive realisation of the right. It shows that steps are being taken towards the realisation of the right. By moving towards implementing the White Paper the provinces fulfil their constitutional obligation to implement national policy or to develop and implement provincial policy.⁷⁶

The North West Department of Education made attempts of promoting the right through increasing access for needy and female students. The department provided financial assistance and accommodation where needed. The action has protected the right because it considered the needs of some vulnerable groups. Only the North West Department of Education reported that it introduced technical college programmes for people with disabilities. The other provinces did not report on measures taken to advance the needs of people with disabilities.

1.4 Recommendations

⁷⁵ *Grootboom* (note 22 above) para 39.

⁷⁶ Section 125 of the Constitution says that the provincial executive is responsible for developing and implementing provincial policy.

The NDE did not respond to all questions in the protocol. The NDE should report on all policies and programmes for the year under review. When reporting on these measures the NDE should provide details on the objectives of the measures and their intended results. The details should also provide specific information on how the measures affect the right of access to further education for learners from vulnerable groups. The response should also give full account of the implementation plans of national policy.

The NDE should provide adequate institutional support for proper implementation of the Further Education Policy at the provincial sphere.⁷⁷ This can be done by seconding people with expertise to the provincial departments. The NDE should ensure that the structures required for the implementation of the evaluation policy were in place in all schools. Where NDE cannot incapacitate the province then it should take over the implementation process.⁷⁸

The provincial departments should in their policies and implementation thereof adhere to performance indicators, as required by Tirisano. In its implementation the NDE and provincial departments should pay special attention to vulnerable groups.⁷⁹

2 LEGISLATIVE MEASURES

The Education Laws Amendment Act 48 of 1999 was passed for education in general including basic education and further education. The Act was discussed above.

3 BUDGETARY MEASURES

The budget allocation for further education was the responsibility of provincial Departments of Education. Information requested on the budgetary allocation for secondary education has been summarised in the Table below.

Table 13 Budget allocation for secondary education per province

PROVINCE	YEARS	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
Eastern Cape	1998/1999	1 894 138 000	-	-

⁷⁷ Section 125 (2) of the Constitution says that where provinces lack capacity the national government should provide assist the provinces to develop the capacity necessary to deliver.

⁷⁸ Section 100 of the Constitution says that when a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution the national executive may intervene by taking any appropriate steps to ensure fulfilment of the obligation, including issuing a directive to the provincial executive or assuming responsibility for the relevant obligation.

⁷⁹ *Grootboom* (note 22 above) para 41.

PROVINCE	YEARS	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
	1999/2000	1 968 164 000	-	-
	2000/2001	2 373 617 000	-	-
Free State	1998/1999	1 081 131 000	1 081 131 000	1 097 301 000
	1999/2000	1 148 221 000	1 148 221 000	1 132 337 000
	2000/2001	1 171 985 000	1 179 985 000	-
Gauteng	1998/1999	2 040 065 000	1 979 166 000	1 940 310 000
	1999/2000	2 066 571 000	1 954 921 000	1 958 702 559
	2000/2001	2 081 607 000	2 081 607 000	-
KwaZulu Natal	1998/1999	2 156 500 000	-	2 291 359 206
	1999/2000	2 344 119 000	-	2 399 989 212
	2000/2001	2 531 024 000	2 531 024 000	-
Mpumalanga	1998/1999	718 200 000	-	-
	1999/2000	770 800 000	-	731 432 000
	2000/2001	785 331 000	-	898 995 000
Northern Cape	1998/1999	275 416 000	-	219 126 000
	1999/2000	208 265 000	-	225 555 000
	2000/2001	191 819 000	191 819 000	-
North West	1998/1999	937 442 000	-	952348 000
	1999/2000	1 003 482 000	-	1 021 422 000
	2000/2001	1 072 259 000	-	1 072 259 000
Western Cape	1998/1999	1 289 046 000	1 289 046 000	1 289 046 000
	1999/2000	1 341 171 000	1 341 171 000	1 341 171 000
	2000/2001	1 461 334 000	1 461 334 000	

- Information not supplied

Only Gauteng, Mpumalanga, North West and Western Cape provided information on the per capita allocation. The information has been summarised in the table below.

Table 14 Per capita allocation per province

PROVINCE	YEAR	PER CAPITA ALLOCATION IN RANDS
Gauteng	1998/1999	3 989
	1999/2000	3 960
	2000/2001	3 931
Mpumalanga	1998/1999	2 678
	1999/ 2000	2 709
	2000/ 2001	2 801
North West	1998/ 1999	2 695
	1999/ 2000	2 887
	2000/ 2001	3 755
Western Cape	1998/1999	5 237
	1999/ 2000	5 026
	2000/ 2001	5 045

The per capita allocation shows that the total allocation does not mean that the province that has allocated more will spend more per learner. For instance Gauteng has allocated more than the Western Cape for the total allocation, but the Western Cape allocated more per capita.

The Northern Cape Department of Education reported that the variances in the total allocation were due to schools being combined during the year 1998/1999, while the Western Cape Department of Education reported that the variances were due to salary increases.

Most provincial departments indicated that the budgetary allocation for secondary schools was inadequate. Only the Gauteng Department of Education reported that the allocation was adequate because it followed current provisioning policy. The Eastern Cape in its report stated that as a result of budget constraints no new classrooms were built, stationery was not supplied and no new textbooks were bought. This affected the morale of learners and contributed to poor results at the end of the year. The Free State reported that due to under funding in 1998 there was over spending in the subsequent years. KwaZulu Natal in its report indicated that the department had to readjust priorities in order for it to provide quality education. In Mpumalanga the increase in the number of learners affected the quality of education, because it resulted in the decrease in the share of the provincial budget. The Northern Cape Department of Education indicated that it had to reduce the number of educators in order to remain within budget allocation.

The Gauteng, KwaZulu Natal, Mpumalanga and the North West Departments of Education indicated that the budget was allocated in accordance with the national norms and standards on funding public schools, which makes provisions for consideration of vulnerable groups.

Technical Colleges

The provincial departments also made the allocation for technical colleges. The allocations were represented in the Table below.

Table 15 Budget allocation for Technical Colleges

PROVINCES	YEAR	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
Eastern Cape	1998/1999	132 000 000	-	-
	1999/2000	114 000 000	-	-
	2000/2001	101 000 000	-	-
Free State	1998/1999	44 782 000	44 782 000	44 553 000
	1999/2000	53 424 000	53 424 000	59 943 000
	2000/2001	103 888 000	103 888 000	-
Gauteng	1998/1999	213 313 000	213 313 000	204 090 000
	1999/2000	209 921 000	209 921 000	324 910 000
	2000/2001	233 338 000	233 338 000	-
KwaZulu Natal	1998/1999	109 155 000	-	109 155 000
	1999/2000	114 513 000	-	114 513 000
	2000/2001	124 000 000	124 000 000	-
Mpumalanga	1998/1999	42 612 000	-	35 437 000
	1999/2000	45 525 000	-	42 658 000
	2000/2001	49 204 000	4 9 204 000	-
Northern Cape	1998/1999	21 215 000	-	16 205 000
	1999/2000	18 196 000	-	17 501 000
	2000/2001	19 799 000	-	-

PROVINCES	YEAR	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
North West	1998/1999	21 292 000	34 680 000	50 250 000
	1999/2000	22 506 000	46 047 000	51 124 000
	2000/2001	67 625 000	67 626 000	67 626 000
Western Cape	1998/1999	93 828 000	93 828 000	93 828 000
	1999/2000	107 740 000	107 740 000	107 740 000
	2000/2001	106 120 000	106 120 000	-

- Information not supplied

The Table indicates that generally there was an increase in the allocations. The allocation in the Northern Cape appeared to be decreasing.

Only the Gauteng, Mpumalanga, North West and Western Cape departments of Education provided information on the per capita allocation as shown in the Table below.

Table 16 Per capita allocation per province

PROVINCE	YEAR	PER CAPITA ALLOCATION IN RANDS
Gauteng	1998/1999	5 090
	1999/ 2000	4 790
	2000/ 2001	5 100
Mpumalanga	1998/ 1999	4 587
	1999/ 2000	4 273
	2000/ 2001	4 270
North West	1998/ 1999	7 550
	1999/ 2000	8 022
	2000/ 2001	9 672
Western Cape	1998/ 1999	6 445
	1999/ 2000	6 814
	2000/ 2001	6 185

The above Tables show that although the budget allocation for the North West was less compared to other provinces such as the Western Cape and Gauteng, the province still managed to spend more per capita for technical colleges. The Table shows that despite the low allocation the Western Cape spent more per capita compared to Gauteng.

The Eastern Cape, Gauteng, North West, Mpumalanga and Western Cape departments of Education correctly point out that this sector of education represents an area where much investment was needed. Most of these colleges have been neglected; there was more emphasis on practical learning, but limited supply of equipment. Colleges in Gauteng and the North West could not accommodate the desired number of students. Students who were in colleges in the Eastern Cape graduated without receiving practical experience.

The departments indicate that funding in the FET will follow the National Norms and Standards on Funding Public Schools. Norms give special

considerations to disadvantaged schools

3.1 Critique

The provincial reports did not provide the required information, and no reasons were provided. The Eastern Cape and Free State Departments of Education did not respond to the question on the variances in the budget allocation. Mpumalanga reported that there were no significant variances. The information provided by the North West was not helpful for the purposes of this analysis.

The provincial departments did not answer questions on special considerations given to vulnerable groups, who represent a significant section of society. The government claims to have measures that will address their needs and yet cannot account for the measures. The right to education affects the enjoyment of rights such as equality and freedom. Therefore this requires the state to take special measures to affirm those who are most affected by the denial of the right. Lack of measures affecting vulnerable groups diminishes the chances of the enjoyment of other human rights.

The information from the provinces indicates that the budget allocation for further education was not adequate for the needs of the sector. The introduction of the restructuring of further education and training institutions and its impact seems not to be catered for in the budget allocation. The restructuring of the FET sector will impact on the use of resources and might for the interim require more resources for administration. The disproportionate allocation of funds for personnel and non-personnel expenditure will not make matters any better, because current spending patterns affect the progressive realisation of the right. The share of the budget from national revenue for education was adequate for the provision of the right. As already mentioned in the section on basic education, it was the ratio of personnel to non-personnel spending that was problematic. According to the Limburg Principles the available funds have to be used efficiently.⁸⁰

Under spending for secondary education as in the case of Gauteng affects the realisation of the right, because it means that available resources were not adequately spent. Over spending as in the secondary education budget for the Northern Cape in 1999/2000, also weighs down on the availability of resources because it affects the allocations for the following years. These phenomena do not respect the right to further education because it was the action of the State that result in both under-spending and over-spending and excessive personnel expenditure.

Most provinces did not mention the measures taken to accommodate the needs of vulnerable groups in the allocation of the budget. This omission

⁸⁰ Limburg Principles (note 9 above) para 25.

affects the reasonableness of the measures as far as they concerned the affected categories.

3.2 Recommendations

It became clear that allocations made by provincial departments were intended to achieve a governmental goal. However the good intention of the allocations was marred by inefficient utilisation of the monies allocated. Efficient financial management systems should be developed for the effective use of resources. The NDE should co-operate with provinces to ensure proper planning; co-ordination may include the national department defining priorities for provinces especially for the provision of facilities and services.⁸¹ Provincial departments may then have to prioritise according to educational problems the particular provinces.

Budget allocation amongst provinces should consider the effects of past policies and legislation on resources allocation. The needs of vulnerable groups should be prioritised, especially people with disabilities in the provision of further education and training.

Provinces should reshuffle funds for personnel and non-personnel expenditure to meet the 80:20 target.

4 OUTCOMES

National and provincial departments were required to provide information for secondary and further education. The learner/educator ratio, number of learners, NER,⁸² GER,⁸³ learners between 15-18 years not attending school, learners with disabilities excluded due to lack of facilities, dropouts, and learners above 18 years who complete high school.

4.1 National Sphere

The NDE only provided information on the total number of learners, learner/educator ratio, NER and GER. According to the department there were 4 111 177 learners in secondary schools, of those 2 195 611 were female learners. Information provided for the NER and the GER was for the year 1997, when the ratios were 59 percent and 89 percent respectively. The learner/educator ratio provided by the department was also for the year 1997 when it was 30:1. However other sources indicate that for the year 1999 the learner/educator ratio in secondary schools was 33:1.⁸⁴

⁸¹ Paragraph 28 of the Limburg Principles encourages states to prioritise realisation of the rights mindful of the need to satisfy everybody a satisfactory subsistence.

⁸² Defined as the number of appropriately aged learners who are in secondary school as a proportion of the corresponding age group in the population, expressed as a percentage.

⁸³ Defined as the number of learners enrolled in secondary school as a proportion of the appropriate age group in the population, expressed as a percentage.

⁸⁴ Department of Education (note 34 above) 158.

4.2 Provincial Sphere

The KwaZulu Natal Department of Education only provided information on matriculants for the outcomes section. Information provided by other provinces on secondary school learners, the learner/ educator ratio, has been summarised in the Table below.

Table 17 Learners in Secondary Schools

PROVINCES	LEARNERS	FEMALE LEARNERS	LEARNER: EDUCATOR RATIO
Eastern Cape	591 882	-	34:1
Free State	12 407	6 112	-
Gauteng	572 014	298 469	24:1
Mpumalanga	903 408	-	38:1
Northern Cape	199 277	98 608	30:1
North West	179 001	96 514	31:1
Western Cape	301 649	160 993	33:1

The Table shows that Eastern Cape and Mpumalanga had the highest number of learners in secondary school. There were also, higher learner/educator ratios.

The Gauteng Department of Education was the only province that provided information on NER, which was 65.3 percent. The Mpumalanga provincial department reported that the given figure in the Table was also a figure for learners from rural areas.

The breakdown of the different categories or groups of learners for the total number of learners is summarised in the Table below.

Table 18 Different categories of learners per province

CATEGORIES	FREE STATE	GAUTENG	NORTHERN CAPE
Rural areas	974	37 958	14 273
LSEN	13	26 882	1 365
Africans	10 524	283 046	66 587
Coloureds	29	29 007	105 971
Indians	2	457	965
Whites	1 832	161 143	25 754

Only Mpumalanga and North West departments reported on the number of children aged 15-18 years who were not attending secondary school. The total for Mpumalanga was 322 307, and of that total 171 150 were females from rural areas. In the North West, 181 746 children were not attending school. The province of the North West had 39 learners of refugees and asylum seekers.

Provinces that provided information on the number of learners who enrol and leave school early in the year include the Free State with a total of 182 learners who dropped out, and of those 95 were females, 28 were from the rural areas and 178 were African. The Northern Cape has a total of 76 learners who dropped out, 21 of these were females, 44 were from the rural areas, 6 were learners with special education needs, 25 of them were

African, 39 were Coloureds, 1 Indian and 11 Whites. The North West had 52 457 learners who left school during the financial year 1999/2000.

The North West and Mpumalanga were the only two provinces that reported on the number of persons above 18 years who complete secondary school, which is 1 449 and 5 483 respectively.

In response to the question on the matric learners, the Eastern Cape reported that for the year 1999 there were 123 948 matric learners. Of that total only 71 077 wrote the final exam, only 5 191 passed with exemptions and 23 214 achieved a school leaving certificate. The Free State Department reported that for the year 1999 there were 33 242 learners in matric, and of those 18 047 were females. For that year only 14 017 passed and 6 972 were female learners. Of the learners that passed 3 611 of them passed with exemptions, and 1 816 of them were females. KwaZulu-Natal had 95 047 learners in matric, and 54 696 of them passed in the year 1999, 48 of those learners were learners with disabilities. Out of that total number of learners who passed, only 15 607 passed with exemption.

In Mpumalanga there were 38 395 learners in matric for the year 1999, and 21 099 of them were female. Of the 18 627 learners that passed, 9 441 of them were female, and only 4 245 learners passed with exemption, with 2 021 of them being females. The Northern Cape Department of Education reported that there were 7 178 matric learners for the year 1999. Only 3 801 passed and 810 passed with exemption. The North West had 40 097 learners in matric, and of those 18 113 were females. There were only 26 learners with disabilities at matric level (N3)⁸⁵ and 12 of them were females. A total of 18 316 learners passed, and 9 568 of them were females. In the total number of learners that passed only 5 058 passed with exemption, with 2 582 of them being females. According to the Western Cape Department of Education there were 37 199 matriculants, 29 303 passed and 9 090 of the learners passed with exemption.

Only Northern Cape provided the literacy rate, which was 63 percent for people in the rural areas and 51,6 percent for females. The Mpumalanga Department of Education provided information that made it impossible to deduce what the literacy rate was for the province.

4.3 Critique

The department provided outdated information. They did not follow the format of the protocols. Most of the provinces also indicated that the information requested is not collected by the departments, hence most leave out questions and do not include information on the categories of vulnerable groups as requested.

⁸⁵ N3 at Technical Colleges is equivalent to a matric at an ordinary school.

Most of the statistics on infrastructure and services remained unchanged, making it difficult to tell if there was improvement. For example the NDE used data from the 1996 schools register of needs. This makes it difficult to assess whether there was progressive realisation of the right. The quality of education depends largely on conditions in the learning institutions. Appalling conditions can negatively affect delivery of quality education.

Inadequate information provided by KwaZulu Natal made it impossible to assess the realisation of the right. Other provinces provided incomplete information, especially with regard to vulnerable groups.

The learner/ educator ratio shows a rise in the number of learners. Mpumalanga is the only province, which showed a ratio above 38:1. Other provinces showed an average of 32:1. Gauteng had the lowest ratio of 25:1. However there was no corresponding increase in the number of educators or the number of classrooms, thereby affecting quality of education.

In response to the question on the matric pass rate, most of the provincial departments of education provided incomplete information. The provincial departments failed to provide a complete breakdown in terms of urban, rural, and the different racial groups.

4.4 Recommendations

Most of the information provided by departments is incomplete and outdated. Departments should provide complete and up to date information. If the departments are unable to do so reasons should be given.

Outcomes should show a relationship between stated policy objectives and the actual result. There should be an efficient monitoring system in place to help departments assess the effectiveness of the instituted measures and where possible, the system should help rectify identified shortfalls.

Departments should have clearly defined targets or results they wish to achieve, especially for vulnerable groups.

5 MONITORING

The NDE has a branch responsible for planning and monitoring the different aspects of the education system. The department developed an Education Management Information System (EMIS) as a national core database. To begin feeding information into the system, the NDE conducted a survey for the School Register of Needs in 1996.

The Eastern Cape department undertook planned and informal visits to regional and district and school level regularly. The department had

quarterly submissions of learner statistics and undertook mobilisation and advocacy campaigns in communities.

The Free State Department of Education reported that the education Management Information System is in place and is used to monitor the realisation of the right. The department was assisted by private institutions with which it had partnerships. KwaZulu Natal used the Strategic Planning Executive (SPEX) to monitor the implementation of its action plans. SPEX regularly reported to senior management meetings.

Mpumalanga Department of Education had a strategic planning section, which reports to the head of the department about the progressive realisation of the right. In the Northern Cape there was advocacy through the media and distribution of flyers. There were also regional co-ordinators and cluster programme managers who have to meet to plan on targets.

5.1 Critique

Monitoring at national level seemed to be well conceptualised. However if the monitoring cannot show the progress in terms of the number of new classrooms or which schools were in rural areas, then it means that there is a problem with its effectiveness. Monitoring should be understood in the context of the obligation to achieve results. Monitoring should provide a scenario of how far departments are with the realisation of the right. From monitoring, departments should be able to see where its measures are lacking, and assist in taking appropriate corrective measures. As a result of an inadequate monitoring system the NDE failed to report adequately to the Commission. It is unable to detect problems in the implementation of the measures and consequently fails to take appropriate corrective action.

The monitoring systems in the provinces seem to be well conceptualised and in existence. They aim to collect information on the education situation and assess the effectiveness of other measures. However the functioning of the monitoring is questionable where departments fail to provide information, which should be readily available. Most of the provinces, in spite of their monitoring systems, could not provide the information, required by the protocols, suggesting that the monitoring and the assessment of the measures were not effective and thus not serving their intended purpose.

5.2 Recommendations

The purpose of a monitoring system should be the assessment and evaluation of measures taken and the impact thereof. To this end the monitoring system needs to set standards and benchmarks to which the measures must adhere. The system should then be able to pick up the shortfalls and help with corrective intervention.

Education rights

There should be linkages with the national EMIS with the provinces for the collation of information. All provincial systems must be linked to a common database nationally.

The system should collect information as envisaged by the NAP. Information should be human rights-related; which should make it easier for the departments to report to the Commission.

HIGHER EDUCATION

1 POLICY MEASURES

Provincial departments are not responsible for higher education. The NDE was therefore required to provide information on policy measures or other programmes it had implemented or undertaken during the relevant year to advance access to higher education.

1.1 Critique

The transformation of the higher education sector came about as the present system was incoherent, wasteful and uncoordinated. These problems and weaknesses were seen to be severely compromising the ability of the higher education sector to effectively and efficiently achieve important national goals. Central to this vision was the establishment of an integrated, nationally co-ordinated and differentiated system, which would meet the learning needs of the country and the reconstruction and development needs of society and economy,⁸⁶ and provide an adaptable and flexible education system. The White Paper also considered the issue of equal access to institutions of higher learning. Institutions would be expected to establish student equity targets with the emphasis on the programmes in which black and women students are under-represented and to develop strategies to ensure equity of outcomes.

The process of transformation involved liberating higher education institutions from the past to be more responsive to the needs of the country in the 21st century. The CHE also indicated that the configuration of the higher education sector would also try to form strong linkages with further education and training.

To ensure equal access the National Student Financial Aid Scheme (NSFAS) was set up and tasked with providing financial assistance to deserving and needy students, so that they are able to enter institutions of higher learning.⁸⁷

Looking at the provisions of the Report of the CHE an inference could be made as to the possible implications of the Report. The Report aims to make higher education more accessible and provide a coherent and responsive higher education system. The attempt to increase the number of learners from disadvantaged groups and female learners in programmes they were under represented is credible. One of the major responsibilities of government is to remove discrimination in order to increase accessibility for the most vulnerable groups.⁸⁸ To this end states may institute special measures for the most vulnerable in order to address

⁸⁶ National Plan for Higher Education, February 2001 at

http://www.education.pwv.gov.za/DoE_Site/higher_Education/HE_Plan/

⁸⁷ Minister of Education's message to the higher education community at

http://www.education.pwv.gov.za/Media/Statements_2001/Feb_2001/message_HE.

⁸⁸ General Comment 13 (note5 above) para 6 (b).

discrimination.⁸⁹ The provisions in the Report promote and fulfil the right through ensuring that tertiary institutions do institute policies that aim to promote groups that have been underrepresented. Such measures, including affirmative admission policies would be reasonable in their endeavour to achieve advancement of people who would be most effected by exclusion.⁹⁰

The report also promotes the right through restructuring of the curriculum to make it more relevant and responsive to societal needs. The measure also protects the right to education in that it promotes equity in the provision of opportunities to enter higher education programmes and succeed.

Nonetheless whether the measures promote the right depends on how the department informs and educates communities about available financial resources such as the National Student Financial Aid Scheme. Presently the NDE does not seem to be doing enough to inform students about the availability of the financial aid scheme. At the beginning of each academic year students are forced to stay at home due to financial exclusions.⁹¹

1.2 Recommendations

Attempts at increasing the number of formerly under represented students should consider readjusting admission requirements of most institutions. The transformation of the higher education sector should clearly address the selection criteria used for admitting students to higher education institutions.

The national NDE should embark on public awareness campaigns to educate the public about available programmes and services such as the financial scheme for poor students.

2 LEGISLATIVE MEASURES

The NDE did not report on any legislative measures relating to higher education that took place during the year under review.

2.1 Critique

Independent research shows that there were legislative measures instituted during the year under review. The following Acts were passed:

- Higher Education Amendment Act 55 of 1999
- National Student Financial Aid Scheme Act 56 of 1999

⁸⁹ *Ibid*, para 32.

⁹⁰ *Motala v University of Natal* 1995 (3) BCLR 374 (D) 383.

⁹¹ *Top people tells how she did it*, Sowetan 01/04/2001.

Higher Education Amendment Act amends the Higher Education Act 101 of 1997. The amendment does not make substantial amendments except for substitution of definitions, administrative matters and composition of tertiary institutions' councils.

The National Student Financial Aid Scheme Act provides for the establishment of a national student fund to grant loans and bursaries to eligible students at public higher education institutions. The objective of the Act is to redress past discrimination and ensure representivity and equal access, and to respond to human resource needs of the country. The Act puts in place a sustainable student fund to help fund education of poor South Africans.

The existence of the Acts fulfils the requirement to have in place measures; legislative and otherwise aimed at satisfying the right to education.⁹² The Acts passed during the year under review do not deviate from state responsibility. The Acts were reasonable in that they did not constitute barriers to education; they were deliberately aimed at fulfilling the state responsibility.⁹³

Higher Education Amendment Act continues with the purpose and objects of the principal Act. The National Student Financial Aid Scheme Act seeks to make higher education available and accessible to all eligible South Africans. The Acts therefore meet the requirement to remove barriers to access education.

The Committee on Economic, Social and Cultural Right states that there is progressive realisation of the right where the state has put in place appropriate measures aimed at fulfilling state obligations. Putting measures in place should be done immediately without delay. Both Acts fulfil this responsibility and indicate that there is progressive realisation of the right.

2.2 Recommendations

The NDE should set national standards for admission into institutions with the view of achieving representivity.

3 BUDGETARY MEASURES

The national Department of Education (NDE) provided information on its budget allocations for the different programmes and services on higher education.

The department provided information on allocations to universities and technikons as summarised in the Table below.

⁹² General Comment 3 (note 17 above) para 3.

⁹³ Ibid para 2 says that States should take steps immediately aimed at the fulfilment of a right.

Table 19 Budget allocation for Universities and Technikons

INSTITUTION	YEAR	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
Universities	1998/1999	4 336 687 000	4 336 687 000	4 336 687 000
	1999/2000	4 648 252 000	4 648 252 000	4 648 252 000
	2000/2001	5 001 196 000	5 001 196 000	5 001 196 000
Technikons	1998/1999	1 663 101 000	1 663 101 000	1 663 101 000
	1999/2000	1 896 873 000	1 896 873 000	1 896 873 000
	2000/2001	1 976 701 000	1 976 701 000	1 976 701 000

The Table shows that the NDE allocated considerably lower amounts for technikons as compared to universities. It is clear from the Table that all allocations were spent to the fullest.

The allocation for universities and technikons represent 57 percent and 23 percent of the total department budget respectively. The per capita allocation for universities for the financial year 1999/2000 was R14 077; for technikons, R10 015.

In response to the question on the variances in the allocation of the budget, the NDE stated that the question is not applicable to higher education. Reporting on the inadequacy of the budget allocation the department indicated that funding for higher education had decreased from 65 percent in 1998/1999 to 63,4 percent in 2000/2001. According to the NDE 65 percent is the absolute minimum funding level for higher education, which was calculated using budget requirements of these institutions.

The problem experienced by the NDE due to budget constraints was the inability to provide adequate funding for the full functioning of higher education institutions. As a result the learning institutions ended up exhausting their financial reserves due to unrecovered tuition and residence fees of previous years from students. The learning institutions were unable to increase student fees to compensate for lower government funding, because the increase in fees would trigger student unrest in many higher education institutions.

In an attempt to provide for vulnerable groups the NDE allocated an amount of R300 million in 1998/1999, R390 million in 1999/2000 and R443, 5 million for the National Student Financial Aid Scheme (NSFAS). The Scheme supported academically deserving, but financially constrained students who want to access higher education. Redress funds were also made available in 1999/2000 at R60 million and in 2000/2001 at R30 million.

3.1 Critique

The budgetary allocation for higher education showed a movement towards a better provision of education. For instance the NSFAS was an attempt to ensure access for students who otherwise would not be able to

do so due to lack of financial resources. However, the inability of the NDE to provide sufficient funds for universities and technikons means that NSFAS will be overburdened by the demand from poor students.

The problem was worsened by the fact that institutions of higher learning increase their fees every year to recover costs. This burden is shifted to students thereby affecting accessibility, particularly for students from poor backgrounds. Therefore every year South African institutions are faced with financial difficulties because students fail to pay their fees.

The allocation of redress funds for higher education represented a reasonable attempt to provide funds to institutions of higher learning so that they are able to admit more learners from impoverished backgrounds. The measure ensures progressive realisation of the right in that there are funds employed towards the fulfilment of the right.

The NDE maintains that the allocation applies equally to learners from vulnerable groups and that there is no discrimination. Allocation should be geared towards inclusion and affirmation of the vulnerable. Budget allocations that do not make these contingencies are unreasonable.⁹⁴

3.2 Recommendations

Annual increases in fees affects mostly poor students, and the NDE could address this problem by making more redress funds available to institutions. This will ensure that most students from poor backgrounds are not excluded due to financial constraints.

There is a general lack of information on services available. The NDE should put in place mechanisms of informing students about the different financial aid schemes available.

4 OUTCOMES

Information provided by the NDE on tertiary education has been summarised in the Table below.

Table 20 Students in Higher Education

CATEGORIES	UNIVERSITIES (1998)	TECHNIKONS (1999)
Total number of learners	351 787	190 120
Learner educator ratio	35	60
Females	192 086	86 670
Africans	180 438	129 961
Coloureds	16 256	12 190
Indians	27 913	7 886
Whites	125 867	38 756
Unknown population group	1 313	1 327

⁹⁴ The Limburg Principle para 39 suggest special measures to help certain groups that require the to enjoy Economic and Social Rights, The Grootboom case held that government programmes that fail to do this where they clearly should are unreasonable.

Education rights

The Table shows the number of students at institutions of higher learning. The NDE indicates that the number of students in universities decreased during the year 1999 to 330 100. Of this number 149 587 were males and 180 513 females.⁹⁵

⁹⁵ Department of Education (note 34 above) 161.

PART C: CONCLUSION

Education is a requirement for the exercise and appreciation of human rights.⁹⁶ The major aims and objectives of education are, to enable a human being to be able to exercise his/her rights freely and with dignity, and to participate effectively in society. The national and provincial departments have instituted policy and legislative measures supported by budgetary allocations. The measures were aimed at removing barriers to education, and attaining state objectives, through making education available. The measures facilitated the realisation of the right, and demonstrated a comprehensive plan deliberately aimed at providing quality education in the country.

It can be deduced from all the responses that the state has enacted and adopted measures to realise the right to education, but these measures seem not to be implemented in a manner that is reasonable and effective for the progressive realisation of the right. This was due to problems of mismanagement in the administration of provincial budgets. Such practices are disturbing, especially in view of the fact that 85 percent of the budget was being spent on personnel. Non personnel matters were not being given enough attention, hence many schools still have a shortage of classrooms, no toilets, no water within walking distance and no electricity and telephones. Lack of basic infrastructure impacts negatively on the quality of education, and affects not only the morale of learners but that of the educators as well. For instance lack of water and toilets, results in girls missing out on some lessons due to the fact that they have to fetch water before going to school.

The poor quality of education received due to inadequate facilities affects all levels of education. In 1999 the number of students registered in universities and technikons decreased. This was despite an increase in the funding to the National Student Financial Aid Scheme. Financial resources are not the only barrier to accessing higher education, the educational attainment of learners from previously disadvantaged schools also contributes. Although there has been a decrease in the enrolment of students in institutions of higher learning, the number of female students has increased from 44 percent for technikons and 45 percent for universities to 46 percent in 1999. This shows a movement towards the achievement of policy objectives of promoting access by female students to higher institutions.

Much still needs to be done to improve the level of education for the large part of the population. To begin improving this situation the departments of education should start addressing the inefficiencies in the system that continue impacting on the expenditure of the budget if not handled appropriately. This reiterates what has been said earlier in the report, and that is, it is not only the amount of funding that determines the provision of the right, but also how those resources are utilised to best attain the

⁹⁶ A Eide et al (eds) *Economic, Social and Cultural Rights* (1995) 189.

intended goal that is important. Until all the intended beneficiaries are reached in the provision of education, the goal of making education accessible for every one will remain a distant goal, especially for those who need it most.

ABBREVIATIONS

ABET	- Adult Basic Education and Training
COLTS	- Culture of Learning, Training and Service campaign
ECDE	- Eastern Cape Department of Education
EU	- European Union
FSDE	- Free State Department of Education
GDE	- Gauteng Department of Education
HIV/AIDS Syndrome	- Human Immune Virus/Acquired Immune Deficiency Syndrome
KZNDE	- KwaZulu-Natal Department of Education
NDE	- National Department of Education
NQF	- National Qualification Framework
SASA	- South African Schools Act
SIDA	- Swedish International Development Agency
USAID	- United States Agency for International Development
WCDE	- Western Cape Department of Education

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CHAPTER FOUR

THE RIGHT TO FOOD

PART A: OVERVIEW

1 INTRODUCTION

South Africa as a country is self sufficient in terms of the amount of food available, but distribution still remains a problem. This is due to poverty and past inequalities that are major impediments to food security. The majority of people either do not have the means of production such as land, water and agricultural expertise needed for farming, or the financial means to purchase adequate food.

The post-1994 era has seen the development of policies mainly by the Departments of Agriculture and Health, in attempting to address the problem of food insecurity. The realisation that food security is complex has called for interdepartmental collaboration and co-ordination, beyond the Departments of Health and Agriculture.

This Chapter reviews information provided by both the national and provincial Departments of Health and Agriculture on legislative and other measures instituted during 1999/2000, towards the realisation of food rights contained in the Constitution.

2 CONSTITUTIONAL OBLIGATIONS

Food rights are recognised in two sections of the South African Constitution. The first is s 27(1)(b), which states that everyone has the right of access to sufficient food. The second is s 28(1)(c), which states that every child has the right to basic nutrition.

The right to food is also recognised in a number of international human rights instruments. The Universal Declaration of Human Rights (UDHR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognise the right to food as a component of an adequate standard of living.¹ The ICESCR in particular, requires that State Parties undertake individually and through international co-operation, to institute measures including specific programmes to improve access to food.² The right to food security is also recognised in the Copenhagen Declaration on Social Development.³

¹ Article 25 of the Universal Declaration of Human Rights (1948) and Article 11 of the International Covenant on Economic, Social and Cultural Rights (1966).

² Article 2(1) of the ICESCR (1966).

³ Commitment Number 2 of the Copenhagen Declaration on Social Development (1995) provides that 'States should focus their efforts and policies in addressing the root causes of poverty, including the elimination of hunger and malnutrition through food security.'

There are other rights in the Constitution that are relevant to the right to sufficient food and basic nutrition. The first is s 25 that regulates ownership, tenure and access to land, which is the basic means of production of food. Section 24(b) requires the sustainable use of natural resources while promoting justifiable economic and social development, including food production. Section 27(1)(b) provides access to water, which is needed for food production, preparation and other important functions that contribute to an adequate standard of living. Good health is also necessary for people to be able to eat and utilise food properly.

2.1 Access to sufficient food

As stated above, s 27(1)(b) of the Constitution provides for the right of access to sufficient food. Such access requires the elimination of barriers to food acquisition. Access has both economic and physical dimensions. Economic access refers to the individual or household's financial means needed to acquire adequate food, whereas physical access refers to the access that will enable vulnerable groups such as children, the elderly and the disabled to have food. This also includes people with unrelenting medical problems.⁴ Providing access also requires that States should take steps to improve measures of production, conservation and distribution of food, by making full use of technical and scientific knowledge and disseminating information on the principles of nutrition. Furthermore, States are required to develop or reform agrarian systems that will enable the efficient development and utilisation of natural resources.⁵

Section 27(1)(b) refers to *sufficient* food, whereas international instruments refer to *adequate* food. For the purpose of this discussion, the words *sufficient* and *adequate* will be used interchangeably. Adequate means food must be available in sufficient *quantity*, be of acceptable *quality*, and be *safe* and *culturally acceptable*.⁶ Sufficient quantity refers to the calories that must be available to satisfy the dietary needs of individuals. For instance, the Department of Health has specified minimum consumption levels per day, which stipulate that infants are not allowed to eat less than 650 kcal/day. Quality refers to the nutrient composition, such as vitamins, iron, iodine and carbohydrates available in foodstuffs. Safety means food must be free from adverse substances, such as contamination through pesticides, bad environmental hygiene or naturally occurring toxins.⁷ Cultural acceptability means the food must be in accordance with the prevailing food or dietary culture. Food must be of good quality in terms of texture and taste. Flowing from this is the view that options such as the production and distribution of genetically modified food should be explored under very strict conditions. According to this view, if food is

⁴ General Comment 12 (1992) para 13.

⁵ Article 11(2)(a) of the ICESCR.

⁶ UNDP *Human Development and Human Rights- Report on the Oslo Symposium, 2-3 October 1998* (1998) 224.

⁷ *Ibid.*

genetically modified, consumers should be informed about the ingredients to ensure that people's right to culturally acceptable food is not violated.

The realisation of the right to sufficient food in terms of s 27(2) is internally limited by the availability of resources. The State is required to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. The qualification "within its available resources" implies that available resources include those existing within a State as well as the resources available from the international community through international assistance and co-operation.⁸

2.2 Basic nutrition

The obligation imposed on the State by s 28 (1)(c) is different in nature from that imposed by s 27 (1)(b). The right in terms of children places the primary responsibility for providing food on parents or guardians. However, in cases where parents or guardian are unable to provide food, the State should provide food for the children. The Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (the Charter) echo similar sentiments.⁹ The provisions of the CRC and the Charter place an obligation on the State to take measures to ensure the provision of adequate nutrition for the best attainable standard of health. Article 27(3) of the CRC and Article 20 of the Charter, further put an obligation on the State in cases of need, to provide material assistance and support programmes, particularly with regard to nutrition.

Basic nutrition like *sufficient* food refers to the extent to which people should have access to food for a healthy standard of living. Therefore the same principles of access, quality and quantity also apply to *basic nutrition*. The right cannot be realised if there is no access to food of proper quality and in sufficient quantity at all times. The right of children to adequate nutritious food along with the right to clean drinking water and health care, is essential for combating disease and malnutrition.

2.3 State obligations

The State is required in terms of s 27(2), to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to sufficient food. As stated above, the qualification "within its available resources" refers to those available resources within a State as well as resources available from the international community.¹⁰

⁸ General Comment No 3 (1990) para 13 and Limburg Principles (1986) para 26

⁹ Article 27(3) of the Convention on the Rights of the Child (1989) and Article 20 of the Charter on the Rights and Welfare of the Child (1990).

¹⁰ See note 8 above.

The obligation is also expressed at the international level. The World Food Summit provided that States can fulfil this obligation through developing national laws, strategies, policies, and programmes. The measures would also, as stated in Commitment 7.4 of the Plan of Action assist in clarifying the content of the right of adequate food and the fundamental right of everyone to be free from hunger.¹¹ The above-mentioned provisions indicate that the State must develop legislation to fulfil both national international obligations.

In terms of s 7(2) the State must respect, protect, promote and fulfil the rights in the Bill of Rights. This means ensuring equitable distribution of food supplies in relation to domestic need.¹² The right is being violated when the State allows people to continue suffering from starvation, in circumstances where it has the resources to address the problem. Violation of the right to food happens when the State fails to protect the right by not removing discriminatory barriers that prevent access to markets for certain groups who want to earn their living through selling items or services.

Another form of violation of the right is when subsidies for basic foods such as maize meal, sugar and flour are removed by the State without introducing a replacement programme to ensure that the poorest people can afford to buy or obtain food through other means.¹³

The conservation and protection of the environment is also important for ensuring access to food. Development programmes such as mining and other large projects, have been known to cause evictions of the poor, fishers, indigenous people and others from their ancestral lands, fishing areas, forests or other places that are traditional sources of food, thereby violating peoples right to food.¹⁴

Lastly, the State has the obligation to protect women's right to land, because if equal rights are not ensured for women to own, use and inherit land or other property, their rights are being violated.

3 KEY DEVELOPMENTS FOR THE YEAR UNDER REVIEW

Responsibilities for the realisation of the right to food are dispersed widely within the state machinery. The Departments of Health and Agriculture are just two of the key departments in this regard. The Department of Agriculture's range of activities in this area have tended to focus on the right to sufficient food, while the Department of Health's activities have paid specific attention to basic nutrition for children.

¹¹ Item 12 of the Plan of Action adopted at the World Food Summit, Rome 13-17 November 1996.

¹² A McChesney *Promoting and Defending Economic, Social and Cultural Rights - a handbook* (2000) 39.

¹³ *Ibid* 51.

¹⁴ McChesney (note 12 above) 51-52.

The actual developments that took place during the reporting period have to be viewed in the broader context of two key policy instruments that were reported to the Commission in the last two monitoring cycles. The first was the Food Policy released by the Department of Agriculture in 1998 that addresses the right to sufficient food in s 27(1)(b). The second policy instrument was the Integrated Nutrition Programme, developed by the Department of Health as part of Primary Health Care.

3.1 Policy developments

There were no new policies as regards the right to sufficient food.

Developments from the national Department of Health (NDH) in the provision of the right to basic nutrition included:

- Breastfeeding Guidelines for Health Workers; and
- Food Consumption Survey for children aged 1-9 years.

Breastfeeding Guidelines for Health Workers were developed in line with the growing commitment of ensuring that all infants and mothers derive maximum benefit from breastfeeding.¹⁵ The NDH recognised that breastfeeding has become complicated due to the prevalence of the HIV/AIDS pandemic, and that HIV is transmissible through breast milk. The guidelines do not necessarily address the broader societal issues, such as HIV/AIDS and their impact on breastfeeding, but are there to promote breastfeeding for mothers who are able to do so, to ensure basic nutrition and other health benefits for infants.

The Food Consumption Survey was conducted to assess food and nutrient intake, growth rate, and to also investigate issues that affect food intake for children. The Survey was meant to enable the Department to formulate guidelines for food fortification.¹⁶ The Department aimed to establish information on food commonly found in poor households. These basic foodstuffs would then be fortified through a centralised process to reduce micronutrient deficiencies in children and infants. The information compiled from the survey would also be used to develop appropriate nutrition education material.¹⁷

Much work still needs to be done to ensure that more people have access to food and basic nutrition. As mentioned above the Food Consumption Survey was conducted as part of the Integrated Nutrition Programme. The information required in the survey will have numerous benefits, especially for basic nutrition. The database that will be compiled from this information will benefit many institutions and organisations that deal with nutritional issues. The information will assist in establishing why an

¹⁵ National Department of Health *South African Breastfeeding Guidelines for health workers* (2000) 5.

¹⁶ Department of Health *National Food Consumption Survey- Children aged 1-9 years*(1999) vol. 2, 491.

¹⁷ Ibid.

estimated 23 percent of children under five years of age suffer from chronic malnutrition or stunting; approximately 16 percent are underweight resulting in poor growth and development;¹⁸ and 85 000 of the 1,2 million children who are born annually die before their fifth birthday.¹⁹

3.2 Legislative developments

There were no legislative developments from the Departments of Agriculture and Health during the year under review.

There continues to be a gap in legislation on food. National legislation is essential to ensure that the State fulfils its responsibility in ensuring the respect for and protection and promotion of economic, social and cultural rights by all sectors of the society.

4 CONCLUSION

Any intervention that will be developed to address the problem of food insecurity must take into account the root causes of malnutrition, which are poverty and social inequality. The findings of the survey conducted by the National Department of Health show that household income is the decisive factor in the consumption and procurement of foods.²⁰ Other issues that affect food insecurity are poor caring practices, unhygienic environments and poor services. The need for a legislative framework was reiterated in the previous year's report, and its absence in this reporting period is noted with concern. Internationally the State as outlined in the World Food Summit must implement the recommendations in the Plan of Action. This entails developing national laws, strategies, policies and programmes.²¹ The measures will assist in clarifying the content of the right of adequate food and the fundamental right of everyone to be free from hunger as stated in the international instruments.²² In assessing the progressive realisation of the right to have access to food, one should look at whether the State has met its obligations of taking appropriate measures and utilising its maximum available resources.

¹⁸ Southern African Journal of Public Health (1998) as cited in the article 'Winter agony of city poor' *Sowetan* (1999) June 10.

¹⁹ Department of Health (note 15 above) 5.

²⁰ *Ibid.*

²¹ Item 12 of the Plan of Action adopted by the World Food Summit, Rome 13-17 November 1996.

²² Commitment 7, objective 7.4 of the World Food Summit Plan of Action, 1996.

PART B: ANALYSIS OF REPORTS FROM ORGANS OF STATE

THE RIGHT TO BASIC NUTRITION

1 POLICY MEASURES

The National and Provincial Departments of Health were required to provide information on the policy, legislative and budgetary measures instituted to realise the right of children to basic nutrition. In addition to providing that information, the departments were required to indicate if the instituted measures respect, protect, promote and fulfil the right to basic nutrition. The departments were also required to provide information on indicators that are relevant to the determination of progress with the realisation of the right. Lastly, information was required on how the measures gave special considerations to vulnerable groups, and the difficulties experienced in implementing the measures.

1.1 National Sphere

During the year under review, the National Department of Health (NDH) continued to implement the following measures, as part of the Integrated Nutrition Programme:

- Primary School Nutrition Programme (PSNP)
- Parasitic Control Programme (PCP)
- Protein Energy Malnutrition (PEM) Scheme

Primary School Nutrition Programme

The National Department of Health reported that during the year under review the Primary School Nutrition Programme continued to be implemented, and benefited 15 248 schools with a total of 4 719 487 children.

Parasitic Control Programme

The NDH stated that the Parasitic Control Programme was implemented as a pilot in provinces that were infested with parasites, namely KwaZulu-Natal and Mpumalanga.

Protein Energy Malnutrition Scheme

The provision of the nutrition rehabilitation programme through the protein and malnutrition scheme fulfilled the right to basic nutrition for children with nutrient deficiencies.

According to the report by the National Department of Health, the PSNP protected the right to basic nutrition, because children have had continuous access to food. Through the Parasitic Control Programme, the

Department has combated diseases and malnutrition in health care facilities. The Baby-Friendly Hospital Initiatives and the Road to Health Card, promoted healthy eating habits for children.

Problems encountered in the implementation of the measures were that the Primary School Nutrition Programme experienced shortages with food supply due to the mismanagement of funds.

1.2 Provincial Sphere

The Free State and Northern Province Departments of Health did not respond to the protocol on basic nutrition. The Northern Cape sent the same report as the previous reporting period. The Gauteng Department of Health provided a report on nutrition, which did not follow the format of the protocol.

The Eastern Cape, KwaZulu-Natal, Mpumalanga, North West and the Western Cape Departments of Health reported that they were implementing different elements of the Integrated Nutrition Programme.

In the Eastern Cape, steps to manage malnutrition were being implemented in hospitals, as part of the District Health System. KwaZulu-Natal admitted infants and children suffering from malnutrition to the Protein Energy Malnutrition (PEM) scheme, the Vitamin-A Supplementation Programme, Parasitic Control Programme, and the Primary School Nutrition Programme in schools.

The Mpumalanga Department of Health provided food supplements and infant feeds at provincial hospitals, clinics and government-funded old age homes. The Department was still finalising its malnutrition intervention programme. The only other programme being implemented was the PSNP, which benefited schools in rural areas and on farms.

The North West Department of Health reported that more emphasis was placed on providing nutrition services to children between the ages 0-6 years and those at primary school. Children suffering from malnutrition were attended to in hospitals, clinics, crèches and schools via rehabilitative measures and preventative interventions through nutrition education.

1.2.1 Constitutional obligations and vulnerable groups

The malnutrition management programme in the Eastern Cape reduced the number of children suffering from malnutrition and considered the needs of all children except for refugees and asylum seekers. During the year under review, nine community based growth monitoring and promotion sites were established. This resulted in more cases of malnutrition being identified and addressed. The KwaZulu-Natal Department of Health reported that the INP respected, protected, promoted and fulfilled the right to basic nutrition, because infants and children who suffered from

malnutrition were assisted through the PEM, Vitamin-A Supplementation Programme, Parasitic Control Programme and Primary School Nutrition Programme in schools.

In response to whether the measures were reasonable and effective, the KwaZulu-Natal Department of Health reported that the Primary School Nutrition Programme resulted in improved learner attendance at school and end-of-year results.

The North West Department had approximately 80 percent of learners in primary school in rural areas and 20 percent in urban areas benefiting from the PSNP. Informal settlements were targeted individually by the Department of Health in the North West. In the Western Cape, the PSNP also targeted children from rural areas and informal settlements.

1.2.2 Difficulties experienced in the implementation of the measures

Difficulties experienced by the KwaZulu-Natal Department of Health in implementing the PSNP resulted from the late submission of relevant documentation pertaining to applications and payment procedures, leading to interrupted feeding. There was also fraud and inaccessibility of schools in rural areas, that hampered the regular monitoring of service delivery, and limited the choice of suppliers.

Since the PSNP is a community programme, the North West Department issued tenders to small medium and micro enterprises. However, the enterprises experienced capacity problems making it difficult to render services properly. Programmes for children up to 6 years were marred by budgetary constraints, and needed additional personnel for full implementation of the INP.

The Western Cape Department of Health reported that more funding would enable a nutrition programme to be provided to children in poor schools. In the province the Social Services Department cares for homeless children and those with disabilities. No special arrangements were available for vulnerable groups due to budgetary constraints. The limited budget resulted in the Department offering the nutrition programme only to specific grades at certain schools.

1.3 Critique

Lack of information from the NDH and provincial departments in the Free State and Northern Province made it difficult to assess whether the right to basic nutrition was being fulfilled. The Northern Cape misrepresented its report by providing the previous years report.²³

The national department failed to report on the breastfeeding guidelines developed during the reporting period. As already mentioned in the

²³ For more details refer to chapter 1.

overview section, during the year under review the breastfeeding guidelines for health workers were finalised. The measure aimed to protect, promote and support breastfeeding. In the guidelines the NDH has committed itself to:²⁴

- Protecting, promoting and supporting breastfeeding as a norm, bearing in mind that HIV is transmissible through breast milk;
- Ensuring that practices and behaviours in health care settings are always protecting, promoting and supporting breastfeeding; and
- Ensuring that health care facilities build on good practices and remove constraints and discourage practices detrimental to establishing, maintaining or sustaining breastfeeding.

The guidelines were developed due to the low prevalence of breastfeeding in the country, compared to other African countries. The other reason was the acknowledgement and appreciation of the linkage between low breastfeeding rates and malnutrition in the critical growth period of six to 36 months. The NDH realised that exclusive breastfeeding reduces the incidence and severity of diarrhoea and respiratory and other infectious diseases. Breastfeeding also has the ability to lower the risk of non-infectious illnesses such as insulin dependent diabetes mellitus, pre-menopausal breast cancer and osteoporosis. Even in good economic and social conditions, breastfeeding protects infants against infection.²⁵

Both public and private providers of health care are supposed to inform all mothers about the guidelines and prominently display the guidelines in appropriate places. Furthermore, health workers should be appropriately trained in the implementation of the guidelines. Of utmost importance is that mothers should be informed about the benefits of breastfeeding, encouraged and supported to exclusively breastfeed for the first six months. In instances where the mother is HIV-positive and chooses not to breastfeed, counselling and a demonstration of how to prepare the infant formula or other breast milk substitutes should be given.²⁶

The INP related measures are reasonable and will serve different groups. With proper implementation the INP related programmes could be effective in addressing the nutritional needs of the country. Information provided suggests that in terms of implementation there is more emphasis on providing assistance in health care facilities and through the primary school feeding programme only. Other deserving children, who are not in school such as those in early childhood development centres run by non-governmental organisations and homeless children, are not being reached.

Reports from the provinces imply that the Primary School Nutrition Programme has been effective because there has been reduced absenteeism in primary schools, more participation by children in class

²⁴ National Department of Health (note 15 above) 4.

²⁵ Ibid 8.

²⁶ National Department of Health (Note 15 above) 5.

and improved end-of-year results. Nonetheless, the Food Consumption Survey reported that 88 percent of children do not eat on a regular basis in the feeding scheme,²⁷ meaning that the service is not being provided regularly. Basic nutrition can only be ensured if there is sustainable supply of food for everyone, including those who are unable to provide food for themselves.²⁸ Therefore failure to provide basic nutrition for children from disadvantaged backgrounds in all circumstances is an infringement of the enjoyment of the right.

Basic nutrition is respected, protected, promoted and fulfilled if there is intake of a wide variety of essential nutrients. The National Food Consumption Survey found that the mean energy intake of children in all provinces was below the one recommended for their age group. The highest energy intake in the country was in the Western Cape with about 5 197 kilo joules (kJ) being consumed per child between 1-3 years, which was still below the recommended daily allowance (RDA) of 5 460 kJ for a child in the same age group. The same trend was also prevalent in the consumption of micronutrients. The survey showed that only children living in the urban areas and in the Western Cape had the recommended intake of vitamin A,²⁹ all other provinces fell below the RDA. This clearly indicates that the food children consume does not provide the necessary nutrient composition for healthy growth. It is important therefore that basic foodstuffs be fortified as recommended by the Department. Providing nutrition rehabilitation programmes is seen as a positive step towards fulfilling a part of government's obligation of providing basic nutrition.

Measures reported by the Eastern Cape, KwaZulu-Natal, Mpumalanga, North West and the Western Cape showed a commitment to fulfilling the right to basic nutrition. These provinces all encourage breast-feeding as a means of securing nutrition for infants, which is a reasonable measure. In this regard Gauteng has implemented the Mother-Baby-Friendly Initiative to encourage breast-feeding.

The Eastern Cape and Gauteng reported that they carried out growth monitoring projects to detect growth irregularities and respond accordingly. The projects were enhanced by micro-nutrition supplementation and nutrition education. This measure showed the effort being made by provincial departments to address malnutrition. Due to the above-mentioned reasons the measure does respect, protect, promote and fulfil the right to basic nutrition.

The link between poverty and malnutrition has been recognised by provinces, such as Gauteng. The Department provided food parcels, which unfortunately had to be phased out due to administrative problems. Nevertheless, crèche feeding schemes and soup kitchens were still running. The measure indicated an attempt to help children from poor

²⁷ Department of Health (note 16 above) 225.

²⁸ General Comment 12 (note 4 above) para 7.

²⁹ Department of Health (note 16 above) 231.

backgrounds, especially those not at primary school, to gain access to basic nutrition.

The Free State had projects aimed at poverty alleviation and household food security, thereby providing funding for purposes of long term self help projects. The projects included food gardens, handwork projects and other life skill courses. The projects showed a commitment to eliminating malnutrition through addressing poverty for the realisation of the right.

Most provinces reported that the measures targeted poor communities in rural areas and informal settlements, which is commendable, as these are the most vulnerable groups. Another vulnerable group that needs attention is children heading households, due to HIV/AIDS.

Measures instituted by the NDH respect the right to basic nutrition by seeking to promote and protect availability of foods or supplements to children through breastfeeding. The guidelines will ensure that mothers and health care workers are aware of the importance of breastfeeding.

Provinces have instituted measures aimed at fulfilling government's responsibility towards the provision of basic nutrition for children. The measures are reasonable, but their effectiveness is less visible given the continuing rates of stunting amongst children (one out of every five children) as a result of malnutrition, and half of the country's children are eating less than half the recommended daily amounts of basic nutrients.³⁰ This suggests that the manner in which the measures were being implemented needs to be reviewed because all the intended beneficiaries were not being reached.

1.4 Recommendations

The Free State and Northern Province have a duty to provide information to the Commission, responsible officers should ensure that the information is forwarded as requested. Departments that provided information such as the National Department of Health should ensure that measures are explained thoroughly. Provinces such as Gauteng must respond to the protocol and not just provide reports compiled for other purposes.

To ensure that the food security programmes are effective, more emphasis should be placed on poverty alleviation, because poverty is a major cause of food insecurity.

The NDH should improve its strategies for implementing community-based projects, which are a component of the Integrated Nutrition Programme so as to target a wider range of vulnerable groups, such as homeless children.

³⁰ Department of Health (Note 16 above).

Food fortification is encouraged and the NDH should continue with efforts of securing basic foodstuffs that will be used in the fortification process, in order to address micronutrient deficiency amongst children, especially those from disadvantaged communities.

The national Department of Health needs to develop guidelines for feeding children of HIV-positive mothers, especially those from disadvantaged communities. Children of such mothers are more at risk of malnutrition if they are not breastfed. It is very important that feeding guidelines for mothers in that situation are developed as soon as possible.

2 LEGISLATIVE MEASURES

Responses from the national and provincial departments of Health indicated that there were no legislative measures instituted for the realisation of the right to basic nutrition.

2.1 Critique

Lack of information from both national and provincial departments of health suggests that there were no legislative measures, which exist that relate to the right to basic nutrition.

Although the development of legislation is mainly a national competency, s 104 of the Constitution also gives provincial governments legislative powers to make laws. Provinces are also responsible for the implementation of national legislation and maintenance of uniform standards.³¹ Failure to develop or implement legislation is a violation of the Constitution. In instances where provinces clearly fail to develop or implement measures the national department should assume responsibility or be held responsible.

2.2 Recommendation

In the National Action Plan one of the challenges identified for departments responsible for ensuring the right to basic nutrition is realised, is the development of measures to strengthen food security. The development of legislation that focuses solely on food would ensure that the provision of the right is strengthened and sustained.

3 BUDGETARY MEASURES

National and provincial departments of health were required to provide information on budgetary measures instituted for the right to basic nutrition. The Departments were also required to provide information on variances where they existed, and the adequacy of budgetary allocations towards the different programmes established for the realisation of the

³¹ Section 125 of the Constitution.

right to basic nutrition, the impacts of the inadequacy of the budget, measures taken to cope with budget inadequacy and special considerations given to vulnerable groups in the allocation and application of budgetary resources.

3.1 National Sphere

The National Department of Health provided information on the budgetary allocation for measures instituted and the information is summarised in the tables below.

School feeding projects

The budgetary allocations for the school feeding projects are shown in the Table below.

Table 1 Budgetary allocation for the school feeding projects

YEAR	INP/ CONDITIONAL GRANT ALLOCATION TO THE NDH IN RANDS	ALLOCATION TO SCHOOL FEEDING PROJECTS (ACTUAL & PROJECTED) IN RANDS	ACTUAL EXPENDITURE IN RANDS	ALLOCATION AS PERCENTAGE OF DEPARTMENTAL BUDGET IN RANDS
1998/1999	525 760 000	465 941 132	331 559 239	8.22%
1999/2000	554 677 000	457 954 362	356 145 445	7.10%
2000/2001	582 411 000	-	-	-

- Information not provided

Budgetary allocations towards the school feeding projects come from two sources, namely the INP/Conditional Grant, and an unidentified source. The amount represented in the expenditure column does not clearly indicate whether it is for both amounts. As can be seen from Table 1, budgetary allocations for both the conditional grant and the School Feeding Projects decreased from the 1998/1999 to the 1999/2000 reporting period. The NDH reported that the per capita allocation after adjusting for inflation for the school feeding projects also decreased from R68.00 in 1998/1999 to R67.00 for the year 1999/2000.

Poverty alleviation projects

The NDH also provided information on poverty alleviation as one of the projects being implemented to ensure that the right to basic nutrition is realised in the following Table.

Table 2 Budgetary allocation for poverty alleviation projects

YEAR	POVERTY ALLEVIATION ALLOCATION IN RANDS	ALLOCATION TO PROJECTS IN RANDS	ACTUAL EXPENDITURE IN RANDS	ALLOCATION TO PROJECT AS % OF DEPARTMENTAL BUDGET IN
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				RANDS
1998/1999	28 000 000	2 377 914	508 597	.04%
1999/2000	23 000 000	7 251 569	1 784 000	.11%
2000/2001	7 000 000	-	-	-

- information not provided

The information in the above Table shows that for poverty alleviation the total allocation has nominally decreased and will continue in that trend even for the year 2000/2001. The money allocated and expenditure indicate that there was under spending on projects.

According to information provided by the NDH, the above projects were funded from the Primary School Nutrition Programme budget of the Reconstruction and Development Programme (RDP) and the INP Conditional Grant Allocation, which replaced the RDP allocation during the financial year 1998/1999. The Department also indicated that it was difficult to respond to the questions in the required format.

According to the NDH the scope of activities relating to INP was funded at different spheres of government, from sources such as the Poverty Alleviation Fund, INP Conditional Grant, donor funding and normal budget allocations. The National Department of Health reported that the funds were adequate.

3.2 Provincial Sphere

The Free State and Mpumalanga provinces did not respond to all the questions in the protocol. The report provided by the Gauteng Department of Health did not provide any relevant budgetary information.

Table 3 Total budgetary allocation for provinces

PROVINCE	YEARS	TOTAL ALLOCATION IN RANDES	PROJECTED EXPENDITURE IN RANDES	ACTUAL EXPENDITURE IN RANDES
Eastern Cape	1998/1999	3 100 872 000	-	3 146 450 000
	1999/2000	3 434 091 000	-	3 494 798 000
	2000/2001	3 318 080 000	3 318 080 000	-
KwaZulu-Natal	1998/1999	119 586 000	-	86 826 985
	1999/2000	132 863 275	-	61 690 335
	2000/2001	145 471 473	-	12 536 129
North West	1998/1999	1 361 710 000	1 445 253 000	1 341 992 000
	1999/2000	1 431 592 000	1 459 994 000	1 383 842 000
	2000/2001	1 565 328 000	1 576 000 000	-

- information not provided

The Table above shows that the total budgetary allocation varies amongst the provinces, with Eastern Cape receiving the biggest amount. The total allocation increased nominally for two of the three provinces that provided the information. The actual expenditure column shows a trend of under spending for KwaZulu-Natal and the North West, and over spending for the Eastern Cape.

Variations: The North West and Western Cape reported that the variations in the budgetary allocation for the INP Conditional Grant were due to inflation. The Western Cape provided information in a different format, its information on the budget was in separate columns for the provincial allocation and the INP as seen in the Table below.

Table 4 Budget allocation for the Western Cape

PROVINCE	YEARS	INP ALLOCATION IN RANDS	INP EXPENDITURE IN RANDS	PROVINCIAL ALLOCATION IN RANDS
Western Cape	1998/1999	25 989 000	22 630 364	21 489 000*
	1999/2000	27 418 000	24 241 364	19 673 000*
	2000/2001	28 979 000	5 094 849	18 672 000*

Information in Table 4 shows a nominal increase in the INP allocation, with the provincial allocation showing a different trend from that of the INP. The figures in the expenditure column show that the Department has been and is still under spending.

Feeding Programmes

The only provincial departments that provided information on the budget allocation for the provision of feeding programmes were the Eastern Cape, North West and the Western Cape, as summarised in the Table below.

Table 5 Budgetary allocation for feeding programmes for provinces

PROVINCE	YEARS	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
Eastern Cape	1998/1999	114 899 949	-	94 662 734
	1999/2000	116 683 933	-	91 762 409
	2000/2001	119 568 540	119 568 540	-
North West	1998/1999	35 559 000	35 559 000	33 406 515
	1999/2000	37 514 759	37 514 759	36 463 199
	2000/2001	39 894 166	39 894 166	26 000 000
Western Cape	1998/1999	21 489 000	18 432 213	18 432 213
	1999/2000	19 673 000	22 195 507	22 195 507
	2000/2001	18 672 000	18 672 000	2 415 957

The allocations increased nominally in both the Eastern Cape and the North West, but decreased in the Western Cape. Both the Eastern Cape and the North West under-spent on their budgets, while the Western Cape over-spent.

Only KwaZulu-Natal provided information on the Protein Energy Malnutrition Scheme. The information from the Department has been summarised on the PSNP and PEM as indicated in the Table below. The province only spent R9, 943, 906, which is about 10 percent of what was allocated.

Table 6 Allocation for PSNP and PEM for KwaZulu-Natal

PROGRAMME	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS	ROLL OVER IN RANDS
PSNP	1998/1999	100 635 000	77 142 349	20 841 949

	1999/2000	95 095 000	55 399 049	9 943 906
	2000/2001	117 090 000	12 536 129	-
PEM	1998/1999	1 710 000	357 911	-
	1999/2000	4 000 000	2 531 424	-
	2000/2001	4 000 000	-	-

- information not provided

The PSNP budget was reduced from R100, 635, 000 in the 1998 financial year, to R95, 095, 000 during the 1999/2000 financial year. It was however, expected to increase to R117, 095, 000 in the 2000/2001 financial year.

Variances: In the Eastern Cape variances in the departmental allocation were due to poor co-ordination and lack of capacity at the district level, such as delays in the tender system, shortage of logistical resources and delayed implementation of projects.

The Western Cape acknowledged that the R3 million under-spending in 1998 resulted in overspending in 1999/2000.

Adequacy: The Eastern Cape and KwaZulu-Natal Departments of Health reported that the allocation was adequate for the provision of basic nutrition. In the Eastern Cape, the grant catered for all performance areas identified according to the capacity of the Department.

The North West allocation was not adequate, as necessary services could not be provided. Due to the insufficient budget in the North West, the programmes reached only 52 percent of primary schools. Problems were addressed by prioritising urgent needs of the community, and promoting functional integration and intersectional collaboration.

The Western Cape found the budget to be inadequate, especially with the cost of food increasing without corresponding increase in the budget. Due to these financial constraints, the Department was unable to reach all the children in need. There were financial constraints with principals and non-governmental organisations complaining about children going hungry. Children on farms were not properly reached.

Special considerations given to vulnerable groups: In the Eastern Cape, most children were within the INP target groups.

In KwaZulu-Natal every child benefited. However, no special considerations had been given to the homeless, children with disabilities and children of refugees and asylum seekers.

In the North West and Western Cape the programme mainly targeted children from the rural areas and informal settlements.

3.3 Critique

The national and most provincial departments did not respond to all the questions in the protocol. Questions that had a poor response rate were on

variances, adequacy of the budget and special considerations given vulnerable groups. Only the Eastern Cape, KwaZulu-Natal, North West and Western Cape provided information on the allocation for school feeding projects.

The budget allocation for both the national and provincial departments showed a nominal increase in the total allocations over the years. However and at the national sphere, this increase was not reflected in the school feeding projects. There was also a disparity in the actual spending, which was lower than the allocation to projects during both 1998/1999 and 1999/2000.

There was also a decrease in per capita allocation after adjustment from R68.00 in the year 1998/1999 to R67.00 in the financial year of 1999/2000. The decrease in the budget is unacceptable as only 63 percent of children actually benefited from the PSNP, meaning that there was still scope for extending the benefits of the programme to more children.³² Lack of proper implementation affects the reasonableness of the measure, as intended beneficiaries were not reached on a regular basis. The decrease in the budget allocation does not contribute to the realisation of the right to basic nutrition.

The KwaZulu-Natal Department of Health did not reflect on the amount spent on the PEM scheme and other nutrition supplementation initiatives.

As seen from Tables 1 and 2 above, there was under-spending for the projects. Although half a billion was allocated for school feeding from the INP funds, only R331 million was actually spent. According to the findings of an evaluation conducted by the Health Systems Trust, spending half a billion rand each year for the school-feeding programme is difficult to justify, especially when the coverage of school feeding has been poor and inconsistent, and the food offered was of sub-standard quality. Expenditure for the school feeding programme did not seem to be adequate to enable the programme to reach approximately 7,9 million primary school children concentrated mainly in the rural areas. Government measures that fail to target children are unreasonable.³³

All the provinces that reported on budgetary allocation showed a trend of under-spending, especially in terms of the feeding projects. For the Eastern Cape and KwaZulu-Natal, which have the largest population of stunted children to under spend, undermines the purpose of a reasonable measure. KwaZulu-Natal's allocation for PEM was reasonably conceived for the purpose of providing nutrition rehabilitation, but its effectiveness in implementation was reserved because of huge under spending. Inappropriate spending rendered the programme incapable of achieving its

³² Department of Health (note 16 above) 225.

³³ *Grootboom Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR (CC) para 45.

objective of correcting micronutrient deficiency in a province with about 20 percent of stunted children.³⁴

3.4 Recommendations

The budgetary allocation should reflect information on all measures as requested in the protocol, and special considerations given to vulnerable groups.

The National Department of Health should monitor whether provincial departments are implementing policies and programmes effectively. The implementation of school feeding projects should be done at the district level to better target needy schools. Provincial departments should still be involved at a supervisory level and for ensuring compliance with national norms and standards.

Interdepartmental collaboration is necessary to ensure that funds are utilised efficiently and cover a large number of communities. Provincial budgets should be in line with departmental priorities of providing basic nutrition to ensure that allocated resources are used effectively. Efficient use of resources requires appropriate management systems for the implementation of the measures.

4 OUTCOMES

The national and provincial departments were requested to provide information on the number of children with a low birth weight, and children aged 6-71 months, who were malnourished, stunted, wasted and suffering from kwashiorkor. This information was supposed to be disaggregated according to race and geographic location.

4.1 National Sphere

In response to the above questions the National Department of Health indicated that there were 4 992 children with a low birth weight. Of this number 4 149 were Africans and 2 522 were from rural areas. About 10,3 percent of children aged between 6-71 months were malnourished, and 21,6 percent of the children in the same age group were stunted.

There were 4,7 million children benefiting from the feeding programme.

4.2 Provincial Sphere

The Eastern Cape, KwaZulu-Natal, North West and the Western Cape were the only provinces that responded to the questions on outcomes.

³⁴ SAHRC *International Conference on Food Security & Nutrition as Human Rights: Conference proceedings, 25-27 March 1999* (2000) 60.

The information provided by the Eastern Cape indicated that the incidence of children with a low birth weight was 11.4 percent; the number of under weight children below 5 years was 3.8 percent while for stunting it was 20 percent.

Information provided by KwaZulu-Natal was from the South African Vitamin A Consultative Group of 1994. The statistics put the percentage of stunted and wasted children at 15.7 and 4.2 respectively. Infant mortality is at 52.1 (per 1000 live births), underweight 4.6 percent and vitamin deficiency rate at 38 percent.

The North West reported that there were 5 421 children with a low birth weight, 7 362 children aged 6-7 who were malnourished and 8 732 children suffering from kwashiorkor. The Western Cape reported that information on stunting and wasting was not routinely collected. There were about 4 289 children under 6 years who suffered from severe malnutrition. About 2 083 children had a low birth weight and 10 157 children had failing growth.

In the North West there were 335 805 children on the feeding programme. The Western Cape had 317 698 children on the feeding programme, 37 356 on the Community Based Nutrition Programme, and 20 611 on the PEM programme.

5 NATIONAL ACTION PLAN (NAP)

The National Department of Health only provided information on some of the NAP challenges. Approximately 4 740 children had parasitic diseases, of this number 3 920 are Africans, 2 366 were from rural areas and 10 percent of children had iron deficiency.

KwaZulu-Natal only reported on the number of children benefiting from the Primary School Feeding Programme. During the year under review 1 148 585 primary school children were reached by the feeding programme, all of them Africans.

5.1 Critique

The National Department of Health did not provide all the information required by the protocol. The lack of information suggests that the Department does not have a system that collects information on the requested indicators. The Free State, Gauteng and Mpumalanga provinces did not provide information on the outcomes section. The Eastern Cape, KwaZulu-Natal and the Western Cape did not provide information in the format required by the protocol. Only the KwaZulu-Natal Department of Health provided information on the NAP section. The information provided by other provinces in most cases was incomplete, making it difficult to assess progress towards the realisation of the right to basic nutrition.

The National Department of Health in its White Paper on the Transformation of the Health System had set the goal of reducing the prevalence of low birth weight to 10 percent. According to the National Food Consumption Survey, the prevalence of underweight children had been reduced to 1,5 percent, of which most were in rural areas. This information indicates that the Department's objective had been achieved in reducing the number of underweight children. The measures implemented were also effective in reducing the number of wasted children to 1 in 20.³⁵

Where the indicators were not positive, was in the rate of malnutrition. One of the objectives of the INP as set out in the White Paper was to reduce malnutrition in children to 1 percent. The nutrition indicators show that malnourishment is at 10,3 percent. The situation is worse in the Eastern Cape, which has the second highest level of malnutrition of 28,8 percent. This shows that the Department still has a lot to do to meet its objective. The same applies with the set objective on stunted children. The objective was set at restricting the number of stunted children to 20 percent. However, the figure still stands at 21,6 percent, where one in five children are stunted. Most of this happens in the most poverty-stricken provinces, which host 60 percent of all stunted children.³⁶

The above-mentioned indicators show that programmes such as the PEM and nutrition rehabilitation are not being fully implemented. The Department encourages the production and consumption of food with vitamin A and iodation of salt. However there are still many children suffering from malnutrition and micronutrient deficiency. The information on NAP indicators showed that 10 percent of children suffer from iron deficiency.

In the overview section, it was mentioned that the right to basic nutrition for children is not qualified by the internal limitation such as is the case with the right to sufficient food. The right to basic nutrition imposes an immediately enforceable obligation that has to be satisfied without delay and stringent regard to resources. The State has an obligation to take immediate steps to help realise the right.

5.2 Recommendations

Food provided by the feeding programme should satisfy the Required Daily Allowance in terms of nutrient composition. The National Department of Health should conduct regular evaluation of projects to identify problems and address them expeditiously.

There is a need to fast track the provision of health-facility based rehabilitation centres especially in rural areas where malnutrition is rife. Government departments should develop special measures for out of school children and infants that do not have access to health care

³⁵ Department of Health (note 16 above) 225.

³⁶ SAHRC (note 34 above) 60.

facilities. For instance the implementation of the Community-Based Programme of the INP by the Department of Health would ensure that such children's basic nutrition needs are catered for.

6 MONITORING SYSTEMS

6.1 National Sphere

The information provided by the national Department of Health for the section on monitoring systems, was similar to that provided for the 2nd Economic and Social Rights Report.

6.2 Provincial Sphere

The Eastern Cape, Free State and Mpumalanga Departments of Health did not respond to questions relating to monitoring.

The Gauteng province reported that the Departments of Health and Education were responsible for monitoring feeding schemes at schools. The officials monitored the delivery of approved food items to schools and the feeding process as well as storage and sanitation. The officials also inspect the quality of food items at schools and take complaints from the public.

KwaZulu-Natal employed field workers to collect statistics to be used to compile a report on the:

- number of children attending health facilities
- children participating in the primary school nutrition intervention programme
- percentage of children participating in the PEM scheme
- weight of children
- number of participants in the community-based projects and quality of food supplied to primary school children

The North West employed school health nurses to assess and monitor health status of primary school children. At clinic level, the monitoring was done through growth monitoring. Data collected was on the incidence of malnutrition, number of underweight children, and children on the PEM scheme.

The Western Cape used a malnutrition register in all clinics. A quarterly report on the Primary School Nutrition Programme was compiled at regional levels. The regions also undertook site visits.

6.3 Critique

The existence of a monitoring system is reasonable in that it helps identify difficulties and facilitate adoption of corrective measures. Monitoring is a

deliberate government action aimed at achieving set objectives. The Committee on Economic, Social and Cultural Right states that there should be mechanisms put in place to help monitor progress towards the realisation of the right.³⁷ A national information system is a necessary prerequisite for proper planning, monitoring and evaluation.

Statistics collected by the provinces are detailed. However the same Departments are unable to provide information on the indicators required in the protocol. This means that the monitoring mechanism was not effective in capturing the necessary statistics as required by the NAP and the protocols.

6.4 Recommendations

Monitoring and evaluation should extend to all aspects of the INP based programmes. This includes the National Department of Health finalising the development of a monitoring system for all provinces to ensure uniformity in the collection of information that could be utilised to set up a National Database accessible to all the provinces.

Within the same framework, provincial departments need to develop proper information systems for their respective provinces, for improved targeting of beneficiaries and planning. This entails including more indicators in the statistics they collect, especially those required by the protocol.

National and provincial departments should tailor their programmes according to the National Action Plan in order to prioritise appropriate goals, lobby for sufficient funding, and implement monitoring systems.

³⁷ General Comment 12 (note 4 above) para 31.

THE RIGHT TO SUFFICIENT FOOD

Legislative and other measures instituted by the national and provincial Departments of health, are derived from the Food Policy released before the period under review, and reported in the 2nd Economic and Social Rights Report.³⁸

1 POLICY MEASURES

1.1 *National Sphere*

The National Department of Agriculture (NDA) instituted the following measures during the reporting period:

- Land Care South Africa
- Special Programme for Food Security (SPFS)

Land Care South Africa

The Land Care South Africa programme was instituted to address access to sufficient food through job creation and better utilisation of natural resources.

The Special Programme for Food Security

The Programme was aimed at improving food security for poor households that live in rural and peri-urban areas. The programme intended to use different appropriate technologies to help increase food production and income for small farmers without compromising the sustainability of their resource base. Due to the fact that the programme was still new, only three provinces were to be used to pilot the programme.

In response to how the measures gave special considerations to vulnerable groups, the NDA reported that projects and programmes were mainly implemented in rural areas, where black people and the poor are the majority. The programme targeted households; and children also benefited.

Problems experienced by the NDA in the implementation of the measures were resulted from the slow transfer of funds to provinces, and lack of good quality projects.

1.2 *Provincial Sphere*

³⁸ The policy focuses on food insecurity, food nutrition, employment creation, income generation, food production, food distribution process, food affordability and food importation. Rural people and other vulnerable groups are identified in the policy. The Department intends assisting these groups through food support, income support, food production and job and income generation.

The following measures were being instituted by different provinces during the reporting period:

- Food Security Programme
- Women in Agriculture Programme
- Farmer Settlement Programme
- Broadening Access to the Agricultural Trust (BATAT)
- Land Care Programme
- White Paper on Agriculture and Environment

Food Security Programme (FSP)

Provinces that provided information on the Food Security Programme were Gauteng and the North West.

The Gauteng Department of Agriculture (GDA) was still implementing the Household Food Security Programme (HFSP), which contributed to the mitigation of household food insecurity and income generation through household level food production projects. The HFSP also helped with the provision of technical assistance and funding for households to produce their own food.

The North West Department reported that it has put in place intervention strategies to combat household food insecurity, such as the Food Security Programme. The Food Security Programme had the following sub-programmes:

- *Food production* - the aim was to produce a variety of foodstuffs, enhance sustainable food production and foster ecological recycling of material and nutrients. Some of the food that would be harvested included vegetables, small stock, poultry and fruit trees.
- *Food processing and preservation* - the aim was to improve storage of basic food products through dehydrating, freezing, vacuum packing, jam making and canning.
- *Income Generating* - this was aimed at assisting deserving communities with small projects related to food production, processing and preservation. The aim of these ventures was to generate income for food acquisition.
- *Supplementary sub-programme* - this was designed to broaden access to resources. It aims to fill the gaps where an existing project lacks certain essential components such as skills, production inputs, technology, and links with service providers or infrastructure.

Women in Agriculture Programme

The Free State, North West and Western Cape Departments of Agriculture instituted a measure that encouraged women to partake in agricultural activities to enhance and develop food security.

The report from the North West further outlined that its Women in Agriculture Programme had the following sub-programmes:

- ***Institution building*** - to assist women in agriculture to form associations, forums and co-operatives. It also afforded them more bargaining power and allowed them to become more competitive.
- ***Capacity building*** - aimed at building capacity in fields such as home economics, networking with other organisations, negotiations and related management skills.
- ***Facilitation*** - assisted in removing barriers to the identification of opportunities and participation in the agricultural sector.
- ***Representation*** - dealt with the promotion of women's issues, through highlighting the plight of women in the agriculture sector.

Farmer Settlement Programme

Only the Gauteng and Northern Cape Departments of Agriculture provided information on the Farmer Settlement Programme. GDA reported that the Farmer Settlement Programme sought to realise the right to sufficient food through:

- Enhancing the contribution of established small-holdings and commercial farms to national food security
- Promoting skills transfer to improve agricultural production, and
- Promoting the full utilisation of available land for agricultural production

The Northern Cape Department of Agriculture (NCDA) reported that the Farmer Settlement Programme provided functions that:

- Ensure sustainable food production by means of good after-care measures.
- Promote the diversity of agricultural products, and mariculture on the West Coast
- Enforce the law and fulfil statutory obligations with respect to agricultural production
- Ensure quality and resource management for sustainable use
- Ensure co-operation with neighbouring states in agricultural and veterinary issues

Broadening Access to the Agricultural Trust (BATAT)

The Northern Cape was the only Department that reported on the BATAT programme. This programme was meant to assist emerging farmers to increase food production in South Africa. According to the NCDA the emerging sector has multiple possibilities. The areas traditionally in black hands are producing way below their capacity. This arises from lack of access to credit, inputs and proper information. There is a need for appropriate networking within black communities. The NCDA reported that

there is currently sufficient food produced in the country, but the distribution thereof is a problem and this was the main challenge of the Department.

The Department has structured its budget such that there is a cluster of skills units that form an Agricultural Development Unit. These units interact with the public and the community; a multi-skilled approach to development of agriculture is used. The Department indicated that their establishment is not confined to access to food at the household level, but only up to the production level.

Land Care Project

The Eastern Cape Department of Agriculture (ECDA) reported that it was implementing the Land Care Programme in line with the National Policy of Agriculture. The ECDA also had the Integrated Livestock and Crop Project, which was a leading Land Care Programme. This project was an initiative for rural development through optimum sustained resource use. The project directly addressed the problem of a passive rural economy that falls short of the present and growing socio-economic needs of these areas. The purpose was to effect immediate and lasting improvements in the rural socio-economy by developing appropriate agricultural, marketing and production skills and opportunities. The Department reported that it used indicators to measure the success of the project. Social indicators included effective community management institutions, number of beneficiaries, skills development and household food security. Economic indicators included household income, job creation and community-commodity funds and environmental parameters of the condition of the natural resources and the conservation status of arable areas.

White Paper on Agriculture and Environment Affairs

The KwaZulu-Natal Department of Agriculture indicated that the provincial White Paper on Agriculture and Environmental Affairs was being reviewed and would be finalised during 2001.

The Community Food Gardening, Irrigation Schemes Rehabilitation, Land Care and Farmer Settlement Programmes were some of the measures that the Northern Province Department of Agriculture was still implementing to ensure access to food security.

1.2.1 Effectiveness of the measures

The Free State, Gauteng, KwaZulu-Natal and Northern Province Departments of Agriculture reported that the measures instituted were effective. In the Free State the measures uplifted the lives of rural women, and people from disadvantaged communities. In Gauteng, the measures were educational, and targeted individuals with food insecurity, and enabled poor people to meet their household food needs and generate a surplus for sale through their own initiatives. In KwaZulu-Natal the

instituted measures were effective as they reached about 38 653 African households. In the Northern Province, the implemented measures were effective because they ensured that members of the public and farmers had access to land, water and other natural resources for food production.

1.2.2 Special considerations given to vulnerable groups

The Eastern Cape, KwaZulu-Natal and the North West Departments reported that women head many households. Assistance provided thus went beyond agricultural advice, and included empowerment of women through capacity building.

The Eastern Cape Department further supported women on the storage, packaging, transportation and marketing of food to enable full use of production potential.

The Northern Province Department of Agriculture reported that women were in the majority in small-scale farming in rural areas.

KwaZulu-Natal also reported that the Xoshindlala programme targeted previously disadvantaged communities and children.

The Eastern Cape, including the Northern Cape and Northern Province Departments of Agriculture reported that special attention was given to households in rural areas, informal settlements and low-income groups.

The NCDA indicated that it recognised the presence of older persons but had not addressed issues concerning them.

In the Northern Province people living in informal settlements were provided with limited extension services on crop production. Older persons were supported in group farming, vegetable food plots and food processing.

The Western Cape Department of Agriculture reported that, because of past discriminatory policies, good moral, ethical and political reasons existed, to institute special measures to assist in practising and prospective disadvantaged farmers and their dependants to enter into the mainstream of agriculture. The Department also indicated that it placed high emphasis on supporting practising small and subsistence farmers who were denied state support in the past.

1.2.3 Difficulties experienced in implementing the measures

The Gauteng Department of Agriculture indicated that the demand was greater than the resources, hence the GFSP and HFSP were oversubscribed. The Northern Province highlighted the same problem,

where the need for agricultural support outstripped available support because the province is largely rural, and agriculture was the main sector supporting the rural and previously disadvantaged communities. Other problems experienced by the Northern Province included 171 irrigation schemes that were developed during 1994 that deteriorated due to lack of maintenance. Rehabilitation costs would be in the vicinity of R200 million, which was far beyond the capacity of the current departmental budget on the programme. The Department provided that only three schemes underwent rehabilitation, a further four schemes was in line for rehabilitation.

The Northern Cape Department of Agriculture reported that inadequate funding and staffing compromised the implementation of the measures. There was lack of funding for small-scale farmers due to insecurity of tenure and collateral, inadequate state and private land, and delays in land claims of available state land. Other difficulties experienced by the Northern Cape were structural, and had more to do with the way the Department was structured. The Department was structured to fulfil food production, and lacked a mechanism to ensure access and affordability at the household level. The Department needed the expertise in Family (Home) Economics as part of the extension services, as officials lacked the skills of advising families on how to utilise their limited resources.

The North West Department of Agriculture experienced minor problems related to institutional arrangements, which marginally affected the implementation of the programmes.

1.3 Critique

The report by the National Department of Agriculture had insufficient information. Reported measures were not explained in detail. Other sources indicate that the Land Care Programme had as its main goal the optimisation of productivity, food security, job creation and a better quality of life for all. The objectives of the programme included the following:³⁹

- Providing a framework to optimise productivity of the natural resources through management, protection and rehabilitation
- Developing the capacity and skills of land users
- Maintaining and enhancing the ecological integrity of natural systems, minimising or avoiding risks related to the irreversible damage of the land.

The Land Care Programme was targeted at small, medium and communal farming groups associated with exploitative farming practices and limited resources for implementing corrective measures. Other beneficiaries of the

³⁹ Land Care policy at http://www.polity.org.za/govdocs/policy/Land_CARE.html site visited on 27/06/2001.

programme include people from rural areas, in job creation and transfer of skills and knowledge.⁴⁰

Land Care South Africa represents a reasonably conceived measure. The programme intends to make good use of land to ensure sustained food production. The measure accords with obligations imposed on the State to ensure sustained availability of food.⁴¹ The availability of food on a sustainable basis depends on the availability of suitable land to produce food. The measure is reasonable because it tries to ensure the maintenance of an environment that is, amongst other things, conducive to food production.

The Special Programme of Food Security (SPFS) instituted by the NDA is conceptually reasonable because it is aimed at increasing food production without compromising natural resources. The programme is also reasonable because it forms part of the Poverty Alleviation Programme within the Department. As mentioned earlier poverty contributes to food insecurity. Measures that address the problem of poverty have the potential of contributing immensely to the progressive realisation of the right. This is especially important when 45 percent of the population was without food at least once a month and 17 percent at least once a week. Presently 40 percent of the country's families are living in abject poverty, with rural African families the hardest hit.

The majority of the measures instituted by the NDA are biased in favour of production with less emphasis on distribution. Consequently food that is produced does not reach all parts of the country at an acceptable level. The bias towards production and less emphasis on food distribution detracts from the requirement of availability, which means ensuring that food moves from the site of production to where it is needed most in terms of demand.⁴² The bias undermines the responsibility to respect, protect, promote and fulfil the right of access to sufficient food.

The KwaZulu-Natal, Mpumalanga, Northern Cape and Western Cape Departments of Agriculture did not provide information on measures instituted. Although the Eastern Cape Department of Agriculture had reported that it was implementing the National Policy on Agriculture, it provided insufficient details on the measure. Most of the information provided by the Eastern Cape was not helpful for the analysis. Only information on the Land Care Programme could be used for the analysis.

The Eastern Cape and Free State Departments of Agriculture did not follow the format of the protocol, and the report from Mpumalanga provided limited information. The Eastern Cape, KwaZulu-Natal and North West provinces failed to provide information on how the measures had given special consideration to vulnerable groups.

⁴⁰ Ibid.

⁴¹ General Comment 12 (note 4 above) para 8.

⁴² Ibid para 8.

The Gauteng Department of Agriculture (GDA) indicated that the instituted programmes protect the right because they are educational, and they target as beneficiaries, individuals whose current state of food sufficiency is under threat. The measures are reasonable because they enable poor people to meet their household food needs.

It is commendable that some provinces have specific programmes that target women, as women are particularly vulnerable to food insecurity. Measures, which give special consideration for these groups, are conceptually reasonable.⁴³

The national and provincial departments have at least fulfilled the basic requirement to have in place measures aimed at fulfilling the constitutional mandate of ensuring access to sufficient food. Due to the fact that implementation of the measures is still at the preliminary stages, their effectiveness is difficult to assess.

1.4 Recommendations

The national and provincial Departments of Agriculture are required to answer the questions in accordance with the format in the protocols. In providing this information departments must ensure that answers are relevant to the questions asked.

Provinces should be commended for targeting vulnerable groups, such as women and people in rural areas. However more programmes should be developed for people with disabilities, older persons and communities in informal settlements.

There should be balanced emphasis between food production and food distribution, for equitable quantity of food at all times. The NDA should also look into food pricing so that food becomes economically affordable to the poor. The same sentiments are expressed by the ICESCR, which states that to ensure equitable distribution of food supplies in relation to need, States must address the problems of both food-importation and food-exportation.⁴⁴

In the process of providing land for farming the national Department of Agriculture should maintain a balance between provision of land for commercial farming and subsistence farming, for better access to sufficient food at household level.

2 LEGISLATIVE MEASURES

2.1 National Sphere

⁴³ *Grootboom* (note 33 above) para 44.

⁴⁴ Article 11 of the ICESCR.

There were no legislative measures instituted during the reporting period. However the National Department of Agriculture cited three pieces of legislation passed outside the reporting period and which were ongoing:

- Marketing of Agricultural Product Act of 1996
- Agricultural Research Amendment Act of 1996
- Land Bank Amendment Act of 1998

The Department believes that the above-mentioned measures have affected the constitutional obligations to respect, protect, promote and fulfil the right of access to sufficient food, because they enabled the previously disadvantaged people to make applications to the Land Bank for loans to assist them in planting crops.

The NDA also believes that the measures were reasonable because they had created opportunities for people to buy inputs for farming. Regarding special considerations given to vulnerable groups, it was reported that measures were instituted in a way that gives those groups access to food.

2.2 Critique

The response from NDA did not provide sufficient information for the analysis. The question on the implementation of the measures and difficulties experienced was not answered. The NDA mentioned measures without indicating how those measures have impacted on the realisation of the right of access to sufficient food. There was no information on how the measures have affected the constitutional obligations to respect, protect, promote and fulfil. Neither could the NDA indicate the reasonableness and effectiveness of the measures in effecting constitutional obligations.

Regarding the question on special considerations given to vulnerable groups, the NDA asserted that measures did consider the conditions of the vulnerable groups, but did not elaborate on how this was done.

The measures mentioned by the NDA as instituted for the realisation of the right of access to sufficient food are not relevant. The measures fall short of the constitutional obligations to respect, protect, promote and fulfil. Though the NDA has measures that could enable poor people to apply for loans, it has not shown the impact of these measures on the realisation the right of access to food, especially for the poor.

The government has never formulated any legislation that would effect the realisation of access to the right; hence there is a need to develop a legislative framework on the right to food. Black people, rural people, women and children, *inter alia*, are the most vulnerable groups that are susceptible to hunger and malnutrition. The causes of this inequity in accessing food are political, economic and social, and could be overcome by reasonable legislative measures that are aligned to the Constitutional obligations.

2.3 Recommendation

Due to the inability of existing legislative measures on agriculture and land to address the right of access to sufficient food, the National Department of Agriculture should develop a legislative framework that will address issues relating specifically to food security, such as distribution and consumption.

3 BUDGETARY MEASURES

The Departments of Agriculture were required to provide information on how much has been set aside for the measures reported in the policy section. In the process Departments were supposed to explain variances in the budget allocation and to account for the impact budgetary allocations had on specific categories of vulnerable groups.

3.1 National Sphere

The information provided by the National Department of Agriculture in response to the questions has been outlined in the Table below.

Table 1 Total budgetary allocation of the NDA

YEAR	TOTAL ALLOCATION IN RANDS
1998-1999	10 400 000
1999-2000	5 000 000
2000-2001	9 000 000

The budgetary allocation shows that the budgetary allocation towards the NDA, was reduced by half from R10, 4 million during the 1998/1999 financial year to R5 million during the reporting period of 1999/2000. The Department has however increased the budget allocation for 2000-2001 to R 9 million.

The National Department of Agriculture reported that there was no separate budget for the right of access to sufficient food. The budget was adequate for the planned programmes. However the same Department provided that in some instances projects had to be turned down due to insufficient funding. The Department further provided that the instituted programmes were targeted towards people who were previously disadvantaged and who were poor and experience food insecurity. The programmes were geared towards improving the lives of these people.

3.2 Provincial Sphere

The only provincial Departments that responded to the questions on the budgetary allocations were the Free State, Gauteng, KwaZulu-Natal, Northern Province and the North West. The information on budgetary allocations is outlined in the Table below.

Table 2 Budgetary Allocations for the Provinces

Food rights

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
Free State	1998/1999	105 591 000	-	100 099 233
	1999/2000	85 818 000	109 068 800	103 792 746
	2000/2001	109 068 000	-	-
Gauteng	1998/1999	93 993 000	42 900 000	26 000 000
	1999/2000	86 804 000	38 700 000	37 600 000
	2000/2001	118 576 000	118 576 000	-
KwaZulu Natal	1998/1999	243 264 000	-	263 630 000
	1999/2000	337 082 000	-	517 538 000
	2000/2001	361 692 000	-	-
Northern Province	1998/1999	516 171 000	103 234 000	572 275 000
	1999/2000	533 976 000	106 795 000	561 295 000
	2000/2001	573 073 000	114 614 000	-
North West	1998/1999	207 222 000	206 500 000	192 260 000
	1999/2000	226 254 000	225 500 000	220 069 000
	2000/2001	214 832 000	68 982 000	-

- Information not provided

Only five provinces as reflected above presented their budgetary allocations. Four of these provinces had nominal increases from the 1998/1999 financial year to the 1999/2000 financial year. It was only the Free State whose budget decreased. The North West and Gauteng under-spent on the budget, the former spending less than half of the allocated amount. The remaining provinces over-spent, the highest being KwaZulu-Natal, over-spending by about 35 percent.

3.2.1 Budgetary allocation towards access to sufficient food

The budgetary allocation towards sufficient food is given in the table below.

Table 3 Budgetary Allocation for Access to Sufficient food

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
Free State	1998/1999	105 591 000	-	100 099 233
	1999/2000	85 818 000	109 068 800	103 792 746
	2000/2001	109 068 000	-	-
Gauteng	1998/1999	5 793 000	5 793 000	4 653 000
	1999/2000	6 839 000	7 303 000	5 318 000
	2000/2001	8 813 000	8 813 000	-
Northern Province	1998/1999	336 002 000	426 969	447 990
	1999/2000	414 856 000	448 571	437 691
	2000/2001	467 116 000	515 786	-
North West	1998/1999	-	-	-
	1999/2000	2 000 000	1 950 000	1 046 490
	2000/2001	2 600 000	2 500 000	2 049 894

- information not provided

Only the reflected provinces gave their allocation on access to sufficient food. The Table shows that four of the five provincial Departments that provided information had nominal increases in their budget allocations towards access to sufficient food. The exception was the Free State. In the

case of the North West however, no information was provided for the preceding financial year. As with the budget for the entire Department, it was again Gauteng and North West that under-spent on their budgets during the reporting period.

Variances: Only Gauteng provided information. The variance between projected and actual expenditure arose from the inefficiency of the allocation, which was later corrected.

Budget adequacy: The KwaZulu-Natal Department of Agriculture reported that in terms of the Medium Term Expenditure Framework, R196 million was allocated for food security, which is inadequate for the provision of services. According to the Department the funds allocated towards food security were utilised optimally and effectively.

The Northern Province also reported that the budget allocation for food was inadequate. Inadequacies in the budget were identified beforehand, and some of the projects had to be frozen, or implementation delayed because of budget constraints.

The North West Department reported that the budget allocated was adequate and no problems were encountered. The budget allocation for food increased compared to the previous years. However the Department under spent.

Free State Department of Agriculture (FSDA) budgetary allocation for the period under review was limited and this nearly prevented the Department from achieving its set goals. This information from the FSDA is contradictory because the same Department also provides that the budgetary allocation for 1999/2000 was adequate for the provision of sufficient food and evidence of overspending is visible.

Special considerations given to vulnerable groups: In KwaZulu-Natal projects for food security targeted mainly people living in rural areas.

The Northern Province gave special considerations to specific groups, for instance farmers were provided with subsidies. Poor farmers and people received government subsidies. The FSDA budgetary allocation gives special consideration to vulnerable groups as stipulated in the protocols because an amount of R8.7 million was directed towards these groups.

3.3 Critique

The National Department of Agriculture did not provide information on the actual expenditure, per capita allocation, projected expenditure and allocation as a percentage of the Department's total budget. Lack of information makes it difficult to assess whether the Department has properly spent the allocated funds. It becomes impossible to detect whether there was over or under spending on the total budget allocation.

The Mpumalanga, Northern Cape, Western Cape and the Eastern Cape Departments of Agriculture did not report on budgetary allocations.

The national and provincial departments failed to account for variances in the budget allocation. Most of the provinces reported that the budgetary allocation was inadequate. However the provinces did provide information on problems that had been experienced as a result of inadequate budget allocation, such problems could be addressed.

Inadequate budgetary allocation should not hinder the department's efforts of providing services to the people and realising the right of access to sufficient food. Nothing prevents the departments from realising the rights of access to sufficient food within the budgetary constraints. In any event, resource scarcity does not relieve the state of its minimum core obligations.⁴⁵ Effective use of available resources requires the State to be mindful of the needs of all sectors of its population especially socially vulnerable groups and plan accordingly.⁴⁶ Violation of the right to have access to sufficient food is when the State fails to budget for its programmes or under spends. There is violation also where the State does not promote equal access to resources.

It is necessary that provinces know the extent of the shortfall in their respective areas of competence so that there is proper planning to ensure appropriate utilisation of allocated funds. The recommendations by the Financial and Fiscal Commission⁴⁷ provide that the provincial budgetary allocation should be based on the objective measure of the cost of delivering the services in the province. The amount transferred to each province should be based on an assessment of the amount of money that would be required for the province to deliver a standard level of services in an efficient manner. The transfer amount should reflect the demographic, geographic and other features of the province that affect the cost of delivering services.

3.4 Recommendations

Proper planning at both national and provincial spheres of government is important to ensure that funds allocated are adequate for access to food. This entails provinces planning their expenditure and not being subjected to uncertainty or budget shocks. In their planning, departments have a responsibility to design and deliver programmes within their jurisdictions that satisfy national standards, utilising the resources available to them.

The vulnerable groups should be made first priority in all the projects that are meant to alleviate the depressing and intolerable conditions under which people live.

⁴⁵ Maastricht Guidelines on Violation of Economic, Social and Cultural Rights (1997) para 10.

⁴⁶ *Ibid* para 28.

⁴⁷ Financial and Fiscal Commission Consultation Document February (2000) 15.

4 OUTCOMES

The national and provincial departments were required to provide information on indicators that relate to income and land. The information requested was supposed to be disaggregated according to racial and geographical categories. The departments were required to indicate how many households were assisted with food security, with a monthly income below the poverty line and households with no source of income. Other indicators requested include household expenditure on food.

The indicators on land requested national and provincial departments to provide the proportion of land that has been set aside for agricultural purposes, and the proportion, which has been cultivated for agricultural purposes. Other indicators include the volume of produce, and imported and exported food.

4.1 National Sphere

The national Department of Agriculture provided information as outlined in Tables 4 and 5 below:

Table 4 Indicators – Income and Food by location

NATIONAL	TOTAL	URBAN	RURAL
Number of households with monthly income below the poverty line	10 771 000	6 503 000	4 268 000
Number of households with no source of income	26 280 000	15 566 000	10 713 000
Number of households with inadequate income to provide for food	10 771 000	6 503 000	4 268 000

Table 5 Indicators – Income and Food by “race”

NATIONAL	AFRICAN	COLOURED	INDIAN	WHITE
Number of households with monthly income below the poverty line	7 985 000	268 000		-
Number of households with no source of income	2 751 000	232 000	72 000	99 000
Number of households with inadequate income to provide for food	17 895	897	268	-

The Tables show that a disproportionate number of rural and African households did not have adequate income to procure food, or had income that fell below the poverty line. It is also clear from the Table that large numbers of rural and African households did not have any form of income.

4.1 Provincial Sphere

Only KwaZulu-Natal provided information as summarised in the Tables below:

Table 6 KwaZulu Natal Indicators – Food Security by location

	TOTAL	RURAL
Number of households assisted with food security	38 653	38 653
Proportion of land set for agricultural purpose (in hectares)	6 529 315	6 529 315
Proportion of cultivated land set for agricultural purpose (in hectares)	1 199 675	119 967

Table 7 KwaZulu Natal Indicators – Food Security by “race”

	TOTAL	AFRICAN	COLOURED	INDIAN	WHITE
Number of households assisted with food security	38 653	38 653	Nil	Nil	Nil
Proportion of land set for agricultural purpose (in hectares)	6 529 315	3 089 912	34 394	309 546	3 095 463
Proportion of cultivated land set	1 199 675	360 700	8 390	75 508	755 077

	TOTAL	AFRICAN	COLOURED	INDIAN	WHITE
for agricultural purpose (in hectares)					

The Tables show that all the beneficiaries of food security were in rural areas, and mainly Africans. The Free State also reported that there were 2 million hectares of rural land that was cultivated and set aside for agricultural purposes.

5 NATIONAL ACTION PLAN (NAP)

The National and Provincial Departments of Agriculture did not provide information for this section. The NDA reported that only the National Department of Health could provide the information requested.

5.1 Critique

The National and the KwaZulu-Natal Departments of Agriculture, were the only Departments that responded and provided information on indicators for the outcomes section. Information provided was however incomplete, and made comparative analysis across provinces difficult.

Delays by the State to address the most important issues facing society such as food insecurity is seen as a violation of the right.⁴⁸ The State has to comply with the procedural requirements of the duty to realise human rights progressively. Information is necessary to enable government departments to know which persons and groups are most in need and preparation of plans of action for progressively addressing the needs of everyone, while treating the situation of the most disadvantaged and the seriously suffering on a special priority basis.⁴⁹

5.2 Recommendations

There is need for more regular evaluation of projects for early detection of problems in the implementation process. In the evaluation process departments should develop a set of indicators that will be used to measure progress. The departments should act with the intention of achieving stated policy objectives, to this end they need to set targets towards which they must work. The evaluation of the food projects should be used to develop corrective measures in instances where there are problems during implementation.

6 MONITORING SYSTEMS

⁴⁸ Craig Scott and Philip Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom Promise' (2000) 16 SAJHR 206, 254.

⁴⁹ Ibid.

6.1 National Sphere

The National Department of Agriculture prepared food balance sheets every month to report on the food security status in the country. The information is then sent to the SADC office for Food Security and Training, and compared with information from other SADC Member States. The information was used to compile the Food Security Bulletin and sent to each SADC country.

Statistics collected by the Department were on the consumption expenditure on food, the availability and consumption of foodstuffs and crop estimates and forecasts, which gave decision makers and traders an early indication of expected crop sizes.

6.2 Provincial Sphere

Only KwaZulu-Natal, Gauteng and the Northern Cape provided information on monitoring systems.

The KwaZulu-Natal Department of Agriculture reported that the Key Performance Indicators allowed monitoring of achievement of food security as an outcome. Close monitoring of progress with each individual project took place on a continuous basis. The details of the number and type of projects undertaken to ensure food security are annotated and the Annual Report serves as a reporting tool.

The Gauteng Department of Agriculture used an internal mechanism and measures through which activities of the Department were monitored and assessed:

- Senior management meetings
- Directorate and sub-programme meetings
- Quarterly review meetings to assess the preceding period and plan for the forthcoming period
- Visits of the MEC and Gauteng Provincial Legislature Standing Committee on projects

The Department also collected statistics from parastatals, academic institutions in order to facilitate the monitoring, and assessment of the progressive realisation of the right of access to food.

The Northern Cape Department of Agriculture used strategic and quarterly management plans and annual reports and project evaluation as monitoring mechanisms. Statistics were collected from production statistics, farmer statistics and project statistics. Typologies were built from a good and thorough database of the community, and the different types were formed to support the actions to be introduced in such a way that it was efficient, transparent, participatory and constructive. This information enabled the Department to ensure that every group within the community was understood in terms of its own knowledge, beliefs, goals

and socio-economic well being. This means that a typology to introduce a food security programme can be built from the same database.

6.3 Critique

It is disconcerting to note that although provinces such as Gauteng and Northern Province have monitoring systems, they fail to provide information on the outcomes and NAP sections. No explanation was provided for this omission.

Monitoring necessitates the development of a conceptual framework to define what should be monitored and the indicators used.⁵⁰ The effectiveness and reasonableness of instituted measures should be detected through the monitoring system. According to General Comment No.12 of the Committee on Economic, Social and Cultural Rights State Parties shall develop and maintain mechanisms to monitor progress towards the realisation of the right to adequate food for all, identify the factors and difficulties affecting the degree of implementation of their obligations, and facilitate the adoption of corrective legislative and administrative measures, including measures to implement their obligations article 2 (1) and 23 of the Covenant.

To strengthen the enjoyment of economic, social and cultural rights, additional approaches should be examined, such as a system of indicators to measure progress in the realisation of the rights set forth in the International Covenant on Economic, Social and Cultural Rights. There must be a concerted effort to ensure recognition of economic, social and cultural rights at national, regional and international level.⁵¹

6.4 Recommendations

A clear monitoring system with relevant indicators should be developed by the Departments of Agriculture to enable the progressive realisation of the right of access to sufficient food. The Departments of Agriculture should adhere to international standards in their process of progressively realising the rights.

⁵⁰ Department of Health (note 16 above) 389.

⁵¹ Article 98 of the Vienna Declaration and Programme of Action, 1993.

PART C: CONCLUSION

Food security is defined as the availability of sufficient food at all times for all people in order to ensure an active and healthy life.⁵² Nutrition security is the appropriate quantity and combination of inputs such as food, nutrition and health services, as well as the caretaker's time needed to ensure an active and healthy life at all times for all people. Nutrition education plays an important role in improving food nutrition security.⁵³ Agriculture, income generating and other efforts to improve food security and dietary diversification should all include a nutrition education component to ensure that households learn to utilise available foodstuffs. The fortification of foods, should be implemented, and be accompanied by a nutrition programme involving all relevant sectors including public policy makers, the food industry and health professionals.

The fortification of food is also important to ensuring that even the most basic foodstuffs have the necessary nutrients, especially because basic foodstuffs such as sugar and maize are the most frequently and consistently consumed foods in the country followed by tea, whole milk, brown bread and margarine. It is equally important to note that these same six items were also the ones that were found most frequently in the house. Most households procured these items by purchasing them and subsistence agriculture was not a major source of these foods in the country. These items were primarily bought in supermarkets and to a limited extent, small shops.⁵⁴ This means that interventions on food security should ensure generation of income for the purchasing of the above mentioned foodstuffs. The obligation of the State is to create an enabling environment within which self-sufficient persons are able to acquire food for themselves.

Presently there is no legislative framework on the right to food. The existing policies do not provide a specific plan of action on how food security will be progressively realised. The new programme on food is still being piloted in some provinces. The development of a legislative framework will not only assist in defining clearly the different roles that should be played by the different government departments, as the provision of the right to food requires the involvement of more than one department. The framework will also assist in defining the problems and how they should be addressed in order to ensure better provision of food.

⁵² Department of Health (note 16 above) 512.

⁵³ *Ibid* 517.

⁵⁴ *Ibid* 511.

ABBREVIATIONS

BATAT	- Broadening Access to the Agricultural Trust
CRC	- Convention on the Rights of the Child
ECDA	- Eastern Cape Department of Agriculture
FSDA	- Free State Department of Agriculture
FSP	- Farmer Settlement Programme
GDA	- Gauteng Department of Agriculture
HFSP	- Household Food Security Programme
ICESCR	- International Covenant on Economic, Social and Cultural Rights
INP	- Integrated Nutrition Programme
kJ	- Kilo joules
KZNDA	- KwaZulu -Natal Department of Agriculture
NAP	- National Action Plan
NCDA	- Northern Cape Department of Agriculture
NDA	- National Department of Agriculture
NDH	- National Department of Health
PEM	- Protein Energy Malnutrition
PSNP	- Primary School Nutrition Programme
PCP	- Parasitic Control Programme
RDA	- Recommended Daily Allowance
SADC	- Southern African Developing Countries
SPFS	- Special Programme on Food Security
UDHR	- Universal Declaration on Human Rights

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CHAPTER FIVE

HEALTH CARE AND

HEALTH CARE SERVICES FOR CHILDREN

PART A: OVERVIEW

1 INTRODUCTION

The post-apartheid South African government inherited a health system with huge inequalities in access to services. Some of the key features of this system included:¹

- discriminatory laws that resulted in inequitable access to health care services
- a highly curative health care services that did not sufficiently focus on prevention
- fragmented service delivery in racialised health departments
- limited access to health care services by women, children and farm workers
- lack of health infrastructure in rural areas
- limited information on health issues

The results of these factors were: high infant mortality rates especially amongst Africans, high maternal mortality rates, high rates of communicable diseases such as measles, and inequitable access to medical insurance. Due to the fact that relevant health statistics were not collected, appropriate interventions could not be made. The then government also introduced a number of regulations that had the effect of discriminating against people with HIV/AIDS.²

In the last two reports to the South African Human Rights Commission, national and provincial health departments reported that they had introduced legislative and other measures to reorient health care services towards primary health care; taken steps to address inequitable access to health services; reorganised the delivery system; and reprioritised the health budget.

This chapter reviews measures instituted during 1999/2000 in the realisation of the right to health care in accordance with the provisions

¹ South African Human Rights Commission *First Economic and Social Rights Report* (1999) Vol. 3.

² These regulations were: Admissions of Persons to the Republic Act of 1972 which allowed immigration officials to detain or deport people who were HIV-positive; and regulations relating to Communicable Diseases and the Notification of Notifiable Medical Conditions of 1987 promulgated under the Health Act of 1977.

contained in the Constitution and the White Paper on the Transformation of the Health System in South Africa. The chapter assesses whether the measures instituted during 1999/2000, contributed to the progressive realisation of the right to health rights.

2 CONSTITUTIONAL OBLIGATIONS

Health rights are contained in three sections of the Constitution. These are ss 27(1) and 27(3) dealing with the right of access to health care (including reproductive health); and emergency medical treatment respectively; s 28 dealing with children's access right to basic health care services and s 35 dealing with the health rights of arrested, detained and accused persons.

2.1 Health care including reproductive health and emergency medical treatment

The first of the three sections mentioned above is s 27, which provides for the right of access to health care for everyone. Section 27(1)(a) specifically states that 'everyone has a right of access to health care including reproductive health'.³ Also singled out in s 27 is emergency medical treatment. Section 27(3), states that everyone is entitled to emergency medical treatment. The concept of health care as used in the Constitution, although not yet interpreted by South African courts at the time of writing this report, is understood at the international level to include medical care; preventive health care; primary health care; child health care; family planning; pre- and post- natal health services; and mental health care services.⁴

The right to health is a part of, and need not be confused with the broader concept of the right to health as contained in the Constitution of the World Health Organisation (WHO) and interpreted by the Committee on Economic, Social and Cultural Rights.⁵ The WHO Constitution defines health as a 'state of complete physical, mental and social well being and not the just the absence of disease or infirmity'.⁶

Certain interpretations of health rights would refer to the right to health and not the narrower concept of the right to health care. Where an interpretation of health rights goes beyond health care, reference is also made to what are often referred to as underlying preconditions (determinants) for health, which together with health care, constitute the right to health. The all-encompassing term for these preconditions/determinants is environmental hygiene. It is mentioned in articles (12)(2)(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and articles 24(2)(c) and (e) of the Convention on the Rights of the Child (CRC). Environmental hygiene includes access to

³ Section 27(1)(a) of the Constitution of the Republic of South Africa Act 108 of 1996

⁴ B Toebes *The Right to Health as a Human Right in International Law* (1999) 19.

⁵ The Committee on Economic, Social and Cultural Rights is a United Nations body responsible for the implementation of the International Covenant on Economic, Social and Cultural Rights.

⁶ Preamble to the *Constitution of the World Health Organisation*.

clean drinking water; adequate sanitation; adequate nutrition and food; environmental health; occupational health; and abolishment of harmful traditional practices. The Committee on Economic, Social and Cultural Rights has specifically stated that it interprets the right to health beyond timely and appropriate health care but to also include, underlying determinants/preconditions for health, and access to health-related education and information, especially sexual and reproductive health.⁷

Section 27(3) provides that no one may be refused emergency medical treatment. This is understood to require that bureaucratic obstacles not prevent the provision of emergency medical treatment. This right, like all the rights in the Bill of Rights, applies not just vertically but also horizontally, meaning that private health care providers also have obligations. However, emergency medical treatment does not necessarily require that the service be provided free, but that its provision should not be prevented by lack of funds, and that payment arrangements may be made later.⁸ The Soobramoney case has interpreted s 27(3) of the Constitution, which deals with emergency medical treatment. According to the court's interpretation, s 27(3) on the right of non-refusal of emergency medical treatment, referred to a person suffering from a sudden catastrophe calling for immediate medical attention. The person should not be denied ambulance or other available medical emergency services and admission to hospital and should be provided with treatment. Terminal conditions such as chronic renal failure were thus not considered as emergencies calling for immediate remedial treatment.

2.2 Basic health care services for children

The second provision of the Constitution addressing health rights relates to children, and is contained in s 28. Section 28(1)(c) states that every child has a right to basic health care. What should constitute basic health care for children is to be found in several international and regional instruments. Basic health care services for children are an area that has received considerable attention from WHO. The rights of children to basic health care also receive special mention in the ICESCR, CRC and the African Charter on the Rights and Welfare of the Child.

In article 12 of the ICESCR, and in the context of the nature of state obligations in the realisation of health rights for children, it is stated that one of the things State Parties have to do is to reduce infant mortality and stillbirths.⁹ Further guidance on what would constitute basic health care services for children is to be found in articles 23, 24 and 28 of the CRC. Article 23 of the CRC refers to children in general and requires states to:

- diminish infant and child mortality

⁷ General Comment 14 of the Committee on Economic, Social and Cultural Rights (2000) para 11.

⁸ de Waal et al (eds) *The Bill of Rights Handbook* (2000) 408.

⁹ Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1965.

- provide assistance to all children with an emphasis on Primary Health Care
- combat diseases and malnutrition, while providing clean drinking water and paying attention to the risks of environmental pollution
- provide appropriate pre-natal and post-natal health care for mothers
- provide information and access to education about health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and prevention of accidents
- abolish traditional practices prejudicial to the health of children¹⁰

Article 24 of the CRC pays attention to children with disabilities, and requires that assistance be provided to these children free of charge if possible, taking into account the financial resources of parents.¹¹ The rights of children of migrant workers receive mention in article 28 of the CRC, which requires that migrant workers and members of their families receive medical care to preserve life and prevent irreparable harm to their health on the basis of equality of treatment.

The African Charter on the Rights and Welfare of the Child is also relevant in the discussion of basic health care services for children. Article 14 of the Charter provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.¹² Article 14(2)(b) mandates State Parties to take measures, *inter alia*, to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care.

In the light of the above, it can be said that basic health care services for children are those services that are aimed, amongst other things, at reducing infant mortality, childhood illnesses, malnutrition amongst children and providing care to mothers during and after pregnancy and clean drinking water. Emphasis in the provision of basic health care services for children has to be placed on primary health care. Although the right to basic health care services for children applies to all children, particular attention has to be paid to the needs of children with disabilities, and children in emergency situations.

2.3 The rights of arrested, detained and accused persons

The rights of arrested, detained and accused persons to health care are contained in s 35 of the Constitution. Section 35(2)(e) states that 'everyone who is detained, including every sentenced prisoner, has a right to conditions that are consistent with human dignity, including at state expense, medical treatment'. Section 35(f)(iv) specifically deals with the rights of prisoners to communicate with a medical practitioner of their choice.

¹⁰ Article 23 of the Convention of the Rights of the Child, 1989.

¹¹ Article 24 *Ibid*.

¹² Article 14 of the African Charter on the Rights and Welfare of the Child, 1990.

2.4 Differences between ss 27(1), 27(3), 28(1)(c) and 35(2)(e)

There are differences between ss 27(1), 27(3), 28(1)(c) and 35(2)(e), especially as regards the role of the state in the realisation of health rights. The right to health care contained in s 27 is qualified by s 27(2), which requires the state to take reasonable legislative and other measures, within its available resources to progressively realise, the right to health care contained in s 27(1). This means that the realisation of health rights is primarily, reliant on resource availability, and may therefore not be realised immediately, but progressively in the medium to long-term. However, the state must take reasonable measures that demonstrate the effective use of available resources in its effort to realise the right to health care.

The issues that have to be dealt with are what the meanings of 'reasonable', available resources and 'progressive realisation'.

In *Government of the Republic of South Africa v Grootboom and Others* and in defining reasonableness, the Constitutional Court held that for measures to be considered reasonable, they needed to be reasonable in both conception and implementation.¹³ The conceptual soundness of a measure is not sufficient to meet the reasonableness test. If measures were to be reasonable in conception but not reasonable in implementation, they would not be considered to be in compliance with s 27(1). Measures had to make appropriate provisions for crises in the short-, medium and long-term. Moreover, a programme that excluded a significant segment of society would not pass the reasonableness test. It was also held that a statistical advance might also not pass the reasonableness test if it fails to meet the needs of a significant segment of society. As regards progressive realisation, the Court held that the state should progressively facilitate accessibility.

The unavailability of resources is a justifiable ground for failure to take legislative and other measures towards the realisation of the right. Moreover, resource availability would also determine the pace at which the right to health care can be realised. The issue of resource availability however, has to be treated cautiously. The Limburg Principles states that irrespective of the level of economic development every state is obliged to ensure respect for minimum subsistence of the rights.¹⁴ The minimum subsistence in the area of health rights is to be found in General Comment Number 14 of the Committee on Economic, Social and Cultural Rights, in what the Committee refers to as core obligations. These include:

- ensuring that the right of access to health care facilities, goods and services are enjoyed on a non-discriminatory basis especially by vulnerable groups

¹³ *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 39.

¹⁴ Limburg Principles, 1986 para 25.

- ensuring access to minimum essential food which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger for everyone
- ensuring access to basic shelter, housing and sanitation and an adequate supply of safe and potable water
- providing essential drugs defined from time to time by WHO's Essential Drugs List
- ensuring the equitable distribution of health care
- developing a national strategy and plan of action towards the provision of health care¹⁵

2.5 Equality and the issue of vulnerable groups

Section 27(1) of the Constitution specifically states that 'everyone' has the right to health care. One of the immediate implications of this is that access to health care has to be premised on the equality clause in s 9 of the Constitution, particularly on the prohibited grounds for discrimination listed in s 9(3). This is consistent with the Convention on the Elimination of All Forms of Racial Discrimination that requires states to prohibit and eliminate discrimination and guarantee everyone without distinction to race, colour, national or ethnic origin, the enjoyment of economic and social rights, including health rights.¹⁶

At the international level, the issue of discrimination in the context of health rights has received considerable attention. This has been the case especially in the contexts of mental health and the control of the spread of communicable diseases, which have in certain instances been used to discriminate against migrants and in more recent times persons infected with HIV/AIDS. The overall aim of the international organisations, including WHO, has been to discourage states from introducing excessive measures in attempts to control the spread of communicable diseases for fear that such measures could result in unfair discrimination.

Such discrimination as may be deemed appropriate, should be fair and directed at addressing the special needs of those groups that for economic and social reasons, may not be able to provide for themselves. The state is therefore required not only to introduce negative measures to remove discrimination, but to also introduce positive measures to correct existing discrimination, especially as regards the provision of health care.

2.6 State obligations regarding health rights

Obligations of the state regarding health rights have to be understood against s 7(2) of the Constitution,¹⁷ which requires the state to respect,¹⁸

¹⁵ General Comment 14 (note 7 above) para 43.

¹⁶ Article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination, 1965.

¹⁷ Section 7(2) of the Constitution.

¹⁸ The obligation to respect means that the state must not engage in activities that undermine people's own efforts to realise rights contained in the Bill of Right.

protect,¹⁹ promote²⁰ and fulfil²¹ rights contained in the Bill of Rights. The Committee on Economic, Social and Cultural Rights has devoted considerable attention in explaining in particular, the obligations to respect, protect and fulfil in the context of health rights.²²

The obligation to *respect* requires states to refrain from:

- denying or limiting equal access to health
- imposing discriminatory practices relating to women's health
- prohibiting or impeding traditional preventive healing
- marketing unsafe drugs and applying coercive measures except in the case of mental health where conditions for the application of coercive measures need to be clearly spelt out
- limiting contraception
- censoring, withholding or misrepresenting health information
- preventing participation
- unlawful pollution
- nuclear testing where that will jeopardise people's health

The obligation to *protect* requires states to:

- ensure that privatisation does not constitute a threat to the availability,²³ accessibility,²⁴ acceptability²⁵ and quality of health facilities, goods and services²⁶
- control the marketing of health equipment and medicines by third parties

¹⁹ The obligation to protect means that the state must protect third parties from violating rights contained in the Bill of Rights.

²⁰ The obligation to promote means that the state must raise awareness about the rights contained in the Bill of Rights.

²¹ The obligation to fulfil means that where people are not on their own, able to realise the rights contained in the Bill of Rights, the state must take legislative and other measures to assist.

²² General Comment 14 (note 7 above).

²³ Functioning public health care facilities, goods, services and programmes in sufficient quantities. General Comment Number 14.

²⁴ Accessibility has four overlapping dimensions, namely non-discrimination, physical accessibility, economic accessibility and information accessibility. The principle of non-discrimination however, recognises that certain vulnerable groups may require special measures for the enjoyment of the right to health. Physical accessibility means that health care facilities be physically accessible to all, especially vulnerable groups. Economic accessibility (affordability) relates to the payment for services, which has to be based on the principle of equity, ensuring that both publicly and privately provided services are affordable to all, including poorer households. Information accessibility means the right to seek, receive and impart information and ideas concerning health issues. However, this should not impair the right to have personal information and data treated with confidentiality.

²⁵ Acceptability relates to the need for the respect for medical ethics and cultural appropriateness

²⁶ Scientifically and medically appropriate. Ibid.

- ensure that medical practitioners and related professionals meet the appropriate standards of education, skill and ethical codes of conduct
- ensure that harmful traditional practices such as the mutilation of female genitals are prohibited
- prevent third parties from coercing women into harmful traditional practices
- protect vulnerable groups from gender-based violence
- prevent third parties from withholding the dissemination of health information

The obligation to *fulfil* requires states to:

- give legal recognition to the right to health
- ensure access to the underlying preconditions (determinants) of health mentioned above
- ensure that public health infrastructure provide for sexual and reproductive health including safe motherhood especially in rural areas
- provide appropriate training of health personnel, sufficient number of clinics and related facilities
- provide health insurance
- undertake medical research and health education

The Committee has also spelt out special considerations that need to be given to women, children and adolescents, persons with disabilities, older persons and indigenous groups.

3 KEY DEVELOPMENTS FOR THE YEAR UNDER REVIEW

The developments that took place during the reporting period have to be contextualised within the constitutional provisions mentioned above, the White Paper on the Transformation of the Health System in South Africa, and measures instituted before the reporting period, reported to the Commission in the 1st and 2nd Economic and Social Rights Reports.

The White Paper on the Transformation of the Health System in South Africa proposed prioritisation in the provision of health care, of previously disadvantaged racial, gender, geographical and other groups. The White Paper proposes a unitary health system where all could enjoy equitable and affordable access to basic health care services.²⁷ The policies laid out in the paper include:

- a focus on primary health care services;
- ensuring the availability of safe, good quality essential drugs;

²⁷ Department of Health. *White Paper for the Transformation of the Health System in South Africa*. 1997.

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- financial resources rationalisation through budget reprioritisation;
- development of a National Health Information System; and
- establishment of the Integrated Nutrition Programme for sustainable food security.²⁸

Flowing from the White Paper, the national and provincial departments reported in the first two reports to the Commission that they have taken measures towards the realisation of health rights. These included the development of a Comprehensive Primary Health Care Package; the development of health infrastructure mainly through the Clinic Building and Upgrading Programme; the development of a Patient's Rights Charter in order to instil a human rights culture in the rendering of health care services; the development of policies in the area of HIV/AIDS; and development of programmes to address childhood illnesses.

During the reporting period of 1999/2000, a number of key developments took place with regard to the realisation of the right to health. Although most of the developments were the introduction of legislative measures, there will also be outlined, policies, programmes and services; and budgetary measures.

3.1 Policies, programmes and other interventions

Several policy and related developments took place during the reporting period. While many of these developments were positive in that they contributed to the progressive realisation of the right to health care. There were also negative developments that did not augur well for the realisation of the right.

3.1.1 Positive developments

On the positive side, the following developments occurred: the re-demarcation of health districts in line with the District Health Model; the launch of the Patient's Rights Charter which was developed before the reporting period; the development of guidelines for health professionals on the protection of older persons against abuse; and further developments in the fight against HIV/AIDS.

With the local government elections scheduled for late 2000, reform of the health care sector was directed at the District Health System. The District Health System is central to the government's Primary Health Care that, as mentioned above, is one of the areas considered appropriate as an element of health care. This involved the demarcation of health district boundaries alongside municipal boundaries.²⁹

²⁸ See the Chapter Four on Food rights.

²⁹ Department of Health *Annual Report* (1999) 7.

Another important policy development for the reporting period was the launch of The National Patients' Rights Charter on 2 November 1999. The Charter had been developed before the reporting period and the details of its rationale and contents were included in the 2nd Economic and Social Rights Report. The aim of the Charter was to improve the quality of health care by defining twelve core health rights of users of health care facilities.³⁰ The Charter is consistent with the obligation to promote the right to health, described above, in which the state is obliged to provide information and education on health.

As part of the International Year of Older Persons in 1999, the Department of Health developed guidelines for health professionals on how to prevent and address physical and sexual abuse of older persons. It is important to note that older persons are a vulnerable group in the provision of the right to health, and in the specific context of state obligations.

The scourge of the HIV/AIDS epidemic and the public debate on the relationship between poverty and HIV/AIDS focused attention on the Department of Health's Programme to address the epidemic. New developments in the government's strategy to deal with HIV/AIDS were in three main areas:

- Drug Intervention to prevent Mother to Child Transmission (MTCT)
- Development of an AIDS Vaccine
- Establishment of an AIDS Council to advise government on the approach to HIV/AIDS

There was also released during the reporting period, a report titled *Review of Public Health Service*, a study commissioned by the Department of Health and undertaken by the Institute of Development Studies at Sussex University. The study focused on trends in public health expenditure, issues of quality in the delivery of health care, experiences with the introduction of the Primary Health Care Model, and a review of health infrastructure, particularly clinics and hospitals.

Policy developments for child health care included a new Road to Health Card for monitoring, which was developed and implemented nationally during 1999. The new card focuses on the use of growth surveillance statistics to promote and monitor child growth. Policy guidelines for the management and prevention of genetic disorders, birth defects and disabilities were also developed during 1999. Breast-feeding guidelines for health workers were finalised during December 1999 and included guidelines on the feeding of infants of HIV-positive mothers.

As part of the Expanded Programme on Immunisation (EPI), the Department successfully introduced a new vaccine, *Haemophilus influenzae* type B (HIB) in July 1999 at a budgeted cost of R58 million.³¹ Infection with HIB can result

³⁰ Ibid.

³¹ Ibid 18.

in pneumonia, meningitis, septic arthritis, osteomyelitis, cellulitis, pericarditis, epiglottitis and septicaemia. The mortality rate due to infection with HIB can be as high as 30 percent in developing countries.

During the reporting period, the Department of Health with assistance from WHO, reviewed the implementation of the Integrated Management of Childhood Illnesses (IMCI) in KwaZulu-Natal, Mpumalanga, Northern Cape and Northern Province. The IMCI is a strategy to promote child health and improve child survival as part of the National Plan of Action for Children. The core intervention is integrated case management of the five most important causes of childhood deaths (acute respiratory infections, diarrhoea, measles, malaria and malnutrition). The strategy was first launched in 1998 in the provinces mentioned above. Implementation of IMCI began in the remaining provinces during the reporting period, with a commitment by the Minister and MECs of Health to implement IMCI in every district throughout the country by the end of 2003.³²

3.1.2 Negative developments

While the abovementioned developments were positive, there were also other developments during the reporting period that did not positively contribute to the progressive realisation of the right to health care. These include human resources problems; reports of maladministration and corruption; and drug shortages and theft.

There were reports of serious personnel problems in the country. Senior health personnel at four major Gauteng hospitals reported via the media that the hospitals were on the brink of collapse, caused by a complete moratorium on the filling of posts for many months due to budget constraints.³³ The affected hospitals were Chris Hani Baragwanath, Johannesburg, Coronation and Helen Joseph, together serving an estimated 10 million people. South Africa's largest hospital, Chris Hani Baragwanath, had a shortage of about 2 282 staff members, including more than 100 doctors. As a result of this shortage, the hospital administration decided to close the neonatal intensive care unit, stop admissions to paediatric wards at night and suspend the provision of emergency services after 22h00. The hospital was also forced to curtail the provision of termination of pregnancy (TOP) services. The superintendent-general of Gauteng hospitals estimated that the province required about R300 million more than the allocated budget to sustain these services.

Reports of maladministration and corruption also surfaced during the reporting period. During May 2000, an investigation conducted by the Star newspaper revealed that doctors were getting kickbacks from some pathology laboratories in return for ordering tests. The investigation showed that two of South Africa's pathology groups, Ampath and Lancet

³² Ibid.

³³ In Idasa BIS. *Gauteng Health Services in Crisis* (1999) at <http://www.idasa.org.za/bis/briefs/brief16.htm>.

were paying millions of rands to certain doctors in kickbacks each year. Commissions paid to 84 doctors by Lancet averaged R247 000 a month in 1999; Ampath paid a total of R3, 9 million to 103 doctors for the year. It is argued that the financial incentives were given to maintain or increase the number of referrals and that laboratories sometimes carry out more tests than requested or is medically necessary. The practice of kickbacks is considered to be unethical and in contravention of the ethical rules of the Health Professionals Council of South Africa. Whilst the Forum of Statutory Health Councils decided to address the issue by establishing guidelines forbidding doctors from accepting payment in return for referring pathology tests, it is doubtful whether the envisaged guidelines shall prove to be a deterrent. In 1998, of the 155 cases of doctors, psychiatrists and dentists heard by the Council's disciplinary committee on charges of negligence and improper or disgraceful conduct, none was removed from the medical register.³⁴ The 80 professionals found guilty were given suspended sentences or fines, and allowed to return to work immediately.

Other negative developments were reports of drug shortages and theft of medicines. In April 2000, it was reported that poor administration had resulted in a shortage of BCG percutaneous vaccine (the tuberculosis [TB] vaccine given to babies) since March 2000.³⁵ The shortage occurred at a time when TB rates had doubled in most provinces over the past five years up to the 1999/2000 financial year, and were expected to increase five-fold by 2005 if current trends were to continue. A switchover from local production of the vaccine to importation was blamed for the shortage. Bureaucratic bungling had resulted in local production being stopped whilst supply from importation was only expected in September 2000.

Amidst the shortage of tuberculosis and other essential drugs, the review period was also marred by theft of medicine by public sector health care professionals and organised crime.³⁶ In KwaZulu-Natal, a state pharmacist who reported a number of suspected thefts from the state hospital in which he worked was poisoned. In a separate incident, state medicines estimated to be worth thousands of rands were found in the possession of a local nurse who worked at KwaMaphumulo Hospital.³⁷ The theft of drugs is also believed to be the work of crime syndicates that costs the pharmaceutical industry close to R2 billion per year.³⁸ Alarming, it is estimated that half of all state medicines are stolen. In an effort to address overwhelming theft from hospitals and clinics, medicines destined for state hospitals were to be packaged differently to distinguish them from drugs intended for the private sector.

3.2 Legislative developments

³⁴ *The Saturday Star* 28 April 1999.

³⁵ *The Star* 25 April 2000.

³⁶ *The Sunday Tribune* 10 July 1999.

³⁷ *The Daily News* 6 September 1999.

³⁸ *The Cape Argus* 3 September 1999.

Several key legislative developments, all of them causing intense lobbying, debate and review, took place during the reporting period. These included the Tobacco Products Control Act 12 of 1999, the promulgation in 1999 of the Medical Schemes Act 131 of 1998, the implementation of the Pharmacy Amendment Act 88 of 1997 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

The Tobacco Products Control Amendment Act 12 of 1999 places certain restrictions on the marketing, sale and consumption of cigarettes. The main aim of the Act is to make it more difficult for people to smoke with an emphasis on making smoking less attractive to people who have never smoked. In terms of the Medical Schemes Act 131 of 1998, and aims to ensure that participants enjoy fair and adequate cover, and are not discriminated against on their age or health status. The most important section of the Pharmacy Amendment Act 88 of 1997, implemented during the reporting period concerns the introduction of community service for newly qualified pharmacists. The Act provides for 12-months of community service starting from January 2001. All graduates who register as pharmacists will have to work in the public health care sector for one year before being able to practice privately. Community service is expected to make additional 500 pharmacists a year available to public health institutions.

Another important piece of legislation that was developed during the reporting period was the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Although the Act is not specifically directed towards addressing health issues, the new legislation is aimed at prohibiting unfair discrimination towards people with disabilities, people who are HIV positive and pregnant women.

While the abovementioned developments were certainly positive in that they were in line with the obligations of the state mentioned above, there were also reports of implementation problems of some of the legislation introduced earlier. A major negative development was growing reports of under utilisation of Termination of Pregnancy Services. According to the South African Health Review of 1999,³⁹ of the 246 public health facilities responsible for offering abortions to South African women, only 73 were rendering those services. Of these, approximately half (49 percent) of all terminations were carried out in Gauteng while only 1 percent were carried out in the North West.

3.3 The Budget

The health budget for the financial year 1999/2000 was increased by R157 million, bringing the total to R24 billion. Additional funds went to vaccine production, expansion of the Influenza Immunisation Programme and the government's HIV/AIDS Action Plan. Provinces received R8, 8 billion to

³⁹ S J Varkey et al 'Termination of Pregnancy' in N Crisp and A Ntuli (Eds) *South African Health Review 1999* (1999).

fund hospital services; and upgrade and rehabilitate dilapidated institutions.

Between 1997/1998 and 1999/2000, capital expenditure including spending on new clinics declined by almost 12 percent in real terms.⁴⁰ A declining portion of provincial health budgets was allocated to the construction and maintenance of provincial health buildings since 1997/1998, and the national conditional grant for Hospital Rehabilitation and Reconstruction, has not been large enough to compensate for the inadequate provincial expenditure. Also, provinces had not spent what they budgeted for on the maintenance and construction of health facilities. Provinces spent only 57 percent of budgeted expenditure between 1997/1998 and 1998/99. This means that provinces were even less able to keep their facilities from deteriorating than their budgets suggest.

Another problem was under-spending on the AIDS budget. The budget for the AIDS programmes was about R109 million in 1999/2000 and R182 million for the following year. The department's Government AIDS Action Programme (GAAP) spent only 25 percent of its budget of R40, 4 million, with R30, 3m unspent even though R29, 9 m of these unspent funds were 'committed' to GAAP projects.

4 CONCLUSION

The measures instituted by the state before and during the reporting period were positive and contributed to the progressive realisation of the right to health care. In particular, these are measures such as the institutional restructuring of the district health model, human resources development, maternal health, and infrastructure development. The actual results of these measures however, are mixed. There is clearly evidence that there is increasing use of the public health care sector. This attests to increasing accessibility of the sector. Moreover, the state has been relatively successful in addressing childhood illnesses such as measles, although there is still a lot that has to be done in this area. In terms of legislation, there is need for attention to be paid to medical insurance in order to continue to increase the affordability of health care. One issue that is becoming clear is that health care is being implemented in a situation of declining budgetary resources and where there is also difficulty in the efficient application of budgetary resources.

⁴⁰ Idasa BIS. 'Capital expenditure in provincial Health budgets' (1999) at <http://www.idasa.org.za/bis/briefs/brief42.htm>,

PART B: ANALYSIS OF RESPONSES BY ORGANS OF STATE

This section focuses on the assessment of information provided by the national and provincial departments of health on policy, legislative and budgetary measures instituted during the 1999/2000 financial year, to realise health rights. In each of these sections, departments were asked to report on the way any instituted measures met constitutional obligations in s 7(2) of the Constitution stated in the overview section; special considerations given to vulnerable groups; and implementation difficulties experienced. In the case of budgetary measures, departments were asked to account for any variances in the budgets, whether budgeted amounts were adequate, impacts of any inadequacies, and measures instituted to cope with budget inadequacies and special considerations given to vulnerable groups. The Commission also required departments to provide information on the state of the indicators that are relevant to the determination of progress with the realisation of health rights, as well as information on mechanisms that departments have put in place to monitor the realisation of health rights.

RIGHT OF ACCESS TO HEALTH CARE SERVICES

1 POLICY MEASURES

1.1 National Sphere

Policy measures, programmes and services of the national Department of Health, including the measures instituted during the reporting period, are derived from the White Paper for the Transformation of the Health System in South Africa. The White Paper purports to transform the health system towards Primary Health Care, address racial, geographical, gender and other disparities in access to health care, introduce a human rights culture in the provision of health care, oral health and develop Information Technology for monitoring patient and other data systems.

The measures that the department reported on for the 1999/2000 reporting period were the Clinic Building and Upgrading Programme; Confidential Enquiry into Maternal Health; Training of Staff; Community Service for Health Professionals; and a policy on Drugs and Pharmaceutical Supplies. It is important to note that these were not new measures instituted during the reporting period, but were measures instituted before the reporting period.

Clinic Building and Upgrading Programme

The programme attempted to address infrastructure backlogs and disparities, with emphasis on rural areas. It entails the construction of new clinics and rehabilitation of existing ones. According to the department, over 400 clinics had either been constructed or rehabilitated under the

programme. This resulted in higher utilisation rates, as communities travel shorter distances to health care facilities.

Confidential Enquiry into Maternal Health

In 1998, the department commissioned an enquiry into South Africa's alarming maternal mortality rate.⁴¹ The report found that the maternal death rates in South Africa were 22 times higher than in developed countries, but nearly four times lower than in countries such as Kenya, Zimbabwe and Zambia. The major causes of maternal deaths in South Africa were found to be hypertension (23,2 percent); HIV/AIDS (14,5 percent); bleeding before, during and after delivery (13,3 percent); pregnancy-related sepsis (11,9 percent); and pre-existing medical conditions, mostly heart disease (10,4 percent).

In response to the findings of the report, the department began implementing strategies to address some of these problems. The strategy entailed the institution of in-depth monitoring of maternal deaths, mandating notification of all maternal deaths and investigating causes of notified deaths. As part of this monitoring, a card for women's reproductive health to improve continued care and promote healthy lifestyles for men and women was developed. Other interventions include the training of health workers, strengthening of staff support, provision of more clinics and the improvement of the quality of care.

Staff development programme

This entailed training and community service, and was directed at addressing reproductive health issues with a specific focus on rural areas that have the highest shortage of human resources. The training component of the measure took the form of a Staff-Training Programme that mainly concentrated on enhancing the skills of midwives, by providing advanced midwifery and neonatal nursing science courses. The Policy on Community Service was introduced as a means of improving the level of service provided to communities, especially in rural areas. The department stated that the Community Service for Dentists in particular, had assisted in improving the level of oral health care services provided to rural communities.

Policy on drugs and pharmaceutical supplies

The policy was meant to address the provision of essential drugs, including prescribing guidelines for the management and distribution of drugs and pharmaceutical supplies.

Although the department stated in its response to the protocol that the abovementioned measures affect the obligations to respect, protect,

⁴¹ Department of Health *Report on Confidential Enquiry into maternal Deaths in South Africa Executive Summary* (1999).

promote and fulfil the right to health, were reasonable and effective, they did not clearly explain this in a way that would lend itself to analysis.

The department did not specifically address the issue of special considerations given to vulnerable groups identified in the protocol, except to mention that all the measures instituted benefited previously disadvantaged groups.

1.2 Provincial Sphere

Most provinces provided information on their different policies, programmes and services. The Gauteng, KwaZulu-Natal, Northern Cape and Western Cape Departments of Health provided the same answers as in the 2nd Economic and Social Rights Report with slight variations and additions.

A number of areas identified in the White Paper for the Transformation of the Health System in South Africa received attention in the provinces. The Table below identifies areas that received attention in the provinces, and the actual provinces that instituted measures in the identified areas.

Table 1 Policies, programmes and services instituted in the provinces

Policies, programmes and services	Provincial departments that instituted the measures
Batho Pele Principles on Service Delivery	Northern Province
Patients' Rights Charter	Gauteng; Northern Province; Western Cape
HIV/AIDS	Eastern Cape; Free State
Maternal health	Free State; Gauteng, North West
Mental health and substance abuse	Free State; Mpumalanga, Gauteng
Rehabilitation	Eastern Cape; Free State; Gauteng
Chronic care	Eastern Cape; Free State;
Communicable diseases	Eastern Cape; Free State; Mpumalanga
Oral health	Free State

Batho Pele Principles on Service Delivery

The Northern Province Department of Health instituted the monitoring of service standards as part of implementing the Batho Pele 'White Paper on Transforming Public Service Delivery'.

Patients Charter

In line with the national department, Gauteng, Northern Province and Western Cape Departments of Health launched the Patients' Rights Charter during 1999.

The Gauteng Department of Health further conducted workshops on the Charter to all health care institutions.

The Northern Province Department of Health set up a Toll Free line for lodging complaints. Health summits were also held in all the regions to conscientise health workers about patients' rights.

The Western Cape Department of Health developed a Patient's Complaint Procedure. The mechanism for implementing the Charter was set up in many health care facilities in the province.

HIV/AIDS

As shown in Table 1, the Eastern Cape and the Free State reported on measures in the area of HIV/AIDS.

The Eastern Cape Department of Health increased the number of sites for voluntary testing and counselling, and the training of health care workers. The department also extended the service on rapid testing for the virus to other clinics and a community based HIV/AIDS project was established. The Faces of AIDS Project was implemented to raise awareness on AIDS.

The Free State Department of Health (FSDH) finalised the development of the policy on Post Exposure Prophylaxis to HIV/AIDS for employees. This measure outlines how patients should be dealt with, and the prevention of HIV/AIDS. The FSDH also developed strategic plans to address key performance areas such as:

- HIV/AIDS Workplace Policy
- Effective Management of Sexually Transmitted Diseases (STD) and condom distribution
- Voluntary Testing and Counselling
- Home-Based Care

The FSDH reported that the policy on HIV/AIDS mentioned above respected, protected, promoted and fulfilled the right of access to health care. The policy ensured that personnel were informed about the treatment of and work with HIV-positive persons. The FSDH also stated that patients were treated fairly and not discriminated against as prescribed by the Patient's Rights Charter⁴² and the HIV/AIDS Rights Charter.⁴³

Maternal Health Programmes

The FSDH and North West's Departments of Health (NWDH) developed policy guidelines for:

- the provision of Termination of Pregnancy (TOP) services;
- contraception; and

⁴² The Patients' Rights Charters' main objective is the fulfillment of the rights of all patients as

equal claimants to human dignity.

⁴³ The HIV/AIDS Charter lays down those basic rights that should be enjoyed by all citizens,

that should not be denied to persons affected by HIV/AIDS.

Health rights

- cervical cancer screening.

The NWDH further developed guidelines for breast examination and family planning, and launched the maternal deaths notification programme. The department also offered in-service education to health personnel in order to improve the quality of services provided to clients. The courses included the Perinatal Problem Identification Programme (PPIP), Perinatal Education Programme (PEP) and the Decentralised Education Programme in Advanced Midwifery (DEPAM).

The FSDH on the other hand, was still reviewing the DEPAM Curriculum which was to be used for training health care workers in the province. Other measures reported by the FSDH included the expansion of existing Primary Health Care (PHC) services to include antenatal and postnatal services and the development of tools for monitoring Maternity Services in order to regulate and improve the standard of care.

Mental Health and Substance Abuse

Policies on mental health and substance abuse were introduced in the Free State, Gauteng and Mpumalanga. The FSDH instituted the Mental Health Draft policy guidelines.

The GDH instituted the Interdepartmental Programme on substance abuse. The Mpumalanga Department of Health (MDH) was drafting policy guidelines at the close of the reporting period. However, there were treatment guidelines and protocols in place. The department also introduced the Community-Based Mental Health programmes.

In terms of special considerations given to vulnerable groups, the Mpumalanga Department stated that outreach programmes conducted by psychiatrists were offered to peripheral hospitals. The needs of homeless persons were met through community-based mental health services offered by day care centres. The assistance provided took the form of meals and psychological rehabilitation.

Rehabilitation

The Eastern Cape, Free State and Gauteng instituted measures in the area of rehabilitation. The Eastern Cape Department of Health provided assistive devices such as wheel chairs and hearing aids to persons with disabilities. According to the department, this helped to address existing backlogs in hearing aids and wheel chairs.

The FSDH produced a document that informed health care professionals on the new approach to rehabilitation services. Health care facilities had been made more accessible to persons with disabilities. The Gauteng Department of Health (GDH) provided counselling services to victims of violence and introduced a pilot project aimed at improving the detection of cases of domestic violence.

Care of the Elderly

The Eastern Cape, Free State and Gauteng provinces paid attention to the elderly during the reporting period.

The Eastern Cape Department of Health (ECDH) indicated that for the elderly, the availability of the treatment protocol ensured the provision of services such as the diagnosis and treatment of diabetes mellitus, arthritis and hypertension.

The FSDH utilised the existing National Prevention of Blindness Programme, and training on eye care. Other measures included the International Year of Older Person's Programme. Some clinics had projects such as gardening and handwork targeted at the elderly. The FSDH stated that the projects were effective because they imparted skills, which would help the elderly to support themselves.

The GDH offered training to health workers on the care of the elderly.

Communicable Disease Programme

The Eastern Cape and the Free State instituted measures towards addressing the spread of communicable diseases.

The ECDH introduced the Directly Observed Treatment Short Course (DOTS) programme targeted at low-income groups, which assisted in the treatment and prevention of the spread of TB. The DOTS programme had been expanded to over eighty Demonstration and Training Districts. The department further stated that under this programme a high success rate was achieved with smear conversion⁴⁴ rates when the programme was first implemented during 1996. The department also reported that implementation of the programme was in line with the protocols endorsed by WHO.

The following programmes were instituted by the FSDH during the year under review:

- TB Control Programme and the Management of Rabies and Leprosy Control Programme
- a Programme on reporting adverse events following immunisation, elimination of measles and the eradication of polio through investigation of all Acute Flaccid Paralysis

Oral Health

The FSDH instituted the Oral Health Services Guidelines for the province, and was planning to implement the Community Service for Dentists

⁴⁴ No explanation provided on what this means.

Programme from 1 July 2000, as a means of increasing accessibility to oral services especially in rural areas.

1.3 Critique

The national Department of Health's report continues to lack useful information that could be used for the assessment of policy measures, related programmes and services. In terms of the question on policy measures, the response of the department is lacking in two respects. The first is lack of information on measures instituted during the reporting period. Although the protocol clearly states that it is the measures instituted during the reporting period that are the object of inquiry, the department continued to report on measures that were instituted before the reporting period.

The second shortcoming of the report is that there were measures instituted during the 1999/2000 reporting period that the department failed to mention. Independent research showed that the following measures were instituted during the reporting period:

- *the demarcation of the health districts based on the Primary Health Model to coincide with local government boundaries:* this involved the demarcation of health district boundaries alongside municipal boundaries in view of the local government elections scheduled for late 2000.⁴⁵ In keeping with this policy, all primary level services including 24-hour emergency services and level 1 hospitals would fall under local government. Consequently, a significant amount of provincial health services and personnel were to be transferred to the newly formed local authorities. It was intended that over 50 000-health workers would be transferred from the provincial public service to local authorities staff, and that local authority health budgets would increase more than five times.
- *the launch of the National Patients Charter:* The Charter was developed before the reporting period and was reported in the 2nd Economic and Social Rights Report
- *development of guidelines for health professionals on how to prevent and address physical and sexual abuse of older persons*

The national department did not explain the rationale for the measures, the contents of each measure and its intended outcomes. Questions on instituted measures and constitutional obligations in s 7(2) of the Constitution were answered at such a level of generality that there was no clear demonstration that the department understands these obligations. The same is the case with the question on vulnerable groups.

In view of the above, it is fair to infer that reporting by the national department is less than satisfactory. By and large, measures instituted by the national department, including those introduced before the reporting period, are relevant to the realisation of the right to health care. Moreover,

⁴⁵ Department of Health (note 29 above) 7.

they help meet the obligations of the state in s 7(2) of the Constitution as elaborated by the Committee on Economic, Social and Cultural Rights. The difficulty is more pronounced at the implementation level.

The national Department of Health has taken great strides before and during the reporting period, towards the realisation of health rights contained in the Constitution. Whereas the situation before 1994 was dominated by the private sector, which was largely inaccessible to the majority of poor people, there is growing evidence of the use of the public health sector. The October Household Survey published in 2001, which covered the period up to 1999, has demonstrated an increase in the use of the public health sector.⁴⁶

The *monitoring of maternal deaths* was progressively realising the right to have access to health care services, especially reproductive health.⁴⁷ Notification of maternal deaths would compel medical health practitioners to take note and record causes of death. Maternal mortality notification was meant to ensure that the high incidence of pregnancy related deaths is reduced.

Although the *Clinic Building and Upgrading Programme* was also a positive measure given the centrality of the measure to the Primary Health Care approach of government, questions can be raised about the sustainability of the Programme. It took four years to upgrade 2 547 clinics, build 495 new ones and provide 215 mobile clinics for the entire country.⁴⁸ The national department's Annual Report indicates that during 1998, only 68 new clinics were built and 14 upgraded using Reconstruction and Development (RDP) funds.⁴⁹ This was quite critical in the context of free Primary Health Care (PHC) services to children under the ages of six, including pregnant and lactating women for the entire country. The programme was also developed to support access to Primary Health Care services to those whose nearest clinic was more than 5 km away.⁵⁰ Moreover, in the Annual Report of the Department of Health, it was stated that funding from the RDP Fund and Independent Development Trust (IDT) for the Clinic Building and Upgrading Programme would end during the 1998/1999 financial year. No report was provided on the budgetary allocation for this programme for the year under review.

While the department was taking active measures to address *human resources development*, some more urgent problems were beginning to surface. For instance, the department stated that the introduction of Community Service for Doctors and Dentists has assisted in improving the level of care provided to rural communities. However, some hospitals and

⁴⁶ P Lehohla *South Africa in Transition: Selected Findings from the October household survey of 1999 and changes that have occurred between 1995 and 1999* (2001) 86.

⁴⁷ Confidential Enquiry into Maternal Deaths at <http://www.polity.org.za/search/ooop/qfullhit.htm>. site visited 02/03/2001.

⁴⁸ Department of Health (note 29 above) 7.

⁴⁹ Ibid.

⁵⁰ Clinic Building and Upgrading Programme at <http://www.polity.org.za/search/ooop/qsumrhit.htm>. Site visited 02/03/2001.

clinics experienced staff shortages. Budget cuts were the major causes of these problems. For instance, following budget cuts for personnel, some Johannesburg hospitals were compelled to close their neo-natal intensive care units and suspend emergency services for children between 10 p.m. and 8 a.m.⁵¹

Despite the institution of measures on *drug policy*, patients were still forced to wait in long queues for hours, sometimes the whole day for their medication.⁵² In the Western Cape, medication for patients at state hospitals across the Peninsula was often in short supply due to the late delivery by manufacturers.⁵³ In provinces such as KwaZulu-Natal, there were also problems of corruption and mismanagement in some hospitals and clinics, with doctors and nurses involved in the theft and illegal sale of medicines.⁵⁴ AIDS patients suffered more because drugs were often not available at some clinics.⁵⁵

It is worth noting that the department was silent on the manner in which instituted measures had been implemented, and the difficulties faced therein. While conceding that the role of the national department is largely that of policymaking, monitoring and evaluation, as implementation occurs mainly in the provinces, it is necessary that the national department is aware of the manner in which these policies were being implemented. This is particularly critical, as it has emerged that while most of the policies developed by the department have generally been reasonable in conception, it is at the point of service delivery where increasing attention needs to be directed.⁵⁶ Some of the evidence for this claim is that there continues to be under-utilisation of new facilities such as the Termination of Pregnancy services.

Most provincial departments have reported adequately on policies, programmes and services instituted during the reporting period. However, and with the exception of the Free State, most provinces still fail to demonstrate the way the measures undertaken address constitutional obligations and give special considerations to vulnerable groups.

Reports from the provinces highlight diverse measures introduced by various provincial health departments in an effort to realise the right of access to health care services. It is however important to highlight that some provinces were not instituting measures to address priority problem areas. A number of examples attest to this:

- The Eastern Cape instituted the DOTS programme as it is one of the provinces with high incidence of TB. Other provinces that also have a

⁵¹ 'Staff cuts may close baby wards, June 23, 1999 at <http://www.iol.co.za>.

⁵² 'Patients forced to wait up to hours', *The Star*, July 06, 1999.

⁵³ 'Patients wait in vain for medicine', *The Cape Argus*, November 29, 1999.

⁵⁴ 'Nurses and doctors caught selling medicine', *Daily News* September 06, 1999.

⁵⁵ The Mail & Guardian *Aids policy is a disaster* at <http://www.mg.co.za/mg/news/99jul2/19jul-aids.html>. Site visited on the 16/03/2001.

⁵⁶ Department of Health (note 29 above) 25.

high incidence of TB were the Western Cape⁵⁷ and KwaZulu-Natal, although these provinces do not seem to be taking measures to address this issue

- The 2nd Economic and Social Rights Report noted that KwaZulu-Natal, facing one of the highest rates of HIV/AIDS, did not present information on how it dealt with HIV/AIDS. During this reporting period, it was only the Eastern Cape and the Free State that reported on measures in the area of HIV/AIDS. A similar report from KwaZulu-Natal was still unavailable
- Only the Free State Department of Health reported on oral health care services suggesting that other provinces were not taking measures to address this issue
- It is worth noting that most provinces were silent on the implementation of the Patient's Rights Charter, despite the centrality of the Charter in entrenching a human rights culture in the provision of health care services

All the measures instituted in the provinces were relevant and contributed to the realisation of the right to health care. It is thus inconceivable that some provinces were not taking steps to institute these policy measures.

Measures such as the National Prevention of Blindness and the International Year of Older Person's Programme were given attention by all other provinces.

It is worth commending Mpumalanga for successfully implementing the DOTS programme. It was the first province to have a successful treatment rate of 80 percent, and the national department stated that lessons learnt could be used in the improvement of the approach that could be taken by other provinces.⁵⁸

The Patients' Rights Charter can be regarded as progressively realising the right of access to health care services. Its principles are aligned to the Batho Pele paradigm, which emphasises access to information, accountability and transparency.⁵⁹ The implementation of the Charter however, remains even more critical.

1.4 Recommendations

National and provincial departments should provide information on the progress or lack thereof in the implementation of policy measures, instituted before the reporting period. In reporting on each measure, departments should state the rationale for each measure and the actual content of the measure. The report also needs to highlight how the measure addresses obligations in s 7(2) of the Constitution, whose context in the right to health is contained in General Comment No. 14 of the Committee on Economic, Social and Cultural Rights. It is also necessary

⁵⁷ Department of Health *TB in South Africa: The People's Plague* (1997) 8.

⁵⁸ *Ibid* 20.

⁵⁹ *Ibid*.

that more specific information be provided on special considerations given to vulnerable groups.

There is a need by national government to develop comprehensive mechanisms to support policy implementation by provincial departments. This is particularly so in the light of research findings that clearly indicate that while policy interventions have redirected health care services towards addressing historical imbalances, attention is needed in service delivery. The particular issues that require scrutiny are the sustainability of capital facilities such as clinics, wherein issues of operation and maintenance need to feature prominently.

Another area of service delivery that requires attention is staff. As stated earlier, the moratorium on staff shortages was reportedly having a crippling effect on staffing in major hospitals.

The national department needs to ensure that the Drugs and Pharmaceutical Supplies Policy is properly implemented and monitored for better service provision. Problems of corruption and mismanagement create a barrier to adequate service provision.

Provinces such as the Western Cape and KwaZulu-Natal, and others that have a higher prevalence of TB need to adopt and implement the DOTS programme as a matter of urgency.

All provinces need to implement the Patient's Rights Charter. It was unsatisfactory that only few provinces have started to develop strategies to implement the Charter, given its pivotal role in entrenching a human rights culture in the provision of health care services. The Charter is also in line with the obligation to promote the right in that it is aimed at informing members of the public about their health rights.

Government needs to take measures to address the shortages of medicines. As outlined in the overview section, one of the contributing factors to these shortages is theft of medicines.

There is still a tendency of government not to identify vulnerable groups and explicitly state how the measures instituted give special considerations to these groups. Government needs to be more explicit about special consideration given to refugees and asylum seekers.

2 LEGISLATIVE MEASURES

2.1 *National Sphere*

In its report, the department did not provide information on new legislative measures instituted during the reporting period to realise the right to health care. Instead, it mentioned two Acts that were instituted before the reporting period. These were the Medical Schemes Act 131 of 1998 that

was promulgated in February 1999, and the Choice of Termination of Pregnancy Act 92 of 1996.

The promulgation of the Medical Aid Schemes Act 131 of 1998

The Act is directed at protecting the right of access to health care by ensuring broad access to medical insurance. It removes discriminatory practice in the private sector. In terms of the Act, medical aid schemes had until December 1999 to redesign their products, benefits and rules to conform to regulations and have them approved by the Registrar for Medical Schemes. The main aims of the Act are to ensure that participants enjoy fair and adequate cover, and are not discriminated against on the basis of their age or health risk status. In so doing, the Act prevents schemes from barring the sick and the elderly through prohibitively expensive membership. The regulations provide for the guaranteed acceptance into a medical scheme and a minimum benefits package. Contributions to a medical scheme were to be standardised.

According to the Department of Health, the Act takes precedence in cases where there is conflict with any legislation other than the Constitution. Important provisions of this law that deal with contributions and benefit structures are contained in the regulations published in October 1999 and brought into effect in January 2000, with the exception of other limited regulations that came into effect in November 1999. The regulations state a list of prescribed minimum benefit conditions, in respect of which medical schemes are required to reimburse in full without co-payment or the use of deductibles, the diagnostic, treatment and care costs in at least one provider or provider network, which must include the public hospital system. While medical aid schemes may still employ techniques such as pre-authorisation, they are not entitled to refuse authorisation in a public hospital of standard treatment for any prescribed minimum benefit.

The objectives behind the prescribed minimum benefits are to avoid instances where individuals lose their medical scheme cover in the event of serious illness, and the consequent risk of unfunded utilisation of public hospitals; and to improve efficiency in the allocation of private and public health care resources. The regulations further provide that due to changes in medical practice and technology, the national Department of Health will review the prescribed minimum benefits every two years. This is to be done in consultation with other role players in the health sector, namely the Council for Medical Schemes, provincial Health departments and consumer representatives.

Choice of Termination of Pregnancy Act 92 of 1996

This Act meets constitutional obligations stated in s 7(2) of the Constitution. On the one hand it gives legislative recognition to the right to reproductive health contained in s 27(1) of the Constitution. It also has the benefit of providing termination of pregnancy (TOP) services, thereby protecting women against potential exposure to hazardous 'backstreet

abortions'. The department has reported that over a five-year period (the actual years were not given), South African health facilities were admitting hundreds of women with incomplete abortions, of whom 450 died annually. Most of these women were from poorer backgrounds and could thus not afford abortion services in the private sector. The measure is thus also a positive measure in that it makes available public facilities available towards the termination of pregnancy. As a result of the Act, about 270 health facilities have been designated for TOP services.

According to the department, the major difficulty with the implementation of TOP was conscientious objections.

2.2 Provincial Sphere

Departments of the Eastern Cape and Mpumalanga did not submit responses on the right to health care. The Northern Cape Department submitted a replica of the report submitted in the previous reporting period. The remaining six provincial departments instituted their own health legislation.

The Free State province passed, *inter alia*, the Free State Provincial Health Act 8 of 1999. No information on the content of the measure was provided.

As a follow-up to the White Paper on District Health Services, the Gauteng province developed the District Health Services Bill, which was due to be tabled in June 2000. The purpose of the Bill is to effect the devolution of District Health Services to local government. The Emergency Services Bill was also developed during the reporting period. The Nursing Education and Training Bill was reportedly due for distribution and consultation during the reporting period. No further information was made available.

In KwaZulu-Natal, the provincial department drafted the Provincial Health Bill. The department also reported that two hospitals have been established in line with the TOP services. Furthermore, the department implemented the Sterilisation Act to make sterilisation more accessible to the disabled.

There was no new legislation passed in the North West province. However, the department has indicated that there has been a continued implementation of the Choice of Termination of Pregnancy Act of 1996 and the Domestic Violence Act 116 of 1998. These laws were reported to have been helpful in the protection of women from discrimination.

The Western Cape Department continued to implement national legislation such as the Choice of Termination of Pregnancy Act, and was also using the Draft National Health Bill to guide the delivery of health care services.

2.3 Critique

The report from the national department failed to mention key legislative measures instituted during the reporting period. These include the Medicines and Related Substances Control Amendment Act 90 of 1999; and the Pharmacy Amendment Bill of 1999. A brief description of each of the Acts instituted but not reported on by the department is hereby given.

Medicines and Related Substances Control Amendment Act 90 of 1999

This legislation was passed to bring down the cost of medicines and to make health care more accessible and affordable. One of the main objectives of the Act was to provide for the supply of affordable medicines in certain circumstances. The major amendment to Act 101 of 1965 was the insertion of s 15(c), which empowers the Minister of Health to take measures to ensure the supply of more affordable medicines by prescribing conditions so as to protect the health of the public.

The Pharmacy Amendment Bill of 1999

This Bill introduced the system of community service for pharmacists, similar to the one introduced for medical practitioners through the Medical, Dental and Supplementary Health Service Professions Amendment Act 89 of 1997. According to the Bill, a first time registering pharmacist is subject to the completion of one year of remunerated pharmaceutical community service. The Bill was intended to come into effect on the same day that s 13 of the Pharmacy Amendment Act 88 of 1997 came into force. It was expected that additional 500 pharmacists a year would be made available to public health institutions. The Act was an attempt to address shortages of pharmacists and to address the inter-provincial disparities in pharmacists in the public health sector. For example, whilst Gauteng has one pharmacist for every 1 738 people, the Northern Province has one pharmacist for every 16 446 people.

Also worth mentioning is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Although the Act is not specifically directed at the health sector, it prohibits discrimination on a number of grounds. After the Act was passed in 2000, further research was conducted to investigate additional grounds for unfair discrimination. HIV status is one of the grounds under investigation.

While the above-mentioned measures are certainly positive in that they move towards meeting constitutional obligations, there are several areas requiring attention. There are policies of government whose implementation is hindered by lack of a legislative framework such as the demarcation of health districts, gaps in some legislative measures for instance the Medical Aid Schemes Act, and difficulties experienced in implementing legislation such as the Termination of Pregnancy Act.

One of the factors that stood in the way of the re-demarcation of District Health boundaries mentioned in the section on policy measures was lack of a legislative framework to guide the process. There were no definitive

guidelines on the scope and depth of primary level services to be rendered by the district health services. Without national legislation, each province would have had to introduce legislation resulting in significant variability between provinces.

The Medical Aid Schemes Act is a particularly useful measure to protect the violation of the right to health care by third parties. However, it is important to note that the state itself has not made a statement on the feasibility of a state-funded or subsidised form of health insurance, as is provided in some countries. It is a fact that the Act as it is would benefit people who are either already members of medical aid schemes, or those who are simply being prevented from doing so by unfair discrimination. Nevertheless, many South Africans are simply not able to afford health care, hence the continued prevalence of diseases in the country. One of the findings of the October Household Survey mentioned earlier was that medical insurance provided in the private sector, continues to be inaccessible to the majority of people in the country. The Survey showed that only 10 percent of Africans had medical cover, compared to 20 percent for Coloureds, and 25 percent for Indians, while seven out of every 10 Whites had such cover.⁶⁰ The state is thus required to comment on the feasibility of a publicly funded or subsidised form of health insurance.

While the Termination of Pregnancy Act 92 of 1996 is positive for the reasons mentioned above, the implementation of the measure tells a slightly different story. Although the overall national figure of 70 000 abortions conducted since the passing of the Act before the 1999/2000 reporting period seems encouraging, these national figures hide the way in which certain groups of women have poorer access to abortion services than others. According to the South African Health Review of 1999,⁶¹ a total of 246 public health facilities were responsible for offering abortions to South African women, but only 73 were delivering the service. Of the 73, almost half (49 percent) of all terminations of pregnancy were carried out in Gauteng while only one percent were carried out in the North West. When comparing the female population per province with the number of reported TOPs, KwaZulu-Natal with the highest female population in the country (21 percent) registered only 10 percent of the total TOPs.

The Review also showed that young women were still unaware of their right to request a safe and legal abortion without their parents or partner's consent. Moreover, health care workers still have negative attitudes towards abortion with most nurses being unaware that by law, young women (including minors) have the right to an abortion on request. Budgetary constraints have also resulted in the training of very few personnel to conduct terminations of pregnancy. There were only 31 qualified, practising midwives who could legally perform an abortion. Although the Act was promulgated in February 1997, the curriculum for the training of midwives was only finalised in October 1998.

⁶⁰ Lehohla (note 46 above) 86.

⁶¹ Varkey (note 39 above).

Generally, provincial departments did not provide the Commission with adequate information as required by the protocol. Information dealing with the constitutional obligations and the impact of instituted measures on the progressive realisation of the right was not provided. Neither was the information on the reasonableness and effectiveness of the measures provided.

There were significant legislative developments in some of the provinces that did not respond at all, namely the Eastern Cape, Mpumalanga and Northern Province. For example, the Eastern Cape Provincial Health Bill was to be tabled in the provincial legislature in November 1999. In Mpumalanga, there were two pieces of legislation that were being developed, namely the Mpumalanga Health Bill and the Health Facilities Bill. The latter was to be submitted to Cabinet for consideration in early 2000. The Northern Province Legislature passed the Northern Province Health Bill during the reporting period.

2.4 Recommendations

The national department should develop legislation to guide the transformation of the District Health System that is at the heart of the Primary Health Care Model. Such legislation should clearly spell out definitive guidelines on the scope and depth of primary level services to be rendered by the district health services.

There is a need for government to make a definite statement regarding the feasibility of a publicly funded or subsidised form of medical insurance. Such a form of insurance could be targeted at poorer households that are not able to afford medical insurance due to either low income or unemployment. The development of such a system should be accompanied by continued monitoring of the private provision of medical insurance.

There is also a need for government to continuously monitor the implementation of key legislation such as the Termination of Pregnancy Act. Such monitoring should pay specific attention to the level of utilisation of services, against trends in the rate of 'backstreet abortions'.

3 BUDGETARY MEASURES

3.1 National Sphere

Most of the information requested from the national Department of Health on budgetary allocations towards specific health care programmes for the reporting period was not provided. Information was only provided for the total allocation for the department and for the prevention and treatment of HIV/AIDS.

The department reported that it does not disaggregate the total allocation according to the format of the protocol, wherein budget information was required according to the following programmes: health care services, including reproductive health care; primary health care; and health care facilities. The respective provincial departments were the ones who would have this information as they implement national policies. The national department is involved only in the administrative oversight of these services. However, the department stated that review of the public health system showed that more resources were being committed to the District Health System.

3.2 Provincial Sphere

The Mpumalanga Health Department provided information from its various districts and the information could thus not be used, as it was not collated into a comprehensive provincial report. Gauteng and the Northern Cape Health Departments did not provide information on their respective total provincial health budgets. The Table below shows the overall budgetary allocations to health for the provinces.

Table 2 Provincial health budgets

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
Eastern Cape	1998/1999	3 100 872 000	3 027 061 000
	1999/2000	3 434 091 000	3 496 262 000
	2000/2001	3 318 018 000	3 650 636 000
Free State	1998/1999	1 589 708 130	1 688 028 273
	1999/2000	1 724 403 018	1 588 986 823
	2000/2001	1 780 454 000	-
KwaZulu-Natal	1998/1999	4 804 355 000	4 867 437 000
	1999/2000	5 115 056 000	5 109 604 000
	2000/2001	5 109 604 000	
Northern Province	1998/1999	1 906 185 000	2 056 005 000
	1999/2000	2 282 601 000	2 220 525 000
	2000/2001	2 395 065 000	1 156 805 000
North West	1998/1999	1 361 710 000	1 341 992 000
	1999/2000	1 431 592 000	1 383 842 000
	2000/2001	1 565 328 000	-
Western Cape	1998/1999	3 024 055 000	3 023 826 000
	1999/2000	3 072 888 000	3 106 704 000
	2000/2001	3 322 532 000	-

All the provinces that provided information on budgetary allocations had nominal increases in their budgets. The Free State, KwaZulu-Natal, Northern Province and the North West under-spent on their budgets. The departments that over-spent were the Western Cape, the Eastern Cape and Northern Cape.

Health care services

Some provincial departments did provide information of that portion of the health budget that went into health care services including reproductive health. Figures are shown in the Table below.

Table 3 Budgetary allocations towards health care services including reproductive health

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
Eastern Cape	1998/1999	114 607 000	90 989 000
	1999/2000	88 658 000	84 000 000
	2000/2001	30 496 000	
Free State	1998/1999	1 484 334 130	1 584 121 581
	1999/2000	1 501 724 891	1 391 996 631
	2000/2001	1 544 430 000	-
Gauteng	1998/1999	672 170 000	587 452 000
	1999/2000	941 874 000	648 645 000
	2000/2001	1 123 675 000	-
KwaZulu Natal	1998/1999	4 803 355 000	4 867 437 000
	1999/2000	5 115 056 000	5 109 604 000
	2000/2001	5 574 263 000	-
North West	1998/1999	1 361 710 000	1 341 992 000
	1999/2000	-	1 383 842 000
	2000/2001	-	-
Western Cape	1998/1999	2 717 725	2 754 941 000
	1999/2000	2 868 209	2 919 619 000
	2000/2001	3 303 142	-

All provincial departments with the exception of the Eastern Cape had nominal budget increases from the 1998/1999 to the 1999/2000 financial years. The Eastern Cape experienced a substantial reduction in the allocation towards the health care services budget. What is also worth noting is that during the reporting period, with the exception of the Western Cape that over-spent on its budget, all provincial departments variably under-spent on their health services budget.

Some provinces provided information on variances, budget adequacy and special considerations given to vulnerable groups.

Explanations of variances: Northern Province, Gauteng, the Northern Cape and Mpumalanga did not provide any information on variances.

In the Western Cape, the R41 million variance was attributed to the fact that there was only a 1,5 percent increase in the budget, which was far below the inflation rate.

The Free State Department of Health indicated there was an 8,2 percent increase from the 1998/1999 to the 1999/2000 financial year. The department attributes the variance to Growth Employment and Redistribution (GEAR), the Medium Term Expenditure Framework (MTEF) and the Transformation of the Financial Management System.

In KwaZulu-Natal, the department stated that during the reporting period, there was under-spending of funds earmarked for special projects. As a result, an application was made for rollover funds, approval of which would result in over-spending of R 72 million. The department had expected that during the 2000/2001 financial year, there would be over-spending.

In the Eastern Cape, adjustments were made towards the end of the financial year, which resulted in under-spending. During the 2000/2001 financial year, projections were that there would be over-spending and the matter was receiving attention.

Budget adequacy: Gauteng, Northern Cape, Northern Province and Mpumalanga Health departments did not provide information on budget adequacy.

The FSDH indicated that the allocated budget was not adequate. An attempt was made to address this problem through reprioritisation and budget realignment, management of cost drivers, and the improvement of financial management skills and methods.⁶² As a result, there were severe staff shortages although no actual figures of the extent of the shortages were provided. Medicines were under-budgeted for. The department ended up cutting down on staff through Voluntary Severance Packages and on costs such as consumables at academic hospitals.

In KwaZulu-Natal, there was insufficient funding to fill vacancies, maintain stocks of medicines, provision purchase, replace essential equipment and maintain buildings. Measures taken to deal with the problems included freezing of posts resulting in unacceptable pressure on key personnel and reduction of stock levels.

The ECDH reported that budgetary allocations were adequate for personnel but not for non-personnel costs, clinical purposes, medicines, hospital support services, maintenance of machinery, generators, coal, etc. Consequently, the department introduced cost containment measures, including curtailment of expenditure, budget envelopes per section and containment committees to closely monitor expenditure.

Special considerations given to vulnerable groups: In the Western Cape, the health department reported that it increased allocations towards rural areas and that its PHC and HIV/AIDS Programmes took into consideration some of the vulnerable groups identified in the protocol.

⁶² The Department provided a detailed list of measures that it has implemented to address budget inadequacies. These include the development of a three-year strategic Service Plan linked to a costed Business Plan; capacity building of management at all levels in terms of performance, budgeting and financial management; appointment of a finance management officer; financial management strategies to ensure effectiveness and efficiency; centralisation of monitoring and approval of expenditure; revision of staff establishments; implementation of essential list drugs and the implementation of cost centres.

The KwaZulu-Natal Department of Health gave a more extensive account of the way special considerations were given to the groups identified in the protocol.

- *People with HIV/AIDS* benefited from the HIV/AIDS Programme
- New clinics and free rural clinics benefit *people in rural areas*
- Although no special considerations were given to *older persons*, all facilities were made available to the elderly. The same was the case for the homeless
- For *people with disabilities*, specific funding was being provided for prosthetic aids. Moreover, construction of buildings takes into account the needs of the disabled. There were also specific programmes such as physiotherapy, occupational therapy and rehabilitation
- *Low-income groups* benefit from free PHC services and funding specifically made available for nutritional support. No special provisions were made to refugees and asylum seekers

The Free State, Northern Province and the Eastern Cape Departments of Health did not respond to the question.

Primary health care

The Northern Province, Northern Cape and Mpumalanga Departments of Health did not provide the required information on budgetary allocations towards Primary Health Care. Figures received are provided in the Table below.

Table 4 Budgetary allocations towards Primary Health Care

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
Eastern Cape	1998/1999	418 826 000	-
	1999/2000	305 675 000	-
	2000/2001	-	-
Free State	1998/1999	593 000 000	609 113 493
	1999/2000	606 573 000	577 203 501
	2000/2001	657 030 000	183 753 490
Gauteng	1998/1999	35 078 000	18 882 000
	1999/2000	75 069 000	56 503 000
	2000/2001	75 069 000	-
KwaZulu Natal	1998/1999	1 973 763 000	1 961 903 000
	1999/2000	2 085 607 000	2 141 290 000
	2000/2001	2 618 764 000	-
North Cape	1998/1999	-	-
	1999/2000	27 836 000	234 540000
	2000/2001	-	-
Northern Province	1998/1999	1 906 185 000	2 056 005 000
	1999/2000	2 282 601 000	2 220 525 000
	2000/2001	2 395 065 000	955 413 365
North West	1998/1999	786 732 000	854 747 000
	1999/2000	865 707 000	943 848 000
	2000/2001	920 571 000	
Western Cape	1998/1999	507 384 000	492 474 000
	1999/2000	554 790 000	569 768 000

Health rights

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
	2000/2001	542 342 000	-

What was also worth noting under the Primary Health Care budget was that four of the seven provincial departments that provided the Commission with the required information namely, the Northern Cape, the North West, the Western Cape and the Northern Province had under-spent on their budgets.

Variances: the Western Cape Department of Health reported that there was about R15 million over-spending with a 9,3 percent increase from the 1998/1999 to the 1999/2000 financial years. No reasons were given for this over-spending.

In KwaZulu-Natal, there had been inadequate funding in respect of rank promotion, and important medicines, mainly at the district hospital level. During the 2000/2001 financial year, there was anticipated, a shortfall in respect of the cost of medicines, equipment and escalating inflation.

The Department of Health and Social Services in the North West reported that the variance between the years was only an adjustment for inflation and not growth or expansion of services. Some personnel costs for provincial hospitals (secondary level services) were paid from the District Health Service allocation, hence the difference between the budget and actual expenditure.

The FSDH reported that the budget allocation had increased annually from 1998 to 2000. The main difference, the report said, was between 1999/2000 and 2000/2001 financial years. Two reasons were given for variances. The first was the transfer of Ambulance Services from Local Government services to the province and the second was the fact that the TB budget from SANTA and private hospitals was transferred to Primary Health Care from the Hospital Services Budget.

The ECDH did not provide information on variances but indicated that the same reasons given for variances in the health care service budget discussed above, were the same as the ones for primary health care.

Budget adequacy: There were no responses from the Gauteng, the Northern Cape and Northern Province's Departments of Health.

The North West Department of Health and Social Services indicated that the budget was not adequate, as it was based on available funds not needs. As a result, services have had to be scaled down to fit into available resources.

In the Western Cape, the amount allocated was dependent on the total health allocation represented above. Amidst ongoing efforts to expand

Primary Health Care, population growth and the escalation of health care, costs were the main factors increasing pressures on the budget.

The KwaZulu-Natal Department of Health also said the budgetary allocation towards health care was inadequate.

In the case of the ECDH, it was reported that the budget was inadequate to provide effective Primary Health Care. There were significant cuts in expenditure on stores and livestock, and professional and special budget allocation. This, the report said, affected the ability of clinics and district hospitals to purchase drugs, conduct laboratory tests and supplies.

The department was thus unable to extend services including staffing of clinics, as had been envisaged. The FSDH indicated that after reprioritisation, the budget was adequate.

Measures embarked upon to address the inadequacy of budgetary allocation towards Primary Health Care: In the Free State, areas of under-spending were identified and funds moved. The Eastern Cape Department of Health applied for a lifeline allocation. In the Western Cape, the Health and Social Services Department earmarked further funding for the commissioning of health facilities. KwaZulu-Natal reported the same measures as were reported for health care services. The North West Department of Health and Social Services resorted to reprioritisation in an attempt to cope with the inadequacy of the budget.

HIV/AIDS

The Commission required information on budgetary allocations for both the prevention and treatment of HIV/AIDS.

Prevention

Limited information was provided on the prevention of HIV/AIDS, as the Table below illustrates.

Table 5 Budgetary allocations towards Prevention of HIV/AIDS

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS
Eastern Cape	1998/1999	-	-
	1999/2000	-	-
	2000/2001	9 000 000	-
Free State	1998/1999	3 000 000	5 000 000
	1999/2000	3 000 000	10 000 000
	2000/2001	3 000 000	20 000 000
Gauteng	1998/1999	-	-
	1999/2000	-	-
	2000/2001	-	-
KwaZulu Natal	1998/1999	6 998 000	7 193 000
	1999/2000	15 800 000	12 298 000
	2000/2001	35 800 000	

Health rights

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS
North Cape	1998/1999	-	737 636
	1999/2000	-	1 321 686
	2000/2001	-	234 540
North Province	1998/1999	1 000 000 000	-
	1999/2000	1 000 000 000	-
	2000/2001	2 000 000 000	-
North West	1998/1999	-	10 372 015
	1999/2000	-	11 385 057
	2000/2001	-	-
Western Cape	1998/1999	1 000 000	-
	1999/2000	3 000 000	-
	2000/2001	7 300 000	-

The North West Department of Health explicitly stated that the department did not have a specific allocation for the prevention of HIV/AIDS. However, it estimated that about R 113, 000, 000 was spent on HIV/AIDS prevention during 1999/2000. About R 1, 2 000, 000 was spent on information, education and communication activities. Items such as condoms, which were provided by the national Department of Health, were not part of the provincial budget.

The Northern Cape reported that the figures for HIV/AIDS prevention only reflected conditional grants for the phases High Transmission Project and Lay Counsellor Programmes and not the amount spent by the department in the provincial office and in the districts. The Financial Management System did not distinguish between expenditure on different health programmes.

Variations: Only the Free State and Western Cape Departments of Health provided information on variances and the reasons thereof.

The Free State Health Department reported that while it acknowledges that HIV/AIDS was a high priority, it had to be balanced against other priorities, although support and prioritisation of HIV/AIDS led to more funds being allocated.

The Western Cape Health and Social Services Department attributed variances to inadequate funding during the 1998/1999 financial year, the late implementation of a Special AIDS Unit and the difficulty in finalising contracts with NGOs for workers in the field for the 1999/2000 financial year.

Budget adequacy: Limited information was provided on budget adequacy, the impact of inadequacies, and measures put in place to address inadequacies.

The Western Cape Department of Health reported that the budget was not adequate for the prevention of HIV/AIDS, and that it was becoming difficult

to manage the HIV/AIDS pandemic. A motivation was made for an increased budget.

The Free State Health Department reported that the budgeted amount was not adequate as the province had the second highest incidence of HIV infection in the country, although this claim was not corroborated by the figures provided by the same department in the outcomes section. What was needed, the report stated, were massive allocations of resources such as staff, time, community work, funds, and targeted sustainable projects and programmes on a large scale. Regarding problems encountered as a result of budget inadequacy, the department stated that it was difficult to report, as HIV/AIDS was not a notifiable disease. Measures taken by the department to cope with budget inadequacy include amongst others:

- lobbying for more funds
- creation of partnerships with other organisations to deal with HIV/AIDS
- allocation of funds towards CBOs/NGOs to supplement public funds
- public awareness campaigns and additional staffing

There was also limited information on special considerations given to vulnerable groups. The KwaZulu-Natal and the Western Cape Departments of Health reported that health resources towards HIV/AIDS do accommodate all the people in the province. The remaining departments did not respond to the question.

Treatment

The Eastern Cape and the Free State Departments of Health were the only ones that responded to questions on budgetary allocations for the treatment of HIV/AIDS. For both the 1998/1999 and 1999/2000 financial years, the Eastern Cape Department of Health did not make a separate allocation for the treatment of HIV/AIDS, as the focus was on treating opportunistic infections. The Free State Department reported that there was no data on HIV/AIDS treatment.

Health care facilities

Budgetary allocations towards health care facilities are provided in the Table below.

Table 6 Budgetary allocations towards Health care facilities

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS
Eastern Cape	1998/1999	114 607 000	90 989 000
	1999/2000	88 658 000	84 000 000
	2000/2001	30 496 000	-
Free State	1998/1999	4 053 861	3 772 861
	1999/2000	63 309 604	46 238 366

Health rights

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE IN RANDS
	2000/2001	36 241 784	7 647 253 to date
Gauteng	1998/1999	417 484 000	293 593 000
	1999/2000	453 941 000	335 300 000
	2000/2001	787 176 000	-
KwaZulu-Natal	1998/1999	228 092 000	269 828 000
	1999/2000	356 928 000	250 941 000
	2000/2001	488 049 000	-
Northern Cape	1998/1999	-	-
	1999/2000	219 132 000	-
	2000/2001	-	-
North West	1998/1999	27 869 000	27 869 000
	1999/2000	45 470 000	32 946 000
	2000/2001	51 389 000	-
Western Cape	1998/1999	49 325 000	43 634 000
	1999/2000	71 954 000	53 421 000
	2000/2001	108 357 000	-

Budgetary allocations towards health care facilities went up from the 1998/1999 to the 1999/2000 financial year in the Free State, Gauteng, KwaZulu-Natal the North West and the Western Cape. They were reduced in the Eastern Cape. What was particularly noticeable about the health care facilities budget was the high level of under-spending. All the provincial departments that had provided information under-spent on their health budgets, with KwaZulu-Natal spending the least (70 percent) of the allocated amount.

Variations: The Eastern Cape reasoned that articulation of over- and under-spending as regards capital works programmes was not always possible as programmes spread over three years and were dependent on contract slippage. Savings and excesses can thus only be reflected on completion of the project(s). A similar response came from the Free State Health Department.

The KwaZulu-Natal, Western Cape and North West Departments of Health attributed variations to delays in tendering procedures. Gauteng, Northern Province and the Northern Cape did not respond to the question.

Budget adequacy: The Eastern Cape Health Department reported that the budget was not adequate and as a result, maintenance of facilities was not properly undertaken.

The Free State Health Department stated that except for Minor Works, the budget was adequate as the department also received, through the national Health department, financial assistance towards infrastructure development from the Embassy of Ireland. The issue of maintenance raised above was also stated as a problem for the department. Where funds were inadequate, projects could not be implemented in time. Measures taken to cope with inadequacy included reprioritisation, shifting

of deadlines and the urgent upgrading of district hospitals where the need was greatest.

The KwaZulu-Natal Health Department said the budget was adequate. In the case of the North West Department of Health, the budget was also found not to be adequate, and several capital works projects determined on the basis of need could not be built and no measures could be taken in this regard. The Western Cape Health Department also mentioned that the budget was inadequate especially for maintenance, and that as a result significant effort was increasingly going towards allocating funds towards maintenance. The Gauteng, Northern Cape and Northern Province Departments of Health did not provide information.

Special considerations given to vulnerable groups: No specific information was given on special consideration given to vulnerable groups.

The Western Cape and KwaZulu-Natal Health Departments stated that facilities were being made available to all the people in the province, with the former specifically stating that newly constructed facilities made provisions for people with disabilities.

The North West and Eastern Cape Health Departments indicated that new facilities were being constructed in under-served areas such as rural areas.

The Free State Health Department stated that there was an involved, participatory process for identifying needs, which served as the basis for prioritisation, aimed at determining needs, rationalising previously segregated facilities and ensuring that every town had at least one clinic, including mobile clinics.

The Northern Province, Gauteng and the Northern Cape Departments of Health did not respond to the question.

3.3 Critique

Reporting by organs of state at both the national and provincial levels continues to be unsatisfactory. What hinders better analysis of especially provincial comparisons was the non-provision of information on per capita allocations, meaning that it was not possible to see how provincial inequities were being addressed through budgetary measures.

However, compared to other sections of the protocol, the budget section is relatively satisfactory. What is completely unacceptable is for the Mpumalanga Department of Health not to provide provincially aggregated information. It is their duty to collate district information into a provincial report that can be submitted to the Commission.

The health budget has become a focus of considerable attention in the last few years, mainly due to numerous projections that have been made

regarding needs in the future. A number of issues have featured prominently in these analyses. These issues included:

- the tendency of the budget to take a downward trend in real terms towards the end of the 20th century after having registered positive gains during the mid 90s,
- substantial reductions in the capital budget,
- rising inequalities,
- over-spending and under spending,
- personnel crises that have emerged as a result of budget cuts in some parts of the country.

An analysis of the health budget for the period before the 1999/2000 financial year has identified several trends that, while likely to continue during and after the reporting period, pose serious challenges to the realisation of policy goals contained in the White Paper on the Transformation of the Health System in South Africa. These include downward movements in real term budget allocations, after what had before appeared to be upward movements. The Health budget rose from R22, 6 billion during the 1995/1996 financial year, to R24, 9 billion (10 percent increase) in the 1996 financial year.⁶³ However, it fell down in real terms to R23, 5 billion during the 1997/1998 financial year. It was expected that the budget would be declining in real terms in subsequent years. The figure has looked even more serious when calculations are done on a per capita basis. When population growth figures were taken into account, average per capita growth moved from R572 to R614 from 1995 to 1997, fell to R601 during 1998, and was budgeted to fall again to R557 during 1999. Budget cuts have had serious implications on the provision of health care. Two areas, namely the capital and personnel budget, have suffered as a result of this scenario. One of the immediate upshots of declining budgetary allocations towards health is declining capital spending. Although the focus of the National Health Plan has been to move away from tertiary health facilities to primary level care, between 1997/1998 and 1999/2000 capital expenditure including spending on new clinics has declined by almost 12 percent in real terms.⁶⁴ A declining portion of the provincial health budgets has been allocated to the construction and maintenance of provincial health buildings since the 1997/1998 financial year. The national conditional grant for Hospital Rehabilitation and Reconstruction has not been large enough to compensate for the inadequate provincial expenditure. Also and as vividly noted in the presentation of provincial budgets, provinces had not spent what they budgeted for on the maintenance and construction of health facilities.

Personnel problems have also arisen from decreasing budgets. Community service doctors threatened to work to rule because of late

⁶³ M Segal *Review of Public Health Service* (1999) 7.

⁶⁴ Idasa BIS. '*Capital expenditure in provincial Health budget* (1999) at <http://www.idasa.org.za/bis/briefs/brief42.htm>.

payment of their salaries, overtime and rural allowances.⁶⁵ Interns from Frere Hospital in the Eastern Cape said their salaries were more than two weeks late whilst community service doctors in the Free State, Gauteng, Mpumalanga, Northern Province, and North West complained of not being paid overtime and rural allowances.

An issue that has featured prominently in the analysis of health budgets is the degree to which budgetary allocations are addressing historical inequities. As stated in the introduction, the South African health system has inherited a legacy characterised by huge geographical, racial and gender disparities. One of the goals of the government is to address, mainly through resource prioritisation, inequities. Table 7 below shows wide variations in the health budgets between provinces. The projected health budgets until 2003 suggest that the health budgets for the provinces of the Eastern Cape, Northern Cape and Western Cape were set to decrease in real terms in the next few years.⁶⁶ The total provincial health expenditure is expected to remain stagnant until 2003. The 2000 Intergovernmental Fiscal Review also suggests that inequalities between provinces (as measured by per capita health expenditure trends) were increasing. For example, in 1998/1999 the difference between Gauteng and Northern Province was R330 whilst the budgeted difference for 1999/2000 was R350.

Table 7 Provincial health budgets for 1999/2000¹

	Total provincial health budget in Rand(s) million	Per capita expenditure In Rand(s) ²	Capital expenditure as proportion of total health budget (%)	Expenditure on clinic upgrading & building programme in Rand(s)
Eastern Cape	3 566	574	3.9	16 305 000
Free State	1 604	577	2.3	37 164 000
Gauteng	5 610	819	6.7	13 847 000
KwaZulu-Natal	5 110	573	9.7	134 691 000
Mpumalanga	1 147	451	3.8	5 018 000
Northern Cape	429	597	1.7	2 499 000
Northern Province	2 260	469	9.2	27 205 000
North West	1 388	458	5.6	28 344 000
Western Cape	3 125	658	1.2	6 378 000
Total/Average	24 239	-	5.9	271 452 000

Notes: ¹ Adapted from Tables 5 and 8 in Idasa BIS. 'The 2000 Intergovernmental Fiscal Review: A Response.' (2000) at <http://www.idasa.org.za/bis/briefs/brief49.htm> and Tables 5 and 7 in Idasa BIS. 'Capital expenditure in provincial Health budgets.' (1999) at <http://www.idasa.org.za/bis/briefs/brief42.htm>

² Excludes health conditional grants and people with access to medical aid.

A number of reasons have been advanced to explain this declining and inequitable resource allocation. These range from macro-economic policies that do not favour increased allocation towards equitable allocations for health, and decentralisation that has relocated decision

⁶⁵ *The Sunday Times* 21 February 1999.

⁶⁶ Department of Finance. *2000 Intergovernmental Fiscal Review*.

making on the budget, to provincial authorities, sometimes at the expense of centrally determined equity goals.⁶⁷

While the above factors relate more to issues of allocations, some of the problems that have arisen are more suggestive of inefficiency in the application of allocated resources. Under spending is one such a problem. For instance, funding for the Department of Health's AIDS programmes was about R109 million in 1999/2000 and R182 million for the following financial year. The department's Government AIDS Action Programme (GAAP) spent only 25 percent of its budget of R40, 4 million, with R30, 3 million not spent.

Under spending is not only experienced at the national sphere but also in the provinces. As was shown above, several provinces have under-spent in at least one of their programmes. For instance, of the R 63 309 609 allocated towards health care services for the Free State Department during the reporting period, only R 46 236 366 was actually spent. What was particularly noticeable as an instance of under-spending in the Free State Province Health Department was in the HIV/AIDS Programme in that of the R 10 000 000 made available, only R 3 000 000 was actually spent. In the case of the Gauteng Health Department, of the R 75 069 000 allocated for primary health care, only R 56 503 000 was spent.

3.4 Recommendations

The declining capital spending requires immediate attention, as it is central to the success of the Clinic Building and Upgrading Programme and other capital programmes of organs of state involved in the delivery of health care services, given the need to provide basic services to unserved areas.

There is a need to address the issue of under-spending, which is noticeable in assessing provincial budgets, even at the superficial level.

Another issue requiring attention is measures to address maintenance of health care facilities arising from budget cuts and lack of institutional capacity to utilise existing funds. Health officials faced with declining resources resort to the neglect of maintenance as a way of keeping essential services. As a result, the long-term sustainability of health services faces severe threats.

Human resources development remains a challenge. While the department is developing a human resources strategy for the medium to the long-term, it is important that short-term measures be put in place to address some of the crises such as payment of salaries and shortage of staff

⁶⁷ S Thomas *et al* 'Public Sector Financing' in D Burger (ed) *South African Health Review* (2000) 139.

4 OUTCOMES

National and provincial Departments of Health were required to provide information on health care personnel, hospitals and clinics, availability of Termination of Pregnancy services, disease indicators, primary health care indicators and general indicators.

4.1 National sphere

4.1.1 Health care personnel

The Table below indicates that, more nurses were employed in the public sector (102 900) than in the private sector (71 447). However, the figure was different for doctors, dentists, pharmacists and other allied medical personnel, who were mostly concentrated in the private sector. Such a situation is largely responsible for the continued lack of access to health care, especially amongst the rural poor, mainly due to lack of such personnel in the rural areas.

Table 8 Type of Health Professionals in South Africa

Type of Personnel	Public	Private
Nurses	102 900	71 447
Doctors	9 569	19 935
Paediatrics (included in specialists)	1 938	5 888
Dentists	327	3 868
Pharmacists	1 206	8 581
Other Allied Medical Personnel	2 868	9 581
Ambulance drivers	-	-

4.1.2 Notifiable medical conditions

The department provided information on a number of medical conditions, showing changes between 1998 and 1999. The figures for 1999 were however, incomplete and it would therefore not be particularly useful to provide these figures.

However, projected figures from the 1999 HIV ante-natal survey indicate that there were 2.2 million women between the ages of 15 and 49 as compared to 1.9 million men and between 94 608 and 102 000 babies who were infected. The prevalence of HIV infection in antenatal clinic attendees rose from 1 percent in 1990 to 23 percent in 1998. South Africa's HIV/AIDS epidemic was one of the fastest growing in the world with an estimated 3.6 million people already infected with HIV.⁶⁸

4.2 Provinces

Tables 9 and 10 below give an indication of health care personnel in the public sector. KwaZulu-Natal had the highest number of nurses employed in the public sector (130 474), followed by the Eastern Cape (14 111) and the Northern Province (10 841). The picture was different for doctors,

⁶⁸ G Adler and O Qulo *South African Health Review 1999* (1999).

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where the Western Cape had the highest number (1 377),⁶⁹ followed by KwaZulu-Natal (1 338) and Gauteng (1 211). The lowest number of doctors was in the Northern Cape.

Gauteng had the highest number of specialists (2 167), the difficulty of comparison being that the Western Cape did not differentiate between general practitioners and specialists. The North West had the lowest number of specialists (21), followed by the Northern Province and Northern Cape.

Table 9 Public health personnel for Eastern Cape, Free State, Gauteng and KwaZulu Natal

	Eastern Cape	Free State	Gauteng	KwaZulu Natal
Nurses	14 111 *	6 064 *	14 400	130 474 #
Matrons	91		-	
Doctors	668	399	1 211	1 338
Specialists	119	93	2 167	220
Dentists	35	0	254	33
Pharmacists	195	42	210	218
Other	1 355	705	1 146	753
Ambulance services	851		-	246
Nurses	14 111 *	5 064 *	14 400	130 474 #
Matrons	91		-	
Doctors	668	399	1 211	1 338
Specialists	119	93	2 167	220
Dentists	35	0	254	33
Pharmacists	195	42	210	218
Other	1 355	705	1 146	753
Ambulance services	851		-	246

Table 10 Public health personnel for Northern Cape, Northern Province, North West, Western Cape

	Northern Cape	Northern Province	North West	Western Cape
Nurses	260	10 841 #	5 639	8 499
Matrons	932		-	80
Doctors	195	519	289	1 374 @
Specialists	59	36	45	
Dentists	1	29	39	50
Pharmacists	20	101	46	112
Other	3	357	199	1 051
Ambulance services	129	253	0	1 090
Nurses	260	10 841 #	5 639	8 499
Matrons	932		-	80

⁶⁹ Although the response indicated that the figure given includes both general practitioners and specialists.

	Northern Cape	Northern Province	North West	Western Cape
Doctors	195	519	289	1 374 \$
Specialists	59	36	45	
Dentists	1	29	39	50
Pharmacists	20	101	46	112
Other	3	357	199	1 051
Ambulance services	129	253	0	1 090

Notes: * - include midwives

- includes matrons and midwives

@ - the figure given covers both doctors and specialists

\$ - the figure given covers both doctors and specialists

Only the Free State and to some degree the Eastern Cape provided information on private health care personnel.

4.2.1 Public clinics

KwaZulu-Natal and the North West Province did not provide information on public clinics. Mpumalanga and Gauteng provinces did not provide information that the Commission could use. It was therefore only the Free State, Eastern Cape, the Northern Cape, the Western Cape and the Northern Province that presented usable information.

The information presented by the six provinces was depicted in the Table below.

Table 11 Availability and utilisation of health facilities*

	Northern Province	North West	N. Cape	E. Cape	F. State	Western Cape
Patient/doctor ratio	1.5/10 000	88 139:1	-	No permanent allocation to clinics	59 852:1	-
No of clinics	476	328	206	716	348	251
Number of patients for the year	8 836 487	7 227 402	-	4 662 129	1 908 288	10 112 188
No. of beds	(200 EU + 220)	-	1 894	None	0	-
Average number of visits to clinics	1 300 per clinic per month	2.2	-	6 511	159 024	-

Note: * the values in the table are recorded as per responses

Of the six provinces that responded, the Eastern Cape had the highest number of clinics (716), followed by Northern Province (476), Free State (348), North West (328), Western Cape (251) and Northern Cape (206). However, the Western Cape had the highest number of patients for the year (10 112 188), followed by the Northern Province (8 836 487), the Eastern Cape (4 662 129) and the Free State (1 908 288). The Western Cape went further to provide the rural/urban distribution of clinics and patients for the year. Of the

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251 clinics, 146 were in rural areas and 105 in urban areas. Of the 10 112 188 patients' visits for the year, 6 335 999 were in urban areas, while 3 776 189 were in rural areas.

4.2.2 Hospitals

The Mpumalanga, Gauteng, KwaZulu-Natal and the North West provincial Departments of Health did not answer the question on the number of hospitals in their provinces. The remaining five provinces reported on the number of public and in some instances private hospitals. The Eastern Cape reported the highest number of public hospitals (98), followed by the Northern Province (46 despite the fact that five were non-functioning), the Western Cape (32) and the Free State (31). The Eastern Cape had the highest number of patients per year (2 901 109) in hospitals when both inpatients and outpatients are combined, followed by the Northern Province (2 808 016), the Western Cape (6 315) and the Free State (185 150). However, the picture looked different when the number of daily visits is the focus of attention. The highest number of day visits was registered in the Western Cape (6 412), followed by the Eastern Cape (2 289) and the Free State (1076.67). The lowest number of day visits was in the Northern Province (183).

Information on access to health care facilities was not presented in ways that could be of specific use for the purposes of the SAHRC's monitoring process.

4.2.3 Termination of pregnancy

The Gauteng, Mpumalanga, KwaZulu-Natal, Northern Cape and Western Cape Health Departments did not submit the requested information on the termination of pregnancy. Information came from the remaining four provinces. The most terminations of pregnancies occurred in the Free State (3 566), followed by the Northern Province, the Eastern Cape and the North West.

Table 12 Provincial termination of pregnancy

Province	Public Clinic/ Hospital	Number of Terminations of Pregnancy
Eastern Cape	14	2 504
Free State	4	3 566
Northern Province	20	3 085
North West	4	196

4.2.4 Disease indicators

The Eastern Cape, Northern Cape, Western Cape, Free State and Northern Province Departments of Health provided information on rates of HIV infection. The North West reported the highest incidence (21.3 percent), followed by the Eastern Cape (18 percent), the Northern Province (11.4 percent), the Free State (8.9 percent) and the Western Cape (7.2 percent). However, these figures need to be treated with absolute caution due to provinces such as KwaZulu-Natal not having responded to the question, but also due to the fact raised in the Free State's report, namely

that there were many people who were HIV-positive, but who have not been tested.

4.2.5 Primary Health Indicators

As was stated in the overview section, the state's policy was to shift towards primary health care. The Gauteng, Mpumalanga, KwaZulu-Natal and Northern Cape Departments did not provide useful information on primary health care indicators. It was only the remaining five provinces that provided such information, and the results are presented in Table 13 below. With regard to the percentage of clinics with TB services everyday, the Northern Province and North West Department reported the highest figure (100 percent), followed by the Free State (94 percent). The Western Cape reported the lowest figure (84 percent).

The Northern Province and the North West also reported the highest figure for the provision of Sexually Transmitted Disease (STD) services (100 percent), followed by the Eastern Cape. The Western Cape again reflected the lowest figure (78 percent) for the provision of STDs services. The Western Cape however, reported the highest figure for the percentage of clinics with cervical cancer services (97 percent), followed closely by the Free State (94 percent). The Northern Province had the lowest percentage of clinics with cervical cancer facilities (5.9 percent), with the Eastern Cape also having a lower percentage (30 percent).

The Northern Province and the North West however, reported the highest percentage of clinics with family planning services, followed by both the Free State and the Eastern Cape (99 percent), with the Western Cape having only 72 percent. Antenatal services were available in all the clinics of the Northern Province and the North West. In the Eastern Cape, 95 percent of the clinics had such facilities, the figure being 91 percent in the Free State. The Western Cape had the lowest percentage of 22 percent of clinics providing antenatal services. The Northern Province and the North West reported that all the clinics in the province have available, free condoms. The figure was also high in the Eastern Cape (85 percent), but lowest in the Western Cape (72 percent).

Table 13 Primary Health Indicators

	Free State	North West	Western Cape	Northern Province	Eastern Cape
% of clinics with TB services everyday	94%	100%	84%	100%	89%
% of clinics with STD services everyday	90%	100%	78%	100%	98%
% of clinics with cervical cancer Screening Services	94%		97%	5.9%	30%

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	Free State	North West	Western Cape	Northern Province	Eastern Cape
% of clinics with Family planning Services	99%	100%	72%	100%	99%
% of clinics with Antenatal Care Services	91%	100%	22%	100%	95.2%
% of clinics where condoms were freely available	100%	100%	72%	100%	85%

4.2.6 General indicators

Gauteng, Mpumalanga, the Northern Cape and KwaZulu-Natal did not submit useful information on general disease indicators. Information from the remaining provinces is presented in the Table below. Of the five provinces that presented information, the Eastern Cape had the highest infant mortality rate of 62 per 1000 births, followed by the Northern Province at 47,3. The lowest infant mortality rate of 26 was reported by the Western Cape, followed by the North West at 36. The North West however, had the highest maternal mortality rate of 154, followed by the Eastern Cape at 135. The lowest maternal mortality rate of 24,4 was recorded in the Free State, followed by the Western Cape at 49,8.

Table 14 General Indicators - provinces

Province	Infant Mortality	Maternal Mortality
Eastern Cape	62	135
Free-State	36,8	24,4
Northern Province	47,3	66,7
North West	37	154
Western Cape	26,9	49.8

4.2.7 Life expectancy - provinces

The KwaZulu-Natal and Mpumalanga Departments of Health did not submit requested information regarding the life expectancy. The information for the remaining six provinces is shown in Table 15 below. The highest life expectancy (64.9 years) was reported in the Western Cape, followed by the Northern Province. The lowest was in the North West.

Table 15 Life expectancy

Province	Life expectancy (years)
Eastern Cape	60,70
Free State	61,55
Northern Cape	60,00
Northern Province	63,50
North West	59,70
Western Cape	64.90

4.3 Critique

One of the obligations of the State, a subject often referred to in the presentation of state reports to the Committee on Economic, Social and Cultural Rights is information availability. The question is often raised indirectly, when states are required to identify groups that do not have access to rights identified in the Covenant on Economic, Social and Cultural Rights, the level of need for the services, and the degree to which state measures have gone in reducing the number of these people. It is clear from the information presented by national and provincial health departments, that such information is not being comprehensively collected, making the assessment of the effectiveness of the measures on the basis of information from organs of state, difficult. This also suggests gaps from within organs of state themselves, to track the effectiveness of their own measures. Organs of state argue that they either do not keep information, or that available information is not kept in the format required by the protocol.

Especially at the provincial sphere of government, the implausibility of the argument that the required information is not available is made all the more obvious when the different responses of the different provincial departments are taken into consideration. It is clear from the varying quantity and quality of responses from provinces that it takes a certain level of commitment and will on the part of government departments to make the required information available to the Commission. In particular, the Free State Department of Health has gone to great lengths in providing the Commission with the required information.

Mpumalanga in particular provided a highly unsatisfactory report on district information, without collating it into a provincial report. The Department of Health in the province should be reminded that it is the department's and not the Commission's responsibility to collate the information from its health districts. To some degree, the Gauteng Department of Health is also not collating some of the useful information that could be immediately analysed by the Commission. The KwaZulu-Natal Department of Health should provide information on public clinics. The Eastern Cape, Western Cape, Northern Province, Mpumalanga and the North West should provide information on private clinics. In a sector with such a high dominance of the private sector, such information is particularly useful in analysing the realisation of the right. The Mpumalanga, Gauteng and KwaZulu-Natal departments should report on the number of hospitals in the provinces.

It is clear from the assessment of these indicators even at a superficial level that despite efforts being made by the State to progressively realise a larger proportion of the right to health care, a lot still needs to be done.

A particularly serious issue for the government is the high rate of HIV/AIDS infections in the country and the continuing need to address this phenomenon.

There are several observations that could be made in the different provinces in which the government's health policy is being implemented. The first relates to the availability of doctors. As shown in the preceding sections, the Northern Province had the lowest number of doctors, and thus requires attention. Also particularly alarming is the fact that the North West had the lowest number of specialists, which requires some attention. Also important to note is the high level of day patients in the Western Cape, especially when compared to poorer provinces such as the Northern Province.

It is highly disturbing to note that in both the Eastern Cape and the Free State, very few patients are utilising public health facilities when compared with the Western Cape. There is a need for this phenomenon to be properly investigated to ascertain the reasons for the whether the low levels of utilisation of these facilities.

It is particularly disappointing to see that the coverage for Termination of Pregnancy services is limited, with utilisation being concentrated mainly in the Gauteng province. The Termination of Pregnancy programme requires close scrutiny.

The figure for HIV/AIDS infection of 8,9 percent provided by the Free State is not corroborated by statistics from independent research. The UNAIDS Report released in 1998, estimated the infection rate in the Free State to be 19, 6 percent in 1997.⁷⁰ Notwithstanding the department's own concession that the information provided is an underestimation of the actual rate of infection in the province, the figure provided is highly questionable against the abovementioned figures.

The Northern Province and the North West should be particularly commended for the considerable attention they were paying to Primary Health Care, in line with government's shift towards Primary Health Care. However, the availability of services for cervical cancer in the Northern Province is particularly concerning. The Western Cape Province in particular, should pay attention to providing more TB services. The Eastern Cape should pay attention to the high infant mortality rate. The North West Province had the highest maternal mortality rate, which is a source for concern.

4.4 Recommendations

For the national government, there is a pressing need to continue to address infant mortality rate, especially in the rural areas where the phenomenon continues to be marked. As argued in the overview section, addressing infant mortality rate goes beyond activities of the health sector and is also reliant on addressing underlying preconditions for the enjoyment of the right to health care.

⁷⁰ UNAIDS *HIV/AIDS and Human Development in South Africa* (1998) 51.

Both national and provincial government should pay attention to the substantially low figures of doctors in the Northern Province and specialists in the North West. This raises serious concerns.

An issue that also remains unclear is why there were so many day patients in the Western Cape, but so few in the poorer provinces of the Northern Province. In the next reporting period, national and provincial departments should shed some light on the causes of this phenomenon.

There is need for the close monitoring of the implementation of the Termination of Pregnancy Act of 1996. While it is clear that the utilisation of available facilities varies across provinces, there is a need for insight into the correlation between rates of 'backstreet abortions' and the level of the utilisation of TOP services. This will establish whether the availability of TOP services has any impact on the rate of unsafe abortions.

Another issue that requires immediate attention is whether the slow pace of the Western Cape, in making available PHC facilities, has any impact on the progressive realisation of the right to health care, especially among the poorer sections of the population in the Western Cape. This might require some active measures on the part of the State.

5 MONITORING SYSTEMS

Only the Eastern Cape and the Free State Departments of Health commented on systems for monitoring the progressive realisation of the right of access to health care.

The Eastern Cape Department collects data through supervisors' monthly tools (these were not explained), quarterly meetings, monthly-analysed statistics, reports (no indication of what types of reports) and physical visits to facilities. The department did not provide useful information on the type of statistical information collected.

The Free State simply said that most of the information is posted on the Intranet. The information collected is categorised into:

- Primary Health Care
- Hospital statistics
- TOP statistics
- Notifiable medical conditions
- Mortality statistics

5.1 Critique

It is clear that there is limited information being collected to track the realisation of the right to health.

BASIC HEALTH CARE FOR CHILDREN

1 POLICY MEASURES

The National Programme of Action (NPA) guides policy measures of government in the area of basic health care services for children. The NPA is based on the Convention on the Rights of the Child. Significant policies that were developed before the reporting period and reported to the Commission include the Integrated Management of Childhood Illnesses (IMCI) which focuses on key causes of death during the child's first 5 years and the Expanded Programme on Immunisation (EPI).

1.1 *National sphere*

The department did not necessarily report on new policy measures instituted but commented on progress with the implementation of EPI, IMCI, policy on free health care and the Primary Health Care in general.

1.1.1 *EPI*

As part of the Expanded Programme on Immunisation (EPI), the department successfully introduced a new vaccine, *Haemophilus influenzae* type B (HIB) in July 1999 at a budgeted cost of R58 million.⁷¹ Infection with HIB can result in pneumonia, meningitis, septic arthritis, osteomyelitis, cellulitis, pericarditis, epiglottitis and septicaemia. The mortality rate due to infection with HIB can be as high as 30 percent in developing countries. This measure needs to be seen within the overall context of the EPI, which is to combat communicable childhood diseases by providing children with immunisation against various diseases such as measles, tetanus, whooping cough, hepatitis B, polio and tuberculosis.

1.1.2 *IMCI*

A review of the IMCI implementation took place in November 1999 with the assistance of WHO. Implementation of IMCI began in the remaining provinces during the reporting period with a commitment by the Minister and MECs of Health to implement IMCI in every district throughout the country by the end of 2003.⁷²

With regard to free health care and PHC in general, the department simply reported that this has specifically benefited children up to the age of six.

1.1.3 *The reasonableness and effectiveness of the measures*

The department considered its programmes as reasonable and effective due to increased attendance of children and women at public health care

⁷¹ Department of Health *Annual Report* (1999) 18.

⁷² *Ibid* 17.

facilities. In terms of reasonableness, the department reported that the UNICEF and WHO review of IMCI showed that there was a better integrated management of children as patients in the provinces where the programme had already been implemented before 1999. According to the department, the EPI has also been effective for the following reasons:

- there were no reported cases of polio in 2000, South Africa was about to be declared polio-free
- the measles campaign had reached 90 percent of children by 1999
- no district in the country had reported a more than 1 case per 10 000 of neonatal tetanus between 1998 and 2000

The department further stated that no claims can be made about the impact of policies on the Infant Mortality Rate, as it would ordinarily take about 5-8 years for that to be determined.

1.1.4 Instituted measures and vulnerable groups

Except for children with HIV/AIDS, the department did not necessarily report on any special considerations given to the groups identified in the protocol, except to mention that the general direction of government policies is towards addressing the needs of the groups identified. With regard to children with HIV/AIDS, paediatric guidelines for the treatment of HIV/AIDS and those for obstetrics management of mothers with HIV/AIDS were developed; a policy for breastfeeding in the context of HIV/AIDS was developed and IMCI guidelines were reviewed to include the HIV/AIDS module.

1.2 Provincial Sphere

The Gauteng and Northern Cape Departments of Health submitted the same report on basic health care services for children as the one submitted for the 1998/1999 financial year. The measures that received attention in the provinces are shown in the Table below.

Table 1 Measures instituted by the various provinces

MEASURES	RELEVANT PROVINCES
National Plan of Action for Children	North West, Western Cape
Batho Pele	North West
IMCI	Eastern Cape; North West; Western Cape
HIV/AIDS	Free State
Maternal Child and Women's Health	Northern Cape
EPI	Eastern Cape
Children with Disabilities	Western Cape

Most of the provinces did not provide any information on the specific manner in which they adapted what were essentially, national policies to provincial situations. The exceptions were the Free State, Northern Cape and the Western Cape that specifically described the nature of interventions made in the area of HIV/AIDS.

The Free State concentrated on guidelines on breastfeeding and HIV/AIDS; mother-to-child transmission and treatment of children with HIV/AIDS. It was

not clear from the report whether this simply meant the implementation of guidelines developed nationally or the development of provincially-developed guidelines.

The Northern Cape described the Maternal Child and Women's Health (MCWH) services. These services were re-organised at provincial, regional and community levels to facilitate planning, implementation, supervision, monitoring and evaluation, and to ensure effective coverage of the majority of children and women. This also entailed the training of health workers as part of orientation towards primary health care concepts and principles.

In the Western Cape, the department specifically focused on interventions to combat the spread of diarrhoea, which was reportedly the number one childhood killer in the Western Cape, and impacts significantly on children from disadvantaged background. The measure entailed treatment and prevention. The department attempted to treat the problem through developing standardised guidelines for management at the primary and secondary levels and a training manual for new trainers to be trained. Prevention was undertaken through education awareness raising programmes.

1.2.1 The measures and constitutional obligations

The Western Cape Department of Health reported that measures implemented were reasonable and effective to a certain extent, despite changes in the information systems used. For instance, children were routinely monitored for growth developmental disabilities. Training of health care workers was being conducted to improve the management of health problems, which has resulted in increased immunisation coverage of infectious diseases including measles and hepatitis B.

The Free State, KwaZulu-Natal, Mpumalanga, and North West Departments of Health did not respond to questions on reasonableness and effectiveness of the measures implemented to realise the right to basic health care services for children. Furthermore, the departments did not provide reasons for their failure to respond to this question.

The Eastern Cape, Mpumalanga, North West and Western Cape Departments of Health stated that difficulties experienced in implementing the instituted programmes included insufficient budget committed to child health. With the exception of the Western Cape, other provincial departments of Health stated that lack of health care personnel and resources were some of the problems experienced.

1.3 Critique

National and provincial Departments of Health did not provide information required in the protocol. The responses failed to provide the rationale for and objectives of the measures.

Departments of Health did not provide sufficient information on how vulnerable groups were given special considerations in the instituted measures. For instance, the Free State, KwaZulu Natal, Mpumalanga and North West Departments of Health reported that all the measures were meant for vulnerable children. A detailed account on how the measures impacted on the various categories of vulnerable children did not emerge from the submissions made by the provincial departments of Health.

In the past few years, significant progress has been made by the government in improving the health status of children in South Africa. The IMCI and the EPI, and the signing of the Convention on the Right of the Child are perhaps the most visible examples of this commitment. However, the experience of the new government was best encapsulated in the comment made by the Committee on the Convention on the Right of the Child. The Committee noted in its assessment of the submission of a report submitted by the South African government, the country's efforts in introducing policies addressing children's rights; there is a need for more efforts to go into implementing many of these policy and legislative measures.⁷³

Immunisation coverage needs to continue and be extended. The EPI had envisaged that by 2003, immunisation coverage would be about 90 percent nationally, with 80 percent minima in the provinces. The latest figures suggest that this figure is still far from being met. Nationally, the rate of immunisation is sitting at 63 percent; 60 percent in non-urban areas, and 67 percent in urban areas.⁷⁴

Another point of criticism that has been directed at government is the little attention that the Patient's Rights Charter gives to children's health care rights. The Charter does not make specific mention of children, despite the fact that children have been singled out as specific vulnerable groups in the Constitution, deserving of special measures in the realisation of the right to basic health care services. Moreover, those provisions of the Constitution addressing children's rights to basic health care services in s 28 of the Constitution are not subjected to the internal limitation like the right to health care in s 27(2).⁷⁵

There have however, been areas that have shown remarkable progress. There has been high a reduction in measles cases, poliomyelitis and tetanus. Moreover, it is generally accepted that children have benefited from free health care and the shift of resources from academic to primary health services. Service utilisation has also increased substantially, but the main shortcoming of this policy is that it is limited to children up to six years, and this deprives other vulnerable children of the right of access to health care services for children between seven and 18. According to s 28(3) of the Constitution, a child is a person under the age of 18 years.⁷⁶ Section 28(1)(c)

⁷³ M King *et al* Child Health in *South African Health Review* (2000) 375.

⁷⁴ *Ibid* 370.

⁷⁵ *Ibid*.

⁷⁶ Section 28(3) of the Constitution.

further states that every child has the right to basic health care services,⁷⁷ and this policy has not catered for the needs of the vulnerable children that suggests that it has not been reasonably implemented.

An issue that continues to demonstrate that provinces need to specifically increase efforts to address the health care rights of children is infant mortality. The latest figures suggest that infant mortality remains high in the Eastern Cape, Free State and KwaZulu-Natal. As expected, infant mortality rates were higher in rural areas, babies from mothers with no formal education and in cases of shorter birth intervals.

The programmes implemented during the year under review showed the departments' commitment to fulfilling the right to basic health care services for children.

Whilst one acknowledges the achievements made by the different departments of Health, there remains a challenge in terms of building on these achievements, and to contribute to the building of a better life for children.

1.4 Recommendations

The national Department of Health should provide clear objectives of policy measures implemented during the reporting period and report on how vulnerable children, especially children with disabilities, benefited from such policies.

The provincial departments of Health should provide information on measures instituted during the period under review with clear objectives and the intended plans to implement those policies. The Commission needs to see how the needs of the vulnerable children were addressed by the policy measures or programmes instituted. The departments of Health in the Eastern Cape, Free State, KwaZulu Natal, Mpumalanga, North West and Western Cape provinces should provide a detailed account of how the measures impacted on vulnerable children.

Whilst financial and human resources play a crucial role in service delivery, proper planning is imperative to ensure the realisation of the right. The national Department of Health needs to channel its budgetary allocation towards programmes that would ensure the realisation of the right.

Government should investigate the constitutionality of not providing free health care services to children between six and 18, given the definition of the child in the Constitution.

2 LEGISLATIVE MEASURES

⁷⁷ Ibid s 28(1)(c).

2.1 Measures instituted at the National level

The national Department of Health did not report on new measures instituted.

2.2 Provincial Sphere

All provincial department mentioned national legislation they were implementing and did not report on their own provincial legislative measures.

The Free State department of Health only mentioned the Child Care Act 74 of 1983. Similarly, the Gauteng Department reported that it relies on the Child Care Act for guidance on the treatment of children with HIV/AIDS.

2.3 Critique

The response from the national department of Health did not provide adequate information on measures instituted for the protection of the right of children to basic health care services. Other sources have revealed that there was a legislative measure instituted during the reporting period. This was the Tobacco Control Act 12 of 1999.

The Tobacco Control Act 12 of 1999 protects the right of the children to a smoke-free environment. The banning of tobacco products also helps in protecting children from smoking. This Act came into force in 1999. Among other things, the Act prohibits the advertising and promotion of tobacco products. There were also regulations that provide for the prohibition of public smoking in offices, bars, restaurants and other public places unless there is a designated smoking area separated by a solid partition. The Act places certain restrictions on the marketing, sale and consumption of cigarettes. The regulations further state that signs indicating the sale of tobacco would have to be written only in black on white and 'shall not be more than a metre away from the point of sale'. Tar and nicotine yields per cigarette would also be reduced. The then existing tobacco sponsorships were allowed to continue until 31 December 2000.

The response also failed to provide information on how the constitutional obligations in s 7(2) of the Constitution were affected by the instituted measures. The response did not adequately address the protocol, especially regarding vulnerable groups of children. There was no indication of how the measures were instituted.

It would have been ideal if the national department had provided information on the implementation of the Child Care Act and its subsequent amendments.

South Africa has ratified the Convention on the Rights of the Child. Article 24 of the Convention provides for the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment

of illness and rehabilitation of health. In implementing this right, State Parties shall take appropriate measures, *inter alia*, to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care. The Constitution has enshrined children's rights pertaining to health as basic rights that require minimum health care services for children. The Constitution makes it a duty of the state to take legislative and other measures for the realisation of these rights.

The Constitution provides for children's rights that are basic in nature. This means that the rights are not subject to progressive realisation. By their very nature, the rights of children to basic health care services require significant positive action on the part of the state to effect the realisation of these rights. This is imperative because children are more vulnerable to social problems that affect their standard of living, especially their health. From the national Department of Health responses, there has not been much done to respect, protect, promote and fulfil the right to basic health care services. It is therefore safe to conclude that the few measures instituted by the national Department of Health are not sufficient to warrant a realisation of the right.

There was no single provincial government that introduced a new law during the period under review.

The mention of the Child Care Act in the responses from the Free State and Gauteng provinces is not enough. The responses were supposed to have reflected more on how the Act was being implemented for the realisation of the right to basic services for children.

2.4 Recommendations

Legislation should be formulated in such a way that it would give effect to the constitutional obligations to respect, protect, promote and fulfil the right. The main objective of passing legislation should be to increase access to health care services and the provision of minimum basic health care for children.

In the formulation of legislation, regard should be had to the needs of vulnerable and disadvantaged children,⁷⁸ that includes the poor, rural people, children, the aged and refugees. Legislative protection for these groups of people should be clear from the measures that are instituted.

There is a need to increase the utilisation of the TOP services. In particular, government should continue to raise awareness amongst the public and health workers about these services

⁷⁸ This finding was also made by the Constitutional Court in the *Grootboom Judgement*.

3 BUDGETARY MEASURES

The national department did not provide information on budgetary measures towards basic health care services for children.

All provincial departments except the Free State and Eastern Cape failed to provide information on budgetary allocation for children. What is particularly unsatisfactory in the case of Mpumalanga in particular, was that the department simply sent to the Commission responses from the individual districts and did not collate the information. The remaining provinces explicitly stated that the organisation of the budget does not make specific provision for children but that the budgets are organised in an integrated manner. To some degree, the Free State Department of Health, has been an exception in this regard. Although the department did indicate that it was not possible to provide budgetary information due to existing formats of the budget, it estimated that budgetary allocations towards children are as follows:

- total budgetary allocation - R 1, 724, 403, 000
- per capita allocation - R 653
- total allocation per children below 18: The figures do not reflect actual expenditure towards children. They were derived from the Free State population figure of 2, 715, 000, of which 1, 054, 000 (32. 7 percent) was below 18 years. It was therefore represented as 32 percent of the health budget

The Eastern Cape Department of Health provided information on expenditures for basic health care services for children.⁷⁹ During the 1999/2000 financial year; the total allocation that went to children under the age of 15 was R 1, 404, 236, with a per capita allocation in rands of R 616 per child. The amount allocated for children in this category made up 40 percent of the department's total health budget. The department projected and spent R 1, 398, 504. For children under 5, an amount of R 351, 059 was made available, with the same per capita allocation as the one for children under the age of 15. However, this amount was only 10 percent of the province's health budget. For Primary Health Care in particular, the total allocation for children under the age of 15 was R 122, 270, with a per capita average R 48 per child.

The Western Cape Health Department also stipulated how special considerations are given to vulnerable groups when deciding on budgetary allocations.

Table 2 Special considerations to vulnerable groups by the Western Cape Department of Health in allocating the budget

Category of Children	Measures
Children in rural areas	An equity study was conducted and equity was specifically being pursued in order to address rural/urban disparities

⁷⁹ The reason the Eastern Cape department of Health is able to provide this information is that the department has a programme called the Child Health Programme.

Category of Children	Measures
Children living in informal settlements	55 new clinics in mostly informal settlements are being financed by the department
Homeless children	Programmes in this area are developed by the department of Social Services
Children with disabilities	Increased funding was allocated to the Prosthetic and Orthotic Centre for the provision of assistive devices for disabled children
Children from low-income groups	The increase in the primary health care budget from 13% to 19% attests to increasing attention towards children from low income groups, as do free PHC and the establishment of Regional Hospitals in the four regions
Children with HIV/AIDS	Continuing increase of the HIV/AIDS budget
Abused children	Several hospitals have established specialised focus for rape victims and abused children
Previously disadvantaged racial groups	Basic health care implicitly benefits these groups
Child refugees and asylum seekers	no special arrangements

3.1 Critique

Provinces argue that they were not able to provide information in the format in which they were being required to in the protocol. There are some problems with this way of responding. First, provinces still have a duty to show that budgetary allocations do indeed take into account the needs of children. Moreover, the example of the Eastern Cape Department of Health, which has specifically developed a programme on basic health care for children should further show that it is feasible to allocate the budget with a specific view towards children.

Given the lack of information on budgetary allocations towards children by most health departments, it is not possible to tell whether special considerations are being given to the needs of children in the allocation of public budgets. Provinces may not necessarily be in a position to provide information required in the protocol, but they still need to demonstrate how their budgetary allocations consider access to basic health care services for children.

4 OUTCOMES

National and provincial departments of health were required to provide information on a number of indicators that are considered to be necessary in determining the realisation of basic health care for children. The specific indicators on which information was required were: health care personnel, public and private clinics, ratios of personnel to hospitals and clinics, general disease indicators, health status of children and notifiable medical conditions of children.

4.1 National Department of Health

The department stated that as far as public clinics were concerned, it was not in a position to provide information on:

- child/doctor ratios
- child/nurse ratios
- doctor/nurse ratios;
- number of child patients
- the average distance of primary health clinics
- the number of people residing within radius identified on the protocol.

The same applies to private clinics. Information on personnel was not collected and stored in terms of the urban/rural divide, but a process started in 1999 to collect appropriate data on the issues raised.

Vast disparities continue to be reflected in the distribution of hospitals although the department did not specify the urban/rural distribution of hospitals. The number of public hospitals was 509 of which 25 were mental hospitals. Of the 25 mental hospitals, 18 were located in urban areas whilst seven were in rural areas. The total number of private hospitals was 162 (142 in urban area and 20 in the rural area).

4.1.1 General Indicators

Of the information requested on general indicators, the Department of Health has not been able to provide information on congenital malformation, incidence of drug abuse, and prevalence of mental health problems amongst children.

Information was provided on infant mortality rates, which continued to show sharp inequalities of a racial and geographical nature. The infant mortality rate was 45, 33 per 1 000 live births in urban areas and 53 in rural areas showing that more children die in the rural areas than in the urban areas. The figure for African children was 47 per 1 000 live births, 19 for Coloureds and only 12 for White children.⁸⁰ With regard to the under-5 mortality rate, the average rate was 59 per 1 000 for the entire country. Again it was in the rural areas where the majority of children died before reaching the age of five. It was reported that 43 of under-5 children die in urban areas as opposed to 71 in rural areas. African children bear the brunt of these deaths. The figure for African children was 64, 28 for Coloureds and 15 for White children.

Teenage pregnancy stood at a national average of 16 per 1000. A higher prevalence was shown in the rural areas with 21 as compared to 13 in the urban areas. Moreover, teenage pregnancy was highest in the Coloured (19.3 percent) and the African communities (18 percent), as compared to negligible levels for Indians (4.3 percent) and Whites (2.2 percent).

⁸⁰ No figures were given for Indian children.

4.1.2 Health status

The department also provided information on health status, based on the South African Demographic and Health Survey of 1998. Most of these indicators have not been broken down into urban and rural dimensions. The figures show that 3.7 percent of the children between 6 and 71 months in South Africa suffer from wasting; the figure being 2.6 percent for children in Grade 1 and 2. Figures for stunting were as follows:

- 13.3 percent for children in grades 1 and 2; and
- 22 percent for children between 6 and 71 months.

Throughout the country the percentage of children not immunised against measles was 2.15 percent. There was a marked reduction in the number of notified measles cases in South Africa, from 22 798 in 1992 to 1070 in 1998. This followed the measles catch-up campaigns in 1996 and 1997, wherein all children under the age of 15 received an additional dose of the measles vaccine, regardless of their vaccination status. Coverage for measles was improved from 76 percent in 1994 to 82 percent in 1998.⁸¹

4.2 Provincial sphere

None of the provinces provided information on indicators on basic health care for children.

4.3 Critique

It is clear from the responses obtained from government departments that there is critical information relating to basic health care services for children that is not at the disposal of organs of state. In particular, information on facilities available to children, ranging from health personnel to infrastructure is not available. This is particularly so at the provincial level.

However, progress with the reduction of some childhood illnesses such as measles and tetanus remains positive and commendable.

What remains an issue of concern is the continuing high rate of infant mortality, especially in the poorer provinces such as the Eastern Cape. Some of these figures were above the World Health Organisation's recommended 50 per 1000.

Another issue of concern is the high rate of teenage pregnancy, especially amongst the Coloured and African groups. This raises the critical issue of reproductive health for adolescents. Teenage pregnancy remains a big challenge for not only the Department of Health but the Departments of Education and Social Development as well. It is also symptomatic of the bigger issue: the high risk of infectious sexual diseases including HIV/AIDS that teenagers are exposed to.

⁸¹ Department of Health (note 71 above).

4.4 Recommendations

In the reporting cycle, and in instances where government departments are not able to provide information on indicators, they must demonstrate to the Commission on how, without these indicators, they are able to meet the constitutional obligations on the right to basic health care services for children.

Infant mortality rates and teenage pregnancy are issues that continue to require attention.

5 MONITORING

5.1 National Sphere

The national Department of Health reported that it uses the National Health Information System of South Africa (NHISA), which was formally established to co-ordinate, manage and standardise data collection in the country. Also in use were the EPI, AFP and statistics collected around childhood conditions. Data is collected through an Immunisation Calendar. Notification and surveillance of EPI diseases information was obtained through surveillance and was used to measure the success of immunisation efforts, identify, investigate and control. Acute Flaccid Paralysis surveillance entailed full investigation and supplemental investigation of children in the affected district or province. Neonatal Tetanus was data captured in GW 20/8 FORM.

5.2 Provincial Sphere

Health departments in the Eastern Cape Northern Province, Northern Cape and KwaZulu-Natal did not provide information on this section. Gauteng and Mpumalanga did not provide useful information on monitoring systems.

In the North West, the department had an Information and Epidemiology Unit responsible for information management. Each of the 18 district offices has an information officer, responsible for data collection. In 1999, the department introduced the Information System Program, which includes a new system for collecting and analysing data from all health facilities. Data was submitted every month to the district information officer who then transmitted it to the provincial office. The following types of information were collected:

- children under 5 seen in clinics
- number of births
- number of prenatal deaths
- birth deliveries by children under 18 years
- child immunisation by type of vaccine
- malnourished children

Health rights

- diarrhoeal diseases in children
- acute respiratory tract infections in children
- number of children under 12 years screened in schools
- number of schools visited by a school health personnel

The Western Cape Health Department reported that it collected information through regular meetings between all institutional heads and data were collected and captured by staff on a daily basis throughout the province. The data were then compiled as monthly or annual Statistical Reports by different sections of the department. The following statistics were collected:

- immunisation
- infant mortality rate
- low birth-weight babies
- diarrhoeal diseases and acute respiratory infections
- children with developmental delays

In the Free State, the department reported that it collected information through growth monitoring cards for children, which were kept in clinics. There was being developed, a Primary Health Care Information System. Statistics that were to be collected include:

- register of PEM patients recorded at clinics
- number of school children

5.3 Critique

It is disappointing that so few provincial departments were able to provide information on monitoring systems available. It was clear from this lack of information that there was not available, mechanism for the determination of the realisation of the right to basic health care for children.

PART C: CONCLUSION

Conceptually, most of the measures instituted by the relevant organs of state, including those reported in this monitoring cycle, were reasonable in terms of the obligations of the state contained in s 7(2) of the Constitution, and ss 27 and, 28 and 35 that deal with health rights.⁸² It is at the implementation of the measures that the picture is mixed. On the one hand there are positive reports such as the one on improved utilisation of the public health sector. Considerable progress has also been made in the reduction of some communicable diseases, especially those in the area of basic health care services for children. In particular, measures such as the institutional restructuring of the district health model, human resources development, maternal health and the management of childhood illnesses were positive measures. Although there is evidence that there is an increase in the use of the public health care sector, tertiary care facilities in the private sector remains unaffordable to the majority of South Africans. This suggests a need to reform medical insurance coverage so as to increase the affordability of health care.

There were also other factors that detracted from the realisation of health rights. These included shortages of health care personnel due to a moratorium on filling vacant posts, maladministration, corruption, shortages of drugs and theft of hospital equipment and medicines which compounded existing problems in service delivery.

⁸² Sections 27, 28 and 35 of the *Constitution of the Republic of South Africa, Act 108 of 1996*.

ABBREVIATIONS

DEPAM	- Decentralised Education Programme in Advanced Midwifery
ECDH	- Eastern Cape Department of Health
EPI	- Expanded Programme on Immunisation
FSDH	- Free State Department of Health
GDH	- Gauteng Department of Health
GEAR	- Growth, Employment and Redistribution
IMCI	- Integrated Management of Childhood Illnesses
KZDH	- KwaZulu-Natal Department of Health
MCWH	- Maternal Child and Women's Health
MDH	- Mpumalanga Department of Health
MTCT	- Mother-to-Child-Transmission
MTEF	- Medium Term Expenditure Framework
NCDH	- Northern Cape Department of Health
NHISA	- National Health Information system of South Africa
NPDH	- Northern Province Department of Health
NWDH	- North West Department of Health
PEP	- Perinatal Education Programme
PEPUDA	- Promotion of Equality and Prevention of Unfair Discrimination Act of 2000
PHC	- Primary Health Care
PPIP	- Perinatal Problem Identification Programme
STD	- Sexually Transmitted Disease
TOP	- Termination of Pregnancy
WCDH	- Western Cape Department of Health
WHO	- World Health Organisation

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CHAPTER SIX

ACCESS TO ADEQUATE HOUSING

PART A: OVERVIEW

1 INTRODUCTION

When the new government came into existence in 1994, it inherited a huge housing backlog. In its attempt to reduce the backlog, the government committed itself to building one million houses during its first term of office. By December 1999, 980 000 houses were under construction or had already been completed. This was made possible by the R12, 5 billion that was spent on the housing delivery programme during the five-year period.

Notwithstanding the number of houses built, the housing situation in the country remains unsatisfactory. National and provincial departments responsible for housing reported to the South African Human Rights Commission in response to its protocols for the 2nd Economic and Social Rights Report, that approximately 2 778 000 households in South Africa, did not have adequate shelter. There were 6 959 000 households that qualified for housing subsidies, but insufficient budget allocations prevented them from accessing these subsidies. The national department also indicated that the budget allocation could afford to pay 200 000 subsidies per year. This amount would not be sufficient to address the need for housing. The majority of rural communities could not access the housing subsidies due to insecure tenure in informal, mainly communal land arrangements, meaning that the subsidies were out of reach for about half of the country's population. The situations of groups such as persons with disabilities were left unaffected by the rate of housing delivery.

In acknowledgement of the intractability of the housing problem, the national Department of Housing (DoH) has, in the last few years, introduced several measures to deal with these difficulties. These measures have included the development of the People's Housing Process as a participatory approach to improve the responsiveness of housing delivery; the Rural Housing Programme to make housing policy accessible to rural communities, and the Subsidy Scheme to Support Disabled Beneficiaries.

This chapter assesses information provided by the national and provincial departments responsible for housing delivery on legislative and other measures instituted during the 1999/2000 reporting period, to give effect to ss 26 and 28 of the Constitution.

2 CONSTITUTIONAL OBLIGATIONS

There are two sections in the Constitution that specifically deal with housing rights. The first is s 26, which addresses the right of access to

adequate housing, and the second is s 28, which deals with the rights of children to shelter.

2.1 *The right of access to adequate housing*

Section 26(1) states that 'everyone has the right to have access to adequate housing.' Section 26(2) also provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 26(3) specifically addresses security of tenure issues and provides that 'no one may be evicted from their home or have their home demolished, without an order of court, after considering all relevant circumstances. No legislation may permit arbitrary evictions.'¹

Housing rights are recognised in numerous international human rights instruments. The Universal Declaration of Human Rights, provides that everyone has a right to a standard of living that is adequate to the health and well-being of himself [herself] and his [her] family, including housing.² The Committee on Economic, Social and Cultural Rights has devoted attention to defining the concept of adequate housing,³ a phrase used in the South African Constitution. It elaborates seven criteria to clarify what adequate housing means. These criteria are legal security of tenure, affordability, availability of services, habitability, accessibility, location and cultural acceptability.

- **Legal security of tenure:** *tenure* takes a variety of forms, including rental, co-operative housing, owner-occupied, informal settlements, emergency occupation of land or property. Legal security of tenure is fundamental to the right of access to adequate housing. Secure tenure protects people against arbitrary evictions, harassment and other threats. Security of tenure is provided for by s 26(3) of the Constitution that requires an order of court before an eviction can take place.⁴
- **Affordability:** Housing should be affordable. The amount a person or family pays for housing costs should not be so high that it compromises the attainment of other basic needs. State parties are required to ensure that housing costs are commensurate with income levels. State Parties are also required to give housing subsidies and make loans accessible to those who cannot afford adequate housing. Tenants should also be protected against unreasonable rent increases.

¹ Section 26 of the *Constitution of the Republic of South Africa*, Act 108 of 1996.

² Article 25(1) of the Universal Declaration of Human Rights (1948).

³ General Comment 4 (1990) para 8.

⁴ It was held in the *Despatch Municipality v Sunridge Estate and Development (Pty) Ltd* (1997) 8 BCLR 1023 that previous legislation dating to 1951 which allowed demolition of buildings or structures without a court order no longer applied.

- **Availability of services, materials, facilities and infrastructure.** An adequate house must contain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right of access to adequate housing should have sustainable access to natural and common resources; safe drinking water; energy for cooking, heating and lighting, sanitation and washing facilities; means of food storage, refuse disposal and site drainage; and emergency services.
- **Habitability.** For housing to be considered adequate, it must be habitable. Inhabitants must be ensured adequate space and protection against the cold, damp, heat, rain, and/or other threats to health, structural hazards or disease. Inadequate and deficient housing is associated with higher mortality and morbidity rates.
- **Accessibility:** Housing must be accessible to everyone. Disadvantaged groups such as the elderly, the physically and mentally disabled, the terminally ill, HIV-positive persons, victims of natural disasters and children should be assured some degree of priority consideration in housing. Laws and policies should prioritise these groups and access to land should be a central policy goal.
- **Location:** For housing to be adequate, it must be situated so as to facilitate access to employment opportunities, health care services, schools, and other social facilities. It must not be located in polluted areas which violate the right to the health of the inhabitants.
- **Cultural adequacy:** Building materials and design must enable the expression of cultural identity and diversity without compromising modern technological facilities.

When one or more of these attributes are not available, it can be said that housing is inadequate. It follows from this that the right of access to adequate housing cannot be viewed in isolation from other human rights such as the right to human dignity.

2.1.1 Reasonable measures, limited resources and the progressive achievement of the right of access to adequate housing

Reasonableness means that the programmes instituted must be balanced and flexible, and make appropriate provision for attention to housing crises in the short, medium and long term. A programme that excludes a significant segment of society cannot be said to be reasonable.⁵

The right to adequate housing is not immediately realisable as it is limited by the provision of the 'progressive realisation' and within available resources. Section 26(1) is an 'access' right with an internal qualifier,

⁵ *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 43.

which makes the State's obligations for the progressive realisation of the right dependent on available resources. The State is obliged to show that it is not only taking appropriate steps to implement housing rights, but that there is a continuous improvement of living conditions and that housing is made available to a wider range of people as time progresses.⁶ Therefore, the provision of subsidies is not the only indicator of progressive realisation.

The Committee on Economic, Social and Cultural Rights has emphasised the need to adopt strategies to define the objectives of the housing sector. He strategies should also involve identifying available resources, and the most cost-effective way of utilising them and establishing responsibilities and time frames for the implementation of the necessary measures. Such strategies should include genuine consultation with and participation by all those affected, including the homeless and the inadequately housed and/or their representatives. International law has stressed that States must give priority to those groups living in conditions not consistent with the content and intent of housing rights.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) states that if a State is unable to meet even its minimum obligations due to lack of resources, it must at least be able to demonstrate that every effort has been made to use all resources to satisfy those minimum obligations. However, lack of resources can never be used to justify failure by the state to take steps towards the enjoyment of the right.⁷ Even with extremely limited resources, the state has an obligation to delineate its core minimum obligations to take some measures towards the realisation of the right of access to adequate housing.

2.2 Children's right to shelter

Section 28(1) (c) of the South African Constitution, obliges the State to provide shelter for children in times of crises where parents are unable to do so. Section 28(1)(c) has to be interpreted within the context of the entire s 28 that also addresses issues such as the child's best interests and the role of the parents in caring for children. Section 28 (1) (b) defines primary caregivers as the family or parents. Alternative caregivers must provide shelter when children are removed from the family. The judgement in the Grootboom case stated that the Constitution contemplated that a child had the right to parental or family care in the first place and the right to alternative appropriate care only where parental or family care was lacking.⁸ Therefore the obligation to provide shelter was accordingly imposed primarily on the parents or family and only alternatively on the State, in the event of parents or family not being able to do so.

⁶ Ibid para 45.

⁷ General Comment 3 (1990) para11.

⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000(11) BCLR 1196 (CC) 1174 G-H.

This does not, however, mean that the State incurs no obligation in relation to the children who are being cared for by their parents or families. The State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28. The State is also required to fulfil its obligations to provide families with the right of access to land in terms of s (25), as well as access to health care, food, water and social security in terms of s 27 subject to available resources. The Committee reiterated that children, who fall into the vulnerable group category, should be protected by the state, which is obliged to take appropriate measures to ensure that their rights are protected.⁹

In light of the above, it can be said that adequate housing is not just the roof over one's head, but also include the other components mentioned above, such as security of tenure, affordability and habitability. The State is required to take measures that are flexible and are able to address crises in the short-, medium- and long-term. These measures must not exclude a significant segment of society. As regards children, the primary responsibility for the provision of shelter lies with parents. However, in situations where parents are not able to provide shelter for the children, the State is obliged to take legislative and other measures, towards assisting parents with meeting the shelter needs of the children. The State should also provide shelter for children who find themselves in intolerable conditions such as being abused, orphaned or in conflict with the law. These sentiments are also echoed in the Convention on the Rights of the Child (CRC).

3 KEY DEVELOPMENTS FOR THE YEAR UNDER REVIEW

The developments that took place during the 1999/2000 reporting period have to be considered against constitutional provisions referred to above, and the measures that had been introduced before the reporting period, for the realisation of the right of access to adequate housing and the child's right to shelter.

3.1 Policy developments

The Department of Housing did not institute any new policy measures during the reporting period. In the previous report submitted to the Commission for the preparation of the 2nd Economic and Social Rights Report, the Department indicated that it was in the process of developing the Rural Housing Subsidies Programme and the National Norms and Standards in respect of permanent structures.¹⁰ The Rural Housing Subsidies Programme was introduced in November 1999 for implementation by the nine provinces. Its main aim was to enhance the realisation of the right of access to adequate housing for people in rural areas, who on the basis of informal land rights, were excluded from

⁹ General Comment No 4 (1997).

¹⁰ SAHRC 2nd *Economic and Social Rights Report 1998-1999*. (2000) 167.

accessing the National Housing Subsidy Scheme. This was a positive development as it attempted to bring about the realisation of housing rights to the majority of previously disadvantaged rural people and in line with the criteria set out in General Comment No 4 of the Committee on Economic, Social and Cultural Rights mentioned above that a house must be culturally appropriate and enable the expression of cultural identity and diversity without compromising modern technological facilities.

The National Norms and Standards programme was introduced with effect from 1 April 1999.¹¹ The programme was meant to protect housing subsidy beneficiaries from developers who built unacceptably small and badly constructed houses. They were also meant to ensure protection against structural hazards and the availability of services and infrastructure.

3.2 Legislative developments

During the reporting period, two Acts were passed and one Bill initiated. These were the Housing Consumer Protection Measures Act 95 of 1999, the Rental Housing Act 50 of 1999 and the Home Loan and Mortgage Disclosure Bill 53 of 2000.

The Housing Consumer Protection Measures Act 95 of 1999 was aimed at providing protection for all new housing consumers against defects on built structures. This piece of legislation was a step forward as it strengthened the National Norms and Standard in respect of permanent structures.

The Rental Housing Act 50 of 1999 was intended to address the following: facilitation of sound landlord/tenant relations; provision of general conflict resolution principles; establishment of the Housing Rental Tribunals, and the promotion of the housing rental property market. This Act protects people against arbitrary evictions and harassment.

The Home Loan and Mortgage Disclosure Bill 53 of 2000 was a significant development. The Bill attempts to address lending practices by financial institutions. Government recognised that most of the homeless people and people who apply for houses earn less than what banks would require for qualification for a housing loan. Therefore, the Bill advances the right of access to adequate housing.

3.3 The Budget

The national expenditure for housing as a share of the national budget decreased over the past two years from 1.9 percent in 1998/1999 to 1.4

¹¹ In terms of these norms and standards the internal reticulation services that may be subsidised are limited to water, sanitation, roads, storm water and street lightning. This is subject to a funding limit of a maximum amount of R7 500 for the provision of the services and acquisition of land. The minimum size of the permanent residential structures to be provided by means of the balance of the housing subsidy after the provision for basic services is 30 square meters (gross floor area).

1999/2000.¹² This is particularly disconcerting because of the huge backlog in housing delivery. What also became clear from the analysis of spending patterns especially at the provincial sphere was that there were several instances of under spending. This meant that these departments were still not able to apply financial resources efficiently.

4 CONCLUSION

The measures instituted address the dire conditions of housing in the country. Despite the institution of new measures however, the housing backlog is still acute. The decreasing budget makes it extremely difficult for provinces to implement the new measures. The housing programme has not succeeded in accommodating the needs of the vast majority of homeless people who fail to qualify for the housing subsidy and those who qualify but fail to get funding. Adequate shelter is essential to human existence; the provision of affordable and adequate housing remains a challenge for organs of State to meet their constitutional obligations.

There are some issues that remain problematic in the housing sector. These include redlining, continuing location of low-cost housing away from areas of economic opportunities, limited success of housing policies in integrating racially divided settlements and the link between housing delivery and economic development in order to make the housing delivery process sustainable.

¹² Based on the National Expenditure Review 2000.

PART B: ANALYSIS OF RESPONSES BY ORGANS OF STATE

This section of the report analyses information provided by national and provincial departments responsible for housing, on legislative and other measures instituted during the 1999/2000 financial year to realise housing rights contained in ss 26 and 28(1)(c) of the Constitution. National and provincial departments of Housing were required to provide information on policy, legislative and budgetary measures instituted during the period mentioned above. They were also required to provide information on outcomes, which are indicators relevant to the determination of progress in the realisation of housing rights, as well as systems established within the Departments, to monitor the realisation of housing rights.

1 POLICY MEASURES

1.1 National Sphere

The National Department of Housing (hereafter DoH) did not provide information on any policies or programmes instituted during the year under review. However, the Department reported that it had implemented the following programmes developed in the previous reporting period:

- The Rural Housing Subsidies: Informal Land Rights
- The National Norms and Standards in respect of Permanent Residential Structures
- Increase of the Housing Subsidy

The Rural Housing Subsidies: Informal Land Rights

This measure was developed before the current reporting period and was referred to in the 2nd Economic and Social Rights Report. The measure was introduced during 1999, to address the housing needs of people in rural areas. Before the promulgation of the Interim Protection of Informal Land Rights Act 13 of 1996 (see chapter seven on land rights, people living on land on the basis of only informal land rights (e.g. tribal land where communal tenure applies), and where registration of ownership of the land was not possible, were excluded from accessing the National Housing Subsidy Scheme. This measure was therefore instituted to terminate discrimination in accessing the subsidy, on the basis of the type of land rights. The measure extends housing subsidies to people who did not have secured land tenure before the 1996 Act.

National Norms and Standards in respect of Permanent Residential Structures

The Norms and Standards were required to protect housing subsidy beneficiaries from exploitation by developers who delivered unacceptably small and poorly constructed houses and local authorities that disregarded the principle of affordability and consequently demanded unreasonable

standards and expensive engineering services. The imposition of unreasonably high standards in particular has had the effect of leaving inadequate funds for the construction of top structures on the stands developed.

An increase in the subsidy amount

An increase of the housing subsidy amount was introduced in April 1999 and was necessary to ensure that the target group of the Government's housing assistance initiatives is assured of quality houses as well as products that comply with the National Norms and Standards in respect of Permanent Residential Structures. The increases introduced were between R500 and R1000. The Table below shows the increases in the different subsidy amounts.

Table 1 Adjustments introduced on the subsidy amount

Previous amount	New amount
R 5 000,00	R 5 500,00
R 7 500,00	R 8 500,00
R 9 500,00	R10 000,00
R15 000,00	R16 000,00

1.1.1 Measures and constitutional obligations

The DoH did not indicate how the instituted measures complied with the constitutional obligations in s 7(2) of the Constitution. According to the Department, the measures were reasonable and effective in meeting constitutional obligations relating to the right of access to adequate housing. The housing subsidy programme was made more accessible to a previously disqualified (rural) sector of the community. The National Norms and Standards in Respect of Permanent Residential Structures was meant to ensure that subsidy beneficiaries receive durable structures of quality.

1.1.2 Special considerations given to vulnerable groups

The programmes introduced made special considerations to the following categories of vulnerable groups:

Persons living in rural areas and homeless persons: The Rural Housing Subsidy was designed around the special requirements and needs of rural communities and homeless people previously excluded from the subsidy schemes due to informal land rights. By recognising informal tenure arrangements, the subsidy enables rural communities to access housing.

People living in informal settlements, low-income groups and previously disadvantaged racial groups including indigenous groups: The Housing Subsidy Scheme focuses on households earning up to R3 500 per month who are in need of housing assistance.

Refugees and asylum seekers: did not qualify since they were not South Africans citizens.

1.1.3 Implementation and difficulties experienced

The major difficulty experienced by the DoH was lack of financial resources. Although the measures for the Rural Housing Subsidy were in place, no additional funding was made available for the programme. As a result, it was being implemented through budget reprioritisation. Moreover, the programme required capacity building and training of officials entrusted with implementation. These activities are handled at the provincial sphere and the DoH has the responsibility to monitor implementation. The National Norms and Standards in Respect of Permanent Residential Structures were implemented without difficulties.

1.2 Provincial Sphere

All provincial departments adapted the National Housing Policy to their local situations. The main programme that provinces instituted was the Housing Subsidy Scheme. Provinces have developed various sub-programmes such as rural subsidies, individual subsidies, non-credit subsidies, credit-linked subsidies, institutional subsidies, consolidation subsidies and rental housing subsidies. Other related measures included the People's Housing Process and the Discount Benefit Scheme. All provincial departments were using the National Norms and Standards in Respect of Permanent Residential Structures to ensure that the quality of new housing meets the required standards.

The most notable policies were instituted by Gauteng Department of Housing. These were the Home Truth Commission, the Special Needs Policy, Mayibuye Upgrading Programme, the High Density and Transitional Housing Programmes.

The *Home Truth Commission* was initiated to investigate alleged acts of corruption committed by officials from the period 16th June 1976 to 27th April 1994. The Commission found that people illegally evicted from their homes experienced difficulties accessing housing subsidies under the Housing Subsidy Scheme. The Commission recommended that victims of unlawful removals from their homes be provided with alternative accommodation. As a result, a policy was developed to facilitate access to the subsidy, for victims of unlawful removals.

A *Special Needs Policy* was developed in order to promote sustainable and integrated housing delivery. It was aimed at addressing the specific needs and housing requirements of special categories of beneficiaries, namely, women, persons infected with and/ or affected by HIV/AIDS, persons with disabilities, the aged and youth. No further information on the policy was provided.

The *Mayibuye Upgrading Programme* was initiated as a result of the Department's recognition of the realities of urban landlessness and tenure

insecurity. The Department introduced the programme to release land and upgrade the tenure rights of citizens living in informal settlements.

The *High-Density* programme provides affordable housing usually to a multi-storey design specification in the inner cities through the upgrading of existing buildings.

Transitional Housing: provides shelter assistance to destitute people on a temporary basis.

1.2.1 Special considerations given to vulnerable groups

Some comments were made on how the various provincial departments gave special considerations to groups identified in the protocols. The groups that were mentioned were persons living in rural areas, female-headed households, older persons and persons with disabilities

Persons living in rural areas: The Gauteng province is predominantly urban but the provincial housing department implemented projects to accommodate individuals who reside in peri-urban areas and rural areas. No further information on the nature of these projects was provided.

The Eastern Cape started implementing two housing projects within the rural housing subsidy scheme and was planning to have a needs assessment done to establish the needs of rural community.

The North-West reported that the relaxation of terms of tenure and survey requirements, for the first time allows access to housing subsidies to the value of approximately R300 million. Approximately 20 000 subsidies have already been approved for housing development in rural areas.

Persons living in informal settlements: In Gauteng, the Peoples' Housing Process benefited people living in informal settlements. Through the Mayibuye programme, informal settlements were formalised to confer freehold ownership to residents. Where it was not possible to formalise informal settlements; residents were relocated to vacant land as part of the programme.

The North West, Eastern Cape, Northern Province, KwaZulu Natal, Western Cape and Mpumalanga reported that the housing delivery programme largely addressed the needs of people living in informal settlements. Projects on new settlements, comprising serviced stands and top-structures were provided to qualifying beneficiaries.

Female-headed households: All the provincial departments of housing indicated that female-headed households were afforded preference on the waiting list in order to ensure that imbalances created in society with regard to women by the past oppressive policies, were addressed.

The most notable response with regard to female-headed households came from the North West. Approximately 30 percent of all qualifying beneficiaries were female-headed households. The People's Housing Process was primarily managed and controlled by females, whereas females were to a large extent involved in other housing programmes as labour, or as members to steering committees.

Older persons: Gauteng implemented a policy where 5 percent of the budget allocation for various projects was earmarked for the elderly. The process was in the initial stages of implementation and processes were being put in place to ensure that various stakeholders complied with the policy. No further information was provided.

The North West and KwaZulu-Natal reported that the qualifying criteria for relocation subsidies in terms of the Relocation Subsidy Programme allowed older persons to occupy and own their existing homes and therefore ensured that older persons were not subjected to undue hardship.

The Western Cape and Mpumalanga reported that there were no special mechanisms aimed at providing special assistance to the above-mentioned groups.

Persons with disabilities: The Gauteng province had two housing projects specifically meant to address the needs of persons with disabilities. These projects fell under institutional subsidy¹³ and provided shelter to 15 persons with disabilities.

The Eastern Cape DoH reported that people with disabilities were integrated into the community and were therefore catered for within a regular housing project.

The North West and Northern Province reported that a special dispensation existed for disabled persons who qualify for additional allowances/subsidy amounts to cater for their specific needs.

The remaining provincial departments did not provide information.

Refugees and asylum seekers: All the provincial departments indicated that they did not have policy measures to assist refugees or asylum seekers, and that the National Housing Subsidy Scheme was only available to South African citizens.

1.2.2 Implementation and difficulties experienced

The Gauteng Department consulted with the various stakeholders and embarked on a regular process, which entailed the prioritisation of

¹³ This type of subsidy is provided to beneficiaries through institutions. Under this arrangement, an institution providing housing to a designated group of beneficiaries receives a subsidy from the state.

provincial and local government development needs. In determining such priorities, empirical data collated by the department by way of research and statistics from Statistics South Africa was used as a guiding tool. The main difficulty experienced by the Department arose when there had to be deviation from national policy. The Department had to seek the approval of the Minister Member of Executive Committee (MINMEC), which was time consuming. In some instances, approval was not even granted.

The Eastern Cape experienced difficulties affecting municipalities with respect to the lengthy process of land release. Within the Hostel Redevelopment Scheme, difficulties arose from disputes between beneficiaries and the Local Negotiating Group.

The North West, Gauteng, Northern Province, Mpumalanga, Western Cape, Northern Cape and KwaZulu-Natal reported that they experienced the following difficulties with regard to the implementation of the policy measures:

- Reduced institutional housing subsidy budget allocations
- Lack of assistance from communities and private sector partners in mobilising additional resources and inherited backlogs
- Lack of suitable land for housing, poor past planning practices and lack of capacity and expertise at local government
- Delays in the implementation of projects by developers
- Community conflicts over resources

KwaZulu-Natal realised the urgent need to move away from the developer driven to a department-driven approach, since the latter focuses on optimising services to housing recipients rather than maximising profits for shareholders.

1.3 Critique

The responses from the national and provincial Departments showed a lack of understanding of their obligations to respect, protect, promote and fulfil the right of access to adequate housing.

The Northern Cape, North West, Mpumalanga, Northern Province and Western Cape only listed the policies and/or related programmes but failed to explain what the benefits of such programmes were to the intended beneficiaries.

Responses from Gauteng, Eastern Cape, KwaZulu-Natal were relatively satisfactory. Housing departments in these provinces provided detailed information on the nature of the measures instituted.

The DoH has laid the foundation for provincial departments to realise the right of access to adequate housing. However, due to huge backlogs and unavailability of land and insufficient funds there was a slow pace of delivery.

Although the Department's policies and programmes were geared towards the realisation of the right, it is noted that the realisation of this right is dependent on the availability of resources. It should also be noted that with the decrease in the housing budget allocation, provincial departments are facing a huge challenge to prioritise their limited funding.

The White Paper on Housing views credit as one of the cornerstones of housing delivery and opportunities for beneficiaries to access additional funding towards adequate housing. Despite the efforts of the DoH to mobilise housing finance, banks and other lending institution have been reluctant to extend housing finance to low-income groups. One could therefore argue that the housing finance system is not effective as it fails to take cognisance of unemployment rates and gender inequalities prevailing in South Africa.

The development of the policy on Norms and Standards was a critical development as it protects beneficiaries from exploitation by developers.¹⁴

1.4 Recommendations

The provinces should adhere to the format of the protocols when responding and should provide the Commission with detailed answers.

The housing departments should encourage environmentally efficient housing development to promote sustainability, by working closely with all the departments whose mandates impact on the environment, such as Environmental Affairs and Tourism, Health, Water Affairs and Forestry, Minerals and Energy, and Provincial and Local Government.

There is a need to give special considerations to those living with HIV/AIDS, especially children and orphans.

Changes in rules and regulations that affect the way in which policy mandates are interpreted and implemented by provinces are necessary. This is raised in view of the fact that the recommendations made by the Housing Truth Commission in Gauteng could not be adopted because the recommendations were contrary to the principles of the housing subsidy scheme.

National and provincial Departments need to recognise levels of unemployment and gender inequalities that prevail in the country, and should therefore provide corresponding financial assistance to women.

¹⁴ Ndinda C 'Women's Access to Housing: Accessing Policy Through Practice' in *Indicator South Africa* Vol 18 No1 (2001).

2 LEGISLATIVE MEASURES

2.1 National Sphere

The DoH reported that the Housing Act 107 of 1997 provides the legislative framework for the right of access to housing. During the reporting period, the following legislative measures were instituted: the promulgation of the Housing Consumer Protection Measures Act 95 of 1998, Rental Housing Act 50 of 1999 and the Home Loan and Mortgage Disclosure Bill 53 of 2000.

The Housing Consumer Protection Measures Act 95 of 1998

This law, which was promulgated on June 4, 1999, established a body called the National Home Builders Registration Council (NHBRC), which is responsible for providing protection for all new housing consumers against structural defects. The Act ensures that builders abide by approved standard when they build houses.

Rental Housing Act 50 of 1999¹⁵

The Act advances the constitutional obligations to protect the right of access to housing. The objectives of the Act are to:

- define Government's responsibility in respect of rental housing and to create mechanisms to promote the provision of rental housing;
- promote access to adequate housing through creating mechanisms to ensure the proper functioning of the rental housing market;
- make provision for the establishment of Rental Housing Tribunals and to define the functions, powers and duties of such Tribunals;
- lay down general principles governing conflict resolution in the rental housing sector, and
- provide for the facilitation of sound relations between tenants and landlords and for this purpose to lay down general requirements relating to leases.

Home Loan and Mortgage Disclosure Bill 53 of 2000

The Department reported that the Bill supports the constitutional obligations to respect, protect, promote and fulfil the right of access to housing because it was aimed at:

- promoting lending practices by financial institutions;
- establishing an Office of Disclosure to monitor compliance with financing requirements.¹⁶
- rating the financial institutions and making such rating public;
- amending the definition of housing loan in the Usury Act;

¹⁵ This Act repealed the Rent Control Act 80 of 1976.

¹⁶ Financial institutions that are engaged in the provision of home loans are required to disclose information in their reports and annual financial statements.

- empowering the Minister of Housing to introduce measures by way of regulations; and
- promoting the sustainable provision of home loans.

2.1.1 Special considerations given to vulnerable groups

Regarding the question of the special considerations given to vulnerable groups, the DoH reported that the Rental Housing Act was applicable in rural areas and also to persons living in informal settlements where rental housing occurs. The Act also promotes access to adequate housing to homeless persons through the proper functioning of the housing rental market, and through the provision of housing rental property. The Home Loan and Mortgage Disclosure Bill was reported to be considering the needs of special groups as it was intended to reveal discriminatory lending patterns by banks, which adversely affect female-headed households, older persons, persons with disabilities, low-income groups and the previously disadvantaged groups, including indigenous groups. According to the department, the needs of refugees and asylum seekers are not considered because the National Housing Subsidy Scheme requires beneficiaries to be citizens of the Republic or have permanent residence permit to reside in the country.

2.2 Provincial Sphere

Several provincial departments provided information on legislative measures instituted during the 1999/2000 reporting period.

In line with the National Housing Act 107 of 1997 the Eastern Cape formulated the Provincial Housing Development Bill to realise the right of access to adequate housing. No further details of the Bill were provided.

The Free State Department passed the Provincial Housing Act in 1999 and was in the process of promulgating a Provincial Rental Housing Act, which would provide for the establishment of a Rental Tribunal.

The Gauteng Department instituted the Gauteng Housing Amendment Bill of 2000 as an amendment to the Gauteng Housing Act.

The KwaZulu-Natal Department passed the Provincial Housing Act 12 of 1998 aimed at the provision of effective housing delivery in the province. This Act is based on the National Housing Act of 1997.

The Western Cape Department promulgated Housing Development Act 6 of 1999.

The remaining provinces mentioned legislative measures instituted before the reporting period.

2.3 Critique

The report from the DoH attempted to provide answers to most of the questions in the protocol. However, the Department did not report on other legislative measures instituted. Since the Housing Act of 1997, there have been two amendments to this law. The first amendments were made in Act 28 of 1999. The amendments were made to recognise the Social Housing Foundation as a national institution, and to further regulate the transfer of movable and immovable property to the provincial Housing Development Boards and the phasing out of certain housing subsidies. The second amendment was Act 60 of 1999. This law authorises a Member of the Executive Council (MEC) of a provincial government to approve the sale or other alienation of welfare facilities in certain circumstances. For example, an MEC may after consultation with members responsible for welfare matters, absolve a juristic person from its obligation to repay a loan or part of it that was granted by a municipality or a Housing Board.¹⁷

There was also an amendment to the Housing Consumers Protection Measures Act of 1998. This was amended by Act 27 of 1999, to remove ambiguity in the wording of certain sections, to make further provision for regulating measures, and to make better provision for the necessary phased implementation of the Act.

Though the measures were adequately described in terms of their provisions, there was little account of how the measures were implemented, and whether there were problems experienced with the implementation. The DoH has mentioned that the Housing Act forms the legislative framework for matters relating to the right of access to housing but failed to discuss the implementation of the Act.

The measures were inclined to make housing accessible without addressing the question of the quality and adequacy of houses. Legislative measures should not only make it possible to access housing, but also should also define and set the minimum standards of adequacy.

Several provinces cited their own provincial legislative measures, but failed to describe how the measures would advance the right of access to adequate housing. Since those measures were not described, Departments could also not give an account of the impact of those measures on the realisation of the right of access to adequate housing. Some Departments cited national legislation such as the Housing Act of 1997, without explaining how that law was implemented at the provincial sphere of government.

None of the provincial responses provided sufficient information on the four constitutional obligations to respect, protect, promote and fulfil the right of access to adequate housing.

Another observation made about provincial reports is that they tend to be too general without addressing specific issues. For example, it could not

¹⁷ See section 1 of Act 60 of 1999.

be determined what specific legislation is said to have considered the interests of vulnerable groups.

2.4 Recommendations

The DoH should provide in its response all relevant legislation regarding housing matters.

The determination of the progressive realisation can only be made on the basis of the extent of the implementation of the measures. The DoH should provide information on how these laws if implemented affect the realisation of the right.

3 BUDGETARY MEASURES

National and provincial departments were required to provide information on budgetary allocations for housing programmes. They were also required to explain variances, comment on budget adequacy and show what special considerations were given to vulnerable groups .

Table 2 Budgetary Allocation of the National Department of Housing

YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE*
1998/1999	3 812 539 000	3 747 565 805
1999/2000	3 629 107 000	3 494 376 042
2000/2001	3 439 355 000	1 666 398 776 ¹⁸

The budgetary allocation decreased by R183 432 000 from 1998/1999 to 199/2000 and by a further R189 752 000 for the 2000/2001 financial year. The total budget allocation during the period 1998 to 2001 decreased by an amount of R373 184 000. The Department under spent its budget by approximately R134 731 000 for the period under review.

Variances: The DoH attributed the decrease in the budgetary allocation to a number of cases, such as Housing Institution Establishment funds, RDP funds, and Special Integrated Presidential Project (SIPPS) funds, which were included in the housing budgets of the previous years.

Adequacy: The DoH responded that there were about 2 778 000 households living in conditions of inadequate shelter and about 5 959 000 households qualifying to receive housing subsidies. The allocated budget was therefore insufficient to cater for the demand for housing subsidies. To address these challenges, the DoH reported that it was in the process of developing a Housing Strategy for the New Millennium, which was expected to address the challenges faced due to budgetary constraints.

¹⁸ It needs to be recalled that departments submitted the reports during the course of the 2000/2001 financial year. By that time, there was not yet information on total spending for the 2000/2001 financial year.

Special considerations given to vulnerable groups: With regard to special consideration given to vulnerable groups, the Department responded that the National Housing Fund provides budget for subsidies in rural areas through the Informal Land Rights Subsidy. The provincial allocation formula has also been adjusted in consultation with MECs responsible for housing in order to facilitate a shift in emphasis from urban to rural provinces to support the Integrated Sustainable Rural Development Strategy.

The Housing Subsidy Programme caters for people with disabilities, older persons, persons living in informal settlements, low-income groups and previously disadvantaged racial groups earning up to R3 500 per month. The Housing Subsidy Scheme's general qualifications criteria have been developed on the principles of, inter alia, gender equality. The needs and requirements of female-headed households were accommodated in the allocation of subsidies by the provinces.

3.1 Provincial Sphere

The budgetary allocations in the provinces are given below.

Table 3 Total Budgetary Allocations for provinces

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE
Eastern Cape	1998/1999	389 705 000	313 302 000
	1999/2000	338 731 000	312 587 712
	2000/2001	689 942 000	
Free State	1998/1999	132 597 000	323 152 559
	1999/2000	131 971 000	129 608 926
	2000/2001	370 062 000	95 078 685 as of 31 July 2000
Gauteng	1998/1999	725 700 000	815 100 000
	1999/2000	725 800 000	767 200 000
	2000/2001	718 900 000	
KwaZulu-Natal	1998/1999	627 755 137	661 138 754
	1999/2000	579 150 000	468 333 257
	2000/2001	587 650 199	
Mpumalanga	1998/1999	165 132 749	153 108 588
	1999/2000	163 487 749	106 194 715
	2000/2001	176 068 502	
Northern Cape	1998/1999	46 407 000	45 038 000
	1999/2000	41 357 000	45 912 000
	2000/2001	111 797 000	
Northern Province	1998/1999	224 640 000	
	1999/2000	224 640 000	
	2000/2001	257 000 000	
North West	1998/1999	233 800 000	228 400 000
	1999/2000	216 400 000	189 400 000
	2000/2001	280 400 000	105 500 000
Western Cape	1998/1999	380 457 659	474 721 450
	1999/2000	351 375 209	396 450 209

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE
	2000/2001	341 500 000	376 870 724

Variances: The Eastern Cape DoH reported that the decrease in budgetary allocations for the year under review (1999/2000) in relation to the 1998/1999 financial years was due to a policy shift introduced by the Department of Provincial and Local Government. The policy requires the allocation, which used to be transferred to provincial departments, to be paid directly to the municipalities. The reduction in actual expenditure was as a result of savings from the various programmes induced by the moratorium from the provincial Department of Finance to cater for financial crises in other departments. Some of the funds were transferred to the Department as conditional grants towards the end of March and could therefore not be utilised in time, which resulted in a roll over of R20m.

The Free State indicated that the variance (an increase between 1999/2000 and 2000/2001 financial years of R218 306) was mainly due to the fact that the housing fund of R218 306 was allocated for the first time to the budget whereas in the previous financial years it was handled as an agency service.

The Gauteng Department received a conditional grant from the DoH that was utilised to implement the various programmes. The operating expenditure of the Department was funded out of allocations made by the Provincial Treasury Department in the Province. The Department also received additional grants to implement special programmes such as special urban renewal programmes like the Kathorus Special Presidential Project, which did not form part of the housing budget.

KwaZulu-Natal over spent in 1998/1999 due to additional projects that were approved during the year.

In the Northern Cape, the variance between 1998/1999 was a result of transfer of responsibility for the payment of the equitable share allocation to local government. During 1998/1999 the Department was allocated R6 million as a once off amount to accommodate this shift.

The North West reported that housing allocations were granted to provinces on the basis of a National Housing Fund Allocation Formula, which was amended from time to time. Allocations for the 2000/2001 financial year was based on the MTEF formula, which was more advantageous to provinces with large rural populations, and were allocated to provinces in the form of a conditional grant. All unspent funds were rolled over for utilisation in the following financial year.

The Western Cape, Mpumalanga and Northern Province did not provide reasons for the variances.

3.1.1 The subsidy scheme

Budgetary allocations for the subsidy scheme are shown in the Table below.

Table 4 Budgetary Allocations for Subsidy Schemes

PROVINCE	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE
Eastern Cape	1998/1999	434 415 705	382 616 956
	1999/2000	396 650 000	325 728 183
	2000/2001	422 200 000	
Free State	1998/1999	207 360 000	
	1999/2000	210 600 000	
	2000/2001	218 306 000	
Gauteng	1998/1999	725 700 000	815 100 000
	1999/2000	725 800 000	767 200 000
	2000/2001	718 900 000	
KwaZulu-Natal	1998/1999	489 178 168	497 558 131
	1999/2000	483 070 000	408 083 563
	2000/2001	524 274 000	
Northern Cape	1998/1999	60.239	
	1999/2000	55 600 000	60 239 000
	2000/2001	58 100 000	55 600 000
North West	1998/1999	225 100 000	221 400 000
	1999/2000	207 700 000	181 400 000
	2000/2001	268 800 000	103 100 000
Western Cape	1998/1999	380 457 659	474 721 450
	1999/2000	351 375 209	396 450 209
	2000/2001	341 500 000	376 870 724
Mpumalanga	1998/1999	165 132 749	144 867 485
	1999/2000	160 800 000	102 521 997
	2000/2001	173 460 753	

Variances: The Northern Cape and Northern Province did not provide information on variances.

In the Eastern Cape, the allocation to the province in terms of the MTEF budgetary cycle was guaranteed at R388, 8m for the three financial years. These amounts were however increased to accommodate cash flow projections in terms of provincial commitments. The amount of R51m that was not spent in the year 1998/1999 was rolled over to the following financial year hence the reduced allocation during the 1999/2000 financial years. The amount allocated to the province, as capital budget for the financial year 2000/2001 was initially R388, 8m but was subsequently revised as per MINMEC resolution in order to address the rural nature of the province hence the revised amount of R422, 2 200 000 was allocated to the province for the reporting period.

In Mpumalanga, the variance was due to the cash flow submitted by the developer's actual expenditure, which was sometimes outside the developer's control.

KwaZulu-Natal indicated that, there was an over expenditure in 1998/1999 due to additional projects approved during the year. Under spending in 1999/2000 was caused by projects that were hampered by the floods in KwaZulu Natal.

The North West, Gauteng, Free State and Western Cape indicated that provincial housing allocations were granted to provinces on a basis of a National Housing Fund Allocation Formula, which was amended from time to time. The allocation for the 2000/2001 financial years was based on a MTEF formula, which was more advantageous to provinces in the form of conditional grant.

Budget adequacy: The Eastern Cape found the budget to be adequate to meet commitments in terms of approved projects but not for new projects. During the financial year 2000/2001 the Department approved funding to only 68 new projects. There were insufficient funds to allocate to new projects. The Department allocated funding only to those projects that were ready to commence and thus spent most of their budget within a short space of time.

In Gauteng the budget was sufficient to meet the Department's commitments to the various programmes. The budget was however, insufficient to meet the backlogs. The Department instituted mechanisms and research into alternative financing mechanisms to unlock private sector funding for housing.

The Northern Cape, Mpumalanga, Western Cape, KwaZulu-Natal and North West indicated that, the allocation was not adequate.

In the North West DoH the allocation only covered the growth in housing needs of 16 000 households per annum which represented R256 million worth of subsidies and did not address the backlog estimated at 486 000 households requiring funding in the order of R7, 776 billion. There were problems experienced, as an increasing number of project proposals had to be rejected or shelved whilst the backlog marginally increased each year and could not be addressed without a substantial increase in funding.

The Western Cape indicated that the budgeted allocation was totally inadequate for the provision of subsidies. The budgetary allocation to the DoH over the reporting period was systematically reduced from R4, 6 billion in 1998/1999 to R4, 2 billion in 1999/2000. The Department introduced a Prioritisation Model to ensure the effective use of inadequate funding.

Special considerations given to vulnerable groups: All the provincial departments reported that the current subsidy was by its nature directed at benefiting low- income groups, the homeless, people living in informal settlements, older person, persons with disabilities, female-headed households and the previously disadvantaged racial groups including indigenous groups.

Mpumalanga set up a disability desk, which came into effect on 1 April 1999. The unit was facilitating applications for housing subsidies.

3.1.2 Physical infrastructure

Budgetary allocations towards infrastructure are given in the Table below.

Table 5 Budgetary Allocations for Physical Infrastructure

PROVINCES	YEAR	TOTAL ALLOCATION IN RANDS	ACTUAL EXPENDITURE
Eastern Cape	1998/1999	108 741 160	98 741 160
	1999/2000	110 797 000	100 747 000
	2000/2001	145 302 000	33 911 571
Free State	1998/1999	138 637 810	135 695 352
	1999/2000	61 212 885	61 212 065
	2000/2001	67 820 000	15 484 005
Gauteng	1998/1999	342 000 000	815 100 000
	1999/2000	203 000 000	767 200 000
	2000/2001	299 000 000	
North West	1998/1999	58 552 000	58 400 000
	1999/2000	130 530 000	126 990 000
	2000/2001	139 260 000	-
Western Cape	1998/1999	157 000	157 000 000
	1999/2000	160 000	160 000 000
	2000/2001	155 000	155 000 000

- No information was provided on variances.

Budget adequacy: In the Eastern Cape, due to poor performance by local authorities to spend their budgets, a total amount of R10 million in 1998/1999 and 1999/2000 had to be returned to Pretoria.

According to the North West, the budgeted allocation was not adequate as the backlog in the provision of infrastructure was estimated to be more than R22 million. The Department reprioritised and sourced additional funding from the Provincial Capital Development Fund and private sector funding opportunities. The Western Cape indicated that they had not instituted measures. The remaining provinces did not respond to the question

The Western Cape DoH indicated that a direct impact of the lack of sufficient funding for infrastructure was that the Department was unable to provide basic services to all beneficiaries.

3.2 Critique

The DoH did not provide relevant information on the allocation as a percentage of the GDP and the actual amount acquired from other sources. The only information provided for the three-year period was on total amounts allocated and the actual expenditures. There has been under-spending in 1998/1999. The DoH confines the information to the National Housing Fund and failed to address the Rural Housing Subsidy to which mention was made in the section on policy measures. This fund was meant

to provide subsidies for rural communities that did not have access to housing since they only had informal land rights.

Other sources showed that planned housing expenditure for 1999/2000 was only 1.6 percent of the total national expenditure and this figure has been steadily decreasing over the past few years from a maximum of 2.4 percent in 1997/1998. This fails to meet the White Paper's goal of increasing housing's share in the national budget to 5 percent. Despite priorities given to other social services like education, health and social welfare, the government fails to recognise the magnitude of the nature of the problems low-income families experience in accessing housing.

3.3 Recommendations

The DoH should adhere to the questions in the protocol and not send selective information.

The limited budgetary allocation for housing and the progressively declining housing budget are areas of concern. If the Department of Housing is going to meet the backlog in housing needs, the State should increase the share for the Housing budget to 5 percent of the total national budget, as requested by the White Paper on Housing.

4 OUTCOMES

The national and provincial departments were requested to provide the following information: number of households granted State subsidies, houses built through self-help housing schemes with some assistance from the State, households that were eligible for subsidies, shelters provided for older persons, homeless persons, households in informal settlements, households in illegal settlements, people on the housing waiting list and average waiting period on the list. Departments were also required to provide information according to racial, rural and urban categories.

4.1 National Sphere

The DoH reported that during the first five years of implementation of the Housing Programme, the emphasis has been on the number of units delivered. By 31 March 1999, five years after the Housing Programme was initiated, a total of 745 717 units were either completed or under construction. The target of 1 000 000 houses was reached in April 2000.

The DoH did not monitor the type of housing developments approved by Provincial Housing Development Boards or Provincial Housing Departments. There was therefore no data at the national sphere on the rural-urban split, or on the population groups to whom subsidies were

allocated. The DoH did not monitor the number of subsidies granted through the People's Housing Process projects.

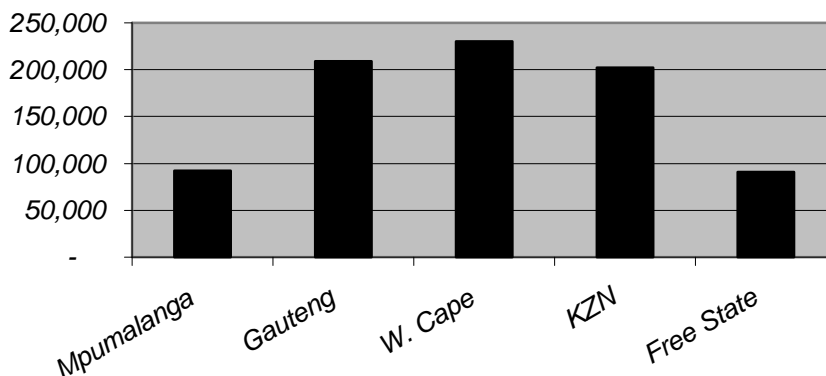
No data was collected on the status of households' accommodation prior to them accessing a subsidised housing unit and illegal settlements. This was a matter that was dealt with at the local sphere of government, as there was no National Housing waiting list. As previously explained, decisions relating to the allocation of housing subsidies were made at the provincial sphere. Some provinces established housing waiting lists as a tool for managing the allocation process.

4.2 Provincial Sphere

The North West and Northern Cape did not provide information on housing delivery statistics. KwaZulu-Natal awarded the highest number of state subsidies and the Northern Cape awarded the lowest number of subsidies as compared to other provinces. Numbers of subsidies granted by provincial departments were not proportionate to the number of houses built. The disproportion was linked to the fact that individual subsidy programmes, which were introduced on 5 June 1995, gave qualifying beneficiaries access to housing subsidies to acquire ownership of existing property or property not located in a project approved by a Provincial Housing Development Board. A person could also buy a serviced site and build his or her own top structure.

The Eastern Cape reported that out of 110 423 subsidies granted, 10 947 were granted to households in urban areas while 945 went to households in rural areas. Northern Cape reported that out of 11 556 subsidies, 9 384 were granted to urban households and 2 172 to rural households. KwaZulu-Natal granted about 200 000 subsidies and has reported that the Department has abolished the waiting list. Gauteng granted about 430 000 subsidies.

Figure 1 Number of households living in informal settlements



The Western Cape, Gauteng and KwaZulu-Natal showed a larger proportion of households living in informal settlements. The North West, Northern Cape, Eastern Cape and Northern Province did not provide information on the number of households living in informal settlements. Compared to the 1998/1999 report, the number of households living in informal settlements in the Western Cape increased by 66 820 whereas in KwaZulu-Natal it increased by 15 930.¹⁹

Gauteng provided 622 shelters to homeless persons and 2 925 shelters to older persons. The North West, Northern Cape, Eastern Cape, Northern Province, Western Cape and KwaZulu-Natal did not provide the information on the number of shelters provided.

The Gauteng DoH reported that 24 403 houses were built during the year under review however in its annual report, it indicated that 46 741 houses were constructed.

4.3 Critique

The DoH only provided information on the number of houses built. However, it is appreciated that the DoH does not deal with implementation of the measures and that is the responsibility of the provincial departments. The monitoring of the realisation of the right to housing cannot be measured by the statistics from certain provinces. In order to make a sound analysis of all provincial departments there is a need to provide information so that a countrywide comparison of the progressive realisation of the right could be made. The national department should therefore take initiatives to capture data that gives a national picture. Provincial departments could help by feeding the necessary data to the national Department.

The fact that provinces have been given the prerogative to make decisions relating to the allocation of subsidies requires that the provincial

¹⁹ South African Human Rights Commission. *2nd Economic and Social Rights Report 1998-1999* (2000) 184.

departments should provide all the necessary information required by the protocols.

Looking at the provincial population gains scenario (1995-2025), the figures clearly indicate that the Northern Cape will experience a tremendous population decrease in both urban areas (21 percent) and rural areas (60 percent). The highest drop in population in the rural areas is expected in the Free State (70 percent) followed by Western Cape (63 percent) and the highest increase in the population in the urban areas was expected in KwaZulu-Natal (64 percent) followed by Western Cape and Gauteng (54 percent). This implies an increasing projected housing backlog in KwaZulu-Natal and a decreasing projected housing backlog in the Free State.²⁰

Research shows that due to the DoH prioritising provinces with large rural populations, the Western Cape housing subsidies face further obstacles. Current approved projects come to R500 million of funding per year and the provincial housing budget was expected to further decrease in the future.²¹ Gauteng, which was predominantly urban, faced similar problems.

Increased numbers of households living in informal settlements together with the high population figures and decreasing housing funds in the three above-mentioned provinces mean that the majority of households will not be able to obtain decent quality housing.

4.4 Recommendations

Provincial departments, as implementers of national policies and legislation need to provide information required by the protocols. Departments should follow a set monitoring criteria, where monitoring systems do not exist, the DoH should establish guidelines on monitoring and evaluation.

With increasing numbers of households living in informal settlements and the decreasing amounts of funding, a comprehensive rehabilitation strategy needs to be engaged. Rehabilitation of existing settlements by providing the necessary infrastructure and facilities to enhance sustainable human settlements is an option. Departments should also start looking at establishing social housing clusters.

5 NATIONAL ACTION PLAN

The national and provincial departments were required to provide the following information:

- number of dwellings without access to safe and healthy drinking water,
- dwellings without adequate sanitation facilities

²⁰ DoH Annual Report 1999-2000

²¹ Ibid.

- dwellings without electricity
- dwellings that did not conform to the departmental construction and safety standards
- persons that were eligible for subsidies but did not receive such subsidies due to budgetary constraints
- persons that were eligible for subsidies but did not receive such subsidies due to administrative problems
- families without houses
- informal settlements
- households with no security of tenure due to administrative problems.

5.1 National Sphere

The DoH did not collect information on the indicators required but relied on the statistics collected by Statistics South Africa (SSA).²² According to this survey, there were 182 600 dwellings without access to safe and healthy drinking water ie households obtaining water from a tanker, borehole on site, communal tap, rainwater tank, flowing water or stream, dam or pools, wells or springs). 1 683 000 were in urban areas and 144 000 in rural areas.

There were 4 933 000 dwellings without adequate sanitation facilities ie households using pit latrines or bucket systems, 3 671 000 urban and 1 251 000 rural. There were 3 318 000 dwellings without electricity ie households using sources other than mains electricity for lighting. About 2 283 000 were in urban areas and 1 037 000 were in rural areas.

5.2 Provincial Sphere

North West, Mpumalanga and KwaZulu-Natal did not provide information on the number of households without adequate water, sanitation and electricity, urban and rural dwellings without adequate sanitation facilities and access to safe and healthy drinking water.

Gauteng, Northern Cape, Eastern Cape and Northern Province, Mpumalanga and KwaZulu-Natal did not provide information on the number of households without adequate water, sanitation and electricity. The Western Cape showed a larger proportion of household without electricity whereas households without adequate water and sanitation were minimal.

None of the provincial departments provided information on the number of households that did not conform to departmental standards, number of households eligible for subsidies but denied due to budget limitations and households with no security of tenure.

The Western Cape indicates that 292 000 families compared with 486 000 families in the North West were without houses who qualified for housing subsidies but did not receive such subsidies due to budgetary constraints. Gauteng, Northern Cape, Eastern Cape, Free State, Mpumalanga and

²² Statistics South Africa *October Households Survey* (1999).

KwaZulu-Natal did not provide the information required on the number of families without houses and eligible for housing subsidies.

The North West showed a bigger proportion of rural dwellings without access to safe and healthy drinking water whereas the Free State showed a bigger proportion of urban dwellings without access to safe and healthy drinking water. Other provinces did not provide the information.

All the provincial Departments did not provide information on dwellings that did not conform to departmental construction and safety standards, persons that were eligible for subsidies but did not receive such subsidies due to budgetary constraints, persons that were eligible for subsidies but did not receive such subsidies due to administrative problems, families without houses, informal settlements and households with no security of tenure due to administrative problems.

5.3 Critique

The DoH and provincial Departments' failure to provide adequate information makes it difficult to make a sound analysis of housing delivery in South Africa.

The statistics received from the provinces are problematic because they differ substantially from the statistics received from Statistics South Africa. This makes it difficult to measure the level of progress achieved in the provision of adequate housing. The failure of provincial departments to provide information according to the rural and urban categories also poses a problem. The departments indicated that the Rural Housing Subsidy was specifically developed for rural communities. However, it is unsatisfactory that the departments could not provide information on rural communities.

Information from the three provinces showed that the provision of infrastructure for the satisfaction of 'adequate housing' in South Africa remains a challenge. It is not only the challenge to housing in the form of a structure but 'adequate housing which must contain certain facilities essential for health, security and comfort' which remains unfulfilled.²³ Research indicates that there were problems with the quality of the houses delivered in the Western Cape which in turn affected issues such as health, safety and education. The main problems included unplastered concrete walls that retain dampness, water-logged houses which result in respiratory diseases from the dampness.²⁴

5.4 Recommendations

Provincial departments should maintain intelligible disaggregated databases on relevant indicators so as to be able to assess housing needs in different areas, and to monitor progress in implementing initiatives to

²³ Note 7 above, para 8.

²⁴ South African Human Rights Commission *2nd Economic and Social Rights Report 1998-1999*. (2000) 184.

facilitate effective planning for the next three years in terms of the MTEF budget.

PART C: CONCLUSION

The measures that have been undertaken by national and provincial Departments of Housing are relevant to the realisation of housing rights contained in ss 26 and 28 of the Constitution. However, the measures remain inadequate to address the key issues that need to be resolved for the realisation of the right of access to adequate housing and children's right to shelter. These problems are to be found in the allocation of budgetary resources towards housing. As a share of the national budget, the housing budget has been declining over the years. The State is reducing the enjoyment of a right without reasonable grounds for the reduction being provided. This occurs in a climate of rising housing needs, and failure of alternatives financing mechanisms such as personal savings, banks and other institutions to provide much-needed finance. This sets serious constraints even on the policy measures that are put in place to improve delivery. For instance, the State's focus, before the reporting period, was on expanding the outreach of the housing programme by including people holding informal land rights. However, the budget was not increased in the light of this new, previously excluded category of beneficiaries. As a result, there had to be reprioritisation, despite the fact that allocated resources were already insufficient to meet the needs of urban dwellers.

Another disturbing trend, also relates to the allocation of budgetary resources and to under-spending. Almost all provincial Departments under-spent their budgets over the three-year period, including the reporting period. It is therefore clear that the State is not even able to prove that it is applying the resources efficiently, meaning that housing rights are being violated.

ABBREVIATIONS

CRC	- Convention on the Rights of the Child
DoH	- Department of Housing
ICESCR	- International Covenant on Economic, Social and Cultural Rights
MEC	- Member of the Executive Council
MINMEC	- Minister Member of Executive Committee
NHBRC	- National Home Builders Registration Council
SIPPS	- Special Integrated Presidential Project
SSA	- Statistics South Africa

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CHAPTER SEVEN

LAND RIGHTS

PART A: OVERVIEW

1 INTRODUCTION

The historical denial of access to land to the majority of South Africans is well documented. This is manifested in the lack of access to productive land; homelessness; and high levels of insecure tenure. The post-Apartheid government developed a land reform programme which focused on three important areas: land redistribution to address lack of access to land for productive and residential purposes; land restitution to restore land to those who lost land due to previous discriminatory laws; and secure tenure to those whose tenure is insecure.

In the two reports submitted to the South African Human Rights Commission (SAHRC), the national Department of Land Affairs reported that it had instituted several measures in the three areas of the land reform programme in order to redress past imbalances and create equitable access to land.

This chapter assesses the information provided by the Department of Land Affairs on legislative and other measures introduced during 1999/2000, towards the realisation of land rights contained in the Bill of Rights.

2 CONSTITUTIONAL OBLIGATIONS

Section 25 of the Constitution provides for the right of access to land and addresses the three above-mentioned areas. Section 25(5) deals with equitable access to land, s 25(6) addresses restitution; s 25(7) concerns security of tenure; and s 25(8) identifies land, water and related reforms, as purposes that should not be impeded by s 25.¹

Land rights are found mainly within the context of property rights, although property is not limited to land. Land rights are largely shaped by the tension between protecting existing property rights, and the need to achieve justice and equity in access to property.

On the one hand, there is a view that purports to protect the existing rights to property. From this perspective, the state should not interfere in property ownership, but should rather protect the right from interference by the state itself or other entities. On the other hand, there is what is often referred to as the social function of property, such as

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

issues of fairness, equity and justice in access to land. In this line of thinking, there are legitimate grounds for interference with existing property rights in order to serve social functions. The United Nations Declaration on Social Progress and Development recognises the social functions of property including land and calls for land ownership that ensures equal rights to property for all.² Certain groups have been identified as requiring positive legislative and other measures towards the realisation of land rights. These groups include women, peasants and indigenous peoples. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) states that women should have equal treatment in the context of land and agrarian reform and in land resettlement schemes.³ The Peasants Charter of the United Nations Food and Agricultural Organisation requires that tenure reform and redistribution should benefit the landless and small farmers. The Convention Concerning Indigenous and Tribal People in Independent Countries recognises the relationship between indigenous people and land and calls for the adoption of special measures on behalf of indigenous people. It also safeguards against arbitrary removal of indigenous people from their traditional land with procedural guarantees.⁴

Land rights in the South African Constitution are an attempt to find a middle ground between the two perspectives mentioned above. The implementation of these measures continues to highlight the tension involved in protecting existing property rights, while attempting to bring about equity and justice in access to land on the other. The first part of property rights in the Constitution deals with protecting existing rights to property. Section 25(1) states that 'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.' The remaining sections identify circumstances under which interference with property rights may be justifiable. Section 25(2)(a) requires that property only be expropriated in terms of a law of general application for a 'public purpose' or in the 'public interest.' Section 25(4)(a) specifically provides that the 'public interest' includes land reform. It is therefore clear from the reading of s 25(2)(a), together with s 25(4)(a), that land reform is considered in the Constitution, to be a justifiable ground for interference with property rights. However, s 25(1)(b) requires that where expropriation occurs, there must be compensation. Section 25(3) specifically deals with the nature of compensation, and includes the determination of the value of compensation.

While the abovementioned sections mainly deal with land rights indirectly, the specific provisions on land rights are contained in ss

² Articles 17(d) and 18(b) of the United Nations Declaration on Social Progress and Development (1969).

³ Article 14(2)(h) of the Convention on the Elimination of all Forms of Discrimination Against Women (1979).

⁴ Articles 7(1), 13, 14, 15, 16, 17, 18 and 19 of the Convention Concerning Tribal and Indigenous Peoples in Independent Countries (1991).

25(5), 25(6), 25(7), 25(8) and 25(9). These sections address issues of equitable access to land, the restoration of land to those who were deprived of land due to past discriminatory practices and security of tenure.

Section 25(5) states that the 'state must 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.' An issue of concern is whether the courts may review legislative and other measures to test their reasonableness.⁵ Prior to the *Grootboom judgement*, the prevailing interpretation was that the courts would not engage in debates over budgetary priorities.⁶ The *Grootboom judgement* has had the dramatic effect of showing that the courts may have to establish whether measures exist to foster conditions for equitable access to land. What has also become clear from this judgment is that the Courts would indeed evaluate the reasonableness of the measures.

Section 25(6) specifically addresses the issue of security of tenure and states that a person whose tenure is insecure as a result of past discriminatory laws or practices, is entitled, to an extent provided by an Act of Parliament, to tenure that is legally secure or to comparable redress. The requirement for an Act of Parliament towards security of tenure is reiterated in s 25(9), which requires that Parliament must enact legislation referred to in s 25(6).

Section 25(7) deals with restitution, and uses the word 'property' rather than the narrower concept of 'land.' This section states that a person or community dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices, is entitled, to an extent provided by an Act of Parliament, either to restitution of that property, or to comparable redress.

Lastly, s 25(8) specifically provides that no provision of s 25 may impede the state from taking measures to achieve land, water and related reform in order to redress past racial discrimination, provided that any departure is consistent with s 36(1). To a certain extent, s 25(8) may be seen as a directive to the Courts, reiterating the importance with which land, water and related reforms are regarded in the Constitution.⁷

3 KEY DEVELOPMENTS FOR THE YEAR UNDER REVIEW

The developments that took place during the reporting period were mainly efforts by the state to deal with some of the problems that had arisen during the implementation of the three areas of the land reform programme. The major problem has been the slow pace of implementation of all three programmes of land reform. In the

⁵ G Budlender 'The Constitutional Protection of Property Rights' in G Budlender J Latsky T Roux (eds) *Juta's New Land Law* (1998) 70.

⁶ *Ibid* 70.

⁷ *Ibid*. 389.

restitution programme, only 28 claims had been resolved, out of a total of 42 000 applications for the restoration of land received by mid-1998.⁸ Most of the applications received also tended to come from urban areas despite the fact the majority of the victims of forced removals and displacement are in rural areas. By 1999, only 2 percent of the land targeted for redistribution under the redistribution programme had been redistributed.⁹ In the tenure reform programme, poor implementation of enabling legislation had resulted in little impact on people living in conditions of insecure tenure. It is in this context that policy and other developments mentioned below should be viewed.

Policy developments

Significant developments that took place during the reporting period were administrative changes introduced in the land restitution programme to accelerate delivery, and the securing of land rights for vulnerable groups under the tenure reform programme.

Land restitution

Administrative changes to the restitution programmes followed the Restitution Review that took place in 1998. The Department of Land Affairs, in view of the particularly disappointing performance of the restitution programme, undertook the Review. Some of the causes of slow delivery included the lengthy legal process that had to be followed in the handling of claims, confusion over the respective roles of the Commission on the Restitution of Land and the Department of Land Affairs, and lack of prioritisation of claims. The actual administrative change introduced involved an arrangement through which claims that were not in dispute no longer had to go through the Land Claims Court, a process considered to be a cause of delay in processing claims.

This change improved the speed of delivery although it remains inadequate to deal with the estimated number of victims of discriminatory practices that resulted in many South Africans losing their land. During the reporting period alone, more than 8000 claims were settled. Clearly, and compared to the preceding five years where only 44 claims were settled, this was a significant improvement. However, this improvement was marginal when measured against the number of eligible beneficiaries. It has been estimated that there are about 3,5 million people who are eligible for land restitution.¹⁰ The measure has also not dealt with other problems that continue to hamper restitution, such as the urban bias of the restitution

⁸ Land restitution at <http://www.nlc.co.za/mdresti.htm> site visited on 18/10/01.

⁹ Land Reform Policy at <http://www.nlc.co.za/mdrefpo.htm> site visited on 18/10/01.

¹⁰ It is important to note however, that the number of beneficiaries would be more than the number of claims as claims are sometimes made on behalf of households and communities. Nonetheless, when taking into account, the fact that the actual number of claims received was 42 000, then it becomes clear that the restitution programme still lags behind the demand for restitution.

Land rights

programme, the continuing marginalisation of women in the programme and the lengthy process of negotiating with landowners over land pricing.

Tenure reform

A significant development that took place under the tenure reform programme was the securing of land tenure for vulnerable groups. This measure was directed at people in the former homelands and the South African Development Trust (SADT) areas, who did not have access to land.

While the measure was positive in that it provides land to a previously disadvantaged segment of society, the tenure reform of the state remains problematic. Although a plethora of legislative measures such as the Extension of Security of Tenure Act (ESTA) 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996 have been passed, poor implementation of these measures undermine prospects for sustainable tenure reform. Farm workers bear the brunt of poor implementation of the measures and continue to suffer from arbitrary evictions. There remains, therefore, a significant segment of society that does not enjoy the right to security of tenure.

Redistribution

Little progress has been made in the redistribution programme. It has been estimated that by 1999, only 2 percent of the 30 percent of land that the state had intended to redistribute, has actually been redistributed, pointing to the slow pace of delivery.

Legislative developments

There were no significant legislative developments that took place during the reporting period. The minor changes introduced included amendments to: s 2 of the Provision of Land and Assistance Act of 1993 to provide for the requirement of Government Notice regarding settlement projects; and to ss 13 (A), 33 (1) and 40 of the Land Reform Act 3 of 1996.

There were also amendments to the Interim Protection of Informal Land Rights Act 31 of 1996; and ss 19 and 20 of ESTA. During the reporting period, a process of drafting regulations in terms of the Land Disposal Act 48 of 1961 and the Upgrading of the Land Tenure Rights Act 112 of 1991 began. The above-mentioned regulations were temporary measures intended to empower the Minister of Land Affairs to approve urgent applications for the transfer of land to communities occupying communal land in the former homelands and SADT areas.

The measures were reasonable in that they began to pay specific attention to vulnerable groups in communally occupied land, but have

not yet addressed some of the fundamental problems impeding the land reform programme. The biggest challenge remains that of effective implementation of land legislation, especially in the area of tenure reform.

The budget

During the reporting period, budgetary allocations in the three programmes were as follows:

- Land Restitution - R143 000 000 of which R 122 196 000 was spent
- Land Redistribution - R163 862 000 with an expenditure of R154 959 000
- Land Tenure Reform - R45 849 000 when the total expenditure amounted to R24 734 000.

A continuing trend, in all the three areas of the land reform programme, was under-spending, which happens at a time when government reports that financial resources towards land reform are limited. As is shown above, of the more than R45 million made available for the tenure reform programme, only about R24 million was spent.

Another observation is that budgetary resources towards land reform remain grossly inadequate to deal with the enormity of the land reform challenge.

3 CONCLUSION

The developments that occurred during the reporting period only marginally contributed to the realisation of land rights contained in the Constitution. Administrative changes introduced in the restitution programme increased the number of restitution claims. However, none of the developments addressed some of the deep-seated problems in the restitution programme, such as the continued urban bias.

Legislative measures, while they reach a neglected segment of the South African society, fail to deal with the overall ineffectiveness of the implementation of existing legislative measures, especially those that relate to tenure reform, which results in especially farm workers being evicted.

Budgetary allocations towards the land reform programme are characterised by under-spending, pointing to inefficiencies in the application of financial resources towards the land reform programme. Moreover, the budget remains very limited given the dire need for land.

PART B: ANALYSIS OF RESPONSES BY ORGANS OF STATE

This section analyses information provided by the national Department of Land Affairs (DLA) on legislative and other measures instituted to realise land rights during the 1999/2000 reporting period. The DLA was required to provide information on policy, legislative and budgetary measures instituted, how the measures have affected constitutional obligations to respect, protect, promote and fulfil land rights. The DLA was also required to provide information on a number of indicators that are critical to the determination of progress with the realisation of the right of access to land rights. Lastly, the DLA was required to provide information on systems that have been established in the Department to determine progress in the realisation of land rights.

1 POLICY MEASURES

There were no new policy measures introduced in the Land Redistribution programme by the Department. However, in March 2000, the Minister of Agriculture and Land Affairs spelt out Strategic Directives with regard to Land Reform that included the Land Redistribution Programme. No further information on the directives was included in the report from the Department.

In the Restitution Programme, the policy measure instituted was the strengthening of the administrative machinery as the process was regarded as being too legalistic and slow. Under the new arrangement, not all land claims would be referred to the Land Claims Court for a ruling. It was only in the event of an agreement not being reached between the claimant and the landowner, that claims would be referred to the Land Claims Court.

Policy measures instituted under the Tenure Reform Programme were:

- The securing of vulnerable rights
- The approval of policy on Church land

Securing of vulnerable rights policy

The securing of vulnerable rights entailed the transfer of land to communities and other groups of people residing in the former homelands and in ex-South African Development Trust (SADT) areas, who by virtue of previous laws did not have access to land. This policy was instituted after meetings and consultations with various stakeholders and research studies. As part of this process a policy document on the entitlements of people protected by the Interim Protection of Informal Land Rights Act 31 of 1996 and the Extension of Security of Tenure Act 62 of 1997 was developed. There was also a proposal for the payment of benefits to the occupants and users of land. No further information on the measure was provided.

Church land policy

The Church Land Policy related to all church-owned land and the rights of groups or individuals that reside therein. This policy was aimed at encouraging the Church as a substantial landowner to contribute towards land reform. This policy was aimed at affirming the rights, ownership, protection and security of tenure of communities living on Church property.

1.1.1 Measures and constitutional obligations

According to the Department, the instituted measures positively affected the constitutional obligations to respect, protect, promote and fulfil land rights. The refinement and streamlining of existing policies contributed to meeting the needs of intended beneficiaries. The measures were reasonable in that they did not compromise the rights of the people, but were in line with the government's development strategy and the Bill of Rights. The securing of vulnerable rights in particular was aimed at improving the effectiveness of the implementation process of the restitution programme. The change relating to church land broadened the scope of the land reform programme by including a group not initially covered by the land reform programme.

The instituted measures were also deemed effective in that whilst only 44 land claims were resolved between 1994 and 1999, the figure rose to 8 288 during 1999/2000.

The report indicated that people living in informal settlements, women (including female-headed households), low-income groups, farm workers, labour tenants and the previously disadvantaged racial groups including the indigenous people, benefited through policies such as the Securing of Vulnerable Rights. Those who had been dispossessed of their land also benefited through the restitution programme.

The Department did not provide information on any difficulties experienced in the implementation of the measures mentioned above, except to mention that the implementation of changes to the security of tenure programme was complex.

1.2 Critique

With regard to the actual measures instituted, it is correct that measures instituted by the state were positive in that they had the aim of expanding the benefits of the land reform programme to more beneficiaries. The focus was on groups that are known to be particularly vulnerable such as rural communities. However, the

measures failed to address some of the core issues that are standing in the way of the realisation of these rights.

It is particularly unacceptable that no measures were instituted in the redistribution programme given the slow pace at which the programme is moving. As stated earlier, by 1999, only 2 percent of the 30 percent of the land that the state had intended to redistribute had actually been redistributed. Such a slow pace calls for drastic and immediate measures.

In the area of restitution, while the measures were positive, they did not address some of the challenges faced in the programme. It has been noted that the number of eligible beneficiaries to restitution is about 3,5 million people in the country. Even a delivery rate of more than 8 000 a year would fall far short of addressing the problem, especially given that 42 000 claims had been received. The other issue is the continuing bias of the restitution programme for urban areas, where most restitution claims are being handled. This raises a number of problems. The first is that restitution claims in urban areas have tended to be protracted due to the unwillingness of landowners to release land. The second is that the majority of eligible claimants were in rural areas, meaning that any restitution programmes that ignores rural people, only pays attention to about 300 000 urban claimants.¹¹

With regard to security of tenure, the measures were positive but once again fell short of addressing core issues. The 2nd Economic and Social Rights Report highlighted the vulnerability of people residing on communal land. During the reporting period, measures aimed at the security of vulnerable groups were introduced. The outcome of the measures will be the major determinant of their effectiveness. Available estimates suggest that about 12 percent of the rural population were living under insecure tenure in 1997.¹²

The report did not provide information on evictions and their implications on the tenure reform programme. Whilst statistics on eviction remain scanty, provincial departments responsible for land reform have collected some information. This information covered the period between November 1999 and May 2000. Their reports revealed the following trends:

- there were more threats of evictions than actual evictions
- there were more illegal evictions than legal ones
- more evictions occur because of change of ownership of land
- evictions also arose from labour disputes

¹¹ Land restitution (note 8 above).

¹² Land Rights Programme Tenure Rights at <http://www.nlc.co.za/tenref.htm> visited on 10/08/2001.

What is missing from the report is a demonstration of special considerations given to the groups mentioned above. While the Department views its measures as broadly giving consideration to these groups, it did not show sensitivity to the more specialised needs of these groups. For instance, concern has been raised about the position of persons with disabilities in the context of land reform. The Department could have reported on its understanding of the needs of each group, and the way its measures address these needs.

The state is clearly not doing enough to protect vulnerable groups, especially farm workers. Despite the existence of land tenure programme and the land reform programme, evictions continue unabated on farms. It is particularly disturbing that the Department of Land Affairs does not have information on the extent of evictions taking place on farms.

1.3 Recommendations

The report should provide information on problems being addressed by each measure, briefly describe the measure, state its objective, and the degree to which such a measure would address the problem identified.

The Department should provide specific information on special considerations given to vulnerable groups so that it can be possible to gauge the extent to which the measures address the needs of rural dwellers, farm workers and women.

There is a need for active measures to be instituted in the area of land redistribution. The slow pace of land redistribution is highly unacceptable.

With regard to land tenure reform, a clear indication should be given on how many of the vulnerable groups such as farm dwellers have acquired secure tenure during the period under review as against the number of evictions that have taken place.

The Government must also indicate how problems in the restitution programme such as urban and gender bias are being addressed.

2. LEGISLATIVE MEASURES

There has not been significant changes in legislation enacted by the DLA, except the following amendments made as part of the Land Affairs General Amendment Act 11 of 2000:¹³

- Amendment to s 2 of the Provision of Land and Assistance Act 126 of 1993, to provide the requirement of Government Notice regarding settlement projects.

¹³ No further information on the nature of these amendments was provided.

Land rights

- Amendment to ss 13(1A), 33(1) and 40 of the Land Reform Act 3 of 1996.
- Amendment to sections 19 and 20 of the Extension of Security of Tenure Act 62 of 1997.

The process of drafting regulations in terms of the State Land Disposal Act 48 of 1961 and the Upgrading of Land Tenure Rights Act 112 of 1991 started in 2000. The regulations were intended to empower the Minister of Land Affairs to consider urgent applications for transfer of land to communities who communally occupy land in the former homelands. The Department of Land Affairs has termed the process, Security of Vulnerable Rights as reported in the policy section. This was a temporary measure pending the enactment of a long-term tenure reform legislation that would deal with communal areas.

2.1.1 Measures and constitutional obligations

The Department of Land Affairs reported that the above-mentioned legislative measures were specifically aimed at carrying out the obligations to respect, protect, promote and fulfil informal rights, the rights of labour tenants and the securing of vulnerable rights. No further information was provided.

Regarding the question of effectiveness, the DLA reported that policy development is an ongoing process owing to the complexity of the issues, especially those relating to the securing of vulnerable rights.

2.1.2 Special considerations given to vulnerable groups

The DLA reported that legislation relating to the securing of vulnerable rights covers all groups mentioned in the policy section. The IPILRA awareness campaign focused on people living in informal and rural settlements, the majority of whom falls in the low-income bracket. The guidelines formulated for labour tenants to acquire land include all the groups mentioned in the protocol.

2.1.3 Implementation of the measures

The DLA did not explain in detail what problems were experienced in the implementation of legislative measures. Implementation of the securing of vulnerable rights had not yet started during the reporting period, as there were still consultation and Parliamentary process that needed to precede implementation. There were communication problems as regards the IPILRA. This was due to the size of the beneficiary group and limited media that could reach the groups; it was therefore difficult to determine the success of the measure.

2.2 Critique

The report from the DLA addressed the questions raised in the protocol but not satisfactorily. Though the format of the protocol was largely followed, the report was not clearly presented in terms of the three areas of the land reform programme, namely restitution, redistribution and tenure reform. Information regarding these three programmes of land reform was combined, making it difficult to understand which specific measures were instituted for each of the three programmes.

Since the DLA is responsible for land reform at the provincial sphere, the response should have given a brief background on the implementation of the measures and the problems encountered by provinces.

It is unacceptable for the DLA not to provide information on how the measures were implemented and the problems experienced therein.

It has been widely reported that although the DLA has instituted progressive pieces of legislation such as ESTA, the implementation of these measures has been problematic in that the right to secure tenure continues to be violated.

2.3 Recommendations

The DLA should provide all relevant information on legislation that was passed to implement the land reform programme. Some crucial pieces of legislation were omitted from the response.

The DLA should in future provide information on difficulties experienced in various provinces regarding the implementation of legislation. The DLA needs to comment on this and indicate on measures being instituted to address the issue of implementation of legislative measures to address security of tenure.

3 BUDGETARY MEASURES

The total budgetary allocation towards land reform for the reporting period was R 842 million, which was a nominal increase from R 761, 320, 000 for the previous year. The budget was to be increased to R 837 million for the financial year of 2000/2001. Of the total amount allocated during the reporting period, only R 679 million was spent, meaning that an amount of R 81 million was not spent. Allocation of budgetary resources as a percentage of the GDP declined from 0.58 percent from the 1998/1999 reporting period to 0.52 percent during the reporting period.

The Department received donor funding of R 33 million for 1999/2000, which was used for training provincial officers, facilitation and, access to credit.

Restitution

The total amount allocated towards the restitution programme during 1999/2000 was R 142 million. This was a nominal increase of 71 percent from R 83 million during the previous financial year. However, the budget was expected to be reduced by 30 percent to R 99 million during the 2000/2001 financial year. The restitution programme also doubled as a percentage of the budget from 9 percent in 1998/1999 to 18 percent during 1999/2000. Only R 122 million (83 percent) of the allocated amount was spent, compared to over-spending for the previous financial year. The reason for the increased allocation for the restitution programme for the financial year was the result of changes introduced in the delivery process, which accelerated the pace of delivery.

Table 1 Budget allocation for the land restitution programme

YEAR	TOTAL ALLOCATION IN RANCS	ALLOCATION AS A % OF THE DEPARTMENT'S TOTAL BUDGET	ACTUAL EXPENDITURE IN RANCS
1998-1999	83 322 000	9,0	114 101 000
1999-2000	142 863 000	18,0	122 196 000
2000-2001	99 000 000		

Redistribution

Budgetary allocations towards the redistribution programme went down by 30 percent from R 233 million during 1998/1999, to R 163 million during the 1999/2000 financial year. It was expected to be increased to R 309 million during the 2000/2001 financial year. Allocations towards the redistribution programme were expected to be increased from 21 to 38 percent as a share of the DLA's budget.

Table 2 Budget allocation for the land redistribution programme

YEAR	TOTAL ALLOCATION IN RANCS	ALLOCATION AS A % OF THE DEPARTMENT'S TOTAL BUDGET	ACTUAL EXPENDITURE IN RANCS
1998-1999	233 000 000	27,7	266 283 000
1999-2000	163 862 000	21,5	154 959 000
2000-2001	309 147 000	36,9	

The variance between the budgets for the periods 1998/1999 and 1999/2000 was R 69 138 000. This figure reflected a reduction in the budget allocation. The Land Redistribution Programme received the lowest allocation for the period under review compared to the other two periods. According to the information provided by the DLA, the reason for the low allocation was that a larger percentage of the Department's

budget was allocated to the land restitution programme. The report also indicated that due to the low allocation for the programme, various needs related to the programme were not adequately met.

Tenure reform

Table 3 Budget allocation for the land tenure reform programme

YEAR	TOTAL ALLOCATION IN RANDBS	ALLOCATION AS A % OF THE DEPARTMENT'S TOTAL BUDGET	ACTUAL EXPENDITURE IN RANDBS
1998-1999	47 000 000	5, 6	34 817 000
1999-2000	45 849 000	6, 0	24 734 000
2000-2001	309 147 000	36, 9	

The period under review saw a reduction in the allocation towards the tenure reform programme, from R47, 000, 000 during 1998/1999, to R45, 849 000 during the 1999/2000 reporting period. There was expected however, a dramatic increase to R 309 million. The reason provided for the low allocation was due to loss of staff and resignations, which gave rise to the drop in expenditure. According to the report, the budget allocation was adequate in that it was enough to meet the needs of the programme.

3.2 Critique

A number of observations can be made about budgetary measures towards the realisation of land rights contained in the Constitution. These include the utilisation of financial resources, adequacy and sustainability of budgetary allocations towards the restitution programme, and confusion regarding budgetary allocations towards the redistribution and tenure reform programmes.

Questions regarding the adequacy and sustainability of the restitution programme can be raised. The Department reported that before the reporting period, 44 claims had been settled, and that at the end of the reporting period, 8288 claims had been settled, suggesting that about 8244 claims were settled during the reporting period. An amount of R 122, 196, 000 was spent. While significant progress has been made in settling restitution claims from previously negligible levels, the rate of delivery remained too slow to address more than 42 000 claims reportedly received by 1999. It is also clear that despite an increase in delivery, about 15 percent of the allocated funds were unspent, suggesting that the Department was still not able to make optimum use of its financial resources for the restitution programme.

It is also worth noting that budgetary allocations towards the restitution programme were expected to be reduced by more than 30 percent to R99, million during the 2000/2001 reporting period. Therefore, despite an improvement in the administrative mechanisms for the restitution

programme, the programme was increasingly faced with decreased financial resources.

In explaining the drastic reduction of just less than 30 percent in the budgetary allocation for the redistribution programme, the DLA cited the shift of the budgetary allocation towards the restitution programme. The impact of such a shift is that at the current rate of delivery, it would take the DLA about 45 years to distribute only 15 percent of all available farmland.¹⁴ In such a scenario, it is particularly important for the DLA to develop institutional and financial mechanisms for speeding up delivery, as opposed to reducing the budgetary allocation.

A particularly noticeable fact, especially in the tenure reform programme, is under-spending. The DLA is not utilising budgetary resources optimally towards improving security of tenure, further attesting to the overall weakness in the implementation of tenure reform. What was not clear from the report was whether the DLA would be in a position to utilise the huge increase in the budgetary allocation, which was expected for the 2000/2001 financial year. This is said in view of the apparent lack of capacity by the DLA to utilise a relatively small budgetary allocation for the 1999/2000 financial year.

3.3 Recommendations

The state should consider the implications of current financial arrangements towards the restitution programme. The particular issues that require attention include the implications of current and projected levels of funding on the demand for restitution.

There is a need for drastic measures to address the under utilisation of budgetary allocations towards the tenure reform programme.

Budgetary allocations towards land reform remained low during 1999/2000 and were not expected to be increased. The key issue is that even with the improvement in financial management, which could lead to better utilisation of financial resources, the budget would remain highly insufficient. This requires immediate attention.

4 OUTCOMES

The South African Human Rights Commission required the DLA to provide information on the following:

- area of land needed per family for settlement or production
- size of land made available to those who were historically and currently denied access to land
- size of land made available to those who were dispossessed of land
- number of land redistribution grants awarded

¹⁴ Land redistribution at <http://www.nlc.co.za/mdredis.htm> site visited on 18/10/01.

- number of compensations awarded
- number of families that have acquired land tenure security

While the information provided was unacceptably limited, the DLA had the following to report:

- that 696 346 ha of land was made available for people who were previously denied access to land
- that only 20 of the land claims were from the rural areas
- 268 306 ha was made available for redistribution. 7516 grants for restitution were awarded to the value of R 1 813 30 293
- 51 345 families were reported to have acquired security of tenure during the period under review

No information was provided with regard to questions on indicators relating to the National Action Plan.

4.1 Critique

The report failed to provide adequate information with regard to questions in the outcome section. The only information provided was with regard to the size of land made available to address problems pertaining to access to land. The number of hectares provided by the DLA's report does not tally with the number provided by the National Land Committee, which is 174 286 ha for the period under review.

With regard to the size of land made available to people who were previously denied access to land, the report did not indicate how the land was divided according to the different categories that represented the vulnerable and previously disadvantaged groups. Insofar as the grants were concerned, the report should have shown how grants were divided between urban and rural people. The Department also failed to indicate what progress had been made in the land tenure programme for people who reside on privately owned land in the farming areas.

In the *Grootboom judgment*, although the case was primarily about the right of access to housing, the Constitutional Court in its order also addressed the right of access to land.¹⁵ The order indicates that the Constitution requires the state to provide relief to people who have no access to land, no roof over their heads, and who are living in intolerable conditions or in crisis situations. The *Grootboom judgment* recognises that the availability of land is central to the realisation of the right of access to housing. Without secure land tenure, people who are in similar conditions to those in Wallacedene would suffer the same human rights violations since the right of access to housing is dependent on the right of access to land.

¹⁵ *The Government of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC).

It is highly unacceptable that only 20 claims had been received from rural areas. This is matter that also requires investigation, especially the information provided to the SAHRC for the 2nd Economic and Social Rights Report that the DLA had embarked on awareness raising campaigns about claims, procedures and related issues. It is important that the effectiveness of the campaigns, especially in addressing restitution issues affecting rural areas, be assessed.

4.2 Recommendations

The report should strive to provide information required by the protocol by conducting its own research on information that is not readily available. The report should show the amount of land that was made available for distribution against the amount of land that is needed to address the problems pertaining to access to land. The report needs to have sufficient information with regard to the progress made in farming communities concerning the right of access to land. The report should also provide a provincial breakdown for the outcome indicators.

5 MONITORING

The Department uses the Core Project Data System (CPD 2000) and the Restitution Monitoring System. The two systems were being integrated with other information sources such as the Public Land Inventory, Financial Management System and PERSAL.¹⁶ These systems will form one database that will be known as the 'Land-base.'

The following five indicators were used to monitor the progressive realisation of the right of access to land:

- Project, case or claim information
- Beneficiary or claimant information
- Land details
- Financial information
- Progress indicators

Financial information was readily available on the two sections of the National Land Reform Programme. The Directorate: Monitoring and Evaluation was given the task of coordinating the preparation of the response to the Commission, which in the past was assigned to different directorates. The Department has also set up a task team on Integrated Information System to assist with the gathering of information that is required by the Protocols.

5.1 Critique

¹⁶ The Department did not give the full name of the system.

The report did not provide information on whether any difficulties were experienced in preparing the responses to the SAHRC's economic and social rights protocols. The failure by the Department to provide adequate information on monitoring mechanisms is of concern, as without this information, the efficacy of the departmental programmes cannot be easily assessed.

PART C: CONCLUSION

The measures instituted by the Department of Land Affairs were appropriate and positive towards the realisation of land rights. However, the measures did not address the major problems in the land reform programme.

In the area of restitution, while significant improvement has been realised in the speed of delivery, the measures reported still fail to address the urban bias of the restitution programme, the continuing marginalisation of women and the enormity of the need for restitution. Moreover, it is becoming clear that the programme is likely to be frustrated by declining budgetary allocation, especially as increased allocations to the programme, were done at the expense of other programmes.

There is limited information being provided on the redistribution programme, despite the fact that the programme is moving at an exceedingly slow pace.

Tenure reform has also not made a huge difference in the lives of people who need secure tenure, especially farm workers. Poor implementation of enabling legislation has resulted in very little impact on people living in conditions of insecure tenure. Tenure security, whilst constitutionally and legislatively protected, is still elusive to the most vulnerable of South Africans – steps need to be taken to allow these groups to fully exercise this right.

Perhaps the greatest area of concern is that the Department of Land Affairs has consistently, and across programmes, failed to utilise the entire budgetary allocation for land reform, pointing to inefficiencies in the application of financial resources for programmes. Such under-expenditure cannot be justified given the dire need for land reform in the country.

ABBREVIATIONS

- DLA** - Department of Land Affairs
ESTA - Extension of Security of Tenure Act 62 of 1997
IPLRA - Interim Protection of Informal Land Rights Act 31 of 1996
SADT - South African Development Trust

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CHAPTER EIGHT

THE RIGHT TO SUFFICIENT WATER

PART A: OVERVIEW

1 INTRODUCTION

Before the 1996 constitutional dispensation, there were huge disparities and inequities with respect to access to services including water. The laws governing water in this country were shaped and developed by the needs and aspirations of Whites, who influenced and enacted laws that served their domestic, agricultural and industrial needs.¹ The vast majority of black people especially those in rural areas, had limited access to water services.²

With the advent of the Constitution,³ came the recognition of past injustices, and the need to establish a society based on democratic values, social justice and fundamental human rights. In line with this constitutional mandate, relevant organs of State, namely the Department of Water Affairs and Forestry (DWA), the Department of Provincial and Local Government (DPLG) and provincial local government departments, have developed legislative and other measures towards the progressive realisation of the right to have access to sufficient water.

This chapter assesses information provided by organs of State to the South African Human Rights Commission on legislative and other measures instituted during 1999/2000 financial year towards the progressive realisation of the right of access to water.

2 CONSTITUTIONAL OBLIGATIONS

The right of access to sufficient water is accorded to everyone in s 27(1)(b) of the Constitution, which states that everyone has the right to have access to sufficient water. Section 27(2) requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right.

In a number of international and regional instruments, the right to sufficient water is not explicitly recognised. Most of the instruments provide for the right to an adequate standard of living for the health and well being of the individual and family.⁴ These instruments include the Universal Declaration of Human Rights (UDHR),⁵ the International

¹ J Glaweski *Environmental Law in South Africa* (2000) 509.

² RDSN *Water for All* at http://www.rdsn.org.za/documents/archive/water_sanitation.html. Site visited on 16/08/2001.

³ Constitution of the Republic of South Africa, Act 108 of 1996.

⁴ G E Devenish *A commentary on the South African Bill of Rights* (1999) 366.

⁵ Article 25 of the Universal Declaration of Human Rights (1948).

Covenant on Economic Social and Cultural Rights (ICESCR),⁶ and at the regional level the African Charter on Human and Peoples Rights.⁷ The above-mentioned provisions emphasise the link between food, water, environment, housing and health.

The right to 'adequate water' is specifically provided for in the International Convention on the Elimination of All forms of Discrimination against Women (CEDAW) and Draft Protocol to the African Charter on the Rights of Women.⁸ CEDAW recognises the right of women in rural areas to enjoy adequate living conditions, particularly in relation to sanitation and water supply.⁹

The right to water has also been provided for in the Copenhagen Declaration, where States are supposed to focus their efforts and policies to provide basic needs for all. The efforts should be directed at providing safe drinking water and sanitation to everyone.¹⁰

Access to sufficient water

The Constitution provides for the right of access to sufficient water. In interpreting the right of access to sufficient water, consideration must be given to international law. The Constitution provides that international law must be considered in interpreting the rights contained in the Bill of Rights.¹¹ Access to water implies that water should be both economically and physically accessible. Physical accessibility means that water should be available within a distance accessible to everyone including vulnerable individuals such as children, elderly persons and persons with disabilities.¹² There should be adequate infrastructure and the effective maintenance of facilities and equipment, and equitable access even for under-serviced areas. Economic access refers to the financial costs associated with accessing water.

The right of access to sufficient water in s 27(2) should be understood to mean that the State is not obliged to provide water freely, but is under an obligation to create mechanisms that enable people to have access to sufficient water. In the event of resource constraints, which limit the ability of the State to fulfil its obligations, the State is still obliged to provide a plan of action that demonstrates that the full realisation of the right shall be achieved over time. Furthermore, available resources should be utilised effectively so as to give maximum results, with priority being given to assuring to everyone, the satisfaction of the most basic requirements as

⁶ Article 11 of the International Covenant of Economic Social Cultural Rights (1966).

⁷ Article 16 (1) of the African Charter on Human and Peoples Right..

⁸ Ibid Article 17(1)(a) of the Draft Protocol recognises the right to have access to nutritious and adequate food. In this regard, State parties to this Protocol shall take appropriate measures to provide women with access to clean water.

⁹ Ibid Article 14(2)(h).

¹⁰ Commitment 2 of the Copenhagen Declaration on Social Development (1992).

¹¹ Note 3 above, Section 39(1)(b).

¹² General Comment 12 (1999) para 13.

well as the provision of essential services, including access to sufficient water.¹³

Sufficient water

Sufficient water refers to the quality and quantity required to satisfy basic domestic needs. The quantity refers to the minimum amount of water required to meet basic needs, and the quality refers to the minimum standards acceptable to consumers in terms of health related characteristics. Water quality implies that it should be free from adverse substances such as toxins, bacteria and other harmful substances.¹⁴ This is important because safe drinking water is an essential part of the human diet and is necessary for survival, and should therefore be within acceptable standards with regards to potability (taste, odour and appearance). It should be safe enough for food preparation, bathing, and for washing laundry.

The quantity of water refers to the cartage distance, availability, assurance of supply, and upgradability of services. Availability refers to the flow rate of water from the outlet, which should be available on a regular basis. Assurance of supply refers to the security in the supply, through regular maintenance of the system and ensuring clean water supply, 98 percent of the time. Upgradability refers to the extent to which communities can upgrade a basic service to a higher-level household connection.¹⁵

According to the World Health Organisation (WHO), the quantity of safe water required is 20-40 litres per person per day. In South Africa, the Department of Water Affairs and Forestry has set the minimum quantity at 25 litres per person per day, the minimum cartage distance at 200 metres, with consideration for varying landscapes. This is considered to be the minimum requirement for direct consumption, food preparation and personal hygiene, but not adequate for a full, healthy and productive life.

As mentioned above water rights are inter-linked with several other rights: the right to food, health, housing and a healthy environment. This places an obligation on the State to provide clean drinking water for human consumption, conserve water and provide basic services for sanitation for the protection of the environment. Water is essential for human survival and must be protected against contamination and unhygienic environmental practices for drinking purposes. The right to a healthy environment requires the appropriate disposal of sewage where basic sanitation services should at the very least provide on-site services such as ventilated pit latrines.

¹³ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) (1986) para 28.

¹⁴ Ibid. para 10.

¹⁵ Department of Water Affairs and Forestry *White Paper on the Water Supply and Sanitation Policy* (1994) 15-16.

3 KEY DEVELOPMENTS FOR THE YEAR UNDER REVIEW

The Water Supply and Sanitation Policy released in 1994 and the White Paper on the National Water Policy for South Africa of 1997, guide legislative and other measures instituted by the State, including those instituted during 1999/2000. The Water Supply and Sanitation Policy sets out the policy for water supply and sanitation services, while the White Paper sets out the policy for the management of both the quality and quantity of scarce water resources.

There are two pieces of legislation, enacted before the reporting period that broadly set the context for the progressive realisation of the right of access to water. These are the Water Services Act 108 of 1997 and the National Water Act 36 of 1998. The two Acts are founded on principles of equity, optimal and sustainable use, responsibility and accountability.¹⁶ It is against the above that legislative and other measures discussed below have to be understood.

3.1 Policy developments

The only major policy developments that took place during the reporting period was the Water Conservation and Water Demand Management (WC/WDM) Strategy for the Water Services Sector.¹⁷ The WC/WDM was one of the four sectoral strategies being developed by the Department, due to the inefficient usage of water found in all water sectors and the lack of recognition of the value of water. Within the WC/WDM strategy the other strategies relate to industry, mining and power generation; agriculture and forestry; environment and water management systems. The integration of all these sectoral strategies will form the National Water Conservation and Water Demand Management Strategy. The overall WC/WDM strategy will then be a component of the Water Resources Strategy promulgated in the National Water Act mentioned above.¹⁸

The purpose of the Water Services Sectoral Strategy was to develop a model that could be used as a guideline by water services authorities. It was aimed at identifying measures to ensure the development and implementation of the WC/WDM by all Water Services institutions.

3.2 Legislative developments

There were no legislative developments on the right to have access to sufficient water that took place during the reporting period. The Department of Water Affairs and Forestry was still implementing the Water Services Act¹⁹ and the National Water Act²⁰ respectively.

¹⁶ Department of Water Affairs and Forestry *Water Conservation and Demand Management National Strategy Framework Draft* May (1999) 8.

¹⁷ Water Conservation and Water Demand Management Strategy for the Water Services Sector: at http://www.dwaf.gov.za/directorates/water_percent20use_percent20percent26percent20cons/lastrat1.doc. Site visited on 16/10/01.

¹⁸ Ibid.

¹⁹ Water Services Act 108 of 1997.

The Water Services Act makes provision for an institutional framework for the delivery of water supplies and sanitation, and recognises the right of access to basic water supply and sanitation necessary to secure sufficient water and an environment not harmful to health or well being.

The National Water Act shifts emphasis from supply management to demand management as an approach to water management and seeks to conserve the nation's water resources by lessening demand through pricing mechanisms and other innovative means. The Act further declares the national government to be the public trustee of the nation's water resources so as to ensure the sustainable and equitable use, management and conservation of water resources. The Act prioritises socio-economic needs, which include the right of access to sufficient water.

3.3 The Budget

During the financial year 1999/2000 the budgetary allocation for the Department of Water Affairs and Forestry amounted to R2, 9 billion or 1.1 percent of the national budget. Of the R2, 9 billion allocated to water, R1, 58 billion was allocated to the Programme of Regional Implementation, which entails the establishment and maintenance of water services schemes and construction projects. Spending on the supply of new water connection services in rural areas for the reporting period amounted to R750 million, which was mostly utilised in the Water Services Capital Programme. The new sanitation infrastructure programmes accounted for about 10 percent of the R750 million of the allocated budget.

3.4 Outcomes

From 1994 to 31 March 2000 water was supplied to 5,4 million people in total.²¹ By the end of 1999, more than 4,4 million people in rural areas had gained access to water. During the year under review, 545,1 million cubic metres of water were delivered to South Africa via the Lesotho Highlands Water Project. The Project augments the water supply in the Vaal System and generates hydro electricity for Lesotho. This project shows positive steps by the State to reserve and provide water in a country with scarce water resources.²²

The Pongolo and Elands River Government Water Scheme are amongst some of the projects that have been successfully initiated by the State to realise the right to have access to water.

An issue that has come to the fore in recent times is the sustainability of water delivery. Some of the water provision projects have become dysfunctional or fallen into disrepair. The pipes ended up delivering dirty water thus forcing people to use alternative sources such as rivers and

²⁰ National Water Act 36 of 1998.

²¹ Department of Water Affairs and Forestry *Progress Report March (2000)*.

²² Department of Water Affairs and Forestry *Annual Report 1999/2000 (2000)* 32.

streams.²³ This is a result of many factors, one being the inability of people in the rural areas to pay for water service. Declining consumption also threatens the financial viability of schemes, as local authorities do not generate sufficient revenue to sustain the schemes.

4 CONCLUSION

The lack of water and sanitation is a public health crisis, and deprives people their right to live in dignity. Although government has made an attempt to realise the right of access to water, statistics indicate that the most vulnerable groups in society do not enjoy access to clean and adequate water. The recent outbreak of cholera in some provinces highlights the fragile and limited infrastructure for safe water supply and sanitary health.

The lack of access to basic water services affects women and children, especially in rural areas where women spend most of their time collecting water. Children in such circumstances die from preventable diseases related to poor sanitation and lack of clean water.

The allocation of resources for water services has economic consequences with secondary costs far in excess of those required to provide everyone with water and sanitation infrastructure. The spread of the cholera epidemic that began in August 2000 increased costs and the burden on health care services and has resulted in the loss of productivity for the economically active population. The Department should develop more short-term solutions because any long-term delivery plans, especially for the provision of basic services will result in more money being spent on treating people suffering from water-borne diseases and the rehabilitation and maintenance of existing over-burdened infrastructure.

²³ UNDP *Transformation for Human Development: South Africa* (2000) 30.

PART B: ANALYSIS OF RESPONSES BY ORGANS OF STATE

This section analyses information provided by relevant organs of state on policy, legislative and budgetary measures taken towards the progressive realisation of the right of access to water. Unlike in the preceding reporting periods, where the protocol was sent only to the Department of Water Affairs and Forestry, for the current reporting period the protocol was also sent to the Department of Provincial and Local Government, as well provincial departments responsible for local government. This was in view of the fact that the Department of Provincial and Local Government, through provincial departments responsible for local government, administer the Consolidated Municipal Infrastructure Programme (CMIP). Water is one of the services provided in CMIP.

1 POLICY MEASURES

1.1 National Sphere

DEPARTMENT OF WATER AFFAIRS AND FORESTRY

The Department of Water Affairs and Forestry (DWAF) did not provide information on new policy measures instituted during the 1999/2000 financial year but provided information on the implementation of a previously instituted policy measure: the Water Services Capital Programme.

1.1.1 Water Services Capital Programme

DWAF reported that it was still implementing the Water Services Capital Programme developed for the delivery of basic water for people in rural areas. Altogether, 5, 447 451 people living in rural areas had access to the minimum standard of 25 litres per person per day, at a cartage distance of within 200 m.

1.1.2 Vulnerable groups

DWAF reported that the Water Services Capital Programme mainly targeted people in rural areas. The Department concentrated mainly in rural areas, as urban areas were catered for through the Consolidated Municipal Infrastructure Programme (CMIP) administered by the Department of Provincial and Local Government (DPLG) and provincial departments responsible for local government.

1.1.3 Difficulties experienced in implementing the measures

The Department indicated that limited financial resources and inadequate water sources had made it difficult to provide high levels of service. The measures were implemented through regional offices of DWAF and other

agencies. Beneficiary communities were also involved in the implementation process.

DEPARTMENT OF PROVINCIAL AND LOCAL GOVERNMENT

The Department of Provincial and Local Government (DPLG) reported that the CMIP was still being implemented. The CMIP was designed to provide internal bulk and connector infrastructure in order to support household infrastructure for needy families to enhance the integration of previously divided areas.²⁴ One of the aims of the programme was to enhance the developmental impact of the infrastructure delivery process through skills transfer, job creation, and small, medium and micro enterprise development. Another aim of the programme was to provide capital funding and capacity building to municipalities to help minimise infrastructure backlogs, which would be minimised through the provision of basic levels of infrastructure and facilities to low-income households in rural and urban areas over a period of 10 years.²⁵ Capital grants are made available to municipalities to provide services such as water, roads, solid waste removal, sanitation and community lighting to needy communities.²⁶

Since the programme was targeted at needy communities, CMIP funds were utilised for new services, and not for upgrading services already at an intermediate or full level.²⁷

1.1.4 Constitutional obligations and vulnerable groups

The DPLG indicated that the CMIP was reasonable and effective, with 66 percent of the beneficiaries receiving access to water and sanitation during the reporting period.

The Department maintained that over 14 million people benefited from the programme, of which over 3 million were in rural areas. According to the Department, the programme respects the right to have access to sufficient water because it does not deprive or obstruct the provision of the right for the needy.

1.1.5 Difficulties experienced in implementing the measures

Lack of implementation capacity by the provincial and local spheres of government was a major difficulty faced in the implementation of the

²⁴ Needy households are defined as those who earn less than R3 500 per month. An amount of R3 000 will be made available for each site.

²⁵ Department of Provincial and Local Government *The Consolidated Municipal Infrastructure Programme Handbook* 3rd edition (1998).

²⁶ CMIP at <http://www.local.gov.za/DCD/dcdlibrary/cmip/cmipa-d.html>. Site visited on 07/08/2001.

²⁷ Ibid.

measures. Other difficulties were the floods that took place in the provinces of Mpumalanga, Northern Province, North West and Gauteng that had an effect on expenditure patterns as construction was halted for long periods of time.

1.2 Provincial Sphere

Only Gauteng, KwaZulu-Natal, Mpumalanga, Northern Province, North West and Western Cape departments responded to the protocols. However, the Northern Province only provided information on policy measures, programmes and other related services.

The provinces that responded indicated that they were implementing the CMIP. Only the North West was implementing the Rural Municipal Infrastructure Programme (RMIP) for the provision of water to rural areas.

1.2.1 Vulnerable groups

The Gauteng and North West departments reported that the CMIP was meant to benefit vulnerable groups, more specifically people living in rural areas. Projects apply different criteria and take into account the peculiarities of the rural situation. Low-income earners benefited because of the inclusion of households, who earn less than R3 500 per month. People in informal settlements were accommodated in communal projects. Both departments reported that the measure was reasonable, even though there were some problems associated with lack of capacity.

The KwaZulu-Natal Department reported that the programme enhanced the provision of potable water to communities in need.

The Western Cape reported that the CMIP was reasonable because 37 percent of funds were allocated to water projects. There were 247, 327 beneficiaries in rural areas and 752, 166 people from poor communities who benefited from the programme.

1.2.2 Difficulties experienced in implementing the measures

The departments of Gauteng, KwaZulu-Natal, Mpumalanga, North West and Western Cape experienced problems due to lack of capacity and insufficient budget allocation for local authorities tasked with the provision of water and sanitation facilities. The Western Cape Department also reported that other problems were due to uncertainty caused by the new demarcations in preparation for the 2000 local government elections.

1.3 Critique

The non-reporting by some provincial departments such as the Eastern Cape and Free State is a violation of the Constitution in terms of providing information to the South African Human Rights Commission to enable it to

fulfil its mandate. The departments that provided information on policy measures provided insufficient details.

DWAF provided information on policies that were instituted before the year under review, while there were new policies that were not reported. For instance, the Department did not report on the Stream Flow Reduction Activities (SFRA), a measure that was developed to secure a constant supply of water for basic human consumption through regulating third party activities that might interfere with that supply. According to the provisions of the National Water Act, there is a need for the licensing of stream flow reduction activities.²⁸ The SFRA sets the policy and procedures for the licensing of land use that reduces stream flow. Activities include forestation for commercial purposes, which involves the conversion of stands of invasive trees or abandoned woodlots to managed plantations.

During the year under review, existing contracts on the *Built Operate Train and Transfer* (BOTT) initiative were re-negotiated and extended for two years.²⁹ BOTT is part of the Private Public Partnerships mentioned previously in the overview section.

The Constitution requires that provincial executives take responsibility for the implementation of national policies as well as initiate their own policies.³⁰ By not implementing measures, provincial departments are falling short of fulfilling constitutional provisions relating to the right of access to water in the Constitution.

The policies and programmes of the departments are not contributing sufficiently to the improvement of the lives of the most vulnerable groups. This might be due to the manner in which the measures are being implemented. The most vulnerable groups still do not have access to sufficient water with only 1,1 percent of the water being utilised by rural communities.³¹ The challenge facing DWAF and DPLG seems to be the implementation of the measures. In 1998 approximately 74 percent of households needed to fetch water on a daily basis, and 21 percent lived at a cartage distance greater than 500 m away.³² The measures to progressively realise the right to have access to water, must be reasonable both in their conception and implementation.³³ Non-implementation or lack of proper implementation negatively impacts on the effectiveness of the measure.

²⁸ Department of Water Affairs and Forestry *SFRA Policy and Procedure - Final Draft*. November (1999) 4.

²⁹ Department of Water Affairs and Forestry *Built Operate Train and Transfer* at <http://www.dwaf.pwv.gov.za/programs/BoTT>. Site visited on 18/09/01.

³⁰ Section 125 of the Constitution of the Republic of South Africa Act 108 1996

³¹ Note 2 above.

³² J May (ed.) *Poverty and Inequality in South Africa* (1998).

³³ *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169.

The BOTT is reasonable because its provisions have the potential to contribute to building the capacity of stakeholders in the delivery of water and related services. The measure respects, protects, promotes and fulfils the right in that it represents deliberate actions aimed at securing delivery of water to communities. Although the Public Private Partnerships (PPP's) projects are good for the delivery of services, the manner in which they are being implemented seems to frustrate the objectives of the partnership. The beneficiaries of the services rendered by PPP's are sometimes denied access to sufficient water if they are unable to pay for water and sanitation services. The water supply is cut off due to non-payment for services. Private companies involved in such projects do not take into consideration the plight of the marginalised, who are unemployed and living in poverty. Therefore, this means that even with such partnership government still needs to retain some control over the distribution of resources.

The CMIP is reasonable and effective, as it has ensured access to 66 percent of the targeted groups. The programme is striving to promote equitable access to resources, thereby reducing inequalities relating to access to water. It targets poor communities earning less than R3 500 per month to gain the right of access to water. For this reason the measure is reasonable because it targets one of the vulnerable groups and in line with the Copenhagen Declaration the measure seeks to provide equal access to resources and basic services.³⁴

The major shortcoming is the lack of monitoring of projects to assess sustainability. Lack of maintenance has also resulted in several water facilities deteriorating much earlier than their expected duration. Irregular access to water violates the right because it does not ensure a sustainable supply of water.

1.4 Recommendations

The Department of Development Planning and Local Government in Gauteng should devise infrastructure maintenance within the context of sustainability of the water supply. The role of communities in the maintenance of water facilities needs to be encouraged.

Measures such as the BOTT and CMIP should be given maximum financial support to ensure capacity building of service providers, especially in view of the fact that lack of capacity seems to be the main obstacle in the provision of services.

DWAF should ensure that the Water Services Capital Programme continues to be implemented to eliminate the backlog in service provision to rural communities. The Department should develop measures that consider the special needs of people with disabilities, the elderly, female-headed households and people living in informal settlements.

³⁴ Note 10 above, Commitment No 2.

There should be better collaboration in the Public Private Partnerships to ensure that there is equitable access to water resources, especially for vulnerable groups. Government must retain control and subsidise projects where communities cannot afford to pay.

2 LEGISLATIVE MEASURES

2.1 *National Sphere*

According to the response from DWAF, two legislative measures were being implemented for the realisation of the right of access to sufficient water. These were the Water Services Act 108 of 1997 and the National Water Act 36 of 1998.

To ensure the implementation of the provisions of the National Water Act, a number of Regulations were developed and published during the reporting period. The first Regulation is on the Use of Water for Mining and Related Activities.³⁵ This Regulation is aimed at protecting water resources from mining related activities by ensuring that no environmental laws are contravened during such activities. The second Regulation on Registration of Water Use regulates the registration of water uses including existing lawful water uses in terms of s 34(2) of the National Water Act.³⁶

DWAF believes that the effects of the measures are to be felt gradually, in the medium to long term. DWAF also believes that legislative measures were reasonable in promoting and fulfilling the right of access to sufficient water.

The Water User Association and the Catchment Management Agency are the two institutions, which were created for the protection, promotion and conservation of national water resources.

1.4.1 *Difficulties in implementing the measures*

Lack of capacity in the municipalities, who are responsible for the delivery of services was identified as a major problem as was non-payment for services. These factors threaten the sustainability of the delivery of water services.

2.2 *Critique*

The response from DWAF provided substantial information on the measures instituted before the year under review, but insufficient details on new measures. Information regarding how the measures gave effect to the constitutional obligations to respect, protect, promote and fulfil was not adequate.

³⁵ GN No. 704 dated June 1999, 20119.

³⁶ GN No. R 1352 dated November 1999, 20606.

It is also imperative for DWAF to provide information on how the measures have impacted on vulnerable groups as required by the protocol. Regarding vulnerable groups, the report made provision for general information only. The conditions of these various groups are not the same and for the purposes of monitoring economic and social rights, the conditions of the various vulnerable groups should be clearly understood. The response indicated that the measures were specifically aimed to benefit and give special considerations to people in rural areas, but no mention was made of other groups such as those living in informal settlements, in urban and peri-urban areas, refugees, and children.

The Department of Provincial and Local Government provided no information on the legislative measures developed to progressively realise the right.

2.3 Recommendations

The protection, use, development, conservation, management and control of water services are very important. Mining is not the only activity that affects water use; there is also the problem of domestic waste which can adversely affect underground water. Therefore, DWAF must develop other legislative measures that would address the problem of domestic waste and its affect on underground water resources and also the extent to which ventilation improved pit latrines affect underground water.

3 BUDGETARY MEASURES

3.1 National Sphere

DEPARTMENT OF PROVINCIAL AND LOCAL GOVERNMENT

Information provided on the programmes has been summarised in Table 1 below.

Table 1 Budgetary allocations towards programmes of the Department of Water Affairs and Forestry

PROGRAMME(S)	YEAR	TOTAL ALLOCATION IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
Water Services	1998-1999	874 648 000	-
	1999-2000	614 359 000	-
	2000-2001	472 121 000	-
Water Resources Assessment	1998-1999	68 000 000	68 000 000
	1999-2000	78 000 000	75 000 000
	2000-2001	86 000 000	-
Water Resources Planning	1998-1999	48 000 000	48 000 000
	1999-2000	53 500 000	53 500 000
	2000-2001	53 200 000	-

Water rights

PROGRAMME(S)	YEAR	TOTAL ALLOCATION IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
Water Resources Development	1998-1999	185 708 000	158 252 000
	1999-2000	213 388 000	202 053 000
	2000-2001	194 994 000	-

[-] denotes that no information was provided

The budget allocation as indicated in Table 1 shows a decrease in the allocation for Water Services from R 874, 648, 000 for the year 1998/1999 to R 614, 359, 000 for the year 1999/2000. The budget allocation towards this programme decreased further to R 472, 121, 000 for the 2000/2001 financial year. The allocation for Water Resources Assessment shows a different trend, where the budget allocation has increased over the three consecutive financial years. Furthermore, the budget allocation for Water Resources Planning and Development has been fluctuating over the three financial years.

Water Services

According to DWAF, the budget allocation for Water Services encompasses funding for capital programmes only, and not operation and maintenance of services. The Department reported that variances were due to the reprioritisation of issues relating to Water Resources Management. DWAF maintains that the allocation was not adequate for the assessment of the ecological status of water resources to determine water reserves.

The response from DWAF indicated that special considerations has been given to vulnerable groups with the exclusion of female-headed households and homeless persons. The Department maintained that Water Resource Planning deals with the supply of bulk water to all users including the above-mentioned groups. However, DWAF prioritises areas where there is a shortage of access to clean and safe water.

DWAF's Annual Report indicates that during the year under review R735 million was spent on Water Services Programmes, with water being provided to over 1.6 million people.³⁷ The same report also indicates that over R3, 6 million was spent in respect of Water Services projects in various provinces affecting over 4,9 million people. The community Water Supply and Sanitation Programme was allocated R50 million as part of the Poverty Alleviation Programme and R30 million for Economic Development Projects.

Water Resources

In response to variances in the allocation for Water Resources Development, DWAF reported that there was under-spending in 1998/1999 due to delayed progress by contractors. DWAF maintained that the allocation was adequate because of the preference to demand

³⁷ Department of Water Affairs and Forestry *Annual Report (1999-2000)*.

management and development over building of dams. The projects would therefore benefit rural communities and poor people.

3.2 Provincial Sphere

Only Gauteng, Mpumalanga, North West and Western Cape provided the information on their respective budgetary allocations for Water Services as summarised in Table 3 below.

Table 2 CMIP Allocations per Province

PROVINCE(S)	YEAR	CMIP ALLOCATION IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
Gauteng	1998-1999	64 841 000	37 064 000
	1999-2000	41 561 000	19 200 000
	2000-2001	53 198 000	-
Mpumalanga	1998-1999	-	-
	1999-2000	-	-
	2000-2001	17 900 000	
North West	1998-1999	76 320 394	76 320 394
	1999-2000	74 955 000	74 955 000
	2000-2001	70 710 000	70 710 000
Western Cape	1998-1999	78 385 000	19 117 584
	1999-2000	99 483 849	24 263 454
	2000-2001	86 724 000	21 151 411

[-] denotes that no information was provided

Allocation towards the Consolidated Municipal Infrastructure Programme showed different trends. The allocation for Gauteng decreased from R64, 841, 000 during 1998/1999 financial year to R41, 561, 000 for the period 1999/2000. The budgetary allocation for Gauteng increased for the period 2000/2001. In the North West, the budget allocation for the three financial years decreased. For the Western Cape Department, the allocation was fluctuating; it increased for the financial year 1999/2000 and decreased for the financial year 2000/2001.

Variances: The Gauteng Department of Development Planning and Local Government reported that there was under-spending, which was caused by managerial problems.

Budget adequacy: The Gauteng Department of Development Planning and Local Government indicated that the allocation was adequate for Water Services Programme because it was incorporated into the housing budget.

The North West on the other hand indicated that the allocation was inadequate to meet the needs of the province. As a result, the Department had to shelve a number of projects. The allocation only catered for 16 000 households which was not adequate to address the backlog of 486 000 households without water connections. To address this inadequacy and other estimated 50 000 people living below the RDP standard, the province would need R7, 8 billion and funds from other sources.

The Gauteng and North West indicated that the allocation was designed to benefit vulnerable groups. The Rural Infrastructure Programme was implemented by the North West province to benefit rural people. The CMIP also helped with the provision of houses to homeless persons because it was also linked to the housing programme.

The CMIP Quarterly Report of the DPLG shows that the biggest allocation in the Free State went to Water and Road projects. In KwaZulu-Natal, 89 percent of the allocations went to Water and Roads. For the North West province, the allocation for Water Services increased to 53 percent.

The information on the budget allocation provided by KwaZulu-Natal was not for water related projects only, but also for all the projects in the Department. The information has been summarised in the Table 3 below.

Table 3 Total allocation for the KwaZulu-Natal

YEAR	TOTAL ALLOCATION IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)	FUNDS FROM OTHER SOURCES IN RAND(S)
1998- 1999	146 183 000	146 183 000	29 000 000
1999- 2000	153 408 000	153 408 000	10 000 000
2000- 2001	186 828 000	107 747 000	107 747 000

3.3 Critique

Information provided on the budgetary allocations towards the Regional Implementation Programme was not included, as allocation for that programme was done at the regional level. No information was provided on allocations towards the Integrated Water Resources Management and no reasons were provided for the omission. The DWAF and the DPLG failed to provide the per capita allocation on the programmes or projects being implemented.

Lack of complete information from some provinces and the Department of Provincial and Local Government made it difficult to make a proper analysis. The inability of the Mpumalanga Department to report on how much money was actually spent on the CMIP also compromised the analysis. Mpumalanga only provided information on the allocation of the year under review, and there was no water project allocation in the previous years.

DWAF under-spent on some of its water resources components, such as in Gauteng and Western Cape. No explanations were given for under-spending. The South African Municipal Workers Union reports that there were about 2 million community taps in disrepair.³⁸ Earlier in the report, it was stated that government was also concerned about the maintenance of new connections. Services were collapsing and yet the Department responsible for providing water resources was not spending all the

³⁸ UNDP *Transformation for Human Development: South Africa* (2000) 29.

allocated funds. Most of these deteriorating facilities were in communal areas serving poor people.

DWAF stated that the budget allocation was inadequate but failed to account for spent money, by indicating as to whether the funds allocated were appropriately spent for water services. The Limburg Principles state that the manner in which the financial resources were spent was essential for the progressive realisation of the right.³⁹ Therefore, the inappropriate use of funding contributes to the violation of the right.

The Gauteng Department of Development Planning and Local Government admitted that under-spending was due to managerial problems. However, the Department failed to indicate steps that will be taken to address the situation.

The allocation in other provinces represented a reasonable measure to promote access to water for poor people. The Free State and KwaZulu-Natal departments spent more on water supply.⁴⁰ This was regarded as a positive action, which would ultimately contribute to the progressive realisation of the right because there is a deliberate State action aimed at providing access to water.

3.4 Recommendations

DWAF should reprioritise resources in the provision of water and related services. This would entail setting more funds aside for infrastructure and maintenance.

Measures should be developed for the proper monitoring of budget expenditure and the early identification of shortfalls in the budget allocation. The provincial departments of local government should make effective use of their budget allocations in order to address past inequalities in the provision of water services. The respective national and provincial departments should develop proper financial management and accounting systems for improved management in spending allocated funds.

4 OUTCOMES

The departments were required to provide information on indicators that show the number of communal taps installed during the reporting period; taps that were not in working order; households with access to communal taps, and those with piped water. Information on households that use other water sources such as water tanks/carriers and rely on unprotected water sources, such as springs and dams was also required. Departments were required to provide information on the number of households with water

³⁹ Note 13 above, para 23.

⁴⁰ Department of Provincial and Local Government *CMIP Quarterly Report* (Jan-Mar 2000).

sources within varying distances, ranging from less than 200 m to greater than 1000 m.

The last set of indicators requested was on standards in terms of litres per person per day, per household, the acceptable level of microbes per litre of drinking water, and the number of people whose access to water was below departmental standards.

4.1 National Sphere

DWAF provided inadequate information on outcomes while the DPLG stated that the number of beneficiaries of Water and Sanitation projects amounted to 66 percent who received potable water supply and sanitation.

4.2 Provincial Sphere

Except for the North West, none of the provincial departments provided information on the indicators. The North West reported that more than half a million people in the province did not have access to piped water. There was a backlog in housing delivery, and concomitant lack of access to piped water. Funding made available via the CMIP was insufficient to address the backlogs and to meet the growing need. The province did not fund any water related projects due to budgetary constraints. This was the main factor accounting for little progress in supplying water.

4.3 Critique

DWAF provided information that was inadequate and not helpful for the analysis. The failure to respond to the outcomes by provincial departments is not acceptable. The lack of information in the outcomes section suggests that provinces do not have proper information systems in place to monitor the progressive realisation of the right of access to water.

Other sources indicate that there has been a slight increase in the number of people gaining access to piped-water on site, from 78,5 percent in 1995 to 83,4 percent in 1999. The number of people using boreholes and rainwater tanks decreased from 10,0 percent in 1995 to 4,7 percent in 1999.⁴¹ Even though there was an increase in access to water supply and services, there were still people mostly from vulnerable communities, who still use contaminated water directly from rivers and streams. This indicates that access to sufficient clean and safe water for the poor and marginalised was not improved sufficiently.

Figures provided by Statistics South Africa, suggest that different communities relied on different water sources, as shown in the Table below.

⁴¹ Statistics South Africa *South Africa in Transition: selected findings from the October household survey of 1999 and changes that have occurred between 1995 and 1999* (2001) 4.

Table 4 Different sources for water used by communities⁴²

Main source of water	Total	African	Coloured	Indian	White
Running water in dwelling	4 168	1 681	660	257	1 559
Running water, on site or in yard	2 911	2 722	160	4	24
Public Tap	1 867	1 822	41	4	0
Water Carrier/ Tanker	100	95	5	-	0
Borehole on site	96	85	3	-	8
Borehole communal	271	268	2	0	0
Tank water on site	40	33	6	-	1
Flowing Water/Stream	556	545	6	0	0
Dam/Pool/ Stagnant water	134	132	2	-	-
Wells	139	137	1	-	1
Springs	321	316	3	-	2

Table 4 above indicates that a number of people were still using unprotected water sources, especially flowing waters and springs. This phenomenon was more prevalent among African communities.

Table 5 Cartage distance for the availability of water⁴³

Distance	Area	Total	African	Coloured	Indian	White
Less than 100m	Urban	395	373	22	2	1
	Rural	628	613	13	1	1
100m-less than 200m	Urban	6 503	173	10	1	-
	Rural	4 268	712	11	1	-
200m-less than 500m	Urban	70	69	1	-	-
	Rural	530	527	3	-	-
500m- less than 1000m	Urban	43	41	2	-	-
	Rural	530	527	3	-	0
1 km or more	Urban	16	15	0	1	-
	Rural	407	404	1	2	0

The information in Table 5 shows that a great number of African communities especially those in rural areas were still travelling long distances to collect water. The information indicates that physical access to water was still a problem for many communities. The state was thus in violation of the right when it fails to ensure the satisfaction of, at the very least, the minimum essential level required for an adequate standard of living.⁴⁴ The measures instituted have to respond to the needs of people who were most desperate.⁴⁵

4.4 Recommendations

⁴² Provision of water services at http://www.statssa.gov.za/RELEASE/Household/99/Section_percent206.htm. Site visited on 18/09/01.

⁴³ Ibid.

⁴⁴ General Comment 12 (1999) para 17.

⁴⁵ Note 33 above, para 44.

The measures that were instituted by DWAF to progressively realise the right of access to sufficient water, whether in the form of policies, programmes or projects, should be in such a manner that they take into consideration the plight of the majority of South Africans who were living in poverty. In supplying water to people at a price, those who were unable to pay were denied access to the supply of water. The DWAF has to devise means of ensuring that people who are unemployed have access to water and sanitation services.

The departments should develop mechanisms that will ensure proper implementation of measures to achieve the intended result. Priority should be given to the most vulnerable groups when measures are instituted and implemented.

5 MONITORING SYSTEMS

5.1 National Sphere

DEPARTMENT OF WATER AFFAIRS AND FORESTRY

DWAF reported that a substantial part of the water services institutions were monitored through compulsory Development Plans for Water Service Authorities, and Business Plans for Water Boards. The business plans were submitted annually. There was a process for appraisal of these plans by the Minister of Water Affairs that began in 2000. The Minister may, direct a Water Board to amend its plans if they were not in the best interest of consumers within its service area.

An Information Management System was being established and would enable the Department to monitor and assess the performance of all role players in the water service sector. Direct and indirect statistics were collected which allowed the Department to monitor and evaluate the realisation of the right of access to water. This included Project Management Reporting Procedures.

DEPARTMENT OF PROVINCIAL AND LOCAL GOVERNMENT

The Department used internal departmental mechanisms to monitor and assess the progressive realisation of the right of access to sufficient water. The Department held meetings with provinces on a monthly basis to discuss policy issues, prioritisation methods and monitor progress. Provinces also submitted monthly and quarterly reports to the Ministry for Provincial and Local Government.

Key performance indicators used to monitor the progressive realisation of the right of access to water were:

- Actual expenditure vs. projected cash flows
- The number of beneficiaries

- The number of people employed, especially women, youth and the disabled
- Number of people trained
- Number of Small Medium and Micro Enterprises used in the projects

The DPLG reported that monthly and quarterly reports by the provinces provided statistics collected in order to facilitate the monitoring and assessment of the progressive realisation of the right of access to sufficient water. The following statistics were collected:

- Actual expenditure vs. projected cash flows
- Number of projects approved
- Projects status – design/tender phase, or under constructions, or completed phase
- Funds allocated to rural and urban areas
- Funds allocated to project categories
- Funds allocated to project types
- Beneficiaries related to project categories
- Employment created – split between women, youth and men
- Training provided – split between women, youth and men
- Utilisation of SMME's on the projects

5.2 Provincial Sphere

The Gauteng Department of Development Planning and Local Government uses six monthly reports and samples of projects to conduct independent studies. The Department had commissioned a consultant to determine the overall success of the CMIP. Regular monitoring was done on projects in progress to determine physical progress.

In responding to the question on what and how statistics were collected, the Gauteng Department reported that the CMIP project leaders and consultants collect statistics, and presented these in a monthly report which culminated in the end-of-the year report.

The Mpumalanga Department constituted Municipal Support Teams to work co-operatively with officials from various municipalities in the province in order to ensure sufficient water provision to the communities. There was also a Project Management Team responsible for the implementation and monitoring of water infrastructure projects. The Municipal Support Team and the Project Management Team were internal departmental mechanisms, which monitor and assess the progressive realisation of the right of access to sufficient water. The Department required municipalities to provide information such as the number of households who would benefit from the programme. This information was provided in the Business Plans that municipalities used to apply for funding. The Department was in the process of establishing a provincial Geographic Information System to assist with the management of all services to the communities.

The North West Department reported that the computerised Perform Developer and Project Management Programmes, including special spreadsheet reports were utilised as internal departmental mechanisms and measures to monitor and assess the progressive realisation of the right of access to sufficient water. The Housing Subsidy System, the National Housing Subsidy Database and the National Housing Information System were utilised to capture information relating to housing delivery and by implication also reflect on water provision, as it was provided together with housing.

The statistics collected by the North West were on the CMIP through site inspections on each project at various stages of implementation. The site inspection was a way of ensuring that the data captured on the Housing Subsidy System, the National Housing Subsidy Database and the National Housing Information System were correct. This ensured that the business plans that indicated statistics such as the number of beneficiaries per project and employment targets in respect of female and youth employment were met.

In the Western Cape, a provincial engineer monitored each CMIP project on a regular basis. Progress was tracked through the payment claims from the local authorities and reported on a monthly basis.

5.3 Critique

Government departments have the responsibility as part of the realisation of socio-economic rights, to have in place monitoring mechanisms to help gauge the progress in realising the rights.⁴⁶ Without such a mechanism there is no reliable basis for the determination of the progressive realisation of the right of access to water. Non-reporting by other provinces may be indicative of the lack of such mechanisms. The non-existence of these mechanisms is a violation of responsibility to realise the right to have access to water.

Although the national and provincial departments have reported that they collected data on the provision of water and related services, these departments did not provide information on indicators. Such actions are unacceptable and result in an incomplete analysis of whether the measures taken do progressively realise the right to have access to sufficient water.

5.4 Recommendations

To ensure effective monitoring of water services government departments need to have information management systems. The information collated in those information systems must be able to assist in the planning processes of the departments. The information collated must also be

⁴⁶ Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights (1997) para 16.

usable for information booklets that will be distributed to the public on water related issues, especially on the conservation of water.

PART C: CONCLUSION

The responsibility for the provision of water is currently split between various spheres of government, which results in serious challenges in terms of the co-ordination of the delivery of services. The supply of retail water (piped or tap water to individual consumers) is the responsibility of the municipalities. Better co-ordination between all the role players, namely national, provincial and local government including parastatal organisations should be addressed, and co-ordination of these roles and functions would enable the government to ensure, within available resources, the progressive realisation of access to sufficient water.

Ideally, water should be free so that everyone can have access to water. Currently the right of access to water is not enjoyed by everyone because water is not delivered free of charge to all the people of South Africa. The most vulnerable amongst the sectors of the community, the unemployed, people who live in dire poverty are amongst those denied access to the right of access to water. The cause of this is due to the inability to pay for water, uncompleted, abandoned and dysfunctional projects, which were initiated to supply water, infrastructure problems, unsolved problems between and amongst services providers (local authorities) who deliver water and sanitation services to the people.

DWAF and provincial departments responsible for local government should monitor the realisation of the right of access to water by having indicators. The purpose of indicators is to capture the willingness and capacity of the government, be it national provincial or local to protect, promote and fulfil the realisation of the right to water. Lack of infrastructure and financial resources, does not constitute an obstacle to the development of indicators. Indicators are designed to monitor progress and identify gaps that need to be addressed in order for government to progressively realise the right of access to water.⁴⁷ The Departments of Water Affairs and Forestry and Provincial and Local Government are slowly moving towards fulfilling their duty to progressively realise the right of access to water. For the efforts to have a greater impact on communities, implementation will have to be accelerated.

⁴⁷ A Eide et al (eds) *Economic Social and Cultural Rights* (1995) 391.

ABBREVIATIONS

BOTT	- Built Operate Train and Transfer Initiative
CEDAW	- Convention on the Elimination of all forms of Discrimination Against Women
CMIP	- Consolidated Municipal Infrastructure Programme
DPLG	- Department of Provincial and Local Government
DWAF	- Department of Water Affairs and Forestry
ICESCR	- International Covenant on Economic Social and Cultural Rights
PPP's	- Public Private Partnerships
RMIP	- Rural Municipal Infrastructure Programme
SFRA	- Stream Flow Reduction Activities
UDHR	- Universal Declaration of Human Rights
WC/WDM Strategy	- Water Conservation and Water Demand Management Strategy
WHO	- World Health Organisation

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CHAPTER NINE

ENVIRONMENTAL RIGHTS

PART A: OVERVIEW

1 INTRODUCTION

Environmental problems in South Africa have undoubtedly been exacerbated by past apartheid policies. Environmental justice, broadly exhorts that nature's environmental gift, should be equitably distributed and that certain sectors of society should not bear an unequal brunt of negative environmental impacts.¹

Bad town planning and racially discriminatory urban designs during apartheid ensured that previously disadvantaged communities felt most of the negative impacts of environmental degradation. Most black designated residential areas were located close to dumping sites, mines or industrial areas. Today most communities situated in these areas continue to be exposed to environmental hazards without adequate access to essential services such as, adequate sanitation, quick and safe transport, safe and healthy working environments.

The present government is faced with the challenge of redressing the imbalances of the past environmental policies in the face of a rapidly growing population. In this regard, solutions to proper environmental management depends on co-operative governance between everyone involved in environmental issues including all three spheres of government, civil society organisations, international organisations and the private sector. Public participation is also essential in improved environmental management; experience has shown that policies developed and implemented without the full participation of stakeholders, particularly the poor and the socially deprived groups, lack the element of sustainability.

This chapter assesses whether organs of State are meeting the constitutional obligations with respect to environmental rights.

2 CONSTITUTIONAL OBLIGATIONS

Domestic environmental laws of all countries, South Africa included, have been profoundly influenced by international law.² Most environmental problems transcend political boundaries and global trends and pressures have driven the development of national laws.³ The purpose of this

¹ J Glazewski "*Environmental Law in South Africa*" (2000). 4.

² Glazewski (note 1 above) 31.

³ Ibid.

section is to analyse the implementation of the environmental clause in the South African Bill of Rights.

Section 24 of the 1996 Constitution stipulates that everyone has the right to an environment that is not harmful to their health or well-being; and the right to have the environment protected, for the benefit of the present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. The State is required to respect, protect, promote and fulfil this right.⁴

The Rio Declaration on Environment and Development emphasises that there should always be a relationship between environmental protection and development, both of which are essential to life. Principle 1 of the Declaration states that human beings are at the centre of concern for sustainable development and are entitled to a healthy and productive life in harmony with nature. Principle 9 of the Declaration points out that in order to achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies. This principle highlights the importance of encouraging public awareness and participation by making environmental information widely available.⁵

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), also provides for the right to environment.⁶ It stipulates steps to be taken by each State Party to achieve the full realisation of this right, which include amongst others:

- those steps necessary for the improvement of all aspects on environmental and industrial hygiene;
- the prevention, treatment and control of epidemic, endemic, occupational and other diseases.

Similar views are echoed in Article 25 of the Universal Declaration of Human Rights and Article 24 of the African Charter on Human and Peoples' Rights. Article 20 of the Draft Protocol to the African Charter on the Rights of Women regarding Environmental Rights states that, in conformity with Article 24 of the African Charter on Human and Peoples' Rights, women shall have the right to live in a healthy environment. The charter also requires State Parties to take appropriate measures to:

- involve women in the management of the environment at all levels;
- promote research into renewable energy sources and facilitate women's access to them;

⁴ Section 7(2) of the *Constitution of the Republic of South Africa*, Act 108 of 1996.

⁵ Report on the United Nations Conference on Environment and Development at <http://www.un.org/documents/ga/conf/51/aconf/5126-1annex1.htm>. (Site visited on June 25 2001).

⁶ International Covenant on Economic, Social and Cultural Rights, Article 12 (2) (C).

- regulate the management, processing and storage of domestic waste; and
- ensure that the proper standards are followed for the storage, transportation and destruction of toxic waste.

The World Health Organisation (WHO) reported that the physical, social and intellectual development of children requires an environment, which is both protected and protective of their health. A growing number of diseases in children are linked to unsafe environments in which they live, play, learn and grow. In countries characterised as either industrialised and/or developing, unsafe food and chemicals in household products and consumer goods threaten children's development, health and well-being⁷.

Content of the environmental right

Environmental rights pose a major challenge globally and South Africa is no exception. All countries, especially the developing countries are faced with a major challenge of ensuring that there is balance between environmental rights and economic development. Human rights cannot be fully realised within a degraded or polluted environment. Linking economic development with environmental rights creates a rights-based approach to environmental protection that places the people harmed by environmental degradation at its centre.⁸

The environmental clause in the Constitution⁹ comprises two components. The environmental protection is of prime importance in this clause, as is set as one of the main objectives and constitutional obligations of the State. The responsibility of the State is further challenged to future generations, i.e.; protection has been extended to cover future generations, which instils long-term accountability and sustainability.

Sub-section (a) of s 24 provides that "everyone has the right to an environment that is not harmful to their health or well-being". Sub-section (b) of s 24 has a socio-economic character as it imposes a constitutional imperative on the State to secure the right of individuals to "have the environment protected, for the benefit of present and future generation, 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."

⁷ World Health Organisation report on the "Protection of Human Environment: Children's Environmental Health" updated February 2001 at <http://www.who.int/peh/CEH/index.htm> (site visited 25 June 2001).

⁸ Laura S. Ziemer 'Application in the Tibet of the Principles on Human Rights and the Environment' (2001) Vol.14, 233, 233.

⁹ Section 24 of the Constitution of the Republic of South Africa, Act 108 of 1998.

The right to a healthy environment contained in sub-section (a) of the environmental clause extends health rights beyond s 27(1) of the Bill of Rights, which is limited to the provision of health care services. A particular environment may be damaging to people's health, yet not necessarily infringe a person's right to health care services. Therefore, for example if atmospheric pollution or the placement of disposal sites is to be subjected to constitutional challenge on the grounds that people's health is being damaged, the challenge would have to be brought in terms of environmental clause and not in terms of s 27.¹⁰

Another important aspect of the right created by s 24(a) is the right to an environment "that is not harmful to individual's health and their well-being". A person's well-being is harmed if his/her interests are harmed. If the environment harms one's interests and those interests are not protected elsewhere in the Constitution, one would use the environmental clause to seek redress. People do not only have an indirect interest in the environment, they also have a direct one, that is, a clean and undisturbed environment that secures other things of value such as, good health or tourist related income.

Sub-section (b) of the environmental clause has a socio-economic character and also imposes a constitutional imperative on the State to secure the rights of individuals through reasonable legislative and other measures. The Grootboom case¹¹ stated that what constitutes reasonable legislative and other measures had to be determined in the light of the fact that the Constitution created different spheres of government, namely the national, provincial and local. A reasonable Programme had to allocate responsibilities and tasks to the different spheres of government and ensure that appropriate financial and human resources are available.¹² The case also highlighted the point that both the content and the implementation of a right should be reasonable.

Sub-section (b) of the environmental clause further goes on to state that pollution and ecological degradation need to be prevented and that conservation needs to be promoted. Where pollution matters are concerned, this could be achieved through protecting the least impacted systems at first, as this will be cost-effective and addressing the problem of the more impacted or polluted systems at a later stage.

Section 32(1) of the Bill of Rights states that everyone has the right of access to any information held by the State and any information that is held by another person that is required for the exercise and protection of any rights. The right of access to information is key to the realisation of the right to a healthy and protected environment. Although this right does not refer to the environment in particular, it is nevertheless pertinent to environmental concerns. In articulating environmental rights, this will give individuals access to information and standing to challenge perceived

¹⁰ Glazewski (note 1 above) 85.

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

¹² Ibid. at 1171.

violations and seeking remedies to prevent the environmental degradation. Enabling citizens to become involved and informed decision-makers is an essential part of the State's comprehensive approach to protecting the environment.

The environmental clause has further been concretised in the set of environmental management principles, which underpin the National Environmental Management Act (NEMA) 107 of 1998; the substantive environmental statute passed by the new government.¹³

3 KEY DEVELOPMENTS DURING THE REPORTING PERIOD

In the past few years, South Africans have witnessed progress and commitment from the Government's side, where legislation pertaining to protecting the environment (including public health) and conserving the country's limited available resources was passed. Government is also in the process of striving to change people's attitudes to the environment, which have been strongly influenced by the past when environmental concerns were viewed by many as concerns of the privileged only.

3.1 Policy, Legislative and Programme Developments

For the period under review, the Department of Environment and Tourism (DEAT) developed the Law Reform Programme (LRP) to address the constitutional and policy imperatives in respect of the environment, tourism and marine resources management in the form of concrete implementation measures. DEAT also began implementing the necessary measures for the control of trans-boundary movement and disposal of hazardous waste as stipulated in the Basel Convention.¹⁴

Environmental Implementations Plans (EIPs) and Environmental Management Plans (EMPs) which are guideline documents as required by the National Environmental Management Act (NEMA) Act 107 of 1998 have also been developed. The White Paper on Environmental Management Policy was preceded by (NEMA), which sets out principles for environmental management throughout the country.¹⁵ EIPs and EMPs are meant to co-ordinate and harmonise environmental policies, plans, programmes and decisions at national, provincial and local spheres of government in order to minimise and avoid duplication. All these measures are intended to promote co-operative governance between different departments, which are mandated by the Bill of Rights to deal with

¹³ G E Devenish *A commentary on the South African Bill of Rights* (1999) 67.

¹⁴ Basel Convention refers to the Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal (1989). This Convention regulates the international transport and disposal of hazardous and other waste. South Africa ratified this convention in 1994.

¹⁵ Chapter 3 of NEMA entitled Procedures for Co-operative Governance, which provides procedures for the compilation of Environmental Implementation Plans by certain scheduled. National and Provincial Government Department.

environmental issues. Provincial departments, local government and those national government departments listed under Schedule 1 and Schedule 2, should compile these EMPs and/or EIPs. Schedule 1 Departments are those national departments exercising functions that may affect the environment, whilst Schedule 2 Departments are those national departments exercising functions that involve the management of the environment.

The development of core environmental indicators by DEAT in collaboration with CSIR and other stakeholders is in its initial stages and is expected to be completed by end of March 2002. These indicators would be used in the monitoring and reporting on the state of the environment. The need for improved environmental information for decision-making was raised as a major concern at the United Nations Conference on Environment & Development in 1992 in Rio and the principles for improving access to environmental information were incorporated into Agenda 21.

3.2 The Budget

DEAT:

The total budget allocation for DEAT during the financial year 1999/2000 was R 541 002 000, which increased by amount of R 128 804 000 as compared to the previous year's (1998/1999) allocation. Additional funds of R 6 898 000 were also received during this reporting period; an increase of R 1 069 000 from the previous year.

Department of Water Affairs and Forestry (DWAf):

The total budget allocation for the Department increased by an amount of R 10 000 000 between the 1998/1999 and 2000/2001 financial years. For the current reporting period, R 56 000 000 was allocated for Nature Conservation and R 1 250 000 for Waste Disposal Management respectively. DWAf further indicated that an amount of R 2 000 000 was also allocated to the Department annually, towards awareness raising about the negative impacts of the alien plants. DWAf also reported that about R 300 000 000 was allocated towards Working for Water Programmes, of which 60 percent goes towards salaries of workers on these programmes drawn from previously disadvantaged groups.

Department of Minerals and Energy (hereinafter DME):

The total budget allocation for DME during the financial year 1999/2000 was R 10 915 000, compared to R 9 803 000 for the previous year. For 2000/2001, the allocation almost doubled to R 21 419 000. The Department did not indicate what portion of this total allocation was budgeted for the programmes or projects aimed at the protection of the environment, in this particular instance, waste management; water management; pollution control functions and rehabilitation of mine dumps.

4 CONCLUSION

Over the past few years, the government has developed appropriate environmental legislation and policies, particularly in the field of waste management, sanitation and the provision of access to water. However, it is evident that much needs to be done in terms of proper implementation and administration of pollution and waste legislation. Current penalties and punitive measures set up by the State are not effective enough as they seldom serve to deter polluters responsible for damaging the environment. Violations of the right to a clean and healthy environment are still being committed, particularly through industrial and mining activities.

Although organs of State have been involved in environmental legislative and policy reform, realisation of these rights would only be attained when the necessary monitoring and implementation instruments are put in place. Restrictive financial resources and limited capacity of human resources capacity are also limitations to realising the right.

PART B: ANALYSIS OF RESPONSES BY ORGANS OF STATE

This part of the chapter summarises and analyses the responses to the protocol on environmental rights by the national Department of Environmental Affairs and Tourism, Department of Water Affairs and Forestry, Department of Minerals and Energy and the provincial departments that deal with environmental issues.

1 POLICY MEASURES AND RELATED PROGRAMMES

1.1 National Sphere

DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM (DEAT)

DEAT focused on the progressive implementation of the following two policy documents that were gazetted during the reporting period, namely; the White Paper on Integrated Pollution and Waste Management (IP&WM) for South Africa and the White Paper on Sustainable Coastal Development (SCD) in South Africa.

The White Paper on Integrated Pollution and Waste Management (IP&WM)

The IP&WM is a policy on Pollution Prevention, Waste Minimisation, Impact Control and Remediation. This policy aims at addressing the waste generation, storage, collection, transport, treatment and final disposal of waste. The National Waste Management Strategy (NWMS) was developed to translate into action the IP&WM and aims at replacing the uncoordinated and fragmented Waste Management with Integrated Waste Management (IWM). The strategy presents a long-term plan (up to the year 2010) for addressing key issues, needs and problems experienced with waste management in South Africa and also aims at reducing both the generation and the environmental impact of waste. The provision of waste

management services to previously un-serviced communities and the translation of IP&WM policy into practice are priority areas.

The NWMS identifies a number of short-term strategic priority initiatives that need to be addressed urgently within the stipulated period(s). Action plans have been developed for their implementation:

- **Capacity Building, Education, Awareness and Communication Action Plans**, which outline measures, aimed at building the capacity of responsible authorities, organisations and individuals that will implement and manage the NWMS.
- **General Waste Collection**: to initiate and implement appropriate, sustainable and environmentally acceptable waste collection services by local government for at least 300 000 households in high-density and un-serviced areas in South Africa between July 1999 and December 2004.
- **Waste Treatment**: standards for medical waste incinerator air emissions and classification of all waste treatment facilities, would be reviewed, revised and enforced. A Public Awareness and WM Education Campaign on the hazards of Medical Waste and the legal responsibilities of Medical Waste Generators will be introduced.
- **Waste Disposal (including radioactive/nuclear waste)**: a process would be initiated to register all general and hazardous landfill sites. Plans would be submitted by landfill owners for remediation and/or meeting of DWAF's minimum requirements. Permit conditions for sites would be enforced through regular monitoring and auditing. A new permitting process would be initiated for mining and power stations. New hazardous waste disposal sites would be established.
- **Waste Information System**: to monitor the progress of all initiatives within the NWMS, supply information to support future developments in the NWMS and disseminate information.

The White Paper on Sustainable Coastal Development (SCD)

The policy on Sustainable Coastal Development (SCD) was developed as a result of the failure of the previous coastal management system to recognise the economic and social value of the coast as a system. The SCD policy provides for more emphasis towards a people-centred approach based on sustainable coastal development. The SCD policy has also developed a Plan of Action for implementation, with four key themes: institutional and legal developments; awareness; education and training; and information and projects. The objectives of SCD policy are:

- prevention, minimisation and control of pollution in the coastal environment
- maintenance of the diversity, health and productivity of coastal processes and ecosystems
- ensuring that the use of renewable resources does not compromise the regenerative

capacity of the coastal ecosystems and that non-renewable coastal resources are

based on public interest and alternate and future uses

- rehabilitation of damaged or degraded coastal ecosystems and habitats

DEPARTMENT OF WATER AFFAIRS AND FORESTRY (DWAF)

For the reporting period, the new policy introduced was the policy on reserve, which provides for water usage being reserved primarily for basic human needs and ecological reserve. The rationale for the policy is to ensure that water is not allocated in vast amounts to industries and agriculture at the expense of the communities reliant on those sources of water and resulting in the degradation of environmental reserve of water. DWAF reported that the Minimum Standards set by the Department for their operations has made departmental policy measures reasonable and effective but failed to explain in what way was this achieved.

DEPARTMENT OF MINERALS AND ENERGY (DME)

DME failed to supply the Commission with information on policy measures instituted by the Department during the reporting period, but stated that the Department has policies that ensure that water used for human consumption is not polluted and that mining inspectors monitor compliance with these policies,

1.1.1 The implementation of the measures

DEAT:

Implementation of DEAT policies rely on implementing instruments, which compliment and translate into meaningful action, all the action plans of the NWMS. Implementing instruments include Institutional Development; Legislative requirements; Financial requirements and funding instruments and Mechanisms for public participation and partnership.

DEAT indicated that the implementation of the SCD has begun progressively and is based on the following four elements:

- Institutional and legal development: aimed at establishing partnerships between all stakeholders. This policy proposes the drafting of a new coastal legislation to set out a framework for sustainable coastal development.
- Awareness, education and training: to sensitise all South Africans on the intrinsic and developmental value and the importance of protecting the ecosystem.
- Information: to monitor the state of the coast and the effectiveness of the coastal management efforts.
- Local demonstration projects: in selected areas to demonstrate the effectiveness of integrated coastal management in achieving SCD.

DWAF:

On how the measures affect the constitutional obligations to respect, protect, promote and fulfil the right to a clean and healthy environment, DWAF only reported that the departmental policies and guidelines are environmentally sensitive and also promote the right to an environment. What the Department failed to do was to specify in what way is this achieved.

DME:

The DME did not provide the Commission with information on the implementation of policy measures.

1.1.2 Reasonableness and effectiveness of the measures

DEAT:

DEAT reported that the measures were reasonable and effective as:

- there is prosecution for non-compliance with legislation
- any pollution of the environment is remediated by holding responsible parties accountable by enforcing the “Polluter Pays Principle”, by introducing heavy fines and penalties
- environmental justice is achieved by integrating environmental considerations with social, political and developmental needs and rights of all sector communities and individuals

DWAF:

Departmental policy measures were reported as being reasonable and effective as the main two policies aimed at realising the right to a clean, healthy and protected environment fulfilled these criteria. These policies are:

- the Water Services Capital Programme, for the supply of water to rural people and also those people living in informal settlements; and
- the Working for Water Programme, aimed at protecting the environment and securing water resources, through invasive alien vegetation clearing and rehabilitation projects

DWAF has also been involved in the NWMS in collaboration with DEAT and other stakeholders. The Department’s responsibilities include the:

- identification of waste disposal facilities that do not comply with the Minimum Requirements; registration of all waste disposal sites by December 2001
- permitting all medium and large waste disposal sites by December 2004
- promulgation of regulations aimed at controlling communal and small landfill sites

DME:

DME reported that the instituted measures are reasonable and effective and that they are enhanced by a Memorandum of Understanding (MOU) between DWAF and the Department. DME further indicated that although

the Department does not regulate access to water, DME plays an important role in the prevention of pollution of water by the mining industry through the Environmental Management Programme (EMP), which is a regulatory process required in terms of the Mineral Act 50 of 1991. The Department further reported that the legislation developed take into consideration the need to ensure that the water resources are conserved and protected.

1.1.3 Special considerations given to the vulnerable groups

DEAT:

The Department indicated that the policy on IP&WM is applicable to all vulnerable groups in South Africa, but places particular emphasis on women. The policy on SCD is applicable to all groups in South Africa, but is of particular but not exclusive relevance to those communities located in coastal areas.

DWAF:

DWAF stated that the measures do not give special consideration to all the listed groups, but that most of the policies and guidelines were developed to assist the disadvantaged groups in exercising their environmental and social rights, equal participation and addressing the concerns of environmental degradation and pollution. In particular, the Working for Water Programme has contributed to improving the lives of people in rural areas and provided employment opportunities for 20 990 previously unemployed people.

DME:

DME indicated that the Department does not play any direct role in the management of suitable water to communities, that its role is only limited to the industrial sector. The Department reported that the Environmental Impact Association within the Department identifies impacts and potential impacts on the environment where the communities are of fundamental importance. DME further reported that it has been addressing asbestos pollution through rehabilitation measures for communities in the vicinity of the asbestos deposits.

1.1.4 Implementation and difficulties experienced

DEAT:

DEAT reported that the success of the implementation of the measures is dependent on adequate human and financial resources. together with the political commitment from politicians and leaders.

DWAF:

DWAF reported that difficulties in the implementation of the NWMS shall be addressed by comprehensive Environmental Management and Implementation Plans, which were being prepared. Fluctuating budgetary allocations for the Working for Water Programme has hindered the implementation of the programme. DWAF indicated that the secured funding streams that the government had begun providing would alleviate this problem.

DME:

DME failed to give the Commission any information regarding the difficulties experienced during the implementation of the measures.

1.2 Provincial Sphere

The Eastern Cape Department of Economic Affairs, Environment and Tourism reported that in order to realise the right to a healthy and protected environment, the following policy measures were instituted: Formulation of the provincial policy on Environmental Education and Environmental Impact Assessments.

The Free State Department of Environmental Affairs and Tourism (DEAT-FS) provided the following as policy measures implemented during the reporting period:

- promoting the development and management of private nature reserves
- promoting the game industry in order to ensure the sustainable utilisation of natural resources
- bio-monitoring of river systems in collaboration with DWAF
- biological control of alien water plants to protect water systems and collaboration with the Plant Protection Research Institute
- inventorying and promoting the protection and proper management of wetlands in the province to protect the water resources of the country
- rehabilitation of degraded wetlands in collaboration with DWAF, Rand Water and others
- produce the Free State School Environment Policy and Management Plan Resource Pack

The Department of Agriculture, Conservation, Environment and Land Affairs (DACEL) in Gauteng stated the following as policy measures:

- Waste Management that involves the development of a Medical Waste Management Strategy and the development of a Landfills Evaluations programme
- Air and Water Quality Management: a strategy to address poor air quality in Gauteng and the management of the implementation of Noise Regulations by the local authorities
- Environmental Assessments, which involve the administration and authorisation of Environmental Impact Assessments
- Environmental Education that involves the local government capacity building

The KwaZulu-Natal Department of Agriculture and Environment reported that it was in the process of drafting the KwaZulu-Natal Waste Management Policy, and had participated in the National Committee for Environment to develop policy measures for Environmental Management.

The Mpumalanga Department of Agriculture, Conservation and Environment (DACE) did not provide information on policy measures and/or related programmes.

The Northern Cape Department of Agriculture, Conservation, Environment and Land Affairs (DACE) reported that environmental functions were only transferred to the Department during October 1999 and could therefore not provide the Commission with information on policy measures that had been instituted during the reporting period.

The Northern Province Department of Agriculture and Environment reported that a policy in the area of management of lions and elephants had been developed. The Department also reported that preliminary work was done on a policy on community based natural resource management.

The North West Department of Agriculture, Conservation and Environment (DACE) did not provide policies but only mentioned the environmental management programmes, which were in support of s 24 of the Constitution. These are:

- Environmental Monitoring and Evaluation
- Environmental Impact Assessments
- Capacity Building Programmes
- Education and Empowerment
- Regulatory Services Programme

The Department reported that these programmes were developed to monitor the state of the environment and to create awareness with respect to the importance of a clean and healthy environment.

The Department of Environmental and Cultural Affairs and Sport in the Western Cape reported that it was in the process of putting in place appropriate policies, legislation and the necessary capacity to give effect to the right to environment. However, the Environmental Impact Assessment Sub-directorate has to date focused on ensuring that no illegal developments took place and that projects, which have a potentially detrimental effect on peoples' lives and their environment are not approved without appropriate mitigation measures being adopted.

1.2.1 Instituted measures and constitutional obligations

Provincial Departments responsible for environment provided limited useful information on how the above-mentioned policy measures and related programmes affect the constitutional obligations to respect, protect, promote and fulfil the right to a healthy and protected

environment. Of greater concern, the North West and the Eastern Cape Departments did not respond to the question.

DEAT-FS reported that the measures empower communities through their involvement in decision-making processes and through workshops where the Department educates communities about protection of the environment.

DACEL (Gauteng) reported that due to the level of generation of waste and pollution, the Department has initiated the utilisation of the R 8 million grant from the Danish Government to undertake a three-year project to develop a strategy for the management of medical and hazardous waste in Gauteng. To complement this work, funds have been budgeted for the development of water and air management strategies to ensure that there is no further deterioration in the state of the environment. Attention was also being given to crisis issues, including a strong provincial involvement in resolving the conflict between Iron and Steel Corporation of South Africa (ISCOR) and surrounding residents through mediation.

DACEL (Gauteng) is also involved in the Eastern Gauteng Service Council's pilot project, which is aimed at educating communities on sorting waste from households in order to promote waste-recycling initiatives. Over the past eighteen months, the Department has also been involved in the running of a school-recycling project in eighty-four schools in Alexandra, Sebokeng, Orange Farm and Meadowlands. This school-recycling project is expected to expand to Soshanguve and Khutsong.

The KwaZulu-Natal and Northern Province departments did not provide the Commission with the information on how the instituted measures meet the constitutional obligations. KwaZulu-Natal Department only stated that the Department has limited capacity and resources, whilst the Northern Province Department indicated that the measures were intended to give effect to the constitutional obligations through the relevant national policy measures.

The Western Cape Department reported that past development projects were assessed purely on scientific basis without due consideration of the harm they would cause on the spiritual, mental, psychological and physical well-being of the people, especially the poor. The utilisation of the Integrated Environment Management procedures and guidelines now considers poor communities by involving them in decision-making processes. The Department reported that it also considered the role of women and youth and has thus initiated community-based projects under the sub directorate of Nature Conservation, which would be fully functional in future. In order to ensure that communities are positively affected by instituted measures, the Department has ensured that the negative impacts of the environment are mitigated and that development benefits were being maximised.

1.2.2 Special considerations given to vulnerable groups

The Eastern Cape Department indicated that no information or data was available regarding vulnerable groups, as the listed policies had not been implemented as yet. The Northern Cape and Mpumalanga provinces did not provide information about these groups.

DACEL (Gauteng) reported that special consideration was given by consulting with all interested and affected parties. In terms of the Waste Management Programme, the Department indicated that monitoring committees for landfill sites have been established; special monitoring of the Holfontein Hazardous Waste Site has also been established. Reduction of hazardous waste through input into EIAs and the Department's tender procedure for removal of public sector general and medical waste were designed to ensure the participation of SMME's.

DEAT-FS reported that the programmes implemented by the Department have special consideration to previously disadvantaged groups in the following ways:

- encouragement to visit and enjoy nature resources
- making resources from the nature reserves available to communities, such as thatch grass for building
- permanent job creation by game industry and private nature reserves
- job creation by commercial and small-scale fisheries
- temporary job creation by rehabilitation of wetland
- temporary job creation as a result of eradication of alien vegetation

DACEL (North West) indicated that these programmes gave special consideration to vulnerable groups in the following way:

Table 1 Special considerations given to vulnerable groups

Persons living in rural areas	Monitoring Programmes aimed at informing, educating and improving the lives of people in rural areas have been established and training centres set up in strategic places in regions.
Exposure of youth	External funding obtained to take children to international environmental awareness events in England and the Far East. Road shows/information days are also planned by the Department regularly to create environmental awareness among youth, including youth in rural areas
Persons living close to industries and waste disposal sites	The Environmental Monitoring Programme is used to determine effects of industries on the lives of people. The Department has started monitoring the mining industry in the province. Databases for landfills and unrehabilitated tailings dams are being developed. The Department states that the problem of asbestos in areas such as Pomfret has already been addressed, but did not report how this was done and the results thereof. Working relationships with the Department of Health with regard to Waste Management, Medical Waste in particular has been established.
Poor communities	The Capacity Building, Education and Empowerment Programmes target and reach out to poor communities. The people are advised on how they can utilise their natural resources to develop SMMEs and fight poverty. Examples are small businesses in waste recycling, harvesting and selling of <i>Harpagophytum</i> , (Devil's Claw), a medicinal plant. Selling of

	permits for hunting on tribal land is still under process.
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The KwaZulu-Natal Department reported that all stakeholders are included in the management and decision-making processes and emphasis was placed on previously disadvantaged communities.

The Northern Province Department indicated that persons living in rural areas, persons living in informal settlement, poor communities and previously disadvantaged groups including indigenous groups have benefited from the management of wildlife via income being able to be retained in these communities.

The Western Cape Department reported that in respect to workers exposed to toxic and hazardous substances, the Department relied on s 2(4)(j) of NEMA and the Occupational Health and Safety (OHS) Act regulations.

1.2.3 Implementation of the measures

The Eastern Cape and North West Departments did not provide the necessary information in response to the question on the implementation of the measures. Free State Department reported that the difficulties in implementation related to lack of funding and staff shortage. The KwaZulu-Natal Department reported that it was difficult to implement the measures due to capacity and institutional constraints and that it is faced with the problem of constitutional and legislative responsibility and conflict in co-operative governance. The Northern Province Department reported that they had difficulties in implementing the measures due to shortage of resources. The Western Cape indicated that the EIA regulations have been extremely difficult to implement due to financial and human resource capacity constraints.

1.3 Critique

During the current reporting period, DEAT developed and implemented a number of policies and programmes towards the realisation of the right to a clean and healthy environment. However, it is of concern that the response from DEAT indicated shortcomings in the ability of the Department to ensure monitoring, enforcement and compliance of these policies. The success of DEAT's policies in meeting its constitutional obligations is difficult to gauge without effective implementation and monitoring.

The mining sector impacts on the environment in a number of ways of which waste generation and pollution is of great concern. Mine dumps pose serious environmental hazards as they reportedly emit high levels of radiation and in the process pollute the atmosphere, surface and underground water, amongst other things. Nevertheless, DME did not supply the Commission with the requisite information regarding Waste Management, Pollution Management and Rehabilitation measures. Due to lack of the requested information, it raises serious concern on whether the

DMEs existing policies, programmes and legislation are indeed achieving the Department's constitutional mandate.

The State's passing of legislation and policies to protect the environment are appreciated particularly in the field of the provision of water and sanitation. However, it is evident that much needs to be done in terms of proper implementation and administration of pollution and waste legislation.

The programmes provided by the provincial Departments did not indicate how they realise the right to a healthy and protected environment. Regarding the consideration given to previously disadvantaged groups and vulnerable groups, most of the provincial Departments failed to indicate how the programmes benefited these groups. Some Departments highlighted the involvement of previously disadvantaged groups in the Small and Medium Enterprises (SMEs) but did not explain what benefits could be gained from their implementation with respect to environmental rights. Provinces also failed to show the reasonableness of the measures they instituted. Some Departments provided the national policies and failed to indicate the programmes they have instituted for their provinces, showing that there is no clear distinction of responsibilities between the three spheres of government.

1.4 Recommendations

DEAT needs to capacitate the different provinces on national policies, legislation and programmes/projects introduced by the Department. Most provinces still do not appear to have an adequate understanding of the aims and objectives of national policies and programmes. Provinces are required by the Constitution to implement national policies

DME should provide policy measures and strategies that the Department has put in place, in dealing with mining pollution.

Most provinces should develop policies that complement national policies and address problems particular to their province.

2 LEGISLATIVE MEASURES

2.1 National Sphere

DEAT:

DEAT reported that the only legislative measure passed during the reporting period is the World Heritage Convention Act 49 of 1999 (HCA), aimed at incorporating the World Heritage Convention into South African legal system and to enforce the convention in the country.

The World Heritage Convention Act 49 of 1999

HCA has given effect to the constitutional obligations to respect, protect, promote and fulfil the right because it has created a legal and administrative framework that allows various cultural and natural sites in South Africa to be granted World Heritage Site status. The Act also ensures that the “state of conservation” reports are prepared as required by the Convention. DEAT also reported that HCA was reasonable and effective in effecting s 7(2) constitutional obligations because it makes provision for the development of an integrated environmental management system for World Heritage Sites to ensure sustainable use of the sites.

The Environmental Impact Assessment Regulations

The EIA regulations, which were prescribed in 1997 in terms of s 21 of the ECA 73 of 1989, were implemented during the reporting period. These regulations identify a list of those activities that may impact negatively on the environment and require environmental assessment. The environmental impacts of a project are determined in order to facilitate and ensure sustainable development.

DWAF:

For the year under review, DWAF did not pass any new legislation. The Water Services Act (WSA) 108 of 1997 and the National Water Act (NWA) 36 of 1998 are still the fundamental legislation for the protection of the environment. Regulations on use of water for mining and related activities aimed at the protection of water resources, GG 20119, GN 704 of 04/06/1999 were also adopted for the year under review.

DME:

DME had not developed any set of new legislation during the reporting period. DME reported that it has been developing legislation aimed at taking into consideration the need to ensure that the water resources are conserved and protected.

2.1.1 Measures and constitutional obligations

DEAT:

DEAT indicated that there has been significant progress in giving effect to NEMA. The Committee for Environmental Co-ordination (CEC) was established, which is responsible for co-ordinating and integrating environmental functions for government. National Departments and all provinces are required to prepare EIPs, EMPs, which communicate how government is complying with, and giving effect to environmental legislation, norms and standards. Conflict management procedures have been designed to provide information to the public on appropriate dispute resolution mechanisms. DEAT has also initiated a process for the compilation of the Annual Performance Report on Sustainable Development as part of its international obligations. NEMA makes provision for the establishment of Environmental Management Co-operation Agreements, for the purpose of promoting compliance with the EMPs set down in the Act.

DWAF:

DWAF reported that the Department believes the measures are reasonable and effective as the Department no longer issues any licences for water use, without first securing an EIA report with the relevant provincial Departments of Environment. The Department further adheres to some fundamental NEMA principles as required by the Act. Furthermore, DWAF the Department can no longer issue a licence for water use without first determining a reserve, which should ensure that there is available water for the ecological and aquatic systems, in addition to water for basic human needs.

DME:

DME indicated that although it is not mandated with the function of regulating water, the Department plays an important role in the prevention of water pollution by the mining industry, through the EMP regulatory process required by the Minerals Act of 1991. The Department emphasised that it is committed to sustainable development in the mining and minerals sector, but failed to indicate what measures are put in place to protect, promote, respect and fulfil the right to a healthy and protected environment. DME indicated that the implemented measures are reasonable and effective and that they are enhanced by a Memorandum of Understanding (MOU) between DWAF and the Department with respect to *inter alia* possible water pollution from mining industries.

2.1.2 Special considerations given to vulnerable groups

DEAT:

There was no information on how the measures considered the listed vulnerable groups, except s 4 of HCA, which sets out fundamental principles that apply to the actions of all organs of state in relation to World Heritage Sites.¹⁶

These principles are the promotion of participation of all interested and affected parties in governance of cultural and natural heritage; promotion of capacity building to achieve equitable and effective participation; promoting participation by vulnerable and historically disadvantaged persons; to ensure that decisions are taken in the interests, needs and values of interested parties, and promoting community well-being and empowerment through cultural and natural heritage education. DEAT reported that regulations and guidelines defining the roles and responsibilities of various role-players in managing these sites were being prepared.

DWAF:

Regarding vulnerable groups, DWAF reported that the instituted measures are aimed at ensuring protection of the Reserve for basic human needs and ecological requirements of particular concern in the allocation and protection of water resources to rural communities. Also, the key component of the relevant legislation and regulations is to ensure and promote the concept of environmental justice amongst the previously marginalised communities. In addition to this, the Department's goal is to ensure equity in the use and allocation of the water resources in the country in terms of the National Water Act, Act 36 of 1998.

DME:

The Department did not report on special consideration(s) given to vulnerable groups.

2.1.3 The implementation of the measures

DWAF:

The Department indicated that the instituted measures were implemented through their regional offices, with the participation of some stakeholders. Some of the problems experienced were: training of communities to participate fully in the implementation of the legislative measures, unrealistic time-frames, non-corporation or willingness of some

¹⁶ World Heritage Sites are those places in the Republic, which have been included on the World Heritage List that have been proclaimed by the Minister by notice in the Government Gazette to be World Heritage Sites. See section 1 of Act 49 of 1999.

stakeholders to be part of the NWA implementation process and of greater concern, the limited financial and human resources.

DME:

The Department reported that the issue of respect where pollution control and waste management was concerned, was beginning to constitute the core of the policy backbone of DME. It also reported that, unsafe pollution of the environment with radioactive materials could potentially deprive people of the right to access of water and in general, the environment. The Department was in the process of drafting nuclear legislation to deal with this potential hazard. Other acts that were being effected, included the Nuclear Energy Act, Act 46 of 1999 and the National Nuclear Regulator Act, Act 47 of 1999. The Department indicated that limits are placed on releases of radioactivity to the environment and monitoring systems are in place to ensure compliance and the identification of problems. The Department further indicated that the new intended legislation has clarified responsibilities and provides for improved intergovernmental management of issues like environmental pollution by provision for co-operative governance agreements.

2.2 Provincial Sphere

The Eastern Cape Department indicated that Environmental Conservation Bill was being drafted. For other questions in the protocol, the Department indicated that there is no information.

DEAT-FS reported that the Nature Conservation Ordinance 8 of 1969 was in place to provide conservation of flora and fauna. It also reported that this measure was relatively effective, though it did not address other needs. The Department also believed that Act 8 of 1969 was reasonable considers the vulnerable groups because it is universal in nature, and does not give any special consideration to a special group.

DACEL (Gauteng) has implemented the EIA regulations and NEMA. The Department also indicated that it was successful in enforcing these measures in court. The measures were also reported to be reasonable and effective. Due to resource constraints, the Department targeted only major transgressions of constitutionally entrenched rights occurring in poor and marginalised communities.

The KwaZulu-Natal Department reported that there were no legislative measures instituted, except the Department's participation in the National Committee for Environmental Co-ordination. This committee ensures that effective participation and discussion take place with and between all role players.

In Mpumalanga, there was an attempt to operationalise NEMA. Apart from NEMA, the EIA regulations were implemented.

In the Northern Cape, the following measures were enforced: Nature and Environmental Conservation Ordinance, Problem Animal Control Ordinance, ECA 73 of 1989 and NEMA. These laws have regulated the protection of environment and ensured sustainable development. The problem encountered by the Department was limitations on budget allocations, which led to some functions being suspended.

No new legislation was put in place in the Northern Province by the provincial Department during the reporting period, except for the application of national legislation.

The North West did not indicate clearly what measures were instituted. However, mention was made of EIA programme, which administers ECA 73 of 1989. The Department did not respond to other questions in the protocol.

2.3 Critique

DEAT did not provide information on the Law Reform Programme (LRP). The Department has a LRP¹⁷ that attempts to address the constitutional and policy imperatives in respect of the environment, tourism and marine resource management in the form of concrete deliverables. Legislation envisaged under the LRP may take the form of Acts of Parliament, Regulations or By-laws. The Department has identified the LRP as a special departmental priority project that extends over a two to three year period from 1999 to 2001/2. The purpose of DEAT's LRP is to:

- give effect to Constitutional obligations and to translate adopted policies into relevant legislation
- give effect to s 7(3)(h) of NEMA
- eliminate, as far as possible, fragmentation of legislation and achieve integration-with particular emphasis on fragmentation in environmental legislation
- ensure that DEAT's legislation promotes sustainable development
- co-ordinate sectoral and sub-ordinate law reform priorities and time frames
- give effect to international obligations
- ensure synchronisation of sectoral laws with NEMA
- build government's capacity and competency to implement legislation
- initiate the process of developing strategies for the implementation of new legislation

The response from DEAT concentrated largely on one measure, the World Heritage Convention Act, and other measures were not adequately covered, such as NEMA and EIA regulations. NEMA, as the main legislation aimed at giving effect to s 24 of the Constitution should have been elaborated on how the legislation seeks to promote, respect, protect and fulfil the right to a clean and healthy environment.

¹⁷ See <http://www.environment.gov.za/lrp/index.html>, visited on October 10, 2000.

DEAT has identified a number of gaps within the environmental legislation. This has necessitated environmental law reform, which is believed to rationalise and eliminate fragmented environmental legislation. DEAT's LRP identified the need for sectoral legislative reforms in respect of pollution and waste, environmental planning and assessment, bio-diversity conservation and protected areas management. New legislation is needed to fill gaps in current legislation, standardise procedures, set minimum norms and standards, clarify decision-making criteria and provide appropriate and effective enforcement mechanisms.

The new approach to addressing legislative needs and gaps in respect of environmental governance favours additions and amendments to NEMA above extensive standalone legislation. The key missing elements in NEMA to adequately address these needs are:

- mainstreaming/integrating environmental aspects into planning and economic processes through all 3 spheres of government
- integrated enforcement and regulatory framework (e.g. when taking action against environmental offenders)
- sectoral norms and standards (e.g. waste minimisation & recycling, air quality & chemicals management, trade in endangered species, bio-prospecting)
- accessible and user-friendly law
- classification and management system for protected & sensitive environments management and reorientation to tourism & development (job creation & poverty alleviation)

It is clear from the responses from provincial Departments that there were no significant legislative developments at provincial sphere of government. Matters relating to environment are a functional area of concurrent national and provincial legislative competence.¹⁸ Provinces are therefore expected to pass their own legislation to protect the environment as required by s 24 of the Constitution. Provincial governments are enabled by the Constitution¹⁹ in this regard.

The Eastern Cape Department has reported that Environmental Conservation Bill is being drafted. It is not clear as to whether this proposed law will be able to respect, protect, promote and fulfil the right of everyone to an environment that is not harmful to their health or well-being. The Bill, if passed, should consider issues of environmental health, especially the social aspect of environment. It should not just be environmental conservation, but it should be from a socio-economic perspective within the spirit of s 24(b) of the Constitution.²⁰ The same applies to the Nature Conservation Ordinance 8 of 1969, as reported by the Free State Department, and nature and Environmental Conservation Ordinance in the Northern Cape. It has also been reported that the measure

¹⁸ Schedule 4 of the Constitution.

¹⁹ Section 104(1)(b)(i).

²⁰ This includes, *inter alia*, the prevention of pollution, and ensuring ecologically sustainable development.

does not address other needs such as those, which infers that the ordinance falls short of the requirements of the Bill of Rights in the Constitution.

2.4 Recommendations

Although there have been significant legislative developments during the reporting period, DEAT should utilise this enabling legislative framework to implement appropriate policies. The realisation of environmental rights depends on the proper co-ordination and implementation of these measures.

The responses from provincial Departments did not contain useful information for the purposes of monitoring environmental rights at provincial level. In general, the provincial Departments provided information on measures that were instituted at national level but could not explain their impact on various provinces. The provincial Departments of Environment should state clearly what policies they have implemented and the provinces should distinguish provincial policies from national policies.

3. BUDGETARY MEASURES

3.1 National Sphere

The total budgetary allocations towards different programmes and/or projects for DEAT, DWAF and DME are shown in the Tables below. Only DEAT included budgets received from other sources.

Table 2 DEAT's (National) Total Budget Allocation

YEAR	TOTAL ALLOCATION IN RAND(S)	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL AMOUNT IN RAND(S) RECEIVED FROM OTHER SOURCES	ACTUAL EXPENDITURE IN RAND(S)
1998/1999	412 198 000	N/A	5 829 000	410 939 000
1999/ 2000	541 002 000	N/A	6 898 000	505 423 000
2000/ 2001	731 230 000	731 230 000	91 425 000	-

For the past three financial years, the total budget allocation has increased by an amount of R 319 032 000.

Variances: DEAT indicated that the variances for actual expenditure for the period 1998/1999 and 1999/2000 was due to lack of completion of projects or tenders not being in place timeously. For the 1999/2000 reporting period, the requested information would only be available at the end of the 2001/2002 financial year (March 2002).

Pollution Control and Waste Management

Table 3 DEAT's Budgetary Allocation towards Pollution Control and Waste Management

YEAR	TOTAL ALLOCATION IN RAND(S)	ALLOCATION AS A % OF DEPARTMENT'S TOTAL BUDGET	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
1998/1999	24 000 000	5.8	N/A	23 221 000
1999/2000	31 000 000	5.7	N/A	30 445 000
2000/2001	46 062 000	6.3	46 062 000	-

[-] the requested information would only be available at the end of the financial year, March 2002.

The table above indicates that there has been an increase of R 22 062 000 between the above-mentioned three financial years for the budgetary allocation towards Pollution Control (PC) and Waste Management (WM) Programmes.

DEAT reported that the PC and WM budgets have been combined and that it relied on donor funding for the development of the White Paper on IP & WM. These programmes accounted for 6,3 percent of the Department's total budget. DEAT further indicated that potential problems are envisaged in the future because the Department is estimating the cost of about R187 million for WM and R100 million for PC in the next five years for implementation. In order to address problems created by these budgetary constraint, the Department indicated that it has secured donor funding of approximately R12 million for a period of three years.

Variance(s): The variances for actual expenditures between 1998/1999 and 1999/2000 financial years were very minimal and the Department did not provide the Commission with reasoning for these variances. There have been minimal variances regarding the actual expenditures between the previous financial years, that is R 779 000 for 1998/1999 and R 555 000 for 1999/2000.

Nature Conservation

Table 4 below represents the total budgetary allocation provided by DEAT towards Nature Conservation.

Table 4 Budgetary Allocation of DEAT towards Nature Conservation (including SA National Parks)

YEAR	TOTAL ALLOCATION IN RAND(S)	ALLOCATION AS A % OF DEPT'S TOTAL BUDGET	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
1998/1999	100 000 000	0.24	N/A	100 000 757
1999/ 2000	800 000 000	1.40	N/A	100 070 833
2000/ 2001	700 848 000	1.07	100 070 848	-

[-] the requested information would only be available at the end of the financial year, March 2002.

There have been fluctuations in the budgetary allocations towards Nature Conservation between the three financial years. Overall, there has been an

increase of approximately R 600 848 000 between 1998/1999 and the 2000/2001 financial years towards the above-mentioned programme. DEAT did not provide the Commission with any information which might have resulted and/or contributed to these fluctuations. DEAT indicated that the majority of the funding for the Nature Conservation Programme comes from external donors and that the MTEF allocation is used predominantly for operational expenses. DEAT also stated that as a result of the inadequate funding, the implementation of a strategy to give effect to the White Paper on the Conservation and Sustainable Use has been delayed. In order to address these problems, the Department had requested for additional funding from MTEF in line with the prioritisation on policy implementation.

Variances: There are drastic fluctuations regarding the total budget allocation towards Nature Conservation. The criteria used regarding this allocation is unclear. Moreover, the Department did not provide the Commission with substantive reasoning towards this. Although the Department remarked that the budget is inadequate for executing policy obligations, the Department is nevertheless under-spending its allocation. (refer to the above Table 4, financial year 1999/2000).

Capacity Building and Information Dissemination Programmes

Table 5 below represents the total budgetary allocation for DEAT towards Capacity Building (CB) and Information Dissemination (ID) Programmes.

Table 5 Budgetary Allocation of DEAT towards Capacity Building and Information Dissemination

YEAR	TOTAL ALLOCATION IN RAND(S)	ALLOCATION AS A % OF DEPT'S TOTAL BUDGET	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
1998/1999	45 000 000	1.1	N/A	42 540 000
1999/2000	45 000 000	0.8	N/A	43 800 000
2000/2001	56 820 000	0.8	5 682 000	-

[-] the requested information would only be available at the end of the financial year, March 2002.

The programme accounted for 0.8 percent of the total Department's allocation for the current and previous financial years. DEAT indicated that the budget was insufficient and had resulted in slow development of environmental monitoring capacity and lack of funds to maintain monitoring instrumentation e.g. air quality monitoring stations and lack of funds to establish the necessary capacity building programmes. However, DEAT reported that it had secured donor funding for the State of the Environment (SoE) Report and Environmental CB Programme.

Variance(s): For the financial years 1998/1999 and 1999/2000, the variances for actual expenditures were minimal. Substantive reasoning for not utilising the whole amount of the total budgetary allocation towards this programme was not provided. The Department did indicate that the budgetary allocation for this programme was inadequate due to the

increasing need for capacity building in the following fields, environmental information and information technologies.

Table 6 below is indicative of the total budgetary allocation of the Department of Water Affairs and Forestry.

Table 6 DWAF's Total Budget Allocation

YEAR	TOTAL ALLOCATION IN RAND(S)	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
1998/1999	160 000 000	220 000 000	180 000 000
1999/2000	250 000 000	300 000 000	300 000 000
2000/2001	560 000 000	560 000 000	-

[-] the requested information would only be available at the end of the financial year, March 2002.

DWAF reported that the only environmental programmes the Department was responsible for were the Indigenous Forest Management; Waste disposal Management and Working for Water.. For the reporting period, the Working for Water project had been allocated R300 million for alien vegetation clearing, of which, 60 percent goes directly to previously unemployed poor people in the form of wages. In addition to this, a further R 2 million was allocated for raising awareness about the negative impacts of invading alien plants.

The Department further indicated that the budget for Indigenous Forest Management and Waste Disposal Management has been combined but the larger part of it goes to Indigenous Forest Management. The Department stated that it was difficult to say what fraction of this total allocation was budgeted for the protection of the environment, mainly WM&PC, as the department's budget cannot be accounted separately from that of the core functions of the department. For the reporting period, the following budgets were allocated to the following programmes: Nature Conservation; R 56 000 000, Waste Disposal Management; R 1 250 000 both of which increased by an amount of R 40 000 000 and R 480 000 respectively.

Variance(s): The table above shows an increase in the total budgetary allocation between the financial years 1998/1999 and 1999/2000. The variances on the above allocations took place due to the following reason(s):

- a) The functions and duties of the Directorate have been substantially increased in the past three years and extra capacity is required to deal with these. The additional functions include the management of approximately 150 000 hectares of indigenous forests inherited from the former homelands, especially in the Eastern Cape and KwaZulu-Natal. The Directorate is also responsible for the management of primary conservation inherited from SAFCOL.
- b) With regard to special groups, DWAF indicated that it has initiated a Participatory Forest Management Programme, which is aimed at the active involvement and participation of communities in neighbouring indigenous forests in their management. For persons living in informal

settlements, DWAF reported that it is engaged in a process of resettling the Dukuduku and Port St. Johns forest communities to suitable alternative land adjoining the forest. During this process the Department would like to ensure that these communities maintain access to the forest and its produce to fulfil their different needs.

Table 7 DME's Total Budgetary Allocation towards Pollution Control, Waste Management and Rehabilitation of derelict and ownerless mines/dumps

YEAR	TOTAL ALLOCATION IN RAND(S)	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
1998/1999	9 803 000	N/A	9 803 000
1999/ 2000	10 915 000	10 915 000	8 500 000
2000 /2001	21 419 000	21 419 000	-

[-] the requested information would only be available at the end of the financial year, March 2002.

Regarding Table 7 above, DME reported that a single budget is allocated for PC, WM and Water Management. The main focus is on the rehabilitation of derelict and ownerless mine dumps. The Department indicated an increase of R 11 816 000 in the total allocation from 1998/1999 to 2000/2001.

Variance(s): DME reported that Pollution Management is executed in a phased approach and that in addressing the issue PC&WM, the expenditure of funds has been satisfactory. The Department failed to provide the Commission with reasoning for under-spending during the 1999/2000 financial year.

3.2 Provincial Sphere

Table 8 below is a summary of the total budgetary allocations for the different provincial Departments of Environment. Only seven out of the nine provincial departments provided the Commission with the required budgetary information. The table below indicates that the total budgetary allocation differs per provinces, with the Western Cape and Gauteng receiving the largest allocations.

Table 8 Provincial Departments of Environment Total Budget Allocations

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	PROJECTE D EXP'TURE IN RAND(S)	AMOUNT RECEIVED FROM OTHER SOURCES IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
Free State	1998/1999	38 200 000	38 200 000		38 200 000
	1999/2000	36 500 000	36 500 000		36 500 000
	2000/2001	30 400 000	30 400 000		-
Gauteng ²¹	1998/1999	93 993 000	69 350 000		53 860 000
	1999/2000	86 804 000	48 810 000		48 690 000

²¹ The Department is combined with Agriculture, Conservation and Land Affairs.

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	PROJECTED EXP'TURE IN RAND(S)	AMOUNT RECEIVED FROM OTHER SOURCES IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
	2000/2001	118 576 000	74 510 000		-
Mpumalanga	1998/1999	-	-	-	-
	1999/2000	4 9 857 450	-	500 000	-
	2000/2001	6 4 395 800	-	400 000	-
Northern Cape ²²	1998/1999	89 377 000	-	-	-
	1999/2000	85 399 000	-	-	-
	2000/2001	71 616 000	-	-	-
Northern Province ²³	1998/1999	89 377 000	-	-	-
	1999/2000	85 399 000	-	-	-
	2000/2001	74 616 000	-	-	-
North West	1998/1999	23 996 000	-	-	-
	1999/2000	18 130 000	-	-	-
	2000/2001	18 116 000	-	-	16 554 316
Western Cape	1998/1999	117 762 000	-	-	117 093 000
	1999/2000	136 519 000	-	-	134 070 000
	2000/2001	150 941 000	150 941 000	-	-

[-] for the expenditure column, the requested information would only be available at the end of the financial year, March 2002.

The Eastern Cape Department of Economic Affairs, Environment and Tourism and KwaZulu-Natal Department of Agriculture and Environmental Affairs did not provide their Departments' total allocation.

The KwaZulu-Natal Department of Agriculture and Environmental Affairs reported that all environmental programmes are included in the total function of Environmental Management, which is currently restructuring and clear allocation would only be available as from 1 April 2001, whilst the Eastern Cape province did not give any explanation to their failure of providing this information to the Commission as requested.

Regarding the total budget allocation, DACEL (Northern Cape) reported that the environmental functions were only transferred to the Department during October 1999 with a budget of R531 862. The Department pointed out that the bulk of the working capital was already committed to Environmental Impact Assessment with Coastal Management and Waste Management sharing the minor portion. The Department indicated that all matters regarding pollution management were referred to DEAT (national).

DEAT-FS allocation shows a decrease of R8 200 000 from the previous reporting period. The Department indicated that the allocated budget is inadequate as it only provided for personnel expenditure and a very limited amount to cover running costs for programmes.

²² The figures provided refer only to the functions of the Environment Directorate and not the entire Department of Agriculture and Environment.

²³ Ibid.

DACEL (Gauteng) indicated that the figures tabulated in Table 8 express the allocations for environment in relation to the total allocation for the whole department. Furthermore, the Department indicated that there was allocative inefficiency in the 1998/1999 financial year, which resulted in a downward adjustment of the amount voted in the 1999/2000 financial year commensurate with the human resource capacity of the component. Expansion of the organisational establishment and a commensurate increase in the operational budget in the 2000/2001 financial year resulted in an upward adjustment in the amount voted in the 2000/2001 financial year.

Variance(s): The Northern Province Department of Agriculture and Environment reported that the allocation to the environment sub-directorate has declined over time due to resource constraints within the larger Departments of Agriculture and Environment. The Western Cape Department of Environmental Affairs reported that the reasons for variation were related to the inflation and improved service delivery conditions and the filling of essential posts due to the expansion of the services. DACEL (Mpumalanga) and DACE (North West) did not provide information for the variation in budgetary allocations however; the allocations provided shows an increase. The Gauteng and Western Cape provinces did not provide reasons for under-spending. The Mpumalanga, North West and Northern provinces did not indicate their actual expenditure.

Pollution Management

The provincial budgetary allocation towards Pollution Control/Management is tabulated below. Only six of the nine provinces provided the necessary information as requested per protocols. The Free State and Northern Cape failed to provide the Commission with the budgetary figures for Pollution Control/Management, while the KwaZulu-Natal Department reported that funds are not budgeted for or allocated separately for different Environmental Management functions. The Western Cape province reported that the allocation of an amount of R 265 000 during the 2000/2001 financial year, which is little as compared to other provinces, was as a result that this is a newly created sub-directorate within the Department and provides for its operational expenditure.

Table 9 Provincial Budgetary allocation towards Pollution Control/Management

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	ALLOC. AS A % OF THE DEPT'S TOTAL BUDGET	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPEND. IN RAND(S)
Eastern Cape	1998/1999	3 485 516	3.5	2 642 000	2 072 278
	1999/2000	6 009 000	4	5 561 000	5 457 000
	2000/2001	*	*	*	*

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	ALLOC. AS A % OF THE DEPT'S TOTAL BUDGET	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPEND. IN RAND(S)
Gauteng ²⁴	1998/1999	6 935 000	7.36	-	-
	1999/2000	4 881 000	5.52	4 881 000	4 869 000
	2000/2001	7 451 000	6.28	7 451 000	-
Mpumalanga	1998/1999	-	-	-	-
	1999/2000	-	-	-	-
	2000/2001	3 702 696	-	-	-
Northern Province	1998/1999	5 500 000	-	-	-
	1999/2000	4 910 000	-	-	-
	2000/2001	3 860 000	-	-	-
North West	1998/1999	-	-	-	-
	1999/2000	11 688 000	-	-	-
	2000/2001	11 688 000	-	-	-
Western Cape ²⁵	1998/1999	-	-	-	-
	1999/2000	-	-	-	-
	2000/2001	265 000	-	265 000	-

[-] for the total expenditure section for financial year 2000/2001, the requested information would only be available at the end of financial year, March 2002; whereas for the others it simply means that no information was supplied by the relevant department.

*During 1999, the Eastern Cape Environmental Protection Directorate discontinued through the restructuring process. Figures for the financial year 2000/2001 would be reflected under Nature Conservation budget, which is now part of the new Directorate: Environmental Affairs.

Variance(s): For most provincial departments, Pollution Management functions are new responsibilities. This is supported by the fact that during the 1998/1999 and 1999/2000 financial years, no budget was allocated towards these functions to the above provincial departments, with the exception of the Eastern Cape, Gauteng, the Northern province and the North West to some extent. Regarding over-spending, no reasoning was provided by the responsible provinces.

In terms of consideration given to vulnerable groups, the Eastern Cape Department of Environment indicated that its budgetary allocations towards environmental protection gave no special consideration for these groups.

²⁴ The Gauteng Department of Agriculture, Conservation, Environment and Land Affairs indicated that there was allocative inefficiency in the 1998/1999 financial year, which resulted in a downward adjustment of the amount voted in the 1999/2000 financial year commensurate with the human resource capacity of the component. Expansion of the organisational establishment and a commensurate increase in the operational budget in the 2000/2001 financial year resulted in an upward adjustment in the amount voted in the 2000/2001 financial year.

²⁵ The Department indicated that the amount of R 265 000 during the 2000/2001 financial year to pollution and waste related issues was as a result of the newly created Pollution Control and Waste Management Sub-directorate; and that this amount provides for the Department's operational expenditure.

Waste Disposal Management

Table 10 below represents the provincial responses regarding budgetary allocation towards Waste Disposal Management. Only five of the nine provinces provided the Commission with some of the required information regarding this programme.

Table 10 Provincial Budgetary Allocations towards Waste Disposal Management

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	ALLOC. AS A % OF THE DEPT'S TOTAL BUDGET	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPEND. IN RAND(S)
Eastern Cape	1998/1999	3 485 516	-	100 000	80 000
	1999/2000	6 119 000	-	610 000	220 000
	2000/2001	*	*	*	*
Gauteng ²⁶	1998/1999	1 823 000	1.06	-	1 000 000
	1999/2000	1 408 000	1.26	-	1 029 000
	2000/2001	1 788 000	1.52	-	-
Mpumalanga	1998/1999	-	-	-	-
	1999/2000	-	-	-	-
	2000/2001	4 738 890	-	-	-
North West	1998/1999	1 398 000	-	-	-
	1999/2000	1 398 000	-	-	-
	2000/2001	1 558 000	-	-	-
Western Cape	1998/1999	Nil	Nil	Nil	Nil
	1999/2000	Nil	Nil	Nil	Nil
	2000/2001	Nil	Nil	Nil	Nil

[-] for the financial year 2000/2001 means that the required information would only be available at the end of the financial year, that is, March 2002. For the other information requested the symbol simply means that the relevant Department supplied no information.

* indicates that the figures are reflected under Nature Conservation budget as per the new restructured process.

The KwaZulu-Natal province did not provide information for this programme but indicated that functions of this programme are included in the total function of Environmental Management. The Northern Cape, Free State and Northern Province did not provide the Commission with any relevant information and/or explanation.

Variance(s): DACEL (Gauteng) indicated a 1.26 percent increase in allocation and bilateral funding from the Danish Government for a Health Care Waste Management Strategy complemented this allocation towards Waste Disposal Management. With regard to the previously marginalised groups, the Department indicated that due to the fact that environmental transgressions are spatially located in proximity to poor people, the Department's budgetary allocation proactively targets these groups. The Department however, failed to indicate how these groups are targeted.

²⁶ Ibid.

The Eastern Cape Department did not provide information about the variation in the allocation but indicated that the allocation was inadequate and therefore could not discharge its responsibilities in this regard.

The Western Cape Department of Environment reported that this measure is not applicable to their department, since section 20 of the ECA 73 of 1989 that covers the permitting and auditing of waste disposal sites is administered by DWAF. Furthermore, the EIA covers the development of new waste disposal sites.

The North West and Mpumalanga only provided the allocation but failed to report as to whether the allocation was sufficient or not and how it benefited the previously marginalised groups. The Mpumalanga and North West provinces did not indicate their actual expenditure.

Soil Erosion and Conservation

Provincial total budgetary allocation towards Soil Erosion and Conservation is tabulated in Table 10 below. Out of the nine provincial departments responsible for environmental management, only seven managed to provide the Commission with the required information as per protocols.

DEAT-FS indicated that this programme is the responsibility of the provincial Department of Agriculture. The Eastern Cape, Northern Cape and the Northern Province departments did not provide any relevant information regarding budgetary allocations towards this programme. The KwaZulu-Natal Department of Environment reported that since these activities were provincialized, the budget allocations towards the above function were drawn from the Department's total budget allocation according to the availability of funds.

Table 11 Provincial Budgetary Allocations towards Soil Erosion and Conservation

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	ALLOC. AS A % OF THE DEPT'S TOTAL BUDGET	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPEND. IN RAND(S)
Gauteng	1998/1999	780 000	-	500 000	496 935
	1999/2000	590 000	-	500 000	103 766
	2000/2001	500 000	-	500 000	-
Mpumalanga	1998/1999	7 204 025	5.46	7 204 025	7 819 537
	1999/2000	4 455 727	3.31	4 455 727	3 907 992
	2000/2001	4 682 919	2.26	4 682 919	-
North West	1998/1999	-	-	-	-
	1999/2000	11 688 000	-	-	-
	2000/2001	11 688 000	-	-	-
KwaZulu-Natal	1998/1999	307 636		1 000 000	307 636
	1999/2000	753 296		1 000 000	753 296
	2000/2001	90 398		1 000 000	90 398
Western Cape	1998/1999	Nil	Nil	Nil	Nil
	1999/2000	Nil	Nil	Nil	Nil
	2000/2001	Nil	Nil	Nil	Nil

[-] for the Actual Expenditure column means that the requested information would only be available at the end of the financial year, and for the others the information was not made available.

Variance(s): The Gauteng Department indicated that the variation was due to a review of policy with respect to public spending on soil conservation, which affected the actual expenditure in the 1999/2000 financial year. Spending on soil conservation works up to this point on time comprised subsidisation of works on private land in terms of s 8 schemes in terms of the Conservation of Agricultural Resources Act. During the 1999/2000 financial year spending on s 8 schemes was limited to continuations hence the deviation of actual expenditure from projected expenditure. During the 2000/2001 financial year, spending is allocated to public good soil conservation works including clearing and re-vegetation of riverbanks and gabions on public roads.

DACE (Mpumalanga) reported that this programme accounts for 3.31 percent, an indication of a decrease from the previous period. The Department indicated that during the 1998/1999 reporting period, subsidy schemes for all farmers to carry out soil conservation works e.g. contours, waterways, erosion fencing and drainage systems have been removed, hence the decrease in percentage allocation from 5.46 percent to 3.31 percent during the current reporting period. The percentage allocation of 2.26 is only for personnel expenditures. The Department reported that as a result of lack of funds for soil conservation, land degradation is on the increase in the province and there are no measures that the Department can put in place because there are no allocations provided for this exercise.

Regarding the Western Cape province, this measure was not applicable as the budget was zero and there were no variances. No reasoning was given to the Commission as to why the Department within its total budget allocation did allocate a certain portion of this amount towards programmes aimed at alleviating the soil erosion problem in that province.

Nature Conservation

Table 12 is a brief summary of the total budgetary allocation of the provinces towards Nature Conservation. Only five of the nine provinces provided the Commission with the relevant required information. Some provinces supplied substantive reasoning to the Commission as to why the information was omitted, whilst other provinces did not supply the Commission with any information.

The Free State, Northern Province, Northern Cape did not provide the Commission with any relevant information. The Northern province reported that as far as Nature Conservation is concerned, there is no specific line item for this programme. The Department further went on indicating that, the various aspects of this function have been subsumed into the broader departmental function of integrated environmental management. The KwaZulu-Natal province reported that no allocations were made towards this programme, as the KwaZulu-Natal Nature Conservation Service (NCS) was desperately short of operating funds due to an imbalance on staff expenditure.

Table 12 Provincial Budgetary Allocation towards Nature Conservation

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	ALLOC. AS A % OF THE DEPT'S TOTAL BUDGET	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPEND. IN RAND(S)
Gauteng	1998/1999	30 881 000	32.7	-	20 904 000
	1999/2000	22 995 000	22.4	22 995 000	21 532 000
	2000/2001	39 740 000	33.5	39 740 000	-
North West	1998/1999	11 688 000	-	-	-
	1999/2000	11 688 000	-	-	-
	2000/2001	11 688 000	-	-	-
Mpumalanga	1998/1999	11 887 141	N/A	10 410 000	12 575 000
	1999/2000	10 941 000	N/A	13 346 802	13 346 801
	2000/2001	11 723 000	N/A	13 346 801	13 346 801
Western Cape	1999/1999	39 311 000		-	45 901 000
	1999/2000	53 569 000		-	51 590 000
	2000/2001	59 203 000		59 203 000	-
Eastern Cape	1998/1999	123 631 000	42.1	52 009 000	32 417 000
	1999/2000	145 207 000	38.4	55 792 000	38 662 000
	2000/2001	127 476 000	45.2	57 561 000	37 370 724

[-] no information was supplied by the relevant department, with the exception of the Actual Expenditure column for the 2000/2001 financial year, as information would only be available at the end of the financial year, that is March 2002.

Variance(s): Most of these were notable, especially the Eastern Cape. DACEL (Gauteng) did not provide reasoning as to why it has been under-spending during the past two reporting periods. Gauteng Nature Conservation accounted for 33.5 percent of the Department's total budget showing an increase of 11.09 percent compare to the previous year. The increase is attributed to a conditional allocation of R18 million for CAPEX Works²⁷ on Provincial Nature Reserves. The Department indicated that the budgetary allocation is utilised for the sustainable utilisation and protection of bio-diversity and the management of provincial nature reserves and therefore is of benefit to the public at large, including the previously marginalised groups. The Department also utilises their Nature Reserves to promote access and educational opportunities however, this is done at a cost by charging visitor services. Regarding special consideration given to special groups, the Department indicated that the allocation is used for the sustainable use and protection of bio-diversity. It also stated that this functional responsibility is a prerequisite for sustainable living environment and therefore is of benefit to the public at large.

The KwaZulu-Natal Department reported that the Nature Conservation Services (NCS) were short of operating funds due to an imbalance on staff expenditure, but that this is in the process of being addressed. Furthermore, due to inadequate funding of the Nature Conservation Programmes, this had a significant effect on the Community Conservation efforts; furthermore, this shortage in budget allocation also had a significant effect on Bio-diversity Conservation needs such as the enormous alien plant invasions in the parks. Regarding special consideration to vulnerable groups, the Department reported that the Community Conservation Projects benefited impoverished people as the eradication of alien plants is very labour-intensive and provided opportunities for SMME's.

The Mpumalanga province on the other hand did not provide the Commission with reasoning as to why the Department has been over-spending during the past two reporting periods.

The North West province indicated that the allocation was inadequate and as a result, there were no funds to employ relevant expertise to implement the programme. However, the Department did not indicate their actual expenditure. With regard to special groups, the Department indicated that regulatory services have been stepped up in rural areas especially on tribal land. Community game reserves were proposed and one is fully operational. Several conservation occurrences were registered and dealt with, these include hunting, fishing permits and conduction of site investigations. The Department however, did not indicate how regulatory services were functioning.

²⁷ CAPEX (capital expenditure) is a Program started in 1998 by the Gauteng Provincial Government for the development of the province and the upliftment of its people with primary focus on the poor and previously neglected communities. For this the Gauteng provincial government allocated R1.098 million for capital expenditure.

Regarding this notable under-spending experienced by the Department, the Eastern Cape Department of Environment reported that this was due to lack of approval from Treasury to fill in critical posts identified within the Department. Furthermore, misallocation of nature conservation staff and also non-approval and/or backlog for the purchasing and/or replacement of the redundant and or/old GG and Departmental vehicles. The Department indicates that the Environmental Protection and Nature Conservation Directorates were combined into Environmental Affairs during December 1999. The Department further reports that the budget allocation in the table above was not enough as most projects namely, Environmental Education, Field Services projects and operations had to be shelved and/or cancelled. The Department indicates that due to this, the department's day to day performance was affected as it could not perform its regulatory functions effectively and efficiently, and this in turn affected the service delivery greatly.

In terms of special consideration given to vulnerable groups, the Eastern Cape Department of Environment indicated that for people living in rural areas, community projects like Bizana Community Nature Reserve initiative, Xonxa Dam Eco-Tourism and Maluti Drakensburg Trans-frontier project were initiated. The Department also indicated that funding allocated was relatively inadequate and that has resulted in other projects being cancelled. Special consideration was also given to poor people through initiating food garden initiatives. Furthermore, the previously disadvantaged groups including indigenous groups were also considered through involving them in management committees on reserves and also through initiating projects in their respective areas.

The Western Cape Department of Environment indicated that it has limited control over budget allocations or variances related to this function. The Department indicated that the budget allocations are totally inadequate for the Department to execute its functions effectively, and for it to provide an effective Nature Conservation service in the province.

Capacity Building and Information Dissemination Programmes

Table 13 below summarises the provincial total budget allocation for the financial years, 1998/1999; 1999/2000 and 2000/2001 towards Capacity Building and Information Dissemination Programmes. The provinces of the Northern Cape, KwaZulu-Natal and Free State did not provide information on their provinces total budget allocation for Capacity Building and Information Dissemination Programmes for the past two financial years including the present reporting period.

The Western Cape reported that at present, the Department is unable to fund Capacity Building and Information Dissemination Programmes and is dependent upon donor funding/sponsorships to meet needs of this nature.

The Eastern Cape Department of Environment indicated that the Directorate appeals to private organisations for assistance regarding training and capacity building issues. What the Department failed to do was to make mention of those private organisations and the total amount the Department has set aside in order for these functions to be efficiently executed.

Table 13 Provincial Budget Allocations towards Capacity Building and Information Dissemination Programmes

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	ALLOC. AS A % OF THE DEPT'S TOTAL BUDGET	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
Gauteng ²⁸	1998/1999	1 223 000	1. 30	1 223 000	978 000
	1999/2000	1 287 000	1. 41	1 287 000	1 336 000
	2000/2001	1 392 000	1. 17	1 392 000	-
Mpumalanga	1998/1999	-	-	-	-
	1999/2000	-	-	-	-
	2000/2001	20 000 000	-	-	-
Northern Province	1998/1999	6 000 000	-	-	-
	1999/2000	3 898 000	-	-	-
	2000/2001	1 527 000	-	-	-
North West	1998/1999	-	-	-	-
	1999/2000	11 688 000	-	-	-
	2000/2001	11 688 000	-	-	-

[-] information for the actual expenditure would only be available at the end of the current financial year, March 2002.

Variance(s): All the provinces indicated above except for Gauteng did not provide the reason(s) for the variation in the allocations and their actual expenditure. The Mpumalanga province indicated that the amount allocated was used to relieve the financial crisis in the Department.

With regard to consideration given to special groups, DACEL (Gauteng) reported that due to the fact that environmental transgression are spatially located in proximity to poor people, their budgetary allocation proactively targets these groups. The North West province reported that five active NGOs were formed through the awareness campaign, workshops and meetings are held regularly with the affected and interested parties to raise awareness about environmental rights.

The Western Cape reported that with regard to special groups, the Directorate is unable to fund Capacity Building and Information Dissemination and is dependent upon donor funding/sponsorships to meet needs of this nature.

Technology and Support Service

²⁸ Op cit. note 25.

Table 14 below represents the responses provided by the different environmental departments with regard to the departments' total budget allocation towards Technology and Support Services. The Northern Cape, Eastern Cape, Western Cape, Mpumalanga, Free State and Northern Province did not provide the Commission with the requested information regarding this section.

Table 14 Provincial Budgetary Allocation regarding Technology and Support Services

PROVINCE	YEAR	TOTAL ALLOCATION IN RAND(S)	PROJECTED EXPENDITURE IN RAND(S)	ACTUAL EXPENDITURE IN RAND(S)
Gauteng	1998/1999	12 789 000		11 556 000
	1999/2000	13 536 000	-	6 034 000
	2000/2001	11 939 000	-	-
Mpumalanga	1998/1999	12 000 000	-	10 800,000
	1999/2000	12 400 000	-	11 200 000
	2000/2001	11 200 000	-	10 100 000
North West	1998/1999	-	-	-
	1999/2000	11 688 000	-	-
	2000/2001	11 688 000	-	-

[-] regarding Actual Expenditure for the reporting period, means that the requested information would only be available at the end of the financial year, that is, March 2002. The other financial years and projected expenditure means that no information was supplied.

Variances: Referring to the table above, Gauteng and Mpumalanga provinces have under-spent on their allocated budgets over the different financial years towards the implementation of this programme. Regarding the DACEL (Gauteng) Department of Environment, the amount not spend was very notable during the 1999/2000 financial year, almost an amount two-fold of the total allocation. The North West province only submitted the allocated figures failing to provide the Commission with the actual expenditure for this programme.

The Gauteng and Mpumalanga provinces did not provide reasons for the variation in the allocations towards this programme. Furthermore, these provinces did not provided any satisfactory reasoning as to why they had under-spent their allocated funds over the past three financial years. The Gauteng Department indicated that over 80 percent of the budget is used to support programmes targeting the previously marginalised groups.

The North West province indicated that it developed an environmental monitoring laboratory to carry out chemicals and bacteriological analysis of soil and water samples. Awareness to the environment is also created among the poor communities regarding potential sources of pollutants like pit latrines, agricultural chemicals and discharging domestic waste into the river. This analysis is still under process in rural areas. Mpumalanga did not provide information as to what considerations are in place for these groups. The Gauteng and Mpumalanga provinces did not provide their projected expenditure and therefore makes it difficult to assess whether

they under-spent or not. The North West province did not provide the actual expenditure.

3.3 Critique

DEAT provided sufficient budgetary information for various programmes that made it possible for the proper analysis of the extent to which the Department is realising the right to a healthy and protected environment. The Department did not utilise the entire allocated budget, as some projects were not completed. DEAT indicated that it received R 91.4 million from other sources in the reporting period. However, DEAT failed to indicate where the funds came from, for what purpose and how they were utilised.

Additional budget should be allocated to DEAT for Waste Management and Pollution Control matters, in order for it to realise the right to a clean and healthy environment in totality. The Department reported that there are serious potential problems envisaged in future due to an insufficient budgetary allocation for these programmes. In order for the Department to implement the White Paper on Pollution Control and Waste Management over the next five (5) years, the estimated costs are R 100 000 000 and R 187 000 000 for Pollution Control and Waste Management respectively.

DWAF gave a clear indication as to their responsibilities regarding environmental rights, whereas DME only mentions the budget allocated and its responsibility in terms of mining.

The Western Cape province showed a larger allocation in t provinces and continued increase in the 2000/2001 allocations, whereas Mpumalanga received a small allocation although it is a province suffering from the legacy of coal mining including areas infested by underground fire, collapsing earth and massive air and land pollution. This situation necessitates the movements of funds between provinces and additional allocations from national government.

The report from DACEL (Gauteng) provincial Department of environment showed a clear understanding of the obligation to protect the environment. The Department provided information for all the provinces and how the programmes give special consideration to vulnerable groups.

The North West Department's budget allocation seems unrealistic and therefore difficult to assess if the allocation was sufficient to realise the right to a healthy and protected environment. This is exacerbated by the fact that the allocations for programmes do not indicate how much were spent and whether that was sufficient.

Generally, it is difficult to conclude whether provincial departments over or under-spent because they failed to provide the projected and actual expenditures.

3.4 Recommendations

The responsible Departments of Environment need to address both the environmental and health concerns. It is important to acknowledge the social and economic factors that act as major driving forces for unhealthy environmental condition and major determinants of health. The most severe environmental health problems affect people who lack access to economic and other resources. As long as poverty and economic inequality persist, the living conditions and environment and health status of millions of people will not improve. Environment Education and/or Capacity Building alone without proper infrastructure and services in place would be fruitless.

Since waste disposal management and pollution control is critical environmental issues, it is important for the departments to prioritise these functions when budgeting.

There is a need for prioritised spending on a thorough environmental education and/or capacity building campaigns, particularly in the informal settlements, where there are environmental health hazard in terms of sanitation and hygiene.

The Provincial Departments of Environment need to understand their constitutional obligations to provide for a healthy and protected environment. The lack of such understanding is evident in the budget allocations provided by those Departments. In order to maintain a strategic vision to address environmental rights and the implementation thereof, there needs to be designation of contact points to exchange monitoring and implementation of programmes across provinces so that they could share the information and learn from other experiences.

The lack of inclusion of direct budgetary allocations for marginalised groups for the different programmes is of some concern, as marginalised groups are the ones that are most affected by environmental transgressions and therefore should be included in these programmes.

There should be a clear allocation of responsibilities between the local, provincial and national spheres of government. The involvement at national level should focus on the monitoring of the implementation of legislation and policies and sufficient allocation of funds to provincial departments in order for the departments to execute their mandate efficiently. These allocated funds to respective provinces also need to be monitored so that they are put to a better and productive use.

4 OUTCOMES

4.1 National Sphere

DEAT did not provide information on indicators but reported that the information could be obtained from other Departments such as Agriculture, Health, DWAF and provincial Departments that deal with environmental issues. DEAT also reported that if these indicator categories remain constant for future Commission's reports, DEAT would give serious consideration to gather information on indicators required by the Commission as part of its indicator programme.

DWAF reported that of all of the indicators listed, the Department could only report on people affected and harmed by water pollution. The rest of the indicators fall within the legal jurisdiction of other governmental institutions. With regard to water pollution the Department reported that it is not officially aware of any cases of people affected or harmed, although the Department's activities continuously aim at preventing water pollution that could cause human harm. The Department is continuously developing water quality monitoring and auditing systems to detect any risk of affecting human health.

DME did not provide the required information on the outcome measures.

4.2 Provincial Sphere

The Gauteng Department of Agriculture, Conservation, Environment and Land Affairs did not provide specific information but only reported that the information is reflected in the Strategic Plan, Operational Plan and Budget Statement for the reporting period. In terms of the information that was required regarding the nature of pollutants experienced in South Africa, the Department indicated that the information is contained in the State of the Environment Report and the Department's Environmental Information Management System, which is GIS based. The KwaZulu-Natal Department reported that the appointment of staff to monitor compliance with environmental legislation would be finalised during the course of 2001. The Northern Province Department reported that due to resource constraints statistics required are not collected.

Provincial Environment Departments of Free State, Eastern Cape, Mpumalanga, Northern Cape, North West and Western Cape neither provided the required information nor reasons for non-provision.

4.3 Critique

During the current reporting period, DEAT, DWAF and DME failed to provide the Commission with the information on environmental indicators. It should be noted that indicators or performance measures are those tools that are used to measure progress towards a target or desired future state. Thus, without proper reporting, monitoring and implementation instruments on indicators being put in place, the goal(s) and/or objective(s) cannot be achieved. It is important for all the Departments that impact on the environment that are DEAT, DWAF and DME in this

particular instance, to make it their departments' responsibility to report on this section on indicators.

It is unacceptable that DME did not provide the Commission with information on environmental and health indicators, as it is a known fact that the Department through mining operations impacts on the biophysical, social and economic environment. Mining generates dust (especially from asbestos mining), causes visual impacts and in the process causes discomfort and serious health impacts. Health is a serious concern where mines are situated especially near urban areas, therefore DME need to report on the health indicators the Department has developed in order to address this.

Furthermore, various highly toxic trace elements like mercury, lead, nickel, copper, zinc and cadmium regularly find their way into aquatic environments as a result of some mining activities and cause a wide range of damage to vertebrates. The most recent local case was the alleged poisoning of workers at the Thor Chemicals plant in KwaZulu-Natal with mercury. Mercury and lead irreversibly damage the central nervous system; nickel and beryllium damage the lungs; and cadmium damages the kidneys and lungs. DME therefore needs to report on indicators that the Department has put in place in order to assess, monitor and control pollution of the environment, especially aquatic systems.

However, DWAF could have reported on the South African River Health Programme indicators including the indicators developed by the Department's (Forestry section) to monitor and control pollution of aquatic systems.

Measure to measure atmospheric, soil and water pollution should be put in place by DWAF and DEAT. Legal action is still not being taken against those companies who are responsible for polluting.

DEAT did not supply the Commission with information on the number of people and communities affected by atmospheric pollution, soil and water pollution. Furthermore, DEAT has developed the integrated NSoER during October 1999 as a first step in presenting information on environmental conditions in South Africa, the Department could at least have reported on those indicators that were used in the process of compiling the NSoER. DEAT could also have reported on those indicators that have been developed by the Department with the assistance of CSIR (Water, Environment & Forestry), Human Science Research Council and Mzuri Consultants cc, during the indicator testing process of the United Nations Commission for Sustainable Development.

4.4 Recommendations

The State should enact a legislation that force all industrial developments to undergo an environmental audit as this would alleviate the pollution of the environment at large, (mainly atmospheric, soil and water). DEAT

should also ensure that all industries/companies operating processes controlled in terms of the Atmospheric Pollution Prevention Act 45 of 1965 meet the local acceptable emission standards set by the Department.

Furthermore, handling and disposal of medical waste is also of greater concern in the country. Medical waste is still being disposed off illegally and this is a great hazard to people's health as it always find way into the aquatic system and pollute the country's water resources. DEAT and DWAF need to monitor the handling and disposal of this waste and ensure that all the incinerators operating in the country meet the minimum requirements. Those indicators that do not meet the standard minimum requirements should be shut down with immediate effect and the owners must fined heavily as these incinerators contribute greatly to atmospheric and water pollution and put people's health in danger.

There are other various initiatives regarding the environmental indicators that have been initiated locally. These include Socio-economic indicators developed by SAHRC; the South African River Health Programme by DWAF in collaboration with Water Research Commission (WRC), DEAT and other relevant stakeholders; Department of Health; the South African Integrated Spatial Information System Programme indicators for sustainable human settlements; the programme to develop indicators for sustainable forest management by DWAF amongst others. These set of environmental indicators need to be consolidated and linked to the present environmental indicators, in order to have a core set of integrated environmental indicators.

The specialist team should strive on working and improving on those indicators that have already been developed (e.g. by DWAF, Forestry Section), so that the duplication of information from the different tiers of government and between different government Departments should be avoided. Furthermore, the above-mentioned team should, with the help of other stakeholders, develop indicators that would be shared amongst different tiers of government.

5 MONITORING SYSTEMS

DME and DWAF did not provide the Commission with any information regarding monitoring and assessment of the progressive realisation of the environmental right. The Mpumalanga, Free State, Eastern Cape, KwaZulu-Natal, Eastern Cape and North West Provincial Departments of Environment did not address the question on monitoring and no reasoning was provided to the Commission for failure to do so.

DACEL (Gauteng) indicated that it in order to monitor the progressive realisation of the environmental rights, the Department does this through meetings held at the Department. Furthermore, the Department produces quarterly and annual reports, an operational plan for the department, business plans, individual employees work plans and periodic budget

statements. Regarding the question on the collected statistics, the Department reported that it collects limited information in its Environmental Information Management System and that the primary information is sourced from parastatals and academic institutions. With regard to the compilation of the responses by the Department, it is reported that the MEC and the HOD delegated the task to a component that deals with Policy Co-ordination in the Department. It is mentioned that all the departmental reports and documents are available to this component and that the component has a general broad understanding of the department's activities. In fulfilling this right, the Department has indicated that it works closely with the following departments: DEAT, DWAF, DME, Agriculture, Land Affairs, the Provincial Departments of Development Planning and Local Government, Housing, Education, Transport and Public Works, Health and the Local Authorities.

The Northern Province Department of Agriculture and Environment reported that no measures and/or mechanisms are in place in order to assess the progressive realisation of the environmental right. The Department reported that, this is due to shortage of resources, amongst them personnel included.

The Western Cape reported that the Minister of the Environmental and Cultural Affairs established the West Coast Environmental Monitoring Committee (WEMCO) during June 1999, which is accountable to the Provincial Minister of Environmental Affairs. The main function of this committee is to act in a review, monitoring and advisory capacity for the new and existing developments within the West Coast District Council's geographical boundaries. In executing its mandate, WEMCO together with the Department seeks to promote and ensure the progressive realisation of the environmental rights. Furthermore, the Department added that when it issues authorisations on project developments, conditions are recorded in the record of decisions for the applicant to adhere to, which would guide the applicant in establishing monitoring mechanisms and measures. No statistics are collected by the Department aimed at facilitating monitoring and assessment of the progressive realisation of the environmental rights. The Department added that an Information Technology (IT) committee has been established in terms of the Provincial Strategic Plan that would enhance this. In order for the Department to prepare its responses to the Commission on the socio-economic rights protocol, senior management in the Department gathers inputs from relevant organs of the State. The Department recognises that it has not done enough to facilitate the realisation of the right to a healthy environment, and that these were the results of problems encountered during the transformation process. Furthermore, the Department indicated that it works together with other organs of State at national, provincial and local sphere in order to improve service delivery to the public and in achieving sustainable development.

PART C: CONCLUSION

In respect of the environmental rights, the Departments' reporting indicated that to some extent, there has been progressive realisation to this particular right in question. This is evident in the legislation, policies and programmes developed by DEAT and DWAF. DME failed to indicate clearly whether the Department has derived policies, legislation and or programmes that indicates that there has been progressive realisation of the right to a clean, protected and healthy environment.

Matters relating to environmental rights are a functional area of concurrent national and provincial competence. However, at both levels of governance, budget allocation, human resource and capacity constraints are major hindrances on Departments executing their respective mandates effectively and efficiently. Whilst enabling legislation has been passed, insufficient budgetary allocations for programmes are the fundamental constraints. Furthermore, reliable social impact indicators of environmental rights for vulnerable groups are lacking.

ABBREVIATIONS

DEAT	- Department of Environmental Affairs and Tourism
DME	- Department of Minerals and Energy
DWAF	- Department of Water Affairs and Forestry
EIA	- Environmental Impact Assessment
EIPs	- Environmental Implementation Plans
EMPs	- Environmental Management Plans
HCA	- World Heritage Convention Act 49 of 1999
ICESCR	- International Covenant on Economic, Social and Cultural Rights
IP&WM	- Integrated Pollution and Waste Management
NEMA	- National Environment Management Act 107 of 1998
NSoER	- National State of the Environment Report
NWMS	- National Waste Management Strategy
NGOs	- Non-governmental organisations
SCD	- Sustainable Coastal Development

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CHAPTER TEN

PRISONERS' RIGHTS

PART A: OVERVIEW

1 INTRODUCTION

The South African prison system formed part of the state apparatus of a minority government based on racial discrimination. The 'pass laws' required Africans to carry passes at all times and failure to do so meant a jail sentence. As a result South Africa had one of the highest prison populations in the world and prisons were often overcrowded.

The focus on the living conditions of prisoners was brought about by an outcry in the manner in which prisoners were being treated upon incarceration. Detained persons were subjected to human rights abuses in South African prisons during the apartheid era. Detention without trial and torture were the order of the day.

Most prisons are still overcrowded, and this has resulted in many other problems such as the increased burden on infrastructure and the provision of toilets, showers and beds. The safety and security of prisoners have also been compromised. Adding to this is the outbreak of the AIDS epidemic, which requires costly medical intervention.

The chapter will begin by outlining the constitutional provisions relating to prisoners' rights which will be discussed in the light of relevant international instruments.

2 CONSTITUTIONAL OBLIGATIONS

The procedural and substantive rights of detained, arrested and accused persons are compatible with the essence and spirit of the post 1994 liberal democracy and a constitution of liberty.¹ Section 35(2)(e) of the South African Constitution provides for the right to conditions of detention that are consistent with human dignity.² Section 35(2)(e) of the South African Constitution provides that 'everyone who is detained, including every sentenced prisoner has the right to conditions of detention that are consistent with human dignity; including at least exercise and the provision, at state expense, adequate accommodation, nutrition, reading material and medical treatment. The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the treatment with humanity and with respect for the inherent dignity of the human person. The rights of prisoners are also specifically provided for at the international level under certain rules and principles. The United Nations

¹ G E Devenish *A Commentary on the South African Bill of Rights* (1999) 512

² The Constitution of the Republic of South Africa Act 106 of 1996

Standard Minimum Rules for the Treatment of Prisoners (SMR) provides for the separation of categories in prisons. The different categories of prisoners must be kept in separate institutions or parts of institutions taking into consideration their gender, age, criminal record, legal reason for their detention and the necessities of their treatment.³

Accommodation

The constitutional provision for adequate accommodation is in line with the SMR which sets out what is generally accepted as being good principle and practice in the accommodation of prisoners. Rule nine of the SMR stipulates that all accommodation provided for the use of prisoners shall meet all the requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation. The rules recognise the problem of overcrowding in prisons and therefore call for alternative forms of imprisonment to alleviate the problem of overcrowding. The careful selection of prisoners accommodated in the same cells is crucial to protect vulnerable prisoners from gang and sexual abuse.⁴

Nutrition

Prisoners are accorded the right to nutrition in the Constitution. The SMR provides for the right to food that is of nutritional value, adequate for health and well-being, food of wholesome quality and that is well prepared.⁵

Reading material

The provision of reading material is also catered for under the Basic Principles on the Treatment of Prisoners and it states that all prisoners shall have the right to take part in cultural activities and education that is aimed at the full development of the human personality.⁶ The SMR provide for the right to books, education and recreation. In terms of s 35(2)(e) of the Constitution there is provision for the right to reading material, and paragraph 40 of the SMR states that every institution shall have a library. The library must be used by all categories of prisoners and should be adequately stocked with both recreational and instructional books.

As far as the right to education is concerned, prisoners are also included within the context of s 29 of the South African Constitution in that the right is afforded to everyone. The SMR provides for the right to further education for all prisoners and compulsory basic education for illiterates and young prisoners.⁷ As far as practicable the education of prisoners

³ Para. 8 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, 1957

⁴ *Ibid.* para 9 (2).

⁵ Note 3 above para 20 (1).

⁶ Principle Number 6 of the Basic Principles on the Treatment of Prisoners, 1990

⁷ Note 3 above, para 77(1)

shall be integrated into the educational system of the country. This would ensure that prisoners are able to continue with their education even after their release from prison.⁸

Medical treatment

With regard to the provision of medical treatment, the SMR states that where hospital facilities are provided in an institution, equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners. There is a duty on the part of the state to ensure that conditions in prison do not negatively affect the maintenance of health. The obligation is to ensure effective preventative measures as well as conventional health care. The SMR provides for the segregation of prisoners suspected of having infectious diseases or contagious conditions.⁹ However the World Health Organisation's Guidelines on HIV/AIDS in Prisons has recommended that infected prisoners should not be segregated from the general community as this amounts to discrimination. Adequate toilet facilities and the provision of bathing or shower facilities are required.

The rights of detainees in terms of s (35) of the Constitution relate to awaiting trial prisoners who are presumed innocent until proven otherwise by a court of law. This section is designed to ensure the physical, mental and psychological well-being of detainees and prisoners.

As far as children are concerned s 28(1)(g) of the Constitution provides that every child has the right not to be detained except as a measure of last resort. In addition to the rights a child enjoys under ss (12) and (35), a child may be detained only for the shortest period of time, and has the right to be kept separately from detained persons over the age of 18 years. The child must be treated in a humane manner, and kept in conditions that take account of the child's age. The best interests of the child should be of paramount importance. The Convention on the Rights of the Child (CRC) establishes rules regarding children's fundamental rights. Article 37(c) states that juveniles should receive treatment in a manner consistent with the promotion of the child's sense of dignity and worth. This helps in promoting the child's reintegration and assuming a constructive role in society.

The rights of child prisoners are provided for in the Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) which define the treatment of juvenile detainees.¹⁰ This instrument urges states to adopt measures relating to care, guidance,

⁸ Ibid, para 77(2)

⁹ Note 3 above para 24.

¹⁰ The United Nations Assembly General in its Resolution 40\33 of November 1985 adopted the Beijing Rules.

supervision, educational and vocational training to ensure the well being of juveniles.

The SMR states that correctional institutions for women should be provided with special accommodation for all necessary pre-natal and post-natal care and treatment. Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery where the infants shall be placed when they are not in the care of their mothers.¹¹

3 KEY DEVELOPMENTS FOR THE YEAR UNDER REVIEW

3.1 Policy and legislative measures

There were no new legislative or policy developments during the reporting period to advance prisoner's rights. The Department of Correctional Services (DCS) continues to implement the provisions of the Correctional Services Act 111 of 1998.

3.2 The Budget

The budget for the 1999/2000 financial year increased by 2.09 percent compared to the 1998/1999 financial year. The per capita costs per prisoner per day also increased from R72.99 in 1998/1999 to R80.82 in 1999/2000.

3.3 Outcomes

By December 1999, prisoner population had increased by 11.18 percent. Out of a total of 162 638 prisoners, 58 231 were unsentenced. Male juveniles accounted for 13 882 and females juveniles for 248 of the total number of prisoners. By December 1999, available cell accommodation capacity had been exceeded by 62.9 percent.

Education and training programmes were presented at 81 prisons nationally by qualified educationists, who were assisted by selected and trained functional personnel, study leaders, temporary personnel and volunteers. There were approximately 318 educationists, 157 temporary educationists, and 427 study leaders.

4 CONCLUSION

Although the above-mentioned developments were positive, overcrowding in prisons will place a greater burden on the facilities provided for prisoners, unless alternatives are found. The budget allocation is also insufficient for the provision of medical treatment, adequate nutrition, education and training programmes. For instance the DCS stated that only a limited number of rehabilitation programmes could be provided due to lack of resources. Even if budgetary allocation were to increase,

¹¹ Note 3 above para 23 (1) (2).

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overcrowding would still result in the living conditions of prisoners not being consistent with the SMR. The provision of proper prisoner conditions in South Africa remains a challenge to the DCS.

PART B: ANALYSIS OF RESPONSES BY ORGANS OF STATE

1 POLICY MEASURES

The Department of Correctional Services reported that it was still in the process of implementing existing policies and that no new policy measures were instituted during the year under review.

Accommodation

The DCS reported that it had not instituted any new policy or programmes during the reporting period but indicated changes to comply with the SMR. The DCS attempted to adhere to the rules in terms of the provision of Mother and Child Units for the child's proper development. The report also indicated that special considerations were made to accommodate the needs of different categories of prisoners.

The DCS applied the provisions of rules nine and fourteen of the SMR to items such as floor space, cubic content of air, ventilation, natural and artificial light, ablution and sanitary facilities. These also complied with local health regulations and by-laws.

The DCS reported that the measures in place were reasonable and effective in respecting, protecting, promoting and fulfilling the right of prisoners to adequate accommodation. Mother and Child Units had been created in correctional facilities which enabled mothers to exercise their parental responsibilities. Facilities for proper childcare had been created and provision had been made for the child's proper development. Where a correctional centre did not provide for Mother and Child Units, satisfactory arrangements have been made to accommodate a mother and her child in a humane environment, which was also private.

Reading material

In response to the question on what policy measures and programmes had been instituted to realise the right of prisoners to adequate reading material, the DCS reported that according to rule thirteen of the Correctional Services Regulations, a properly organised library containing literature of constructive and educational value must be established in every prison. The Department stated that reading material may also be received in accordance with regulation 13(2). A prisoner may receive reading material from outside and is also allowed to have religious literature. The DCS stated that it had complied with its constitutional obligations.

Nutrition

No new information was provided by the DCS on policy measures instituted for the provision of adequate nutrition. The Department reported that in co-operation with the health authorities it provided food as

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prescribed by the World Health Organisation and the American Nutritional Council.

Medical treatment

There were no new reported policy measures instituted during the reporting period. The information provided was similar to that presented for the 1998/99 reporting period.

Vulnerable groups

With regard to special considerations given to vulnerable groups, the DCS reported that it had established a sub-directorate on special categories of persons in prison. Some of these categories of prisoners include mothers with babies, young children, prisoners with disabilities and aged prisoners. The motivation for delineating these categories was to provide more humane conditions of custody and in compliance with promoting a human rights culture. It also stated that according to the Correctional Services Regulations, prisoners classified as belonging to any of the special categories must be held in conditions appropriate to that category. For instance, female prisoners with children were kept in separate Mother and Child Units within the prison where the surroundings and facilities were conducive to their physical, social and mental development. In so doing, the DCS pointed out that it was protecting the rights of the child. Pregnant women, who had no complications arising from their condition, were accommodated, at night, from the sixth month of pregnancy onward, in the hospital section of the prison. This was done as a precautionary measure. If however, complications arose, before the sixth month of pregnancy, the same rule was applied. Where no hospital facilities were available, the pregnant mother was transferred to a nearby prison with a hospital section.

It was noted that HIV-positive inmates were not separated as a special category because of their status.

Female offenders with children, lactating mothers and pregnant women who had special dietary needs were catered for through the provision of special diets as prescribed by a medical doctor. Special diets, high in protein and kilojoules, were provided for infants. Necessary arrangements were made to ensure that infants received their food after hours.

The DCS also reported that it was in the process of implementing a revised and amended ration scale for female offenders so as to increase their portion size. Although no specific policies existed for persons with disabilities, their needs were catered for in the same manner as those of other prisoners.

Problems experienced in implementing the measures

The DCS reported that one of the problems experienced, while discharging their constitutional obligations relating to the right of prisoners to adequate accommodation, was the fact that children awaiting trial were referred back to prisons. The other problem was that children were remanded into custody for periods exceeding six weeks while awaiting referral to places of safety. These children therefore ended up spending a long time in prison. The Department indicated that the Eastern Cape had the highest number of such children.

1.2 Critique

Accommodation

The DCS did not supply adequate information on how overcrowding affected the provision of resources and facilities for prisoners. Although there were some measures in place for children awaiting trial, they were not adequate, since children ended up spending a long time in jail before being moved to places of safety where they could be separated from older prisoners. The DCS failed to outline the measures that were in place and how they were implemented.

Education

The DCS provided brief, inadequate responses for a full understanding of prisoners' right to education. A reading of its Annual Report revealed that the DCS provides education and training programmes in accordance with national legislation and policies of education. The DCS also provided education and training for skills development in order to rehabilitate offenders and to contribute towards affecting behavioural changes.¹² All offenders were given the opportunity to participate in the formal and informal education programmes offered by educationists, social workers, psychologists, and religious care workers. The education and training programmes were provided in partnership with the national and provincial Departments of Education, relevant NGOs, CBOs and tertiary institutions. The following formal and informal programmes were offered to equip prisoners with skills, values and knowledge:

Formal Education Programmes

The DCS offered formal education for general, further and higher education and training levels. The general education level comprises adult basic education (ABET) and training programmes, which include literacy programmes from level 1-4. The fourth level is the exit level and is equivalent to grade nine.

For prisoners who aspire to study beyond the general education level the DCS offers education for grades 10-12, and N1-N3. Teaching for the further education level occurs in various fields of learning on a full-time basis by educationists, functional staff and volunteers. Higher education courses

¹² Department of Correctional Services *Annual Report 1999/2000* (2000) 16.

are offered through distance education with the relevant tertiary institutions. The provincial education departments, accrediting bodies and tertiary education institutions are responsible for the assessment, evaluation and accreditation of learners.¹³

Informal Education Programmes

Informal education programmes consist mainly of courses that require technical training. Technical training is categorised into vocational training, occupational skills and computer-based training. ABET also forms part of this training for a balanced and integrated approach. The training is provided in conjunction with NGOs and CBOs and the Department of Labour. Recognised accreditation bodies are responsible for the accreditation of these courses.

Although the DCS reported that 81 prisons benefited from its education programmes, it is not clear exactly what percentage of prisons this figure represents and just how many prisoners were enrolled. The fact that 302 qualified educationists and trained personnel were employed means that there are clearly insufficient educators to accommodate the needs of prisoners. In instances where there were no qualified educationist the DCS used temporary personnel as well as volunteers to present supportive educational and training programmes. During the year under review, the DCS also used the services of prisoners with academic or technical qualifications as tutors. Although the DCS is endeavouring to implement prisoners' right to education it is clear that personnel and material constraints are a major impediment to the realisation of the right.

The DCS appears to be offering good educational and training programmes, which have the potential to respect, protect, promote and fulfil the right to education. However, at the present time, the programmes are not being accessed by a large group of offenders. This was deduced from the fact that the DCS stated in other reports that it aimed at increasing the involvement of child prisoners in education programmes to 90 percent, and those of adults to 45 percent of prisoners serving two years or less.¹⁴ These figures suggest that not enough child and adult offenders are accessing education. Only 20 000 prisoners out of a total of 162 638 are accessing education programmes. The children of female offenders should be accessing early childhood development programmes and the DCS makes no mention of this.

Nutrition

The Department's response was brief and failed to outline new measures which had been put in place. Other sources indicated that for the year under review, a revised manual for food handlers was developed to serve as an internal training tool. This was meant to empower prisoners working

¹³ Ibid.

¹⁴ Note 12 above, 17

in prison kitchens with the necessary skills and knowledge, and to also assist in the improvement of services and hygiene in prison kitchens. The manual further prepared prisoners for other internal and external training.¹⁵

Intimidation in overcrowded prisons results in some prisoners not getting enough to eat. The DCS does not seem to have short-term solutions for addressing this problem especially where children are concerned.

1.3 Recommendations

Prisons are places where people are at risk of contracting HIV/ AIDS due to prison rapes and sexual abuse. The DCS needs to develop a clear policy on HIV/AIDS in prisons so as to reduce the risk of other prisoners being infected.

The DCS also needs to indicate the procedure involved in dealing with juveniles awaiting trial.

The DCS should develop measures that will ensure that child prisoners of school going age have access to basic education. The DCS should work together with the Department of Education to provide early childhood development to children below the age of seven.

Better food distribution methods need to be developed to eliminate theft amongst prisoners and address issues such as intimidation to enable all prisoners to enjoy the right to food.

2. LEGISLATIVE MEASURES

There were no new legislative measures instituted during the reporting period. The DCS reported that it was implementing the Correctional Services Act 111 of 1998.

3 BUDGETARY MEASURES

The DCS reported that budget allocations had increased substantially to overcome the problems the Department was facing, particularly overcrowding in prisons.

Table 1 Total Budgetary Allocation of the Department

YEAR	TOTAL ALLOCATION IN RANDS	PROJECTED EXPENDITURE IN RANDS	ACTUAL EXPENDITURE IN RANDS
1998 – 1999	4 345 494 000	4 515 581 000	4 480 478 000
1999 – 2000	4 502 010 000	4 610 361 000	4 569 327 000
2000 – 2001	5 206 427 000	5 320 553 000	2 895 449 000

¹⁵ See note 12 above.

The Table above shows that there has been a nominal increase in the budget allocation of the DCS since the previous financial year. The nominal increase will continue for the year 2000/2001. Actual expenditure shows a trend of over-spending for the year 1999/2000.

Table 2 Budgetary Allocation for Accommodation

YEAR	TOTAL ALLOCATION IN RAN DS	PER CAPITA ALLOCATION IN RAN DS AFTER INFLATION ADJUSTMENT	PROJECTED EXPENDITURE IN RAN DS	ACTUAL EXPENDITURE IN RAN DS
1998- 1999	759 206 000	13 330	602 423 000	602 423 000
1999- 2000	463 717 000	8 820	614 335 000	625 428 000
2000- 2001	581 111 000	10 610	606 197 000	-

The DCS reported that the variance in budgetary allocation had been as a result of an increase in the prisoner population. In response to the question on special considerations given to special categories of prisoners, the DCS stated that the budget made provision for all categories of offenders, including children, females, pregnant women, the disabled, juveniles, awaiting trial prisoners and members of the previously disadvantaged 'racial' groups including indigenous peoples.

Table 3 Budget allocation for Education and Nutrition

	YEAR	TOTAL ALLOCATION IN RAN DS	PER CAPITA ALLOCATION IN RAN DS AFTER INFLATION ADJUSTMENT	ACTUAL EXPENDITURE IN RAN DS
Education	1998-1999	59 252 000	1 040	58 109 000
	1999-2000	57 534 000	1 090	65 454 000
	2000-2001	81 792 000	1 490	32 465 000
Nutrition	1998-1999	289 002 000	5 070	256 049 000
	1999-2000	285 175 000	5 420	278 476 000
	2000-2001	295 248 000	5 390	129 434 000

The Department reported that variances in the allocation for education were due to annual increases in the budget. The allocations were insufficient for the provision of education, because only 20 000 offenders could be involved in education and training programmes. The lack of funds created a shortage of instructors, limited capacity building and limited the number of offenders that could be involved in the programmes.

In response to the variance in the budget allocation for nutrition over the three-year period, the DCS reported that the variance was due to an increase in the prison population. The Department further reported that the budget was adequate because of the implementation of the amended dietary scale for female offenders.

Table 4 Budgetary Allocations for Medical Treatment

YEAR	TOTAL ALLOCATION IN RANDB	PER CAPITA ALLOCATION IN RANDB AFTER INFLATION ADJUSTMENT	ACTUAL EXPENDITURE IN RANDB
1998 – 1999	181 886 000	3 190	163 222 000
1999 – 2000	185 702 000	3 530	152 179 000
2000 – 2001	208 223 000	3 800	-

Budgetary allocations towards medical care rose from R181 886 000 during the 1998/1999 financial year, to R185 702 000 during the reporting period, and was expected to increase further to R208 223 000 during the 2000/2001 financial year. However, there was significant under-spending during both the 1998/1999 and 1999/2000 financial years. In response to the question on variances, the Department stated that variances were accounted for by an increase in the number of prisoners. In the view of the Department, the budgeted amounts were adequate. The Department singled out prisoners with HIV/AIDS for special consideration although no details were provided. For the other categories of vulnerable groups the Department simply stated that it did make provisions for all of them.

3.1 Critique

The DCS indicated that it had spent R625 428 000 for accommodation, whilst it was allocated R463 717 000 during the reporting period. No reasons were provided as to where the additional funds came from, and how over-spending affected allocations for the following year.

For the year 1999/2000, the DCS over-spent for education, and under-spent for the provision of adequate nutrition. The DCS stated that the budget allocation was not sufficient for providing education and training programmes to a majority of prisoners. However the Department failed to indicate what measures were being taken to address the situation. The per capita allocation for education was insufficient for providing education and training for the prison population. Basic education including adult basic education, general education and training as well as further education and training. These were offered gratis, while only higher education and training was provided at the prisoner's own expense. The information provided by the Department did not clearly indicate whether the budget allocation for reading material was also included in the allocation for educational programmes.

3.2 Recommendations

More funds for educational programmes are required since education is an important contributory factor towards the rehabilitation of offenders.

The high incidence of HIV/AIDS amongst offenders requires the State to provide access to anti-retroviral drugs and food of sufficient quality and quantity to promote health.

Due to overcrowding in prisons, the United Nations has sought to alleviate the problem by reducing the size of the prisoner population by recommending alternatives to imprisonment. The DCS should consider alternatives to imprisonment for petty crimes. To alleviate overcrowding, methods of expediting trials of awaiting trial prisoners should be considered.

4. OUTCOMES

The Department of Correctional Services was requested to provide information on indicators relating to education, medical treatment, nutrition and accommodation. The information submitted by the Department is outlined in the tables below.

Table 5 Indicators - Prisoner Population

Category	Total	% of Total	Child-offenders	Female offenders
Offender population	171 462	N/A	6 678	4 416
Convicted offenders	104 407	63.29	2 407	2 905
Awaiting trial offenders in custody	62 952	36.71	4 271	1 511
Offenders above 60 years of age	259	-	-	-
Disabled offenders	163	-	-	-

- Information not provided

The prison population has increased over the past few years and now exceeds the available accommodation capacity. The total daily average prisoner population for 1999 was 154 576 with 160 368 males, 4 416 females and 6 678 child offenders. Cell accommodation and utilisation showed a 62.9 percent overcrowding.

Medical treatment

The Department provided several indicators on medical care for female prisoners. There were 565 health care personnel within the prison system. However, the Department did not provide vital information on the ratio of health care service provider:prisoner. The Department further reported that there were

3, 463 hospital beds for ill prisoners. The average number of clinics per prison was one. The number of prisons with access to essential drugs was 236.

In terms of HIV/AIDS infection, it was reported that there were 3 427 prisoners infected, which amounted to 2 percent of the prison population. No information was available on the percentage of prisoners with sexually transmitted diseases. In terms of tuberculosis infection, the Department reported that 1.1 percent of the prison population were affected. No information was made available with regard to the number of prisoners suffering from malnutrition and iron deficiency.

Education

The DCS was requested to provide information on the educational level of the prisoners, and those involved in the different education and training programmes. The information provided is outlined in the Table below:

Table 6 Indicators - Education

	Total	% of prison population (unsentenced included)
The literacy rate	63%	-
Number of prisoners enrolled for Basic Education, including Adult Basic Education	6 936	4.7
Number of prisoners enrolled for Vocational Education	912	.61
Number of prisoners enrolled for Occupational Skills Training	7 339	4.8

-Information not provided

Nutrition

The DCS reported that the standard minimum calories provided per prisoner per day is 2 000 k/cal for adult females, 2 500 k/cal for adult males and 2 800 k/cal for children. To determine the quality of food in terms of its nutritional status a medical official or any other delegated official tastes the cooked food on a daily basis for palatability. Offenders living with HIV/AIDS, pregnant and lactating offenders are given a high protein and kilojoule diet as prescribed by a doctor.

4.1 Critique

Whilst the DCS is unable to regulate the number of prisoners accommodated, the DCS has an obligation to ensure protection of prisoners' rights. Although the DCS has built new prisons and upgraded or extended existing facilities to alleviate overcrowding, these are not sufficient to cater for the number of prisoners. Two prisons in KwaZulu-Natal were under construction and would accommodate a prison population of about 2 832.¹⁶

The cause of overcrowding in South African prisons is the growth in the number of unsentenced prisoners. Whilst the sentenced prisoner population increased by 26.2 percent, the number of unsentenced prisoners has increased to 16 percent. The number of awaiting trial offenders was 16.19 percent for male child offenders, female child offenders constitute 0.29 percent and adult females constitute 2.12 percent.¹⁷ Overcrowding results in the violation of prisoner's rights to adequate accommodation, sanitation, food, education and health care.

The duration of stay of unsentenced prisoners places a financial burden on the State. It cost R88, 00 per prisoner/per day. This amounts to approximately R5, 4 million per day to the taxpayer to keep awaiting trial

¹⁶ Note 12 above, 7.

¹⁷ D Burger (ed.) *South Africa Yearbook 2000/01* (2001) 394.

prisoners in prison.¹⁸ Therefore even the increases in budgetary allocations would not alleviate the plight of overcrowded prisons. Practices within the DCS indicate that there is a need for more policy redevelopment to realise prisoners' rights.

The illiteracy rate for prisoners has not changed since the financial year 1998/1999. It still stands at 37 percent, which is more than the national average. Although the Department seems to be committed to the well being of the prisoners, the budget allocation and indicators do not reflect that commitment of ensuring access to education and training.

Information provided on nutrition was insufficient to make a proper analysis on the provision of adequate nutrition in prisons.

Prisons have a high concentration of persons living with HIV/AIDS and individuals are at great risk of acquiring HIV via injecting drugs and sexual activity. There is an assumed prevalence rate of between ten and thirty percent prisoners infected with HIV/AIDS in South Africa's prisons.¹⁹ By 31 December 1999 there were 2 600 registered cases of HIV and 136 cases of AIDS. There were 1 360 cases of tuberculosis.²⁰ The response from the DCS reported that there were about 3 427 cases within the reporting period which means that from 31 December 1999 to 31 March 2000, there has been an increase of 691 cases in HIV/AIDS infections.

4.2 Recommendations

The problem of overcrowding in prisons has been identified and the DCS should find alternatives especially in relation to children and awaiting trial prisoners. HIV/AIDS has reached pandemic proportions in South Africa and offenders infected with the virus should be treated so as to avoid the spread of the virus in the prison population. Creative solutions to the problem need to be found. It remains a challenge to design and implement a comprehensive HIV prevention programmes for the detained population. HIV prevention efforts require financial and organisational investment on the part of the DCS. In the long term, this may save money by minimising the number of HIV positive prisoners. Research indicates that sexual activity, tattooing, body piercing (prisoners may use the same pin to create tattoos on multiple prisoners), and drug use by injection are the most prevalent HIV risk related activities among incarcerated men.²¹ In addition to the minimisation of the number of HIV positive prisoners, it is recommended that the promotion of condom use not be the only

¹⁸ Correctional Services "A Collective Social Responsibility" Report of the Proceedings of the 1st National Symposium of Correctional Services 2000," (2001) 33.

¹⁹ M Heywood "The HIV/AIDS Problem in our Prisons" in Correctional Services: "A Collective Social Responsibility" Report of the Proceedings of the 1st National Symposium of Correctional Services (2001) 44.

²⁰ See Note 12 above, 19.

²¹ The Body: AIDS Action, Policy Facts, Incarcerated Populations and HIV/AIDS at <http://www.thebody.com/aac/brochures/incarcerated.html>

preventative method advocated in dealing with the epidemic. Education, life skills training and changing behaviour patterns are also recommended.

Young offenders should be kept in places of safety, instead of being imprisoned whilst awaiting trial.

5 MONITORING SYSTEMS

The DCS reported that there were three levels of monitoring and assessing mechanisms, which were located at the national, provincial and local prison levels. However, it only reported on the monitoring of the provision of health and nutritional services.

Statistics were collected by the DCS and captured on a computerised system on a daily basis. Approved accommodation of prisoners as well as the lockup totals (offender population figures), per prison, were monitored on a monthly basis, at the National Head Office. These statistics were available to heads of prisons on a daily basis.

PART C: CONCLUSION

The provision of conditions consistent with human dignity including adequate accommodation, nutrition, education and medical treatment still remains a challenge to prison authorities. Despite the fact that there were no new policies and legislation instituted during the reporting period, the DCS should be commended for attempting to implement the provisions of existing policies and legislation. However, the main problem of overcrowding seems to be ongoing with no solutions on the horizon. The challenge is now on reducing the number of unsentenced prisoners, since they cost the State millions of Rands and deprives sentenced prisoners of adequate facilities and the right to humane conditions of detention. Although most prisons are overcrowded, the solution is not to build more prisons, but to actually look at finding alternative forms of imprisonment. Although the DCS made no mention in its report about probation services, other sources indicated that such services are being provided. The challenge is to increase the provision of such services and expand the early intervention work of the Department.

Information on HIV/AIDS education is essential for offenders to help prevent the spread of the disease and decrease the mortality rate. Prisoners should also be provided with adequate medical care.

As mentioned in the National Action Plan, many challenges remain for the Departments of Correctional Services, Justice, Social Development, and Safety and Security and include reducing the crime rate, reducing the number of those awaiting trial in prisoners, to find alternatives to incarceration, and to continue improving conditions in prisons. The unacceptable levels of overcrowding, physical and sexual assaults, lack of reading material and inadequate medical treatment are also areas of concern.²² Other challenges include protecting child offenders from being physically or sexually assaulted when detained in police cells or prisons. Also ensuring that child offenders do not await trial in police cells or prisons, but in secure care programmes.

Although, significant progress has been made in the prison system, more changes are required to ensure the human development of prisoners and their integration into the community as productive and law abiding citizens.

²² *National Action Plan for the Promotion and Protection of Human Rights* (1998) 90.

ABBREVIATIONS

- ABET** - Adult Basic Education
CRC - Convention on the Rights of the Child
DCS - Department of Correctional Services
ICESCR - International Covenant on Economic, Social and Cultural Rights
SMR - United Nations Standard Minimum Rules for the Treatment of Prisoners

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CHAPTER ELEVEN

FINANCING ECONOMIC AND SOCIAL RIGHTS

PART A: OVERVIEW

1 INTRODUCTION¹

The challenges of financing and delivering economic and social rights in South Africa can only be understood in the context of the history of colonialism, racial discrimination, and the legacy of apartheid. Not only were the overwhelming majority of the population subjected to gross human rights violations but were also deprived of accessing the material benefits of society. The results of past discriminatory practices are evident in uneven income distribution, availability and delivery of social and basic services, distribution of infrastructure, and access to economic opportunities necessary for an adequate standard of living. When the democratic government came into power in 1994, in addition to inheriting vast backlogs in housing, health care, welfare, the provision of basic and other social services, it also inherited an inefficient and discriminatory budget system in which allocations were spread over fifteen budgets (for the four provinces and the 'homelands').²

One of the stated goals of the Reconstruction and Development Programme (RDP) instituted by the new democratic government was the alleviation of poverty through the material advancement of the previously disadvantaged sections of the population. The re-prioritisation of social services in the RDP required the redistribution of the total revenue pool between the national and the newly formed nine provincial governments so as to enable them to carry out their functions. This called for major budget reforms to reflect the new priorities of government.

It is the aim of this chapter to firstly assess whether progress has been made by the national and provincial Treasuries³ (Departments of Finance) *vis a vis* the Government's constitutional obligations when formulating budgetary policy, and secondly, to determine what monitoring mechanisms were put in place and whether these were effective in overseeing expenditure by service agencies. The assessment will be based on the responses to the protocols sent by the South African Human Rights Commission (SAHRC), in compliance with its mandate to monitor,

¹ The Department of Finance is not responsible for service delivery. The protocol sent to this department therefore, posed a different set of questions relating specifically to financial matters, which is reflected in this chapter. From 1st of April 2000, the national Departments of Finance and State Expenditure merged to form the National Treasury.

² I Abedian *The Budget Book, Challenge and Change* (1995) IDASA 21.

³ The responses received by the SAHRC were sent by the then 'Departments of Finance', now known as the National and Provincial Treasuries. For the purpose for this Report, these names will be used interchangeably.

annually, the measures adopted by organs of State to advance economic and social rights.⁴

In the last reporting period, 1998-99, the then national Department of Finance (DoF) stated that it was not responsible for service delivery and had therefore not instituted any policies aimed at respecting, protecting, promoting and fulfilling social and economic rights. It indicted that the budgetary process had been reformed by the introduction of the Medium Term Expenditure Framework (MTEF), which was a tool to assess and plan expenditures for a three-year period. Many of the provincial Departments were of the view that they were responsible mainly to oversee financial management and ensure efficient financial practices. Although a few of the provinces had instituted measures to advance economic and social rights, most did not indicate the criteria used to allocate funds for various programmes.⁵

This chapter is divided into three parts. Part A serves as an introduction to the South African fiscal system. The State's Constitutional obligations in financing economic and social rights is discussed in the light of Constitutional provisions for the creation of financial authorities and mechanisms for making budgetary allocations. The responses from the Treasuries will be summarised to provide a bird's eye view of developments that have taken place in the fiscal year 1999/2000.

Part B consists of a more detailed analysis of the responses received from national and provincial Treasuries, followed by a critique and recommendations.

Part C is an appendix outlining the budgetary process to highlight points where the Treasuries play a key role. Since the vast majority, including the national Treasury, reiterated the view that they were not directly responsible for setting spending priorities, it would be useful therefore to review the budgetary process to examine their roles in determining policy priorities and the allocation of budgets for the delivery of services. This will be done so as to identify key points in the budget process where these Departments are able to influence the decision-making process in setting government's priorities regarding the delivery of economic and social rights.

2 CONSTITUTIONAL OBLIGATIONS

2.1 Economic and social rights and the State's obligations⁶

In order to address the vast backlogs inherited from the previous regimes, the new democratic government entrenched economic and social rights in

⁴ Section 184 (3) of the Constitution of the Republic of South Africa Act 108 of 1996.

⁵ See the *2nd Economic & Social Rights Report (1998-1999)* 2000 265.

⁶ The Constitutional provisions for economic and social rights are discussed in other chapters of this Report.

the Bill of Rights of the South African Constitution.⁷ Section 7 (2) obliges the State to 'respect, promote, and fulfil the rights in the Bill of Rights.' This implies that all the rights including economic and social rights be given priority status. Since many of the economic and social rights are also internally limited by the 'availability of resources', the State is obliged to 'progressively realise' them over time.⁸ The inclusion of economic and social rights in the Bill of Rights obliges the State to take all the necessary steps to ensure maximum and effective use of all the resources available to it. It is, therefore, incumbent on the State to devise sound macroeconomic, fiscal and monetary policies so as to maximise the revenue pool earmarked for the delivery of economic and social rights. It also requires organs of State, responsible for financial matters to manage public finances in an efficient and accountable manner so as to maximise the ability of service agencies to deliver services.

2.2 Constitutional provisions relating to financial matters⁹

Fiscal federalism

South Africa has a fiscal federalist system where the pool of revenue is collected nationally into a central fund and then divided equitably between the three spheres of government. The Constitution provides for the establishment of National and Provincial Revenue Funds into which all funds must be deposited. Section 213 of the Constitution provides for the establishment of a National Revenue Fund. Similarly, s 226 provides for establishing a Provincial Revenue Fund. Money can only be withdrawn from these Funds by an Act of Parliament and in the case of the provinces, the Provincial Legislatures.

The vertical division of the national revenue pool must be preceded by the enactment of The Division of Revenue Bill, a non-money Bill, which therefore allows Parliament to amend it. The National Revenue Fund is divided into equitable shares between the three spheres of government.¹⁰ Once the vertical division of the nationally collected revenue pool into national, provincial and local shares have taken place, individual transfers are made to Departments at the provincial and local spheres of government. This process is known as the horizontal division of revenue.

The National Treasury

The Constitutional provisions governing the fiscal system are as follows. Section 216 (1) provides for legislation to establish a National Treasury and

⁷ The Constitution of the Republic of South Africa Act 108 of 1996.

⁸ When interpreting the Bill of Rights, the State is also obliged to take cognisance of international law as stipulated in subsection 39 (b) and foreign law subsection 39 (c) when interpreting the Bill of Rights.⁸

⁹ Chapter 13 of the Constitution is devoted to financial and fiscal matters.

¹⁰ In South Africa, the government consists of three spheres: national, provincial and local.

to 'prescribe measures to ensure both transparency and expenditure control in each sphere of government by introducing generally accepted accounting practices'.¹¹ The National Treasury is responsible for, amongst other things, advising Cabinet on economic trends, the overall level of spending within the macro-economic and fiscal framework, advising the Minister's Committee on the Budget (MinComBud) and Cabinet, on the division of revenue between the spheres. The National Treasury thus plays a vital role in the budgetary process where key decisions are made regarding policy priorities and allocations for the following fiscal year.

The Financial and Fiscal Commission (FFC)

Section 220 makes provision for legislation for the establishment of the Financial and Fiscal Commission. The Financial and Fiscal Commission Act of 1997 established the FFC, an independent technical advisory body on financial and fiscal matters relating to the spheres and specifically tasked with advising Parliament. This provides Parliament with an independent assessment of the manner in which the vertical split is determined and can potentially equip it to play a more active role in supporting the prioritising of economic and social rights in the budget process.

The National Treasury and the FFC are responsible for financial and technical matters relating to the budget. They also play an advisory role to Cabinet and to Parliament in the budget process and thus play a pivotal role at key points in the budgetary process where they can influence policy decisions in setting priorities on budget allocations.

The equitable division of revenue

As stated previously, in a fiscal federalist system the total revenue pool is collected at the national sphere and is then divided into equitable shares between the three spheres. Each of these enjoys a certain degree of autonomy, requiring a secure stream of revenue to enable it to carry out its constitutionally defined responsibilities. The division of revenue into equitable shares is provided for in section 214(1)(a) of the Constitution which states that 'An Act of Parliament must provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government. This is the Division of Revenue Act. Subsection (1)(b) provides for the 'determination of each province's equitable share of the provincial share of that revenue;' Subsection (2) stipulates that the Act may be enacted only:

after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted and must take into account certain conditions, amongst others, the national interest; the

¹¹ The National Treasury is comprised of the national Departments of Finance and State Expenditure that have recently merged, and is headed by the Director-General of the Department of Finance.

national debt; the needs and interest of the provinces; the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them; the fiscal capacity and efficiency of provinces, local government and municipalities; development needs of the provinces; economic disparities amongst the provinces, obligations of the provinces in terms of national legislation; the desirability of stable and predictable allocations of revenue shares and the need for flexibility in responding to emergencies or other temporary needs ...based on objective criteria.

This means that the vertical division should be done in such a way so as to ensure that the sub-national governments have sufficient resources to carry out their functions, in line with national legislation and obligations. Furthermore, such considerations as a province's, and local municipality's respective capacities to deliver basic services are to be taken into consideration. Although this provision does not specifically prioritise the delivery of economic and social rights, subsection (2) (h) makes provision for national legislation to be taken into account. In this regard, s 7(2) of the Bill of Rights, which obliges the State to 'respect, promote, protect and fulfil the rights in the Bill of Rights', can be interpreted to imply that priority should be given to economic and social rights and that policy decisions and budget allocations should reflect this at the crucial stage of deciding the vertical division of the total revenue pool.

The vertical division of revenue takes place *after* taking into consideration the national interest and the national debt, which means that Cabinet can set different priorities at the national level, which will impact on the total revenue pool available for the vertical division.

The horizontal division of revenue

Once the vertical division has taken place, the provincial and local shares are subdivided into individual transfers for each unit of government in both these spheres. This latter process is called the horizontal division of revenue. The funds transferred to sub-national governments may be conditional or unconditional. The latter gives provincial governments some discretion over the allocation of resources allowing them to utilise their budgets according to their needs and priorities with regard to service delivery. On the other hand, conditional grants allow the central government to exercise a degree of control of how the funds are utilised and accounted for. Recently though, block transfers to provinces have been introduced where they exercise greater autonomy over spending decisions that reflect their individual needs.

National sources of provincial and local funding

Section 227 of the Constitution provides for national sources of provincial and local government funding whereby each receives an equitable share. It defines the fiscal capacity of these organs of state to refer to potential revenue, which they can generate. Importantly, allocation to provinces or municipalities cannot be related to other revenues they raise nor can they expect to be reimbursed for failure to raise revenue 'commensurate with

their fiscal capacity and tax base.’ Provinces are also expected to raise their own revenue and provide their own resources to fulfil their requirements.

National, provincial and municipal budgets and the budgetary process ‘must promote transparency, accountability, and effective financial management of the economy, debt, and the public sector’ in terms of s 215 (1). Subsection (2) (c) requires each sphere of government to show ‘in which way proposed expenditure will comply with national legislation’. Organs of state are also required to disclose intended borrowing, which might incur public liability.

The Constitution makes provision for economic and social rights and also provides for the establishment of bodies and mechanisms to finance and to exercise control over expenditure. The mobilisation and efficient utilisation of funds is therefore crucial in enabling the State to fulfil its mandate. The National Treasury plays a pivotal role in this regard. It plays a technically supportive role and advises Cabinet on whether realistic budgets are allocated to national and provincial departments when the vertical division of national revenue takes place. The National Treasury also plays a role at the provincial sphere.

Budgeting authorities and budgeting agencies

The central budgeting authority consists of the national Cabinet, the Extended Cabinet, and the Minister’s Committee on the Budget (MinComBud). At the provincial sphere, the Budget Council and the Budget Forum are the key budgeting authorities. The budgeting authorities exercise political oversight of the decision-making process, which determines the vertical and horizontal division of revenue. A number of government level budget authorities and budgeting agencies may also be involved in the decision making process. The former consists of Provincial Executive Councils (PECs) and legislatures and at the local level, the municipal councils. The National Treasury and its provincial counterparts act as budgeting agencies.

The budget authorities, for example, the Provincial Executive Councils recommend priority areas to the central budgetary authority and the level and type of expenditure they should support. Budget agencies, then advise the authorities on the implication of different types of expenditure. Since priorities are constantly changing and spending needs of departments compete with one another, there is a need to trade-off the benefits of different services against each other.¹² It is at this level that re-prioritisation takes place.

¹² P Whelan ‘Evaluating the Vertical Division of Revenue’ IDASA Discussion Paper (2000) 4.

The assignment of functions to the spheres is complex since several functions may be concurrently assigned across spheres. In general national government determines norms and standards while sub-national governments are responsible for implementing key social services such as health, welfare and education, and basic utilities such as water, sanitation and electricity. The level of authority, however, differs across spheres. For instance, housing subsidies set by the national Department are facilitated by the provincial Departments of Housing whereas provincial Departments of Education enjoy greater authority.¹³

A broad range of inter-governmental co-operation has been defined in the Constitution whereby spheres consult with one another and co-ordinate their actions and legislation. Sub-national spheres are also involved in the law making process through the National Council of Provinces (NCOP). They can thus influence the nature of legislation enacted to advance socio-economic rights.

Budget Reform

As stated earlier the Apartheid budget required extensive reform. One of the most important reforms was the introduction of the Medium Term Expenditure Framework (MTEF). The MTEF details a three-year rolling plan for expenditure and revenue budgets for national and provincial departments. Provincial spending plans in the MTEF take into account transfers from the National Revenue Fund as well as additional funds that provinces raise. The MTEF also includes transfers from national and provincial spheres to local government. Budgeting within this framework is based on principles governing policy priorities linked to public expenditure, political oversight of the budget process, and budgeting for service delivery.

Medium-term budgeting has the following advantages:

- greater certainty of policy priorities which are set out in advance allowing departments to plan their budgets for delivery of services in line with policy priorities
- affordable spending for the medium term as departments plan and spend on programmes according to an agreed three year expenditure envelope
- strengthened political decision making and accountability as policy choices may be linked to agreed spending commitments
- improved management of public finances

The budget for any current fiscal year must be seen in the context of the three-year MTEF. Every year this framework is reviewed to reflect changing priorities, revenue and expenditures for that fiscal year before the budget is tabled in Parliament.

¹³ Ibid

The Public Finance Management Act 1 of 1999 (PFMA)

The PFMA introduced generally recognised accounting practices; uniform treasury norms and standards; prescribed measures to ensure transparency and expenditure control in all spheres of government; and set the operational procedures for borrowing, guarantees, procurement and oversight over the various national and provincial revenue funds. This legislation enables the Treasuries to monitor expenditures over the medium term and also includes an Early Warning System whereby any anomalies in spending may be picked up on a monthly basis.

3 SUMMARY OF RESPONSES FROM THE DEPARTMENTS OF FINANCE

Since budget allocations are fundamental to the delivery of economic and social rights, the national Department DoF and the nine provincial Departments of Finance were required, in terms of the Commission's mandate, to answer four questions as set out in the protocols prepared by the SAHRC:

- to describe in which manner they take into account the government's constitutional obligations when formulating budgetary policy
- what criteria they employed in deciding budgetary allocations to various government departments responsible for the realisation of economic and social rights
- what mechanisms are used in monitoring and assessing the utilisation of these funds, and
- to describe the manner in which the effectiveness of these mechanisms is assessed

The national DoF, including the majority of provincial departments of Finance did not provide adequate responses to the first two questions relating to the manner in which they take into account the Government's constitutional obligations when formulating budgetary policy and what criteria they used in deciding budgetary allocations to various government departments responsible for the realisation of economic and social rights. The key theme of the responses was the reiteration of the view that they were not responsible for the delivery of economic and social rights, and that Cabinet was responsible for setting priorities. Provincial departments typically regarded their function as implementation of financial policies set at national level and the provision of technical assistance in preparing budgets and accounting services. Although several provincial governments stated that the budget for 'the three social services, namely, education, health care and welfare grants, was set at the national sphere by Cabinet' and amounted to 85 percent of the allocated funds while only 15 percent remained for the delivery of other basic services. Only Gauteng and KZN provided details of their spending envelopes.

As to the question referring to the mechanisms used in monitoring the utilisation of funds most of the departments cited the Early Warning System and auditing practices, which had been put in place. The effectiveness of the monitoring systems was measured by staying within budget while over-spending or under-spending was considered inefficient use of allocated budgets by nearly all the departments.

4 CONCLUSION

The responses of the Departments of Finance to the first two questions were inadequate in that they made a disclaimer as regards taking government's Constitutional mandate into account when setting priorities. They also did not stipulate what criteria they used when deciding budgetary allocations. Instead they provided an outline of the budgetary process without indicating at which points they are involved in the process, nor what role they play. Furthermore, no details of budget allocations were provided for the realisation economic and social rights. This suggests that many of the departments were unaware of their Constitutional obligations since they cited Cabinet as the principal authority in deciding budget priorities.

In general, the questions relating to monitoring mechanisms and their effectiveness, received better treatment, in that most departments outlined accounting practices as set out by the MTEF and the Early Warning System as effective mechanisms to stay within budgets. However, it was difficult to judge if these monitoring mechanisms were effective since only two provinces supplied details of their budgets for the fiscal year.

PART B: ANALYSIS OF REPORTS FROM ORGANS OF STATE

1 NATIONAL SPHERE

The national Department of Finance provided inadequate responses to the first two questions pertaining to the manner in which constitutional obligations were taken into account and what criteria they used when deciding budgetary allocations to various government departments responsible for the realisation of economic and social rights. Instead, the response outlined the budget process and provided information relevant to the fiscal year 2000-01. Furthermore the information supplied did not follow the format of the protocol.

1.1 State obligations

The DoF reiterated its position that Cabinet was responsible for formulating policy and for budget allocations. The DoF stated that its main role was a supportive one, namely the provision of 'quality' documentation to the Minister's Committee on the Budget and Cabinet regarding policy priorities and spending pressures across national, provincial and local governments. It further indicated that the MTEF details a three-year rolling expenditure and revenue plan for national and provincial departments that allows Government to strengthen the link between policy priorities and choices for resource allocation decisions across government.

1.2 Criteria

Although, the DoF provided some information on policies and programmes, only one programme, the Poverty Relief Programme was relevant to the period under review. In 1999 Cabinet instituted a special programme to address poverty and implement the recommendations of the Job Summit. The intended beneficiaries of the programme were rural women, young people and the disabled. One billion Rand was set aside for poverty relief, infrastructure investment, and Job Summit projects.

The criteria for the allocation of these funds were that projects should:

- target the poorest area in the provinces, particularly rural areas and households with single women as the main breadwinners
- promote human development and capacity building among the poor and the unemployed
- provide jobs and community involvement
- be sustainable in the long term

A supplementary estimate for poverty relief funds was tabled in 1999 as shown in Table 1 below.

Table 1 Poverty Relief and Job Summit Allocations

	R Millions (1999)
Agriculture - Land care	20
Environment & Tourism	70
Health	23
Housing	75
Labour	59
Provincial & Local Govt. Affairs	45 45
Public Works	377
Transport	100
Water Affairs & Forestry	200
Welfare	40
Total allocated	1000
Unallocated	0

1.3 Monitoring mechanisms

In response to the question as to what internal departmental mechanisms were used to monitor and assess the utilisation of funds by various government departments for the realisation of economic and social rights, the DoF replied that the management of the Department of State Expenditure was responsible for monitoring and evaluating expenditure by departments which included the evaluation of budget inputs and expenditure to ensure that Government's priorities are achieved within the MTEF. It also evaluated practices in cost management, which contributed to a reduction of roll-over funds and the initiation of a culture of adherence to effective and efficient management of public finances in the departments. It also assisted in monitoring and reporting on national and provincial trends by comparing actual and projected expenditure on a monthly basis. Any under or over-reporting is brought to the attention of the Cabinet, for the responsible Minister to take appropriate action. This minimises cash borrowing by Government.

The DoF further stated that the departments of Finance and State Expenditure have developed and implemented the Public Finance Management Act No1 of 1999, which provides the legislative framework for strengthening financial accountability while devolving managerial responsibility to accounting officers and departmental managers. This is part of a broader strategy to improve financial management in the public sector, including improving budgetary systems, reform of public sector procurement, support for public-private partnerships and enhanced corporate governance and financial risk management across the public sector.

1.4 Effectiveness of monitoring mechanisms

The effectiveness of these mechanisms was assessed by implementing the PFMA, which requires departments to report on the state of their expenditure on a monthly basis. During this reporting period they utilised

the Early Warning System, which relied on estimated actual spending by departments on a monthly basis. A special PFMA unit has been formed in The National Treasury to steer the implementation of the PFMA. In turn, the Parliamentary Committees on Finance and Public Accounts will be monitoring the activities of the National Treasury to ensure that monitoring systems are operational and accountable.

2 PROVINCIAL SPHERE

2.1 *State obligations*

In response to the question in what manner the Department of Finance take into account the Government's constitutional obligations in terms of economic and social rights when formulating budgetary policy, most of the provincial Departments pointed out that they were not directly responsible for formulating policy which is circumscribed in practice and in statute by National policy and convention set by Cabinet. It has been a long-standing convention between the Provinces and the National Treasury as articulated in the Budget Council resolution, that Provinces will allocate at least 85 percent of their appropriated budgets to the three social service departments of education, health and social welfare, in view of the fact that it is in these areas that the backlogs and current needs are the greatest. These 'three social rights are accorded the highest priority' and receive the lion's share of the available funds in accordance with the 85:15 percent ratio set by Cabinet.

Although most of the provinces referred to this ratio, hardly any provided details of how the allocated budgets were spent except for KwaZulu-Natal and Gauteng provinces. The latter overspent its budget by R1million and provided no reasons for this.

The KwaZulu-Natal department sent two responses to the SAHRC's protocol, one signed by the Head of the Department of Finance and the other by the provincial MEC for Finance.¹⁴ The HOD of Finance provided tables to show that the 85:15 percent ratio for the three social rights had been progressively realised and that in fact for the year under review the actual expenditure on these three social services was 85.02 percent of the total provincial expenditure. He also indicated that other services for which the provincial government is primarily or jointly responsible for, were funded within the limitations of available resources. This breakdown was in line with policy decisions which require social services (health, education and welfare) jointly share 85 percent of available resources and the balance of the budget is to be allocated to the rest of the Province's activities. The MEC indicated that all departments must give priority to meeting personnel expenditure before funding other programmes. He pointed out that excessive spending on personnel constitutes the

¹⁴ Although the two reports concurred on the first question, they differed in the content of the information provided and also in the assessment of the ability and effectiveness of the Department to fulfil its mandate.

overwhelming constraint in the effort to provide social and economic rights. This is attested to by an analysis of the budget as shown in Table 2. Of a total expenditure of R18, 959,76,000, R11, 329,767,000 went to personnel expenditure while only R7, 630,209,000 was available to fund services. Independent research shows that approximately 92 percent and 65.2 percent of the budget for education and health respectively go to personnel expenditure.

However, the major portion of the welfare allocation goes towards transfer payments.

Table 2 Summary of estimated actual expenditure for 1999/2000 for KwaZulu- Natal

Sector	Estimated Actual Expenditure in R' 000
Education	
Personnel Expenditure	6 721 253
Other	610 774
Total Education	7 332 027
Health	
Personnel Expenditure	3 332 485
Other	1 777 899
Total Health	5 110 384
Welfare	
Personnel Expenditure	149 115
Transfer Payments	3 716 400
Other	181 824
Total Welfare	4 047 339
Other Expenditure	2 470 416
Improvements in Conditions of Service Delivery	0

A surplus of R770, 525,000 was tabled with no explanation of why these monies were not spent. While both parties pointed to the unavailability of resources they nevertheless did not account for under-spending of the budgetary allocation.

Gauteng Province responded that the Provincial Executive Council determined the priority areas, which were social services and social infrastructure and to which 90 percent of the budget had been allocated – a trend over the past five years. An analysis of the budget revealed that the Department had overspent by approximately R1 million of its allocation for the fiscal year. No reasons for this were provided.

The North West province provided an outline of the budgetary process. It stated that responsibility of the Department was to advise the Executive Council on whether the priorities they set were in line with budgetary policy set by the Minister of Finance and the Provincial MECs for Finance.

The Western and Eastern Cape did not follow the protocol at all. The Western Cape, instead, provided lengthy extracts from its Budget Statements of 2000.

The Free State Department's response indicated that provincial political priorities were reviewed and confirmed every budget cycle and that due consideration was given to ensure the fulfilment of economic and social rights through 'inadequately catering for service delivery, so as to ensure that acceptable minimum standards are accessible to all.' It further indicated that when instituting new programmes a principle of non-discrimination was applied, priority being given to vulnerable groups such as women, the disabled and the rural poor.

The Northern Province indicated that 'In formulating policy the department ensures that available resources are channelled towards housing, primary health care, social security and education as required by s 27 of the Constitution'.¹⁵ It further stated that budgetary policy is guided by the following principles: the needs of the people, developing human resources, building the economy and creating jobs. This was done in line with directives from the National Treasury.

The Northern and Eastern Cape's response was that they follow the inter-governmental policy framework - where education, health and welfare receive 85 percent of the budget allocation. Mpumalanga and the North West Province provided irrelevant responses. The Mpumalanga Department also pointed out that it is not responsible for service delivery but provides financial services to other departments and that it had stayed within its approved budgetary allocations.

2.2 Criteria

In response to the question on what criteria were used in deciding budgetary allocations to departments responsible for the realisation of economic and social rights, most of provincial Departments stated that they were not responsible for political decisions which were taken at the level of the provincial executive, who in turn abide by national priorities set by Cabinet. They were also of the view that Departments of Finance merely facilitate the budgetary process, by putting forward recommendations for the approval of Cabinet.

¹⁵Section 27 does not provide for housing and education as stated in the response but for health care, food, water and social security.

Only the Free State, the North West and KZN provinces attempted to answer this question. The Free State indicated that block allocations to various departments responsible for the delivery of economic and social rights are informed by demographics, backlogs in service delivery to vulnerable groups and institutional capacity to redress past imbalances. The department of Finance did not set hard criteria but utilised its business plans to assess the affordability and sustainability of projects that were specifically directed to eradicating backlogs on service delivery.

The HoD of the KZN Department of Finance listed the following criteria for allocation of funds: past performance in spending funds, the amounts of roll-over funds requested, pre-determined conditional grants, the amount of available funds, national and provincial policies which include employment creation, economic growth, equity and social development. In contrast, the MEC noted that 'independent criteria were not used, it was a case of how to limit expenditure rather than realise all the economic and social rights obligations as outlined in the Constitution.'

The North West Province indicated that the criteria employed were the economic and social rights mandate, the magnitude of input costs, the priorities set by the Executive Council and legislative requirements. No details were provided by either of these departments.

2.3 Monitoring mechanisms

In response to the question on what internal mechanisms were used to monitor and assess the utilisation of funds allocated to various departments for the realisation of economic and social rights, most of the provinces provided a similar response. They indicated that internal auditing mechanisms were in place to review expenditure patterns and account for variances in spending. Departments were required to submit weekly, monthly, quarterly, and annual expenditure reports to the provincial Departments of Finance. Several provinces noted that the monthly meetings serve as an Early Warning System.

Only the KwaZulu-Natal department provided details of the process whereby the Provincial Treasury via the Treasury Committee exercise strict control over departmental spending through regular expenditures review with departmental accounting officers.

The Free State department noted that the responsibility for economic and social rights lies with functionary departments whose business plans define measurable outputs. The DoF's responsibility was to ensure that they were costed as accurately as possible. The North West reported that a monthly assessment was made to gauge whether set targets were met. In addition the Batho Pele Standards of Service Delivery were utilised to assess whether services rendered met set standards. It however, failed to demonstrate exactly what was assessed and how these this was done. Only the Mpumalanga and KwaZulu-Natal governments indicated that funds allocated for the delivery of socio- economic rights were 'ring

fenced' so as to ensure that they were not utilised for non-prioritised services. The latter province further added that those funds allocated to the 'larger social services departments' (presumably education, social services and health care) were reported separately to the Provincial Treasury and the transferring department or agency at the National level to ensure that conditions attached to the grant funding were adhered to.

2.4 Effectiveness of monitoring mechanisms

The departments were requested to describe the manner in which the effectiveness of these mechanisms was assessed. KwaZulu-Natal's HOD of Finance indicated that 'heavily qualified audit reports tend to indicate inadequate or poor control mechanisms whereas unqualified ones confirmed their effectiveness'. The MEC responded that a budget was considered effective if spending was 'within budget'. He also indicated that 'fraud, corruption, inefficiency and incompetence make the task of extracting value from the resource envelope even more difficult' in the effort to deliver economic and social rights.

Several other departments echoed the sentiment expressed by the MEC, that staying within budget was a measure of the effectiveness of the measures to monitor spending. The Eastern and Western Cape did not respond to the question while most others cited auditing procedures, public perception, and inter-departmental forums that serve as monitoring mechanisms. The North West province included NGOs, business and other stakeholders who assess effectiveness of performance. It also indicated that a citizen's Report incorporated all programmes relating to economic and social rights.

3 CRITIQUE OF THE RESPONSES

3.1 National Sphere

The national DoF's response to the first two questions was inadequate. It made a disclaimer regarding its constitutional obligations regarding economic and social rights. It also reiterated its previous position that Cabinet was responsible for setting priorities and that it only played a supportive role. It also did not state what criteria were used in the allocation of funds to departments towards realising economic and social rights. The DoF indicated that Cabinet had to make trade-offs against competing political, social and economic needs in making affordable spending decisions and that budgetary allocations do take into consideration the Government's constitutional obligations pertaining to economic and social rights. No information on how this was done was provided.

The DoF also omitted to supply any details of the current budget, which might have provided useful information on the vertical division of revenue and what allocations had been made for the provision of economic and social rights.

The disclaimer by both national and provincial spheres, regarding their roles in setting priorities and criteria for the realisation of economic and social rights is not consistent with research conducted independently which shows that they play a crucial role in advising budgetary authorities at both national and provincial spheres. Key officials of both national and provincial Treasuries participate in several committees in the budgetary process and influence both Cabinet and the Budget Council where Provincial Executive Members make policy decisions.

The National Treasury plays a key role in the Medium Term Expenditure Committee (MTEC) where its Director-General (DG) chairs the committee. Senior officials together with DGs of other departments, including the Presidency, review the budget submissions from provincial departments. The National Treasury is also responsible for drawing up a memorandum and submitting it to one of the most powerful committees in the budget process, the Minister's Committee on the Budget (MinComBud), which determines the vertical split. The National Treasury plays a secretariat role here and it is at this level that the Department can advise and influence Cabinet on prioritising economic and social rights. The National Treasury provides government with technical details on the feasibility of programmes within realistic allocations and also advises government on spending priorities for the MTEF.

Although the Poverty Relief Programme targeted such areas as housing, health, social welfare and water, the monies allocated to various sectors were to create jobs and not for the provision of services.

The National Treasury's response to its constitutional obligations and what criteria it used to decide on allocations, did not throw any light on its role and influence in the budget process. It did, however, respond to the last two questions in some detail although no actual data was provided to show that the monitoring system was in fact efficient, transparent and accountable. No data was provided for provincial spending patterns, of how and which programmes were targeted and whether these were cost effective.

3.2 Provincial Sphere

One of the main weaknesses of both the national and provincial Departments of Finance's response to the SAHRC's protocol was the failure to respond to the questions relating to the manner in which these departments take into account their constitutional obligations relating to the provision of economic and social rights and what criteria they utilised when making spending decisions. Most departments outlined the budget process and the Medium Expenditure Framework but failed to detail how the economic and social rights mandate impacted on setting the expenditure framework for the realisation of these rights. Even though, several provincial governments stated that Cabinet had set the 85:15 percent ratio for education, social welfare and health, it is clear, from the

responses, that the delivery of other economic and social rights is not seen as a priority which they are obligated to fulfil. None of the other economic and social rights were referred to.

Gauteng and KwaZulu-Natal must be commended for the effort they put into the responses even though two responses were received from KwaZulu-Natal.

The disclaimer by almost all the Departments of Finance that they were not responsible for service delivery, nor for setting priorities in terms of allocation of budgets, can be viewed in the light of the belief that they play mainly a supportive role in assessing the feasibility of proposed budgets and offer auditing services within the MTEF. Whilst it may not be their task to directly manage health care or welfare services it is the Departments' responsibility to mobilise resources for service delivery in terms of their Constitutional mandate. Furthermore, no indication was given on how the other economic and social rights were prioritised. No details of budget allocations received nor additional revenues raised for their provision were provided.

The identification of key points at which the provincial MEC's for Finance and the members of the PEC are involved in the budget process, will serve to show the pivotal role they actually play in deciding priority spending areas and also how they can influence both the vertical and horizontal division of revenue. After government departments have submitted their initial baseline budgets to the MTEC, they are involved at the stage of the division of revenue with senior officials of Finance Departments. Budget priorities are decided upon, in line with national priorities. During this phase the Budget Council, which is comprised of the Minister of Finance and the provincial MECs for Finance, decide on the vertical split of projected revenue and the allocations available for the three spheres of government. Based on the division of revenue, bidding processes take place at the national and provincial spheres. At the national sphere, bids are made to the MTEC, which consists of DGs from departments with crosscutting functions such as that of Finance. It is here that trade offs are made and reprioritisation takes place and where the Treasuries can play an influential role.

During the bidding process the MTEC makes recommendations to the Cabinet Committee on the Budget for final approval. Based on these allocations Departments draw up their final budgets and re-submit them to the National Treasury, which prepares the Budget for publication on budget day.

The national and provincial departments of Finance clearly play an important role in the budgetary process and have the power to influence policy decisions taken at both provincial and Cabinet level. Economic and social rights issues can further be highlighted at key nodal points in the budget process: at the stage where policy priorities are set by political authorities, when the fiscal framework is determined, at the Division of

Revenue stage, and at the bidding process (MTEC) and lastly at Cabinet, level. Clearly, national and provincial Departments of Finance are involved at the level of their own spheres and also influence the intergovernmental process where they exert considerable influence.

Parliament can also play a more active role in scrutinising the Budget to see that it complies with the State's constitutional mandate. Although the Budget is a Money Bill, which Parliament can only amend through an Act of Parliament, two provisions in the PFMA might increase the oversight of Parliament regarding the vertical division. Firstly, Parliament will now receive information on the fiscal implications for provincial government of any national legislation set before it. Should Parliament wish, it could avoid creating new un-funded mandates by not passing the legislation until appropriate financial mechanisms are put in place (section 35). Secondly, Parliament has to pass each 'main division of vote' i.e. each programme. This allows Parliament a slightly sharper device to review national budgets (section 43). As this oversight device applies within Parliament exclusively to national programmes, it can impact on the vertical division in only a limited manner. For instance conditional grants may be reviewed through this provision. In addition, the Medium Term Budget Policy Statement (MTBPS) is released in August, which gives Parliament enough time (six months) to study the implications of allocations made for service delivery.¹⁶

As regards mechanisms for monitoring of funds by spending agencies, although most Departments gave a general outline of procedures followed in auditing expenditures, they were not explicit as to what measures were in place to monitor funds specifically earmarked for the purpose of delivering socio-economic rights. Furthermore, only two Departments provided budgets and did not account for over-spending or under-spending which indicates that their accounting practices for monitoring expenditures are not as effective as they could be.

Hardly any of the provincial Departments cited the PFMA, which is aimed at reforming and improving the quality of managers and accountability in the public sector. It includes the monitoring of expenditure on a monthly basis, improving financial reporting, appointing qualified personnel, training financial managers, and improving software systems. Neither did they refer to the National Expenditure Survey (NES), which empowers Parliament and the nation to monitor delivery against available resources. The NES is a detailed account of spending and service delivery by national Departments and spending agencies. It sets out policies and goals and the resources that have been allocated to achieve them. It links departmental expenditure with outputs, enabling assessment of whether spending trends meet the policy priorities set by government. It also includes information on the impact of government spending on women and the

¹⁶ The MTBFS is available to civil society which enables them to take a more active role in influencing the policy decisions in the budget process.

redistribution of resources in favour of the poor. By emphasising the link between spending, service delivery, and outputs the NES provides a powerful tool with which to call the government to account. The NES should contribute to informed debate about the outputs delivered by government and thereby promote more effective use of public money.

While it appears that there are internal auditing mechanisms in place to monitor and assess expenditures, it is not clear whether staying within budget is the only useful criteria for assessing the effectiveness of these mechanisms. In addition none of the provincial Departments provided any statistics or tables to show the amounts they were allocated and how these were spent. Neither did they provide any evidence of what information was collected to effectively deliver economic and social rights to the most needy. All the Departments without exception quoted only education, social welfare and health care as the three areas prioritised by Cabinet. None mentioned any of the other rights such as the right to food, water, the environment and others stipulated in the Bill of Rights. This may be an oversight or it could be interpreted to mean that they are not aware that these too, constitute economic and social rights. The Minister of Finance in his Budget Speech delivered to Parliament in February 1999, identified, besides the three social services of education, welfare and health care, other key priorities to include housing, clean water, and sanitation. In spite of this all the Departments only referred to the first three as high priority social spending areas, which seems to suggest that the other economic and social rights do not receive priority status at the time of the vertical or the horizontal division of national revenue. The Minister did not delineate access to food, land, and environment rights as priority areas in his Budget Speech.

The Minister also indicated that in spite of the Asian melt down of 1998 and the financial crises which affected emerging markets like South Africa, the State had maintained its strategy towards redirecting its spending towards core public services: education, health, welfare, and social infrastructure. He emphasised that it was a strategy that recognised the enormity of the inherited backlogs but it also recognised the limited resources available and the need to maximise service delivery within the available resources.

The 1999 Budget Review cites revenue of R191, 7 billion, including grants and recoveries, and a budget deficit of R25, 1 billion. It also provides for expenditure of R216, 8 billion or 30.6 percent of the Gross Domestic Product (GDP). From this R48, 2 billion (22,3 percent) is deducted for servicing the debt, R750 million of donor financed projects and R1, 1 billion as a contingency reserve, leaving R166, 7 billion to be shared equitably between national, provincial and local governments.

The equitable division in 1999 was as follows: The national government received R78, 7 billion or 47 percent of the total, while provincial government received R86, 3 billion or 52 percent of the total, and local government received R1, 7 billion or one percent of the total. This is clearly

insufficient to finance the provision of economic and social rights in the medium term.

In line with priorities, national and provincial governments were earmarked to spend R103, 7 billion of the available resources on social services, which account for 61 percent of non-interest spending. R1 billion or 0.6 percent would also be set aside for poverty relief programmes, giving effect to several Job Summit commitments.¹⁷ Education expenditure in 1999 was set to be R48, 5 billion, Health at R24 billion, and Welfare and social grants, at 19,8 billion.¹⁸ However, the major portion (more than 80 percent of the education and health envelopes) was spent on personnel expenditure rather than on infrastructure, books, and educational material and in the case of health, drugs, facilities and equipment for treating clients. Furthermore it is apparent from an analysis of the budget breakdown that the spheres responsible for service delivery received inadequate funding.

Independent research shows that although budget reform has to some degree addressed inefficiencies in the system, however several provinces still had large rollover funds, which were not accounted for, while yet others were racked by corruption and misuse of public money.

4 RECOMMENDATIONS

Both the national and provincial Departments of Finance are advised to provide information requested by the protocols so as to enable the Commission to fulfil its mandate. They should also provide details of revenue and expenditure to show what percentage of their budgets was allocated to the realisation of economic and social rights, which programmes were funded, and how they were monitored to determine cost efficiency.

In order to highlight the constitutional provisions for the prioritisation of economic and social rights, it would be preferable that the MTEC and their provincial counterparts include and account for how their recommendations for allocations is informed by their constitutional obligations to deliver of economic and social rights. They should also be required to show how and which new programmes would advance these rights in the most cost effective manner. This process should feed into Cabinet's policy priorities, which should also reflect economic and social rights. Furthermore, the National Assembly and the National Council of Provinces should play a more critical role when commenting on the MTBPS. They also have powers to amend allocations to specific programmes of the Division of Revenue Bill. They should exercise their powers to ensure that programmes are aimed at advancing delivery of services to the most needy sections of the population.

¹⁷ *Budget Speech of the Minister of Finance. (1999) 7*

¹⁸ *Ibid 14*

It has been noted that there is an asymmetry during the division of revenue, which results in provinces and local governments, who are responsible for service delivery, receiving a smaller share. Budget allocations should be made on objective criteria using benefit-incidence analyses. Input costs should be based on real expenditure for individual programmes. This would entail budget authorities setting targets in terms of outputs and outcomes and that spending agencies report on the extent the targets have been met, and account for the costs. This would measure performance and also serve as a monitoring mechanism.

There also exists an asymmetry in information between the national and provincial budgetary authorities in so far as information collected by the provinces on projected budgets is not available to the national budgetary authority when the vertical division of revenue is made. Cabinet and MinComBud should have more detailed information when making priority choices. Furthermore, it is essential for service departments to collect and analyse data regarding projects and programmes to enable them to make more informed choices. Reliable data would enable them to lobby for funding to service areas of greatest need. Departments should prepare the best policy, budget and service delivery information in their MTEF budget submissions in order to influence policy decisions in their favour.

PART C: APPENDIX¹

KEY PLAYERS IN THE BUDGET PROCESS

The medium-term spending plans are prepared within the government's macroeconomic and fiscal framework set out in the previous budget, which outlines the 'resource envelope.' Projections are revised during the year from the National Treasuries model. Strengthening the link between Government's policy priorities and public expenditure is at the core of medium-term budgeting. Public expenditure translates Government's policy priorities into the delivery of services to communities, and is therefore a key tool for accomplishing public goals.

Budget authorities

The budget process is complex and involves budgeting authorities and budget agencies. Budgeting authorities include the Minister of Finance and the National Treasury, the Extended Cabinet, and the Ministers Committee on the Budget. At the provincial and local levels, the key players are the Budget Council, The Budget Forum, MEC's of Finance, senior officials, and members of South African Local Government Association (SALGA).

Budget agencies

There are two types of sector-based agencies: sectoral review teams and 4x4s. The main function of these is to identify, describe and quantify the cost pressure facing sectors and develop solutions, although, recently the 4x4s have concentrated on developing strategies for managing specific policy issues.

The key players are:

- National and provincial departments
- National Treasury and the nine provincial treasuries (Departments of Finance)
- The national and provincial Medium Term Expenditure Committees (MTECs)
- The Financial and Fiscal Commission (FFC)
- The Technical Committee on Finance and the joint sectoral technical committees ("4x4"s)
- Budget Council and the Budget Forum
- Sectoral MinMECs
- The Minister of Finance and the provincial Members of Executive Council for Finance
- The Ministers' Committee on the Budget (MinComBud)
- Treasury Committee

¹ Most of the information in the Appendix was obtained from the National Treasury publication: *Medium Term Expenditure Framework Treasury Guidelines 2001*.

- Cabinet and Provincial Executive Councils

The table below provides a summary of the composition of and the agencies at the national and provincial spheres and their roles.

Table 1 Key agencies in the intergovernmental budgeting process¹⁹

Body	Constitution	Function	Outputs
Budget Authorities			
Cabinet	Executive of national legislature	Decides on vertical division and publishes MTPBS for discussion in Parliament	Medium Term Budget Policy Statement National White Book Division of Revenue Bill National Expenditure Review
Extended cabinet	Cabinet plus provincial premier	Consult on the vertical and horizontal division	
Minister's Committee on the Budget (MinComBud)	Committee of Cabinet	Inject policy priorities into 4 X 4 process; review work of the 4 X 4s; intersectoral prioritisation; advise Cabinet on budget; presumably intersectoral envelopes given by MTEF are relaxed to some extent here	Term of reference of the 4 X 4s Drafts of official budgeting outputs for cabinet approval
Budget Council	Finance MINMEC plus FFC and key finance officials	Recommend horizontal division to Cabinet at the provincial level	
Budget Forum	Finance MINMEC and organised local government and technical support	Receive from local government information on its financial requirements in relation to ES and conditional grants; discuss other fiscal issues in the local government sector	
Joint MINMECs: Health, Education	National minister and provincial MECs of the sector	Non-statutory (except for education);	

¹⁹ P Whelan 'The Vertical Division of Revenue in South Africa' *IDASA Discussion Paper (2000)*

Body	Constitution	Function	Outputs
	in question plus the equivalent for finance sector	Intrasectoral policy priorities within fiscal envelopes	
Provincial Executive Councils	Executive of provincial legislature	Intra-provincial focus: department priorities and resource allocation	Preliminary provincial budgets
Budget Agencies			
4 X 4s: Health, Welfare, Education, Public Works, Personnel, transport	Sector based officials from the national department and 3 provinces plus officials from national Department of Finance and provincial equivalents in three provinces	Non-statutory; advisory; ongoing exploration of spending trends in terms of MTEF baseline allocations (fiscal envelope); cost implications of alternative delivery approaches / policy	One annual report per team
MTEF Sector Review Teams: Health, Welfare, Education	Officials of national and provincial sector departments at national & provincial levels	More periodic work on particular aspect of budget reform e.g. in 1999 performance indicators; research and data collection	
Technical Committee on Finance	Officials from national and provincial departments of finance	Support Budget Council; Makes total revenue projections; compiles (preliminary) findings of 4X4s and sectoral review teams; help draw up proposal for vertical division	

The budget process in brief

The budget process is one with sequential overlapping loops between the spheres. It starts in January and ends in February of the following year when the budget is tabled in Parliament on Budget day. The process begins with Departments preparing and submitting their baseline budget proposals to their respective Medium Term Expenditure Committees (MTECs). Departments are responsible for preparing their MTEF budget submissions in line with Government and departmental policy and spending priorities. This is a key stage in the budget process as it determines the quality and extent of information provided to the budgetary decision-makers. It is important, therefore, that departments prepare and present the best possible policy, budget and service delivery information in their MTEF budget submissions.

At the national level, departments are also responsible for submitting the first draft of the relevant departmental chapter for the *Estimates of National Expenditure* and working with National Treasury spending teams and budget analysts to finalise the documentation. At the national sphere, the MTEC is chaired by the Director General (DG) of the National Treasury and includes senior members of the National Treasury and other DGs from other departments including the Presidency. The role of the National Treasury is to review the budget and submit a memorandum to the MinComBud. The National Treasury advises if baseline projections are realistic and in line with spending priorities. It is at this stage that it can influence MinComBud to reprioritise policy decisions and adjust spending envelopes to reflect Constitutional obligations for the delivery of economic and social rights.

A similar process occurs at the provincial level. Once the MTEC's recommendations are made the budget is discussed further by the Budget Council and the Extended Cabinet, which may include provincial Premiers and the MECs and senior officials of the departments of Finance. The preliminary division of revenue is decided upon and Departments make baseline changes.

The National Treasury collates all the information and submits a report to the Budget Council, the Joint MinMEcS and MinComBud. The National Treasury draws up the Medium Term Budget Proposal Statement and the medium term fiscal framework proposal. After the meeting of the nine provincial premiers and the Cabinet and after the division of revenue has been decided upon, the MTBPS is tabled in Parliament in August.

Between August and February, the National Treasury drafts the final Division of Revenue Bill, which is approved by the national Cabinet and is tabled before the National Assembly and the NCOP on Budget Day, usually in February.

Key decision stages in the budget process

Unpacking the budget process is simplified by viewing it as a series of decision stages that form the building blocks in preparing the Budget.

The process comprises seven overlapping stages that correspond to the critical decision nodal points:

- **The prioritisation stage** between April to September calls for the political executive to focus on the broad medium-term policy and spending priorities associated with Government's social, economic and developmental priorities
- **Preparation and review of the MTEF-** budget submissions of national and provincial departments take place between April to August
- **Review of the macroeconomic and fiscal framework and the division of revenue** between the three spheres of government is the subject of technical analyses and consultation between July and August, and is considered by the extended Cabinet in September.

- **The Medium-term allocation process: the recommendation stage is initiated during the Medium Term Expenditure Committee hearings and discussions at the national and provincial level between September and October**
- **Government's broad medium-term policy and spending plans are considered by Cabinet and tabled before Parliament in the Medium Term Budget Policy Statement (MTBPS).**
- **The Medium-term allocation process: Decision stage in November facilitates determination of the new medium-term allocations to national votes and those to provincial and local government**
- **Preparation for the Budget, between November to February sees national departments and provincial treasuries work closely with National Treasury to prepare the budget documentation that is tabled before Parliament and before provincial legislatures.**

National sphere

The National Treasury is responsible for:²

- ***Advising Cabinet on the economic trends and the overall level of spending that can be afforded within the macroeconomic and fiscal framework***
- ***Advising the Ministers' Committee on the Budget and Cabinet on the Division of Revenue between the spheres***
- ***Evaluating departmental budget submissions and policy options***
- ***Submitting comments and views to departments regarding proposed department 'options'***
- ***Negotiating allocations, reprioritisation and funding levels of programmes including savings therein***
- ***Developing and presenting the national MTEF for consideration by the MinComBud***
- ***Preparing and finalising budget document, including the "Estimates of National Expenditure", for Budget Day***

The Medium Term Expenditure Committee

The MTEC is chaired by the Director-General of the National Treasury and includes senior National Treasury officials and other Directors-General (or their representatives) from a number of departments including the Presidency and the Department of Public Service and Administration.

The MTEC Committee is responsible for:

- ***Evaluating departments' budget submissions based on policy and budgetary 'options', taking into account the available resources***

² Text in *italic* indicates key stages where the Departments of Finance play a crucial role in the budgetary process.

stated within the macroeconomic and fiscal framework and the set of medium-term policy priorities agreed to by Cabinet

- *Compiling recommendations on changes to the medium-term allocations to national votes to the MinComBud*
- *Identifying spending risk items that are not accommodated within the MTEC recommendations but pose potential claims on available resources*
- *Compiling a draft memorandum to Cabinet detailing the recommendations of the MinComBud on changes to the medium-term allocations to national votes, given Government's medium-term policy and spending priorities*

Provinces follow a similar approach. Provincial MTECs are typically chaired by the Member of Executive Council (MEC) for Finance or the head of the provincial treasury and comprise senior provincial treasury officials.

Improved policy and budgetary information submitted by departments to treasuries and to the MTECs allows the Committees to play more effective roles in the MTEF allocation process. In turn, the national and provincial MTECs are able to improve the quality of information submitted to the Ministers' Committee on the Budget, provincial Executive Councils and Cabinet. This contributes to more robust budgetary decision-making at the political level.

The MTEC's *recommendations on changes to medium-term allocations to national votes are reviewed by the Minister of Finance and considered by the MinComBud*, given Government's medium-term policy and spending priorities. At the provincial level *the MECs for Finance review the MTEC recommendations and advise the Provincial Executive Councils on proposed changes to medium-term allocations to provincial votes.*

The Ministers' Committee on the Budget (MinComBud) consists of eight ministers and deputy ministers who advise the Minister of Finance. It plays an important role in building the level of political involvement and participation in the process of policy review and budgetary prioritisation.

The Committee considers key policy and budgetary issues that pertain to the budget process before they are tabled in the Cabinet. These include:

- *Government's medium-term policy and budgetary priorities*
- *The macroeconomic and fiscal framework and the Division of Revenue between the three spheres of government*
- *The Medium Term Budget Policy Statement (MTBPS) which signals Government's broad policy priorities and spending commitments for the coming 3-year period months ahead of the detailed Budget presented to Parliament*
- *Recommended changes to the MTEF allocations to national votes*

The MinComBud is one of most powerful political bodies in the budgeting process. The Minister of Finance uses the body as a sounding board before introducing proposed allocations to Cabinet for discussion and authorisation. It is convened by the Minister and meets on an ad hoc basis when the need arises. Proposals for the vertical division of revenue, as well as the supplementary allocations in June and the allocations arising from the adjustments estimate in November, which both have implications for the vertical split, pass through this committee before being tabled in the Cabinet. *The national Department of Finance play the role of secretariat to the Committee and provides a conduit between specific sections in the Department at the Committee.* The Minister briefs the secretariat on what technical work is required. MinComBud meetings are closed and their minutes are confidential, so the details about its functioning are unknown. For deliberations on the vertical division provincial premiers are drawn into an 'Extended Cabinet.'³

The Treasury Committee

This committee is chaired by the Minister of Finance and comprises a selected number of Cabinet Ministers and meets during October every year to decide on allocations to national departments for unforeseen and unavoidable expenditure that has occurred during the current year, in terms of section 32(b) of the PFMA. The Committee also makes decisions on in-year allocations to provinces. These are included in the adjustments to the original budget and tabled in the Adjustments Estimate during October each year.

Cabinet

Cabinet considers and makes the ultimate decisions on Government's medium-term policy and spending priorities, the macroeconomic and fiscal framework and the Division of Revenue between national, provincial and local government, the Medium Term Budget Policy Statement and changes to the medium-term allocations to national votes.

The provincial and local government spheres

The Budget Council and the Budget Forum are key players in promoting intergovernmental co-operation between the spheres of government on fiscal, budgetary and other financial matters. These two statutory bodies were set up to support the decision of the central authority, to facilitate consultation between them and the other two spheres of government. The Technical Committees on Finance and the sectoral technical committees (known as the '4x4s') support the Budget Council.

Local Government

³ P Whelan 'Evaluating the Vertical Division of Revenue in South Africa' (2000) IDASA Discussion Paper 11

The Budget Forum is the equivalent body for fiscal and financial matters of concern to local government. Its membership includes the Budget Council, five members nominated by the South African Local Government Association (SALGA) and one representative from each of the provincial associations. Though not a member, the Minister of Provincial and Local Government is also invited to these meetings.

Sectoral Joint MinMecs, comprising the national ministers and MECs of a concurrent function including health, education, welfare and housing, meet during the year to review sectoral trends, clarify sectoral priorities and address the budgetary implications of national policies for provincial implementation.

Political oversight of the Budget

Political oversight of the budget process is essential to ensure that the political executive is responsible for policy, budget planning and prioritisation, which must be linked to departmental spending plans and the delivery of services. The budget process is primarily about the choices and trade-offs that Government has to make on how to meet the agreed set of policy priorities and objectives for service delivery. Political oversight of the budget process allows Government to manage the tension between competing policy priorities and budget realities. This helps to reprioritise spending and make more informed policy choices that are affordable in the medium term.

Cabinet, supported by the Ministers' Committee on the Budget, the Budget Council and the Budget Forum, plays a leading role in guiding the alignment of resource allocation with national priorities. At the provincial level, the MECs for Finance and the Executive Councils play a parallel role in guiding the alignment of resource allocation with provincial priorities. The Budget Forum also plays a role in advising Cabinet on the resource allocation for the local sphere.

GLOSSARY

Budget Council	A body established to coordinate financial relations between national and provincial government, comprising the Minister and Deputy Minister of Finance and the nine provincial MECs for Finance.
Budget Forum	A body established to coordinate financial relations between national, provincial and organised local government, comprising the Budget Council, five members nominated by the South African Local Government Association (SALGA) and one representative from each of the provincial associations. Though not a member, the Minister of Provincial and Local Government is invited to the meetings of the Budget Forum.
Conditional grants	Allocations of money from one sphere of government to another, conditional on certain services being delivered or on compliance with specified requirements. Conditional grants appear as expenditure in the budget of the department making the grant and as revenue of the province or municipality

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	receiving the grant. (See also agency payments)
Consolidated expenditure	Total expenditure by national and provincial government, including transfers to municipalities and other extra-budgetary agencies. Consolidated expenditure includes spending by provinces financed from own revenues. Consolidated spending is therefore the sum of national and provincial spending, excluding the double counting of transfers from national to provincial government.
Donor grant funding	Donor grants used to supplement MTEF allocated expenditure.
Division of revenue	The allocation of funds between the spheres of government, as required by the Constitution.
Equitable shares	The allocation of revenue to the national, provincial and local spheres of government, as required by the Constitution.
Financial and Fiscal Commission (FFC)	An independent body established by the Constitution to make recommendations to Parliament and provincial legislatures about financial issues affecting the three spheres of government
Financial year	The 12 months on which government budgets are based, beginning 1 April and ending 31 March of the subsequent calendar year.
Gross domestic product (GDP)	A measure of the total national output, income and expenditure in the economy. GDP per head is the simplest overall measure of welfare, although it does not take account of the distribution of income, nor of goods and services that are produced outside the market economy, such as work within the household.
GDP inflation	The rate of increase of prices across gross domestic product.
Option	Sets out a possible change in a department's baseline allocation.
Medium-term expenditure framework (MTEF)	The 3-year spending plans of national and provincial governments, published at the time of the budget.
Project loan	Strategy of debt financing using the project loan facilities of international lending institutions. Usually includes elements of technical support and capacity building.
Reprioritisation within baseline	The proposed re-allocation of resources to programmes and activities if the department were to receive the medium-term baseline as its allocation.
Rolling budgets	A budget system in which 3-year forward projections are revised annually.
Treasury (National)	The national departments responsible for financial and fiscal matters, that is, the Departments of Finance and State Expenditure
Treasury committee	Committee that evaluates all requests for additional funds for unavoidable and unforeseen expenditure during a financial year.
Vertical division of revenue	The division of revenue between spheres of government.
Vote	An appropriation voted by Parliament.

ABBREVIATIONS

DoF	- Department of Finance
FFC	- Financial and Fiscal Commission
GDP	- Gross Domestic Product
HOD	- Head of Department
KZN	- KwaZulu-Natal
MinComBud	- Minister's Committee on the Budget
MinMec	- Minister's & Member of the Executive Council
MTEC	- Medium Term Expenditure Committee
MTEF	- Medium Term Expenditure Framework
MTBPS	- Medium Term Budget Policy Statement
PEC	- Provincial Executive Council
PFMA	- Public Finance Management Act of 1999
PPP	- Public Private Partnership
RDP	- Reconstruction and Development Programme
SAHRC	- South African Human Right's Commission
SALGA	- South African Local Government Association

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