



ECONOMIC &  
SOCIAL RIGHTS REPORT

Baseline Information

1997-1998

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## Preface

The 1993 Vienna Declaration and Programme of Action resolved a contentious debate in human rights theory by asserting that “[a]ll human rights are universal, indivisible, interdependent and interrelated.”<sup>1</sup> This seminal United Nations document further stated that “[t]he international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis....”<sup>2</sup> It is not always easy to recognise the whirlwind revolution this constituted. These statements purported to put to rest generations of debate about the hierarchy of rights as well as the relative Justifiability of various rights within the canon of international human rights. Before the Vienna Declaration, politics had intervened inappropriately to prevent the elaboration of the Universal Declaration in a single text. Instead, two different covenants were adopted in 1966, giving credence to those who sought to diminish the importance of some rights. Hopefully, the Vienna Declaration will encourage a more holistic approach to comprehending and enforcing all human rights.

South Africans have benefited from this new approach already. The 1996 Constitution achieved what very few constitutional systems have dared to accomplish—an integrated, holistic approach to fundamental rights. All the rights, even as their different ways of enforcement are recognised, are viewed as equally enforceable.

The South African Human Rights Commission has asserted repeatedly that this integrated approach helps give meaning to the body of rights in our Constitution. More specifically, as the Commission strives to make these rights, such as the right to equality and dignity, a reality for all South Africans, it cannot disassociate them from issues pertaining to poverty. Economic and social rights often encompass the most basic primary needs for human beings. Poverty is more than a lack of adequate income. It is rather, as the *Human Development Report 1997* puts it, a lack of the necessities to be a self-respecting, dignified and wholesome human being. Poverty *is* a denial of human rights.

The Constitution calls on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights.”<sup>3</sup> It goes further, however, by establishing a mechanism for monitoring and assessing the realisation of the economic and social rights. Section 184(3) empowers the South African Human Rights Commission to require relevant organs of state to provide the Commission with 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.<sup>4</sup>

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<sup>1</sup> Vienna Declaration. World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF. 157/24 (Part I) at 20 (1993) Part 1 at para 5.

<sup>2</sup> *Ibid.*

<sup>3</sup> Constitution of the Republic of South Africa of 1996 (Act no 108 of 1996) ch 2 at s 7(2).

<sup>4</sup> Section 184(3) of the Constitution of the Republic of South Africa 1996

This provision has capacity, if used creatively, to ensure not only the monitoring of the implementation of these rights, but also accountability. The Human Rights Commission Act 54 of 1994 gives the Commission powers to enforce this accountability through judicial means.

This report, based on the information obtained from institutions of state, is the Commission's first initiative in meeting its constitutional obligation to monitor and assess the realisation of economic and social rights in South Africa. As such, the report is not a comprehensive list. Instead, it represents an examination of key national and local government departments, their understanding of their human rights obligations and the actions they have reportedly taken to meet them. The Commission hopes this report will help in promoting and protecting economic and social rights.

During the drafting of this report, we have learned many lessons and committed several mistakes. In the end, we are proud of this effort. The generosity and commitment of many people—colleagues and staff of the Commission, partners in research institutions, government departments and NGOs who served as our interlocutors—have made the report possible. We are deeply appreciative of their assistance and we salute them for what we have been assessment of the state's success or failure in delivering social and economic rig able to achieve together. Elsewhere we have expressed our thanks in a more personal manner. Still, this is only the beginning. We look forward to receiving feedback on this report as we prepare another for 1999. Please stay with us.

The Commission also takes this opportunity to thank all the strategic partners in the NGO community and within the government sector for their efforts in making this report a reality. These partners are representatives from the following organisations:

Centre for Human Rights, Community Law Centre (University of the Western Cape), Centre for Applied Legal Studies (CALS), Community Agency for Social Enquiry (CASE), Commission on Gender Equality (CGE), Human Science Research Council (HSRC), South Africa Non-Governmental Coalition (SANGOCO).

We also thank the following institutions for financial, and other, assistance with this process:

The Human Science Research Council (HSRC), the European Union Foundation for Human Rights in South Africa (EUFHR), the Government of Finland through the Human Rights Institute for South Africa (HURISA) and the Danish Centre for Human Rights.

We are grateful for their participation and comments.

Finally, the following individuals also made significant contributions:  
Tseliso Thipanyane, Siphon D. Molepo, Sandy Liebenberg, Karrisha Pillay, Danie Brand, Shadrack Gutto, Gina Bekker and Christof Heyns.

***To them we say lekamoso!***

*The struggle for equality, social justice and human dignity for all must continue.*

N. Barney Pitryana  
CHAIRPERSON  
South African Human Rights Commission

## List of Abbreviations

CBOs	Community-Based Organisations
CRC	International Convention on the Rights of the Child
DEAT	Department of Environmental Affairs and Tourism
GJMC	Greater Johannesburg Metropolitan Council
ICESCR	International Covenant on Economic, Social and Cultural Rights
MTEF	Medium-Term Expenditure Framework
NGOs	Non-governmental Organisations
NPA	National Programme of Action for South African Children
SAHRC	South African Human Rights Commission
CASE	Community Agency for Social Enquiry
SALGA	South African Local Government Association

# Legislation

## Acts

Abolition of Restrictions on the Jurisdiction of Courts Act of 1996 (Act No 88 of 1996)

Atmospheric Pollution Prevention Act of 1965 (Act No 45 of 1965)

Constitution of the Republic of South Africa of 1996 (Act No 108 of 1996)

Development Facilitation Act of 1995 (Act No 67 of 1995)

Environmental Conservation Act of 1989 (Act No 73 of 1989)

Extension of Security of Tenure Act of 1997 (Act No 62 of 1997)

Further Education and Training Act of 1998 (Act No 98 of 1998)

General Law Fourth Amendment Act of 1993 (Act No 132 of 1993)

Higher Education Act (Act No 101 of 1997)

Housing Act of 1997 (Act No 107 of 1997)

Human Rights Commission Act of 1994 (Act No 54 of 1994)

National Education Policy Act of 1996 (Act No 27 of 1996)

National Environmental Management Act of 1998 (Act No 107 of 1998)

National Water Act of 1998 (Act No 36 of 1998)

Prevention of Illegal Evictions from and Unlawful Occupation of Land Act of 1998 (Act No 19 of 1998)

Rent Control Act of 1976 (Act No 80 of 1976)

Rent Control Act of 1989 (Act No 230 of 1989)

Restitution of Land Act of 1994 (Act No 22 of 1994)

Social Assistance Act of 1992 (Act No 59 of 1992)

South African Schools Act of 1996 (Act No 84 of 1996)

Water Services Act of 1997 (Act No 108 of 1997)

# Introduction

South Africa has suffered a long history of gross human rights violations, mainly in the forms of racial domination, sexual discrimination and economic exploitation. This history manifested itself in the oppression and exploitation of the majority of South Africa's people who experienced inequality, under-development, political oppression, economic exploitation, injustice and psychological and physical violence.

To date, many South Africans continue to suffer from the vestiges of colonialism and apartheid. Some of these effects are poverty, hunger, unemployment, lack of adequate housing and infrastructure, lack of access to clean water and health services, lack of access to education and unacceptable exposure to environmental pollution and degradation.

To help address these issues, the Constitution requires the South African Human Rights Commission to collect information from government institutions on what measures they have taken to promote the realisation of certain social and economic rights. This report aims to fulfil this constitutional mandate.

The report has several objectives:

- to establish whether organs of state understand their obligations to realise economic and social rights;
- to determine whether organs of state have taken measures to realise the economic and social rights in the Bill of Rights;
- to ensure that national, provincial and local legislation, regulations and practices are in harmony with international human rights instruments; and
- to provide government and Parliament with proposals concerning the promotion and protection of economic and social rights.

The responses submitted by government departments, as discussed in the report, reveal the varying levels of commitment government departments have towards fulfilling their human rights obligations.

The report is divided into six volumes. The first volume is comprised of the substantive analytical elements of the report. The remaining volumes provide the detailed documents from which the Commission prepared its report. Most readers will focus on the contents of Volume One as a self-contained report. The remaining volumes provide a more in-depth insight into the reporting process.

The Volumes are divided as follows:

- Volume I                    *Initial assessment of government compliance*  
Part 1:    Overview of South African and International  
                 Norms  
Part 2:    Methodology  
Part 3:    Evaluation  
Part 4:    Recommendations
- Volume II                   *Protocols Sent to Relevant Government Departments*
- Volume III                 *Governmental Responses to Protocols*  
Part 1:    National Government Responses to Protocols  
                 Sent by the Commission  
Part 2:    Provincial Government Responses to Protocols  
                 Sent by the Commission  
Part 3:    Local Government Responses to Protocols Sent  
                 by the Commission
- Volume IV                 *Researcher's Evaluation of Government Responses*
- Volume V                  *CASE's Survey Report on Public Perceptions on the Realisation  
of Socio-Economic Rights*
- Volume VI                 *SANGOCO's Report on Poverty and Human Rights*



## Part 1: Overview of South African and International Norms

The South African Constitution was built on a foundation of decades of international human rights practice, which has come to assert that all human rights are “universal, indivisible, interdependent and interrelated.”<sup>5</sup> Social and economic rights reflect the positive rights that provide each citizen with the freedom to enjoy certain dignities in life. The Constitution encodes these rights with phrases such as “the state must...” or “everyone has the right to...” It also provides that each individual shall have access to social and economic rights such as adequate housing, an environment that is not harmful, health care, sufficient food and water, social security, and basic education.

Government institutions have the duty to fulfil these enumerated rights, like all of those contained in the Bill of Rights. The state must “respect, protect, promote and fulfil” all the economic and social rights in promoting the general welfare of its citizens.<sup>6</sup> By not distinguishing between the state’s obligations to realise civil rights and social and economic rights, the Constitution acknowledges that the enjoyment of some rights is impossible without the enjoyment of all rights.

The monitoring and assessment of the realisation of economic and social rights helps to “protect the full range of human rights required for people to have a full, free, safe, secure and healthy life.”<sup>7</sup> For many, a dignified and fulfilling life remains unattainable until they can satisfy such fundamental needs as employment, clean and safe food and water, housing, health care and education. In accordance with international human rights law, these elements of life constitute economic and social rights or, as commonly referred to, *socio-economic* rights.

Thus, Socio-economic rights are “designed to ensure the protection of people as full persons in such a way that they can enjoy rights, freedoms and social justice simultaneously.”<sup>8</sup> This returns us to the understanding embodied in the Constitution, that the full enjoyment of human rights, particularly civil and political rights, cannot be achieved without the complete realisation of economic and social rights.

### Economic and Social Trends

As a result of colonial and apartheid policies, many South Africans suffer from abject poverty, hunger and unemployment, inadequate housing, unsanitary and remote water sources, scarce health services, illiteracy and lack of adequate educational opportunities and exposure to harmful environmental pollution and degradation. Justice Arthur Chaskalson, the President of the Constitutional Court, noted in a landmark decision:

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<sup>5</sup> Vienna Declaration. World Conference on Human Rights, Vienna 14-25 June 1993, U. N. Doc A/CONF. 157/24 (Part I) at 20 (1993) Part 1 at para 5.

<sup>6</sup> Section 7(2) of the Constitution of the Republic of South Africa Act No. 108 of 1996

<sup>7</sup> Committee on Economic, Social and Cultural Rights, UN Fact Sheet No. 16, at 3

<sup>8</sup> *Ibid*, at 5.

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one, in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.<sup>9</sup>

Indeed, the apartheid legacy has eradicated any current, practicable sense of socio-economic development for many South Africans. The World Bank Group noted in 1995 that South Africa has one of the worst social indicator records (i.e., health education, potable water, fertility, and mortality) in the world as a result of these past discriminatory policies.<sup>10</sup> According to this study, 40 percent of the households surveyed (equivalent to 53 percent of the population) account for less than 10 percent of the total consumption. In contrast, 10 percent of households (approximately 5,8 percent of the population) account for over 40 percent of the country's total consumption.<sup>11</sup> The survey also indicated that poverty in South Africa has a clear racial dimension—Africans represent nearly 95 percent of South Africa's impoverished as opposed to five percent in the Coloured and the Indian communities and less than one percent in the white communities.<sup>12</sup>

Similarly, the *Poverty and Inequality* Report for South Africa found that 61 percent of African people could be classified as poor, whereas only one percent of white people fall into this category.<sup>13</sup> In addition, 28,5 percent of the population comprise 20 percent of the poorest households in South Africa. The report also noted that one-third of South African children less than five years old live in extremely poor households and 60 percent of the members of these households are women.<sup>14</sup>

The high unemployment rate in South Africa represents another vestige of the apartheid system. These figures continue to divide along racial lines with a 38 percent unemployment rate for Africans, 21 percent for Coloureds, 11 percent for Indians and four percent for whites.<sup>15</sup> African women are worst affected. For example, a 1995 study found that 47 percent of African females were unemployed as opposed to 29

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<sup>9</sup> *Soobramoney v Minister of Health*, KwaZulu-Natal 1997 (4) BCLR 1696 (CC) at para 8.

<sup>10</sup> World Bank Group Key Indicators of Poverty in South Africa 1995. See also, J May et al. *Poverty and Inequality in South Africa* (1998) 23.

<sup>11</sup> World Bank, *Poverty* at 7.

<sup>12</sup> *Ibid.*

<sup>13</sup> J May et al, *Poverty* at 29.

<sup>14</sup> *Ibid. Poverty* at 33. See also, National Economic Development and Labour Council *Annual Report 1996-97* (May 1997) at 94.

<sup>15</sup> Parliamentary Bulletin. *Poverty in South Africa – Poverty Week Debate* 21 October 1996. According to the Central Statistical Service Household Survey 1994-1997 on Employment and Unemployment in South Africa, the official unemployment rates for the years 1994 to 1997 were 20.0 percent (African), 16.9 percent (Coloured), 21.0 percent (Indian), and 22.9 percent (White)

percent of African males.<sup>16</sup> Further, only 3 percent of African females were engaged in the professional employment sector, whereas 50 percent of African females remained employed in elementary occupations such as cleaning, garbage collection and agricultural labour. In contrast, 34 percent of African males were employed in elementary jobs while only 3 percent of whites were employed in such positions.<sup>17</sup>

According to a 1996 UNESCO report, the greatest disparities between the black and white populations in South Africa are in housing and access to clean water.<sup>18</sup> More than 30 percent of African households live in shacks.<sup>19</sup> A report by the Reconstruction and Development Programme office, stated that most white, Indian and Coloured people live in substantial dwellings, two-thirds of which have four or more rooms.<sup>20</sup> In contrast, 18 percent of African people in urban areas live in shacks while an additional eight percent live in hostels.

For African people in rural areas, the situation is even more dire. Only half live in proper houses, whereas one-third live in makeshift structures.<sup>21</sup> The Department of Housing has indicated that over 13,5 percent of all households in South Africa live in squatter housing—mostly in free-standing squatter settlements on the periphery of cities and towns.<sup>22</sup>

Inadequate housing has resulted in overcrowding, which like other socio-economic issues, is a result of past discriminatory policies. On average, African and Coloured people have 0,8 rooms per person, while white people generally have 1,9 rooms per person. In poor households, each room accommodates 2,3 persons on average, while the richest households host 0,5 persons per room.<sup>23</sup>

In highlighting the problems in the housing sector, the *Poverty and Inequality in South Africa* noted:

Informal housing is the most prevalent means by which the poor access shelter. In urban areas about one-third of existing stock is informal and in the PWV an estimated 80 percent of newly built housing is informal settlement or backyard shacks. Importantly, many of these forms of accommodation are regarded as illegal, have insecure tenure and are characterised by limited services, overcrowding and inadequate or deteriorating physical conditions. Socially, the housing situation

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<sup>16</sup> Central Statistical Service Living in South Africa – Selected findings of the 1995 October Household Survey (1996) 16

<sup>17</sup> *Ibid.* Central Statistical Service at 20-22.

<sup>18</sup> See UN Children's Fund Country Program Strategy Note E/ICEF/1996/2 South Africa 1996.

<sup>19</sup> However, according to the October Household Survey of 1995, only 52 percent of the African population live in houses. The remainder of this community lives in traditional dwellings (21 percent), backyard formal (seven percent), backyard shacks (three percent), shacks (seven percent) and hostels (eight percent). The survey does not include statistics on the homeless population.

<sup>20</sup> Reconstruction and Development Programme Office: *Children, Poverty And Disparity Reduction: Towards Fulfilling the Rights of South Africa's Children* (1996) at 75.

<sup>21</sup> *Ibid.*

<sup>22</sup> Department of Housing. *Housing the Nation 1994 Annual Report* (1995) at 14.

<sup>23</sup> RDP, *Children* 75.

contributes to considerable dissatisfaction and dysfunctional behaviour, including criminality and violence.<sup>24</sup>

A report by Community Agency for Social Enquiry (CASE) found that when the democratic government came into power in 1994, 17-20 million people did not have access to a proper water supply or to safe water.<sup>25</sup> Further, approximately one-quarter of all South African households did not have access to piped potable water supplies in 1994 and did not have flush toilets.<sup>26</sup> Another study found that more than 80 percent of poor households in rural areas have no access to piped water or to sanitation and that 74 percent of all rural African households fetch their water on a daily basis. Twenty-one percent of these households have to transport water distances of more than 500 metres.<sup>27</sup>

In terms of harmful environmental conditions, approximately 12 percent of Africans did not have sanitation facilities in 1995. This is compared to an estimated 0,1 percent of Indians, 2,4 percent of Coloureds and virtually no whites.<sup>28</sup> These drastic inequities have affected the quality of life of many African people and have impeded their development and progress. The historical combination of patriarchal and racist policies has often meant that African females and children in rural areas especially have continued to bear the burden of the effects of poverty.

Indeed, these socio-economic imbalances and numerous others, effectively preclude many South Africans from exercising and enjoying their rights as expressed in the Bill of Rights and cumulatively deprive them of the right to lead dignified lives.

## **Promoting and Protecting Economic and Social Rights**

To mitigate existing economic and societal imbalances and to further the meaningful realisation of economic and social rights represents a major challenge. The constitutional aspiration “to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”<sup>29</sup> will be realised only after this challenge has been met. Our country’s failure to meet these challenges could have serious repercussions for the new democracy and the establishment of a human rights culture. In recognition of this challenge, the Constitution establishes a foundation for realising fundamental socio-economic rights.

The Constitution specifically provides for socio-economic rights relating to the environment,<sup>30</sup> land,<sup>31</sup> housing and shelter,<sup>32</sup> health care,<sup>33</sup> food,<sup>34</sup> water, social

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<sup>24</sup> J May, *Poverty* at 237.

<sup>25</sup> P Pigou et al. Community Agency for Social Enquiry *Monitoring Socio-Economic Rights in South Africa: Public Perceptions* (June 1998) at 56. Researched for the South African Human Rights Commission.

<sup>26</sup> Department of Housing. *Annual Report 1994* at 15.

<sup>27</sup> J May, *Poverty* at 139.

<sup>28</sup> Department of Housing *Annual Report 1995* 23-24.

<sup>29</sup> SA CONST., preamble.

<sup>30</sup> SA CONST, CH 2 at s 24.

security,<sup>35</sup> and education.<sup>36</sup> These rights, in conjunction with all rights in the Constitution, place obligations on national legislation and all organs of the state.<sup>37</sup> The state is required to respect, protect, promote and fulfil all of these rights.<sup>38</sup> These rights, like all other provisions of the Bill of Rights, also bind both natural and juridical persons to a certain extent.<sup>39</sup>

## 1 Constitutional provisions

In terms of Section 184(3) of the Constitution, the South African Human Rights Commission has the duty to monitor and assess the realisation of economic and social rights pertaining to housing, health care, food, water, social security, education and the environment. The Bill of Rights outlines the full scope and application of these rights:

### Housing<sup>40</sup>

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

### Health Care, Food, Water and Social Security<sup>41</sup>

- (1) Everyone has the right to have access to –
  - (a) health care services, including reproductive health care...
  - (b) sufficient food and water; and
  - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

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<sup>31</sup> *Ibid.*, SA CONST, ch 2 at s 25(5).

<sup>32</sup> *Ibid.*, SA CONST, ch 2 at s 26 and 28(1)(c).

<sup>33</sup> *Ibid.*, SA CONST, ch 2 at s 27(1) (a), 27(3) and 28(1)(c).

<sup>34</sup> *Ibid.*, SA CONST, ch 2 at s 27(1)(b) and 28(1) (c).

<sup>35</sup> *Ibid.*, SA CONST, ch 2 at s 27(1)(c) and 28(1)(c).

<sup>36</sup> *Ibid.*, SA CONST, ch 2 at s 29(1). See also, ch 2 sections 10 (human dignity) and 11 (right to life) that address these issues.

<sup>37</sup> *Ibid.*, SA CONST, ch 2 at s 8(1).

<sup>39</sup> *Ibid.*, SA CONST, ch 2 at s 8(2).

<sup>40</sup> *Ibid.*, SA CONST, ch 2 at s 26.

<sup>41</sup> *Ibid.*, SA CONST, ch 2 at s 27.

## Education <sup>42</sup>

- (1) Everyone has the right -
  - (a) to a basic education, including adult basic education; and
  - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
  
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –
  - (a) equity
  - (b) practicability; and
  - (c) the need to redress the results of past racially discriminatory laws and practices.
  
- (3) Everyone has the right to establish and maintain, at their own expense, independent 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 standards at comparable public educational institutions.
  
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.<sup>43</sup>

## Environment <sup>44</sup>

Everyone has the right –

- (a) to an environment that is not harmful to their health or well-being
- (b) to have the environment protected, for the benefit of the present and future generations, through reasonable legislative and other measures that –
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

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<sup>42</sup> *Ibid.*, SA CONST, ch 2 at s 29.

<sup>43</sup> This section also allows for the establishment of independent educational institutions.

<sup>44</sup> *Ibid.*, SA CONST, ch 2 at s 24.

## Property <sup>45</sup>

- (5) *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.*

The state must take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis.

In addition to the aforementioned sections, the Constitution outlines broader economic and social rights for children.

## Children's Rights <sup>46</sup>

- (1) Every child has the right to basic nutrition, shelter, basic health care services and social services.

Finally, South Africa has signed and, ratified international human rights instruments that provide for economic and social rights. The main instruments ratified by South Africa include the *Convention on the Rights of the Child* and the *African Charter on Human and Peoples' Rights*. South Africa has signed, but has not ratified, the International Covenant on Economic, Social and Cultural Rights (ICESCR) which remains the most significant international instrument pertaining to socio-economic rights.<sup>47</sup>

South Africa also deposited its National Action Plan for the Protection and Promotion of Human Rights with the United Nations on 10 December 1998. This document discussed, among other things, the national implementation of the socio-economic rights contained in the Constitution.

## 2 Application and interpretation

### 2.1 Application

The application of the socio-economic rights enumerated in the Constitution, like other provisions of the Bill of Rights, is subject to internal and external limitations or qualifications.<sup>48</sup> Most rights are not absolute, but instead are “access rights”—that is, they provide individuals with the newly established ability to gain access to a particular right. Furthermore, the realisation of these rights, although progressive, remains subject to the availability of state resources.

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<sup>45</sup> *Ibid.*, SA CONST, ch 2 at s 25(5). While the right to gain access to land is not included in s 184 (3) of the Constitution, the Commission, in recognition of the relevance of land in socio-economic rights matters, decided to include this right in its monitoring process.

<sup>46</sup> *Ibid.*, SA CONST, ch 2 at s 28.

<sup>47</sup> The South African Cabinet has approved ratification of the ICESCR Covenant

<sup>48</sup> See P De Vos. “Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa’s 1996 Constitution” 13 *SAJHR* 67 at 92-8.

The constitutional limitation clause further states that a law of general application may limit all rights as long as these provisions are reasonable and justifiable in an open and democratic society. The limitation of these rights also must take into account the following:

- the nature of the right,
- the importance of the purpose of the limitation,
- the nature and extent of the limitation,
- the relation between the limitation and its purpose, and
- less restrictive means to achieve the purpose.<sup>49</sup>

## 2.2 Application

Although South African courts have not developed a body of case law pertaining to the socio-economic rights provisions of the Constitution, international human rights instruments do provide keener insight into possible legal interpretations of these rights. Documents such as the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter, the “Limburg Principles”),<sup>50</sup> the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (hereinafter, the “Maastricht Guidelines”)<sup>51</sup> and the Comments of the Committee on Economic, Social and Cultural Rights (hereinafter, the “Committee”).<sup>52</sup> In addition, some of the elaborate provisions of the ICESCR, the African Charter on Human and Peoples’ Rights and the Convention on the Rights of the Child can assist with understanding the scope of South Africa’s constitutional provisions on economic and social rights.

In addition, the Constitution allows courts to rely on international law when interpreting the Bill of Rights and other provisions of the Constitution. Section 39 of the Constitution provides: “When interpreting the Bill of Rights, a court, tribunal or forum—must consider international law.”<sup>53</sup> Accordingly, the interpretation of

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<sup>49</sup> CONST, ch 2 at s 36.

<sup>50</sup> The International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights at the University of Cincinnati (Ohio, United States of America) convened a forum comprised of a group of experts in international law which drafted and agreed upon the Limburg Principles. The participants met in Maastricht on 2-6 June 1986 to consider the nature and scope of the obligations of states to adhere to the International Covenant on Economic, Social and Cultural Rights. See, International Commission of Jurists *Economic, Social and Cultural Rights: A Compilation of Essential Documents* (1997) at 63.

<sup>51</sup> The Guidelines are designed to assist in the understanding and determination of violations of economic, social and cultural rights and in providing remedies for such violations. The Guidelines were agreed upon by more than thirty experts that met in Maastricht from 22-26 January 1997 during the 10th anniversary of the Limburg Principles. The meeting was organised by the same organisations behind the process that led to the development of the Limburg Principles. The Maastricht Guidelines should thus be seen as an elaboration of the Limburg Principles. *Ibid.* at 79.

<sup>52</sup> The Committee was requested by the UN Economic and Social Council to adopt general comments under the ICESCR in order to assist States parties in meeting their reporting obligations. See Raoul Wallenberg Institute of Human Rights and Humanitarian Law. *General Comments or Recommendations Adopted by United Nations Human Rights Treaty Bodies: Committee on Economic, Social and Cultural Rights* (1998).

<sup>53</sup> SA CONST., ch 2 at s 39. See also, CONST, ch 14 at s 233 using similar language for the interpretation of legislation.



international norms and standards on socio-economic rights will be important in understanding our own constitutional provisions.

### Significance of *respect, protect, promote and fulfil*

The second clause of the Bill of Rights provides that the “state must respect, protect, promote and fulfil the rights in the Bill of Rights.”<sup>54</sup> What does this mean in relation to the realisation of socio-economic rights?

The Maastricht Guidelines offer some insight into this issue. According to these guidelines, the obligation to *respect* means that states must “refrain from interfering with the enjoyment” of the socio-economic right in question. The duty to *protect* conveys that states must prevent violations of the right in question, either by other organs of state or third parties. Finally, the obligation to *fulfil* requires states to “take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of socio-economic rights.”<sup>55</sup>

The Maastricht Guidelines also include two additional obligations associated with the duties to respect, protect and fulfil economic and social rights. According to these guidelines, states must incorporate the concepts of *conduct* and *result* into their socio-economic models. In terms of *conduct*, states are required to take action that is “reasonably calculated to realise the enjoyment” of any given socio-economic right. On the other hand, the obligation of *result* requires states to “achieve specific targets” in order to meet set standards in the enjoyment of these rights.<sup>56</sup>

While the guidelines do not define the concept to *promote*, it means that states should take necessary and reasonable measures to publicise socio-economic rights—their need, enjoyment and protection.

### Significance of taking *reasonable legislative and other measures*

Article 2(1) of the ICESCR does not use the phrase “reasonable legislative and other measures,” rather it refers to “appropriate means, including particularly the adoption of legislative measures.” Indeed, it contends that the words “appropriate” and “reasonable” are similar or related in the context in which they are applied. In this regard, the usage of the term “appropriate” refers to the realisation of economic and social rights as required by the ICESCR. This definition is similar to the Constitution’s requirement that the state must take “reasonable...measures” to realise the same rights. The Committee on Economic, Social and Cultural Rights further interpreted the “appropriate measures to realise economic and social rights” to mean that states should be “deliberate, concrete and targeted as clearly as possible towards meeting the obligations” in accordance with the ICESCR.<sup>57</sup> Therefore, South Africa

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<sup>54</sup> *Ibid.*, SA CONST. at s 7.

<sup>55</sup> Maastricht Guidelines, Para. 6 (n 13) at 82.

<sup>56</sup> *Ibid.*, para. 7.

<sup>57</sup> Committee on Economic, Social and Cultural Rights *General Comment No. 3 (1990) The Nature of States parties obligations para 2*. Adopted by the Committee on Economic, Social and Cultural Rights at its 48th meeting (fifth session), held on 11 December 1990. See, Raoul Wallenberg Institute.

should rely on this definition as it strives to realise its goals pertaining to the furtherance of socio-economic rights.

### Significance of *progressive realisation*

According to the Committee on Economic, Social and Cultural Rights, the concept of “progressive realisation” reflects a “recognition of the fact that full realisation of all economic, social and cultural rights generally will not be able to be achieved all at once in a short period of time.” However, the Committee further acknowledges that states should not misinterpret this definition as “depriving the obligation of all meaningful content.” Rather, they should recognise that the phrase imposes a positive duty on them to “move as expeditiously and effectively as possible towards” the realisation of economic, social and cultural rights.

In terms of the Limburg Principles, the progressive realisation of economic, social and cultural rights implies that

- states must move as expeditiously as possible towards the realisation of the rights;
- states do not, under any circumstances, have the right to defer indefinitely, efforts to ensure the full realisation of the rights;
- states have the obligation to begin immediately to take steps to fulfil their obligations to realise the rights;
- the realisation of the rights requires the effective utilisation of available resources and such realisation is not dependent on the increase in resources; and
- the progressive realisation of the rights cannot only be effected by an increase in resources but also by the development and tapping of broader societal resources.<sup>58</sup>

### Meaning of *within available resources*

In terms of article 2(1) of the International Covenant on Economic, Social and Cultural Rights, states are obliged to realise economic, social and cultural rights to “the maximum of their available resources.” The language of the South African Constitution limits the scope of this phrase by using, instead, the words “available resources.” However, many people contend that there is no real difference between the two concepts and that the relevant interpretations of the ICESCR will provide a keener understanding of the phrase “available resources” in the Constitution.

In accordance with the Limburg Principles, the phrase “to the maximum of its available resources” entails:

- the obligation on states, regardless of the level of economic development, to ensure respect for the rights;
- the equitable and effective use of and access to available resources which include those within a state and those available from the international community through international co-operation and assistance; and

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<sup>58</sup> *Maastricht Guidelines* at para 21-24.

- due priority to be given to the realisation of economic, social and cultural rights while mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.<sup>59</sup>

The Committee also endorsed the above principles. It reaffirmed that if a state wanted to attribute its failure to meet its minimum obligation towards socio-economic and cultural rights to a lack of available resources, it had to “demonstrate that every effort has been made to use all [available] resources” to fulfil its duty.<sup>60</sup>

### Minimum core-obligation

While neither the ICESCR nor the Constitution refer to the phrase “minimum core obligations,” the Committee on Economic, Social and Cultural Rights recognised and adopted this concept in order to ensure minimum levels for the realisation of socio-economic and cultural rights. The Committee stated that a state actor failed to meet these standards when it deprived “any significant number of individuals of essential primary health care, of basic shelter and housing, or of the most basic forms of education.” The Committee also contended that the failure to recognise a minimum core obligation would deprive economic, social and cultural rights of the basis for their existence.<sup>61</sup>

Similarly, the Maastricht Guidelines endorsed this concept and argued that states could not rely on a lack of resources or any other factor as the sole excuse for failing to meet the minimum core obligations referred to by the Committee on Economic, Social and Cultural Rights.<sup>62</sup> In defining South Africa’s commitment to the furtherance of individual socio-economic rights, government entities could incorporate this concept of a minimum core obligation in order to use it as a benchmark for its programs.

### Specific provision: adequate housing

The Committee broadly interpreted the right to housing as the right to live “somewhere in security, peace and dignity.”<sup>63</sup> It further contended that states should interpret the right to housing, as articulated in article 11(1) of the ICESCR, as the right to “adequate housing.” The Commission on Human Settlement and the Global Strategy for Shelter to the Year 2000 argued that “adequate housing” meant “adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate infrastructure and adequate location with regard to work and basic facilities—all at a reasonable cost.”<sup>64</sup> The Committee also referred to several factors that states should take into account when conceptualising adequate housing: legal

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<sup>59</sup> *Ibid.* at para 25-28. *See also*, Maastricht Guidelines at para 10.

<sup>60</sup> *Committee on Economic*, at para 11.

<sup>61</sup> *Ibid.*, para 10.

<sup>62</sup> *Ibid.*, para 9.

<sup>63</sup> Committee on Economic, Social and Cultural Rights General Comment No 4 (1991): The Right to Adequate Housing. Adopted on the 24th meeting (sixth session) of the Committee held on 11 December 1991. *See also*, Raoul Wallenberg Institute.

<sup>64</sup> *Ibid.*, para 7.

security of tenure, availability of service, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy.<sup>65</sup>

To enable a meaningful public participation in these debates about rights, the SAHRC relied on the above definitions to inform its analysis. The Commission also referred to terms used by different state organs and now disseminates them more widely in order to allow a clearer understanding of what can be expected of national, provincial and local government departments.

### **3 Role of the South African Human Rights Commission**

The SAHRC, is a state institution established to strengthen constitutional democracy in South Africa, and has the following functions:

- promoting respect for human rights and a culture of human rights;
- promoting the protection, development and attainment of human rights; and
- monitoring and assessing the observance of human rights in the nation.<sup>66</sup>

To perform these duties, the Commission has the power to investigate and report on the observance of human rights in South Africa. It may take steps to secure appropriate redress where human rights have been violated. The Commission has to carry out research on the promotion and protection of human rights and provide education on the promotion and protection of human rights.<sup>67</sup>

As noted previously, the Constitution mandates the Commission to assist government institutions with the furtherance of achieving socio-economic rights for all South Africans. Therefore, the Commission must request information on measures taken by relevant organs of state on the realisation of rights in the Bill of Rights pertaining to housing, health care, food, water, social security, education and the environment.<sup>68</sup> This role of the South African Human Rights Commission, as a national institution for the promotion and protection of human rights and as a monitor of socio-economic rights, correlates to the Vienna Declaration's reaffirmation of the importance and constructive role of national institutions.<sup>69</sup>

National institutions must remain vigilante with their duties of championing socio-economic rights for both targeted groups and all individuals. Indeed, the "right to live a dignified life can never be attained unless all basic necessities of life work, food, housing, health care, education and culture—are adequately and equitably available to everyone."<sup>70</sup>

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<sup>65</sup> *Ibid.*, para 8.

<sup>66</sup> SA CONST., ch 9 at s 181.

<sup>67</sup> *Ibid*, CONST. at s 184(2). *See*, Human Rights Commission Act of 1994 (Section 54 of 1994), s 7 (list of additional powers of the Commission).

<sup>68</sup> SA CONST. ch 14 at s 184(3)..

<sup>69</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna 25 June 1993, part I at para 36.

<sup>70</sup> UN Centre for Human Rights Fact Sheet No. 16 at 3.

## Part 2: Methodology

*Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.*

*~ Constitution, Section 184(3)*

### Background

The Constitution directs the South African Human Rights Commission to monitor and assess the realisation of economic and social rights in South Africa. In recognition of the significance of its mandate, the Commission collaborated with several organisations in this endeavour. Along with these partners, the Commission held a series of workshops and meetings at the national and provincial level to determine an appropriate process for the assessment of economic and social rights in South Africa.

The monitoring of economic and social rights was a new experience for the Commission. Similarly, most organs of state had little experience in reporting on the realisation of human rights. In light of these realities, the Commission, together with relevant stakeholders, decided that simple but practical and effective guidelines, or protocols, would facilitate the reporting process. The protocols were designed to provide a set of questions and guidelines to assist relevant organs of state in reporting to the Commission. The Commission sent the protocols to government departments and requested that they complete and return them for evaluation.

The workshop addressed the following themes:

- the role of the Commission in monitoring economic and social rights;
- the process of implementing the provisions of Section 184(3) of the Constitution;
- what constituted relevant organs of state in terms of Section 184(3);
- international experiences in the monitoring of socio-economic rights; and
- information gathering and evaluation methods for the monitoring of socio-economic rights.

### Content and Nature of the Protocols

Because government departments had not completed such reports in the past, the Commission and its strategic partners agreed to request minimalist, not optimum, information. This decision stemmed from the realisation that some, or many, government departments might not have the resources to furnish the requested information in an appropriate form, that the Commission might not have the capacity to handle large amounts of information provided by departments and that the Commission needed to provide clear guidelines on the reporting framework.

The protocols were based on the seven socio-economic rights detailed in section 184(3) of the Constitution. In view of their relevance in the realisation of economic and social rights, additional protocols were developed for the Departments of Finance and Land Affairs.

Each protocol was divided into nine sections requesting information on:

- the effects of past policies, legislation and practices on the realisation of economic and social rights;
- each relevant department's understanding of its respective constitutional obligations regarding the realisation of economic and social rights;
- "information gathering systems" pertaining to the realisation of economic and social rights and the nature of information collected;
- groups that have been identified as vulnerable and in need of special attention as far as the realisation of economic and social rights was concerned;
- the department's understanding of its obligations to respect, to protect and to promote and fulfil economic and social rights (sections five, six and seven respectively);
- future measures—legislative, budgetary and others—that the departments plan to adopt to realise economic and social rights; and
- general information on the realisation of economic and social rights that have not been included in answers to other sections.

The Commission also attached an explanatory memorandum, providing notes and additional information, to help the organs of state in responding to the protocol.<sup>71</sup>

## **Analysis of Government Responses**

The Commission analysed the government departments' responses with the assistance of a team of experts.

## **Survey on Public Perceptions on the Realisation of Economic and Social Rights**

In addition to producing the economic and social rights protocols, the Commission oversaw a survey on public perceptions of the realisation of economic and social rights. This study aimed to enrich the Commission's understanding by providing a sample of the views and perceptions of the public and some non-governmental organisations (NGOs). The questionnaire for the survey was developed through extensive discussions and consultations between the Commission, the Community Agency for Social Enquiry (CASE) and other Commission partners. CASE conducted the survey on behalf of the Commission during February-March 1998. The report of the study was finalised on 8 June 1998. The survey covered respondents in all nine provinces, from all types of residential areas and representing all racial groups.

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<sup>71</sup> See, Volume II for a copy of a protocol and an explanatory memorandum.

## Supplementary Processes

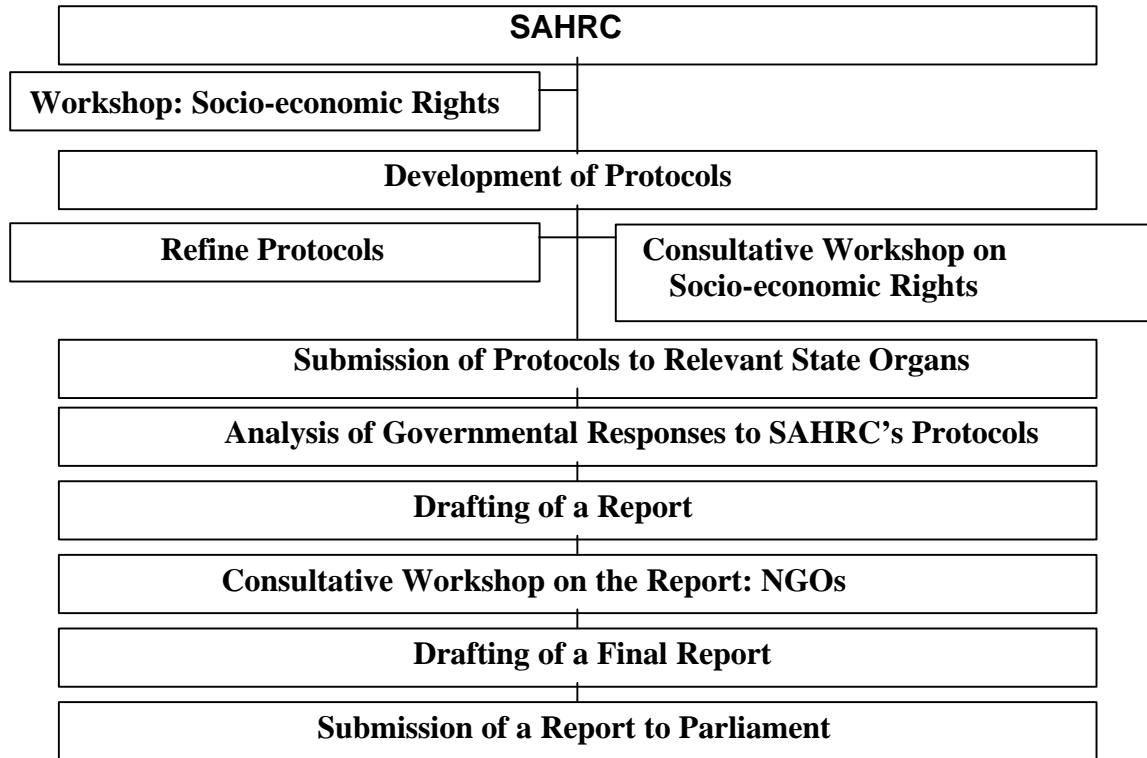
The Commission jointly convened the *National Speak Out on Poverty Hearings*, with the Commission for Gender Equality and the South African NGO Coalition (SANGOCO) from March to June 1998. The oral testimonies made by ordinary people on their experiences of poverty and written submissions by several NGOs on the plight of poor people in South Africa also informed the Commission's process of monitoring the realisation of economic and social rights.<sup>72</sup>

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<sup>72</sup> See, Volume VI for a report on this campaign.

*The process followed by the Commission in monitoring and assessing socio-economic rights.*

**Monitoring and Assessing Economic and Social Rights**





# Part 3: Evaluation

## Quantitative Analysis

### 1 Submission of protocols

The protocols prepared by the Commission were sent to relevant organs of state, at national, provincial and local levels of government in December 1997. The relevant organs of state had to respond to the protocols by 15 February 1998.<sup>73</sup>

The Commission sent the protocols to the following government departments:

National Department of Agriculture  
National Department of Correctional Services  
National Department of Education  
National Department of Environmental Affairs and Tourism  
National Department of Finance  
National Department of Health  
National Department of Housing  
National Department of Land Affairs  
National Department of Water Affairs and Forestry  
National Department of Welfare  
Eastern Cape Provincial Government  
Free State Provincial Government  
Gauteng Provincial Government  
KwaZulu-Natal Provincial Government  
Mpumalanga Provincial Government  
North West Provincial Government  
Northern Cape Provincial Government  
Northern Province Government  
Western Cape Provincial Government  
South African Local Government Association (SALGA)

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<sup>73</sup> See *Volume II* for a sample of the Commission's socio-economic rights protocols sent to relevant organs of state.

## 2 Responses to protocols

Tables 1 and 2 provide information on the relevant government departments that responded to the Commission's socio-economic rights protocols.

**Table 1: National Government**

<b>National Departments</b>	<b>Dates on which the Commission received the report and additional information</b>
Housing	13/2/98 and 7/4/98
Health	20/2/98
Water Affairs and Forestry	20/2/98
Land Affairs	20/2/98
Environmental Affairs and Tourism	23/2/98
Finance	24/2/98 and 14/5/98
Education	27/2/98
Welfare	7/4/98
Correctional Services	21/4/98
Agriculture	4/8/98

**Table 2: Provincial Governments**

<b>Provincial Governments</b>	<b>Dates on which the Commission received the report and additional information</b>
Gauteng (including a response from the Greater Johannesburg Metropolitan Council)	20/2/98 and 24/3/98
Northern Cape	20/2/98, 27/2/98 and 26/3/98
Free State	26/2/98 and 10/3/98
Western Cape	4/3/98
KwaZulu-Natal	11/3/98
Mpumalanga	17/3/98 and 15/4/98

Given that 1998 represented the first year organs of state provided the Commission with information in accordance with section 184(3) of the Constitution, the response rates of national departments has been satisfactory. However, as Table 1 indicates, a few of the responses reached the Commission long after the required date. Delays in the receipt of these reports seriously affected the Commission's ability to monitor and assess the status of socio-economic rights because researchers could not analyse certain protocols for sections of the report.

In contrast to the national Departments, the response from provincial and local Departments was extremely disappointing. Out of the nine provincial governments, only the Mpumalanga and Free State provincial governments provided satisfactory responses. The reports provided by the Gauteng, Northern Cape, KwaZulu-Natal and Western Cape Provinces did not adequately assist the Commission, in producing this

report. Only one Department in the Western Cape provincial government responded to the Commission's protocols.

In spite of numerous requests, and notwithstanding very clear and specific statutory provisions, the governments of the Eastern Cape Province, Northern Province and North West Province did not respond at all. The Commission has not received an explanation from these provincial governments for their failure to respond. The same situation applied to the local government. Only the Greater Johannesburg Metropolitan Council responded to the Commission's protocols.

This unconstitutional conduct on the part of some national, provincial and local government structures is unacceptable and will not be tolerated by the Commission in the future. Governmental departments should be aware that they have a legal obligation in terms of the Human Rights Commission Act of 1994 (Act no 54 of 1994). Each department must assist the Commission with its duty of writing an annual socio-economic report. The failure to do so is an offence in terms of the Human Rights Commission Act No. 54 of 1994. In the future, the Commission will invoke its powers to force Departments to comply with their constitutional mandate.<sup>74</sup>

## Qualitative Analysis

When analysing the responses of relevant organs of state, the Commission measured them against various international and national guidelines, norms and standards. These instruments included: the Limburg Principles on the ICESCR, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, the general comments of the Committee on Economic, Social and Cultural Rights, the ICESCR itself, and the South African Constitution.

In this section, the Commission grouped responses of the government departments in accordance with the economic and social rights listed in section 184(3) of the Constitution. However, the Commission also decided to include the Departments of Finance, Correctional Services and Land Affairs in this analysis.

### 1 Housing

- (1) Everyone has the right to have access to adequate housing.*
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
- (3) No one may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.*

~ Constitution, Section 26

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<sup>74</sup> See, Human Rights Commission Act, at ss 7 (2), 4 (3), 18(i).

## **Departmental Overviews**

Previous legislation created a racially skewed enjoyment of the right to housing largely through the provision of differential housing subsidy grants. Although, the Department repealed all discriminatory legislation, the inefficient and inequitable administrative systems and abuses linger. Thus, the Department is instituting a national housing plan to eliminate these imbalances.

In response to the protocol, the Department defined its obligation to respect, protect, promote and fulfil the right to housing by referring to the Housing Act of 1997 (Act No 107 of 1997). This Act states that government “must give priority to the needs of the poor” and offer “encouragement and support for individuals and communities in their efforts to fulfil their own housing needs by assisting them in accessing land, services and technical assistance....”

Further, the Department defined adequate housing as “housing that meets the basic human needs that are of a standard that satisfies the minimum health and safety requirements applied by local authorities and constitutes a permanent residential structure, ensuring privacy and providing adequate protection against the elements.” It considered its minimum obligation to be the provision of subsidies that allow people to build their own homes, not to build the homes directly. The National Housing Subsidy Scheme is the Department’s main initiative to fulfil this obligation.

While the Act, which came into effect on 1 April 1998, repealed all past discriminatory legislation, the Department acknowledged that past discrimination and economic realities have left farm workers, rural households, female headed households and the youth especially vulnerable in terms of their ability to exercise their right to housing. The housing needs of destitute children and others who cannot care for themselves, however, is considered, by the Housing Department, to be an obligation of the Department of Welfare.

Through the Nomvula Housing and Urbanisation Information System, the Department collected housing, human settlement and basic demographic data. The Department has also been involved in an education campaign through its Housing Support Centres located in communities participating in the People’s Housing Process.

Finally, the Department’s future plans focused on the consolidation and extension of current subsidy and building plans. It also discussed a capacity-building programme to enhance the ability of provincial governments and municipalities to help realise the right to housing.

### *1.1 Understanding of obligations in respect of the right of access to adequate housing*

## **National Department of Housing**

### ***Access***

The Department interpreted the terms “access” to housing as “the opportunity of everyone to exercise a choice in respect of housing options and access such elected

options.”<sup>75</sup> While, its definition of “adequate housing” did not comply with the ICESCR,<sup>76</sup> such as the legal security of tenure, availability of services, materials, facilities and infrastructure, the affordability, the accessibility, the location or the cultural adequacy of the housing, these elements are reflected in the laws and policies of the Department. For example, the Extension of Security of Tenure Act of 1997 (Act No 62 of 1997) reflects a commitment to ensure legal security of tenure. Similarly, the Housing Act of 1997 (Act No 107 of 1997) includes as a target the housing needs of people with disabilities. Specifically, the policy relating to the special needs of people with disabilities seeks to ensure that housing becomes accessible. The Development Facilitation Act of 1995 (Act No 67 of 1995) refers to the location of the housing. Furthermore, the Housing Act’s definition of “housing development” expressly mentions “habitable, stable and sustainable public and private residential environments.” The Act further refers to such structures that allow convenient access to economic opportunities, health, educational and social amenities; provide access on a progressive basis to permanent residential structures with secure tenure; ensure privacy and provide adequate protection against the elements as well as potable water; and that offer adequate sanitary facilities and domestic energy supply.

### ***Progressive realisation***

The Department’s understanding of the term “progressive realisation” accords with the Limburg Principles by explaining that the right to housing has to be realised on the basis of economic principles. Further, the understanding of this term should reflect sustainable housing assistance measures that will eventually allow all people to realise this right.

### ***Evictions***

The Department described some of the issues that make an eviction appropriate under section 26(3). The Extension of the Security of Tenure Act details the considerations that must be taken into account in order to determine whether a termination of the right of residence is just and equitable. In particular, the Department’s policy incorporates:

- *the fairness of an agreement*—provisions in an agreement or provisions of law on which the owner or person in charge relies;
- *the conduct of the parties* giving rise to the termination;
- *the interests of the parties*—including the comparative hardship to the owner or person in charge, the occupier concerned and any other occupier if the right of residence is or is not terminated;
- *the existence of a reasonable expectation* of the renewal of the agreement from which the right of residence arises; and
- *the fairness of the procedure* followed by the owner or person in charge—including whether or not the occupier has, or should have, been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

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<sup>75</sup> See, Protocol submitted by the National Department of Housing to the SAHRC. Volume III.

<sup>76</sup> The department defined “adequate housing” as “housing that meets the basic human needs that are of a standard that satisfies the minimum health and safety requirements applied by local authorities and constitutes a permanent residential structure, ensuring privacy and providing adequate protection against the elements.” *Ibid.*

The Prevention of Illegal Evictions from and Unlawful Occupation of Land Act of 1998 (Act No 19 of 1998) also incorporates the consideration of relevant circumstances. These pertinent factors include “whether the land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner, for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”<sup>77</sup>

With regard to evictions at the instance of organs of state, section 6(3) of the same Act provides as follows:

In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to -

- (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
- (b) the period the unlawful occupier and his or her family have resided on the land in question; and
- (c) the availability to the unlawful occupier of suitable alternative accommodation or land

More specifically, this Act illuminates the seriousness of evictions by outlining a range of interests that landowners and interested parties should consider prior to the issuance of an eviction order. The aforementioned provisions do not provide an exhaustive list. However, they do illustrate an overall consideration of the rights to justice and equality available to potentially evicted persons.

### ***Policy and legislation***

The Department understands its obligation to respect, protect, promote and fulfil the right of access to adequate housing. Its report to the SAHRC, however, draws no conceptual difference between these obligations. Instead, the report explains that the Department called for the introduction of enabling legislation in which appropriate housing policy, strategy and delivery systems can be developed.

The Department’s legislative record has demonstrated its aim to respect, protect, promote and fulfil the right of access to adequate housing to provide for a holistic and comprehensive approach. The White Paper on Housing and the Housing Act of 1997 represent the primary policy and legislative frameworks within which housing development should take place.

The White Paper on Housing represents the primary policy framework that gives effect to section 26 of the Constitution. It analyses the housing sector within a macro-economic framework and outlines the institutional arrangements for housing delivery in South Africa. The White Paper further proposes a national housing strategy and addresses the issue of housing subsidies.

The Housing Act aims to facilitate a sustainable housing delivery process by establishing general principles and defining the functions of national, provincial and

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<sup>77</sup> See, Prevention of Illegal Evictions from and Unlawful Occupation of Land Act of 1998 (Act no 19 of 1998), Section 4(7)

local governments. The Act also seeks to establish a South African Housing Development Board and to promote provincial boards and the financing of national housing programmes. A National Housing Code, published in terms of the Act, details national norms and minimum standards for housing in South Africa.

### **Provincial Governments**

Provincial departments referred to numerous initiatives, which, though not comprehensive, reflect their commitment to fulfil their obligations to facilitate access to the right to housing. The provinces' undertakings to provide temporary accommodation (tents), in the event of people becoming homeless due to natural disasters like storms, is a particularly welcome initiative.

However, provincial governments have failed to indicate their understanding of "adequate housing." This was surprising since the national Housing Act took effect in December 1997, two months before the provinces' responses to the Commission. The provinces should be expected to keep abreast of national developments pertaining to housing. However, since the submission of the protocols, provinces have drafted and enacted legislation pertaining to housing rights.

Provinces recognise that minimum standards would have to be established in respect of socio-economic rights. While the provinces' understanding of this obligation is laudable, the fact that they make reference to minimum standards being required for "shelter," as opposed to adequate housing, raises concern for the Commission. Specifically, the provinces did not focus enough on the concept of "adequate housing" and the criteria they employ to determine the adequacy of housing within these areas.

Finally, the provinces' acknowledgement of their responsibility to provide temporary shelter for street children was also laudable.

#### *1.2 Measures taken to Respect the Right of Access to Adequate Housing*

### **National Department of Housing**

In order to fulfil the duty of sustaining individual rights of access to housing, the government must refrain from acting in a manner that would preclude people from satisfying the right themselves. In addition to the Housing Act, the Prevention of Illegal Evictions From and Unlawful Occupation of Land Act aims to ensure implementation of this right. It seeks to prohibit unlawful evictions and provide procedures for the eviction of unlawful occupiers. It further repeals the Prevention of Illegal Squatting Act of 1951 and other obsolete laws. The aims of this Act are in accordance with the international recognition that the prohibition of unlawful evictions serves as an integral part of the state's duty to respect the right of access to adequate housing.

In addition, the Development Facilitation Act aims to introduce measures to facilitate the implementation of reconstruction and development programmes and projects in relation to land. Accordingly, it delineates the general principles governing land development throughout the country. It further provides nationally uniform

procedures for the subdivision and development of land in rural areas in order to promote speedy provision and development. Finally, it promotes the security of tenure while ensuring the availability of end-user finance, as early as possible, in the land development process, in the form of subsidies and loans.

### ***Vulnerable groups***

The duty to respect the right to equality prohibits unfair discrimination in the provision of access to adequate housing. Accordingly, the Department has recognised that the aim of equity in access to adequate housing requires that special measures be taken for certain sectors of the population. In this regard, it has outlined the following groups as needing these special measures:

- poor people
- people with disabilities
- people in female-headed households, children and the youth
- elderly people
- farm workers
- residents in rural households

The Housing Subsidy Scheme aims to assist the poor in gaining access to adequate housing. The Department is also in the process of developing a policy for increasing the subsidy amount for people with disabilities. The Department, however, did not provide documentation detailing this policy. Though the Department listed female-headed households as a group requiring special measures, the relevant legislation does not clearly describe such measures, except for ordering female-headed households to be given special consideration in the granting of eviction orders. Similarly, the Department's report offers little insight into the special measures it has implemented or planned to address regarding the housing needs of the elderly, with the exception of considering their interests as a relevant factor in the granting of eviction orders.<sup>78</sup>

Furthermore, while the Department listed children and youth as a group in need of special housing measures, it delegated the provision of appropriate housing for children to the Department of Welfare. In undertaking special measures with regard to farm workers, the Department made vague references to investigations to determine the basis upon which subsidies will be made available for housing farm workers. The Department stated that it was finalising its rural housing subsidy policy for rural areas in the provision of housing. However, the Department did not include the relevant documentation in its report.

The passage of the Housing Act repealed all previous discriminatory housing legislation. The Department also has undertaken other measures to remedy the effects of past discrimination (such as the housing subsidy scheme).

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<sup>78</sup> See the Prevention of Illegal Evictions from and the Unlawful Occupation of Land Act, Section 4(7).



### 1.3 Measures taken to Protect the Right of Access to Adequate Housing

#### **National Department of Housing**

##### *Tenants rights*

The state has a duty to protect tenants from unreasonable or sporadic rent increases. The Rent Control Act of 1976 (Act No 80 of 1976) fulfils this duty as required by international norms and standards.<sup>79</sup>

In accordance with the General Comments of the Committee on Economic, Social and Cultural Rights, the government has taken measures to protect people from such acts as forced evictions.<sup>80</sup> The Prevention of Illegal Evictions from and Unlawful Occupation of Land Act aims to protect these individuals by conferring legal security of tenure upon persons and households lacking such protection. Since the Rent Control Act's adoption in 1976, it has been amended by three pieces of legislation: the Rent Control Act of 1989 (Act No 230 of 1989), the General Law Fourth Amendment Act of 1993 (Act No 132 of 1993) and the Abolition of Restrictions on the Jurisdiction of Courts Act of 1996 (Act No 88 of 1996).

In addition, the Extension of Security of Tenure Act was passed in an attempt to confer such security of tenure. This Act provides for state assistance to facilitate the long-term security of land tenure. It also regulates the conditions of residence on certain land and the conditions and circumstances under which persons may be evicted from land.

The Department further noted that the National Home Builder Registration Council Bill would protect individuals who contract to build homes. In particular, it would provide homeowners with a legal remedy in the event that the builder's negligence causes defects and other problems.

Finally, the Mortgage Indemnity Fund attempts to ensure that banks are not discouraged from making home loans available to poorer homebuyers.

#### **Provincial Governments**

The Development Facilitation Act was enacted to speed up the process and acquisition of land and its development. However, the provincial governments did not provide the Commission with adequate information to determine how they are implementing these measures.

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<sup>79</sup> The Department did not refer to the Rent Control Act in its report to the Commission.

<sup>80</sup> See Committee on Economic, Social and Cultural Rights, General Comment 7, The Right to Adequate Housing (Art. 11(1) of the Covenant) forced evictions, U.N. Doc. E/C.12/1997/4 (1997)

## *1.4 Measures Taken to Promote and Fulfil the Right of Access to Adequate Housing*

### **National Department of Housing**

The Department has undertaken an ongoing communication campaign aimed at informing the public about the National Housing Programme. It also established Housing Support Centres within communities involved in the Peoples' Housing Process to provide more detailed and targeted information. In addition, the Department is establishing an Internet Website.

The National Housing Subsidy Scheme has been implemented to fulfil the right of access to adequate housing. Provincial subsidy allocations are based on criteria like population, income categories, existing informal housing, backlogs and urbanisation. Subsidies for individual ownership are allocated to beneficiaries to assist them to acquire ownership of fixed residential properties for the first time. The subsidy levels are linked to household income. There are two types of individual ownership subsidies: project-linked and individual. The project-linked subsidies provide housing opportunities for individuals on an ownership basis in projects approved by the Provincial Housing Board. The individual subsidies offer people ownership of an existing property or a property not approved by the provincial housing board. The Consolidation Subsidy allows for persons who received housing assistance from the state in the form of ownership of serviced sites (before the Housing Subsidy Scheme) to apply for an additional benefit from the state to improve their existing housing circumstances. Institutional subsidies are available to institutions that create affordable housing stock to enable eligible persons to live in subsidised residential properties based on secure tenure.

The National Housing Fund pays all subsidies. This allocation method allows a qualifying beneficiary to acquire a residential property with secure tenure at a price that he or she can afford, satisfies the minimum health and safety requirements and permits as many housing delivery options and opportunities as possible. The national and provincial housing boards that receive subsidy applications from local authorities, developers or individuals control housing subsidies. The Subsidy Implementation Manual provides a comprehensive input on the housing subsidy scheme. The Mortgage Indemnity Fund also sought to ensure that the right of access to adequate housing is fulfilled. Finally, the Department was in the process of developing the Rural Housing Subsidy Policy as well as the Policy on the Variation of the Subsidy Amount for Disabled Persons. In addition, the Department has set up various bodies such as the National Housing Finance Corporation and the Rural Housing Loan Fund in order to enable people to access finance.

### **National Department of Correctional Services**

The Constitution states that prisoners should be provided with adequate accommodation.<sup>81</sup> The Department of Correctional Services referred to many aspects of prisoners' accommodation, but did not mention protection from the cold, damp, heat and rain, structural hazards and disease factors. Furthermore, no reference was

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<sup>81</sup>Constitution of the Republic of South Africa of 1996 (Act no 108 of 1996, s 35(2)(e) )

made to ensuring appropriate (accessible) accommodation for prisoners, especially, for example, prisoners with disabilities. As the Department did not provide information about the number of prisoners accommodated in the group cells or dormitories and the size of these cells or dormitories, the Commission cannot accurately assess the possibility of overcrowding. The Department also did not provide supporting documentation to confirm that prison accommodation conformed to public health legislation.

## **Provincial Governments**

Provincial governments drafted new legislation and plans, but did not provide adequate information to explain what they did to realise their objectives.

### *1.5 Establishing Minimum Core Obligations for the Right of Access to Adequate Housing*

## **National Department of Housing**

International law requires minimum core obligations and specific benchmarks for the right of access to adequate housing. However, the Department's response reflected a poor understanding of the concept of minimum core obligations. The response vaguely referred to the Housing Act's commitment to give priority to the needs of the poor, without detailing the minimum core obligations.

While the General Comments of the Committee on Economic, Social and Cultural Rights discuss the necessity of establishing such minimum standards, the Department did not refer to this concept in relation to housing.<sup>82</sup> However, the Department noted that a national housing code would be published in accordance with the Housing Act of 1997. It wrote: "This housing code will detail national norms and minimum standards for housing in South Africa."<sup>83</sup>

Further, some of these factors, such as legal security, are implicit in legislation like the Extension of Security of Tenure Act. This Act also promotes land development in accordance with international norms by encouraging the integration of residential and employment opportunities.<sup>84</sup> The Act also seeks to optimise the use of resources relating to agriculture, land, minerals, bulk infrastructure, road transportation and social facilities.<sup>85</sup> Finally, the Department's policy on varying the subsidy amount for people with disabilities indicates a degree of commitment to ensuring accessibility to housing.

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<sup>82</sup> The General Comments Note: "The Committee is of the view that a minimum core obligation to ensure the satisfaction of at the very least, minimum essential levels of each rights of the rights is incumbent upon every State Party. Thus for example, a State party in which any significant number of individuals are deprived of essential foodstuffs, of essential primary health care, of *basic shelter and housing*, or of the most basic forms of education is, prima facie, failing or discharge its obligations under the Covenant." (Emphasis added)

<sup>83</sup> See, Department of Housing response. Volume III.

<sup>84</sup> See, Extension of Security of Tenure Act 3(1)(c)(iv).

<sup>85</sup> *Ibid.*

## **Provincial Governments**

Provinces and local governments did not furnish information regarding the minimum core obligations for the right of access to adequate housing.

### *1.6 The Baseline provided for the Realisation of the Right*

## **National Department of Housing**

The information received from the Department did not present a comprehensive overview of the housing situation in South Africa. The Department failed to refer to all relevant legislation that deals with the right in question. For instance, it did not mention the Extension of Security of Tenure Act, the Development Facilitation Act or the Rent Control Act. An analysis of how the existing legislation impacts on the status of individual rights to housing would have offered more insight into the progress of the realisation of this right for most South Africans. When the report did discuss housing legislation, it did not provide an adequate summary of the laws to which it referred.

In addition, the Department did not respond to certain questions, such as those relating to the percentage of the Department's budget set aside to address the right of access to adequate housing. This information would allow the Commission to assess whether the Department has attempted to make the right to housing a reality "to the maximum of its available resources" in accordance with international law.<sup>86</sup> The Department also did not provide information on the laws and other measures introduced in the past year that may have undermined the progressive realisation of the right of access to adequate housing. The Commission recognises that government departments may focus on human rights violations contained in apartheid-era legislation. However, no one should become complacent and assume that all post-apartheid legislation will further socio-economic rights, or human rights more broadly, to their fullest extent.

## **Provincial Governments**

This report cannot draw a full picture of the housing situation within the provinces because different directorates within the provincial departments responded to the questionnaire. While numerous initiatives were referred to, the reports did not provide a comprehensive overview of the housing situation in the provinces.

## **Local Governments**

### ***Greater Johannesburg Metropolitan Council (GJMC)***

Although the Housing Act of 1997 states that local spheres of government should ensure proper housing development, the GJMC lacked a clear understanding of its

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<sup>86</sup> The General Comments state: "Article 2(1) obligates each state party to take the necessary steps 'to the maximum of its available resources.' In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."

obligations.<sup>87</sup> Furthermore, a full picture of the housing situation within the jurisdiction of this local government cannot be determined.

### *1.7 Information Systems to Monitor the Progressive Realisation of the Right – Focus on Desegregated Data regarding Vulnerable and Disadvantaged Groups*

#### **National Department of Housing**

At the time of the report, the Department was in the process of developing Nomvula—the Housing and Urbanisation Information System—which seeks to compile economic, social and statistical information including sector-specific information, funds allocations and housing standards. The report did not describe the system in detail or include supporting documentation. Thus, the Commission cannot develop an in-depth assessment of Nomvula and the Department’s ability to monitor rights particularly for vulnerable and disadvantaged groups. However, the fact that the Nomvula system allows regional and national comparisons and sector-specific information has indicated that this system should enhance the Department’s ability to assess these rights. Depending on the meaning behind the Department’s reference to “sector-specific information,” the system may focus on disaggregated data relating to vulnerable and disadvantaged groups.

#### **Provincial Government Departments**

Provinces have numerous structures and systems to chart their progress and evaluate their plans. However, the provinces did not submit information about whether they will disaggregate this in the future.

#### **Local Governments**

No indication has been provided as to the measures or structures that are in place at the local government level to ensure the progressive realisation of the right of access to adequate housing.

### *1.8 The Existence of a Coherent Plan or Policy to Address the Realisation of the Right*

#### **National Department of Housing**

International norms and standards require state parties to adopt a national housing strategy that defines the objectives for the development of housing, identifies the resources available to meet these goals efficiently and sets out responsibilities and timeframes for the implementation of necessary measures.<sup>88</sup> South Africa’s Housing

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<sup>87</sup> See, Housing Act of 1997 (Act no 107 of 1997) Part 1 at s 2(1)(c).

<sup>88</sup> See Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Art. 11(1) of the Covenant) (Sixth session, 1991), Compilation of General

Act of 1992 represents the primary legislative framework that seeks to give effect to the right to housing. In addition, the White Paper on Housing, the Extension of Security of Tenure Act, the Prevention of Unlawful Evictions from and the Unlawful Occupation of Land Act, the Development Facilitation Act, the Rent Control Act, the impending National Housing Code and the National Homebuilders Registration Council Bill form part of the Department's total plan to realise the right of access to adequate housing. Other policies such as the Variation of the Subsidy Amount for Disabled People Policy, the Rural Housing Subsidy, and the Policy in Respect of Bridging Finance to Developers, as well as the Public Sector Hostels Refinement Policy reaffirm the Department's commitment. In addition, the Mortgage Indemnity Fund, the Subsidy Scheme and the on-going education campaign further support the Department's overall plan in making access to housing a reality for all the people of South Africa.

However, the Department did not provide the Commission with a comprehensive plan of how it will enforce the Housing Act and further the realisation of the right to adequate housing. Future reports should provide the Commission with greater details about the Department's specific programmes and policies to address the issue of housing development in accordance with the Act.

### **Provincial Governments**

The reports to the Commission did not make reference to the existence of a coherent plan.

### **Local Governments**

The Greater Johannesburg Metropolitan Council did not incorporate a plan for the provision of housing into its report. Furthermore, the GJMC's assertion that local government did not have a role to play in the realisation of the right to housing contradicts the terms of the Housing Act of 1997 and prior national housing priorities.

## **1.9 *Children's Rights to Shelter***

### **National Department of Housing**

The Commission could not provide an assessment of the implementation of children's rights to shelter because of the absence of the relevant information. The Department of Housing contended that the Department of Welfare maintained responsibility for this right. However, the Department of Welfare provided insufficient information for an assessment and only made a brief reference to the residential and youth care systems.

## Provincial and local Governments

Provincial and local governments did not provide general information concerning children's rights to shelter.

## 2 Health Care

- (1) *Everyone has the right to have access to –*
  - (a) *health care services, including reproductive health care...*
- (2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*
- (3) *No one may be refused emergency medical treatment.*

~ *Constitution, Section 27*

### Departmental overview

Apartheid-era health legislation and policies systematically discriminated against vulnerable communities based on categorisations such as race and gender. Vestiges of these policies continue to impact on the provision of health services to many sectors of the population: especially in rural areas, where medical care is sparse, and a high mortality rate and other poor health indicators linger, due to lack of facilities and counselling for preventative and reproductive health care.

The Department of Health understands its constitutional obligations to respect, protect and promote the right to health as demanding that the Department “shall not deprive people of the right to access to health services.” Further, it must put “mechanisms in place that guard against the erosion of those rights” and it must disseminate public health information.

In addition, the Department has sought to fulfil these obligations by providing free health care to pregnant and lactating women and children under the age of six. The Department has also attempted to ensure that the “shortage of staff should not mean that people have no access” to health care and has promoted media and community awareness campaigns, especially around the issue of HIV/AIDS.

In general, women and children are the main targets for health care initiatives. More broadly, the Department defines rural people, people living with HIV/AIDS, people living in informal settlements, migrant workers, families whose lives have been disrupted by removals or violence, gay people, youth who have been excluded from the formal education system, poor people and sex workers as especially vulnerable.

Beyond its other information gathering and reporting functions, the Department of Health is the principal body responsible for the co-ordination of the implementation of

the National Plan of Action for children, in pursuance of the UN Convention on the Rights of the Child.

According to the Department, the greatest hindrances to the enjoyment of the right to health are a lack of national guidelines covering HIV/AIDS trials, treatment and reporting, customary law which continues to enforce the subordinate position of women and the lack of a clear directive compelling health workers to provide safe abortions, especially in the rural areas.

### *2.1 The Right of Access to Health Care Services*

#### **National Department of Health**

In accordance with the Constitution, the Department does not deny access of services to groups based on such factors as race or gender. However, the Department concedes that the consolidation of the former homelands exacerbated the backlog of providing primary health care services. Rural areas experienced the worst form of integration. In particular, these communities suffer from a lack of medical resources, including inadequate numbers of necessary staff. As noted by the Department, the integration of the homelands seriously threatened the Department's ability to deliver mental health services to the greatly increased number of people requiring these services. Further, at the time of the report, cancer prevention strategies had not been implemented in the homelands.

### *2.2 Effects of the Consolidation of the Department on the Right of Access to Health Care*

#### **National Department of Health**

As noted by the Department, the consolidation of the homelands has made the backlog in primary health care services more apparent. In the rural areas especially, lack of facilities and inadequate staffing continue to hamper the Department's efforts to rectify the imbalances in the provision of health care.

### *2.3 Children's Right to Basic Health Care*

#### **National Department of Health**

The Department of Health identified children as a vulnerable, and hence, targeted group. While the Department did not focus on legislation referring to the health needs of children, it noted that many of its policies and laws automatically apply equally to children. Further, departmental programmes, such as those that offer free health care to children under the age of six, attempt to eradicate parasites that cause anaemia or tend to stunt individual growth because of poor nutritional sources and that combat malnutrition, all target children and facilitate their ability to access this right to health care.



## 2.4. *Measures taken to Protect, Promote and Fulfil the Right to Health Care*

### **National Department of Health**

The Department's conceptualisation of these terms reflected a "common-knowledge" understanding rather than one informed by international standards or human rights norms. For example, the Department understood that it should not deprive people of the right to access to health services, and that it should put in place measures to guard against the erosion of these rights. The report provided examples of how several policies attempted to incorporate these ideas into its legislation and programmes in order to facilitate each individual's right to proper health care. For example, the Department noted that its programme of providing free health care to pregnant and lactating women and to children under the age of six demonstrated an understanding of the concept "to respect." Similarly, its educational campaigns to disseminate relevant health information to various communities incorporated an element of promoting these rights to South Africans. However, while the Department noted measures that it has in place to protect, promote and fulfil the right to health, it did not detail how it planned to implement these measures.

The Department's responses did not state clearly the percentage of the national budget used to promote and fulfil health care rights.

## 2.5 *Vulnerable Groups*

### **National Department of Health**

The Department identified women and children, people living in the rural areas, people living with HIV/AIDS and people living in informal settlements as vulnerable. However, it did not include the aged or people with disabilities in its categories of vulnerable people. Nonetheless, the report noted that the Department was in the process of drafting a new mental health policy. Further it recognised the recommendations of the White Paper on an Integrated National Disability Strategy. However, these recommendations, or anti-discrimination provisions, may fail to have a substantive impact on the delivery of health services in many cases. The Department conceded that "[t]here are no binding regulations that compel health services to adhere to the non-discriminatory requirements adopted by the Department."<sup>89</sup>

The Department of Health stated that it respected non-discriminatory health rights. However, the lack of guidelines against discrimination in some cases, and the non-enforceability of these guidelines where they exist, are likely to cause discrimination.

### **Provincial Governments**

Only three provincial governments responded to the Commission's protocols on the right of access to health care. The information provided by provincial governments was generally fragmented and lacked a clear picture of benchmarks and plans of

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<sup>89</sup> See, Response from the National Department of Health. Volume III.

action. A clear understanding of the constitutional obligations in respect of health care services did not emerge from the reports.

### **Local government**

No local government responded to protocols sent with regard to the right of access to health care services.

## **3 Food Security**

- (1) *Everyone has the right to have access to – ...  
(b) sufficient food and water...*
- (2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. ...*

~ *Constitution, Section 27*

### **Departmental Overview**

No department in government is charged directly with monitoring or ensuring the realisation of the right to food. The Department of Agriculture reported that it “does not consider itself responsible for household food security. As an economic State department, the Department of Agriculture is more involved with economic development and empowerment and food security from a national perspective.”

In addition, the Department Agriculture argued that:

food security and access to food is not viewed as an objective in itself, but as an outcome...The right of access to food does not necessarily mean that Government should see to it that every citizen has food to eat ever day. It rather entails a duty to do nothing that will impede on a person’s right to food...Food security is viewed in the broader context of creating an environment that will enable each citizen to provide for his or her own household food security and for that of his or her family.

While the Department explained that it did not administer any laws or other measures that have an impact on the right of particular groups of South Africans to access sufficient food, it did consider the “economic development of rural women” as vitally important in meeting its goals of increasing food self-sufficiency.

Finally, the Department did not collect information in terms of the implementation of the right to food.

### 3.1 *The Right of Access to Sufficient Food*

#### **National Department of Agriculture**

The Departments of Agriculture, Finance, Welfare and Health should maintain primary responsibility for the implementation of the right to food at a national level. However, at the time of the analysis, only the Department of Agriculture provided information on this issue. The Department stated that it did not consider itself responsible for food security, instead it regarded itself as co-responsible for creating an environment that would enable people to ensure their own food security.

The Department of Agriculture clearly stated that it neither administered and measured discrimination against people with regard to food security and basic nutrition nor educated people about access to food. Rather, it focused on enhancing economic development, technology, production and access to markets to enable farmers, and individuals more broadly, to ensure their own food security.

Only the national Department of Correctional Services and various Provincial Governments provided information on the right to food. This information indicated that the Departments do not comply with the minimum core obligation of access to sufficient food.

### 3.2 *Information Systems to Monitor the Progressive Realisation of the Right to Food*

#### **National Department of Agriculture**

No systems are in place to collect and analyse information relating to the implementation of the right to food security. Although the Department mentions some efforts toward realising the right to food, the information is at best anecdotal in nature and does not offer a coherent picture to facilitate a broader analysis on the status of socio-economic rights.

The Department of Agriculture did not administer any laws or other measures that have an impact on either vulnerable groups' right to sufficient food or children's rights to basic nutrition.

### 3.3 *Vulnerable Groups*

#### **National Department of Agriculture**

The Department's involvement with food security centred more on economic development than household food security. The Department considered rural women without access to sufficient food or the ability to grow food as the only clear, vulnerable group. The Department did provide some information on the measures in place to help these people.

The Department of Agriculture did not fully address the right of children in terms of nutrition programs because it viewed these programs as the responsibility of the Departments of Health and Welfare.

The Department of Agriculture did not describe any coherent plans in place to address the right to food.

### **Provincial Governments**

The government departments did not respond to the specific questions in the protocols, especially at the provincial level. Although these reports provided substantial amounts of information, they did not provide the *required* information. This diminished the usefulness of the reports.

## **4 Water**

- (1) *Everyone has the right to have access to –  
(b) sufficient food and water...*
- (2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*

~ *Constitution, Section 27*

### **Departmental Overview**

The Department of Water Affairs and Forestry reported that access to South Africa's limited water resources has "historically been dominated by those with access to land and economic power." Apartheid-era legislation governing water did not discriminate directly on race, but the racial imbalance in ownership of land resulted in the disproportionate denial to black people of the right to water. Beyond racial categorisations, the Department defined the rural and poor urban population as especially vulnerable in terms of access to the right.

The Department is committed to ensure "that the nation's water is managed in such a manner that the continued availability of sufficient water for basic human needs will be ensured" long past the year 2030, when the Department predicted that water will run dry if current consumption levels are maintained. In addition, it considers itself obliged to implement the necessary legislation and policies that will help ensure the provision of water services in an equitable and sufficient manner. This approach will "support and strengthen the capacity of [the] local government...to provide water services for the interim period to poor people in rural and urban areas, who do not have access to basic water services until local government will be able to take over the responsibility."

Further, the Department reported that the Water Services Act 108 of 1997 and National Water Bill, now the National Water Act, (Act No 36 of 1998)) sought to address this legacy and honour the Department's commitment to providing access for all South Africans. The Department breaks this goal down into short-, medium- and long-term targets with the ultimate intention of providing all South Africans with clean, running water in their homes. The Department quantifies the delivery of the right to water in terms of distance to source, amount of water, and frequency of availability. At the time of the report, the Department claimed to have provided water to 1,2 million people. By early 1999, the Department reported to have supplied three million people.

Starting with an initial situation analysis, the Department has sought to develop a comprehensive information gathering system to monitor the realisation of the right to water and to ensure the efficient use of Department resources. This system collects information on demography, population, infrastructure, social service sites and the environment.

Finally, the Department plans to focus on developing the technical, informative and administrative infrastructure by building on the legislation it has enacted. The Department is also in the process of developing the national water resource strategy called for in the National Water Act.

#### *4.1 Understanding of Obligations in Respect of the Right of Access to Water*

##### **National Department of Water Affairs and Forestry**

The Department of Water Affairs and Forestry's response to the protocol and supporting documentation demonstrated a thorough understanding of its constitutional obligations in relation to the right to water. The Department's interpretation was in harmony with the provisions of the Constitution and international human rights norms focusing on socio-economic rights.

The Department clearly understood its overarching responsibility to "create an enabling environment" through which all South Africans can access water and sanitation services and to support people in gaining access to these services.

The Department has developed a comprehensive definition of the right of access to sufficient water. The "sufficiency" of water is defined in terms of its capacity to support human life and personal hygiene. The quantification of the mandatory basic minimum, and the medium and long-term goals for water provision, are derived from the relevant World Health Organisation guidelines. Beyond merely focusing on the quantity of water supplied, the Department has considered the other dimensions of the right. These include quality, cartage distance, availability, assurance of supply, upgradability of services, equitable access, just administrative action, beneficial use, sustainable management and use and cultural and social appropriateness. These principles are given expression through, among others, the provisions of the Water Services Act of 1997 (Act No 108 of 1997), the National Water Act of 1998 (Act No

36 of 1998) and the White Paper on the Water Supply and Sanitation Policy and the White Paper on a National Water Policy for South Africa.

#### 4.2 *Duties to Protect, Promote and Fulfil the Right to Water*

##### **National Department of Water Affairs and Forestry**

The Department has a sound understanding of its duties “to protect, promote and fulfil” the right. Though it did not provide a specific interpretation of its duty *to respect* the right, the entire emphasis of the Department’s policy indicates an awareness of that duty. The Department acknowledged that it should not act in ways that deprive people of access to water, that legislative and other policy measures should facilitate and not obstruct, access to water and that the Department should repeal legislation that has a discriminatory impact.

The Department offered specific examples of legislative and policy measures that it has taken (or is in the process of taking) to *protect* the right to water. A key measure is the setting of compulsory national norms and standards for the provision of water services and tariffs, especially as, according to the report, “water services are often provided in monopolistic or near monopolistic circumstances.” The Department also noted other examples of how the national government has protected the right to water. These examples related to the Department’s duty to provide an effective regulatory framework to ensure access to water in a context in which other institutions, particularly local government, are more directly involved in the provision of water.

#### 4.3 *Duty to Promote and Fulfil the Right*

##### **National Department of Water Affairs and Forestry**

The Department referred to the imperative need to reform existing water laws that support inequitable and unsustainable patterns of water usage. The Water Services Act is the primary mechanism through which the fundamental transformation of water law in South Africa is to occur. The key principles on which this law is based include:

- the public trusteeship role of national government;
- the continuity of the water cycle and the conferment of consistent status in law on all water, irrespective of where it occurs;
- the dispensing with the notion of “ownership” of water resources;<sup>90</sup> and
- the elimination of the riparian doctrine which posits that the location of a water source that streams under the land of a given property owner gives that owner the preferential rights to the usage of the water.

The Department also has promoted and fulfilled the right by providing a framework to assist water services providers to achieve the goals of access to water and by supporting and strengthening the capacity of local government to deliver water. The

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<sup>90</sup> The new law will only offer a right of use for environmental and basic human needs or an authorisation for water use in terms of the new licensing system. Indefinite authorisation to use water will not be offered.

national white paper acknowledges that drafting of new legislation will not be adequate to provide sufficient water to all. The white paper says that the most important element in achieving equal delivery of water services is the provision of funds and the regulation and direction of the institutions tasked with providing the services.

The Commission infers from the report that the Department has undertaken the following measures to give effect to a “core minimum obligation” in respect of the right to water:

- acknowledged the right to a basic water supply and basic sanitation in the Water Services Act;
- defined a basic water supply in terms of the criteria set out in the White Paper on the Water Supply and Sanitation Policy of 1994 (e.g. 25 litres per person per day, cartage distance of 200m); and
- protected a basic “reserve” in the National Water Act intended to give a priority status to the quantity and quality of water required to satisfy basic human needs and to preserve the aquatic ecosystem. The amount of water required for the Reserve will probably be calculated on the basis of the minimum standard prescribed in terms of the Water Services Act.

The Department’s interpretation of “progressive realisation” was also in line with the Constitution. The Department understood that it must take reasonable measures to realise the right. The Water Services Act places a duty on water services authorities (i.e., municipalities) to ensure access to water to all consumers within its area of jurisdiction progressively. However, this duty is subject to a number of considerations. Water Services authorities are required to take a number of factors into account in ensuring access to water services, including alternative methods of providing access to water, efficiency, and equality. By regulating the provision of water services by local authorities in this manner, this legislation seeks to provide an appropriate framework for the progressive realisation of the right.

Through its responses to the protocols and accompanying documentation, the Department also demonstrated an understanding of the role and functions of the different spheres of government and water services institutions (e.g. Water Boards) in the progressive realisation of the right. It specifically identified immediate, medium-term and long-term goals for ensuring an effective and co-operative institutional framework.

### **Provincial Governments**

Six provincial governments provided information on the right to water. The Eastern Cape, Northern and Northwest Province governments did not respond to the protocol.

The provincial governments either neglected to respond or did not, in general, provide sufficient information on their understanding of their specific duties in relation to the right to water. The material provided in this regard is fragmentary and did not offer a coherent description of what each provincial government viewed as its specific role and functions in realising the right.

Confusion over which Department had primary responsibility for access to water at provincial level further complicated the analysis. In the case of certain provinces, such as Mpumalanga, the Department of Agriculture contributed the most detailed summary on the right to water. In other cases, the Department of Local Government and Housing, the Department of Environmental Affairs or the Departments of Developmental, Social Welfare and Health took responsibility for water.

Some provincial governments provided a good analysis of the general nature of the obligations imposed by socio-economic rights and the right to water, in particular. Most of the various provincial government departments understood that the right to “sufficient water” meant that people must have access to enough water to support life, health and hygiene (e.g., the response of the Department of Social Welfare, Free State). The analysis by the Director-General in the Office of the Premier of Mpumalanga was particularly thorough and insightful.

The Office on the Status of Women in the Free State also provided a very useful understanding of its duties concerning to the right to water as it relates to gender. This analysis included the Office’s duty to have monitoring and evaluation systems in place in order to assess how women benefited from water services. As noted by the office, these services should alleviate the burden of women “at an affordable price, especially those women in rural and peri-urban areas.”

The Department of Local Government and Housing in the Free State provided a detailed interpretation of the right to water. This interpretation conformed to the national Department’s interpretation. The Gauteng Directorate of Legal Services claimed that no official guidance existed as to the definition of “sufficient water” and that standards of fulfilment had not been set. The KwaZulu-Natal provincial government understood the right of access to water as a component of a right to “a basic sustainable living.” It identified its role as co-ordinating and facilitating, to ensure local authorities provide the necessary services and to build the capacity of local government.

The Northern Cape government provided few details of its understanding of its obligations and role in realising the right of access to water. Finally, the Western Cape government did not offer direct information on the right to water.

## **Local Government**

The Greater Johannesburg Metropolitan Council submitted the only response from local government to the protocol.

The Council identified water services as falling within its functional area of competence. It interpreted the right of access to water as “ensuring the provision of a water supply to paying consumers.” The concern that this raises about access to water by those who cannot afford to pay was addressed by the Council’s reference to its “policy of access to [water] services for the indigent.” It also outlined the specific roles and duties of local government in regard to ensuring access to water. These included “the provision of basic infrastructural services, the maintenance of services and the development of equality and parity in service provision.” The Council raised an important point that the assignment of the administration of a matter to a local



authority must be accompanied by measures to ensure that it has the necessary capacity and sufficient resources to carry out the function.

The Council reported that it was in the process of determining the quantity and quality of basic water services that would satisfy its constitutional obligations. Surprisingly, the Council made no reference to national standards and guidelines in this regard. The response provided a good definition of the general obligation of “progressive realisation.” The Council also commented on some of the steps it has taken towards the fulfilment of its obligations. These mainly involved internal restructuring and budgetary attention.

The Council generally had a fair understanding of the nature of its constitutional obligations in relation to the right to water and of the specific roles and responsibilities of local government in advancing access to the right.

#### 4.4 *The Baseline provided for Realisation of the Right to Access to Water*

##### **National Department of Water Affairs and Forestry**

National departments should determine to what extent South Africans currently enjoy the right to water. Such an assessment would provide the necessary information for any future evaluations of the progress made in realising the right. This assessment must, at a minimum, provide

- information on the numbers of people who currently lack access to water;
- an indication of those groups in a particularly vulnerable or disadvantaged position in accessing the right because of factors such as race, gender, age, geographical location, disability, and so forth; and
- a qualitative assessment of the current level of enjoyment of the right by South Africans.

The Department reported that more than 12 million people lacked access to safe, potable water and more than 20 million did not have adequate sanitation. African women and children in rural and peri-urban areas were particularly disadvantaged by lack of access to water. Women spent hours every day collecting water, which impeded their ability to take part in other activities and impacted negatively on their health. Thousands of children have died annually of avoidable diseases because of poor sanitation and the lack of clean water. In his *Introduction to the Fundamental Principles and Objectives for a New Water Law in South Africa*, 1997, Prof. Kader Asmal, the Minister of Water Affairs and Forestry, referred to the fact that among the historically privileged population, infant mortality rates have been about 20 per 1000 births as compared to 370 infants per 1000 live births in some water-deprived rural areas. The Department also produced a draft document entitled the *Guide to Communities and their Water Services Levels* and ‘vulnerability maps’ which indicated those sections of the rural and poor urban population that did not have access to basic water services and that were more vulnerable to droughts and water quality fluctuations.

## **Provincial and local government**

As far as provincial and local governments are concerned, it is impossible from the information provided to discern a clear baseline against which to measure the progressive realisation of the right to water. This will hopefully also become clearer with the preparation of *Water Services Development Plans* by local authorities. The relevant Provinces must publicise these plans.

### **4.5 *Information Systems to Monitor the Progressive Realisation of the Right - Focus on Desegregated Data Regarding Vulnerable and Disadvantaged Groups***

## **National Department of Water Affairs and Forestry**

The national Department reported that it was in the process of developing an information system to collect and disaggregate available information according to race, gender and other characteristics.

In terms of the Water Services Act, the Minister, and any relevant Province, must monitor the performance of every water service institution (i.e. a local authority, a water services provider, a water board and a water services committee) in order to ensure

- compliance with applicable national standards;
- compliance with all prescribed norms and standards for tariffs; and
- compliance with every applicable development plan, policy statement or business plan adopted in terms of the Act.<sup>91</sup>

The Act also provided for the intervention of the relevant Province or by the Minister if a water services authority did not effectively perform any imposed function. The Act also required the Minister “to ensure that there is a national information system on water services.” This national information system should

- record and provide data for the development, implementation and monitoring of national policy on water services;
- provide information to water services institutions, consumers and the public in order to enable them to monitor the performance of water services institutions; and
- facilitate research.<sup>92</sup>

The Minister may require any Province, water service institution or consumer to furnish information for the national information system.

The proper management, development and use of water resources is crucial to ensure the availability of water to meet basic human needs on a sustainable basis. The

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<sup>91</sup> See, Water Services Act of 1997 (Act no 108 of 1997).

<sup>92</sup> See, Ibid.

National Water Act places a duty on the Director-General, as soon as it is practicable to do so, to establish national monitoring networks. These networks will facilitate the continued and co-ordinated monitoring of various aspects of water resources by collecting relevant information and data from a variety of sources including organs of state, water management institutions and water users. The Director-General also must establish national information systems to cover different aspects of water resources, such as a national register of water-use authorisations and an information system on the quantity and quality of all water resources. The objects of the national information systems include the storage and provision of data and information for the protection, sustainable use and management of water resources. In addition to its use by the Department and by water management institutions, information in the national systems should be accessible for use by water users and the general public. These systems will be a valuable resource for the Commission in monitoring the realisation of the right to water in South Africa.

### **Provincial Governments**

No details of information systems at provincial level were provided.

### **Local Governments**

The Greater Johannesburg Metropolitan Council reported that it has undertaken an information-management systems review and restructuring.

#### **4.6 *The Existence of a Coherent Plan or Policy to Address the Realisation of the Right of Access to Water***

### **National Department of Water Affairs and Forestry**

The 1994 White Paper on the Water and Sanitation Policy and the 1997 White Paper on a National Water Policy for South Africa contain the details of the Department's strategies to ensure that everyone has access to water. These White Papers are exemplary because their policy objectives embody the rights and values in the Constitution. The strategies set out in these documents are clearly designed to give substance and effect to the rights in the Bill of Rights. The policies also honour the principle of the interdependency and inter-relatedness of all human rights and integrate the principles in various goals and strategies.

Reference has already been made to the *Water Services Development Plan* in terms of the Water Services Act, and the *National Water Resource Strategy* and the *Catchment Management Strategy* in terms of the National Water Act. Once these water services development plans and strategies have been fully established they will constitute important plans of action for realising the right to water. The national Department did not set any explicit timeframes for the realisation of short-, medium- and long-term goals for achieving full access to water. The Water Services Development Plans should provide a timeframe for the implementation programme for the next five years including the provision of a basic water supply and sanitation to those who cannot be provided with water services within the next five years. The national Department also needs to synthesise the goals, strategies and timeframes contained in the various

policy documents, development plans and strategies into a coherent national plan of action for realising the right to water.

### **Provincial Governments**

The Provincial Governments did not furnish sufficient information to assess whether plans or policies existed for the realisation of the right.

### **Local Governments**

The Greater Johannesburg Metropolitan Council reported that it was still developing specific targets, timeframes and benchmarks. Planning of this nature should occur within the framework of the Water Services Development Plan.

## **5 Social Security**

- (1) *Everyone has the right to have access to –...*
  - (c) *social security, including if they are unable to support themselves and their dependants, appropriate social assistance.*
- (2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. ...*

~ Constitution, Section 27

### **Departmental Overviews**

The former government's social security structures discriminated against black people in the provision and extent of social security pensions. The Tri-cameral Parliament system exacerbated the denial of the right to social security and "resulted in inconsistencies, a lack of uniformity, lack of resources, different payments for the various pensions and grants for the different races with the lowest awarded to the black group." The Transkei, Boputhatswana, Venda and Ciskei areas also had their own social security regulations.

The national Department of Welfare has sought to alleviate the burdens of this system through the enactment of the Welfare Laws Amendment Act of 1997 (Act No 106 of 1997) and the phasing out of the discriminatory State Maintenance Grant system. While the legislation now promises equal grants to all who qualify, the Department admitted that "limited resources are still prevalent in black areas." The Child Support Grant, introduced in 1997, aimed at reaching three million of South Africa's poorest children (48 percent of children under the age of seven.)

According to the Department's interpretation of the Constitution, "social security covers a wide range of public and private measures that provide cash or in kind benefits." In particular, social security benefits apply "in cases where someone's ability to keep themselves out of poverty is interrupted or ceases permanently" or

where such measures are required to maintain children. The Department further noted that “[t]he domain of social security is poverty prevention, poverty alleviation, and social compensation and income distribution.”

The Department defined the most vulnerable groups as the poorest of the poor, unemployed women with children under the age of five years, children with HIV/AIDS, children living under difficult circumstances, children at risk, children with special needs and victims of crime. The Department was in the process of conducting extensive reviews of its disability grant programmes that historically have discriminated against individuals in black areas.

Since 1996, the provinces have conducted the payment of grants awarded through the Social Assistance Act of 1992 (Act No 59 of 1992). The Department conceded that this has resulted in the denial of the right to social security in some cases.

### *5.1 Understanding of its Constitutional Obligations*

#### **National Department of Welfare**

##### ***The right of access to social security***

The broad scope of social security endorsed in the White Paper for Social Welfare, incorporating both contributory benefits (social insurance) and needs-based assistance from public funds (social assistance), is in line with international trends and standards. The policy commitment to build a comprehensive, integrated social security system is vital to the realisation of the constitutional right to social security. The White Paper explicitly endorses the provision of comprehensive social assistance to those without other means of support. When these broad goals (an economically self-reliant public and an active labour market policy aiming at full employment) cannot be met, social assistance should provide a reliable and accessible safety net.

In its report, the Department of Welfare understood that it should “work inter-sectorally to alleviate poverty.” The Department, however, did not adhere to the principle of providing “universal access” to “minimum income.”

Yet, the White Paper upholds the principles of a rights-based approach to social security such as equity, non-discrimination, participatory democracy, improved quality of life, transparency and accountability, accessibility and appropriateness.

Further, in responding to the protocols, the Department did not evaluate the adequacy of the existing legislative criteria governing access to social security against the constitutional obligations. For example, the Department defined someone who is “unable to support themselves and their dependants”<sup>93</sup> as someone who would satisfy the criteria in the Social Assistance Act of 1992 (Act No 59 of 1992). While the definitions in the Act are not unconstitutional, resorting to these definitions shows a lack of consideration of the importance of analysing the constitutional obligations specifically.

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<sup>93</sup> SA CONST. ch 2 at s 27(1)(c)

An evaluation of the current legislation's human rights compatibility would provide the basis for progressively improving the legislative criteria governing access to social security. As the White Paper indicates, the ultimate aim is to ensure that –

- every member of society in need of care will have access to support; and
- social welfare policies and legislation will facilitate *universal access* to social and welfare services and social security benefits in an enabling environment.

The Commission further recommends that, in the future, the national Department provide greater clarity on how it views the respective roles and responsibilities of the different spheres of government and other relevant organs of state in ensuring access to comprehensive social security. For example, the Departments of Labour and Finance have critical responsibilities in respect of social insurance such as unemployment insurance, compensation for occupational injuries and diseases and occupational retirement insurance. With regard to the division of national and provincial powers, the Department did not indicate whether the assignment of the Social Assistance Act of 1992 and the financing arrangements for payment of social grants to the provincial level has impacted negatively on the accessibility of social security.

#### ***The right of children to social services***

The Department's understanding of this right corresponded with relevant constitutional and international standards, particularly the focus on the welfare needs of children in difficult circumstances and disadvantaged and vulnerable children.

However, it would be useful for the national Department to provide a clearer overview of the roles and responsibilities of the different spheres of government, other relevant organs of state and voluntary welfare organisations in ensuring children's access to social services. For example, the Department did not state clearly which bodies maintain responsibility for setting norms and standards, for delivery and for monitoring in respect of the various forms of social services rendered to children. Similarly, the mechanisms the national Department used to ensure equitable access to appropriate social services for children remained unclear. This is an important issue in the context of the large role played by voluntary welfare organisations in the delivery of social services.

#### **Provincial Governments**

None of the provincial governments gave a detailed account of how they understood their obligations in relation to the right of children to social services. However, the social welfare departments of most of the provincial governments that provided responses had a fair understanding of the constitutional provisions relating to social security.

#### **Local Government**

The only response received from local government to the protocol was from the Greater Johannesburg Metropolitan Council.

The GJMC agreed with the interpretation of the duty to respect, protect, promote and fulfil socio-economic rights provided by the South Africa Human Rights Commission. However, the Council did not provide a coherent account of its specific obligations in relation to the rights under review. For example, although childcare facilities are a local government competency, the GJMC did not establish measures taken to bring about the realisation of the right.

## 5.2 *The Baseline provided for the Realisation of the Rights*

### **National Department of Welfare**

The national Welfare Department's report did not provide a detailed analysis of how many vulnerable people in South Africa currently lack access to social security. These include people whom:

- qualify for one of the social security programmes but have not exercised their entitlement (this can occur for reasons such as inadequate administrative infrastructure, lack of knowledge of their entitlement or fear of being stigmatised); and
- are poor and in need of social security but are excluded in terms of the rules of existing social security programmes (such as poor children older than seven years, the long-term unemployed or domestic workers).

The White Paper states that “every South African should have a minimum income, sufficient to meet basic subsistence needs.” However, benefits are not set with a clear understanding of how they will enable people to meet these needs. In its report to the Commission, the Department failed to provide clearly defined standards for determining the adequacy of social assistance benefits.

In this regard, the Financial and Fiscal Commission has observed that “the fiscal decision has enjoyed primacy over welfare policy concerning the level of the grant.”<sup>94</sup> Although it may not be possible to meet these standards in the short-term, they would provide an essential yardstick for assessing the efforts of the Department to improve the quality of social security.

In order for the Commission provide a clear baseline for measuring the progressive realisation of the right to social security, it will require information on the extent of poverty, a plan for bringing all people out of poverty, and a quantification of the specific financial requirements to provide social security.

More specifically, information on the meaning of the rights of the child to social security is also vital. A detailed situational analysis is needed to determine the number of children who lack access to social services, with a particular focus on children in particularly difficult circumstances. Such an analysis should identify:

- the necessary services currently unavailable to children in need,
- inequities in the availability of social services for children,

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<sup>94</sup> *Financial and Fiscal Commission*. Public Expenditure on Basic Social Services in South Africa. January 1998.

- groups of children whose needs should be prioritised in the allocation of resources and services such as poor children,<sup>95</sup>
- appropriate norms and standards for the rendering of these services, and
- appropriate monitoring mechanisms and institutions.

### **Provincial and Local Governments**

The Mpumalanga Department of Health and Welfare submitted an excellent analysis of the shortcoming of past welfare policy and how it continues to affect the delivery of the right to social security. Other provincial and local government reports, however, did not provide an adequate baseline in relation to the present realisation of the rights under review.

### **5.3 Information Systems to Monitor the Progressive Realisation of the Right**

#### **National Department of Welfare**

The national Department reported that it did not have a system in place to monitor the social security rights of children. It did not indicate expressly whether any system is in place to collect and analyse statistical and other information relating to the implementation of social security. From the information provided by the Department of Finance, the Commission infers that the different systems for administering grants have been amalgamated into one transverse data system. In its report on basic social services in South Africa, the Financial and Fiscal Commission confirmed that “a single national payments data base” has been established.<sup>96</sup> This is obviously a critical step in monitoring access to the existing social assistance programmes.

With regard to the right of children to social services, the Department reported that the National Programme of Action for South African Children (NPA) Steering Committee has a monitoring task group that monitors the implementation of the Convention on the Rights of the Child (CRC), ratified by South Africa in 1995. The Provincial Information System for Social Welfare (PIMWEL) collected the information required for that purpose.

Statistical review documents that disaggregate the data according to race, gender and rural and urban location were available. In addition, the NPA Steering Committee submitted progress reports to Cabinet. Finally, the Department also listed a number of review and monitoring mechanisms of laws and other measures. These systems provided an invaluable information resource for monitoring the right of children to social services. The Department should, however, review the terminology of some of the categories of services on which data is collected, such as “uncontrollable child,” “work-shy” and “hobo.” These categories are outdated and stigmatise children.

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<sup>95</sup> See, the goals for priority area of social welfare development provided in the National Plan of Action.

<sup>96</sup> *Financial and Fiscal Commission*. Public Expenditure on Basic Social Services in South Africa. January 1998.



## **Provincial and Local Governments**

From the information submitted by provincial and local governments, the Commission cannot identify whether adequate information systems have been put in place to measure the realisation of the relevant rights over time.

### **5.4 Existence of a Coherent Plan or Policy to Address the Realisation of the Rights**

#### **National Department of Welfare**

The Department of Welfare indicated that it was engaged in an on-going revision and amendment of laws that make access to social security rights difficult. In particular, it has appointed a task team to review all aspects pertaining to disability grants.

The White Paper for Social Welfare outlines the overall policy framework for the realisation of the right to social security and the right of children to social services. The White Paper states that “a national plan of action for the next five years will be developed by the national and provincial Departments of Welfare, in consultation with all stakeholders, including government departments, to facilitate the shift towards a comprehensive, integrated, equitable, multidisciplinary and developmental approach in the welfare field.” The White Paper will be used as a basis for the development of this plan of action. This should contain detailed time-related goals, strategies and benchmarks for realising the right to social security.

The Department provided more information on its future plans and goals in relation to the right of children to social services. A critical future goal is increasing the proportion of the welfare services budget directed to children. The National Plan of Action for Children in South Africa, which lists a number of specific goals in the policy priority area of social welfare development, provides the central inter-sectoral programme of action for realising the right of children to social services. The Department also referred to the *Social Welfare Action Plan* in its responses related to the *Initiatives for children and youth with disabilities*.

#### **Provincial and Local Governments**

Provincial governments and one local government submitted information that listed very general goals and plans in relation to the relevant rights. However, the Free State Department of Social Welfare proved a notable exception by listing a number of very specific goals in conjunction with targets, timelines, indicators and monitoring structures. The Northern Cape Province also enumerated a number of concrete goals relating to the rights under review.

## 6 Education

- (1) *Everyone has the right -  
(a) to a basic education, including adult basic education; and  
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.*
- (2) *Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –  
(a) equity  
(b) practicability; and  
(c) the need to redress the results of past racially discriminatory laws and practices.*
- (3) *Everyone has the right to establish and maintain, at their own expense, independent 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 standards at comparable public educational institutions.*
- (4) *Subsection (3) does not preclude state subsidies for independent educational institutions.*

~ Constitution, Section 29

### Departmental Overview

Under apartheid, the South African education system was characterised by a complex duality: “a highly motivated and well-staffed, well-resourced elite system” was established for white people while black learners attended over-crowded, under-funded schools with poor infrastructure and human resources. The institution of the tri-cameral parliamentary system in 1983 furthered the racially-discriminatory gaps in education. Specifically, the racial disparities increased because the different education departments operated completely independently of one another.

The national Department of Education has repealed all discriminatory laws and drafted new education laws in view of the Constitution. This legislation includes the South African Schools Act of 1996 (Act No 84 of 1996) which calls for compulsory education for all learners from the age of seven to 15 (grade 1-9) and the National Education Policy Act of 1996 (Act No 27 of 1996). In 1997, the Department served 1,2 million learners in grades 1-12.

Despite the passage of non-discriminatory legislation, however, the Department of Education conceded that “cases of discrimination do occur where legislation is not properly interpreted.” For example, instances have occurred where children were denied access to schools or to their school reports because their parents could not pay the school fees. Furthermore, the lack of electricity, lack of teachers—especially in maths, science and technical subjects—, a shortage of textbooks and funds and a lack of co-ordination between various national departments continue to hamper the enjoyment of the right to education.

In defining its constitutional duty to respect, protect, promote and fulfil the right to education, the department stated clearly that a “lack of resources should not be a barrier to education.” While the national department does not control provincial allocations for education, the department considers all provincial MECs bound to the constitutional obligations of providing at least primary education within reach all learners. The national Department has committed itself to fulfilling its constitutional obligation through “reconstructing, developing and maintaining the education system and by implementing strategic plans geared to delivering education to everyone.” The “progressive realisation” of the right to education, however, is directly related to the availability of “trained educators and the necessary finance and infrastructure (such as schools).”

The Minister of Education appointed the National Commission on Special Needs in Education and Training (NCSNET) and the National Committee for Education Support Services (NCESS) to recommend ways to assist learners and students who are disabled and may experience barriers to learning. The NCSNET and NCESS released their joint report entitled *Quality Education for All: Overcoming barriers to learning and development*. The Department also convened a “Gender Equity Task Team” which released a report on gender equity in education.

The Department has collected information on the realisation of the right to learning through the Education Management and Information System, which captures data from the annual schools survey for use by provincial education officials. The Department has referred to an old system of collecting information on higher education. Finally, the Department uses the results of a survey which mapped 32 000 education institutions nation-wide, including “schools, early childhood centres, adult education centres, and colleges for teacher education.”

## *6.1 Understanding by Relevant Organs of State of their Obligations*

### **National Department of Education**

The Department of Education’s understanding of its constitutional obligations with regard to the right to education complied with both international norms and standards and the provisions of the Constitution.

The Department stated that its duty to respect meant that it should enforce the rights in section 29 of the Constitution and it should “show practical proof of its desire to

comply with the requirements mandated in that section.”<sup>97</sup> Further, it noted that the “state must provide such educational services as are necessary to ensure at least reasonable access to education by anyone anywhere in the country.” The Department also confirmed that issues pertaining to the availability of funding should not compromise this right and pose an obstacle to educational initiatives.

The Department recognised its duty to promote the right of all people to education. In order to promote this right, the Department also acknowledged its obligation to prevent unfair discrimination against all individuals.

In particular, the Department referred to its duties to formulate policy and to develop measures to mitigate and eventually eradicate the legacy of discriminatory apartheid-era policies. The report further noted that in order for the Department to fulfil its obligations under section 29 of the Constitution, it is committed to “reconstructing, developing and maintaining the education system...by implementing strategic plans geared to delivering education to everyone.”<sup>98</sup>

In addition to these terms, the Department provided a clear interpretation of the words basic education and adult basic education.<sup>99</sup> Accordingly, the Department noted that it was in the process of drawing up a policy on further education and training during the submission of their responses. Following the submission of the protocol, the Further Education and Training Act of 1998 (Act 98 of 1998) was enacted.

The Department’s interpretation of progressively available and accessible education recognised the difficulties inherent in transforming education. The Department called on the state to make education progressively available and accessible as the necessary human resources, finance and infrastructure become available.

### **National Department of Correctional Services**

The Department of Correctional Services did not discuss what it understood as its constitutional obligations to respect the right to provide education. In particular, it did not discuss its perspectives on providing the necessary reading material in order to respect the right to education.

### **Provincial and Local Governments**

The Free State, Gauteng, KwaZulu-Natal, Mpumalanga and Northern Cape provincial governments submitted information on this right.

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<sup>97</sup> *Response to protocol by the Department of Education. Volume III.*

<sup>98</sup> *Ibid.*

<sup>99</sup> The Department interpreted the words basic education as “appropriately designed education programmes to the level of the proposed General Education Certificate, whether offered in school to children, or through other forms of delivery to young people and adults, adequately defines basic education. In schools this will cover grades 1 to 9.” In addition, adult basic education and training consists of the “general conceptual foundation towards lifelong learning and development, comprising knowledge, skills and attitudes required for social, economic and political participation and transformation applicable to a range of contexts.” *Ibid.*

The Free State Department of Education's understanding of its duties to "respect, protect, promote and fulfil" complied with the Constitution and international law. The Department removed all pre-conditions to education and made learning compulsory to all learners under the age of 15 years. In particular, the criminalisation of non-compliance with compulsory education will further protect the right to education.

The Department also stated that it will ensure the participation of learners and parents as equal partners and will implement a funding system to redress past imbalances in the future. The Department's definition of progressive availability and accessibility, read with its definition on progressive realisation is also in line with both the Constitution and international laws. In particular, the fact that the Department emphasised that financial constraints should not impede the right to education is commendable.

Provincial departments do not set policy, but are tasked with implementing an agreed policy framework. Still, the reports provided by other provincial governments generally did not indicate their understanding of their duties with regard to the right to education. In some cases, Departments that ostensibly have nothing to do with the right to education provide interpretations of the constitutional mandate that everyone has the right to education in the official language of their choice.<sup>100</sup>

The Free State and Mpumalanga Departments of Education provided useful information on these educational issues.

## 6.2 *The Realisation of the Right*

### **National Department of Education**

In order to combat the legacy of discriminatory education laws, Parliament enacted the South African Schools Act of 1996 (Act No 84 of 1996). This Act provides a legal framework for the provision of education. In particular, it establishes compulsory basic education for all learners from age seven to age 15.

Although the report gave a brief overview of the impact of discriminatory laws and other measures, it did not articulate how these affected the Department's ability to realise the right to education. Specifically, the report did not provide a comprehensive analysis, or even description, of how the consolidation or non-consolidation of departments from previous homelands have had an impact on the right to education.

Similarly, the Department noted that it established various special committees to monitor the implementation of laws and other measures (e.g., committee for the implementation of the South African Schools Act of 1996). However, in practice, these committees have not had the desired impact judging from the number of complaints received by the Commission on various actions (e.g., discriminatory dismissals) that contravene the South African Schools Act. Further, the Commission

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<sup>100</sup> SA CONST. ch 2 at s 29(2). *See, e.g.*, the official definition of the Northern Cape Department of Local Housing and Local Government).

has found, in many cases, that although discriminatory laws have been repealed, schools are merely disaggregated and *not* integrated.<sup>101</sup>

The Department of Education has considered other aspects of discrimination in addition to race and gender. In particular, it released a Draft National Policy on HIV/AIDS for Learners and Educators in Public Schools for comment in the Government Gazette.<sup>102</sup> As written, this proposed policy precludes discrimination against learners, students or educators. It further states:

Any special measures, in respect of a learner, student or educator with HIV should be fair and justifiable in the light of medical facts, school or institution conditions and in the best interest of the learner, student and educator with HIV/AIDS and those of other learners, students or educators.<sup>103</sup>

In addition, this proposed policy bars schools and institutions from denying admission to a learner or student based on his or her HIV/AIDS status. Similarly, an educator cannot be denied a position to teach or a promotion based on his or her HIV/AIDS status.<sup>104</sup>

In regard to its language policy, the Department asserted that a school must provide instruction in an official language if 40 learners in a single lower grade or 35 learners in a single higher grade request it. This approach may prove problematic if a particular grade has only a few learners in total. For this reason, the Commission suggests that the Department consider the percentage of students who want to take a particular language rather than impose a rigid number. Reasonable educational alternatives, such as double-medium instruction and parallel-medium classes, also complied with the constitutional obligations.

The Department sets out the specific measures that it has taken in order to respect the right to education. In particular, the Department emphasised the removal of discriminatory laws and enactment of new legislation. The Constitution, the National Education Policy Act of 1996 (Act 27 of 1996), the South African Schools Act of 1996 and the Higher Education Act of 1997 (Act 101 of 1997) also protect people from private practices which impact negatively on the right to education and from discrimination in private educational institutions. The Department fulfilled the duty to promote the right to education through the publication of *The South African Schools Act Made Easy* as a supplement to major newspapers. Finally, the appointment of the National Commission on Special Needs in Education and Training (NCSNET) and the establishment of the National Committee for Education and the Gender Equity task team further promoted the right to education.

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<sup>101</sup> For a detailed analysis of these issues, refer to the South African Human Rights Commission study on “Racism, ‘racial integration’ and desegregation” in South African public secondary schools to be published in 1999.

<sup>102</sup> Department of Education. *Call for Comment on the Draft National Policy on HIV/AIDS, for Learners and Educators in Further Education and Training Institutions*. General Notice. Government Gazette. Vol 402. No. 19603 11 December 1998.

<sup>103</sup> *Ibid.*, Call for Comment at s 3.3

<sup>104</sup> *Ibid.*, Call for Comment at ss 4.1-4.2

### 6.3 *The Baseline Provided for the Realisation of the Right*

#### **National Department of Education**

Any future assessment of the progressive realisation of the right to education requires comprehensive information on the current situation. The Department submitted figures for the number of persons currently enrolled in educational institutions disaggregated by race, gender and geographic location. In addition to this, the School Register of Needs survey provided concrete statistics about the facilities available at schools throughout the country. While these statistics did offer useful guides to measure the progressive realisation of the right, the report did not provide comprehensive information on those groups that did not have access to education. Other statistics were missing, such as the number of children unable to exercise their right to education because of exploitative labour practices and the number of adults who have not received formal training.

#### **National Department of Correctional Services**

The Department of Correctional Services failed to include information that would provide a clear baseline for the realisation of the right of prisoners to education. The report did not provide information about facilities for studying, or how many inmates participate in study courses, make use of libraries or have access to reading material. Once again, it is important to keep in mind that this right is not subject to a progressive realisation.

#### **Provincial and Local Governments**

Information that would provide a clear baseline for the realisation of the right to education is needed from the provinces. Even the two provincial education departments that reported in more detail on the right to education did not supply any information that would provide a clear baseline. Figures relating to the numbers of persons who currently do and do not enjoy the right to education are especially needed.

### 6.4 *Information Systems to Monitor the Progressive Realisation of the Right*

#### **National Department of Education**

The Department of Education submitted a comprehensive account of information systems available to monitor the progressive realisation of the right to education. The Education Management Information System (EMIS) divided the data according to race, gender and geographic location of schools. The School Register of Needs (SRN) survey collected information on the physical facilities at schools. The survey collects information on water supply, power supply, telephones and sanitary facilities, learner-classroom as well as educator-classroom ratios, the percentages of secondary schools with laboratories, the percentage of primary and secondary schools with media centres and the percentage of schools without sports facilities. The SRN only discussed figures that related to learners and educators; this information is not distinguished

along the lines of race, gender or other characteristics. Nevertheless, it does provide an overview of the available facilities and will greatly assist in addressing the optimal use of limited resources. The South African Post Secondary Education System (SAPSE), which is used to collect information and statistics relating to universities and technikons, separates information according to race and gender.

### **National Department of Correctional Services**

The Department of Correctional Services report described the Electronic Directive System (EDS) and the Management Information System (MIS). The MIS separates information into categories such as race, gender and geographic location. However, it is apparent that neither of these systems deals specifically with the monitoring of an inmate's right to reading material. The Department did not indicate how many prisoners, including juveniles, receive education and what rehabilitation programmes focus on these issues.

### **Provincial and Local Governments**

Systems such as the EMIS are developed in collaboration with the provincial education departments. In addition, the SRN submitted detailed information relating to particular provinces. In the future, provincial departments should provide an account of these systems, as well as any other systems they have developed to monitor the realisation of the right to education—particularly of vulnerable and disadvantaged groups.

## **6.5 *The Existence of a Coherent Plan or Policy to Address the Realisation of the Right***

### **National Department of Education**

The Department of Education did not refer directly to a coherent plan. Nevertheless, the existence of a plan can be deduced from the White Paper, various education laws, and other supporting documentation. The School Register of Needs (SRN) survey, the Culture of Learning, Teaching and Service (COLTS) campaign, the report of the Gender Equity Task Team and the report of the NCSNET indicate a general understanding of a national education plan. The Department also outlined its future goals, though it did so without indicating benchmarks or timeframes.

### **National Department of Correctional Services**

The Department of Correctional Services did not refer to a coherent plan to realise the right of detained persons to reading material. It merely alluded to a general policy in this regard. The Department should develop a coherent plan, or include the existing plan in future reports.

### **Provincial and Local Governments**

The Free State and Mpumalanga Departments of Education both appeared to have devised a strategy to realise the right to education. The Free State Department of



Education, however, does not provide benchmarks or timeframes with its future goals. The Mpumalanga Department of Education provided a clearer picture, with specific goals and targets as well as timeframes, for the implementation of these goals. However, the Department did not understand the requirements for contributing adequate benchmarks or other indicators. None of the other provinces provided information about a coherent plan to realise the right.

## 7 Environment

*Everyone has the right –*

- (a) to an environment that is not harmful to their health or well-being*
- (b) to have the environment protected, for the benefit of the present and future generations, through reasonable legislative and other measures that –*
  - (i) prevent pollution and ecological degradation;*
  - (ii) promote conservation; and*
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*

*~ Constitution, Section 24*

### Departmental Overview

The national Department of Environmental Affairs and Tourism (DEAT) asserted that environmental laws historically were not explicitly discriminatory because they did not administer people directly. However, the analysis of equitable delivery of environmental rights must consider the disparate *impact* of the laws on people and not solely whether the laws explicitly discuss or administer people. In addition, the report mentioned the negative environmental impacts of mining, forestry and dams.

Apartheid legislation and town and city planning concepts resulted in gross violation of environmental rights. This was especially true in black townships, which were often intentionally developed in hazardous industrial zones without consideration for environmental rights. The former government failed to consider the concepts of sustainability and the negative environmental and health repercussions on disadvantaged and disenfranchised communities when it granted mining rights, forestry permits and the construction of dams.

Yet, despite new environmental policies and laws like the Environmental Laws Rationalisation Act of 1997 (Act No 51 of 1997), which unified national environmental law, the decisions of the previous government continued to impact negatively on the environment of already marginalised communities. According to the national Department of Environmental Affairs and Tourism's report, "environmentally and socially unacceptable standards currently characterise many aspects of waste management, particularly in rural areas, where services are often

non-existent.” People living in rural areas and those living close to industries and waste disposal sites (most often black people living in townships) were especially vulnerable.

The Department understood that the constitutional obligation to protect people from a harmful environment “not only refer[s] to a person’s physical health and well-being, but also his or her mental health and cultural/aesthetic well-being, including his or her concerns for conservation.” The report explained that

where ‘sustainable’ is coupled with ‘development’, the concept means development which seeks to integrate environmental, social and economic concerns, now and in the future, without compromising the ability of future generations to meet their own needs. The focus is on ensuring that environmental sustainability, health and safety are not compromised and that natural and cultural resources are not endangered...justifiable economic development is development that aims to sustainably uplift the standard of living of the present generation without negatively impacting on the resources of future generations to meet their demand of survival. Justifiable social development is development that aims at the sustainable improvement of health, well-being and the provision of necessary infrastructure and basic services, also without detrimentally affecting the availability of resources that future generations will depend on for survival.

To monitor the progressive realisation of environmental rights, the Department collected both geological and demographic records concerning resource use and development levels. The Department was also setting up a system of indicators for sustainable development.

The information in the DEAT’s report focuses on pollution, especially waste-disposal and purification and conservation. However, for the section of the report detailing how past discriminatory laws and practices affect the rights of certain groups, the report does not focus on how the rationalisation, or lack of it, has impacted and continues to impact on those victimised by discriminatory legal schemes.

## *7.1 Understanding of Constitutional Obligations*

### **National Department of Environmental Affairs and Tourism**

The protocol identified the terms respect, protect, promote, and fulfil in regard to the DEAT’s understanding of its constitutional obligations. The response of the Department formally conformed to these. However, when completing the protocol, the Department should have taken into account the additional constitutional requirements “to prevent” and “to secure.”

#### ***The duty to respect***

The Department’s understanding of respect included developing mechanisms and exercising proper judgement in granting permits for developments. It recognised its duties to develop overall policy and legal frameworks and to regulate activities of public and private persons to prevent inappropriate destruction of the environment. The report conceded that where enforcement measures were inadequate, violations, such as

excessive pollution, would occur. This is commendable. However, the Department should indicate precisely where and why such measures are lacking and then indicate strategies and plans to overcome the gaps and weaknesses.

The report also revealed two distinct problems that continue to hinder the DEAT's efforts to fulfil its constitutional obligations. First, many different government departments and organs of state either administer legislation on the environment or which has an impact on the environment directly in their work without being accountable to the Department. Often, these departments do not have a sufficient knowledge-base on environmental issues and frustrate environmental protection measures. Second, the report noted that "there is no effective body regulating pollution in South Africa."

The DEAT's report is not particularly strong in its descriptions of its obligations to "respect" rights. The report acknowledged that some aspects of the Atmospheric Pollution Prevention Act of 1965 (Act No 45 of 1965) may require adjusting to conform to the Constitution. While the report acknowledged that lack of electrification threatens the environment, the report did not indicate what role the private sector and government should play in addressing this issue. The report described requirements for environmental assessment audits to regulate activities of the private sector and referred to regulation for import and export of potentially harmful substances.

#### ***The duty to protect***

The DEAT appropriately conceived of the term protect as requiring the establishment of adequate legal and regulatory frameworks and the enforcement of the laws. However, the DEAT should have specified that the enforcement of laws includes both civil and criminal judicial measures. Further, undertaking environmental impact assessments, as required under the Environmental Conservation Act of 1989 (Act 73 of 1989), is a proactive method of protection and should have been highlighted here.

The list of laws and how they regulated pollution is helpful, though not comprehensive. The report's reference to the Basel Convention was commendable. The failure to mention the Bamako Convention was regrettable, however, especially since the Department could provide leadership in the African region by signing the Convention.

On the issue of unfair discrimination by private persons, the report essentially reproduced the White Paper on Environmental Management Policy for South Africa. Restating the ideal that resources and land belong to all is not enough however, because of the reality that they are privatised and often used for profit without due regard to the environment.

#### ***The duty to promote and fulfil***

The Department's response accurately interpreted its responsibility of "promotion" and recognised the appropriate civil and criminal enforcement processes. Specifically, the Department promoted and fulfilled environmental rights in the Constitution through a variety of mechanisms: submission of legislation to Parliament, the incorporation of judicial remedies in proposed legislation and the inclusion of mechanisms that provide the public goods necessary for an "adequate" environment. In addition, the report argued that "legislation must include the right to apply for interdicts to a competent court to

prevent the breaking of environmental laws and to institute private prosecutions where the state does not act promptly.”<sup>105</sup>

The report detailed the percentage of the DEAT’s budget allocated to promote and fulfil the right and the amount spent by the end of the 1997-1998 financial year. Details of whether the rest of the DEAT’s budgetary allocations were spent and information to enable a comparison of line item expenditures on human rights efforts would have been helpful.

The DEAT report detailed information and public education programmes, including liaison committees (for air pollution control only), educational documents (for pollution control), workshops and involvement of NGOs, CBOs, organised labour and business. The Department has also invited the public to comment on various policy and legislative proposals. Other paper-based strategies are also used. Unfortunately, apart from the major policy papers and some extracts of legislation, the Department did not submit samples of these materials.

### ***Not harmful to health or well-being***

In its conception of the words “not harmful to their health or well-being,” the DEAT’s response is concise but does not refer to international standards, such as the World Health Organisation’s conception of health. The Department wrote: “The words do not only refer to a person’s physical health and well-being, but also his or her mental health and cultural/aesthetic well-being, including his or her concerns for conservation.”<sup>106</sup> Drawing on constitutional provisions relating to the right to health and dignity would also help to broaden the approach.

### ***Sustainable***

The DEAT’s conception of sustainable was commendable, clearly recognising the use and conservation of resources as well as intergenerational concepts. The Department noted:

Where “sustainable” is coupled with “development,” the concept means development which seeks to integrate environmental, social and economic concerns, now and in the future, without compromising the ability of future generations to meet their own needs. The focus is on ensuring that environmental sustainability, health and safety are not compromised and that natural and cultural resources are not endangered.<sup>107</sup>

### ***Justifiable economic and social development***

The Department aptly defined the concepts of justifiable economic and social development within the context of the Constitution. According to the report

justifiable economic development is development that aims to sustainably uplift the standard of living of the present generation without negatively impacting on the resources of future generations to meet their demands of survival. Justifiable social development is development that aims at the sustainable improvement of health, well-being and the provision of necessary infrastructure and basic services, also without detrimentally

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<sup>105</sup> See, Response to protocol by the Department of Environmental Affairs. Volume III.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

affecting the availability of resources that future generations will depend on for survival.<sup>108</sup>

### ***People discriminated against in the past***

The Department did not provide a thorough analysis of the impact of historical discrimination on the environment. Its conceptualisation of discrimination did not appear to appreciate the constitutional understanding of both direct and indirect forms and the distinction between fair and unfair discrimination. Specifically, it argued that the Atmospheric Pollution Prevention Act of 1965 did not discriminate directly against specific populations. However, the DEAT should recognise that while particular legislation may appear neutral, it may have a disparate impact against historically marginalised and discriminated against groups. Accordingly, “environmental racism” and unequal (class-based) exposure to harmful environmental conditions is well-known. Yet, the report failed to address this issue as far as information gathering and analysis was concerned.

## ***7.2 Establishing Minimum Core Obligations for Environmental Rights***

### **National Department of Environmental Affairs and Tourism**

The DEAT’s explanation of its “core minimum obligations” and how laws and other measures implement this obligation was clear but insufficient.

## ***7.3 Information systems and information gathering***

### **National Department of Environmental Affairs and Tourism**

The DEAT’s report offered a fairly detailed and systematic description of information systems and information gathering policies. The response organised the description around themes: air pollution control, general pollution control, environmental impact management, sustainable development, weather bureaus and fisheries.

In terms of information dissemination, which is critical to the independent rights of access to information and of administrative justice, the DEAT indicated that it focused on publications and computer-based information systems. However, these materials are not always accessible to a significant portion of the population. More innovative and user-friendly methods of communication could be used. There was no indication of any strategy to cover or gather information on daily events in press reports. As far as the scope of information is concerned, the DEAT did not identify a comprehensive list of legislation critical to its responsibilities.

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<sup>108</sup> *Ibid.*

#### *7.4 Identification of Vulnerable Groups*

##### **National Department of Environmental Affairs and Tourism**

Just as developing countries are used internationally as dumping sites for harmful wastes, so are poor communities in South Africa. Many people living in impoverished areas, mostly black, have been condemned to live and work in environments that are harmful and detrimental to individual and societal health and well-being. The DEAT's submission recognised this somewhat in its discussion of vulnerable groups.

The report did describe general plans submitted to cabinet, joint investigations with the Department of Minerals and Energy Affairs and strategies for waste management, which have attempted to address the plight of vulnerable groups. However, while it did delineate 14 categories of population groups and circumstances of vulnerability, the report failed to explain the types of problems and strategies for ameliorating their specific conditions.

#### *7.5 Measures taken to Protect Environmental Rights*

##### **National Department of Environmental Affairs and Tourism**

Recent judicial decisions have argued that the provincial legislation and regulations, as well as laws and policies of the former homelands, have played an important and enduring role in the process of rationalisation, national uniformity and the pursuit of rights. The report on the rationalisation of laws and policies is succinct, though not comprehensive, noting that the rationalisation of laws was finalised only recently.

##### ***Structures and mechanisms***

The DEAT employed a satisfactory approach to implement structures and processes to effect legislation in line with its constitutional obligations. However, the DEAT is not solely responsible for the "environment" at national government level. Linkages to provincial and local governmental structures need to be streamlined more effectively.

##### ***Future goals***

In terms of future objectives, the DEAT stated that it has started audits and reviews to determine appropriate legislative initiatives. It discussed the necessity of laws to give legislative effect to the Integrated Pollution and Waste Management Strategy White Paper and draft policy. The Department committed itself to addressing the acknowledged weakness in co-ordination across government departments. However, the report did not detail a plan for addressing this problem or its projected impact. The only clearly-stated action was the implementation of environmental impact assessment through courses and market-based instruments. Regulations with regard to "vulnerable groups," especially in the area of endangered species, wetlands, biodiversity and fisheries, however, were well presented. The report also described its strategy of relying on legal audits to repeal existing laws and measures that have impacted negatively on the enjoyment of environmental rights.

## **Provincial Governments**

The Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape and Western Cape submitted reports concerning environmental issues.

The information explained the interpretation of the terms respect, protect, promote and fulfil, and access to the right. The explanations were general and revealed a colloquial understanding of the terms and not an analysis based on the Constitution. The reports also mentioned the health care provisions in the Constitution and used the definition of “healthy environment” from the International Charter of Consumer Rights.

While provincial departments appeared to bear the primary responsibility for implementing environmental policy, the management of environmental affairs at the provincial level appeared incomplete. Provinces did not describe a clear structure under which environmental affairs fell. The provincial reports covered consumer rights, agriculture, education, status of women, sports, arts, culture, science and technology, health, welfare, local government and housing, but did not focus adequately on the Constitution. The reports mentioned the lack of co-operation with local authorities as a major impediment to environmental health service delivery.

KwaZulu-Natal and the Western Cape have long coasts, industrial centres and natural resources that create different environmental challenges. The provincial government reports focused on conservation and pollution control, as well as an accurate identification of national legislation used in responding to a whole range of environmental issues. However, their responses to the protocol were too general and did not focus on the key terms respect, protect, promote and fulfil as they relate to all the socio-economic rights.

The transport departments in the provinces referred to the policy to promote an accessible physical and social environment, but without linking these to the requirements of the Constitution. Similarly, the Department of Public Works discussed a plan to use building regulations to upgrade facilities for the Health Department, but failed to link this to specific constitutional obligations.

## **Local Governments**

Only the Greater Johannesburg Metropolitan Council submitted a report.

The GJMC succinctly drew the distinctions between positive and negative state obligations in interpreting the terms respect, protect, promote and fulfil and responsibilities. Like the provinces, however, the Council focused on certain constitutional provisions while ignoring those relevant to the environment. The response mentioned the establishment of a Human Rights Information Centre within the Department of Constitutional, Human Rights and Legal Services. The Department promoted human rights through workshops, literature, seminars and other delivery strategies. More specifically, it produced a book called *A Practical Guide to Human Rights in Local Government* and a *Pocket Guide of Councillors*. The response further mentioned the national Development Facilitation Act and the Urban Regeneration and Integration White Paper.

Overall, the GJMC's awareness of its constitutional and human rights responsibilities, and efforts to meet some of the obligations was commendable. Other local authorities should attempt to emulate this example for the next report.

## 8 Finance

### Departmental Overview

According to the national Department of Finance's report, past discriminatory laws and measures contrived to hinder the enjoyment of socio-economic rights primarily because they have

- resulted in the presence of “extremely unequal levels of service provision;”
- provided “inappropriate and unsustainable services” for the minority of the population; and
- led to the “low growth path” of the national economy after the 1960s.

These lingering aspects of apartheid continue to impede the government's ability to fulfil socio-economic rights. As a result, the Department of Finance had “to balance a large number of imperatives pulling in different directions.” These are the “need to remove the backlog in service provision” while maintaining the fiscal balance demanded by low growth and the international financial environment. To balance these imperatives, the Department focused on reprioritising service delivery, redesigning delivery systems and ensuring an efficient distribution of public money.

In terms of its constitutional obligations, the Department stated that it had a duty to ensure that a sustained and increasing pool of resources was available to the government for spending on social services. The Department argued that short-term expenditures to meet socio-economic needs that exceed the requirement of fiscal restraint would result in additional violations of these rights in the long term.

In the response to the protocol, the Department considered women and children as vulnerable groups. This definition had an impact on resource allocation. In particular, indicators of poverty were given more weight in the “formula for the division of the equitable share.”

The Department further noted that social services expenditures—defined as education, health, social security and welfare, housing and other social services—comprised 46,6 percent of the consolidated national and provincial expenditure in 1997-98 and 49,8 percent in 1998-99. This expenditure totals more than 60 percent of non-interest expenditure.

Finally, the Department kept its own macroeconomic data and relied on various public institutions to provide desegregated data.



## 8.1 *Department's Understanding of its Obligations in Respect of Economic and Social Rights*

### **National Department of Finance**

The Bill of Rights recognises the interrelated nature of the socio-economic rights. Therefore to assign responsibility to specific state organs for specific rights is difficult. Even when one Department has a particular duty, co-operation and co-ordination among the relevant Departments and different levels of government becomes necessary to assure a comprehensive approach to the fulfilment of human rights.

The Department of Finance did not have a specific obligation to fulfil these rights, but rather an overarching responsibility to take these rights into account and provide for them when determining national budgets.

The Department of Finance's response made regular reference to the following documents:

- Department of Finance Budget Review 1998
- Department of Finance Budget Review 1997
- Medium Term Budget Policy Statement 1997

As already stated, all national, provincial and local departments bear a responsibility in implementing the Bill of Rights. Therefore, the Department of Finance must facilitate the development and implementation of government's fiscal policy with these socio-economic rights in mind. With reference to the fulfilment of its obligations in terms of human rights, the Department's particular responsibility is determining the government's economic priorities and financing mechanisms. The Department of Finance is not responsible for delivering services to individuals. Rather it provides money to relevant national and provincial Departments to allocate resources to ensure delivery of the rights.

The Department of Finance provided official interpretations of concepts such as access to, adequate and sufficient. In general, however, the Department reported that it sought to ensure that the financing of public resources promotes universal access to a full and balanced spectrum of services. The Department's conceptualisation of the terms adequate and sufficient included references to the relative cost, efficiency and effectiveness of public services in meeting social and economic needs.

The Department viewed the phrases progressive realisation and progressively available as recognition of the reality of limited resources and capacity. This approach acknowledged that comprehensive fulfilment of socio-economic rights will take time. The Department implied that socio-economic rights did not describe fixed levels of service provisions, but standards that would evolve as South Africa developed. Finally, the report recognised that the state had an obligation to concentrate on the needs of the poor in the context of income inequality.

The Department's submission did not attempt to define in detail the terms access to, adequate and sufficient. The Department also appeared to lack a comprehensive understanding of these obligations. The budget review of 1998, however, did take

cognisance of the socio-economic rights, specifically referring to the obligations to respect, protect, promote and fulfil these rights.

In regards to the terms progressive realisation and progressively available, the Department recognised the limitation of available resources and time necessary to fulfil these rights. However, the Department called for urgent and effective action in order to move toward the realisation of these socio-economic rights.

The input from the Department did not provide information on expenditures in terms of the environment. However, it dealt comprehensively with the issue of social services. It is worthwhile to note that budgetary commitment to environmental affairs remains comparatively small in view of the fact that protection of the environment is a basic human right enumerated in the Bill of Rights.

## *8.2 The Baseline provided for the Realisation of Economic and Social Rights*

### **National Department of Finance**

Given its lack of any specific obligation to realise the rights of individuals, the Department did not consider itself bound to establish a baseline for the realisation of social and economic rights.

## *8.3 Information Systems to Monitor the Progressive Realisation of Economic and Social Rights*

### **National Department of Finance**

The Department of Finance assumed that provincial and other national Departments were responsible for collecting and desegregating data. The Department did require considerable information to ensure that budgets continue to meet the basic needs of society. To this end, the Department continually receives data from a number of public institutions.

The Department regularly compiled revenue and expenditure data on a national level to monitor public finance. However, the Department did not collect expenditure data on race, gender and income level. The Department, nonetheless, has used this information, gathered from outside sources, to determine annual budgets. To comply with the principle of equitable distribution and to ensure that revenue is divided according to socio-economic need, the Department has used a budget formula which takes into account the number of school children, woman, the aged, people with disabilities and people living in rural areas.

The Department devised additionally means through which various bodies can contribute to the budget such as the Medium-Term Budget. This allows stakeholders to provide inputs into future budgets in respect of their specific needs. It also allows the Department of Finance to glean the information necessary to determine whether future budgets will be capable of meeting the basic needs of society.

Instituting a new fiscal framework with new institutions, rules and policy priorities has been a demanding task for the Department. Lingering backlogs and structural problems placed significant pressures on the welfare and education budgets particularly. Identifying and addressing these problems is a priority, not only for the Department of Finance, but also for the Department of State Expenditure, the Budget Council and provincial treasuries.

#### *8.4 The Existence of a Coherent Plan or Policy to Address the Realisation of Economic and Social Rights*

##### **National Department of Finance**

The Department of Finance's contributions were clear and concise in describing the laws being developed to give effect to various aspects of the Constitution and the rights it contains. However, the report mentioned little about the other measures and programmes currently being adopted to advance the realisation of socio-economic rights.

Though not discussed in detail, the Medium-Term Expenditure Framework (MTEF) is one of the Department's most significant advances. The MTEF is the initial spending estimate within which the more detailed annual Budget is compiled. The Framework also serves as a basis for inputs into the 2000 and 2001 budgets. Government departments must plan their spending programmes and accommodate proposed policy changes within this medium-term expenditure framework. The MTEF is the outcome of a co-operative process in which political office-bearers and officials of national and provincial departments have examined the expenditure implications of policy commitments, considered the options available for meeting these commitments and chosen between competing priorities. The Financial and Fiscal Commission has played a cardinal role in this process, particularly in the evolution of provincial financing arrangements. Deliberations in the National Economic Development and Labour Council have contributed to the budget process. The work of the Parliamentary Portfolio Committee on Finance is also crucial, both in its oversight of the integrity of the budget and in translating these proposals into law.

## **9 Land**

- (5) 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.

*~ Constitution, Section 25*

### **Departmental Overview**

The Department of Land Affairs reported that since the promulgation of the Natives Land Act of 1913, the "rights to own, rent or even share-crop land in South Africa depended upon a person's racial classification." Apartheid policies further destroyed

the majority's enjoyment of the right to land. In response to this history of race-based discrimination, Parliament passed the Restitution of Land Rights Act of 1994 (Act No 22 of 1994). This Act created the Commission on the Restitution of Land Rights and the Land Claims Court.

In terms of land reform objectives, the Department divided its goals into three central categories: restitution, tenure reform and redistribution. The restitution process prioritises claims that affect a substantial number of people, redresses substantial losses and benefits people with particularly pressing needs. The tenure reform process seeks first to aid groups who are vulnerable to poverty and discrimination—in particular women. Further, farm dwellers and women are singled out for special attention in the redistribution programmes. However, the Department reported that it had not written official definitions of many of the terms in the constitutional provisions governing land rights.

To meet its goals, the Department maintained disaggregated records of the beneficiaries of land reform programmes and the location and type of land transfer. These records also assess the socio-economic implications of land transfers.

### *9.1 Understanding of its Obligations in Respect of Economic and Social Rights*

#### **National Department of Land Affairs**

The Department admitted that there was a lack of legally enforceable rights to land in South Africa, but did not adhere to the protocols in describing the human rights implications of its work. The report only provided information on the Department's objectives and an explanation of why it established a unit to address land issues. The report explained that factors such as historical judicial confiscation continued to affect the Department's ability to implement programmes and projects for the realisation of economic and social rights.

### *9.2 Understanding of Obligation to Respect, Protect, Promote and Fulfil*

#### **National Department of Land Affairs**

The Department stated that its goals for land reform, restitution, tenure reform and redistribution address this obligation. However, the Department did not provide information as to how it has implemented these and did not define its role in terms of access to land.

### *9.3 Measure Taken to Address the Imbalances of the Past*

#### **National Department of Land Affairs**

The Department has developed programmes to address issues resulting from past policies—especially forced removals. These land restitution programmes follow from

the constitutional provisions, which require Parliament to redress inequitable dispossession. The Restitution of Land Act of 1994 (Act No 22 of 1994) has created the Commission on Land Rights and the Land Claims Court to implement constitutional obligations. The Department also created restitution, tenure reforms and redistribution programmes that are directed to improving the socio-economic life of the people. These programmes utilise an integrative approach to addressing poverty. They provide poor people with access to land for residential and productive use in order to improve the income and quality of life. However, the Department did not provide clear information as to how it has implemented its programmes, especially in promoting, protecting, respecting and fulfilling land rights.

#### *9.4 Existence of Coherent Plan to Address the Realisation of Economic and Social Rights*

##### **National Department of Land Affairs**

The report did not provide the Commission with a clear coherent plan as to how the Department has addressed land issues. Furthermore, it did not incorporate timeframes for implementing its programme of redistribution, land reform and restitution into its report.

#### *9.5 Information Systems to Monitor the Progressive Realisation of Economic and Social Rights*

##### **National Department of Land Affairs**

The Department did not provide clear information on, for example, how many people have been provided access to land and how it has implemented its programmes. The report also lacked a discussion of the mechanisms put into place to support people affected by the former and current land policies. From the report, it appeared that the Department did not develop a system to monitor the realisation of economic and social rights.

#### *9.6 Access to Land on an Equitable Basis*

##### **National Department of Land Affairs**

The report stated that the Department did not have an official interpretation of the concepts access to land and equitable basis. Instead, the Department wrote:

Access to land is a broad concept, which includes both registered and unregistered rights, and accommodates the concept of different overlapping rights and interests in the same land.<sup>109</sup>

The Department reported that it was promoting land rights by developing new programmes and projects that will educate people about land issues. However, the

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<sup>109</sup> See, response to protocol by the Department of Environmental Affairs and Tourism. Volume III.

Department did not submit information as to how it would implement these programmes and projects or time frames. The Department also did not provide a clear definition of the concepts it uses to address land issues.

### *9.7 Vulnerable groups*

#### **National Department of Land Affairs**

The Department reported on a redistribution programme, which assists the poor, labour tenants, farm workers, women and emergent farmers. It did not describe how it implemented this programme and how many vulnerable groups this programme assisted.

#### **Provincial Departments**

None of the provincial Departments responded to the Commission's protocols on land rights.

## Part 4: Future Steps for Socio-Economic Development

Compiling this report has illuminated both the great strides South Africa has made to the furtherance of social and economic rights and the steps we must take in the future. Indeed, providing for the enjoyment of social and economic opportunities by most, let alone all South Africans, remains difficult to conceptualise and even more difficult to enforce.

Yet, all of us must systematically re-analyse these issues. We cannot become complacent with, or too accepting of, one specific path or approach. As South Africa continues its journey of providing fundamental human rights to its citizens, we will have to stop and assess our work. Oftentimes, we will alter our approach in order to accomplish our aim. Still, the goal, particularly in providing social and economic rights to everyone, must remain paramount.

With this in mind, the Commission has developed a series of recommendations based on the responses we received in the protocols. These recommendations serve as a means of triggering a debate—or conversation—about the status of social and economic rights in South Africa.

As the departments and the greater public review these recommendations, we ask that they further the conversation concerning them rather than conclude it. Using this logic, we also ask that readers refrain from embracing them as finalised decisions of the Commission. As we continue our studies into the nexus between political and socio-economic rights, our analyses will become increasingly sophisticated and, hopefully, will provide keener insights and greater assistance to organs of state.

While we have attempted to ensure that our recommendations are up to date, we realise that some departments may have conceived of or implemented programmes of which we are not aware to address these concerns. Therefore, some of these recommendations re-emphasise a departmental assessment and encourage them to continue with their own efforts.

Finally, the process of compiling this report has provided the Commission with greater insights into how we can work with governmental departments on these issues in the future. The fact that some departments lacked clarity in their assessment of social and economic rights—and their relationship to fundamental human rights— informed us that we should continue to make ourselves available as a resource. For example, the Commission can collaborate with department heads to provide human rights seminars to their directors, deputy directors and staff. Further, we will request a contact person from each department in order to clarify issues in the returned protocols and to remain up-to-date on department policy.

This collaborative process will help the Commission realise the initial conceptualisation of this report. Over time, these reports will complement one another and will recommend national benchmarks for each enumerated right. This will assist national and provincial departments as well as NGOs and other analysts with their

future assessments of the status of socio-economic rights, and necessarily, human rights in South Africa.

## **Recommendations for the realisation of social and economic rights**

### **1 Housing**

1. The Department recognises that it must take special measures to ensure the rights of disadvantaged groups (people with disabilities, female heads of households and elders). However, all of its laws and policies should reflect these special measures reflected in the Housing Act of 1997.
2. There must be better co-ordination between departments, especially the Departments of Housing and Welfare in addressing children's rights (such as the right of homeless children to shelter).
3. In accordance with the national White Paper on an Integrated National Disability Strategy, the Department should consult with suggested government departments and NGOs. Through this collaborative effort, the Department should develop national guidelines for providing additional subsidies for existing housing schemes, the establishment and renovation of group homes and funding to transform large institutions into smaller group homes.
4. National and provincial departments should co-ordinate and co-operate better when formulating and implementing housing schemes.
5. Relevant national, provincial and local departments must ensure that relevant parties annually comply with the housing obligations under the Constitution.
6. Departments should pursue policies that conform to the constitutional obligations of the national government. In particular, provincial and local governments should refrain from pursuing forced evictions that contradict or frustrate accepted human rights norms and other legislation.

### **2 Health**

1. The Department of Health should target a significant portion of its resources, both monetary and labour, to providing basic health services to key areas; it also should ensure effective delivery of these services to these areas.
2. The Department should draft legal provisions to protect the rights of children and adults affected or infected by HIV and AIDS. It should collaborate with governmental departments currently developing such legislation. For example, the Department of Education recently released for comment anti-discrimination initiatives: Draft National Policy on HIV/AIDS for Learners and Educators in



Public Schools and Students and Educators in Further Education and Training Institutions.

3. The Department of Environmental Affairs and Tourism and the Department of Health should collaborate further on environmental health programmes. This effort would help the Departments meet the right to an environment that is not harmful to individual and community health and would reduce environmental health risks especially in the workplace.
4. The Department should review and adopt the recommendations pertaining to healthcare in the White Paper on an Integrated National Disability Strategy.
5. The Department should facilitate the enactment of national health legislation that provides accessibility of health care to *all* South Africans—especially to marginalised populations and to under-served rural areas.

### **3 Water**

1. In the spirit of co-operative governance, all sectors of government and relevant departments should collaborate in order to implement a coherent, co-ordinated plan of action for the realisation of the right to potable water in accordance with the Water Services Act of 1997.
2. All relevant national and provincial government institutions and departments should immediately address their on-going measures to build the resources and institutional capacity of local governments to fulfil their critical role in water services delivery.
3. Relevant departments should examine the need for enhanced preventative services, specifically to extend water and sanitation provisions and to develop an integrated nutrition programme.

### **4 Food security**

1. None of the departments claimed responsibility for the task of providing sufficient food to at-risk and marginalised populations. The government should develop an inter-departmental mechanism that specifically addresses the right to food security. This inter-departmental body should pay special attention to rural areas as well as the poor in urban informal settlements and townships.

### **5 Social security**

1. Government departments must commit themselves to providing basic social security, not only through the medium-term expenditure programme process, but through the commitment to develop the capacity to deliver services in a more cost-effective and efficient manner.

2. Relevant organs of state should integrate people with disabilities into the economic and social mainstream. These programs should be implemented in collaboration with the Department of Welfare.
3. While financial constraints will determine the pace of the establishment of an adequate social security program, the Welfare Department and Ministry must advocate strongly for an adequate budget in order to enable it to fulfil its constitutional obligations.
4. The child and youth care system should be transformed so as to ensure that the developmental needs of children can be met.
5. Organs of state must improve their collaborative efforts at both the national and provincial levels in order meet the needs of social security recipients.
6. While the government has expressed its commitment to eradicate poverty, no organ of state takes responsibility for strategizing or implementing such efforts. The government should establish a co-ordinating centre that focuses on, and remains responsible for, the efforts to mitigate and, ideally, eradicate poverty. This co-ordinating body also should devise anti-poverty strategies that include enhancing child support grants, reducing unemployment and fostering community-based projects.
7. In accordance with the International Convention of the Rights of the Child, organs of state should implement programmes to protect children in difficult circumstances (e.g., children who are abused and neglected).
8. Relevant government departments should ensure that residential care and secured facilities are in place for children without homes and for juveniles in conflict with the law.
9. Relevant departments should collaborate in establishing or augmenting existing community-based care centres that provide welfare services for, among others, those with disabilities, the aged, those affected by HIV/AIDS and those who are victims of crime and violence.

## **6 Education**

1. The Department of Education should establish a database on children both inside and outside the educational system.
2. In promoting equity, the Department must increase its expenditures to the poor and develop a method of discerning which geographical and educational disciplines should become national and provincial priorities.
3. The Department should review and develop policies and programmes to implement the recommendations outlined in the White Paper on an Integrated National Disability Strategy.

4. In order to combat discrimination in schools, the Department should establish an institutional structure, perhaps in the office of the MEC, that would focus solely on transformation and racial integration of schools. This body should incorporate the findings of the Commission's study on "racism, 'racial integration' and desegregation" in South African public secondary schools into its analysis.

## **7 Environment**

1. The Department of Environmental Affairs and Tourism should further its efforts to enforce measures established in the National Environmental Management Act of 1998 (Act No 107 of 1998).
2. The Department should draft more comprehensive laws to combat systematic practices that damage the environment (e.g., soil, minerals and clean air) in order to give effect to established environmental policies.
3. The Department should promote conservation and ensure that reasonable measures are taken to protect the environment against harmful activities that may come with economic and social development and progress.
4. The Department should develop legislation that establishes minimum environmental standards.
5. The Department should encourage a provincial and local focus on the environment, particularly in relation to issues such as mining, industrial and waste management.

## **8 Finance**

1. The Department should analyse its current budget allocation and determine how its fiscal and monetary policies could contribute to a national reduction of poverty. Following this reallocation, it should publish this information.

## **9 Land**

1. In accordance with the Department's planned programmes to increase awareness, the Commission suggests that the Department publicise information and legal reforms pertaining to land affairs in forums accessible to the greater public. In particular, it should increase awareness about its recently adopted subsidy schemes to assist women, farmers and other vulnerable groups gain access to land, provided for in the Provision of Land for Settlement Amendment Act of 1998 (Act No 26 of 1998).
2. The Department should incorporate people with disabilities into its programmes targeting vulnerable groups.

## **Recommendations for Reporting on Social and Economic Rights**

**During the process of reporting to the Commission, organs of state (national, provincial and local governments) should:**

1. Respond in a timely manner. This will enable the Commission to assess all responses and to seek greater clarity where necessary.
2. Adhere to the protocols compiled by the Commission.
3. Provide clear information on indicators and benchmarks of socio-economic rights issues.
4. Identify a person or persons to collate and collect necessary information required by the Commission in terms of section 184 (3).
5. Desegregate all data into categories focusing on characteristics such as gender, disability, age, urban and rural populations and housing environments and structures (e.g., informal settlements).
6. Increase efforts to develop inter-departmental and intra-departmental policies and programmes.
7. Develop a more comprehensive understanding of constitutional and reporting obligations to the Commission in terms of section 184 (3).
8. Facilitate awareness workshops for members of staff whose duties include incorporating and adhering to these constitutional responsibilities.
9. Incorporate international norms and standards into departmental analyses.
10. Provide information on how departments implement their programmes and how these programmes affect the realisation of socio-economic rights.
11. Respond in a comprehensive, clear and accurate manner in order to facilitate the proper monitoring of socio-economic rights.
12. Provide a clear and current assessment of the state of social and economic rights as they relate to the Department's particular function.
13. Indicate current budget allocations and future needs so that the Commission can assess the use of these funds for matters pertaining to the realisation of social and economic rights for all South Africans.
14. Remain cognisant of the fact that when delivering services (such as water, housing and so forth) to the people of South Africa, they must comply with their constitutional mandate. Therefore, they should provide these services within the framework of the Constitution and use a rights-based approach.

15. Take reporting obligations seriously and treat them as part of daily functions. All relevant sections of the departments should contribute to this reporting activity in order to provide a more comprehensive assessment to the Commission.
16. Provincial Director-Generals should ensure that relevant state organs respond accordingly.

Many organs of state linked the realisation of socio-economic rights to the achievement of sustained economic development in the regions. However, we must note that although economic growth may facilitate the progressive realisation of socio-economic rights, it does not automatically guarantee their realisation. All relevant organs of state have an obligation to adopt a clear plan of action combined with deliberate strategies for improving and advancing access to these rights for everyone under their jurisdiction. Also, the provincial governments should review their progress in an on-going and systematic fashion and should adopt appropriate measures to remove obstacles that prevent the fulfilment of these rights.

Finally, we are concerned by the fact that the local governments, with the exception of the Greater Johannesburg Metropolitan Council, failed to respond to the protocols. The Commission therefore recommends that provincial governments should co-ordinate the reports of the local governments so that the Commission can monitor and assess socio-economic rights in these areas. We would like to thank the GJMC for contributing to the content of this report.



ECONOMIC &  
SOCIAL RIGHTS REPORT

Protocols  
Vol II

1997-1998

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# Protocols

## National Government

A sample of the Explanatory Memorandum and Protocol sent to the Department of Welfare on the right to Social Security has been used.

## Explanatory Memorandum (Social Security)

This memorandum has notes and additional information to assist you in completing the questionnaire. Please read this memorandum carefully before starting the questionnaire and refer to it while completing the questionnaire.

### General

a. Your department is requested to complete the attached questionnaire by the South African Human Rights Commission (SAHRC). Section 184 (3) of the Constitution requires the SAHRC to request relevant organs of state each year to provide it with “information on the measures they have taken towards the realisation” of the so-called socio-economic rights. Further, in terms of Section 7 (2) of the Human Rights Commission Act (No. 54 of 1994), all organs of state must provide the SAHRC with the assistance it requires to effectively exercise its powers and perform its duties and functions.

In addition to the information requested in the questionnaire, your department may wish to provide the SAHRC with additional information which is contained in reports already submitted in terms of South Africa’s reporting obligations under international law or to specialised agencies. Please note that South Africa has ratified the following treaties which include socio-economic rights (also known as social and economic rights):

- the African Charter on Human and People’s Rights (1981);
- the United Nations Convention on the Elimination of all forms of Discrimination against Women (also known as CEDAW) (1979); and
- the United Nations Convention on the Rights of the Child (1989).

c. In some cases, the information requested in the questionnaire will require your department to co-ordinate efforts and collaborate with other relevant government departments and levels of government. In such cases, please obtain this information from the department or level of government, which is responsible for this, and include it in your answers. (For example, the questionnaire might contain questions dealing with children and their rights, which might not fall within your department’s responsibility.)



Please remember that co-ordination and collaboration are important principles of co-operative government as set out in Chapter 3 of the Constitution, and are essential to ensure that comprehensive and accurate information is provided to the SAHRC.

d. If your department is not able to provide any of the information requested, please explain fully why this is so and why the information is not available.

## **Definitions**

In this questionnaire, you will often see the phrase “**laws and other measures**”.

By “laws”, we mean legislation (national, provincial and local), customary law and common law.

By “other measures” we mean:

- plans;
- policies;
- practices (by government or structures outside of government);
- programmes;
- structures;
- mechanisms;
- educational;
- social;
- financial measures (such as international fund raising); and
- administrative measures.

In this questionnaire, you will also see the term “**social security rights**”. This term is used to cover all the rights relating to social security in Section 27 of the Constitution, and means:

- the right of access to social security; and
- the right, where one is not able to support oneself or one’s dependants, of access to appropriate social assistance.

In any answer dealing with “social security rights”, please deal with each of these meanings.

## **Documents to be attached to your answers**

You will be asked from time to time to deal with legislation and policies. While we are able to track down legislation, including white papers, green papers and bills where these are part of public record, please attach copies of any policies or planned legislation which is not yet part of public record. Please mark clearly any documents you attach to your answers with the question number to which these documents refer.

## Specific comments

### 1. Past overview

- a. This section asks what the impact of the past was on people's ability to get social security rights. Please explain how this affected particular groups (such as women and rural people).
- b. You are requested to explain the effects of the past on children's right to social services. Please see General note (c) above.
- c. This question relates to departments set up in the previous homelands, and any legislation passed in the homelands, which dealt with social security rights in these areas.

### 2. Your departments understanding of its Constitutional obligations

In terms of section 7(2) of the Constitution, the state is required to “respect, protect, promote and fulfil the rights in the Bill of Rights”. In question 2 (a), you are requested to explain what your department understands the words “respect”, “protect”, “promote” and “fulfil” to mean with regard to the social security rights (section 27 of the Constitution) and the right of children to social services in section 28 (1) (c). Please explain what is understood by each of these words.

You might find it useful to consider the way in which the international human rights community defines these terms. They define them as follows:

**Respect** The state's obligation to respect a right is understood to mean that the state must not do anything which:

- deprives people of the right (or of access to the right);
- denies or obstructs people in getting the right (or access to the right), for example, by passing a law which makes it extremely difficult for a person or group of persons to get the right (or access to it); or which
- unfairly discriminates against particular individuals and groups in getting the right (or access to it).

Lastly, where laws or other measures exist which have any of these effects, the state is obliged to do away with them and take steps to remedy their effects.

**Protect** The state's obligation to protect a right means that the state must actually do something to protect people's socio-economic rights against invasion by the private sector. For example, the state must pass laws to protect people against arbitrary eviction by their landlords.

**Promote and Fulfil** The state's obligation to promote and fulfil a right means that the state must take reasonable measures (including laws and other measures) to make it possible for people to meet their own needs through their own initiatives and efforts. Note that a very important part of the obligation to “promote” is the obligation to inform and educate people about the right and how to get access to it.

In questions 2(b) to (g), you are requested to explain what your department understands certain key words and phrases in sections 27 and 28 of the Constitution to mean.

### 3. Information gathering

To ensure that people receive social security rights (and children receive social services), it is of utmost importance that your department has or has access to information on what is going on in the country. This section deals with what information systems your department has (or has access to) to gather this information.

### 4. Vulnerable groups

Examples of “vulnerable groups” are women, rural people, people with disabilities, people living with HIV / AIDS, and people in informal settlements.

### 5. The obligation to “respect” these rights

Please see the definition of “respect” above.

The term “current laws and other measures” in questions 5 (a) and 5 (b) refers to laws and other measures of the previous governments (including common law and customary law) which are still in existence and any new laws adopted by the present government.

In questions 5 (c) - (e), you are requested to only look at past laws and other measures.

### 6. The obligation to protect these rights

Please see the definition of “protect” above, and note that these questions relate to the role of the private sector.

### 7. The obligation to promote and fulfil these rights

Please see the definition of “promote and fulfil” above.

7 b and c. Please provide details of any information and education campaigns run by your department as well as details of any strategies your department has to communicate with other departments and with the public.

7 d. The “core minimum obligation” referred to in this question relate to what your department understands the minimum that the Constitution requires of it.

7 e The minimum requirements referred to here are those set by your department to apply across the country and could include things like minimum amounts to be paid as pensions and maintenance grants, transport for the infirm to pay-out points and so on.

## 8. Future goals

In this section, you are requested to deal with goals for 1998, as well as any long-term goals set by your department.

- a. When dealing with this question, please say whether:
- any new groups have been identified as vulnerable groups;
  - any new minimum requirements (such as norms and standards) for making sure the social security rights and children's rights to social services are applied in a uniform way across the country have been set by your department.

## Protocol (Social Security) [Sample]

**Relevant organ of state:** Department of Welfare

**Socio-economic right:** Social security and assistance (Section 27 (1) (c))  
And

**Children's right to social services (Section 28 (1) (c))**

**NOTE: If you refer to any policies (or other documents) in any of your answers, please attach copies of these and mark them clearly with the question number to which they refer.**

### 1. Past overview

- a. Please give an overview of the impact of past discriminatory laws and other measures on particular groups' social security rights. How have these affected your department's ability to realise the rights set out in Section 27 of the Constitution?
- b. What impact did past laws and other measures have on children's right to social services? How have these affected your department's ability to realise the rights set out in Section 28 of the Constitution?
- c. What has been the effect of consolidation or non-consolidation of departments and legislation from the previous homelands on your department's ability to realise the social security rights in Section 27 and the right of children to social services in Section 28?

### 2. Your department's understanding of its Constitutional obligations

- a. What does your department understand it is obliged to do to
- **respect;**
  - **protect;**
  - **promote; and**
  - **fulfil**

the social security rights in section 27 of the Constitution and the right of children to social services in section 28?

b. What is your department's official interpretation of the words "access to" in section 27?

c. What is your department's official interpretation of the words "social security"?

d. What is your department's official interpretation of the words "unable to support themselves"?

e. What is your department's official interpretation of the words "appropriate social assistance"?

f. What is your department's official interpretation of the words "progressive realisation of (this) right"?

g. What is your department's official interpretation of the words "social services" in section 28?

### **3. Information gathering**

Does your department have systems (or access to systems) to collect and analyse statistical and other information relating to the implementation of social security rights and children's right to social services?

a. If your answer is yes, please:

- describe this system;
- state what information is collected;
- state whether or not this information is broken down according to race, gender, geographical location (especially according to rural and urban areas) and income level;
- state whether this information is independently verified and how this is done; and
- state how the public can get access to this information.

b. If your answer is no, please say why not and whether or not your department has plans to obtain or get access to such a system.

### **4. Vulnerable groups**

What groups have been identified by your department as more vulnerable than others and which need special attention?

### **5. The obligation to respect these rights**

a. What current laws and other measures have the effect of denying or depriving people of their social security rights and children's of their right to social services?

b. What current laws and other measures unfairly discriminate against any groups of people, particularly the identified vulnerable groups, and their social security rights or children and their right of access to social security?

c. What steps have been taken by your department to get rid of any past laws and other measures, which impacted on people's social security rights?

- d. What steps have been taken to get rid of past laws and other measures, which impacted on children's right to social services?
- e. What has been done to remedy the effects of these past laws and other measures, which impacted on people's social security rights and children's right to social services?

## **6. The obligation to protect these rights**

- a. What laws and other measures protect people against unfair discrimination in the allocation and availability of pensions in the private sector?
- b. What laws and other measures protect people (including children) against any other practices in the private sector which have a negative effect on their social security rights or children's right to social services?

## **7. The obligation to promote and fulfil these rights**

- a. What percentage of your department's budget is set aside to promote and fulfil social security rights? How much of this budget will have been spent by the end of the 1997-8 financial year?
- b. What has your department done to inform and educate all South Africans, and particularly the identified vulnerable groups, about their social security rights?
- c. What has your department done to inform and educate all children about how to get social services?
- d. What is your department's understanding of the core minimum obligations imposed on it by the social security rights and children's right to social services? How are these understandings reflected in laws and other measures adopted by your department?
- e. What minimum requirements (such as national norms and minimum standards) for making sure the social security rights and children's rights to social services are applied in a uniform way across the country have been set by your department? What laws and other measures are these included in?
- f. Please give a brief description of any current law and other measures, which have been adopted to improve or advance social security rights. Which of these deal with people who have been unfairly discriminated against in the past and which deal with the identified vulnerable groups?
- g. Please give a brief description of any current laws and other measures, which have been adopted to improve or advance the right of children to social services. Which of these deal with children who have been unfairly discriminated against in the past?
- h. Have any new laws and other measures (such as budget cuts and scaling down) been introduced in the past year which have a negative impact on the progressive realisation of social security rights, or which have a negative impact on the rights of children to social services?

What structures or mechanisms has your department put in place to:

- review laws and other measures which relate to this right?
- monitor whether laws and other measures were implemented?

- work with other departments, levels of government or sectors of society to make sure everyone, and particularly the identified vulnerable groups, get access to social security rights?
- work with other departments, levels of government or sectors of society to make sure children get social services?
- make sure the principles of equality and non-discrimination in section 9 (2) of the Constitution are integrated into all department programmes relating to this right?
- consult and involve civil society and people needing access to social security rights (particularly the identified vulnerable groups)?

## **8. Future goals**

a. What new laws and other measures will your department put in place to respect, protect, promote and fulfil social security rights and children's right to social services? Please give full details of these, including:

- which of these are aimed at the identified vulnerable groups;
- goals and targets set by your department;
- timelines for implementing these;
- benchmarks or indicators you will use to chart progress and evaluate these to see whether they are successful; and
- structures or mechanisms you will use to chart progress and evaluate plans.

b. What will your department do to get rid of existing laws and other measures which make it difficult for people to get access to social security rights or for children to get social services?

## **9. General**

Please tell us about anything which your department has done or is planning to do to make sure social security rights and the right of children to social services are respected, protected, promoted and fulfilled which have not been dealt with in your answers to these questions.

## **Provincial Government**

### **Explanatory memorandum** (Provincial Government)

This memorandum has notes and additional information to assist you in completing the questionnaire. Please read this memorandum carefully before starting the questionnaire and refer to it while completing the questionnaire.

#### **General**

a. Your provincial government is requested to complete the attached questionnaire by the South African Human Rights Commission (SAHRC). Section 184 (3) of the Constitution requires the SAHRC to request relevant organs of state each year to provide it with “information on the measures they have taken towards the realisation” of the so-called socio-economic rights. Further, in terms of Section 7 (2) of the Human Rights Commission Act (No. 54 of 1994), all organs of state must provide the SAHRC with the assistance it requires to effectively exercise its powers and perform its duties and functions.

b. In addition to the information requested in the questionnaire, your provincial government may wish to provide the SAHRC with additional information, which is contained in reports already submitted in terms of South Africa’s reporting obligations under international law or to specialised agencies. Please note that South Africa has ratified the following treaties, which include socio-economic rights (also known as social and economic rights):

- the African Charter on Human and People’s Rights (1981);
- the United Nations Convention on the Elimination of all forms of Discrimination against Women (also known as CEDAW) (1979); and
- the United Nations Convention on the Rights of the Child (1989).

c. In some cases, the information requested in the questionnaire will require your provincial government to co-ordinate efforts and collaborate with other relevant government departments and levels of government. In such cases, please obtain this information from the department or level of government which is responsible for this and include it in your answers. (For example, the questionnaire might contain questions dealing with children and their rights which might not fall within your provincial government’s responsibility.)

Please remember that co-ordination and collaboration are important principles of co-operative government as set out in Chapter 3 of the Constitution, and are essential to ensure that comprehensive and accurate information is provided to the SAHRC.

d. If your provincial government is not able to provide any of the information requested, please explain fully why this is so and why the information is not available.



## Definitions

In this questionnaire, you will often see the phrase “laws and other measures”.

By “laws”, we mean legislation (national, provincial and local), customary law and common law.

By “other measures” we mean:

- plans;
- policies;
- practices (by government or structures outside of government);
- programmes;
- structures;
- mechanisms;
- educational;
- social;
- financial measures (such as international fund raising); and
- administrative measures.

## Documents to be attached to your answers

You will be asked from time to time to deal with legislation and policies. While we are able to track down legislation, including white papers, green papers and bills where these are part of public record, please attach copies of any policies or planned legislation which is not yet part of public record. Please mark clearly any documents you attach to your answers with the question number to which these documents refer.

## Specific comments

Your departments understanding of its Constitutional obligations

In terms of section 7(2) of the Constitution, the state is required to “respect, protect, promote and fulfil the rights in the Bill of Rights”. In question 2 (a), you are requested to explain what your provincial government understands the words “respect”, “protect”, “promote” and “fulfil” to mean with regard to the socio-economic rights in the Constitution. Please explain what is understood by each of these words.

You might find it useful to consider the way in which the international human rights community define these terms. They define them as follows:

**Respect** The state’s obligation to respect a right is understood to mean that the state must not do anything which:

- deprives people of the right (or of access to the right);
- denies or obstructs people in getting the right (or access to the right), for example, by passing a law which makes it extremely difficult for a person or group of persons to get the right (or access to it); or which
- unfairly discriminates against particular individuals and groups in getting the right (or access to it).

Lastly, where laws or other measures exist which have any of these effects, the state is obliged to do away with them and take steps to remedy their effects.

***Protect*** The state's obligation to protect a right means that the state must actually do something to protect people's socio-economic rights against invasion by the private sector. For example, the state must pass laws to protect people against arbitrary eviction by their landlords.

***Promote and Fulfil*** The state's obligation to promote and fulfil a right means that the state must take reasonable measures (including laws and other measures) to make it possible for people to meet their own needs through their own initiatives and efforts. Note that a very important part of the obligation to "promote" is the obligation to inform and educate people about the right and how to get access to it.

## **Future goals**

In this section, you are requested to deal with goals for 1998, as well as any long term goals set by your provincial government.

- a. When dealing with this question, please say whether:
- any new groups have been identified as vulnerable groups;
  - any new minimum requirements (such as norms and standards) for making sure the socio-economic rights are applied in a uniform way in your province have been set by your provincial government.

# Provincial Government

## 1. Definitions

The following rights in the Constitution are known as the **socio-economic rights**:

- environment (section 24);
- access to adequate housing (section 26);
- access to health care (section 27);
- access to sufficient food (section 27);
- access to sufficient water (section 27);
- access to social security and social assistance (section 27);
- basic, adult basic and further education (section 29); and
- children's rights in section 28 to:
  - appropriate alternative care when removed from the family;
  - basic nutrition;
  - shelter;
  - basic health care services; and
  - social services.

b. The following areas in Parts A of Schedules of 4 and 5 (which provincial governments will deal with) are linked to the socio-economic rights. For the rest of this document, these will be called responsibilities.

- administration of indigenous forests;
- agriculture;
- animal control and diseases;
- consumer protection (?);
- disaster management;
- education;
- environment;
- health services;
- housing;
- nature conservation;
- pollution control;
- regional planning and development;
- soil conservation;
- urban and rural development;
- welfare services;
- abattoirs;
- ambulance;
- libraries; and
- provincial planning.

c. The following areas in Parts B of Schedules 4 and 5 (which are linked to these socio-economic rights) could be given to local governments, but are also

responsibilities of provincial governments. During this document, these will be called additional responsibilities.

- air pollution;
- building regulations;
- child care facilities;
- electricity and gas reticulation;
- planning with regard to housing;
- health services;
- public transport (?)
- storm water management;
- water and sanitation services;
- cleansing;
- abattoirs;
- municipal roads; and
- noise pollution.

## **2. Your Provincial Government's understanding of its Constitutional obligations**

- a. What does your provincial government understand it is obliged to do to:
  - respect;
  - protect;
  - promote; and
  - fulfil the socio-economic rights?
- b. What is your provincial government's official interpretation of the words "access to" in sections 26 and 27 of the Constitution?
- c. What is your provincial government's official interpretation of the word "adequate" in section 26?
- d. What is your provincial government's official interpretation of the word "sufficient" in relation to food and water in section 27?
- e. What is your provincial government's official interpretation of the words "progressive realisation of this right" in sections 26 (2) and 27 (2)?
- f. What is your provincial government's official interpretation of the words progressively available and accessible in section 29 (1) (b)?
- g. What does your provincial government understand its obligations are with regard to its responsibilities?
- h. What does your provincial government understand its obligations are with regard to the additional responsibilities.

## **3. Your Provincial Government's performance**

- a. Please provide a summary of what your provincial government has done to satisfy the obligations placed on it by the Constitution with regard to:
  - the respect, protection, promotion and fulfilment of the socio-economic rights;
  - its responsibilities; and
  - its additional responsibilities.

Please provide a summary of laws and other measures of the national or local governments in the province which have assisted your provincial government to:

- respect, protect, promote and fulfil the socio-economic rights;
- satisfy its responsibilities; and
- satisfy its additional responsibilities.

Please provide a summary of laws and other measures of the national or local governments in the province which have made it difficult for your provincial government to:

- respect, protect, promote and fulfil the socio-economic rights;
- satisfy its responsibilities; and
- satisfy its additional responsibilities.

#### **4. Future goals**

What new laws and other measures will your provincial government put in place to respect, protect, promote and fulfil the socio-economic rights and deal with your responsibilities and additional responsibilities? Please give full details of these, including:

- goals and targets set by your provincial government;
- timelines for implementing these;
- benchmarks or indicators you will use to chart progress and evaluate these to see whether they are successful; and
- structures or mechanisms you will use to chart progress and evaluate plans.

b. What will your provincial government do to get rid of existing laws and other measures which make it difficult for people to get access to their socio-economic rights or for you to deal with your responsibilities and additional responsibilities?

#### **5. General**

Please tell us about anything which your provincial government has done or is planning to do to deal with the socio-economic rights and your responsibilities and additional responsibilities which has not been dealt with in your answers to these questions.

## Local Government

### Explanatory Memorandum

(Local Government)

This memorandum has notes and additional information to assist you in completing the questionnaire. Please read this memorandum carefully before starting the questionnaire and refer to it while completing the questionnaire.

#### 1. General

a. Your local government is requested to complete the attached questionnaire by the South African Human Rights Commission (SAHRC). Section 184 (3) of the Constitution requires the SAHRC to request relevant organs of state each year to provide it with “information on the measures they have taken towards the realisation” of the so-called socio-economic rights. Further, in terms of Section 7 (2) of the Human Rights Commission Act (No. 54 of 1994), all organs of state must provide the SAHRC with the assistance it requires to effectively exercise its powers and perform its duties and functions.

In addition to the information requested in the questionnaire, your local government may wish to provide the SAHRC with additional information which is contained in reports already submitted in terms of South Africa’s reporting obligations under international law or to specialised agencies. Please note that South Africa has ratified the following treaties which include socio-economic rights (also known as social and economic rights):

- the African Charter on Human and People’s Rights (1981);
- the United Nations Convention on the Elimination of all forms of Discrimination against Women (also known as CEDAW) (1979); and
- the United Nations Convention on the Rights of the Child (1989).

c. In some cases, the information requested in the questionnaire will require your local government to co-ordinate efforts and collaborate with other relevant government departments and levels of government. In such cases, please obtain this information from the department or level of government which is responsible for this and include it in your answers. (For example, the questionnaire might contain questions dealing with children and their rights which might not fall within your local government’s responsibility.)

Please remember that co-ordination and collaboration are important principles of co-operative government as set out in Chapter 3 of the Constitution, and are essential to ensure that comprehensive and accurate information is provided to the SAHRC.

d. If your local government is not able to provide any of the information requested, please explain fully why this is so and why the information is not available.

## 2. Definitions

In this questionnaire, you will often see the phrase “**laws and other measures**”.

By “laws”, we mean legislation (national, provincial and local), customary law and common law.

By “other measures” we mean:

- plans;
- policies;
- practices (by government or structures outside of government);
- programmes;
- structures;
- mechanisms;
- educational;
- social;
- financial measures (such as international fund raising); and
- administrative measures.

## 3. Documents to be attached to your answers

You will be asked from time to time to deal with legislation and policies. While we are able to track down legislation, including white papers, green papers and bills where these are part of public record, please attach copies of any policies or planned legislation which is not yet part of public record. Please mark clearly any documents you attach to your answers with the question number to which these documents refer.

## 4. Specific comments

Your departments understanding of its Constitutional obligations

In terms of section 7(2) of the Constitution, the state is required to “respect, protect, promote and fulfil the rights in the Bill of Rights”. In question 2 (a), you are requested to explain what your local government understands the words “respect”, “protect”, “promote” and “fulfil” to mean with regard to the socio-economic rights in the Constitution. Please explain what is understood by each of these words.

You might find it useful to consider the way in which the international human rights community define these terms. They define them as follows:

**Respect** The state’s obligation to respect a right is understood to mean that the state must not do anything which:

- deprives people of the right (or of access to the right);
- denies or obstructs people in getting the right (or access to the right), for example, by passing a law which makes it extremely difficult for a person or group of persons to get the right (or access to it); or which
- unfairly discriminates against particular individuals and groups in getting the right (or access to it).

Lastly, where laws or other measures exist which have any of these effects, the state is obliged to do away with them and take steps to remedy their effects.

***Protect*** The state's obligation to protect a right means that the state must actually do something to protect people's socio-economic rights against invasion by the private sector. For example, the state must pass laws to protect people against arbitrary eviction by their landlords.

***Promote and Fulfil*** The state's obligation to promote and fulfil a right means that the state must take reasonable measures (including laws and other measures) to make it possible for people to meet their own needs through their own initiatives and efforts. Note that a very important part of the obligation to "promote" is the obligation to inform and educate people about the right and how to get access to it.

## **5. Future goals**

In this section, you are requested to deal with goals for 1998, as well as any long term goals set by your local government.

When dealing with this question, please say whether:

any new groups have been identified as vulnerable groups;  
any new minimum requirements (such as norms and standards) for making sure the socio-economic rights are applied in a uniform way in your municipality have been set by your local government.



# Local Government

## 1. Definitions

a. The following rights in the Constitution are known as the socio-economic rights:

- environment (section 24);
- access to adequate housing (section 26);
- access to health care (section 27);
- access to sufficient food (section 27);
- access to sufficient water (section 27);
- access to social security and social assistance (section 27);
- basic, adult basic and further education (section 29); and
- children's rights in section 28 to:
  - appropriate alternative care when removed from the family;
  - basic nutrition;
  - shelter;
  - basic health care services; and
  - social services.

The following areas in Parts B of Schedules 4 and 5 are linked to these socio-economic rights. During this document, these will be called responsibilities.

- air pollution;
- building regulations;
- child care facilities;
- electricity and gas reticulation;
- planning with regard to housing;
- health services;
- public transport (?)
- storm water management;
- water and sanitation services;
- cleansing;
- abattoirs;
- municipal roads; and
- noise pollution.

The following areas in Parts A of Schedules of 4 and 5 (which are linked to the socio-economic rights) could be given to municipalities to deal with. For the rest of this document, these will be called additional responsibilities.

- administration of indigenous forests;
- agriculture;
- animal control and diseases;
- consumer protection (?);
- disaster management;

- education;
- environment;
- health services;
- housing;
- nature conservation;
- pollution control;
- regional planning and development;
- soil conservation;
- urban and rural development;
- welfare services;
- abattoirs;
- ambulance;
- libraries; and
- provincial planning.

## **2. Your Local Government's understanding of its Constitutional obligations**

What does your local government understand it is obliged to do to:

- respect;
  - protect;
  - promote; and
  - fulfil the socio-economic rights?
- b. What is your local government's official interpretation of the words "access to" in sections 26 and 27 of the Constitution?
- c. What is your local government's official interpretation of the word "adequate" in section 26?
- d. What is your local government's official interpretation of the word "sufficient" in relation to food and water in section 27?
- e. What is your local government's official interpretation of the words "progressive realisation of this right" in sections 26 (2) and 27 (2)?
- f. What is your local government's official interpretation of the words progressively available and accessible in section 29 (1) (b)?
- g. What does your local government understand its obligations are with regard to its responsibilities?

What does your local government understand its obligations are with regard to the additional responsibilities.

## **3. Your Local Government's performance**

Please provide a summary of what your local government has done to satisfy the obligations placed on it by the Constitution with regard to:

- the respect, protection, promotion and fulfilment of the socio-economic rights;
- its responsibilities; and

- its additional responsibilities.

b. Please provide a summary of laws and other measures of the national or your provincial governments in the province which have assisted your local government to:

- respect, protect, promote and fulfil the socio-economic rights;
- satisfy its responsibilities; and
- satisfy its additional responsibilities.

Please provide a summary of laws and other measures of the national or your provincial government which have made it difficult for your local government to:

- respect, protect, promote and fulfil the socio-economic rights;
- satisfy its responsibilities; and
- satisfy its additional responsibilities.

#### **4. Future goals**

What new laws and other measures will your local government put in place to respect, protect, promote and fulfil the socio-economic rights and deal with your responsibilities and additional responsibilities? Please give full details of these, including:

- goals and targets set by your local government;
- timelines for implementing these;
- benchmarks or indicators you will use to chart progress and evaluate these to see whether they are successful; and
- structures or mechanisms you will use to chart progress and evaluate plans.

b. What will your local government do to get rid of existing laws and other measures which make it difficult for people to get access to their socio-economic rights or for you to deal with your responsibilities and additional responsibilities?

#### **5. General**

Please tell us about anything which your local government has done or is planning to do to deal with the socio-economic rights and your responsibilities and additional responsibilities which has not been dealt with in your answers to these questions



ECONOMIC &  
SOCIAL RIGHTS REPORT

Governmental Responses to  
Protocols  
Vol III

1997-1998

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# Governmental Responses to Protocols

## National Government Departments

### 1 HOUSING

#### 1. Past overview

**a. Please give an overview of the impact that past discriminatory laws and other measures have on particular groups' housing rights. How have these affected your department's ability to realise the rights set out in Section 26 of the Constitution?**

Past own affairs legislation that existed as a result of discriminatory laws passed by the previous regime have disadvantaged the Black population of this country. The Department has however repealed all discriminatory legislation in the Housing Act 107 of 1997. The Department has had to deal with the administrative problems of phasing out these old systems and also dealing with various abuses that occurred under these old systems. Section 14 (9) of the new housing legislation provides that the Minister must institute a national housing programme to phase out within one year of the commencement of this legislation every housing subsidy granted under previous racially discriminatory legislation, to wit-

- a) The Housing Act, 1966;
- b) The Development and Housing Act, 1985;
- c) The Housing Act (House of Representatives), 1987;
- d) The Development Act (House of Representatives), 1987; or  
The Housing Development Act (House of Delegates), 1987,

This national housing programme must contain time limits to phase out the various categories of housing subsidies. Further, the Minister must report quarterly to the parliamentary committees for housing of the National Assembly and the National Council of Provinces on the progress of the implementation of such a national housing programme.

**b. "What impact did past laws and other measures have on children's right to shelter? How have these affected your department's ability to realise children's rights to shelter?"**

The Department is of the opinion that the realisation of the right of destitute children to shelter represents a specialised housing field that should be managed by the Department of Welfare. During the consultative process on the draft Housing bill, agreement was reached between the Department of Welfare and Housing that the accommodation needs of the category of persons who cannot independently care for themselves and requires institutional care are the responsibility of the Department of Welfare.

**c. What has been the effect of consolidation or non-consolidation of departments and legislation from the previous homelands on your department's ability to realise the housing rights in Section 26 and the right of children to shelter?**

The Department's Housing legislation applies all over the country and would therefore apply to all of the previous homelands incorporated into the Provinces. There is no doubt that the Provinces themselves may have felt the effects of consolidation of the departments of previous homelands as far as the administrative problems are concerned. The Provincial Boards created in terms of the Housing Arrangements Act 155 of 1993 would also service areas falling under their jurisdiction of which the previous homelands form a part.

**2. Your Department's understanding of its Constitutional obligations**

**a. What does your department understand it is obliged to do to: respect, protect, promote, and fulfil the housing rights in section 26 of the Constitution and the right of children to shelter in section 28?**

It is understood that the Department is obliged:

To respect everyone's right to have access to housing, to protect this right through the introduction of enabling legislation and to develop national programmes which promote the realisation of the right;

For this purpose the Department embarked on a process of legislation development to facilitate the creation of an environment in which appropriate housing policy and strategy and delivery systems could be developed. The Housing Arrangement Act, 1993 was established to facilitate this process in the transitional period until a new Housing Act could be put in place. The new Housing Act, 1997 (Act No. 107 of 1997) was recently adopted by Parliament and approved by the President on 27 November 1997. The Act will come into effect on 1 April 1998. The Act provides for the facilitation of a sustainable housing development process, lays down the general principles applicable to housing development, defines the functions of national, provincial and local governments in South Africa in regard to housing development and provides for the financing of national housing programmes.

To promote the achievement of its obligations, the National Housing Subsidy Scheme was developed and introduced. The subsidy scheme provides for various instruments which direct the funding provided by Government towards housing assistance to the poor and the realisation of the said right.

During the consultative process on the draft Housing bill, agreement was reached between the Department of Welfare and Housing that the accommodation needs of the category of persons who cannot independently care for themselves and requires institutional care are the responsibility of the Department of Welfare. The New Housing Act, 1997, therefore does not make provision for the subsidisation of welfare housing.

**b. What is your department's official interpretation of the words "access to housing in section 26?"**

The words "access to" in the context of section 26(1) of the Constitution, 1996 refer to the opportunity of everyone to exercise choice in respect of housing options and to access such elected options.

**c. What is your department's official interpretation of the words "adequate housing"?**

"Adequate housing" means housing that meets the basic human needs that are of a standard that satisfies the minimum health and safety requirements applied by local authorities and constitutes a permanent residential structure, ensuring privacy and providing adequate protection against the elements.

**d. What is your department's official interpretation of the words "progressive realisation of this right"?**

"Progressive realisation of this right" refers to the fact that the Government has limited available resources to realise all its obligations. It thus has no alternative but to utilise these resources on the basis of economic principles. The "progressive realisation of this right" also refers to the Government's intention to sustain its housing assistance obligations and initiatives to award everyone the opportunity to have access to adequate housing.

**e. What is your department's official interpretation of the words "relevant circumstances"?**

"Relevant circumstances" in the context of section 26(3) of the Constitution, 1996 refers to all circumstances pertaining to a specific case where termination of occupation is considered. This could include, but is not limited to the agreement between the parties and/or the lack thereof, the circumstances that led to the termination of the occupation and the justification for the termination of the occupation.

**f. What is your department's official interpretation of the word "shelter" in section 28?**

"Shelter" as contemplated in section 26(3) of the Constitution, 1996 could include the definition given for "adequate housing" but will also include the definition for "shelter" as contemplated by Welfare legislation and policy.

**3. Information gathering**

*Does your department have systems (or access to systems) to collect and analyse statistical and other information relating to the implementation of the right of access to adequate housing and children's rights to shelter?*



*If your answer is yes, please:*

- *describe this system;*
- *state what information is collected,*
- *state whether or not this information is broken down according to race, gender, geographical location (especially according to rural and urban areas) and income level;*
- *state whether this information is independently verified and how this is done; and*
- *state how the public can get access to this information.*

The Department is in the process of developing the Nomvula - Housing and Urbanisation Information System (HUIS). The vision for Nomvula is to introduce a system that will enable the housing family to have national management information that will allow regional and national comparisons and will assist with the design and targeting of housing and urban development policy. Nomvula is based on data warehousing technology, which will allow the Department to extract raw data from multiple sources, convert the data into meaningful information, and thereby provide users with easy access to housing and urbanisation information. The data for the warehouse will be sourced from over 20 organisations including the Department's own Housing Subsidy System which is administered at Provincial level, the Central Statistical Service, Mortgage Indemnity Fund (MIF), National Housing Finance Corporation (NHFC) Property and Loan Application Network (PLANET), National Homebuilders Registration Council (NHBRC) and National Urban Reconstruction and Housing Agency (NURCHA).

The first phase of Nomvula is now in the user acceptance phase, and is expected to be completed by the end of February 1998. At this stage information is made available via an Intranet.

Nomvula has three principle components: Housing Information, Human Settlement Information and Basic Demographic Information.

- Housing Information will cover both Economic Information (including macro-economic information, sector specific information and funds allocations) and Management Information (including Housing Subsidy Information, project performance and housing standards).
- Human Settlement Information focuses on Infrastructure, Land and the Environment. This section will also cover the Urban Indicators Programme. A pilot study has already been carried out to develop key indicators for tracking the success of the Department's policies. This initiative is in line with the UNCHS Global Urban Observatory Programme.
- Demographic information is common to the first two components and will contain only that data necessary for the development of housing and urbanisation policy and strategy development.

Once Nomvula is well established on the Intranet, it will be placed on the World Wide Web for public access. The users of the system have been identified as:

- The Department of Housing

- Other National Government Departments
- Provincial Housing Departments and Housing Boards
- Major utilities (ESKOM, Telkom and the Water Boards etc)
- Financial Institutions
- Emerging entrepreneurs in the building industry
- Property Developers and Builders
- Local Government
- Research Organisations such as the CSIR and universities
- Community organisations
- Aid organisations
- United Nations
- Political Parties

#### 4. Vulnerable groups

*"What groups have been identified by your department as more vulnerable than others and which need special attention?"*

The following groups have been identified as more vulnerable than others and need special attention:

The poor;  
 The disabled;  
 Female headed households, children and the youth;  
 The elderly;  
 Farm workers; and  
 Rural households

#### 5. The obligation to respect these rights

**a) What current laws and other measures have the effect of denying or depriving people of their housing rights or denying or depriving children of their right to shelter?**

None that we are aware of except to say that one of the measures set out in the Implementation Manual, provides that qualifying beneficiaries in terms of the Housing Subsidy Scheme should obtain a secure right to occupy, use or own a residential property on a permanent basis in terms of a tenure which can be registered. As far as we are aware, investigations are afoot to determine a basis upon which subsidies will be made available in respect of traditional tenure and rural housing (including farm worker housing).

**b. What current laws and other measures unfairly discriminate against any groups of people (particularly the identified vulnerable groups) or children and their housing rights and children's rights to shelter?**

None that we are aware of.

**c) What steps have been taken by your department to get rid of any past laws and other measures, which impacted on people's housing rights?**

Discriminatory legislation has been repealed by the Housing Act 107 of 1997.

**d. What steps have been taken to get rid of past laws and other measures, which impacted on children's rights to shelter?**

Outside our sphere of jurisdiction. See Question i.b.

**e. What has been done to remedy the effects of these past laws and other measures which impacted on people's housing rights and children's rights to shelter?**

The Department has enacted new legislation and repealed discriminatory legislation. It has made subsidies available (in various ways as set out in the Implementation Manual) to the poor to enable them to access housing. It has set up various bodies to enable persons to access finance e.g. National Housing Finance Corporation, Rural Housing Loan Fund. Finally, it has set up the Peoples Housing Partnership Process to enable people on the ground to be actively involved in obtaining their own homes.

6. The obligation to protect these rights

**a) What laws and other measures protect people against arbitrary eviction or demolition of their homes?**

The Department is involved in the process of drafting legislation called Prevention of Unlawful Occupation of Land Act Bill. This will provide protection against evictions without an order of court and demolition of people's homes without an order of court. In a normal scenario, the civil courts do provide protection against landlords who attempt to evict tenants without an order of court.

**b. "What laws and other measures protect people (including children) against unfair discrimination in the allocation and availability of housing in the private sector?"**

The Mortgage Indemnity Fund ensured that Banks were not discouraged from making available home loans to poorer homebuyers because such risks were insured by the Fund.

**c. *What laws and other measures protect people (including children) against any other practices in the private sector which have a negative effect on their rights to shelter and of access to adequate housing?***

The Department is in the process of drafting the National Homebuilders Registration Council Bill which Council will ensure that people building homes will be protected in the event of defects and other problems arising in their homes caused through the negligence of the builder.

## 7. The obligation to promote and fulfil these rights

### **a. What percentage of your department's budget is set aside to promote and fulfil the rights to shelter and of access to adequate housing? How much of this budget will have been spent by the end of the 1997-8 financial year?**

This information is not available at this time. It will be forwarded to you as soon as a response is received from the Directorate of Finance.

### **b. What has your department done to inform and educate all South Africans, and particularly the identified vulnerable groups, about their housing rights?**

The Department of Housing has an ongoing communication campaign, under the Directorate of Communications, which is aimed at informing the public about the National Housing Programme.

Through Housing Support Centres, which are being established within communities that are involved in the Peoples' Housing Process, the Department hopes to provide more targeted and detailed information to a specific audience.

The Department is also in the process of establishing a website, which will provide general information on the work of the Department, as well as details on the Housing Subsidy System and an opportunity to complete and submit a subsidy application online.

### **c. What has your department done to inform and educate all children about their right to shelter?**

The Department is in the process of putting mechanisms in place that will ensure that the rights to housing and related obligations are included in the school curriculum from primary school level. However, this option is still under discussion and the practicalities have not been finalised.

### **d. What is your department's understanding of the core minimum obligations imposed on it by the housing rights? How are these understandings reflected in laws and other measures adopted by your department?**

The new Housing Act, 1997 (Act No. 107 of 1997) will come into effect on 1 April 1998 as indicated. This Act will repeal all previously instituted housing legislation, which was by and large based on discriminatory principles.

The Act in Part 1, section 2(1) provides that the Government must give priority to the needs of the poor in respect of housing development and promote:

- The meeting of the special housing needs, including but not limited to, the needs of the disabled;
- The housing needs of marginalised women and other groups;

- Encouragement and support for individuals and communities in their efforts to fulfil their own housing needs by assisting them in accessing land, services and technical assistance in a way that will realise in the transfer of skills to empowerment of the community;

**e. What minimum requirements (such as national norms and minimum standards) for making sure the housing rights and children's rights to shelter are applied in a uniform way across the country have been set by your department? "What laws and other measures are these included in?"**

The provisions as set out in the White Paper on Housing, our Housing Act 107 of 1997 and the Implementation Manual. A national housing code containing national housing policy will also be published in terms of the Housing Act 107 of 1997. This housing code will detail national norms and minimum standards for housing in SA.

**f. Please give a brief description of any current law and other measures, which have been adopted to improve or advance the right of access to adequate housing. "Which of these deal with people who have been unfairly discriminated against in the past and which deal with the identified vulnerable groups?"**

The existing housing subsidy scheme has been developed on non-discriminatory principles. Female-headed households have been accommodated and specific policy guidelines in regard to rural housing development and farm worker housing needs have been developed but not yet finalised.

In regard to the special housing needs of the disabled, the Department in collaboration with the South African Disability Institute developed policy guidelines for the variation of the housing subsidy amount to cater for the special housing needs of the disabled. A copy of the guidelines is attached. This policy will be finalised early in February 1998.

**g. Please give a brief description of any current laws and other measures which have been adopted to improve or advance the right of children to shelter. Which of these deal with children who have been unfairly discriminated against in the past?**

See question 1 b

**h. Have any new laws and other measures (such as budget cuts and scaling down) been introduced in the past year which have a negative impact on the progressive realisation of the right of access to adequate housing, or which have a negative impact on the rights of children to shelter?**

Response to be provided (See question 7a)

- i) What structures or mechanisms has your department put in place to:**
- *review laws and other measures which relate to this right?*
  - *monitor whether laws and other measures were implemented?*

- *work with other departments, levels of government or sectors of society to make sure everyone, and particularly the identified vulnerable groups, gets access to adequate housing?*
- *work with other departments, levels of government or sectors of society to make sure children get shelter?*
- *make sure the principles of equality and non-discrimination in section 9 (2) of the constitution are integrated into all department programmes relating to this right?*
- *consult and involve civil society and people needing access to adequate housing (particularly the identified vulnerable groups)?*

The new South African Housing Development Board established in terms of the Housing Act 107 of 1997 is charged with monitoring the implementation of national housing policy.

The Department is also in the process of developing an Urban Indicators Programme. A pilot study has already been carried out to develop key indicators for tracking the success of the Department's policies. This initiative is in line with the UNCHS Global Urban Observatory Programme and the requirements of the Habitat Agenda.

## 8. Future goals

**a. What laws and other measures will your department put in place to respect, protect, promote and fulfil the housing rights and the rights of children to shelter? Please give full details of these, including:**

- *which of these are aimed at the identified vulnerable groups.*
- *goals and targets set by your department;*
- *timelines for implementing these;*
- *benchmarks or indicators you will use to chart progress and evaluate these to see whether they are successful; and*
- *structures or mechanisms you will use to chart progress and evaluate plans.*

In terms of the Department's priorities the following initiatives will be embarked upon:

i). The implementation of the new Housing Act, 1997 which inter alia entails the development of norms and standards in respect of permanent residential structures, the development of a national programme to phase out all previously instituted housing assistance measures and to publish a housing code;

ii). Finalisation of the Rural Subsidy policy;

iii). Finalise the Peoples Housing Process policy;

iv). Development of the housing subsidy policy to accommodate and refine various other housing assistance measures such as Bridging Finance to developers, the variation of the subsidy amount to cater for the special needs of the disabled, purchase

of land by provincial governments with subsidy funding, new rental assistance measures and the redevelopment of public sector hostels.

v). To undertake a comprehensive capacity building programme in respect of provincial governments and municipalities to enable them to effectively exercise their powers and perform their duties in respect of housing developments as contemplated in the new Housing Act, 1997;

Target dates for implementation

The target dates are the following:

The implementation of the Housing Act, 1997- 1 April 1998

Finalisation of the Rural Housing Subsidy policy- May 1998;

Finalisation of the Peoples Housing Process- April 1998;

Development of policy in respect of bridging finance to developers- May 1998;

Variation of the subsidy amount to cater for the special needs of the disabled- February 1998;

Redevelopment of public sector hostels policy refinement- August 1998;

The capacity building programme- continuous; and

Other assistance measures- continuous.

The new Housing Act, 1997 also provides for the clear definition of roles and responsibilities especially in regard to the roles and responsibilities of provincial governments and municipalities. As implementers of the national housing programmes these structures are required to report to the Department on progress, pilot project results and problems with existing policies and strategies that need to be addressed.

Furthermore, the Department is in the process to finalise a national housing data and information bank that will assist in the evaluation of the programmes instituted. The new Housing Act, 1997 also provides for the continuation of the nine Provincial Housing Boards as well as a mechanism in terms of which provincial governments could appoint new housing development boards to administer national and provincial housing programmes. These structures will inter alia evaluate plans and consider applications for housing subsidy funding. It is furthermore possible for municipalities to apply to the MEC for Housing to be accredited for purposes of administering one or more national housing programmes.

**b. "What will your department do to get rid of existing laws and other measures which make it difficult for people to get access to housing or for children to get shelter?"**

See question 5c.

9. General

*Please tell us about anything which your department has done or is planning to do to make sure the right of access to adequate housing (and the right of not been dealt with in your answer to these questions.*

## 2 HEALTH CARE

### National Department of Health

#### 1. Past Overview

##### a. Impact of past discriminatory laws and measures

Discriminatory laws have contributed to poverty of disadvantaged groups resulting in the lowering of the nutritional and health status of women and children. Their right to health care was violated. Due to the curative orientated health services of the past primary health care was not properly implemented. Clinics concentrated on curative and limited preventative services e.g. immunisation with limited attention to health development. Health services were fragmented because of the health services that were provided along ethnic and racial groupings, with differential funding. Women and children had limited access to health services especially in the rural areas where there are few ill-equipped hospitals. Many rural communities did not have clinics. People were not given information about health care and developmental issues, or where clinics are situated and appropriate health services were provided. Farm workers have also been neglected, with only emergency services being available to them, and only those that catered for their race group.

Many women in the disadvantaged groups died from septic abortions due to the discriminatory nature of the Abortion and Sterilisation Act, 1975 (Act No 2 of 1975). This Act was not accessible to poor and rural women most in need of termination of pregnancy services, e.g. rape victims, failed contraception. This resulted in back street abortions and a high mortality rate. The laws of forced removals contributed towards increased poverty by limiting access to productive land, thus reducing food supply and lowering the health and nutritional status of the community.

Developmentally oriented health workers were haunted out of the areas; African doctors were not encouraged to work in the rural areas, as Caucasian doctors were encouraged through the payment of rural allowances and preferential promotions. This limited access to the poor and needy, as language barriers necessarily had to be circumvented, and not always successfully. Genetic services, rehabilitation services, as well as accommodation were limited to the urban areas. Rural women are often expected to stay at home to look after their disabled children due to the inadequate referral for appropriate treatment and to social services. Mental health services were non-existent.

Statistics on crucial events for people in the previous homelands and independent states were not collected, with the result that no interventions were instituted, for example, the typhoid epidemic, and the high maternal and infant mortality rate.

The previous government published two sets of regulations, which directly restricted the free movement, and social interaction of People living with AIDS (PLWA's).



These were:

Admission of Persons to the Republic Act (No.59 of 1972) which in terms of the regulations under this Act allowed immigration officials to detain or deport immigrants, visitors or migrant labourers who were HIV positive.

Regulations relating to Communicable Diseases and the Notification of Notifiable Medical Conditions (30 October 1987 published in Gazette No. R2438) which were promulgated under the Health Act, 1977 (Act No. 63 of 1977).

These regulations allowed for certain coercive steps to be taken against people with AIDS including being placed in quarantine and excluded from teaching institutions.

Furthermore prior to 1994, other pieces of legislation were put in place or were used to indirectly penalise PLWA's:

- The Sexual Offences Act, 1957 (Act No.23 of 1957) which criminalises homosexuality and commercial sex work. This marginalised these groups and made it difficult for them to access public health services;
- The lack of legal protection of women and particularly the supremacy of customary law in some parts of the country contributed to the vulnerability of women to the epidemic. Without legal protection women were unable to make decisions which protected and promoted their health; and
- Discriminatory practices within the private sector such as pre-employment HIV testing and the exclusion of PLWAs from life assurance and medical aids were indirectly condoned as no legal protection against these practices were introduced. This further alienated PLWAs and excluded them from the private health care system-

The travel restrictions were repealed by the Aliens Control Act (No. 96 of 1991). The Department is amending the Communicable Disease Regulations so that they will no longer allow for coercive measures to be taken against people with AIDS.

The impact of these laws and measures both direct and indirect has been to marginalise vulnerable groups from the public health sector. Research has shown that fear of discrimination is a significant impediment to people coming forward for counseling, testing, support and treatment. By discouraging the groups that are most vulnerable to infection from using the public health facilities the spiral of new infections simply continues.

Further detail on the above is contained both within the National AIDS Plan and Legal and Human Rights Situational Analysis

b. Impact of past laws on children's right to basic health care

Children being minors depended on their parents to access health care. Poor children often presented late in the disease process, with resultant mortality and morbidity. The journey to the health service would cost money, as well as the consultation itself.

Many of these children would die because of preventable causes, like malnutrition, acute respiratory infections, and diarrhea diseases. Pediatricians in the rural areas were unheard of; obstetricians were scarce. This also affects children with HIV and AIDS, though there are no legal provisions which directly discriminated against them. However many exclusionary policies particularly in the welfare sector have until recently excluded infected children from places of safety, children's homes and day care centres. This impacts on their right to access to care in a broad sense. Furthermore many health care institutions have had policies which deny certain treatments to infected children. The unequal access has interfered with the right of the disabled to adequate health care. The mismanagement of birth defects leads to a poor quality of life for the disabled child.

Some homelands had policies that denied women access to contraception technology. This resulted in many women resorting to illegal termination of pregnancies, or used over the counter medicines, such as quinine or chloroquine as abortion medicines. Clinics were not supported by the nearest hospital if that hospital was not of the same homeland. This resulted in unnecessary death or injury to children. The language policies also meant that other ethnic or race groups were not catered for in the promotion or treatment of diseases and ailments, e.g. health campaigns.

c. **Effect of Consolidation of Departments or Legislation on the right of Access to Health Care and a Child's right to Basic Health Care Services**

With the consolidation of the 'homelands' the backlog in primary health care services became more apparent. Most of these rural areas had no clinic facilities and women and children were deprived of health care. Inadequate staffing has become more widespread, as the available staff had to be shared. There has also been a movement towards the cities - thus depriving the rural areas of skilled workers and progressive people.

Mental health in the country has become even more threatened. With the consolidation of departments from 'homelands' the Department of Health has inherited even more of these deprived facilities (some homelands did not even have any), which increases the population to be served by the Department of Health. Cancer prevention strategies have not been implemented in the 'homeland' areas.

There has not been a specific impact with regard to the rights of PLWAs except that funding is being allocated to provinces with the intention of rectifying past imbalances.

## **2. The Department of Health's understanding of its Constitutional obligations**

a. **“Respect”**

The Department understands that it shall not deprive people of the right to access to health services. The free health care to pregnant and lactating women and to children under the age of 6 years, the access to free primary health care, and the integrated and

primary school nutrition programmes are all examples of the Department's understanding of this respect, as well as to protect that right.

Protection means having mechanisms in place that guards against the erosion of those rights, for example, that shortage of staff should not mean that people have no access, and that all factors that may possibly threaten these rights shall be anticipated and contingency measures are instituted when necessary.

Promotion of the rights is done through the dissemination of information through campaigns and the media, and through community liaison officers, particularly in the area of HIV/AIDS. It means making people aware of these rights, as well as lobbying for the rights to be respected. The Department has also a project "Faces", where people living with AIDS and HIV are employed within the Department to promote the rights of PLWAS.

Fulfilling the rights means that conditions are made favourable for the person to claim and exercise those rights. This may be in the form of legislation, or environment, for example, having friendly health workers who are supportive of a parent who brings a child to the health facility, and not be made to feel inferior, and that drugs are available for the treatment of that condition, and the staff is trained to manage the condition.

b. "Access to" means that the service is within reasonable distance from the client, the availability of such a service is such that the client can utilise it without fear or prejudice, and that information is available for where and when the service is available. It means that monetary hurdles should not be placed for basic or emergency care.

c. "Health care services" refers to all the services that render preventive, curative and rehabilitative care, both mental and physical, and are provided by professionals trained according to the requirements of the statutory bodies for health workers in South Africa.

d. "Reproductive health care" means health care to promote and protect reproductive well-being, so that couples can enjoy reproductive rights, and can make informed choices on whether and when to reproduce, and how often to do so. It includes the decision on whether to continue with pregnancy, in cases of such not having been planned, or when conditions change. It also includes the period before and after the reproductive period, but involving the reproductive system. The care includes information availability and accessibility.

e. "Emergency medical treatment" is treatment, medical or surgical, that is necessary to save life or limb, necessitated by an unforeseen incident.

f. "no one may be refused" emergency medical treatment, means that whenever the need arises for emergency treatment, the health facility or service that is nearest should provide the necessary treatment, irrespective of the social or economic status of the person needing such treatment.

g. "progressive realisation of this right" means that the rights may not be achievable within the immediate future, but that efforts should be made to improve the situation until that right is realised.

h. "basic health care services" means health care services that provide the care as contained within the primary health care package. This includes promotion and health education.

## **EXPLANATORY NOTES.**

**The Constitution (27) states that:**

*Everyone has the right to have access to-*

- (1) *(a) health care services, including reproductive health care;*  
*(b) sufficient food and water, and*  
*(c) Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance*

*(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights*

*(3) No one may be refused emergency medical treatment*

**(1) (a) Everyone has the right to have access to health care services, including reproductive health care (Constitution - 27).**

The Department of Health understands certain key words and phrases in section 27 as follows:

Health care services including reproductive health care should be available and accessible to women and children. This implies that services and information on health and reproductive health should be available to the target audience (women and children as the main group, as well as men, and also youth and adolescents). Health care services must be improved to ensure that the family health status be improved. It is therefore important that primary health care as a developmental approach is implemented to enable people to participate in the solutions of their health problems. Health services must be provided on an equitable basis and should be accessible especially to vulnerable groups like women and children. Women must be empowered to know their rights and any discrimination must be eliminated. Violence and discrimination against women and children must be reduced by providing appropriate health promotion and health support services.

In ensuring that the rights of PLWAs are respected and protected the Directorate: HIV/AIDS and STD's are working towards creating an enabling environment which ensures that adults and children with HIV or AIDS are not discriminated against. This is being done with the assistance of legal consultants and the South African Law Commission's Project Committee on HIV/AIDS who are reviewing legislation, drafting new policies, guidelines and codes of conduct so as to ensure that rights are protected. The consultants are further undertaking with the assistance of NGOs in the field training programmes on AIDS and the law so as to develop a culture of

understanding with regard to HIV/AIDS as a human rights issue. Several other initiatives with both the life assurance industry and business are also underway which aim at further protecting health rights in these sectors.

The Directorate: HIV/AIDS has also taken the following steps with regard to promoting its constitutional obligations:

- The National AIDS Plan is based upon principle of non-discrimination and this principle has been integrated into all its work;
- The launching of the mass media 'Beyond Awareness Campaign' which aims at empowering individuals to protect themselves against infection;
- A law and human rights programme has been created to enhance and develop the capacity of the Directorate to fulfil its constitutional obligations; and
- The following policies are being developed to enhance the rights of health care users: a national testing and informed consent policy; a code of conduct for health care workers; a protocol on care after sexual abuse; and guidelines for health care workers following occupational exposure to HIV.

(b) sufficient food and water, and social security including if they are unable to support themselves and their dependants, appropriate realisation of each of these rights

The foundation of Government's commitment to nutrition is laid in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996). The Bill of Rights, which is contained in Chapter 2 of the constitution guarantees the rights of all people of South Africa to health care, food, water and social security. In particular, the right of every child to basic nutrition is confirmed. The eradication of malnutrition is a necessary condition for the realisation of children's nutritional rights. Directorate: Nutrition oversees the nutritional needs of people. The Department of Health collaborates with the Department of Agriculture, to help families to have sustainable food supply. Two provinces are implementing parasite eradication programmes among children, so as not to feed parasites and children, with parasites often winning, and children suffering from anemia and stunted growth. The Department also has programmes to address the environment, as well as the sanitation needs of the country, through the Directorate: Environmental Health.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights

The Department of Health signed the Convention of the Rights of the Child and a National Plan of Action have been implemented. Article 28, which deals with the rights of children, states the following with regard to nutrition:

- (1) "Every child has the right-
- c) to basic nutrition, shelter, basic health care services;"

The interpretation of the Department regarding health care services is that everyone is entitled to preventative and creative nutrition services as well as household food security. The interpretation of the Department regarding nutritional progressive realisation of rights is that nutrition strategies should be continuously reviewed, and

adjusted in order to improve nutritional services. This applies to all other spheres of health and development.

The Department does not have a separate interpretation of "health care services" for HIV/AIDS. However it views health care services as being very broad so as to include psycho-social care (such as HIV counseling), preventative care (such as the provision of barrier methods and information on how to reduce personal risk) and a recognition of alternative forms of care (such as the integration of traditional healers into the formal health care system). Women need to be informed of their reproductive rights and the impact of possible HIV infection on them and any children so as to fully exercise their constitutional rights.

(c) Expectant and Lactating Mothers are entitled to nutritional services such as counseling of HIV/AIDS and Breastfeeding, balanced diets, Protein Energy and Malnutrition services, etc. They are entitled to free access to health care.

(d) Services aimed at improving severe malnutrition and related diseases. Everybody must have access to nutrition services and household food security.

### **3. Information gathering**

a. The Department does not have special systems for collecting and analysing statistical information relating to health rights and children's rights to basic health care per se, but has systems that collect the impact of the access to these. The NPA has a special monitoring group that is developing indicators for gathering information on the rights of children to protection, security and health and social development.

The Department of Health has a Chief Directorate: Health Information Evaluation and Research, that is responsible for gathering all relevant information on morbidity and mortality, and indicators of the quality of health care, as well as the resources available to make health rights a reality. It collaborates with Department of Home Affairs in Births and Deaths registration. Information is collected, among others, on the following:

- Nutritional status of children - anemia, growth monitoring.
- Number of babies, infants and children born normal and injured.
- Number of infants and children dying from various conditions, or being seen afflicted with certain ailments.
- Number of immunisations or coverage.
- Number of women attending antenatal clinic, having operative deliveries, and those dying from the process of pregnancy and childbirth (maternal mortality notification).
- Number of terminations of pregnancy, as well as the reasons for the termination as required by the Choice on Termination of Pregnancy Act, 1996.
- Number of people afflicted by notifiable conditions such as tuberculosis, measles, typhoid, and malaria. These conditions, particularly tuberculosis, are a measure of socio-economic conditions, as well as access to health care services.

The information is broken down according to gender, race, age and geographic location, but not income level.

The information is independently verified through occasional surveys.

The information is published annually. The various provinces have their information which is more readily available in some provinces. The National Health Information System of South Africa (NHISA) is currently strengthening the information system, so that all provinces will be linked for easy reference.

The Department of Health: Human Genetics sub-directorate records inherited and congenital conditions assisted out by genetic sisters in all the provinces. A new simple form is being designed for recording of birth defects in the immediate post birth period (excluding still births, as these are often not appropriately recorded). This form is designed to be used in conjunction with the new birth registration form to provide a more detailed description of various conditions.

This Directorate is undertaking the annual, national HIV survey on women attending antenatal clinics. This survey provides the most comprehensive data on the prevalence of the epidemic in South Africa and is widely distributed to all stakeholders. Furthermore a decision has been taken to make AIDS a notifiable medical condition during 1998. This will make the reporting of all diagnosis of AIDS and AIDS deaths reportable which will provide the Department with valuable data on the progression of the epidemic. As the confidentiality of the reported information will be protected the public will only be able to gain access to the data collated in terms of the notification process.

The Department of Health is in the process of developing a surveillance system to collect and to investigate maternal deaths. The notification of maternal deaths has been implemented since 1 December 1997. A National Committee for the Confidential Enquiry into Maternal Deaths was established during 1996.

Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996) also collects data, so that areas that need strengthening of reproductive health (particularly contraception services) are identified.

A system has been developed to obtain the maternal deaths from the nine provinces to enable the National Committee for the Confidential Enquiry into Maternal Deaths to conduct a confidential enquiry on the causes of the maternal deaths that occur.

Mental Health information is gathered by annual reports and annual plans as well as research results and surveys.

(b) Plans to develop information system on health rights and the rights of children to basic health care services

The Directorate HIV/AIDS has through its NGO funds funded, in the 1998/99 funding cycle, the AIDS Legal Network to develop a national means to monitor human rights abuses against PLWAs. The Directorate will use this information to plan future legal and human rights programmes implemented.

#### **4. Vulnerable groups**

The Department of Health identified women and children in general, rural people, People living with HIV/AIDS and people in informal settlements as vulnerable groups.

Rural women with inadequate nutrition, lack of information on primary prevention, lack of access to social welfare facilities. Children born to women with HIV and syphilis. Women who use alcohol especially while pregnant.

Regarding Nutrition the following groups have been identified as vulnerable:

**Children 0 - 2 years of age**

**Children 2 - 5 years of age**

**Pregnant and Lactating Women**

**Children 6 - 13 years of age**

The Directorate: HIV/AIDS and STD's has recognised that there are several groups who are particularly vulnerable to the epidemic. The NACOSA National Aids Plan who has been adopted by the Department of Health as its National AIDS plan recognises the following vulnerable groups:

- migrant labourers;
- families whose lives have been disrupted by forced removals, political violence, and the migratory system;
- Women;
- gay people;
- the youth who have been excluded from the formal education system; and
- people living in poor socio-economic circumstances
- commercial sex workers.

#### **5. The obligation to "respect" these rights**

a. The Department of Health respects the rights of women and children as well as the people living with HIV/AIDS. The Constitution and the National Disability Strategy gives government departments guidelines for making provision for disabled people within their activities. There are however, no binding regulations that compel health services to adhere to the non-discriminatory requirements adopted by the Department.

b. The lack of National Guidelines covering ethical guidelines in HIV/AIDS drug trials has the effect of denying or depriving people their health rights.

Customary law continues to reinforce the subordinate position of women, impacting negatively on the ability of women to access health care services. The lack of national policies dealing with, inter alia, informed consent before HIV testing, protection of health care workers following occupational exposure to HIV and the care and treatment of PLWAs depriving people of their health rights.



The exclusion of PLWAs from most medical aid schemes within the private sector excluding them from access to private health care. HIV negativity as a criterion for many life assurance schemes thus denying PLWAs from protecting themselves against future disability. One of the key findings of the National HIV/AIDS Review is that although discriminatory attitudes and practices of many health care workers effectively excluded PLWAs from the formal health care system.

The current Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996), while it improves access to safe termination of pregnancy services, does not compel health workers to provide the service. The rural women are thus still discriminated against.

c. Steps that have been taken to get rid of past laws and other measures which impacted on the individuals right to health care services

The Mental Health Act and the Sterilisation part of the old Abortion and Sterilisation Act (Act No 2 of 1975) are under revision and presently in their early drafts based on inputs from different stake holders. The Sterilisation and Abortion Act, 1975 (Act No.2 of 1975) was repealed because it was not accessible to all women especially those in disadvantaged areas.

The Choice on Termination of Pregnancy Act, 1996 (Act No 92 of 1996) was implemented on 01 February 1997 to reduce maternal mortality due to back street abortions and to make health services more accessible to disadvantaged women to enable them to make their own choices regarding their health problems.

The South African Law Commission's *First Interim Report on Aspects of the Law Relating to AIDS* has been adopted by the Department and will be implemented during 1998. This report covers introducing regulations to ensure that only disposable syringes and needles are used in the health care setting, that universal infection control measures are implemented in every workplace, that all condoms sold must bear and SABS mark of approval, that amendments be made to the regulations relating to Communicable Diseases and the Notification of Notifiable Medical Conditions and that a national policy on HIV testing and informed consent be adopted.

Research is being undertaken into the decriminalisation of sex work so as to enable the Department to work with the Department of Justice in this regard.

NGO funding is made available to organisations working on legal and human rights issues. The introduction of the Essential Drugs List in April 1996 which has prioritise drugs for the treatment and care of STD's and the passing of the Medicine and Related Substance Control Amendment Act and the Pharmacy Amendment Act during 1997 which allow for the parallel importing of drugs and for the promotion of cheaper generic medicine. The development of a new format for the death certificate which will protect a deceased person's privacy.

**d. Steps that have been taken to get rid of past laws and other measures which impacted on children's rights to health care services**

All of the above would apply equally to children. The provision of free health care to all children under the age of 6 years, and to pregnant and lactating mothers has improved access to these children, who are at their most vulnerable stage of life.

**e. Steps taken to remedy the effect of past laws**

The Directorate: Mental Health is revising the Acts that are in place.

The Directorate: HIV/AIDS and STD's has undertaken a para-legal training programme to educate service providers, other government departments, communities and PLWAs on their rights as a way of rectifying the past history of discrimination.

The Directorate: Maternal, Child and Women's Health held workshops on Value Clarification to ensure that there will be no discrimination with the implementation of the Choice on Termination of Pregnancy which allows women and minors to request a termination of pregnancy. Free health services for pregnant women and children under six years of age are implemented from July 1995 to ensure that women and children are not deprived of any health services.

The Integrated Nutrition Programme, and the Primary School Nutrition Programme, together with the Community Based Nutrition Programme are all aimed at remedying the effects of discrimination. The training of health workers to be more competent at looking after children also is aimed at this.

The Department of Health is the principal for the co-ordination of the implementation of the National Plan of Action for children, in pursuance of the objectives of the United Nations Convention of the Rights of the Child.

## **6. The obligation to protect these rights**

**a. What laws and other measures protect people against medical experiments without their informed consent**

The foundation of Government's commitment to the health of women and children is laid in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996). The Bill of Rights, which is contained in Chapter 2 of the constitution, guarantees the rights of all people of South Africa to health care, food, water and social security. In particular, the right of every child to health is confirmed. The eradication of poor health status is a necessary condition for the realisation of children's rights.

The National Health Bill, in its 10th draft, requires that informed consent is necessary before any intervention is implemented. This includes experiments and research. Ethics Committees have to be established in each health service region or district to ensure that the rights of people are not violated.

National Disability Strategy and the Convention on the Rights of the Child also prohibit these practices and the Department of Health adhere to these documents. The Department is drafting policy guidelines for the management and prevention of birth defects, inherited disorders and disabilities. National guidelines will be distributed at clinics to assist the health care workers in the management and referral of genetic conditions.

The Directorate HIV/AIDS and STD's is in the process of working with the Medicines Control Council and other stakeholders in developing ethical guidelines to protect patient rights during HIV/AIDS drug trials. Once these guidelines have been developed they will form the minimum standard to ethical conduct in any trial relating to the development of new HIV/AIDS drugs, treatments or vaccines. These guidelines will further enhance the common law rights to informed consent.

**b Laws and other measures which protect PLWA against discrimination in the private sector**

There is no general HIV/AIDS anti-discrimination statute however several existing pieces of legislation protect the rights of PLWAs. Amongst these are:

- the Labour Relations Act (no 66 of 1995)
- draft Employment Equity Bill
- South African Schools Act (no 84 of 1996)
- draft Correctional Services Bill

Furthermore guidelines produced by the South African Interim Medical and Dental Council entitled the *Management of patients with HIV/AIDS* set out ethical guidelines for health care workers. The Department is working with the life assurance industry to develop a model of HIV testing within the process of applying for life assurance which does not infringe on individual rights.

**c. No laws are currently in place to ensure that no one is refused emergency medical treatment.**

**d. Laws and other measures to protect people against discrimination in private medical care**

Currently a national HIV testing and informed consent policy is being developed and will be promulgated in terms of s 2 of the National Policy for Health Act (no 116 of 1990). This policy will apply to both public and private institutions thus protecting people against being tested for HIV without their consent. No laws currently exist to protect people against discrimination in the availability of health care services in the private sector.

**e. No laws exist for this purpose.**

## **7. The obligation to promote and fulfil these health rights**

a. The Provincial Departments of Health are the implementing agencies for most of the policies. However, the Department directs R18 million to promotion of rights to nutritional services. The policy for Free Health Services for pregnant women and children under six years of age were implemented from July 1994. The Department has also budgeted R 1 00 000 for the 1998/99 financial year for the revision of the Mental Act. The process of informing and getting input on the policy and management guidelines will take place during 1998. The process for the drafting of the New Health Bill amounts to an estimated R500 000. All the work that the Department is engaged in is to promote access to equitable health care.

### **b. Steps taken to inform and educate South Africans about their health rights**

The Department has a Health Promotion and Communication directorate that designs information packages for the public. Health campaigns are held throughout the year on particular days to highlight certain areas of concern, for example, AIDS Day, National Women's Day, and Population Day. The Department of Health contributed funds for posters and pamphlets for the 16 Days of Activism Campaign on violence against women held in 1997.

The Department of Health is committed to ensure that women be empowered to understand and know their rights. A National Committee for the Confidential Enquiry into Maternal Deaths was established. The Notification of Maternal Deaths has been implemented since 1 December 1997.

The Choice on Termination of Pregnancy Act, 1996 (Act No 92 of 1996) came into effect on 01 February 1997. The Sterilisation and Abortion Act, 1975 (Act No. 2 of 1975) was repealed. The Department of Health collaborates with other government departments' e.g., Welfare, Education, Justice, Correctional Services as well as Non-Governmental Organisations on violence against women. The aim is to co-ordinate information dissemination to the public through campaigns, conferences and media briefings, and to respond to this violence. It also includes the empowerment of victims through mental health promotion.

The old Mental Health Acts will be repealed once the new ones have been finalised.

### **Steps taken to inform children about their rights to basic health care services**

The Department of Health is part of the Children and Broadcasting Forum, looking at the use of media for development of children, and promoting their rights. It also co-ordinates the activities of the National Plan of Action for Children, thus promoting the rights of children within the health sector, as well as within the broader society, by encouraging collaboration with non-governmental organisations. Television, radio, billboards, pamphlets, posters and newspapers are utilised for disseminating information.

**d. The Department's understanding of its core minimum obligations in terms of the health rights.**

The Department views the minimum obligation regarding health and nutrition as is contained in Chapter 2 of the Bill of Rights of the Constitution, as well as the Codex Alimentarius Standards, and the Convention on the Rights of the Child. The Department of Health believes that the constitutional rights confer on every person the right to be treated equally and without discrimination. Access must be improved so that health care is within reasonable reach for all. In the HIV/AIDS context this would mean that PLWAs are entitled to be treated in the same manner as any other person with a life threatening illness.

**e. Measures taken to ensure that health rights are applied equally across the country**

The Department of Health implemented Free Health Services for Pregnant women and children under the age of six years old. Termination of Pregnancy is also available at State Hospitals and designated clinics, free of charge. This is to ensure that no women or children are deprived of health care because of socio-economic pressures. HIV/AIDS and STD's endeavors in all its policy work to ensure that national minimal standards are developed so as to ensure uniformity across the country. With regard to nutrition, the Codex Alimentarius Standards are also adhered to.

**f. Brief description of any current law or other measure which improve or advance health rights**

Several initiatives, many of which have been set out above, are in the process of being developed and will contribute towards developing individual rights to health care. Some of these are; work by the South African Law Commission on a prohibition on pre-employment HIV testing, the placing of the draft National Health Bill before parliament and the draft Employment Equity Bill.

**g. Structures or mechanisms which have been put in place to promote rights**

Consultants were appointed to provide a human rights programme for the Directorate: HIV/AIDS. Consultants are being appointed to develop policies and operational guidelines.

The Department collaborates with the Department of Welfare in assisting that department to develop national policy on HIV/AIDS. Support is being provided to several research initiatives which will inform future health care policy decisions in the department.

The Department adopted proposals by the South African Law Commission relating to the promulgation of regulations relating to the use and safe disposal of disposable syringes and needles, implementing universal precautions in all workplaces, requiring all condoms to carry an SABS mark of approval and the adoption of a national HIV testing and informed consent policy. The adoption of a new format for death certificates which protects an individuals right to privacy. The Department also

involved NGOs and other departments in the promotion of children's rights through the National Plan of Action for Children, in response to the Convention on the Rights of the Child. Value clarification workshops have been held, to promote the rights of women in terms of the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996). It also collaborates with the Departments of welfare, Safety and Security, and Justice, to combat the sexual exploitation of children.

## **8. Future goals**

a. The future goals for the Department in the Reproductive health area is to involve men in the promotion of healthy lifestyles, particularly in the struggle against HIV/AIDS, improving access to fertility control services, and making childbirth and termination of pregnancy safe. The aim is also to make health workers less judgmental and more supportive to people seeking help. The vulnerable groups must be protected and encouraged when using health facilities. The health system will also be more supportive to victims of gender based violence. Young people need to be targeted as they are at particular risk of infection. A new group that needs to be involved is that of the commercial sex workers.

Condom availability will be improved, with more appropriate targeting of the groups at risk for infection, without stigmatising them. Health promotion in collaboration with NGOs will continue and be strengthened. Government departments will be required to have plans for the fight against HIV/AIDS.

It is also the goal of the Department to refine the surveillance system of the notification of maternal deaths, and to obtain information on the preventable causes of these deaths.

The Department will improve the care of pregnant women by providing national guidelines for the management of high risk pregnancies.

The Department of Health is striving to improve the nutritional services and household security. The Department will oppose all measures that can infringe upon the nutritional rights of people. The Department is implementing the Integrated Nutrition Programme. A project for development of norms and standards for Mental Health Care has been tendered out for completion by June 1998. Policy guidelines for Mental Health Care have been presented to Parliament and are under discussion. The revised Mental Health and Sterilisation Acts, the Drug Master Plan, Policy on Child Mental Health. Pilot research and surveys will be conducted.

b. The Directorate: HIV/AIDS and STD's will be working with the Department of Justice on the decriminalisation of sex work which will enable sex workers to come forward for health care without fear of prosecution. It is also making proposals regarding the health criteria, which form part of the application process within the civil service so as to, ensure that PLWAs are not discriminated against. Pre-employment HIV testing should be outlawed, and on going training on AIDS and the law will be promoted. The New Health Bill is being discussed at present. It is envisaged that it will be passed by parliament in 1998. This will facilitate access to basic health care to particularly children and other vulnerable groups.

The National Plan of Action Steering Committee will be situated in the Office of the Deputy President, so as to command political and administrative priority. This will help move provinces in ensuring the protection, promotion and preservation of children's rights.

## **9. Other information.**

In promoting the right to access to healthcare, the Department has also passed Acts to make parallel importation of drugs possible, thus making medicines cheaper, both for the public and the private sector. The development of the Essential Drugs List also makes it possible for essential drugs to be supplied to each health facility, so that these are accessible at primary health care level. The introduction of community service for South African doctors is a further step, strengthening the initial step of contracting Cuban doctors for the rural areas. The establishment of the National School of Public Health also will help identify areas for attention in the health field.

### **3. FOOD**

Information on two socio-economic rights namely access to food contained in section 27(1)(b) of the Constitution and Basic Nutrition for children contained in section 28(1)(c) of the Constitution

#### **A BACKGROUND**

1. The Department of Agriculture does not consider itself responsible for household food security. As an economic State department, the Department of Agriculture is more involved with economic development and empowerment and food security from a national perspective.

2. The Department regards itself as co-responsible for creating an environment that will enable people to ensure their own food security. The Department has an important function in monitoring the food industry in the Republic in order to ensure national food security. It also plays an important role in health and quality standards for food, which standards generally improve the nutritional value of food.

3. Though the Constitution enshrines each person's right of access to "sufficient food and water" and each child's right to "basic nutrition", giving effect to these rights may be interpreted in different ways.

4. To this Department, the right of access to food does not necessarily mean that Government should see to it that every citizen has food to eat every day. It rather entails a duty to do nothing that will impede on a person's right to food.

5. Food security is viewed in the broader context of creating an environment that will enable each citizen to provide for his or her own household food security and for that of his or her family.

6. The Department regards itself as being primarily an economic State department and not as responsible for social services (e.g. food projects in schools and certain communities). As an economic department, Agriculture should promote economic development and empowerment.

7. The role played by the Department to promote economic development and empowerment, can be illustrated as follows:

- 1 Through research, extension services, the creation of infrastructure and systems and by providing a support service, the Department enables farmers to improve production to the point where farming becomes economically viable.
- 2 To maintain economic viability, the support and extension services rendered should also aid farmers in dealing with variables in the environment, in production, in markets and in demand.
- 3 By creating an environment in which food production transcends the provision of sufficient food for own use but where production becomes an economic activity, the economy is opened up. Since food becomes a commodity that may be bought and sold, people are able to move into fields of economic activity outside of agriculture.



- 4 When food production becomes an economic activity, employment opportunities in food production are created. Related industries (e.g. research, production enhancement, labour saving devices) is also boosted.
- 5 By converting the prime function of food production from household food security to commercial venture, trade - also international trade - is promoted.
8. The Department of Agriculture is also responsible for monitoring factors that impact on food security. Examples that may be quoted are supplies and prices, market distribution, availability of food, and so forth. It is also critical to monitor food imports to ensure sufficient supply should local production fall short of demand.
9. One of the elements of food security is the accessibility of food. Marketing of food and infrastructure plays an important role in food distribution. For purposes of national planning for food security, these aspects must also be taken into equation.
10. Another important aspect is the Department's monitoring function with regard to food safety. Food should not only be available, but should also be nutritious and safe to consume. Though this is to a great extent a function of the Department of Health, the Department of Agriculture also performs certain functions that are health related and which impacts on food security from that angle.

An extension service aimed at educating people on appropriate food is again something that is viewed by this Department as falling outside Agriculture's mandate. It is deemed to be more appropriate for the Department of Health or the Department of Welfare

## **B INFORMATION REQUIRED IN PROTOCOL**

The information requested in the protocol forwarded to this Department by you also refers to issues that does not form part of this Department's function, but it is attempted to deal with the protocol as comprehensively as possible.

### **1. Past overview**

- a. There were and are no laws and other measures administered by this Department that impacted on particular groups' right of access to sufficient food.
- b. There were and are no laws and other measures administered by this Department that impacted on children's right to basic nutrition.
- c. The consolidation or non-consolidation of departments and legislation from previous homelands had no effect on the department's ability to realise the rights under discussion.

### **2. The Department's understanding of its Constitutional obligations**

With reference to the explanatory memorandum attached to the protocol under reply, the Department of Agriculture **respects, promotes and fulfils** the right of access to sufficient food in section 27 and the right of children to basic nutrition in section 28.

- a. As an economic state department, Agriculture performs the functions referred to in paragraphs 1. to 11 under “BACKGROUND”, which includes economic development and empowerment and monitoring of particular aspects.
- b. “Access to food” is interpreted by Agriculture to mean that people should be empowered to gain access to food, not that Agriculture should ensure that food is available to all. Food security and access to food is not viewed as an objective in itself, but as an outcome.
- c. “Sufficient food” is interpreted by Agriculture to mean sufficient food to sustain adequate nutrition.
- d. “Progressive realisation of this right” is interpreted by Agriculture to mean that the functions performed by Agriculture to promote food security should lead to as many people as possible within the shortest period of time possible to meet their own needs through their own initiatives and efforts.
- e. “Basic nutrition” is interpreted by Agriculture to mean the minimum levels of nutrition required sustaining health and normal physical development.

### 3. Information gathering

- a. No information systems are in place to specifically collect and analyse statistical and other information relating to the implementation of these rights. The Department do collect and analyse statistical and other information relating to Agriculture in general and provides food balance sheets to SADC.
- b. The Department is planning to implement an information system to monitor food security in the country

### 4. Vulnerable groups

Since the Department’s involvement with food security centers more around economic development than household food security as such, the Department regards rural women as a vulnerable group. Economic development of rural women is of vital importance to achieve upliftment of previously disadvantaged communities and to stimulate rural economy.

The vulnerable groups in terms of people, who may not have access to sufficient food, would be people who are unable to provide or grow food for themselves, such as children, the aged, disabled people and extremely poor people.

### 5. The obligation to respect these rights

- a. No current or past laws are or were administered by this Department denying or depriving people of their right of access to sufficient food or denying or depriving children of their right to basic nutrition.
- b. Similarly there are no such laws that unfairly discriminate against people or children in realising these rights.

### 6. The obligation to protect these rights

This Department does not administer laws and measures to specifically protect people against discrimination with regard to food security and basic nutrition. The effect of

the legislation administered by the Department of Agriculture is rather the improvement of food production and economic development, resulting in food security and access to basic nutrition.

For further information on the legislation administered by this Department, see the discussion under question 7 below.

## 7. The obligation to promote and fulfil these rights

- As explained above, the Department does not consider itself responsible for providing food security and basic nutrition to people and children. The Department seeks to improve economic development. Thereby enabling people to attain food security and basic nutrition. It is therefore not possible to indicate the percentage of the department's budget that is set aside for the promotion and fulfilment of food security and basic nutrition.
- The Department does not educate and inform South Africans about access to food, but rather about improvement, economic development, technology, increased production, markets et cetera which lead to people being enabled to ensure their own food security.

The laws administered by this Department relate to the following areas..

- a) Animal welfare,
  - b) Financial assistance to farmers and agricultural industries,
  - c) Branding and identification of animals,
  - d) Fencing of farms,
  - e) Marketing of agricultural products and wine and spirits,
  - f) Subdivision and use of agricultural land,
  - g) Intellectual property rights in plant varieties,
  - h) Improvement of animal and plant genetic resources and propagating material,
  - i) Registration, management and liquidation of co-operatives,
  - j) Registration of substances such as pesticides, fertilisers, animal feeds and animal remedies,
  - k) Control of animal' diseases and of agricultural pests such as plant diseases, insects, pathogens and so forth,
  - l) Conservation and utilisation of agricultural land and agricultural resources such as soil and vegetation,
  - m) Constitution, standards of quality, making and classification of agricultural products and liquor products,
  - n) Hygiene of abattoirs and of slaughtering practices,
  - o) Genetic modification of organisms;
  - p) Creation of statutory bodies to -
- set training standards and codes of conduct for veterinary and related professions
  - execute agricultural research;
  - control the export of perishable products;
  - regulate the business practices of and set codes of conduct for agricultural produce agents;
  - set up legal entities to operate abattoirs and to protect the Societies for the Prevention of Cruelty to Animals.

Although none of the areas of legislation referred to above deal directly with food security and basic nutrition, some of the legislative areas definitely impact on food security and basic nutrition. These are the following:

### **7.1 Marketing of agricultural products**

Orderly marketing of agricultural products ensures the availability of food.

Statutes: Wine and Spirit Control Act, No 47 of 1970

Marketing of Agricultural Products Act No 47 of 1996

### **7.2 Financial assistance to farmers and agricultural industries**

Financial assistance for agricultural purposes improves food production

Statutes: Land Bank Act, 13 of 1944

Agricultural Credit Act 28 of 1966

### **7.3 Subdivision and use of Agricultural land**

Ensure availability of land for agricultural purposes

Statute: Subdivision of Agricultural land Act 70 of 1970

### **7.4 Intellectual property rights in plant varieties**

Incentives to breeders of plant varieties to continue their work to achieve, amongst others, increased food production, meet consumer demands, breed disease and drought resistant plants etc.

Statutes: Plant Breeders' Rights Act, No 15 of 1976

(South Africa is a member of an international convention, the "Convention for the Protection of New Varieties of Plants", with regard to the recognition of intellectual property rights in plants)

### **7.5 Improvement of animal and plant genetic resources and propagating material**

Improved genetic and propagating material results in better food production and higher quality (also more nutritious) food.

Statutes: Plant Improvement Act, No. 53 of 1976 Livestock Improvement Act, No. 25 of 1977

### **7.6 Registration of pesticides, fertilizers, animal feeds**

Substances such as pesticides, fertilizers, animal feeds etc. are all aimed at improving production. Improved food production is beneficial to food security.

Statutes: Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, No.36 of 1947

### **7.7 Control of animal diseases and agricultural pests**

Animal diseases and agricultural pests are potentially harmful to food security

and basic nutrition as such diseases and pests can affect food production.  
Statutes: Agricultural Pests Act, No. 36 of 1983 Animal Diseases Act, No. 35 of 1984

### **7.8 Conservation and utilisation of agricultural land and agricultural resources**

Without land farming and therefore food production is not possible. The degradation of land must be avoided in order to maintain and even increase food production. Land care and the sustainable utilisation of land is vital to ensure food security in future.

Statute: Conservation of Agricultural Resources Act, No. 43 of 1983

### **7.9 Constitution, standards of quality, making products and classification of agricultural products**

Since food production has become an economic venture, it is necessary to regulate the constitution of manufactured and packaged food products and the identification thereof in order to protect the consumer. Levels of residue in or on food (e.g. pesticides, preservatives) must also be regulated as this influences the quality and safety of food.

Statutes Agricultural Product Standards Act, No. 119 of 1990 Liquor Products Act, No. 60 of 1989.

### **7.9 Hygiene of abattoirs and of slaughtering practices**

The hygienic handling of food is very important as contaminated food can cause and spread diseases. Improperly handled and preserved food also influences the nutritive value thereof. Food safety is imperative for food security and basic nutrition.

Statutes: Abattoir Hygiene Act, No. 121 of 1992.

### **7.10 Genetic modification of organisms**

Genetic modification of organisms (genetic engineering as it is also sometimes called) is increasingly used in agriculture to improve food production. Because of the possible harmful side effects if not managed properly, genetic modification is regulated through the introduction of measures to prevent negative side effects.

Statute Genetically Modified Organisms Act, No. 15 of 1997 e.g. See above

i. As with the rest of the Public Service, this Department also suffered from budget cuts and scaling down. For the same reason as explained in question 7, it is not possible to indicate the direct result of such budget cuts and scaling down on food security and basic nutrition.

ii. The Department reviews its laws and legislative and other measures on a continuous basis -to improve the services rendered by this Department. Since the Department does not consider itself responsible for providing people with food and for ensuring basic nutrition to children, laws and other measures are not specifically monitored for this purpose.

The same is valid for:

Monitoring the implementation of laws and other measures;

Working with other State departments, levels of government and sectors of society;  
Integrating the principles of equality and non-discrimination;  
consulting and involving civil society and people.

Although all of the above is done by the Department with regard to its laws and other measures, it is not done for the right to food security and basic nutrition in particular. These actions are taken to improve the efficiency of the Department and the services rendered by it.

## 8. Future goals

The Department's legislative programme for 1998 does not relate to the rights under discussion specifically.

## 9. General

This Department's viewpoints are discussed above. The Department represents South Africa on the Food and Agriculture Organisation of the United Nations, as well as on the following SADC Committees: Technical Committee on Food Security, Regional Early Warning Unit and the Regional Advisory Committee on Food Security.

## 4 WATER

### National Department of Water Affairs and Forestry

#### 1. Past overview

**a. Please give an overview of the impact of past discriminatory laws and other measures on particular groups' right to sufficient water. How have these affected your Department's ability to realise the rights set out in section 27 of the Constitution?**

South Africa has limited water resources, which are already intensively utilised. Planning studies, carried out by the Department of Water Affairs and Forestry, indicate that the quantity of water available to meet South Africa's needs within the most important water catchments will be adequate only until the year 2030 if the present usage patterns (based on predicted growth rates) and tariff structures are maintained.

Access to these water resources has historically been dominated by those with access to land and economic power. The growth of the population and the development of the economy will place increasing demands upon this finite resource. It was therefore important that legislation governing access to and use of water resources is supportive, not only of the imperative of equity and restitution, but also the development needs of the nation, qualities which the Water Act, 1956 (Act 54 of 1956) lack.

The present Water Act, 1956 was promulgated during 1956, and has since been amended substantially. The Act comes from a historical background where agricultural use of water enjoyed the largest share and where people, who owned property adjacent to a public stream had the first call on water from that stream.

Although the Water Act, 1956 regards domestic water requirements as preferential to other uses, when streams are apportioned, there are several provisions in the Act whereby water may be used irrespective of domestic needs.

The Water Act, 1956 does not contain any racial discriminatory clauses, but the enjoyment of water uses in South Africa is de facto disproportionately biased along racial lines. Water rights are directly related to land ownership. Racial discriminatory land laws were one of the cornerstones of apartheid. As the largest part of the land was owned by whites, they have also enjoyed most of the water use. The factor permeates all aspects of water in the country.

The Water Act, 1956 requires specific intervention of the Minister to regulate the use of groundwater, which otherwise is considered as private water. This meant that the owner of the land has the sole and exclusive use of that water even if it was to the detriment of his neighbors. Given the semi-arid climate of South Africa and the importance of this resource, this is no longer acceptable.

The increasing demands for water and the development of social and economic activities represent a threat to the environment which sustains the resource. The present Water Act does not make adequate provision to mediate this conflict and to protect the environment without necessarily curbing other activities.

Apartheid policies distorted the provision of water supply services, so that today still more than 12 million people do not have adequate supplies of potable water. Decisions around water allocation impact on water services provision. Apartheid generated a biased approach to water resource management, and allocation was never merely an economic matter, but a socio-political one. Government policy, in particularly the provision of water subsidies (including those associated with the provision of irrigation water), resulted in considerable advantages to large, mainly white farmers at the expense of emerging black farmers and smallholders.

Government has been required by the Constitution to take reasonable legislative and other measures within its available resources to achieve progressive realisation of the right of access to sufficient water. It was therefore necessary to change the water legislation to ensure that all South Africans gain access to sufficient water to meet basic domestic needs, to provide for the setting of national norms and standards for both water services provision and tariffs, to provide for a regulatory framework for water service institutions and water services intermediaries, to provide for monitoring of water services, the intervention of the Minister and Provinces and to provide for financial assistance to water service institutions to enable them to provide water services.

**b. What has been the effect of consolidation or non-consolidation of departments and legislation from the previous homelands on your Department's ability to realise the right of access to sufficient water in Section 27 of the Constitution?**

The Department had to take over the responsibility for the operation and maintenance of approximately 600 water services schemes of the previous homelands.

All the legislation has been consolidated except for the Water Act, 1988 of Bophuthatswana, which was not compatible with the South African Water Act.

**2. Your Department's understanding of its constitutional obligations.**

a. What does your Department understand it is obliged to do to:

respect;

protect;

promote; and

Fulfil

the right of access to sufficient water in section 27 of the Constitution?



The Department acknowledges its obligation to effect reasonable legislative and policy measures to ensure the fulfilment of the right to access of all South Africans to water for basic human needs. The Department is concerned not only with the protecting of the right, but with fulfilling or giving effect to this right of access through its policies, legislation and day to day practices. The Water Services Act, 1997 (Act 108 of 1997) and the Department's present policies is in line with the Constitution.

The Department understands that it should actually do something, to protect the right of access to water through its policies, legislation as well as through assistance of local government. The Department **protects** this right by-

- creating a " basic human needs reserve" in the National Water Bill, which is a priority right and which provides for the essential needs of individuals served by the water resource concerned and include water for drinking, for food preparation and for personal hygiene;

- acknowledging the right of access to basic water supply and access to basic sanitation in the Water Services Act, 1997;

- providing for the setting of national norms and standards for water services to protect the interests of consumers as water services are often provided in monopolistic or near monopolistic circumstances;

- determining that if a water services institution is unable to meet the requirements of all its existing, consumers, it must give preference to the provision of basic water supply (See section 5 of the Water Services Act, 1997);

- determining that water service institutions may not unreasonably refuse or fail to give access to water services to the consumer or potential consumer in its area of jurisdiction (Please, refer to section 11(4) of the Services Act, 1997);

- determining that in emergency situations a water services authority must take reasonable steps to provide basic water supply- or basic sanitation services to any person within its area of jurisdiction and may do so at the cost of that authority (Please refer to section 11 (5)); and

- creating a legislative framework which is aimed at sustainable water services delivery.

The Department **promotes and fulfils** this right by -

- ensuring that the legislation and policies are in place which will reform the existing water law to ensure inter alia that all South Africans gain access to sufficient water to meet basic domestic needs;

ensuring that legislation and policies provides a framework within which those engaged in services provision will be assisted to achieve the common goals of

government; supporting, and strengthening the capacity of local government to ensure the provision of services;

The White Paper on the Water Supply and Sanitation Policy, 1994 provided a detail strategy for achieving the objective of ensuring that all South Africans have access to adequate water supply and sanitation services.

**b. What is your Department's official interpretation of the words "access to" in section 27?**

Access in terms of Department's responsibility means ensuring, that the nation's water is managed in such a manner that the continued availability of sufficient water for basic human needs will be ensured. Access means that the National Government must further ensure that all citizens have access to adequate water and sanitation services. The National Government must provide legislation, establish national policy guidelines and a national water and sanitation development strategy, formulate criteria for State subsidies, set minimum services and tariffs standards as well as monitoring and regulating service provision.

The Department's immediate goal was to maintain services delivery, to rationalise the National Government Department and to ensure the smooth integration of all previous home, land staff, functions and budgets into a new national Department with appropriate regional structures and to transform the Water Boards.

In the medium term the objective of the department is to support institutional development at local level as well as to provide financial and technical assistance for the physical development of water supply and sanitation services. This will be achieved through the restructured Department of Water Affairs and Forestry at regional level and through water services institutions, such as water Boards with the full involvement of the private and NGO sectors.

In the long term the goal is that the provision of water services to consumers should be the function of a competent democratic local government, supported by provincial governments. This department will be responsible for water resource management, for monitoring and regulating functions and specifically ensure that an enabling environment for community based water supply and sanitation development is maintained.

Access in terms of provincial government's responsibility means providing for the monitoring and support of local government in the province and seeing to the effective performance by municipalities of their functions. (Please refer to section 62 of the water services Act, 1997) If local government does not effectively perform its water services function the minister may request the relevant Provincial authority to interfere.

Access in terms of local government's responsibility means to ensure the provision of sustainable water services, which does not mean that the Local Government should provide the water services itself. Local Government can contract this services out. Water services can also be provided on conditions, such as payment for services delivered. (Please, refer to section 54 of the Water Services Act. 1997)

The constitution guarantees every person the right of access to "sufficient water and food" and to health services. Every child has also amongst others the right to basic nutrition. Access to sufficient affordable clean water for hygiene purposes is also seen as part of health care services.

**c. What is your Department's official interpretation of the words "sufficient water"?**

The Department interprets this right as a right to basic water supply and basic sanitation. (See section 3 of the Water Services Act, 1997).

"Basic water supply" is defined in the Water Services Act, 1997 as the "prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene". (See section 1 of the Act.)

The 1994 White Paper on the Water Supply and Sanitation Policy, defined basic water supply in terms of quantity, cartage, availability, assurance of supply, quality and upgradability. (See pages 15 & 16 of the White Paper.)

Basic water supply at present has been quantified as 25 liters per person per day. This is currently considered the minimum required for direct consumption, for the preparation of food and personal hygiene. It is not considered to be adequate for a full healthy and productive life, which is why it is considered as a minimum. In the medium term it is foreseen that this minimum will rise to 50-60 liters per capita per day. On the long term it will probably mean full services and house connections.

The water must be available within 200m of the dwelling. In steep terrain this distance may have to be reduced to take account of the extra effort required to carry water up steep slopes.

The flow rate from the outlet should not be less than 10 liters a minute and the water should be available on a regular daily basis.

The water supply should provide water security for the community, which means that that "raw water" should be available for 98% of the time and the operation and maintenance of the system should be effective.

The quality of water provided as a basic service should be in accordance with currently accepted minimum standards with respect to health related contaminants and it should also be acceptable to consumers in terms of taste, odour and appearance. The Department in co-operation with the Department of Health published a document "A guide for the assessment of the health-related Quality of Water Supplies" as a first step towards providing important quality related information. This document is currently under revision.

"Basic sanitation" is defined in the Water Services Act, 1997 as the prescribed minimum standard of services necessary for the safe hygienic and adequate collection,

removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal household. "

**d. What is your Department's official interpretation of the words "progressive realisation of this right"?**

The constitutional obligation to realise this right is not unlimited. The Government (National, Provincial and Local) must take reasonable measures to realise this right and taking into account its resources and what reasonably can be achieved, the Government must realise this right progressively.

Section 11(2) of the Water Services Act, 1997 determines that every water authority should progressively ensure efficient, affordable, economical and sustainable access to water services, but that this duty is subject to -

- a) the availability of water resources;
- b) the need for equitable allocation of resources to all consumers and potential consumers within the authority's area of jurisdiction;
- c) the need to regulate access to water services in an equitable way;
- d) the duty of consumers to pay reasonable charges, which must be in accordance with the norms and standards for tariffs for water services;
- e) the duty to conserve water resources;
- f) the nature, topography and situation of the land in question; and
- g) the right of the relevant water services authority to limit or discontinue the provision of services if there is a failure to comply with reasonable conditions set for the provision of services.

### **3. Information gathering**

**Does your Department have systems (or access to systems) to collect and analyse statistical and other information relating to the implementation of the right of access to sufficient water?**

a. If your answer is yes, please:

describe this system;

state what information is collected;

state whether or not this information is broken down to race, gender geographical location (especially according to rural and urban areas) and income level;

state whether this information is independently verified and how this is done.; and

state how the public gets access to the information.

**b. If your answer is no, please say why not and whether or not your Department has plans to obtain or get access to such system.**

Yes, the Department is in the process of developing an information system. The Department started with a national situation analysis to determine the extent of basic water services needed.

The focus of the information system is customer characterisation (needs assessment). This information system is based on demographic and population figures as well as schools, clinics, housing, municipal infrastructure programmes and land reform. Information gathered, includes water infrastructure, all projects initiated and developed by this Department, institutional and management aspects such as operation and maintenance, socio-economic information, water issues and environmental information. The products vary from maps, information manuals to electronic systems. The extent of the task and availability of funds dictates a progressive approach. The systems entails data development, collection, evaluation, storage and availability. Where the information is available the data is also accumulated according to gender and race. Existing data is verified by other departments, provincial and local government as well as other role players. The data is intended for public access and is in the process to be made available on internet as well as to the role players in the area where the data has been collected.

#### **4. Vulnerable groups**

**Which groups have been identified by your Department as more vulnerable than others and which needs special attention?**

The rural population and the poor urban population have been identified as more vulnerable than others, because they do not have access to basic water services. They are also more vulnerable to droughts and water quality fluctuations.

One of the aims of the National Water Bill is to redress the results of past racial and gender discrimination. Emerging Black farmers may be empowered through favourable water tariffs. One of the considerations for the issue of a license for water use is the need to redress past racial and gender discrimination. (Please, refer to section 28(1)(b) of the National Water Bill.) The National Water Bill also determines that draft water allocation schedules should reflect the quantity of water to be allocated to each of the applicants to whom licenses should be issued in order to redress the results of past racial and gender discrimination in accordance with the constitutional mandate for water reform.

#### **5. The obligation to respect the right.**

**a. What current laws and other measures have the effect of denying or depriving people of their right to access to sufficient water?**

Please, refer to paragraph 1 (a) above.

**b. What current laws and other measures unfairly discriminate against groups of people, particularly the identified vulnerable groups of people, and their right to, access to sufficient water?**

Please refer to paragraph I (a) above.

**c. What steps have been taken by your Department to get rid of any past laws and other measures which impacted on people's right of access to sufficient water?**

The Water Supply and Sanitation White Paper was presented to Parliament in November 1994. This was followed by a comprehensive water law reform process, which commenced in March 1995 with a booklet "You and Your Water Rights" which was a call for public response. It was followed by the following documents:

-Fundamental Principles and Objectives for a New Water Law in South Africa in January 1996, which was a document presented by the Water Law Review Panel to the Minister;

-"Water Law Principles" in April 1996 , which was a discussion document;

-"Framework for regulating water services" on 15 January 1997, which was a policy statement for discussion;

-"Fundamental Principles And Objectives For A New Water Law In South Africa" in February 1997, which contained water law principles approved by Cabinet;

-White Paper On A National Water Policy For South Africa in April 1997;

-Water Services Act, 1997 (Act 108 of 1997) 19 December 1997

-National Water Bill, which is approved by Cabinet and will be submitted to Parliament during February 1998. This Act when it comes into operation will repeal 108 Acts and Amendment Acts.

-The Department is at present revising its tariff policy.

-Draft White Paper on Sanitation Policy June 1996, which has been submitted to Cabinet.

**d. What has been done to remedy the effects of these past laws and other measures, which impacted on people's rights of access to sufficient water?**

The Department revised its policies and tabled legislation that will ensure the reform of South Africa's water law. Section I of the National Water Bill states clearly that the purpose of the Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which takes into account the need to redress the results of past racial and gender discrimination.

The Department implemented 12 presidential lead projects since 1994/1995, which had a significant socio-economic impact among beneficiary communities. This is judged against the training component of water supply projects valued at R282,3 million, of which 5% (R13,06 million) has remained in the communities as skills. The projects have also a built-in training component for sustainable community management of systems. This involves the institutional and social development issues, which are a local government capacity building approach to the programme. The intention is to provide for core competencies for the newly established local councils in so far -as the management of water services is concerned.

The other main area of advantage is the employment of youth. They are therefore usefully engaged in community development. They are also represented on the project steering committees and thereby learn decision making processes, which is valuable as they will become the future community leaders or councilors.

In the communities where projects are completed, the time for water collection by mainly women and children has been drastically reduced to free them to attend to other domestic activities and school work respectively.

The diarrhea and gastro intestinal parasitic infections are expected to decline, hence the general morbidity and child mortality rates are expected to reduce, provided that there are sustained sanitation and community health promotion components.

These projects provide the basis for diversification of the rural economy. The assured availability of water allows these communities to engage in agricultural activities such as the rearing of livestock, poultry and developing community vegetable gardens. It therefore also serves as a strategy for poverty alleviation.

To date 1 238 550 people have been served with potable water in the rural areas. The Department's target of 1,7 million by March 1998 is on track.

The inception of the Build, Operate, Train and Transfer Programme (Boot) enhances the delivery capacity.

## **6. The obligation to protect the right**

### **a. What laws and other measures protect people against unfair discrimination in the allocation and availability of water in the private sector.**

The National Water Bill, when it comes into operation, will protect people against unfair discrimination in the allocation and availability of water in the private sector. The allocation of water will be on equitable basis. The water required to meet basic human needs is identified as the reserve and enjoys priority of use by right. The National Water Bill also gives preference to the allocation for emerging water uses to redress past racial and gender discrimination.

In terms of this Bill a person may take water for reasonable use, small gardening and animal watering, directly from the water resource to which that person has lawful access. (Please, refer to Schedule 1 of the National Water Bill.)

Section 3(1) of the Water Services Act, 1997 determines that, everyone has the right to basic water supply and basic sanitation.

Section 5 of the Water Services Act, 1997 determines that if a water service institution is unable to meet the requirements of all existing consumers, it must give preference to the provision of basic water supply and sanitation to them.

**b. What laws and other measures protect people against any other practices in the private sector, which may have a negative effect on their rights to access to sufficient water.**

The Water Services Act, 1997 is aimed at protecting the interest of consumers as water services are often provided in monopolistic or near monopolistic circumstances.

## **7. The obligation to fulfil the right**

**a. What percentage of your Departments budget is set aside to promote and fulfil the right of access to sufficient water? How much of this budget will be spent by the end of the financial year.**

83% of the Department's budget is set aside to promote and fulfil the right of access to sufficient water. It was aimed to spend the full amount, but it is expected that only 88% of the budget will be utilised.

**b. What has your Department done to inform and educate all South Africans , and particularly the identified vulnerable groups, about how to get access to sufficient water?**

The Department has provincial forums, on which the Department of Health and the Provincial Government are represented. The Department also has area forums on which local government is represented. The Department also has special events which are normally organised by the nine regional offices of the Department.

Workshops have been held in the past and will be held in the near future throughout the country on both the Water Services Act, 1997 and the National Water Bill.

**c. What is your Department's understanding of the core minimum obligations imposed on it by the right of access to sufficient water? How are these understandings reflected in the law and other measures adopted by your Department.**

The minimum obligation imposed by the Constitution on this Department, is to provide the necessary legislative and policy framework to ensure that water services are provided in a manner which is sufficient and equitable, to support and strengthen



the capacity of local government and to provide water services for the interim period to poor people in rural and urban areas, who do not have access to basic water services until local government will be able to take over the responsibility.

**d. What minimum requirements (such as norms and standards) for making sure the right of access to sufficient water is applied in a uniform way across the country have been set by your Department. What laws and other measures are these included in?**

The Water Services Act, 1997 makes provision that national norms and standards for the provision of services and tariffs must be set. The Department is in the process of developing these norms and standards, which will be published by regulations.

**e. Please give a brief description of any current law or other measures which have been adopted to improve or advance any right of access to sufficient water. Which of these deal with people who have been unfairly discriminated against in the past and which deals with the identified vulnerable groups?**

The Water Services Act, 1997 (Act 108 of 1997), which came into operation on 19 December 1997, provides for the right of access to basic water supply and sanitation, the setting of national norms and standards for water services and tariffs, a regulator framework for water services institutions and water services intermediaries, water services development plans, information systems and the monitoring of water services,

The National Water Bill has already been approved by Cabinet for tabling in Parliament. This Bill provides inter alia for fundamental changes to the law relating to water resources, the continued availability of sufficient water for basic human and ecological needs, the promotion, regulation, use, conservation, development, management, control and protection of water resources.

Both pieces of legislation deal with people unfairly discriminated against in the past and the identified vulnerable groups.

**f. Please give a brief description of any laws or measures instituted towards water reform (as dealt with in section 25(8) of the Constitution).**

The National Water Bill, 1998 provides for fundamental changes to the present law relating to water resources. Sustainability and equity are identified as central guiding principles in the protection, use, development, conservation, management and control of water resources. These guiding principles recognise the basic human needs of present and future generations, the need to protect water resources, the need to share some water resources with other countries and the need to promote social and economic development through the use of water. National Government acting through its Minister is responsible for the achievement of these purposes and the constitutional mandate for water reform. Being empowered to act on behalf of the nation, the Minister has the ultimate responsibility to fulfil certain obligations related to the use, allocation and protection of and access to water resources.

The National Water Bill provides for progressive development and requires that the Minister must establish a national water resource strategy after consultation with the society at large. The national water resources strategy will provide a framework for the protection, use development, conservation, management and control of water resources. It also provides for the framework within which water will be managed at the regional and catchment level.

The National Water Bill provides for the integrated management of water resources, the establishment of catchment management agencies and other water management institutions. It provides for charges for all forms of water use. It also provides for the systematic collection, evaluation and dissemination of information relating to water resources.

**g. Have any new laws and other budget measures (such as budget cuts and scaling down) been introduced in the past year which has a negative impact on the progressive realisation of the right to access to sufficient water?**

Yes, the Medium Term Expenditure Framework, which deals with the allocation of funding for the period 1998/1999 - 2001. Although the Department accepts the philosophy of the Minister of Finance's approach to restructuring, it will seriously hamper the Departments' progress to deliver basic water supply and sanitation services to 12 million people. This will affect the Department most seriously from the 1999/2000 financial year onwards.

**What structures or mechanisms has your Department put in place to review laws and other measures that relates to this right?**

Since 1994 the Minister of Water Affairs and Forestry, Prof. Kader Asmal, set up various committees, such as the Water Law Review Panel, the Water Law Review Steering Committee, Water Law Review Strategy Team and the Water Law Review Drafting Team to review existing legislation and to recommend and draft new legislation. Extensive public consultation was part of the process. The products, which came out of this process, are set out in par. 5(c) above. The Department also established implementation task groups on both the National Water Bill and the Water Services Act, 1997.

**Monitor whether laws and other measures were implemented?**

Both the Services Act, 1998 and the National Water Bill makes provision for the type of monitoring referred to above. However, DWAF has set up task teams that will look into the implementation of the Water Services Act, 1997 and the National Water Bill.

**Work with other Departments, levels of government or sectors of society to make sure everyone, and particularly the identified groups, get access to sufficient water?**

See paragraph 7(b) above.

**Make sure the principles of equality and non-discrimination in section 9(2) of the Constitution are integrated into all Department programmes relating to this right?**

The principles of equality and non-discrimination form the basis of all the Department's projects.

**Consult and involve civil society and people needing access to sufficient water (particular the identified vulnerable groups)?**

Please refer to paragraph 7(b) above. The Water Services Act, 1997 and the National Water Bill make provision for extensive consultation with water users before any decision making is implemented.

**make sure everyone, and particularly the identified vulnerable groups, gets access to sufficient water**

Please refer to paragraph 5(d) above.

## **8. Future goals**

**What new laws and other measures will your Department put in place in to respect, protect, promote and fulfil the right to sufficient water? Please give full details of these including:**

- which of these are aimed at water reform (as dealt with in section 25(8) of the Constitution);
- which of these are aimed at identified vulnerable groups; goals and targets set by your Department;
- timelines for implementing these; benchmark or indicators you will use to chart progress and evaluate these to see whether they are successful; and
- structures and mechanisms you will use to chart progress and evaluate plans.

The National Water Bill will be tabled in Parliament in April 1998. The Department sets up task teams to look into the implementation of both the National Water Bill and the Water Services Act, 1997. The Department will soon start with the drafting of regulations to be promulgated in terms of the Water Services Act, 1997 and the National Water Bill, when it comes into operation. Please see paragraph 5 (d) above

Section 6 of the National Water Bill determines that the Minister must as soon as reasonable practicable, establish a national water resource strategy for the protection, use, development, conservation, management and control of water resources. Similar strategies must be established for each of the catchment management areas by the catchment management agencies.

Please refer the National Sanitation Programme, 17 November 1997 and National Sanitation Programme Start-up Phase, September 1996.

See the Water Supply and Sanitation Programme for the financial Year 1997/1998.

**b. What will your Department do to get rid of existing laws and other measures, which will make it difficult for people to get access to sufficient water.**

When the National Water Bill comes into operation, it will repeal 108 Acts and Amendment Acts, which will then effectively remove all discriminatory water legislation.

## **9. General**

No additional information.

## **5 Social Security**

### **National Department of Welfare**

#### **1. Give an overview of the impact of past discriminatory laws and other measures on particular groups' social security rights.**

a) The past discriminatory laws impacted severely on the social security rights particularly of what was then called the "Black" racial group.

The Tri-cameral System resulted in inconsistencies, a lack of uniformity, lack of resources, different payments for the various pensions and grants for the different races with the lowest awarded to the black race group. In the previous dispensation, different administrations together with a range of social pension laws from ex-TBVC and self governing territories provided the basis for inequality, and thus limiting access to social grants.

The Social Assistance Act, 1992 (Act No. 59 of 1992) was assigned to the provinces in March 1996. This meant that the provinces have executive authority, i.e., they pay the social assistance beneficiaries.

In keeping with amalgamation and the new Government all rules, regulations, acts and means test are the same for everyone. Whilst, this might be the case the limited resources are still prevalent in black areas.

#### **OLD AGE PENSION**

Whilst, all old aged persons were eligible to receive a social pension the actual amounts of the social pensions varied between the races with the blacks receiving the lowest amount. The means test has also differed among the races i.e. the level of permitted assets was set considerably lower for blacks than for whites. In addition to this, many eligible black elders remained without a social pension, especially in the former homelands, where limits were often put on the number of persons who could receive a social pension. Many elders remained on a waiting list sometimes for years, before actually qualifying for pension.

Black pensioners were at the mercy of a bureaucratic system that was understaffed, inefficient, and often obstructive and sometimes corrupt. The delivery of money was unreliable and slow people often queue all day and facilities such as seating, toilets, availability of water, standing in the hot sun etc. were totally unreasonable.

The pay out system could also be seen as discriminating against blacks. This is a serious violation of the equality clause in the Constitution.

There were allegations of corruption at pay points, improper cut-off of pensions from thousands of pensioners who had received no instructions that they must appear for an annual review and a lack of uniformity among the provinces and the former homelands regarding social pensions.

The payment procedures also lacked uniformity in that predominantly blacks were paid in cash at various mobile and fixed sites, such as trading stores, schools and sometimes under trees in the open air.

Equity of pensions was achieved in 1993.

### **SINGLE CARE GRANTS**

Whilst, the acts and regulations that governed this grant was the same for all, the requirements made it almost impossible for blacks to qualify, based on a birth of Educational Psychologists. Yet, the requirements specified that an untrainable certificate completed by an Educational Psychologist must accompany the application. This requirement resulted in an enormous number of blacks not being eligible for such a grant.

The Social Assistance Act, 1992 (No.59 of 1992) has replaced the previous Act and enforces rules and regulations that everyone can comply with. The single care grant in terms of the new legislation is referred to as a care dependency grant,

### **DISABILITY GRANTS**

Many laws in our country still deny people with disabilities their fundamental human rights. Often the regulations governing legislation and the ways in which laws are applied affect persons with disabilities most severely.

The basic resources are lacking amongst blacks particularly in the rural areas. Assessment and therapy centres are seldom found in the rural areas making work assessments and pre- vocational assessments almost impossible to undertake. Workshops, hostels and half way houses for the mentally and physically disabled in rural areas are also remote. A further complication is the terrain of the area that makes the use of wheel chairs impossible and the cost of private vehicles or taxis are exorbitant. The Social Assistance Act, 1992 (No 59 of 1992) enforces uniform rules and regulations for everyone. It has no responsibility or accountability as far as establishment of resources is concerned.

Whilst, the rules and regulations are uniform the whole concept of holistic treatment is affected due to inaccessibility, hence it is envisaged that difficulty will be experienced in implementing the whole paradigm shift and incorporating developmental linkages. It is only once resources and the necessary basic infrastructure are made available to the remote rural areas can the community feel the full impact of developmental programmes at large.

### **STATE MAINTENANCE GRANTS**

The State Maintenance Grants were targeted at a small section of the population. Many black women, particularly rural women and children were excluded from receiving state maintenance support. In 1995, in light of the concern about the administration of State Maintenance Grant (SMG) in terms of accessibility by those families who had never received it before, future affordability and sustainability of the

SMG system, an investigation was conducted by the Lund Committee on family and child support. Rather than eliminate state support to families and children, the Lund Committee was mandated to investigate this sector and provide recommendations and possible alternatives to the SMG. The Lund Committee recommendations provided a window of opportunity for support to poverty - stricken children. A major recommendation is that a flat- rate child support grant was recommended which should be paid to the primary care- giver. A report of the Lund Committee on Child and Family Support is attached.

(b) What impact did past laws and other measures have on children's right to social services? How have these affected your department's ability to realise the rights set out in section 28 of the Constitution?

The majority of South African children have for historic reasons virtually all been through difficult circumstances and endured psychological as well as physical trauma from years of apartheid legacy. UNICEF defines Children in Especially Difficult Circumstances (CEDC) as those children whose lives are daily lived under such circumstances that place their survival, protection and development at risk.

There are many causes of the problem of CEDC in South Africa. Broadly addressed however, the historical legacy of apartheid resulted in massive disruption of social order particularly among blacks. Protracted years of political violence, forced removals and the rapid rate of urbanisation that followed the abolition of the Influx Control Act in 1985 all led to the rise in the statistical prevalence and psychological suffering of CEDC. Over the 40 years of apartheid legislation, with migratory labour of men from homelands to metropolitan areas, a systematic and progressive destruction of the family as the basic unit of the community and the subsequent erosion of family values and destruction of the extended family structures, greatly contributed to the prevalence and plight of CEDC.

The loss of the father figure in most homes as most men joined the migratory labour pattern, created disjointed families and a social atmosphere where children virtually grew up taking adults' decisions and being swept prematurely into the adult world.

A "survivalist" culture in most townships that characterise the South African peri-urban settlements introduced children to hardships, violence and crime at a very tender and vulnerable age. Indeed most black children in South Africa never knew what childhood was all about. Forced to work for their survival, thousands ended up on farms as child labourers, while, others inhabited streets and township backyards where drug abuse, gang sub-cultures, prostitution and sexual abuse and molestation became daily nightmares. Hunted daily by police, who associated them with terrorists fighting to overthrow the government of the day, thousands sacrificed their education and joined the struggle for political liberation and socio-cultural emancipation.

Children in rural areas were particularly affected because certain specialised services were out of their reach. The department bore the brunt of providing services in rural areas, which obviously meant that services were not entirely successful because social workers were burdened with providing a generic service and frequently did not have the time to render specialist services.

Generally, social services in South Africa were fragmented and unequally distributed along racial lines. Most African children, who are in the majority, had no access to services, and, in cases where such services were available, they were of the least adequate level and inappropriate because of inadequate funding. Presently the Department of Welfare is putting structures, policies, legislation and programmes in place to provide social services that are guided by the principles of equity, non-discrimination, democracy, sustainability, accessibility, quality and appropriateness. This paradigm shift will facilitate the ability of the Department to realise the rights set out in Section 28 of the Constitution of South Africa.

c) What has been the effect of consolidation or non-consolidation of Departments and legislation from the previous homelands on your Department's ability to realise the rights of children to social services in Section 28?

14 different departments for the different population groups and homelands administered the Welfare system. This resulted in fragmentation, duplication, inefficiency and ineffectiveness in meeting needs. Each department had its own procedures, styles of work, approaches and priorities. This fragmentation is also reflected in social welfare legislation for example: approaches towards delivery are still rehabilitative in nature and rely on institutional care and are not preventative and developmental.

The Child Care Act, 74 of 1983 was implemented uniformly in the former four provinces in South Africa. The Act was used to protect vulnerable children. Former homelands introduced their own child care legislation and are still practicing these laws. This implies that when children are referred from one province to another the legal status of the child changes. The Child Care Amendment Act, 96 of 1996 addresses the problems but is not yet promulgated.

## **2. Your Departments understanding of its Constitutional obligations**

**a) What does your department understand it is obliged to do to:** **Respect:**

To be non-discriminate towards people and to treat people as equals.

**Protect:**

To ensure access to social security to all who qualify by fulfilling the requirements/criteria as stipulated in the Social Assistance Act No.59 of 1992 and the Regulations to the said Act i.e. (the correct benefit and amount to the correct recipient at the right time and the right place) and to avoid abuse of the system by having a systems infrastructure that prevents duplication and payments to fraudulent requests.

**Promote:**

To ensure that appropriate policy and social security benefits to effectively meet the needs of the overall community is in place.

**Fulfil:**

To effectively provide the assistance and service to those who qualify within the financial constraints.



The social security rights in section 27 of the Constitution and the rights of children to social services in Section 28?

The above-mentioned obligations have already been dealt with in the policy pertaining to child protection, child prostitution, street children, adoption, foster-care, transformation of the child and youth care system. These policies are being negotiated with the provinces.

**b) What is your department's official interpretation of the words "access to" in Section 27?**

People must be able to easily obtain social security irrespective of where they live. All the relevant infrastructures must be within reach of the community at large.

**c) What is your department's official interpretation of the words "social security"?**

Social security covers a wide range of public and private measures that provide cash or in kind benefits; first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing or being exercised only at unacceptable social cost and such person being unable to avoid poverty and, secondly, in order to maintain children. The domain of social security is: poverty prevention, poverty alleviation, and social compensation and income distribution. The White Paper on Social Welfare is enclosed which contains the policy position on the definition of social security.

**d) What is your department's official interpretation of the words "unable to support themselves"?**

An inability to provide for their basic needs based on their particular circumstances and provided that they fulfil the criteria set out in the Regulations and the Social Assistance Act No. 59 of 1992 and meet the requirements of the means test as prescribed.

**e) What is your department's official interpretation of the words "appropriate social assistance"?**

The assistance offered will be based on their particular circumstances and will be in keeping with the provision as prescribed in the Social Assistance Act No.59 of 1992 and the Regulations to the Act.

**What is your department's official interpretation of the words "progressive realisation of (this) right"?**

Advancing gradually towards the ultimate attainment of social security rights.

**g) What is your department's official interpretation of the word "social services" in section 28?**

Social services are those services which focus on the welfare needs of the community, such as poverty, unemployment, at risk families, children under difficult circumstances, children of divorcing parents, child labour, substance abuse, children with chronic illnesses, children with disabilities, pre-school children, out-of-home care, youth, special needs, juveniles. The approach is developmental in nature to enable a person to become independent based on his/her needs and strengths.

**3. Information Gathering**

Does your department have systems (or access to systems) to collect and analyse statistical and other information relating to the implementation of social security rights and children's right to social services?

The Department does not have a system that monitors social security rights of children to social services. The system that monitors the rights of children to welfare services can be described as follows:

The NPA Steering Committee for Children has a monitoring task group who attend to the implementation of the convention of the rights of children. The information needed for this purpose is collected by means of the Provincial Information System for Social Welfare (PIMWEL).

To quantify the number of children who benefit from social services the following information is being collected through the PIMWEL system regarding the type of services they receive: -

- 1 Supervision Case - Return to Parental Care (Section 15(1) (A), Act 74 of 1983).
- 2 Transfer of Children and Pupils From One Custody or Institution to Another. (Section 34 (1) (A), Act 74 of 1983).
- 3 Supervision Case: Foster Care (Section 15(1)(B), Act 74 of 1983)
- 4 Care of Children Away From Their Parents (Sections 10 (1) (A) and (B), 2 and 3, Act 74 of 1983)
- 5 Reconstruction Case: Children's Home
- 6 Reconstruction Case: Foster Care
- 7 Reconstruction Case: School of Industries
- 8 Reconstruction Case: Reform School
- 9 Absconders Proceedings. (Section 38(2)(A) Act 74\1983
- 10 Leave of Absence :Screening supervision
- I I Foster Parent Screening
- 12 Adoption Screening
- 13 Adoption Investigation (Disclosed)
- 14 Adoption Investigation (Non-disclosed)
- 15 Enquiry Regarding Origin
- 16 Sexually Abused Children
- 17 Child Neglect

18	Child Abuse
19	Uncontrollable Child
20	Orphans
21	Undernourished \ malnourished Child
22	Street Children
23	Abandoned Child
24	Lost Child
25	Child Theft
26	Application of Consent to Marry
27	Marriage Counseling \ therapy
28	Lobola Negotiations
29	Divorce Counseling
30	Statutory Custody \ divorce Order
31	Custody Investigation - Family Advocate
32	Failure to Maintain A Child
33	Teenage Pregnancy
34	Family Conflict
35	Legal Aid
36	Work shy
37	Hobo
38	Mourning Process Support
39	Child Prostitution
40	Prostitution
41	Application -Death \birth \identity Documents
42	Estate \ trust Money Investigation
43	Aged Person
44	Neglected Aged Person
45	Abused Aged Person
46	Care of the Aged
47	Hearing Impairment
48	Visual Impairment
49	Physically Disabled
50	Mental Illness
51	Mental Handicap
52	Multi-handicapped
53	Persons with Aids\HIV
54	Carers of the Disabled
55	Reconstruction Case: Psychiatric Hospital
56	Aftercare Case: Psychiatric Hospital
57	Alcohol Abuse
58	Dependence on Dagga
59	Abuse of Other Drugs
60	Dependence on Inhalants
6	1 Poly-dependent
62	Reconstruction Case (Treatment Centre)
63	After Care (Treatment Centre)
64	Supervision Case Adult (Act. 20\92)
65	Supervision Case Juvenile (Act 20\92)
66	Criminal Offender: Adult
67	Criminal Offender: Juvenile

68	Criminal Offender: Child
69	Probationer: Adult
70	Probation and Supervision Case Adult
71	Probationer: Juvenile
72	Probation and Supervision Case: Juvenile
73	Probationer: Child
74	Probation and Supervision Case: Child
75	Probationer: Bail Condition
76	Reconstruction Case: Correctional Services
77	Aftercare Case: Correctional Services
78	Victim of Crime: Adult
79	Victim of Crime: Child
80	Child Witness
81	Material Need
82	Housing Needs \ Homeless Persons
83	Application \ investigation for A Social Grant
84	Unemployed Person
85	Administration of Grants

### **Information breakdown:**

The data is collected according to the following breakdown: -

Race, Gender, Rural and Urban.

### **Data verification**

The personnel of the National Information Sub-Directorate verify information on provincial level by provincial information managers and on a national level.

### **Public access to the data**

Published statistical review documents are available. Statistics on Welfare Facilities can be accessed through the Internet.

## **4. Vulnerable Groups**

What groups have been identified by your department as more vulnerable than others and which need special attention has identified?

Blacks have been identified as vulnerable with special reference to black women, children, women resident in rural areas and the disabled There is also an emphasis in Social Security on focusing priorities on the poorest of the poor.

In terms of Social Services, the National Programme of Action (NPA) has identified seven priority areas which include nutrition, child and maternal health, water and sanitation, early childhood development and basic education, social welfare development, leisure and cultural activities and child protection measures. The

Department of Welfare has identified certain vulnerable groups from these priority areas namely:

Poorest of the poor;

- unemployed women with children under the age of 5 years.,
- children with HIV/AIDS;
- children under difficult circumstances;
- children at risk;
- children with special needs; victims of crime.

## **5. The obligation to respect these rights**

**a) What current laws and other measures have the effect of denying or depriving people of their social security rights and children's of their right to social services?**

From a social security perspective, none of the current laws and other measures have the effect of denying or depriving people of their social security rights.

With regard to children's right to social services, the Child Care Act and other related Acts for children are not completely in line with the Convention on the Rights of Children (CRC) and South African Constitution.

**b) What current laws and other measures unfairly discriminate against any groups of people, particularly the identified vulnerable groups, and their social security rights or children and their right of access to social security?**

From a social security perspective, none of the current laws and other measures unfairly discriminates against any groups of people whether vulnerable or not.

As far as the rights of children are concerned it was identified that the Child Care Act is not completely in line with the CRC.

**c) What steps have been taken by your department to get rid of any past laws and other measures which impacted on people's social security rights?**

The Department of Welfare mandated the Lund Committee to investigate family and child support. Because the State Maintenance Grant (SMG) was considered to be unaffordable, unsustainable and had targeted certain sectors of the population, the new Child Support Grant was proposed. Many poor black women, particularly rural women and children, were excluded from receiving state maintenance support. This new grant would be targeted at the poorest households. The existing SMG would be phased out over a period of three years. The Welfare Laws Amendment Act No. 106 of 1997 was promulgated on the 19 December 1997 making it possible to introduce the Child Support Grant, put a moratorium on new applications for SMGS, and phase out the SMGS.

The Child Support Grant aims to reach an estimated 3 million of the poorest children when the programme reaches maturity. This grant together with free primary health

care to pregnant women and children under 6 years, will lead to increasing child survival through lower mortality rates and improved child health.

The Department has sanctioned a major investigation into the requirements of the disability sector. This investigation includes *inter alia* intersectoral accessibility to training, employment opportunities, transport and core facilities within the community and open labour market; the promotion of an employment quota and an active labour market policy; investigation and assessment of care dependency and grants-in-aid; home based care for the disabled; assessment of the impact of chronic illness and HIV/Aids on home care provision for disabled people; and uniform simplified and more effective assessment procedures with regard to grants for disabled people. Once the investigation is complete at the end of May 1998, these will lead to policy recommendations.

**What steps have been taken to get rid of past laws and other measures which impacted on children's right to social services?**

The Department has the White Paper for Social Welfare, which guides policy and programmes. The Child Care Act, 74 of 1983 has been amended by the Child Care Amendment Act of 1996. The S A Law Commission, at the request of the Department,

has appointed a Project Committee to review Child Care legislation.

**e) What has been done to remedy the effects of these past laws and other measures which impacted on children's right to social services.**

The Department of Welfare has undertaken the following initiatives to address rights of people/children namely:

The Department of Welfare committed itself, at the National Conference held at the World Trade Centre on 22 and 23 February 1996 in Kempton Park, to implement amongst other a number of programmes aimed at improving the status of women, alleviating poverty and providing skills to women with young children.

As the poverty of women is directly related to the absence of economic opportunities, a strategy was designed to implement a programme, which would provide economic opportunities and the necessary support services to unemployed women with children under the age of five years. The programme is known as the Flagship Programme: Developmental Programmes for Unemployed women with children under Five Years.

A family preservation project at Inanda in Durban has been identified as one of the most effective approaches for primary prevention and early intervention in the prevention of the removal of children and young people from their families and communities.

Child Care Legislation. In 1996 the Child Care Amendment Act, (Act 96 of 1996) was approved by Parliament. This will bring the Child Care Act, 74 of 1983 in line with the crucial aspects of the CRC and the Constitution of South Africa.

The Department of Welfare, in conjunction with the South African Law Commission and other identified stakeholders, is in the process of reviewing existing child care legislation. The aim of the committee is to formulate new comprehensive child care legislation which will be in line with the CRC and would also incorporate all child protection issues under one Child Care Act.

Child Protection. A draft National Strategy on Child Abuse and Neglect has been formulated in conjunction with stakeholders.

A draft child protection protocol has been finalised.

A draft discussion document on street children in conjunction with relevant role players has been formulated.

Substance abuse. A media campaign "I'm addicted to Life", which targeted youth was successfully launched.

Services of the Family Advocate to children of divorcing parents.

The Family Advocate division aims to protect children of divorcing parents against emotional and sometimes even physical abuse as early as possible in the legal process. It has initiated processes such as the establishment of a family court, streamlining the maintenance procedures, assisting as intermediaries in local magistrates courts, advising on the juvenile justice system, etc.

The Child Care Amendment Act has amended the issues. Proposed Child Labour regulations prescribing very detailed minimum conditions for the employment of children in the entertainment industry. Exemptions could be granted to employees in this industry.

### **Initiatives for children and youth with disabilities:**

A National Task Team for Education Support Services has been established, of which the Sub-directorate: Disability, of the Department of Welfare, is a member. This is in an effort to look into the educational needs of learners with special educational needs (ELSEN). There is a move towards including children and youth with disabilities into the mainstream education system. The Department established a National Co-ordinating Committee on Disability together with relevant stakeholders.

Parents' organisations formed the Disabled Children's Action Group (DCAG) which is committed to the promotion and protection of the rights of all children with physical, intellectual, psychiatric, genetic and sensory disabilities. DCAG's specific reference is for prevention, rehabilitation, social integration and equalisation of opportunities through the mobilisation and empowerment of parents, guardians and children.

Chronic Illness and HIV/AIDS. Policy objectives have been developed to effectively address the social implications of HIV/AIDS and Sexually transmitted diseases (STD) in collaboration with all stakeholders. The Department established a task team HIV/AIDS on which provinces are represented with the aim to implement the Social Welfare Action Plan.

**HIV/AIDS** The Department is also represented on an Inter-Departmental Committee on HIV/AIDS.

Adoption. The High Court has ruled that the natural father of a child born out of wedlock is a party to the proceedings in an adoption hearing and therefore has the right to be heard. The Constitutional Court subsequently ruled that the provisions in terms of Section 18(4)(d) of the Child Care Act (1983) (which dispenses with the consent of the natural father) are discriminatory and that it should be redrafted.

The Department of Welfare is in the process of formulating amendments to the relevant section in the Child Care Act, 1983.

Foster Care. A draft foster care policy document has been compiled.

Residential Care. Cabinet has accepted policy for the transformation of the Child and Youth Care System in South Africa.

Children in Prison. The Department of Welfare has established a Committee for the Management of Juveniles Awaiting Trial (COMJAT) to provide for services to children awaiting trial.

With the increased number of children awaiting trial in prisons and police cells and in view of the approaching date (30 April 1998) for removing all children from these institutions in accordance with section 29 of the Correctional Service Amendment Act 1994, COMJAT has been integrated with Project Go. Their aim will be to address blockages and human rights abuse in residential care and improve early intervention services as well as to introduce a new developmental assessment approach and to minimise the number of children awaiting trial by 30 April 1998.

Project Go is located within the new Child and Youth Care System (CYC) framework and will be implemented as far as possible according to the Interim Policy and draft minimum standards for CYC.

Formal training on secure care is provided to the personnel of Residential Care facilities in the provinces.

Youth Justice. Within the transformation of the child and youth care system; the transformation of the youth justice component has received specific attention. This particularly relates to diverting young people from the criminal justice system, ensuring effective pre-trial services and delivering effective services to young people awaiting trial in residential care.

Probation services to young people (a function of welfare) have been under transformation for the past year. Within this process approximately 500 probation officers have been trained so far and/or retrained to deliver services within the new approach. This training will continue throughout 1998. Additional probation posts have been created and new minimum standards and guidelines have been developed.



Formal training on probation work, particularly with youth, is presently under review at a number of university departments.

Youth. The Department is participating in an integrated policy formulation process with the National Youth Commission as there is at present no policy that focuses on services for youth between the ages 16 to 35 years, which is the age range which overlaps with the definition of youth in the White Paper for Social Welfare.

Life skills. A draft discussion document on life skills programmes targeted all age groups and focusing on service delivery areas in the Department of Welfare, has been formulated

Human Resource Development. In line with new policy directions, more than 4 000 child and youth care workers, youth workers, social workers and managers have been trained over the past 2 years. This training will continue throughout 1998.

New Curricula and formal courses in working with children and youth are being established at the Technikon RSA, ranging from 2 year certificates to 3 year diplomas and 4 year degrees. Courses are also presently under review at a number of University Departments.

The Department of Welfare has undertaken the following initiatives to address rights of people/children namely:

The Department of Welfare committed itself, at the National Conference held at the World Trade Centre on 22 and 23 February 1996 in Kempton Park, to implement amongst other a number of programmes aimed at improving the status of women, alleviating poverty and providing skills to women with young children.

## **6. The obligation to protect these**

### **a) What laws and other measures protect people against unfair discrimination in the allocation and availability of pensions in the private sector?**

The Labour Relations Act, 1995 (Department of Labour)

The Special Pensions Act, 1996 (Department of Finance)

### **b) What laws and other measures protect people (including children) against any other practices in the private sector which have a negative effect on their social security rights or children's right to social services?**

The Child Care Act, Act 74 of 1983.

The CRC was ratified in South Africa on 16 June 1995.

## **7. The obligation to promote and fulfill these**

**a) What percentage of your department's budget is set aside to promote and fulfil social security rights? How much of this budget will have been spent by the end of the 1997-8 Financial year?**

88% of the total Welfare budget is currently allocated to social assistance, amounting to approximately 7.5% of Government spending. As highlighted in the newspapers a number of provinces have overspent and required the immediate intervention of the Minister of Finance together with the Minister for Welfare and Population Development in order for the provinces to meet their social security obligations.

**b) What has your department done to inform and educate all South Africans, and particularly the vulnerable groups, about their social security rights?**

The Department has ensured that the Communications Directorate has published pamphlets and Ministerial speeches published both in the daily newspapers and on the radio and on the television etc. In addition to this, discussions and inputs made at lectures, conferences, keynote addresses etc. have been other methods utilised to keep the public informed.

**c) What has your department done to inform and educate all children about how to get social services?**

Through the Department's Communication Section, policy issues are marketed through the media, television, posters, pamphlets, international days, awareness campaigns, annual child protection weeks, etc.

**The Child Emergency Line personnel is able to inform children of their rights.**

An information letter was sent to all the Head Offices of the nine provinces to stress the availability of inter-country social services rendered by the Department of Welfare in collaboration with International Social Services (ISS). This service is available to children and their families where social work intervention is needed on an inter-country level. Provincial welfare departments in turn inform and educate children and their families on how to get inter[country social services and assist them in the preparation of referrals.

**d) What is your department's understanding of the core minimum obligations imposed on it by the social security rights and children's right to social services? How are these understandings reflected in laws and other measures adopted by your department?**

The Social Security Directorate is obliged to ensure that all the provisions stipulated in the Social Assistance Act No.59 of 1992 and the prescribed regulations are met.

**e) What minimum requirements for making sure the children's rights to social services are applied in a uniform way across the country have been set by your department? What laws and other measures are these included in?**

The National Programme of Action is the instrument by which South Africa's commitment to children is being carried out. It is a mechanism for identifying all the plans for children which are developed by government departments, non-governmental organisations (NGOs) and other child-related structures and for ensuring that these plans converge in the framework provided by the convention, the goals of the World Summit for children and the country's development programme. The White Paper for Welfare has adopted the principles of equity, non-racism and accessibility and quality services.

The implementation of the Constitution of South African and the CRC in legislation, programmes and policy regarding Welfare services to children.

**f) Please give a brief description of any current law and other measures which have been adopted to improve or advance social security rights. Which of these deal with people who have been unfairly discriminated against in the past and which deal with the identified vulnerable groups?**

The Welfare Laws Amendment Act No 106 of 1997 is a current legislation, which has been introduced in order to improve social security rights of all the people in the country. In the past maintenance grants were targeted at a small section of the population. Many poor black women, particularly rural women and children were excluded from receiving state maintenance support. The Child Support Grant which replaces the state maintenance grant aims to reach an estimated 3 million of the poorest children when the programme reaches maturity. This will amount to approximately 48% of children under 7 years of age. This Child Support Grant Programme together with free primary health care to pregnant women and children under 6 years, will lead to increasing child survival through lower mortality rates and improved child health. This legislation relates both to people who were unfairly discriminated against in the past and vulnerable groups.

**g) Please give a brief description of any current laws and other measures which have been adopted to improve or advance the Fights of children to social services. Which of these deal with children who have been unfairly discriminated against in the past?**

The amendment of the Child Care Act will improve the right's of children.  
Refer also to 6 (b)

**h) Have any new laws and other measures (such as budget cuts and scaling down) been introduced in the past year which have a negative impact on the rights of children to social services?**

In accordance with the new budget process provinces received a global amount, for each financial year calculated in terms of an equitable revenue sharing distribution formula, where after the provincial treasury divided the global allocated amount between each Department (function). Therefore, any cuts in the subsidies to Welfare Organisations are done on Provincial level in order to stay within their budget allocations. It should be noted that the Department in collaboration with the Provinces is in a process of formulating a new Welfare Financing Policy, which might have a financial effect on the subsidies to Welfare Organisations. It is envisaged that this policy will be based on the new developmental approach of service delivery and that Welfare Organisations should prioritise their activities according to the needs of the community.

There are always financial constraints and budget limitations within which the department has to work.

**i) What structures or mechanisms has your department put in place to: Review laws and other measures which relate to this right?**

Child Care Legislation. The South African Law Commission, in conjunction with the Department of Welfare and other identified stakeholders, is currently revising existing laws that are applicable to children's issues with the aim to draft a new Comprehensive Child Care Act. (Committee: Project 10: The review of the Child Care Act)

Early Childhood Development. Ad-hoc Co-ordinating Committee for Early Childhood Development (CACHED): based on intersectoral collaboration.

National Committee for Child Abuse and Neglect: based on intersectoral collaboration.

The prescribed acts and regulations guide all provinces, which stipulates the criteria and circumstances under which one qualifies for a grant. The Social Assistance Act No 59 of 1992 and the Regulations to the Act and the Welfare Laws Amendment Act No 106 of 1997 are the documents within which the laws pertaining to applications for grants and national norms and standards are controlled. In addition to this, all the forms to be utilised throughout the country are being co-ordinated by the national office which will ultimately ensure uniformity.

**j) What structures or mechanisms has your department put in place to: Review laws and other measures, which relate to this right?**

The Social Security Directorate forms part of the Chief Directorate: Strategic Policy Development and Planning. The Social Security Directorate has a policy sub-directorate, which reviews policy on an ongoing basis with a view to ensuring that the most appropriate policy is in place which meets the needs of the poorest people.

National Committee for Child Protection week: based on an Inter-Sectoral approach.

Intersectoral Committee to Prevent and Combat the Commercial Sexual Exploitation of Children in South Africa.

**Task Team:** AIDS in collaboration with provinces.

**Project Go:** Unblocking of the Residential Care system.

**ii) Monitor whether laws and other measures were implemented? Ongoing meetings with provincial heads of department.**

**iii) Work with other departments, levels of government or sectors of society to make sure everyone, and particularly the identified vulnerable groups, get access to social security rights?**

Task teams made up of representatives from NGOs, CBOs and various departments meet on an ongoing basis to discuss pertinent issues. Representatives from the provinces and key role-players comprise the task teams that revisit, amend and introduce new policy.

**iv) Work with other departments, levels of government or sectors of society to make sure children get social services?**

The National Programme of Action (NPA) is the instrument by which South Africa's commitment to children is being implemented and monitored. It is a mechanism for identifying all the plans for children developed by government departments, non-governmental organisations (NGOs) and other child-related structures and for ensuring that these plans converge in the framework provided by the convention, the goals of the World Summit for Children and the country's development programme.

The Regulations of the Child Care Act have monitoring measures/mechanisms.

The Department of Welfare co-operates with International Social Services (ISS), an international social service network organisation, to ensure that children and their families receive inter-country social services.

Work with other departments, levels of government or sectors of society to make sure children get social services?

Regarding the NPA the Department regularly liaises with provinces and national bodies. There is an inter-departmental Committee which co-ordinates and monitors activities as well as a NPA Steering Committee which consists of the following role-players: Department of Health, Department of Welfare, Department of Justice, Department of Education, Department of Finance, Department of Water Affairs and Forestry, Reconstruction Development Programme (RDP), Department of Foreign Affairs, UNICEF and National Children's Rights Committee (NCRC).

Make sure the principles of equality and non-discrimination in section 9(2) of the Constitution are integrated into all department programmes relating to this right?

The Department is guided by these principles and it co-ordinates all the department's programmes for children through an inter-Departmental task group on the NPA for monitoring purposes.

The function of the Departmental Committee on Developmental Social Services (DCDSS) is to approve policy issues. Heads of Departments in Provinces represent their stakeholders on this committee.

Minister for Welfare and the Members of the Executive Council of the nine provinces (MINMEC). Ministers for Welfare in Provinces are represented on this committee for the approval of policy matters.

## **8. Future Goals**

### **a) What new laws and other measures will your Department put in place to respect, protect, promote and fulfil children's rights to social services?**

The Child Care Act 96 of 1996.

The full implementation transformation of the Child and Youth Care System developed through the Inter-Ministerial Committee (IMC).

The Department of Welfare is currently considering affiliation with International Social Services (ISS). This would lead to even more efficient social services being available to South African clients from the many countries served by ISS.

The establishment of new comprehensive Child Care Legislation.  
Strategy on child abuse and neglect.

The Department has an approved business plan for each financial year.

### **b) What will your department do to get rid of existing laws and other measures which make it difficult for people to get access to social security rights or for children to get social services?**

Ongoing revision and amendment of the laws that make it difficult for accessibility to social security rights.

The terms of reference for the National Programme of Action Steering Committee (NPASC) make provision for the submission of progress reports to Cabinet to be presented annually and whenever required. These reports reflect progress at national and provincial levels and provide an opportunity to identify shortcomings and to develop plans to overcome them.

Increased proportion of welfare services budget to be directed to children  
The implementation of the Child and Youth Care System.  
Promulgated the Child Care Act, Act 96/96 for implementation.  
The establishment of comprehensive Child Care Legislation,

## **9. General**

Please tell us anything which your department has done or is planning to do to make sure social security rights and the right of children to social services are respected, protected, promoted and fulfilled which have not been dealt with in your answers to these questions.

A task team comprising of state representatives and the private sector are reviewing all aspects pertaining to disability grants with a view to ensure that appropriate policy is in place to meet the needs of the public at large more effectively.

## 6 EDUCATION

### National Department of Education

#### 1. Past Overview

(a) In the past South Africa had a racially fragmented and an unequal school system which was based on apartheid policies. Although a highly motivated and well staffed, well-resourced elite system has been developed for one section of the population (the white minority), the rest of the South African population was subjected to an inferior education. From 1983 education was organised through three separate "own affairs" departments for Indians, Coloureds and Whites respectively, with provision for the African population being divided between six self-governing territory departments, a central governing department (DET) administering education for Africans living in "White RSA" and four independent states. These separate systems were operating in total isolation. This state of affairs in education left millions of young and adult South Africans illiterate and unskilled. (Refer to the White Paper on Education and Training of March 1995.)

#### 2. The Constitutional obligation to respect, protect, promote, and fulfil the education rights in section 29 of the Constitution.

The Department is under an obligation to:

(i) **respect** the rights set out in section 29 of the Constitution and to show practical proof of its desire to comply with the requirements mandated in that section. The State must provide such educational institutions and services as are necessary to ensure at least reasonable access to education by anyone anywhere in the country. The MECs of the provinces which are responsible for school education are obliged to situate at least primary schools within reach of learners, even by public transport. Lack of resources should not be a barrier to education.

(ii) **protect** the right of everyone to education and to ensure that there will be no unfair discrimination against any person.

(iii) **promote** education and formulate policy and strategic plans to transform the legacy of the past and to make education available in order to enable everyone to exercise their rights in terms of section 29 of the Constitution.

(iv) **fulfil** its obligations in terms of section 29 by reconstructing, developing and maintaining the education system and by implementing strategic plans geared to delivering education to everyone.

The Department's interpretation of the words "**basic education**" in section 29(1)(a) of the Constitution is that appropriately designed education programmes to the level of the proposed General Education Certificate, whether offered in school to children, or through other forms of delivery to young people and adults, adequately defines basic



education. In schools this will cover grades 1 to 9. See page 40 of the White Paper on Education and Training of 15 March 1995.

(c) Adult Basic Education and Training (ABET) is the general conceptual foundation towards lifelong learning and development, comprising knowledge, skills and attitudes required for social, economic and political participation and transformation applicable to a range of contexts. ABET is flexible, developmental and targeted at the specific needs of particular audiences and, ideally, provides access to national recognised certificates. (The Adult Basic Education and Training Policy Document, October 1997).

(d) The Department of Education is in the process of drawing up a Green Paper on Further Education and Training (FET). In the Green Paper FET will be officially defined. In absence of a formal definition, one will have to fall back on the definition of the NQF by the South African Qualification Authority, namely that FET is the band from level 2 to 4, or grades 10 to 12 of the secondary school.

(e) The manpower is not readily available to change education overnight. The State must make education **progressively available and accessible** as trained educators and the necessary finance and infrastructure (such as schools) become available.

(f) It cannot be expected that 1.1 different language schools Must be established in each district in order to satisfy any member of a group which speaks one of the national languages. It is considered to be **reasonably practicable** to provide education in a particular language of learning and teaching if at least 40 learners in Grades 1 to 6 or 35 learners in Grades 7 to 12 in a particular grade request it in a particular school. See the Language in Education Policy of 14 July 1997.

(g) Reasonable educational alternatives which are implemented are double medium instruction and parallel medium classes in public schools.

(h) It means that private or independent institutions which are established should emulate the standard or quality that is laid down for public institutions.

### **3. Information gathering**

The Department uses the following two systems to collect and analyse statistical and other information relating to the implementation of the right to education:

(i) The EMIS (Education Management Information System)

The EMIS is a database system used by the provincial education departments to capture data from the annual schools survey. It was developed by the national department in collaboration with the provincial education departments. The system was designed using Access 97 database development tool. The system also has a pre-designed query system which will enable the production of summary reports.

Another part of the EMIS system is the School Register of Needs Survey (SRN). This survey was conducted in 1996 and completed in 1997. The survey using Human Rights Commission.

**GIS** located and mapped 32 000 educational institutions in the country including schools, early childhood centres, adult education centres, and colleges for teacher education. The information was then captured using the Access database. It includes maps and a viewing system.

(ii) **SAPSE system (South African Post Secondary Education system)**

The SAPSE system is an old system used to capture and store data collected by universities and technikons. It is a SAS (Statistical Analysis System), mainframe based system. The database is based in Bureau Nucleus. Data is submitted by institutions either on disks or tapes and then transferred into the system. The system is used for editing, to produce reports and to store data.

The following information is collected:

(i) The **EMIS** is used to collect data from the annual schools survey. The information collected includes institutional, learner, subject and educator information. This information provides an indication of access, equity, and quality of the education system.

(ii) The **SRN** is used to collect information on physical facilities, condition of buildings, services provided such as water, electricity, telephones, equipment and resources available at schools. This information can be mapped and located at provincial, regional/district, and/or circuit and school level.

(iii) The **SAPSE** system collects information on student statistics, courses, staff, finances, fixed assets and building space statistics. The information is broken down in the following way:

(i) The information collected by the EMIS is broken down according to race, gender, geographic location of the school e.g. province and magisterial district are part of the EMIS school number (information on rural and urban is indirectly collected as the magisterial district gives such an indication). The income level of the community is not collected by the system but the aim is to link the database to the Census database which will give an indication of the income level.

(ii) The **SRN** only collects the number of learners and educators which are not broken down.

(iii) The SAPSE system collects student and staff information broken down according to race and gender. Information on the geographic origin of first time entering undergraduate students is collected and is broken down to magisterial districts. The income level of the students families is not collected and only average income is available for staff categories.

The information is independently verified and this is done in the following way:

- (i) The EMIS system has the in-built edit query system which is used to verify data. This would be done at the provincial level during the data capturing process.
- (ii) The SRN data was validated independently by the Research Institute for Educational Policy (RIEP) at the Free State University.
- (iii) The SAPSE system is verified at the national department, sent back to the institutions for an update and then to the national department for final verification and report production.

This information is made available to the public in annual statistical reports, the Annual Report of the Department of Education, replies to parliamentary questions, and answers to queries from the public. The Department also submits information to UNESCO.

#### **4. Vulnerable groups that the department caters for are:**

- (a) Women - to counter and eliminate violence and sexual harassment against the female gender in all educational institutions (Report of the Gender Equity Task Team of the Department of Education, 1997)
- (b) Learners with Special Needs - to overcome all barriers that prohibit learning and teaching in all educational institutions (Report of the National Commission on Special Needs in Education and Training, 1997.).
- (c) People living with HIV/AIDS - the SA Law Commission is assisting the Department in drawing up a National Policy on HIV/AIDS for Schools (Aspects of the Law Relating to AIDS, Discussion Paper 73)

#### **5. The obligation to protect the right**

- (a) All discriminatory education legislation was repealed and the new education laws were drafted in view of the Constitution to prevent people from being denied their right to education. Copies of all the education Acts (see enclosed list of Acts) are in the possession of the Human Rights Commission. Cases of discrimination do occur where legislation is not properly interpreted, e.g. children being denied access to schools, or not given their school reports because their parents can not pay their school fees.
- (b) The Constitutional Court declared Regulation 2(2) of the Regulations regarding the Terms and Conditions of Employment of Educators invalid. See the Constitutional Court Case of Charles Kweku Larbi-Odam and others / MEC for Education (North West Province) and the Minister of Education (Appeal to the Constitutional Court).
- (c) All previous education laws were repealed.

(d) New education laws are administered and a Culture of Learning and Teaching programme has been introduced. See the enclosed report of the Consultative Conference on COLTS.

## **6. The obligation to protect the right**

(a) and (b) The Constitution, the National Education Policy Act, 1996, the South African Schools Act, 1996 and the Act on Higher Education, 1996, protect people in private educational institutions.

## **7. The obligation to promote and fulfil these rights**

(a) The total budget for the Department of Education (at national level) (excluding college and school education) for 1997/98 is R5,559 billion. An amount of R5,432 billion is earmarked for universities and technikons, whereas the remaining R127 million is for the management of the national Department of Education.

As universities and technikons are autonomous, they are responsible for the utilisation of their own budgets. Once higher education colleges are declared in terms of section 21 of the Higher Education Act, No 101 of 1997, they will also be responsible for their own budgets.

The provincial education departments are responsible for the provision of college and school education and most of their funds is spent on basic education, adult basic education and further education. The national Department of Education has no constitutional authority to determine the budgets of the provincial education departments.

It is envisaged that all the funds budgeted for basic education, adult basic education and further education will be spent by the provincial education departments by the end of the 1997/98 financial year.

(b) The South African Schools Act Made Easy was published as a supplement to all major newspapers in the country to inform all citizens of their right to school education.

The Minister of Education has appointed the National Commission on Special Needs in Education and Training and the National Committee for Education Support Services to make recommendations to assist learners and students who are disabled and are experiencing barriers to learning. See the report of the Commission.

Also see the Report on Gender Equity in Education of the Gender Equity Task Team. The Human Rights Commission and the Department of Education are working on the publication of an information manual for students in education and educators to provide information and education in human rights.

(c) The core minimum obligations imposed on the Department of Education by the right to education are considered to be the following:

- (1) The establishment of a legal framework to provide a legal basis for the restructuring of education in terms of the Constitution and the White Paper on Education and Training. See the education laws.
- (2) The establishment of the Education Management Information System on which basis the provision of education can be planned and monitored.
- (3) The provision of sufficient funds for education.
- (4) The training of educators, capacity building of governing bodies and the provision of trained manpower to manage the education system.
- (5) The development of education programmes, the South African Qualifications Framework and the maintenance of standards.
- (6) The establishment of Education Councils.
- (7) The Culture of Learning, Teaching and Service Campaign to restore the culture of learning and teaching and to make schools safe for learning and teaching.
- (8) The regulation of the service conditions of educators. For the reflection of the above obligations please see the various education laws.

(d) The provision that everyone must have access to education can only be satisfied by the exercise of equal and non-discriminatory admission policies on the part of educational institutions. This cannot be interpreted that any educational institution is obliged to admit every person who applies to enter. Admission policy to public schools is regulated in the South African Schools Act, 1996, section 5. The Department of Education is in the process of drafting guidelines for admission policy for public schools.

(e) The Department of Education is in the process of drafting a Bill on Further Education and Training and a Bill for Adult Basic Education and Training. Consideration is also given to amend legislation to accommodate vulnerable groups without discriminating against them by isolating them in separate legislation.

(f) No. The Green Paper on Further Education is under consideration to make the progressive realisation of the right to further education possible.

- (g)
  - (i) The Directorate Legal Services and Legislation together with the various Directorates, which administer education laws, review laws.
  - (ii) Special committees are set up in the Department of Education, e.g. the Committee for the Implementation of the South African Schools Act, to monitor the implementation of laws. The Education Policy Development Unit in Johannesburg also monitors education in collaboration with the Department of Education.

- (iii) The Department of Education consults with as many stakeholders in government as well as the private sector on all major projects, e.g. the National Committee on Further Education, Curriculum 2005, the Commission on Further Education and Training, the National Commission on Special Needs in Education and Training, the Gender Equity Task Team and Children at Risk. These bodies publish their policy documents in the Government Gazette for comment from the public. Consultative meetings are also held with stakeholders in all the provinces.
- (iv) The above teams and Senior Management and Broad Management of the Department of Education monitor education constantly.
- (v) See (iii) above.

## **8. Future goals**

- (a) The Department is in the process of drafting legislation for Further Education and to amend the Educator's Employment Act, 1994. By 1999 legislation will hopefully be drafted on Adult Basic Education and Training. As soon as the laws are promulgated a process is set into motion to implement the laws.

The major goals to restructure education are contained in the White Paper on Education and Training of 15 March 1995.

- (b) All discriminatory legislation has been repealed.

## **9. General**

The staff guidelines of the Public Service Commission are followed with the appointment of new staff to make provision for redress and representivity.

Extensive co-operation with donor countries, the United Nations and UNESCO is encouraged to develop education in South Africa.

A communication strategy has also been developed to keep the public and stakeholders informed about new developments and for capacity building of governing bodies.

A report regarding the rights of children is enclosed.

## **10. Relevant Education Acts**

National Education Policy Act, Act No 27 of 1996 Higher Education Act, Act No 101 of 1997 South African Schools Act, Act No 84 of 1996

## MEMORANDUM

### 1. MEASURES ADOPTED TO GIVE EFFECT TO THE RIGHTS OF THE CHILD IN EDUCATION, CULTURE LEISURE, SPORT AND RECREATION

The South African Government committed itself to bring education, leisure, sport and recreation in line with articles 28, 29, 30 and 31 of the Convention on the Rights of the Child.

The Constitution of the Republic of South Africa, 1996, Act No 108 of 1996, makes provision in section 29 that:

(1) *Everyone has the right*

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

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

(2) *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 the implementation of this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-*

(a) *equity;*

(b) *practicability, and*

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

(3) *Everyone has the right to establish and maintain, at their own expense, independent 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 standards at comparable public educational institutions.*

(4) *Subsection (3) does not preclude state subsidies or independent educational institutions.*

Schedule 4 of the Constitution makes provision for education at all levels, excluding tertiary education to be a functional area of concurrent national and provincial legislative competence. Tertiary education is a national competence.

Since Cabinet agreed that the South African Education system must be transformed in Accordance with democratic values and practice and the requirements of the Constitution

#### **Three white papers were published:**

Education White paper 1: Education and Training in a Democratic South Africa, First steps to develop a new System Education White Paper 2: The organisation, Governance and Funding of Schools White Paper on Higher Education.

The following education legislation has been placed on the statute books since 1994:

South African Qualifications Authority Act, Act No 58 of 1995

National Education Policy Act, Act No. 27 of 1996

Educators Employment Act, Proclamation No.38 of 1994

The South African Schools Act, Act No. 84 of 1996 and provincial school education acts.

Higher Education Act, Act No. 101 of 1997

The Constitution of the Republic of South Africa, Act No. 108 of 1996, makes provision that education for children must be provided by the nine provincial departments of education, taking into account the right of everyone to basic education and the right to receive education in the official language of their choice. However, the Minister of Education at national level determines the minimum norms and standards for education in terms of the National Education Policy Act, Act No. 27 of 1996, in consultation with the Members of the Executive Councils who are responsible for education in the provinces.

The South African Schools Act, Act No. 84 of 1996, (SASA) and the provincial education laws provide the legal framework for the provision of education to all learners and to protect their rights in public and independent schools. The Bill of Rights and the Convention on the rights of the Child were taken into consideration during the drafting process of this legislation. A wide cross section of school parent communities were consulted when school education policy was formulated.

The South African Schools Act makes provision for compulsory basic education for all learners from the age of 7 or grade 1 to the age of 15 or grade 9, based on the principle of non-discrimination. Compulsory education places an obligation on provinces to provide sufficient school places for all learners. Consequently the provincial departments of education have embarked on a building programme to provide sufficient places for the 1 1 908 879 learners who are in Grades I to 12 in 1997. Reconstruction and Development (RDP) funds are used in provinces to assist with the funding of learner transport.

On admission to a school or education institution, as stated in Section 9 of the Constitution of the Republic of South Africa, 1996, Act No. 108 of 1996, no learner shall be unfairly discriminated against, directly or indirectly, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, conscience, belief, culture or language. Although admissions policies will be decided by a school's governing body, the Schools Act bans unfair admission policies and discriminatory educational practices in public schools.



Other major achievements which were accomplished through the South African Schools Act are the following:

- (a) Minimum norms and standards for language policy in public schools were established in the new language policy which is in keeping with the values and principles of the Constitution of the Republic of South Africa.
- (b) Freedom of religion which is provided for in the Constitution is entrenched in the SASA and a policy for religious education is being developed by a task team of the Department of Education.
- (c) Governing bodies may adopt a code of conduct for a public school after consultation with the learners, parents and educators of the school and taking into consideration guidelines provided by the Minister of Education to ensure that discipline is maintained in public schools. These guidelines make provision for the continued education of pregnant girls.
- (d) Protection of individual rights against cruel or inhuman actions is entrenched in the Constitution and in the SASA which prohibits corporal punishment.
- (e) Learners are represented on their own Learner Representative Councils which must be established at all public schools enrolling learners from the eighth grade or higher.
- (f) In seeking the well-being of children, learners are represented on the governing bodies of public schools and take part in decision making about matters affecting them, e.g. a Code of Conduct.
- (g) A capacity building programme is under way to enhance the capacity of newly elected governing bodies and parents.
- (h) Minimum norms and standards for the funding of public schools are currently being developed to be implemented from 1998 to fund schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision. Education is compulsory up to grade 9. The SASA enables schools to charge fees if a resolution to do so has been adopted by a majority of parents. In such cases a parent is liable to pay the school fees unless he or she has been exempted from payment for financial considerations. No learner may be excluded from a school because of the non-payment of his or her school fees. If a parent cannot fulfil his or her financial responsibility towards a school such parent may be exempted from payment partially or in full by the governing body and may appeal to the Head of Department if the application for exemption is refused by the school. In some public schools fees up to R 2 000 per year are payable if the parents can afford it.
- (i) Provision has been made for home schooling.

During 1995/96 state expenditure on education for children under the age of 18 was as follows:

Pre-primary education R 213 111 000  
 Primary education R 14 291 610 000  
 Secondary education R 10 313 405 000

Statistics, Internal Report of the Department of Education (June 1997)

A **National School Construction and Upgrading Programme** was established in 1995 and caters for the physical improvement of school buildings. An initial RDP allocation of R200 million was received in 1995 and a second RDP allocation of R1 billion was made available for 1996/97.

The **National Commission on Special Needs in Education and Training** and the **National Committee for Education Support Services** were appointed to identify critical issues and needs, develop policy options and make recommendations on the education of learners with special needs. The report of the Commission will be submitted to the Minister of Education by the end of November 1997.

Learners with disabilities experience discrimination in all spheres of their lives. Full participation in the education system as well as society is difficult to achieve because of many barriers which exist, e.g. access to institutions of learning, services and access to places of work. Under the new SASA, mainstream schools have to admit such learners, where this is reasonably practical, and schools are encouraged to take every step to make their facilities accessible to the disabled. Learners who cannot be properly taught at mainstream schools will be educated at separate special schools. The wishes of parents of children with special education needs must be taken into account in determining where the learner will be placed in school. However it appears that there are many learners with disabilities who currently do not have access to education. Redress for learners who have previously been disadvantaged is also necessary and will be approached in an integrated manner.

The **Committee on Gender Equity** which was established by the Minister of Education in October 1996 will submit its report in October 1997. The Committee contributed to the development of Curriculum 2005 to ensure that gender sensitivity is reflected in the learning outcomes. All curriculum development work will be sensitive to gender, race and disability. There will also be equity and representivity in the employment and training of educators.

PERCENTAGE OF FEMALES PER GRADE FOR 1995

GRADE

1	2	3	4	5	6	7	8	9	10	11	12
48	48	49	49	50	51	52	53	54	55	55	57

Total % 11, 908 879

**Curriculum 2005** was launched in April 1997. It makes provision for eight learning areas, i.e. (1) Language, Literacy and Communication, (2) Human and Social Sciences, (3) Technology, (4) Mathematical Literacy, Mathematics and Mathematical Sciences, (5) Arts and Culture, (6) Economics and Management Sciences, (7) Human

and Social Sciences and (8) Life Orientation. Two of these learning areas, i.e. Human and Social Sciences and Life Orientation, specifically make provision for human rights education, however children's rights will be addressed across the curriculum. Protection of the environment is included in Human and Social Sciences and Natural sciences. Life Skills Education including sex education will be addressed in Life Orientation. The South African Law Commission has developed a policy for AIDS/HIV for schools.

The South African Human Rights Commission works in collaboration with the Heads of provincial departments of education to promote human rights in schools, i.e. through a human rights week every year, school assemblies focusing on human rights, extracurricular activities, classroom learning and teaching around human rights, a human rights essay competition, school community gatherings and teacher capacity building.

A **National Primary School Nutrition Programme** is provided in most of the provinces. The programme targets school children in all schools particularly those in economically disadvantaged communities.

Most MECs responsible for Education are also responsible for Arts and Culture in the provinces. Arts and Culture are crucial components of developing human resources. All children will be taking arts and culture in school to help unlock the creativity of children, allowing for cultural diversity within the process of developing a unifying national culture. This learning area makes provision for design education, oral traditions, communication, literature and literacy.

The long history of discriminatory provision for early childhood development (ECD) makes it difficult to provide a quick remedy for ECD. The national Department of Education is now supporting the implementation of a Project-based Early Childhood Development Programme entitled the **National ECD Pilot Project**. The aim of this project is to implement a reception year throughout South Africa and to build the capacity of provincial departments of education and NGOs to contribute to the overall development of policy implementation for ECD from birth to at least 9 years. ECD aims to implement the principles of "learning begins at birth", joint and shared parental responsibilities and the defence of children's rights, assisting disadvantaged and disabled children and work for children's enhanced development sharing the visions of the Convention on the Rights of the Child, the World Conference on Education for All and the World Summit for Children. The ECD strategy makes provision for policy, curriculum, accreditation, training, employment of ECD practitioners, funding of ECD services and policy development structures.

In 1995/96 the expenditure on pre-primary education in ordinary public schools was R 213 million, i.e. 0,63% of the total expenditure on education. Only 9% of children, from birth to 6 years, have access to any ECD services.

The **Commission for Further Education** completed its investigation into the provision of education for learners after the age of 15 years. The provisioning of Vocational Education and Guidance is part of this investigation. Recommendations will be made on the transformation of this sector of education to make it more accessible to all learners and to provide greater mobility in the education system and

for qualifications to be recognised by the South African Qualifications Authority within the National Qualifications Framework.

The **Culture of Learning, Teaching and Service Campaign (COLTS)** was launched early in 1997 to restore the culture of learning and teaching which was broken down in the liberation struggle. The COLTS programme also aims to counteract the dropout of learners from schools. The campaign will be sustained for a period of three years until 1999.

The **School Register of Needs Survey** was initiated as one of the foundations of the government's commitment to equity in education and improving the quality of learning and teaching. It provides a comprehensive database of schools and educational institutions and will be a useful instrument for planning the optimal use of facilities, the allocation of resources and to address the historical backlogs in physical facilities. This survey will also serve as the basis from which progress in education could be monitored for the next five year report on children's rights. On the basis of this survey schools are being provided with clean drinking water and sanitation, e.g. 200 schools have to be provided with toilet facilities.

A **White Paper on Higher Education and the Higher Education Act** became available during 1997. The principle of accessibility is acknowledged. Higher education is not free, consequently a National Student Financial Aid (NSFAS) was established in 1996. The higher education institutions may levy fees but cannot discriminate in any way in admitting students to such institutions.

The **National Arts Council and Provincial Arts Councils** were established to develop all aspects of arts and culture which will also make provision for children. Community Arts Centres are being built and developed with RDP Funds (R 50 million) in the provinces. The Southern Africa Development Community (SADEC) is also contributing

towards a strategy for funding arts and culture. The Department of Arts, Culture, Science and Technology is developing a growth strategy for cultural industries to maximise the role of arts and culture in economic and social development which will include the contribution of children. Business Arts of South Africa is seeking to link business and specific art events. Several Non Government Organisations developed various initiatives to promote art and culture for children.

The **South African National Games and Leisure Activities (SANGALA)** is a child and youth focused recreation project of the Department of Sports and Recreation. The following projects focus on children:

#### **Community SANGALA**

This is a low level competition, physical recreation project. This project commenced towards the latter part of 1995 and culminated in a National Festival held in Margate, Kwa-Zulu/Natal during August 1996. A total of 1 200 people, drawn from all nine provinces, represented almost 260 000 participants from 290 communities in South Africa. In future, this project will be decentralised to provide opportunities for young and old to participate in continuous, sustainable programmes in their communities.

The project will now take place in all nine provinces and will culminate in Community Festivals throughout the country during 1997. It is estimated that 80% of participants will be children and youth. The aim is to reach 5500 000 participants throughout the country during 1997 through this project.

### **Training SANGALA**

This is a recreation leader (Capacity building) project. More than 1 623 Community Recreation Leaders have completed the first level of training. As part of their training and prior to certification they are required to render 10 hours of practical service to their various communities. More than 10 000 hours of volunteer services have thus been provided to communities. 80% of these trainees render their services in the rural areas. In addition to this, 124 of these leaders have completed the second level and a further 22 the third level of training.

The project also focuses on the training of youth to present the SANGALA programme to their communities.

### **Street SANGALA**

Street SANGALA is a recreation and life skills project for street children. This project commenced in Durban, Kwa-Zulu/Natal and due to the huge demand, was extended to Cape Town on 30 November 1996. A total of 1 600 street children have attended the activities presented. This project is aimed at getting marginalised youth off the street and back into normal community life. Street SANGALA was extended to Pretoria and Johannesburg at the end of March 1997 respectively.

### **Rural SANGALA**

Rural SANGALA is a recreation impact assessment project in rural and informal settlements. The pilot projects were scheduled to commence in Mpumalanga, the Eastern Cape, the Northern Province, Gauteng and the North West Province before March 1997. Specific communities are currently being identified for this project. Children do not play a direct role in the delivery of this project. The outcome of the research will however focus strongly on the needs of the children from these communities.

### **Recrehab project**

This project focuses on the rehabilitation of youth in prisons, which will be presented as part of the SANGALA programme. Ekuseni, a Youth rehabilitation Centre in Newcastle, was officially opened by President Nelson Mandela on 19 November 1996. 30 prisoners have already attended a SANGALA Training course and will be responsible for the presentation and organisation of SANGALA projects in the prison. An additional 30 prison wardens from Gauteng were trained during December 1996 to present SANGALA projects in the prisons. It is envisaged that the project will be extended to at least one prison in each province by the end of 1997. This project impact directly on a rehabilitation programme for youth offenders.

Other national projects and activities for 1997 include National Sport and Recreation (Wellness) Day, to coincide with the World Walking Day and the Africa Sport and Recreation Day, is an awareness campaign to promote the benefits of participation in recreation activities. This day will consist of a variety of recreation activities and sport events to take place across the country. Most of the participants will be children as the communities, sport federations and schools will be actively involved on this day. Sport and Recreation Against Crime (SAC) is an awareness campaign involving prominent sporting personalities.

### **SANGALA Movers**

This is an active participation programme for pre-primary children between three and six years of age to enhance their motor skills development. The aim is to bring recreation to the formal and non-formal groups of children in the care of supervisors and preschool teachers in the communities.

**The National Sport and Recreation volunteers Programme** will establish a database of volunteers to enhance sport and recreation activities. It will also provide a training programme for volunteers and a reward system will be implemented to promote active voluntarism in South Africa.

**Sport on a provincial basis** are promoted by the Ministers of Education in the provinces are also responsible for the promotion of school sport on a provincial basis. School children take part in a wide range of sport in extracurricular activities and also in physical education. The MECs work with the United Schools Sports Association of South Africa (USSASA) which receives funding from the Department of Sports and Recreation and subsidies from provincial departments of education, sport and recreation. USSASA promotes sports for children to participate on a national and international basis. The Department of Sports and Recreation is developing a policy for Women and Sports which will also make provision for girls.

**The Children's Broadcasting Forum** has been established regionally. It will aim at providing programmes in all the official languages. Access to electronic media is speeded up through RDP Funding, which is used for electrification projects in all the provinces. The Independent Broadcasting Association (IBA) was established to also make provision for the quotas for children's programmes on radio and television. The National Film and Video Foundation is supplying schools with audio visual material to supplement teaching in schools.

The Minister of Education hosted the 1996-Conference on Education for All in South Africa.

## **2. OBSTACLES AND DIFFICULTIES TO BE OVERCOME**

Despite the significant increase in educational opportunities since the apartheid regime, poverty, illiteracy among children and their parents, and a lack of education facilities are major obstacles in education of children and adults. Although there is a discrepancy in access to education amongst African children, especially females, statistics show that compared to Coloureds, Indians and Whites, there has been a

steady improvement. Only 3% of Africans aged 10 to 14 years and 2% of Africans aged 15 to 19 years have received no education. In 1995 95% of white candidates, 93% of Asian candidates and 86% of coloured candidates, compared to only 39% of black candidates who sat for the examination, passed the matriculation examination. (Department of Education).

Transportation of children, particularly in rural areas, limits access to schools. In some provinces children travel distances in excess of 10 km to school. The provincial departments of education and the Centre for Education Policy Development are investigating the transport of learners. The main difficulties regarding scholar transport are a lack of funds and high transport cost.

The School Register of Needs Survey shows that there are still schools which have no toilets at all while many others do not have electricity and on site water. Some of the school buildings are unsuitable or structurally weak. Many schools have classroom shortages and do not have library or media facilities. In some schools there is still overcrowding of classrooms with a high teacher: pupil ratio. Historical attitudes to corporal punishment, discipline, the education and treatment of girls and the socialisation of children still prevail. Many children do not have safe care after school hours or safe transport while their parents are at work. This results in rape and murder. The potential of preschool children is also not developed with the result that bridging education and reception classes have to be financed additional to the regular expenditure on education.

Learners do not always have access to text books.

There is also a shortage of qualified teachers in science, mathematics and technical subjects.

There is a shortage of funding for pre school and school education for children up to the age of 18 years.

There is a lack of co-ordination between the Department of Arts, Culture, Science and Technology, the Department of Sport and Recreation and the Department of Education as far as provisioning is concerned and also in management and planning. There is no access as yet for all children to cultural, recreational and sporting activities. Research in Higher Education also needs to be regulated with the Department of Arts, Science and Technology. There is a shortage of funding, trained facilitators and material resources for arts and culture. Available resources are also used inappropriately.

The public broadcaster and locally produced children's programmes are under-utilised. Children are marginalised in print and electronic media and there still is sexism in programmes. Community art centres are not developed on the basis of proper feasibility studies which also make provision for children.

There are no trained personnel to act as facilitators and specialists in leisure, recreational and cultural activities. There is a lack of creative events/ happenings and festivities directed at children both in school and in informal settings.

There is a lack of South African content and the portrayal thereof in public broadcasting. The cultural heritage of many children is not validated, e.g. oral traditional theatre, story telling, traditional customs and myths.

The media communication strategy to inform rural, urban, disadvantaged, informal and

Non formal areas is inadequate.

### **3. PROGRESS AND THE WAY FORWARD**

3.1 The Ministry of Education is committed to give every child a better future through education and to promote the full development of their potential and to prepare them for productive employment. The Ministry is also committed to adult basic education, literacy and lifelong learning.

3.2 Plans have been developed and are being implemented to build the capacity of school governing bodies to implement the South African Schools Act especially in the area of the financial management of schools. However, guidance has to be given in the areas of human rights, positive discipline, learner participation, etc. and to parents. Both parents and educators should receive guidance to protect children and learners from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment and exploitation.

3.3. The provision of education for disabled children must be further developed pending the recommendations of the National Commission on Special Needs in Education and Training and the National Committee on Education Support Services.

3.4 Scholar transport must be made available on a larger more affordable basis. Provision should also be made for the transport of children to participate in sport. More provision should be made to develop the child's personality, talents and mental and physical abilities to their fullest.

3.5 Educators need to be trained to implement Curriculum 2005 taking into account lessons learnt from pilot projects for each stage of implementation beginning from 1998.

3.6 Schools in rural and squatter settlements should be better financed and developed More learners' books, computer and science facilities should be made available.

3.7 Children should be better informed about their rights but they should also be made aware of their responsibilities and obligations to protect the right of peers and other children and learners.

3.8 Local governments should make better provision for early childhood programmes in all the provinces.

3.9 The electrification programme should be speeded up as it hampers children in their learning and exposure to electronic media.



3.10 The provision of water to schools and households should be speeded up.

3.11 The Department of Education has embarked on the Technology 2005 Project to improve the learning outcomes in the fields of Natural Sciences, Mathematics, Technology, Engineering and Economic Development and to become part of the education of every learner in South Africa by the year 2005. The ideal is to nurture creative, employable citizens who can contribute to the economy and society of South Africa. Implementation is to be piloted in 20 schools in all the provinces.

3.12 SYSTEM (students and youth into science, technology, engineering and mathematics) is an initiative designed to break the ongoing cycle of mediocrity in Science and Mathematics teaching. It seeks to recover large numbers of Senior Certificate candidates who performed poorly in these subjects. They will undertake a full year of study leading to the awarding of certificates equivalent to the Senior certificate. A proportion of SYSTEM completers will then enter for a new diploma programme in Science and Mathematics teacher education. An Institute for Education Technology is being set up as part of a National Institute for Lifelong Learning. Local governments should make better provision to promote arts and culture for children and should allocate more funds to arts and culture.

Local governments should make better provision for the development of facilities for leisure and sport.

## 7 ENVIRONMENT

### INTRODUCTORY REMARK

Due to the considerable diversity of functions performed by the Department of Environmental Affairs and Tourism, especially as reflected in the various laws administered by it, the Department's response to the majority of questions is given per Directorate rather than in a generalised manner.

#### 1. Past overview

*Please give an overview of the impact of past discriminatory laws and other measures on particular groups' environmental rights. How have these affected DEA& T's ability to realise the rights set out in section 24 of the Constitution?*

Answer :

#### *Air Pollution Control*

Because the Atmospheric Pollution Prevention Act, 45 of 1965 is aimed at the prevention and control of air pollution, it does not, per se, contain any discriminatory provisions. Various sections, however, contain provisions which could lead to a negative impact on other Constitutional rights e.g. the right to property, privacy, etc.

For instance, section 7(3) stipulates that, "whenever the chief officer or an inspector is alleged to have caused injury to any person or damage to property or in any other manner to have detrimentally affected the rights of any person it shall be a defence that the chief officer or such inspector has used the best known or the only or the most practicable available methods and has acted without negligence in the exercise of the powers or the performance of the duties or functions. This provision does not necessarily impact on environmental rights, but the possibility exists that it may be implemented and it may then impact on other Constitutional rights.

Section 12(1) provides for the proper maintenance of all plant and apparatus used for the carrying on of scheduled processes. However, it also reads: "Provided that... due allowance shall be made for the unavoidable escape into the atmosphere of noxious or offensive gases during the starting up of any plant or apparatus or during the period of any breakdown or shutting down or disturbance of such apparatus or plant".

This means that gases could still reach the atmosphere and affect a healthy, etc. environment, albeit only during starting up or breakdown periods. Section 15(1)(a) contains a similar provisions regarding smoke emissions.

Section 13(1)(b) takes into account only the protection of the health of man, not any other rights incorporated within section 24 of the Constitution e.g. the right to have the environment protected.

Section 16(1)(a) stipulates that no construction of chimneys will be approved unless it is satisfied that the height thereof will "as far as practicable be sufficient to prevent smoke or any other product of combustion from becoming prejudicial to health. By

implication, if it is not practicable it may be prejudicial to health and affect environmental rights..

### **Pollution Control**

Environmentally and socially unacceptable standards currently characterise many aspects of waste management, particularly in rural areas, where services are often non-existent. In many urban communities which have always had poor quality services, these services have collapsed as a result of non-payment and poor budgeting and financial planning.

Examples of environmentally and socially unacceptable standards include:

- Substandard, ineffective or non-existent waste collection and street cleaning systems.
- illegal dumping and littering.
- Waste disposal sites which are poorly sited, designed and operated, and thus impact negatively on both the environment and quality of life. Furthermore, there is often little or no control over their use, and general waste disposal sites are frequently used for the illegal disposal of hazardous waste.
- Pickers at landfill sites are a controversial issue. While picking does provide a meager sustenance, pickers disrupt operations and are exposed to hazardous wastes, including chemicals, medical and veterinary waste and dead animals, all of which could affect their health.

### **Sustainable Development**

While many urban areas partition themselves on socio-economic and ethnic grounds, the apartheid system of South Africa institutionalised the partitioning for longer than any country in the world, which has resulted in a unique and problematic urban environment.

In general, cities depend on fragile and limited ecological resource base, yet South African urban systems tend to forage on the productive peri-urban areas instead of looking at ways of conserving and recycling resources, resulting in an extremely inefficient city environment. The apartheid urban planning was based on a zoning concept which was extended into a form of social engineering and racial control. Partitioning of people into ethnic groups in specific areas, with particular areas being restricted for residential and economic activity for particular race groups was a cornerstone of the apartheid city. People were forcibly removed from their homes in established areas to new areas, where all people of a specific racial group were forced to live. Only black persons working in white areas were allowed to reside in the urban area, but their families were required to live in the apartheid created homelands which were often remote from the urban areas.

These townships were close to industrial areas, thus providing cheap labour. Other townships have been developed on land which is considered unsuitable for other forms of development, for example land which is prone to flooding, or was excessively steep, or was adjacent to industrial areas.

Within black areas, neither the green nor the brown agendas were considered.

## **Natural Environment**

There was no discrimination in the past where the Environmental Conservation Act, 73 of 1989 is concerned. However, no provision was made for real rights in, or ownership of a certain area,

Other activities however did influence the Directorate's ability:

Mining rights : Their effects on the sustainable use of natural resources and counter to the state's obligation to protect socio economic rights against invasion by the private sector.

Forestry permits: Reduce of low flows in streams.

Dam building/Water zone development : Effects on environment, e.g., Pongola floodplain.

### ***Question 1 b.***

***What has been the effect of consolidation or non-consolidation of departments and legislation from the previous homelands on your department's ability to realise the environmental fights in Section 24 ?***

Answer:

### ***Air Pollution Control***

The Atmospheric Pollution Prevention Act, 45 of 1965 was applicable on the whole of South Africa before the homelands were created. All previous homelands drafted new legislation, which was based on the above-mentioned Act. The Second Schedule to this Act, which contains various processes carried on by industries, was also accepted by these homelands. However, amendments to the Schedule on a national level, were not implemented by homelands. The effect was that certain new processes were included in national, South African legislation, but not in legislation of the homelands. The effect was that, although prosecutions could be instituted regarding all scheduled processes within South Africa, none could be instituted within the jurisdictions of the homelands regarding the additional processes, since it was not included in homeland legislation

Only recently and as a result of the Environmental Laws Rationalisation Act, 51 of 1997, Act 45 of 1965 was made applicable on the various homelands. This has the effect that uniformity has been reached within South Africa in this regard and air pollution matters will now be controlled accordingly.

### **Pollution Control**

Homelands did not have to meet the minimum requirements with regard to waste disposal sites, and were not obliged to comply with the requirements for the purification of waste water or effluent. The previous homelands now have to comply with the national requirements. This is a problem because there were differences

between the previous homeland legislation and the national legislation. It takes time to get every landfill site and every industry to meet the requirements of national legislation.

The lack of capacity on the side of provincial departments responsible for the environment delays the whole process.

## **Natural Environment**

Previous homelands consolidated with the provinces which has taken those functions in hand. This has improved liaison and communication between the Directorate and the provinces and has reduced the burden on the Directorate where it had to deal with more authorities in the past.

The integration of functions of previous homelands (or lack thereof) and the disparity in existing legislative instruments does, however have and impact on fully integrating constitutional and policy obligations into grassroots plans and programmes.

## **2. Your department's understanding of its Constitutional obligations**

***a. What does your department understand it is obliged to do to : respect, protect; promote; and fulfil the environmental rights in section 24 of the Constitution ?***

### **respect the environmental rights in section 24 of the Constitution?**

- by developing mechanisms to ensure that the environment is not harmful to human health and well-being;
- by developing mechanisms to ensure that infringements by others are minimised; by not granting authorisations which allow others to harm the said rights;
- by generally complying with and being a custodian of the rights.
- by ensuring that development is environmentally sustainable.

### **protect the environmental rights in section 24 of the Constitution?**

- by enforcing environmental laws and regulations;
- by establishing adequate legal and regulatory frameworks, including legislation establishing national norms and minimum standards, and legislation to ensure that every person and organisation acts with due care, according to their capacity, to avoid environmental damage.

### **promote and fulfil the environmental rights in section 24 of the Constitution?**

By submitting legislation to Parliament giving people standing to take legal action, both civil and criminal, to protect the environment and ensure compliance with environmental law. The legislation must include the right to apply for interdicts to a competent court to prevent the breaking of environmental laws and to institute private prosecutions where the State does not act promptly;

by ensuring that mechanisms are in place to provide those public goods that are essential to provide an adequate environment to all.

***(b) What is your department's official interpretation of the words "not harmful to their health and well-being" in section 24?***

The words do not only refer to a person's physical health and well-being, but also his or her mental health and cultural/aesthetic well-being, including his or her concerns for conservation.

***(c) What is your department's official interpretation of the word "sustainable"?***

Where "sustainable" is coupled with "development", the concept means development which seeks to integrate environmental, social and economic concerns, now and in the future, without compromising the ability of future generations to meet their own needs. The focus is on ensuring that environmental sustainability, health and safety are not compromised and that natural and cultural resources are not endangered.

***What is your department's official interpretation of the words 'Justifiable economic and social development'?***

"Justifiable economic and social development " is development that may only be pursued when it is accompanied by the measures intended to protect the environment as referred to in section 24(b) (i) (ii) and (iii) of the Constitution. Put in another way justifiable economic development is development that aims to sustainably uplift the standard of living of the present generation without negatively impacting on the resources of future generations to meet their demands of survival. Justifiable social development is development that aims at the sustainable improvement of health, well-being and the provision of necessary infrastructure and basic services, also without detrimentally affecting the availability of resources that future generations will depend on for survival.

### **3. Information gathering**

***Does your department have system (or access to system) to collect and analyse statistical and other information relating to the implementation of the right to a healthy and protected environment ?***

**a.**

*If your answer is yes, please:*

- *describe the system, .*
- *state what information is collected;*
- *state whether or not this information is broken down according to race, gender, geographical location (especially according to rural and urban areas) and income level, state whether this information is independently verified and how this is done, and*
- *state how the public can get access to this information.*

The issue of information systems is addressed in the White Paper on Environmental Management Policy for South Africa, Chapter 4 "Strategic Goals and Objectives",

Goal 6 "Information Management", page 36, as well as Chapter 5 "Governance", page 57-58 (Government Gazette No. 18164).

### **Air Pollution Control**

Yes.

Apart from the information given below, it should be mentioned that approximately five years ago, the Weather Bureau was planning on creating a database where all information regarding air pollution could be integrated. However, this database has not yet materialised and steps have only been taken recently to create it. Depending on, firstly, the sensitivity of the information contained in this database as well as, secondly, the approval from the relevant industry, information will be made available to the public.

**(i)**

The computer program may be accessed by using either DBase in DOS, or Excel or Access in Microsoft. This system consists of a spreadsheet containing the information as described below. The information collected on this system contains details of all industries which have registered scheduled processes in terms of the Atmospheric Pollution Prevention Act, 45 of 1965. The information contained includes the name and contact details of these industries and their contact persons, the relevant scheduled process(es) run by them, the area in which the process is being run, the date / period for which the registration certificate was issued, and the regional air pollution control officer dealing with the specific matter. Information is updated (e.g. changes of address, etc..) when notice is given by the industry to the regional air pollution control officer. When a scheduled process is terminated, the information is entered and the industry is considered to be non-existent. However, such information is not deleted, but is stored for possible future usage.

The information on the DBase database is broken down according to the names of the industry and the relevant regional air pollution control officer, the number and description of the process carried on as well as the districts (geographical locations) within which these processes are being carried on. However, whether the specific area is within a rural or urban area, is not specified.

The information is firstly obtained from the relevant industry, and should be accurate. However, inspections of industries take place regularly, and should any information contained on the database be inaccurate, the onus is on industries to inform the Department thereof. Manpower to inspect and follow up on old details are, however, very limited, and therefore it is inevitable that some of the information contained on the database will be inaccurate. The information is also being verified internally, but not independently.

The only manner in which access could be obtained to the DBase information by the public, would be to contact the Directorate itself and establish whether or not the information requested is available. The system used for the database is not accessible from outside the Directorate.

**(ii)**

The filing system of the Directorate is also considered a database, since it contains information not necessarily included in the DBase database. The same information as at (i) above is contained in the filing system, but additional information includes correspondence between the Department and the industry, as well as a copy of the registration certificate issued. This system is not broken down.

The filing system contains the physical correspondence between industries and the Department, and will be accurate. Copies of information contained on file will only be disclosed on merit.

**(iii & iv)**

There is also a system regarding scheduled processes and a system on local councils (see details below). The Second Schedule to the Act is in itself a database, containing all the processes which may be carried on by industries, but for which approval in terms of the Act is necessary. There is currently 72 scheduled processes. This system is broken down according to the various processes listed.

A list of local authorities which enforces Parts 111, IV and V of the Act (smoke, dust and vehicle emissions) is also included in the Act. The local authority list is broken down according to geographical area.

The processes listed in the Second Schedule as well as the list of local authorities enforcing smoke, dust and vehicle emission control are included in the Act itself, and is therefore independently verified.

The information regarding Second Schedule processes and local authorities are accessible to the public since it forms part of legislation.

With regard to the Montreal Protocol, country studies of each ozone-depleting substance is undertaken. The amount of each ozone-depleting substance is recorded (in kg) as well as the purpose for which it is being used. Information is broken down according to geographical location, urban and rural areas. A consultant is usually employed for the purpose of verifying information. Information is distributed to affected parties.

**Pollution Control**

Yes,

**(i)**

The Department of Water Affairs Minimum requirements for the handling of Hazardous Waste:

Volume 11, 1994 prescribes that waste must be classified using the SABS Code 0228. Samples of waste are taken and analysed for specific components and properties. Tests carried

out on waste must be done by accredited laboratories using recognised, documented methods. The classification system is used to determine the class of waste. The objectives of this classification system are:



- to distinguish between hazardous and non-hazardous waste
- to determine the most hazardous property of the waste
- to differentiate between groups of toxic waste
- to set requirements for pre-treatment and disposal of hazardous waste.

The public can gain access to this information through the laboratories and the disposal requirements are in the minimum requirements document.

**(ii)**

In terms of section 20(4) of the Environment Conservation Act, 73 of 1989 the Minister of Water must maintain a register in which details of every disposal site for which a permit is issued, must be recorded.

When applying for a permit, all information must be supplied on the application form,

**a) Information collected:**

Name of Disposal site

Proposed site or existing one

Whether or not alternative sites were considered and number of alternatives considered

Details of applicant

Details of registered owner of the property.

Location of property Deeds Act description of the property

Size of the property and disposal site

Local authority in whose jurisdiction the disposal site is situated,

Details and educational qualifications of person in control of the disposal site

Proximity to sensitive areas (aquifer, residential area, industrial area etc)

Weather conditions and geology

Size of the population to be served by the site

Location and depth of monitoring boreholes

Expected lifetime of the site

Types and quantities of waste to be disposed of

Salvage methods to be employed

Method of disposal

Total volume available for the disposal of waste on the site and the proposed management system

The current use land use and approved zoning of land adjacent to the site

Topocadastral map of the location and surroundings.

Plan and orthophoto of the site and surroundings

**b) The information is broken down to geographical location**

**c) Public can get access to the information by motivating in writing to DWAF**

**(iii)**

The department is also in the process of establishing a Pollutant Release and Transfer Register. This will be a register of potentially harmful pollutant releases or transfers to the environment (air, water and soil) from various sources.

**(iv)**

A National Waste Data Management System will also be developed with a focus on all waste generated, all waste transported and all waste disposal facilities.

There is co-ordination between DEA&T and DWAF with regard to the register of waste disposal facilities. The two systems to be developed will be co-ordinated at national level with input from local and provincial governments.

### **Environmental Impact Management**

Yes.

### **Geographic Information Systems (GIS)**

Geographical Information System deals with the gathering, storage and analysis of geo-referenced data. The end product is the production of maps which are used in decision-making processes

Only geographical information is collected, 90% of the data used is gathered from other institutions on a tender basis. GIS uses data based on geographical location only, and sometimes data depicting rural and urban areas is analysed.

Most of the information is verified by the CSIR. Information on natural heritage sites, for example is gathered and verified by the DEA&T. Whenever data used in the compilation of maps is not verified, means are devised to make sure that the public is informed.

Information gathered remains in the public domain, therefore all planners, developers, conservationists and the public has access to it. Information will soon be accessible on the internet.

### **Environmental Potential Atlas (ENPAT)**

ENPAT is GIS based spatial analysis decision support system for environmental management. The purpose of ENPAT is to show the potential of a chosen piece of land for conservation, development or agriculture using environmental criteria. This it does by listing the number of opportunities for conservation and the number of constraints on development and agriculture for a particular land facet. The user can now decide which of the opportunities and constraints are more important than others.

ENPAT displays socio economic, environmental, environmental with environmental, socio economic with socio economic, environmental with socio economic, strategic environmental indexes, and environmental management indicators.

The information is broken according to geographic location and income level, not according to race and gender.

DEA&T does not verify any information. DEA&T gathers verified information from other institutions e.g. From Central Statistical Services, Department of Water Affairs and Forestry, Geological Survey, University of Natal, University of Pretoria, Survey and Land Information, Agricultural Research Council, etc.

ENPAT is available at a reasonably cheap cost to the public.

### ***Sustainable Development***

Yes.

Apart from gathering information, the department also actively disseminates information, as an informed public cannot as easily be deprived of their rights. This is done through publications given out by different sections in the Chief Directorates Environmental Management, Sea Fisheries, Weather Bureau, Pollution Control, Air Pollution and Tourism, as well as the department's communication section.

The sub-directorate: Environmental Education is in the process of setting up a database on Environmental Education in South Africa. This database will serve as a directory of information on all articles, magazines, resources, national and international contacts and other information valuable to environmental education. The project is in the exploratory phase, where the department is looking at what type of information would be needed, and how it should be structured and accessed. It will probably be broken down into geographical areas to make access easier, and contain gender-related information, as well as information on aids, disability, etc. What this information will entail and how it will be set up and accessed, will be determined by the research done presently. As anybody should be able to get access to this system, it would also serve as verification, together with cross-referencing from other databases. Access will be gained by telephoning in requests, writing, and hopefully also through new technology such as the Internet.

### **Indicators:**

This Department is currently busy with the testing of indicators for sustainable development.

In the four years since the Rio Summit, there have been many initiatives to promote sustainable development. Indicators are useful tools to gain insight regarding the progress made in achieving sustainable development. Agenda 21 calls for countries, international organisations and non-governmental organisations to develop and use indicators of sustainable development.

The Commission on Sustainable Development (CSD) in 1995 adopted a work programme on indicators for sustainable development. The work programme includes an initial set of 134 indicators and related methodology sheets have been developed and is now ready for testing at the national level by countries from all regions of the world.

South Africa, through its Department of Environmental Affairs and Tourism, agreed to participate in the testing of the CSD Indicators of Sustainable Development.

Questionnaires were sent out by this Department to nominated persons from national departments and institutions, for their completion. The completed questionnaires and attached data sets were processed into the subscribed CSD format. The document is nearing completion and will soon be sent out for final inputs from the members of the Sub-Committee for Sustainable Development. The document will then be sent to the CSD, as a first draft from South Africa, for their evaluation.

Information on social-, economical-, environmental- and institutional issues were collected. Available data, taken over a period of time, were processed into a graphical format to determine the trend in South Africa for that specific indicator. Examples of indicators are: Unemployment rate, house price to income ration, annual energy consumption, land affected by desertification, ratification of global agreements,

The information used, can be broken down according to race, gender, geographical location and income level. However, for the testing phase, most of the information used is on a national scale, and is comprehensive of the whole population in South Africa.

The draft document will be workshopped and information will then be verified independently.

Available graphics, showing the current situation in South Africa, on specific indicators, will be published as part of the State of the Environment Series.

### **Natural Environment**

Yes.

System:

National register on protected areas

GIS

National Inventory on Wetlands

State of Environment Report

Access the development of the Bio-monitoring programme for rivers

CWAC

Information collected

- data on biomes and ecosystems, including species and population components
- listing of protection status of species
- statistical data on all aspects on protected areas
- location, size, type, value, status of wetlands (wetland inventory)
- numbers of wetland birds by type of wetland (CWAC) health of selected reaches of rivers in terms of biological indicators

Information is not broken down

Information is independently verified

## **NBI**

UCT Bird Unit, etc.

Inter-Departmental review and verification

Public access -Freely through the Department (available on request) Specific publications and databases

Internet

Media publications and statements

## **Weather Bureau**

Yes

The Weather Bureau collects, quality controls, archives and makes available all major weather elements. It is also extending the network for collection by means of electronic weather stations. As part of South Africa's commitment to the various environmental Conventions, (such as the Montreal Convention, the Convention to Combat desertification and the Framework Convention for Climate Change (FCCC)), the Weather Bureau is (or is planning) to collect and archive extra elements, namely ozone, ultra violet radiation, various trace and greenhouse gases, solar radiation and low level atmospheric pollutants.

Collection of data is by means of long established and internationally recognised weather and climate stations. More recently more than 100 electronic stations have been included in the network. Two Weather Bureau stations have been equipped to measure ozone levels, three to measure ultra violet radiation and the Cape Point station acquired for Global Atmospheric Watch (GAW) of trace and greenhouse gases. During 1998 a station to measure radiation for the international Baseline Solar Radiation Network (BSRN) will be initiated at De Aar,

All meteorological data are archived on a specially designed and dedicated "Relational Data Base Computer". To this will be added all low-level atmospheric pollution data, collected from assorted locations around the country. In order to accommodate the growing volume of data and meet the increasing inquiries for data, a new Sun computer has been installed with upgraded memory and other features.

The data are identified by each station locality and is thus geographically sectorised.

The data are quality controlled at each individual station or at regional centres and is then crossed checked at the main climate computer centre in Pretoria.

Data are available through a climate information service and can be obtained by telephone, letter, facsimile, computer printout, floppy or stiffy, magnetic tape and on the internet. Statistics are also available in publications and in pamphlets.

**b.**

If your answer is no, please say why not and whether or not your department has plans to obtain or get access to such a system

### **Sea Fisheries**

No.

Although the Chief Directorate: Sea Fisheries does keep records of permit and quota holders, it does not have access to a system which would provide statistical information about stakeholders in either the commercial or the recreational and subsistence sectors.

It is to say that in the past Sea Fisheries managed a medium sized and well defined commercial and recreational South African fishery. Subsistence fishers comprised a significant proportion of the fishery, but a large number of these fishers were concentrated in the regions of the former Transkei, Ciskei, and KwaZulu, and thereby largely ignored by the national department. Since 1994, when access to marine living resources was broadened, and the former homelands were returned to the national government, participation in the fisheries sector has escalated. (By way of example, in the 1996/ 1997 recreational rock lobster season, 75 000 recreational permits were sold. During the 1997/1998 season, more than 100 000 permits had already been sold by early January).

Recognising this escalation in the demand for access to living marine resources, the White Paper on Marine Fisheries Policy clearly states that in the future all users of the sea will pay a higher price for this privilege. In order to manage the large recreational fishery (estimated to involve some 750 000 people), and an unknown number of subsistence fishers, the department will be required to register these fishers in the near future. It is anticipated that by registering fishers the department will gain access to the kind of information which would generate statistics with respect to the gender, population groups and geographical location of stakeholders in the South African fishery.

#### **4. Vulnerable groups**

*What groups have been identified by your department as more vulnerable than others and which need special attention?*

It is important to take note of the fact that one of the goals set in the White Paper on Environmental Management Policy for South Africa (Chapter 4 "Strategic Goals and Objectives", Goal 5 "Environmental Education and Empowerment", page 35) deals specifically with marginalised and special interest groups. These issues will be addressed through implementation strategies.

Identified vulnerable groups are :

- [1] People living in rural areas
- [2] People living close to industries and waste disposal sites
- [3] People living in residential areas without electricity

- [4] Poorer communities
- [5] Workers in all sectors, specifically those exposed to toxic and hazardous substances
- [6] Illiterates
- [7] Subsistence fishers
- [8] People with inadequate water resources
- [9] People in low-lying areas adjacent to rivers
- [10] People living in informal settlements
- [11] Women, particularly rural women
- [12] People with disabilities
- [13] Youth
- [14] Users and practitioners of traditional knowledge

## **5. The obligation to respect these rights**

### ***a. What current laws and other measures have the effect of denying or depriving people of their environmental rights ?***

Sections of certain laws may have a great impact on the environment, but often such laws are administered by other departments. The laws administered by the Department of Mineral and Energy Affairs have a great impact on the environment, as well as the health of communities. An example is the rehabilitation of asbestos mines. Another example is the laws administered by the Department of Agriculture, whereby nobody could prevent the department from spraying poisons, even if it happened on private property. The lack of integration of functions between Departments poses a threat to environmental rights.

### **Air Pollution Control**

The Atmospheric Pollution Prevention Act, 45 of 1965 does not deny or deprive people of any environmental rights. Air pollution caused by the emission of gases, smoke, dust, vehicle emissions, etc. is controlled by this Act. Where enforcement measures are inadequate, air pollution may, however, be harmful to one's health and/or well-being and may therefore in this way deny people the right to a healthy environment.

### **Pollution Control**

At present there is no effective coordinating body regulating pollution in South Africa. Many other departments apart from the Department of Environmental Affairs and Tourism have major responsibilities in the field of pollution control. Different departments apply different standards and procedures to controlling pollution of land, water and air. In some cases departments must both promote economic exploitation of a natural resource and protect it from pollution. In addition there are bodies like the South African Bureau of Standards that play an important role in pollution control. This lack of integration is a threat to people's environmental rights. In order to rectify the situation action plans will be developed to address this issue.

***b. What current laws and other measures unfairly discriminate against any groups of people, particularly the identified vulnerable groups, and their rights to a healthy and protected environment ?***

### **Air Pollution Control**

No laws or measures discriminate against any groups of people. The reason for this is that air pollution is a trans-boundary issue. Legislation is therefore aimed at the issue of air pollution itself. Measures to facilitate public awareness of the Act and the implementation thereof should receive more attention, especially with a view to smoke control enforcement in rural areas.

### **Pollution Control**

There are no specific discriminatory laws or measures but by default there is discrimination due to a number of factors including:

There is no database for small and medium enterprises

Few industries have waste management strategies or plan waste management before start up.

A lack of awareness of hazards but an awareness of inadequate facilities and practices.

Few companies practice waste avoidance

No annual statistics or data bases are available

Waste disposal facilities and transporters often lack detailed information on the make up of the waste they handle.

Little control over the transport of waste

A lack of sites for disposal of hazardous wastes and a lack of adequate controls over the existing sites

Without legislation and control, most waste generators will spend as little money as possible on waste management.

Importation of hazardous and toxic substances was allowed before South Africa became a signatory to the Basel Convention

***c. What steps have been taken by your department to get rid of any past laws and other measures which impacted on people's environmental rights ?***

A National Environmental Strategy and Action Plan (NES&AP) will be developed and implemented by DEA&T, who will be the lead agent for environmental management. Refer to the White Paper on Environmental Management Policy, Chapter 5 "Governance", page 43,

### **Air Pollution Control**

On the whole, the Atmospheric Pollution Prevention Act, 45 of 1965, impacts positively on environmental rights since it is aimed at the prevention and control of air pollution. Measures which impact negatively, albeit indirectly, on people's environmental rights, are the lack of manpower at national and regional levels. A cabinet memorandum has already been submitted in this regard. The Minister of this



Department still has to consult with the Minister of Public Service and Administration on this issue.

Parts III, IV and V (smoke, dust and vehicle emissions) of the Act have been delegated to provincial and/or local authorities, and as a result no uniformity exists in the enforcement of these Parts of the Act. A lack of financial resources is also a major limitation to the fulfilment of the provisions of the Act.

In 1997 the Department of Environmental Affairs and Tourism as well as the Department of Minerals and Energy, in association with fuel and vehicle manufacturing industries, had embarked on a national policy development process on vehicle emissions. A motor vehicle emissions policy will be formulated in association with the Department of Transport.

Ambient monitoring is being done on a national basis.

It should also be mentioned that improvements in air quality exists where smoke control regulations are enforced by local authorities.

### **Pollution Control**

The department developed a White paper on Environmental Management policy which includes principles such as:

Conflict of Interest, Coordination, Demand Management, Environmental Justice, Good Governance, Integration, Polluter Pays and Waste Avoidance and Minimisation.

The draft Integrated pollution and waste management policy includes the development of uniform procedures for the setting and enforcing of environmental criteria throughout the country.

As part of the Policy development process for integrated pollution and waste management, a legal review and audit was done to assist in the identification of such measures and to make recommendations on how to rectify the situation. Action plans will have to be developed to ensure that policies become a reality.

### **Natural Environment**

Initiation of processes for the development of the White Paper on Environmental management, The policy on Biodiversity and the Environmental Conservation Act. CONN-EPP process, which involved the public and the private sector. Institution of a legal audit process to harmonise and nationalise environmental legislation.

***d. What has been done to remedy the effects of these past laws and other measures which impacted on people's environmental rights ?***

### **Air Pollution Control**

The combination of a lack of funds and manpower restrains the Department from taking any steps to solve the problems experienced in this regard. It should be

mentioned that some smoke control officer posts at some local authorities are being subsidised by the Department. This assists these local authorities in the execution of certain air pollution related tasks.

The National Air Pollution Advisory Committee submitted a memorandum to Cabinet to bring the smoke pollution problem to the attention of the government. Electrification was indicated as a high priority.

The Department of Environmental Affairs and Tourism, in association with the Department of Mineral and Energy, is embarking on a study in order to investigate the possible development of a low-smoke fuel to be used in stoves. The goal will be that this should serve as an interim measure until full electrification can be achieved. Refer to the White Paper on Environmental Management Policy for South Africa, Appendix 1, "Energy", page 65,

### **Pollution Control**

The Draft White Paper on Integrated Pollution and Waste Management deals with the role of government, other stakeholders and the mechanisms used for enforcement of integrated pollution and waste management.

The national waste management strategy project, already underway, look at ways of optimising pollution and waste management to remedy the current situation. The strategy will develop a range of mechanisms to deal with problems. New legislation will be drafted to fill the gaps of present laws.

### **Natural Environment**

Adoption and conducting of participatory policy processes such as CONNEPP, Biodiversity, Sea Fisheries, Pollution Control and Tourism etc., Wetlands Conservation Bill.

## **6. The obligation to protect these rights**

*a. What laws and other measures that protect people from actions by the private sector, particularly with regard to :*

- 1. Harm to their health and well-being;**
- 2. pollution and ecological degradation;**
- 3. arbitrary eviction from areas set aside for conservation; and**
- 4. abuse or monopoly of natural resources ?**

### **Air Pollution Control**

The fact that the Atmospheric Pollution Prevention Act, 45 of 1965, specifies "best practicable means" as a measure for the regulation and control of air pollution implies that measures, which are not necessarily acceptable in terms of the environmental right contained in section 24 of the Constitution, may be in place. However, with regard to industrial pollution, it is accepted that it does not contain any health hazard, but it may be a nuisance, mostly due to odour. If industrial pollution is affecting health, steps will be taken to close or adapt the emissions.

Environmental impact assessments are performed before any new industrial plant may be erected.

Smoke is currently creating the biggest air pollution problems, because of, inter alia, a lack of electrification as well as a lack of thorough enforcement.

Section 10(5) of the Act provides for the protection of environmental rights by granting the opportunity to residents who may be affected by the carrying on of a scheduled process (these processes are carried out by industries), to be consulted with by means of consultation between the Chief Air Pollution Control Officer and these residents' local authority.

Section 17: Where the word "nuisance" with regard to smoke is used, it includes a reference to smoke which is prejudicial to health. Sub-section (7) protects people's environmental rights where it stipulates that, if within a period of one month after conviction of a person charged with an offence in terms of sub-section (4), steps have not been taken with regard to the abatement, the relevant local authority may take steps to ensure the abatement of the nuisance. A similar stipulation is included in section 19(6)(a) of the Act.

With regard to the Montreal Protocol, this Protocol regulates import and export permits of ozone-depleting substances in conjunction with the Department of Trade and Industry

## **Pollution Control**

### Laws :

#### The Water Act 54 of 1956

Section 21 looks at the purification and disposal of water used for industrial purposes and effluent. Section 22 covers prevention of water pollution

#### Conservation of Agricultural Resources Act 43 of 1983

Section 6(2)(n) provides for the Minister to prescribe measures which relate to the protection of water sources against pollution on account of farming practices.

#### Forest Act, 122 of 1984

Section 75 make it an offence to dump or scatter litter in a forest or to leave or deposit waste on a hiking trail or walk.

#### Advertising on roads and Ribbon Development Act 21 of 1940

Section 8 places a prohibition on the depositing or leaving of certain articles or materials near roads.

#### Housing Act 4 of 1966

Section 49 provides that the Commission may call upon an appropriate local authority to provide waste removal and disposal services to any dwelling built by the Commission.

#### Human Tissue Act 65 of 1983

Section 26 deals with the disposal of tissue, blood, blood products or gametes imported without or contrary to a permit.

#### Animal diseases Act 35 of 1984

Section 17 and 31 deals with the disposal of a seized animal and infectious or contaminated things.

#### Minerals Act 50 of 1991

Section 63 authorises the minister to make regulations regarding, inter alia, the making safe of tailings, waste dumps and ash dumps, the prevention, control and combating of pollution of the air, land, sea and other water.

#### Abattoir Hygiene Act 121 of 1992

Section 24 provides for regulations regarding the disposal or removal of remains and refuse from an approved abattoir.

#### Hazardous Substances Act 15 of 1973

#### Health Act 63 of 1977

Section 20 deals with the prevention of the occurrence of any nuisance and the pollution of any water intended for use by the inhabitants of a district. Section 33 provides for regulations relating to the disposal of waste.

#### Other measures :

The Basel Convention protects peoples environmental rights by regulating the transboundary movement of Hazardous materials. With South Africa becoming a signatory to the Convention, the upgrading of standards for waste disposal is of utmost importance and will include the safe handling, treatment and disposal of hazardous waste.

A Commission of inquiry was appointed to investigate the health and pollution problem, at the Chemical plant in Kwa-Zulu Natal. Commissions of inquiry was also appointed in some other instances

Monitoring Committees are set up for most of the larger waste disposal sites. Communities close to the sites are represented on these committees.

### **Environmental Impact Management**

#### Environmental Management Policy

According to the final draft of the White Paper on Environmental Management Policy the mandate for the government's new policy on environmental management lies not only in the universal imperative to protect the our environment in order to ensure our survival and improved quality of life, but also in section 24 of the Bill of Rights .

As a custodian of the nation's environment, Department of Environmental Affairs and Tourism accepts the responsibility of taking appropriate and necessary measures to

- ensure that people's environmental rights are enforced
- act as a custodian of the nation's environment
- -promote, co-ordinate and enhance sustainable development within all government agencies whether at national, provincial, or local level
- develop, co-ordinate the implementation of, an integrated management systems.

DEA&T undertakes to develop a National Environmental strategy and Action Plans which will focus and prioritise goals and objectives requiring action by the government.

### Environmental Impact Assessment Regulations

The sub-directorate of Impact regulations promulgated Environmental Impact Assessment Regulations on the 5th September 1997 in a bid to regulate environmental impacts and to set an application procedure of project proposals. EIA which is compulsory is used as a decision- making tool to authorise the undertaking of projects. The EIA regulations list all activities, which may have significant detrimental effect on the environment when undertaken. A final EIA guideline document is free of charge for the public.

#### ***b. What laws and other measures protect people against unfair discrimination by the private sector in gaining access to economic and social development through ecologically sustainable development and use of natural resources ?***

This is done through the adoption of certain policy principles in the White Paper on Environmental Management Policy for South Africa.

### **Alienation of Resources**

Renewable and non-renewable natural resources, cultural resources and land are all part of South Africa's environmental heritage. They are public assets belonging to all the nation's people. Government must ensure that the ownership and use of this heritage promotes sustainable development that benefits the public good and maintains the integrity of the environment. Any alienation of these resources and land must respect people's environmental rights and ensure the sustainable use of such resources and land.

*In applying this principle government must ensure that its investment policies and programmes do not result in the unchecked transfer of ownership of all the nation's natural and cultural resources and land, to private investors, or result in access to these resources and land being denied to the people of this country.*

### **Custodianship**

The government acknowledges that it has a constitutional duty to protect the environment for the benefit of current and future generations of South Africans. Its responsibilities include the duty to act as custodian of the nation's resources; to protect the public interest in, and to ensure equitable access to, such resources and generally to ensure that all South Africans enjoy an environment of acceptable quality. In

assuming these duties, the government accepts the duties and responsibilities implied by the doctrine of the Public Trust, particularly regarding state owned land and natural resources and will enact legislation to give effect to this principle.

*The doctrine of the Public Trust requires the state to:*

- *ensure that environmental resources are beneficially used in the public interest*
- *protect the people's common heritage*
- *ensure the public's reasonable access to the environment and natural resources*
- *ensure adherence by all spheres of government to the public trust*
- *promote and fulfil the Department of Environmental Affairs and Tourism's*
- *commitment as custodian of the nation's environment.*

## Equity

There should be equitable access to environmental resources, benefits and services to meet basic needs and ensure human well being. Each generation has a duty to avoid impairing the ability of future generations to ensure its well being.

## Environmental Justice

To comply with the requirements of environmental justice, government must integrate environmental considerations with social, political and economic justice and development in addressing the needs and rights of all communities, sectors and individuals.

*Policy, legal and institutional frameworks must:*

- *redress past and present environmental injustice*
- *take account of the need to protect and create employment*
- *recognise that workers can refuse work that is harmful to human health or the environment ensure that everyone is able to make known environmental or health hazards without fear of the consequences*
- *ensure equitable representation and participation of all with particular concern for marginalised groups.*

## **Air Pollution Control**

The Atmospheric Pollution Prevention Act, 45 of 1965, is not preventing anyone from gaining access to economic and social development and nor does it empower any sector of society to enforce such prevention.

## **Natural Environment**

The Biodiversity policy and the White Paper on Environmental Management.

**c. What laws and other measures protect people against any other practices in the private sector which have a negative effect on their environmental rights ?**

***Air Pollution Control***

The Atmospheric Pollution Prevention Act, 45 of 1965, covers a wide range of sources of air pollution: from noxious to offensive gases to vehicle emissions. Any section of the private sector may, therefore, be penalised if the Act is being contravened.

**Natural Environment**

White Paper on Biodiversity (Government Gazette No 18163).  
 White Paper on Environmental Management  
 Environmental Conservation Act, 73 of 1989

**7. The obligation to promote and these tights**

***What percentage of your department's budget is set aside to promote and fulfil people's environmental rights? How of this budget will have been spent by the end of the 199 7-8 financial year?***

Please note that the figures below do not reflect the budgets of the Chief Directorates Tourism and Corporate Service, as they are not directly involved in giving effect to section 24 of the Constitution.

All percentages are indicated per Directorate's budget, except in the case of Sea Fisheries and Weather Bureau, where percentages indicated are per Chief Directorates.

The following standard items are not included ..

Personnel expenditure  
 Land and Buildings  
 Miscellaneous

**BUDGET: DEPARTMENT OF ENVIRONMENTAL AFFAIRS & TOURISM**

<i>(CHIEF)</i>	<i>Stores</i>	<i>Equipment</i>	<i>Professional</i>	<i>Transfer</i>	<i>Administrative</i>	<i>Total</i>
<i>DIRECTORATE</i>				<i>Services</i>	<i>Payments</i>	
<i>Air pollution control</i>	3,26	5,13	8,40	38,26	18,44	73,49
<i>Pollution control</i>	0,49	1,16	39,21	-	7,64	48,50
<i>Environmental Impact Management</i>	6,94	1,85	25,44	-	9,95	44,18
<i>Sustainable Development</i>	7,12	2,16	40,38	-	11,12	60,78

<i>Natural Environment</i>	4,04	0,66	29,93	-	25,81	60,44
<i>Sea Fisheries</i>	12,3	3,2	11,3	-	7,9	34,7
<i>Weather Bureau</i>	6,2	14,2	4,6	-	12,2	37,2
	-	12,2				

Average total: 51,32 7%

A substantial part of Administrative expenditure is used for purposes of travel and subsistence costs. Staff members incur these costs when travelling for the purpose of inspections / investigations, monitoring, etc.

*PER CENTAGE SPENT BY 31/3/1998*  
(CHIEF) DIRECTORATE PERCENTAGE

<i>Air Pollution Control</i>	93,4
<i>Pollution Control</i>	90,27
<i>Environmental Impact Management</i>	92
<i>Sustainable Development</i>	87,9
<i>Natural Environment</i>	86,14
<i>Sea Fisheries</i>	101
<i>Weather Bureau</i>	<u>101</u>

**7b What has your department done to inform and educate all South Africans, and particularly the identified vulnerable groups, about their rights to a healthy and protected environment?**

### **Air Pollution Control**

Pamphlets and booklets, which were drafted in the 1980's and regularly updated, are available to any interested party. As far as could be established, these documents were not translated into languages other than English and Afrikaans. The public is always welcome to contact the Directorate with any comments, inquiries, complaints, etc. on the issue.

Regulations are promulgated according to standard procedures i.e. by means of the Government Gazette, where it is available for inspection by the public.

Guidelines on the 72 scheduled processes are also distributed on request. This serves as a basis for conditions set out in registration certificates issued to industries carrying on scheduled processes. It contains information regarding emission limits, in stack and ambient monitoring., reporting, steps to be taken to prevent abnormal emissions, etc.

Air pollution liaison committees were created some years ago in highly industrial areas, such as the Vaal Triangle, Witbank, Kempton Park, Durban, Richards Bay, Phalaborwa, Cape Town and Port Elizabeth. The functions of these committees are to include industries, provinces, the Department of Environmental Affairs and Tourism,



the public and the media in discussion on air pollution problems, actions to be taken, reporting, etc.

With regard to the Montreal Protocol, various working groups have been formed on various issues such as air conditioning, refrigeration, mining, fire-fighting equipment, methyl bromide, etc.

### **Pollution Control**

The Integrated Pollution and Waste Management Policy process included a public participation process which involved people from all sectors, including all levels of government and the identified vulnerable groups. To enable as many people as possible to participate, an educational document "The need for Integrated Pollution Control in South Africa", was drafted to explain in simple language the problems of the present system.

A workshop document highlighting the issues to be debated for inclusion into the policy was drafted. The workshop document was translated into eight official languages and afforded people from local communities the opportunity to participate in the policy development process.

The National Waste Management strategy process includes a strategy on capacity building to be developed. This Capacity Building strategy is mainly aimed at the three spheres of Government and civil society. The participate structures include the project steering committee with representatives from National Government, provincial government, local government, NGOs, CBOs, labour, industry and Mining.

### **Environmental Impact Management**

Soon after the adoption of the new constitution, the Department of Environmental Affairs and tourism held a series of workshops in the provinces with local government authorities, communities, NGOs and with the private sector educating them about their environmental rights and their obligations. DEA&T also disseminates information on environmental rights in a form of documents, posters and pamphlets which are free of to the public.

### **Sustainable Development**

One of the tools being used to inform the South Africans about their rights to a healthy and protected environment, is through the principles of Agenda 21, which promotes sustainable development and an integrated approach to decision making, including the environment. Local Agenda 21 specifically targets communities to find solutions to their environmental and developmental problems and identify their needs. (See also points 3 and 4).

### **Natural Environment**

Leaflets, Information sheets, workshops, public participation, planned popularisation process for policies (Environmental Management and Biodiversity Policies), newsletters, press releases, etc.

***7c What is your department's understanding of the core minimum obligations imposed on it by the environmental right? How are these understandings reflected in laws and other measures adopted by your department?***

The Department views the following as core minimum obligations:

- develop and implement appropriate legislation and an integrated and holistic environmental management system across government, to ensure that people's environmental rights are enforced
- act as the custodian of the nation's environmental resources and ensure equitable access
- promote, co-ordinate and enhance sustainable development within all government agencies whether at national, provincial or local levels
- develop and implement effective education and information strategies to increase public awareness and understanding of environmental issues develop structures, processes and procedures and implement programmes to ensure effective and appropriate participation in environmental governance.

These are reflected as follows:

**Air Pollution Control**

Air pollution should be controlled to such a degree that neither the environment nor anyone's health should be negatively affected by it. The Atmospheric Pollution Prevention Act, 45 of 1965, however, refers to the term "best practicable means", which is defined as follows :

*" when used with reference to the prevention of the escape of noxious or offensive gases or the dispersal or suspension of dust in the atmosphere or the emission of fumes by vehicles, includes the provision and maintenance of the necessary appliances to that end, the effective care and operation of such appliances, and the adoption of any other methods which, having regard to local conditions and circumstances, the prevailing extent of technical knowledge and the cost likely to be involved, may be reasonably practicable and necessary for the protection of any section of the public against the emission of poisonous or noxious gases, dust or any such fumes"*

This definition is self-explanatory. The implication is that local conditions, etc. may be of such a nature that the application of the best practicable means may lead to an environment which is detrimental to one's health and/or well-being.

Some pollution substances only affect health and some only affect the environment. In-stack and ambient monitoring of pollution levels are performed to prevent pollution from becoming detrimental to health and/or the environment.

With regard to the Montreal Protocol, international control measures (import and export) are imposed.

### **Pollution Control**

In order to move towards development that is economically, socially and environmentally sustainable, all sectors of society will have to undergo a number of changes. These needed changes are stated in the policy on Integrated Pollution and Waste Management as a move towards:

- equitable sharing of development opportunities and benefits and an equitable provision of services aimed at significantly improving the situation of the impoverished majority,
- efficient use of energy with a priority on the development of renewable and affordable resources.
- accelerated industrial development while using cleaner technologies and production methodologies.
- new structures at national, provincial and local government levels with a priority to integrating economic, equity and environmental imperatives in planning and decision making within and between different ministries and between provinces.
- greater public accountability and participation with a priority to initiate and maintain sustainable development partnerships between government and civil society.
- greater national and regional self-reliance with a priority to accelerate development and promote the use of local knowledge, technology and expertise.
- from reliance on foreign aid to economic sufficiency.

### **Environmental Impact Management**

Environmental Conservation Act provides the mechanism towards sustainable development as reflected in the National Environmental Policy. DEA&T fully subscribes and implement international standards.

### **Natural Environment**

Fair and equitable access and benefit sharing to promote prosperity within an environmentally and ecologically sustainable framework.

*7d What minimum requirements (such as national norms and minimum standards) for making sure the environmental tights are applied in a uniform way across the country have been set by your department ? "at laws and other measures are these included in?*

### **Air Pollution Control**

Guidelines regarding the 72 scheduled processes are being made available on request.

Uniform, national registration certificates are issued in terms of the Atmospheric Pollution Prevention Act, 45 of 1965.

Meetings between all regional air pollution control officers are held annually, where various issues regarding the implementation of the Act is discussed.

South Africa has adopted its own standards for air pollution, which are in line with standards set in other industrialised countries.

With regard to the Montreal Protocol, work is being done in association with the Department of Trade and Industry.

### **Pollution Control**

Minimum requirements for waste disposal sites were published by the Department of Water Affairs and Forestry in terms of Section 20(5) of the Environment Conservation Act 73 of 1989,

*7e Please give a brief description of any current law and other measures which have been adopted to improve or advance the environmental tights. Which of these deal with people who have been unfairly discriminated against in the past and which deal with the identified vulnerable groups?*

### **Air Pollution Control**

Air pollution liaison committees are situated in approximately 10 highly industrialised areas in South Africa. Members of levels of government, industries and the public are represented on these committees, and problems, steps necessary, etc. are discussed during these meetings.

### **Pollution Control**

The Integrated Pollution and Waste Management draft policy and the National Waste Management Strategy deals with all the vulnerable groups. Acts will be drafted as result of these projects.

### **Environmental Impact Management**

#### **Environmental Impact Assessment Guideline document.**

### **Natural Environment**

Environmental Management Policy (White Paper)  
Biodiversity policy

*7f Have any new laws and other measures (such as budget cuts and scaling down) been introduced in the past year which have a negative impact on the fight to a healthy and protected environment?*

### **Air Pollution Control**

During the past year, two management posts within the air Pollution Control Directorate were vacated and these posts may not be filled. Administrative support

staff in two of the three regions, as well as the secretary to the Director, are only appointed on a temporary basis. These conditions limit both the quality and quantity of the functions to be performed.

The Directorate often makes use of contractors to tender and fulfil certain functions which can not be dealt with by the Directorate itself, because of, i.e., a lack of manpower.

It is important to mention that second schedule processes do not affect health or the environment - this is only the case where there is a lack of manpower and enforcement is not as efficient as it could be.

### **Pollution Control**

Lack of staff due to the lengthy procedures to appoint staff and finances makes it difficult to give effect to the environmental rights as stated in the Constitution.

### **Sustainable Development**

Scaling down of staff appointments took place.

### **Natural Environment**

No growth, more expectations

Capacity constraints related to implementation of governmental policy and other measures i.e., severance packages and affirmative action appointments have severely impacted on the service delivery and project implementation

***7g What structures or mechanisms has your department put in place to review laws and other measures which relate to this right?***

***monitor whether laws and other measures were implemented?***

***work with other departments, levels of government or sectors of society to ensure a healthy and protected environment for everyone, and particularly the identified vulnerable groups?***

***make sure the principles of equality and non-discrimination in section 9(2) of the Constitution are integrated into all department programmes relating to this fight ?***

***consult and involve civil society and people in need of a healthy and protected environment (particularly the identified vulnerable groups) ?***

It should be mentioned that DEA&T initiated comprehensive and integrated legal and institutional audits and reviews of all environmental legislation to inform the process of redrafting environmental law.

## **Air Pollution Control**

Guidelines on second schedule processes are being reviewed twice annually to cater for new information, technology, etc. There are no rigid standards set by legislation and as a result these standards may be amended on an ad hoc basis. Amended standards can also be enforced immediately.

Industries on scheduled processes are visited and/or inspected on a regular basis. Before registration certificates may be issued, industries should comply with certain conditions. Whether these have been complied with, is established by means of these visits.

In-stack monitoring occurs and some industries are requested to report to the Department. These industries include industries containing huge plants and high risks of impact, as well as plants of which complaints have been received previously.

Local authorities are responsible for the enforcement of Parts III, IV and V of the Act. Subsidies are paid out to some local authorities as a percentage of the salaries of Smoke Control Officers. The Department of Minerals and Energy receive financial assistance from the Department for their role in combating air pollution by dust. Certain projects, which the Department cannot manage itself, due to limited manpower, are advertised as projects for which tenders should be submitted. Various projects are being managed in this fashion by e.g. CSIR and C&M Consulting Engineers.

Pollution control measures are still fragmented between various Departments. Registration certificates specifies the effect the plant will have on water. The Department of Water Affairs and Forestry as well as the Department of Labour are involved in integrated strategies.

With regard to the Montreal Protocol the methyl bromide working group, for instance, consists of scientists, farmers, agriculturists, etc. working together towards finding alternative substances for methyl bromide.

The Atmospheric Pollution Prevention Act, 45 of 1965 does not pose a real problem in this regard since it focuses on air pollution matters.

Also see question 7(b) on Air Pollution Liaison Committees.

## **Pollution Control**

Also see Question 7b

As part of the IPC Policy process a legal review and audit was done of all the existing legislation pertaining to pollution and waste.

An interdepartmental committee was established between DEA&T, Department of Minerals & Energy and the Department of Transport to ensure integration of environmental issues in the transport and energy sector.

## **Environmental Impact Management**

The Environmental Management Committee monitors whether laws and other measures are implemented. MinMec is a forum used by DEA&T, which is made up of the Minister of Environmental Affairs and Tourism and MEC's of Provincial Environmental Affairs Offices. The Transformation Forum within DEA&T ensures that the principles of equality and non-discrimination are integrated into departmental programmes. CONNEPP (Consultative National Environmental Policy Programme) is a consultative forum within DEA&T.

## **Sustainable Development**

The department utilises the Committee for Environmental Co-ordination to liaise with other departments on an official level. The subcommittees functioning under this is Environmental Education, Sustainable Development, Biodiversity, etc.

The Subcommittee on Sustainable Development's mandate include the responsibility for the South African State of the Environment Reporting, the testing of the Commission on Sustainable Development (CSD) indicators for sustainable development and the monitoring and co-ordination of the implementation of Agenda 2 1, of which the responsibility of the compilation of the National Country Profile Report to the CSD is part.

The subcommittee on Environmental Education is essentially an advisory, support and information sharing body with a specific brief to support the information needs of community environment and education service agencies.

Environmental Education is about involving communities, and therefore most of the projects directly relate to this. The communities are involved on a more direct level through the rural project, the *Women and the Environment* forum, as well as the Environmental Education Curriculum Initiative where Environmental Education is being worked into the new curriculum 2005.

## **Natural Environment**

Legal audits

Implementation programmes planned for community resource management and traditional knowledge

The national implementation strategy for Biodiversity Policy

DEA&T works closely with Water Affairs and Forestry, Department of Agriculture, Provincial Nature Conservation Authorities, CEC Sub-Committee, other communication mechanisms, DACST, Statuary bodies and NGOs groupings.

Input is acquired from public in strategy processes

Society representatives are included on steering committees and working groups

Extensive public consultation takes place

## **8. Future goals**

*a. What new laws and other measures will your department put in place to respect, protect, promote and fulfil the environmental rights ? Please give full details of these, including :*

*which of these are aimed at the identified vulnerable groups;*

*goals and targets set by your department;*

*time frames for implementing these;*

*benchmarks or indicators you will use to chart progress and evaluate these to see whether these are successful,*

*structures or mechanisms you will use to chart progress and evaluate plans*

DEA&T has initiated legal audits and reviews in order to inform the process of redrafting of new environmental legislation and national environmental strategy and action plans.

### **Air Pollution Control**

No new laws are currently planned until the Integrated Pollution Control issues have been addressed and the role of provinces are clear. Fines for contraventions of the Act will also have to be adapted. The aim, namely to enlarge the Directorate by means of additional manpower, is essential. No new functions can possibly be taken on without additional capacity within the Directorate.

### **Pollution Control**

The Draft Policy on Integrated Pollution and Waste Management and the National Waste Management Strategy is being developed to help in the protection, promotion and fulfilling of peoples environmental rights. Further measures and Action plans are being developed.

New laws will also be drafted to give effect to the draft policy and strategies.

### Goals and Objectives

The overarching goal is integrated pollution and waste management.

The intention is to move from a previous situation of fragmented and uncoordinated pollution control and waste management to integrated pollution and waste management and waste minimisation.

In order to ensure that this Integrated Pollution and Waste Management policy is translated into practice, the national Departments of Environmental Affairs and Tourism and of Water Affairs and Forestry YAI develop a National Waste Management Strategy. This national strategy will deal with the problems of waste and associated pollution. It will detail strategies and action plans and set time frames and targets. However, many aspects of this Integrated Pollution and Waste Management policy can be implemented without delay and it will not be necessary to wait for the completion of the National Waste Management Strategy. These aspects will be dealt with through existing administration routes.



## Strategic Goals

Within the framework of the overarching goal of integrated pollution and waste management, the government has identified seven strategic goals for achieving integrated pollution and waste management. These goals are interdependent and implementation must address all of them to be effective. It is vital to recognize that environmental concerns and issues cut across various sectors and functions. Therefore, integrated pollution and waste management depends on cooperation and initiatives from all sectors of society. The supporting objectives address functions of Department of Environmental Affairs and Tourism and Department of Water Affairs and Forestry, as well as functions of other government departments that impact on pollution and waste management and will require their cooperation and commitment for effective implementation.

The strategic goals and their supporting objectives, listed under the headings of Administrative Actions and/or the National Waste Management Strategy, address the major issues the government faces in its drive to achieve and ensure integrated pollution and waste management.

Goal 1: Effective Institutional Framework and Legislation

Goal 2: Waste Management, Impact Management and Remediation

Goal 3: Holistic and Integrated Planning

Goal 4: Participation and Partnerships in Integrated Pollution and Waste Management Governance

Goal 5: Empowerment and Environmental Education

Goal 6: Information Management

Goal 7: International Co-operation

Government has initiated a process of formulating a National Waste Management Strategy which will include implementation strategies to give effect to this Integrated Pollution and Waste Management policy and a number of action plans. The strategies and action plans are set out in terms of the seven strategic goals listed above. Action plans will be incorporated in the programme of the Department of Environmental Affairs and Tourism which will guide the reallocation of resources. Clear management responsibilities for the achievement of programme targets will be assigned.

## **Environmental Impact Management**

Goals include the full implementation of EIA regulations and co-ordination for the deliveries of the EIA Review Courses by EPA in South Africa. Listed activities identified in terms of section 21 of Environmental Conservation Act 73 of 1989 will all be fully covered under the EIA regulations as from the 1st April 1998. EIA Review courses are scheduled to be presented in June 1998. Abilities to handle applications and to review EIA documents are seen as indicators.

Environmental Management Systems encourages the use of self-regulatory tools not only for the private sector, but also for the public sector. The adoption of self-regulatory tools by the private sector will result in the enhancement of environmental performance thus reducing the negative impacts on the environment and elevating the

standard of living. The sub-directorate of EMS recently published a guideline document as well as posters which are free of charge to the public.

Market-based Instruments create financial incentive for the private sector to opt for environmentally friendly action in preference to an alternative which is environmentally damaging. The sub-directorate of Environmental Resource Economics documented and published Market-based instruments which are free to the public in a bid to achieve the above.

Integrated Environmental Management (IEM) is also a recommended tool for better environmental management. It is an approach for guiding the planning and implementation of development proposals. The purpose of IEM is to ensure that the possible environmental consequences of development proposals are investigated and understood before decisions are taken, enabling informed decision-making, and accountability for decisions taken. The IEM published in 1992 is presently being revised.

### **Sustainable Development**

The White Paper on Environmental Education is presently being revised, and is in a draft format for discussion. The principles around which this document is built, includes accountability, alienation of resources, capacity building and education, custodianship, equity, environmental justice, inclusively, integration, open information and participation.

It is envisaged that a policy on the combating of land degradation will be developed within the following year which will aim at a better understanding for the vulnerable groups, especially women, on how to manage their environments.

### **Natural Environment**

The Biodiversity Act and Bio-prospecting regulations are aimed at vulnerable groups. The following are goals / targets for this Directorate :

Endangered Species Protection Act

Wetlands Act

Strategies on the implementation of the Biodiversity White Paper including species and wetland conservation

Biodiversity Act

Implementation of Biodiversity Policy

Time lines for implementing is 1998 - 2000.

Data Analysis, Country Reports and State of Environment Reports will be used to chart progress and evaluate success. Databases and data analyses and input from CEC Subcommittee working groups will be used to chart progress and evaluate plans.

### **Sea Fisheries**

In June 1997 an 18-month consultative process culminated in the publishing of a Marine Fisheries Policy for South Africa. This was the first time in the history of the

South African fishery that a detailed policy on the management of the country's valuable fishery had been produced.

A draft Marine Living Resources Bill which adheres to the recommendations of the Marine Fisheries Policy has been drafted and presented to the Parliamentary Portfolio Committee on Environmental Affairs and Tourism. This committee has called for hearings on the Bill and these have been scheduled for early February. It is anticipated that the committee will prescribe certain changes to the Bill. Once the committee is satisfied with the contents of the Bill it will be put before parliament, the Council of Provinces and then the President of South Africa. The department is optimistic that the Bill will be passed before the end of March 1998, ushering in a period of renewed co-operation between stakeholders and fisheries managers.

Following the passing of the Bill, an Implementation Committee with the necessary skills, background experience and expertise will be selected by the Minister of Environmental Affairs and Tourism. This committee will be charged with putting the prescriptions of the Marine Fisheries Policy into practice, namely:

- (a) drafting guidelines on royalties and payments which will be payable on future rights.
- (b) simplifying the tendering process of phase 2, developing tender criteria, calling for tenders and adjudicating them;
- (c) developing proposals on dealing with the rights to by-catches (fish that are inadvertently caught while fishing for a target species).
- (d) developing guidelines on the maximum and minimum number of fishers each fishery can sustain;
- (e) developing guidelines for criteria and parameters that future new entrants will have to meet to be eligible for tendering for rights.
- (f) developing guidelines for the introduction of an ultimate ceiling in terms of tonnage above which any percentage of the TAC cannot rise as a consequence of sustained growth in the resource - this may offer an opportunity for allowing new entrants in future;
- (g) investigating mechanisms which can be used to transform fishing rights into secure rights.
- (h) Points b, d, e, and f are specific areas that the Implementation Committee will investigate with a view to providing privileged access to disadvantaged fishers (a vulnerable group identified in question 3)

### **Weather Bureau**

Special efforts are being made to improve warnings of severe weather events to those vulnerable groups identified in paragraph 4. With this in mind every regional weather forecast centre will continue to improve its' liaison with local municipalities and disaster management services so as to improve lead-time for warnings of severe and dangerous weather events. In this regard it is planned that linkages between radar and automatic weather stations will be expanded. A great deal of this infrastructure is in place and specialised training courses are taking place.

In order to mitigate the effects of drought a special research and operational centre has been initiated to warn all South Africans of expected rainfall conditions up to 6-months ahead, especially for each new summer rainfall season. Plans are to continue with research and so improve the accuracy and value of the output. Integrated in the planning is a "feed-back' and awareness meetings and workshops so as to widen the number of recipients for this expanding service. "Bench-marks" are met by organising questionnaires and workshops with present and future clients.

In order to expand the awareness of weather and climate information by schools and formerly disadvantaged groups, new personnel have been put in place to re-plan Weather Bureau pamphlets and certain of the publications. It is planned to liaise with schools with respect to the new syllabi and also to assess the needs of future users of weather information by questionnaires and workshops. First of the new pamphlets should be ready by the end of 1998.

***b. What will your department do to get rid of existing laws and other measures which have a negative impact on people's environmental rights ?***

This aspect is being addressed by legal audits, as mentioned above, The findings of this audit will spell out the way forward.

## **9. General**

***Please tell us about anything which your department has done or is planning to do to make sure the environmental rights are respected, protected, promoted and fulfilled which has not been dealt with in your answers to these questions.***

### **Air Pollution Control**

Rights other than environmental rights, are impacted on by certain sections of the Atmospheric Pollution Prevention Act, 45 of 1965, e.g. the right to privacy, etc.

One of these sections which affect other entrenched human rights, is section 20(5)(b), where it is stipulated that notices should be placed in Afrikaans and English newspapers, as well as section 23(1) which stipulates that a local authority may authorise any person to enter any premises for the purpose of making any investigation. Section 34(3) goes even further when it stipulates in sub-section (4) that, any person who refuses admission to such a premises shall be guilty of an offence. The same goes for the inspection / examination of vehicles.

Section 47(1) stipulates that the provisions of this Act, except sections 14 to 26 inclusive, shall bind the State. Sections 14-26 forms Part 111 (Smoke) of the Act and it applies where the areas are declared smoke control areas and can not be applicable on the State.

### **Sea Fisheries**

Through transformation within the Sea Fisheries, the Chief Directorate is aiming to promote justifiable economic and social development through ecologically sustainable development and the use of natural resources.

With broader participation in the fishing industry, Sea Fisheries is striving to address issues of service delivery, transparency, representivity and cost efficiency. In-so-doing, it is envisaged that all South African who wish to gain access to South Africa's rich marine heritage will be afforded efficient and professional service when they interact with the Chief Directorate.

### **Weather Bureau**

In order to help improve the water supply to those relying on the Vaal Water System an integrated river management system comprising of hydrological and meteorological data is being implemented. Working together with the Department of Water Affairs and Forestry and by using real-time satellite, radar and rainfall data, long and short term weather predictions the river flow and dam levels in the Vaal system will be maintained at optimal levels. This will have two important results. Firstly it will regulate the river flow, especially in dry or drought seasons so that no users of water suffer from shortages. Secondly, during times of heavy rainfall, it will mitigate against serious and damaging flooding as well as providing timely warnings should these occur.

## **8. FINANCE**

### **National Department of Finance**

#### **1. Past overview**

a) *Please give an overview of the impact of past discriminatory laws and other measures on the financing of the following rights (called the socio-economic rights in the rest of the document) of particular groups:*

- *Environment (section 24 of the Constitution);*
- *Access to adequate housing (section 26);*
- *Access to health care (sections 27);*
- *Access to sufficient food (sections 27);*
- *Access to sufficient water (sections 27);*
- *Access to social security and social assistance (sections 27); and*
- *Basic, adult basic and further education (sections 29)*

*How have these affected your Department's ability to realise the socio-economic rights?*

b) *What impact did past laws and other measures have on the financing of the following rights of children in section 28 of the Constitution:*

- *Appropriate alternative care when removed from the family;*
- *Basic nutrition;*
- *Shelter,.*
- *Basic health care services; and*

- *Social services*

*How have these affected your Department's ability to realise the socio-economic rights of children as set out in section 28 of the Constitution?*

Past discriminatory laws and measures have had far-reaching implications for the provision and financing of services which contribute to the realisation of the socio-economic rights of South Africans. Three aspects of the legacy of these measures have specific relevance for financing social service provision.

Discriminatory legislation and measures resulted, in the first place, in **extremely unequal levels of service provision**. Many people did not have access to services providing for their basic needs while the quality of services available also varied to an extreme extent. This is evident in the contrast today between socio-economic indicators for different communities with regard to health, education and welfare. While this government has now taken many steps to address the situation, the result of decades of unequal provision cannot be changed overnight.

Secondly, discrimination resulted in service provision being focused on the minority and their needs. In many instances the result was the provision of **inappropriate and unsustainable services**. For example, high-cost curative health services were funded by the state while the majority of the community was without basic health services. Absence of democracy and transparency also led to the absence of democratic controls over government expenditure leading to inappropriate services, wastage and fraud.

Thirdly, the whole discriminatory system contributed to the **low growth path** of the economy after the 1960's. This was not only the result of resistance to the system in the form of internal strife and foreign sanctions. Apartheid starved communities of social expenditure with negative implications not only for their attainment of human rights but also for the productive capacity of the economy. The case of education is the clearest. Fiscal mechanisms to limit the state contribution to African education, such as tying expenditure on African education to African taxes in the 1950's and 1960's, led to too little investment in the productive skills of our population. Many have seen this as one of the key constraints on the growth of the country over the last two decades. Repression to maintain the discriminatory system also led to the channeling of scarce funds into defense and wasteful protection services. Low growth and inappropriate spending thus reduced the public funds available for social service expenditure to enhance the human rights attainments of South Africans.

Lastly, the system led to fragmentation of service provision with different bureaucracies responsible for different population groups. Different standards of provision were maintained by the different bureaucracies and there was no attempt to ensure uniformity and equity between different delivery organisations. Furthermore there was no mechanism in place to ensure the equitable division of resources between the different government organs and regions. Needs of communities played almost no role in deciding on allocations. Allocation to different departments and sub-national governments relied on historical patterns, which reflected earlier discrimination against blacks and did not take into account needs and considerations of equity.

These various aspects have impacted significantly on the ability to make progress in terms of service provision by government and thus the promotion of the socio-economic rights. This affects the Department of Finance specifically in that it has to balance a large number of imperatives pulling in different directions. Firstly, there is the need to remove the backlog in service provision and to approach equity in service provision. Secondly, low growth and the international environment have placed severe constraints on fiscal resources implying that the backlog cannot be removed by merely spending more. Removing of backlogs and fiscal balance must therefore be combined with reprioritisation. This often implies the establishment of new institutions and mechanism of delivery. Two recent examples of what is entailed can be seen in the necessity to establish a district health system in the effort to expand primary health care delivery. Establishing a greater extent of equity in grants to children also entailed fundamental change and thus the phasing out of the old system of Maintenance Grants in favour of the new Child Support Grants. Escaping from the legacy of the past thus not only entails marginal adjustments but the redesign of new systems, delivery mechanisms and institutions.

Reprioritisation in service provision is a key issue to the Department and has been taking place within many departments and also in the allocation of revenue between provinces. During this process it is important to ensure fiscal balance in the sense that state expenditure does not outstrip the availability of resources. Fiscal imbalance impacts negatively on the poor and unemployed through high rates of inflation, economic uncertainty and its negative impact on investment and job creation. Fiscal restraint is necessary to ensure growth and investment to provide jobs and additional resources for social expenditure.

While delivery systems must be redesigned dramatically, the supporting financing mechanisms also have to change. The Department of Finance has therefore faced a demanding programme to design and implement more rational and equitable fiscal mechanisms to enable delivery through public expenditure. Legislation and processes regarding division of revenue between fiscal authorities and evaluating expenditure trends (principally the Medium term Expenditure Framework) have advanced significantly while further legislation in terms of the Constitution relating to treasury control and budgets is in progress.

***b) What has been the effect of consolidation or non-consolidation of departments and legislation from the previous homelands on your department's ability to realise the socio-economic rights of children?***

The movement from fragmented, racially focused provision of services and removal of irrational and racially based regional boundaries allowed for progress, although difficulties have been encountered. The consolidation of departments allowed for the removal of duplication, unified administration and the putting into place of orderly financing mechanisms. It has also created the opportunity for unified information systems, which would allow better budgetary control and financial planning.

The process of integrating different bureaucracies and information systems has, however, been complicated and led to substantial uncertainty and data problems that should become less over time.

## 2. Constitutional Obligations

(a-b) What does the department understand it is obliged to do in order to respect, protect, promote and fulfil the socio-economic rights of children in section 28?

In line with its commitment to the elimination of poverty and the reduction of inequality the South African government spends substantially on the social services. Social service expenditure amounts to nearly two-thirds of non-interest expenditure of the government. Within the social services, substantial progress has been made in providing more appropriate services and to target benefits to the poor. It is the task of the Department of Finance to ensure that this process can be sustained and that over time more resources will be available for the social services in order to more effectively fight poverty and inequality.

In this regard, an important role of the Department of Finance is to facilitate the development of and to implement government's fiscal policy which refers particularly to how revenue is raised, how that revenue is divided between the spending authorities, and how deficits are financed. The implementation of sound fiscal policy will ensure the sustainability of resource allocations to spending agencies in order to deliver the required services. While the department therefore does not provide services ensuring the realisation of socio-economic rights directly, it has a key role in ensuring equitable and sustainable service delivery.

The three broad aims of government's fiscal policy were identified in the *Budget Review 1998* as:

- revenue raising, spending and borrowing for each part of the public sector consistent with increasing economic growth, maximum social development and eliminating the inequalities of the past;
- allocation of expenditure across different parts of government that matches the distribution of functions and their relative priority;
- within each sphere of government, use of resources in a manner which minimises costs, maximise utility and avoids the duplication of services that can be provided at a lower cost by the private sector.

### **GROWTH AND SOCIAL DEVELOPMENT**

Increasing economic growth will ensure growing resources for satisfying social needs. In this regard the department is tasked with ensuring the implementation of the strategy for *Growth, Employment and Redistribution* as one of the principal instruments to attain the reconstruction and development objectives of the government. Government fiscal policy therefore seeks to ensure that it:

- a improves domestic savings, support a higher level of investment and reduces the need to borrow from abroad;
- improves South Africa's competitiveness and supports an export-friendly trade and industrial strategy;
- keeps government consumption spending at an affordable level, contributing to lower inflation and sustainable balance of payments;



ensures pay increases within the public sector that are market and productivity related, and are fiscally sustainable; and  
ensures that government debt does not grow faster than the ability to repay it and that debt service costs are consistent with future growth in the delivery of public services, and do not crowd out expenditure.

## **DIVISION OF REVENUE AND REPRIORITISATION**

In the past, fiscal mechanisms did not allow for the equitable division of revenue to spending agencies and expenditure did not reflect the priorities of the poor and needy. A key function of the Department of Finance is to put mechanism in place to ensure division of revenue according to allotted function and relative socio-economic need. It also has to monitor whether actual expenditure moves in line with the required reprioritisation.

## **EFFICIENCY OF FINANCING AND SERVICE DELIVERY**

Much has already been achieved by way of the reprioritising of spending to meet reconstruction and development objectives, in the equitable delivery of services, and in addressing infrastructure backlogs. Maximising government's ability to deliver services within sustainable levels of overall public spending requires:

- a focusing on core public sector responsibilities, while targeting spending on the needs of the poor;
- increasing cost recovery on public services that are used by the non-poor;
- out-sourcing non-core administrative services to reduce costs, allow managers to focus on core activities, and create empowerment opportunities for new and emerging enterprises
- promotion of private-public partnerships to increase efficiency, cost effectiveness and to leverage private sector skills, finance and technology;
- the restructuring of state assets to accelerate delivery and focus on core activities;
- effective targeting of social delivery; and
- designing financing mechanisms that provide structures and incentives to ensure efficient service delivery.

In focusing on these three broad aims the Department of Finance will thus contribute to the ability to provide services and so contribute to the progressive realisation of the socio-economic rights.

***(c-g) What is your Department's official interpretation of the words "access to ", "adequate ", "sufficient ", "progressive realisation of this right" and "progressive" available and accessible".***

Line departments responsible for delivery of services related to the socio-economic rights have managed broad-based policy processes to translate these constitutional requirements into operational goals. White papers and legislation in health, welfare and education therefore provide detailed guidelines on government's interpretation of these concepts. These are, however, complex issues and may in some cases be finally resolved by the courts as recently happened in the Constitutional Court. It is therefore not in the domain of the Department of Finance to provide official interpretations of

concepts such as "access to", "adequate" and "sufficient". In general, however, the Department seeks to ensure that the financing of public resources promotes universal access to a full and balanced spectrum of services. This means that the concepts "adequate" and "sufficient" include reference to the relative cost, efficiency and effectiveness of public services in meeting social and economic needs.

The Department views the phrases "progressive realisation" and "progressively available" as recognition of the reality of limited resources and capacity which entails that time will be required to move towards comprehensive fulfilment of socio-economic rights. It also implies that socio-economic rights do not imply fixed levels of service provision but that standards that can be provided for will change over time because of, among other things, increasing resources and wealth available to society. It also implies a recognition that the State has to concentrate on the needs of the poor in the context of income inequality.

### **3. Information gathering**

*Does your department have systems to collect and analyse statistical and other information relating to the implementation of the socio-economic rights and socio-economic rights of children?*

The Department of Finance compiles fiscal data (i.e. revenue, expenditure and deficit) on a macro level in order to monitor the public finance. More disaggregated data on government expenditure and revenue are used for policy analysis, among other things to track whether expenditures are changing in line with government priorities.

This information is sourced from a large number of public institutions such as the South African Revenue Services, the Department of State Expenditure and provincial treasuries. The annual Estimates of Expenditure compiled by the Department of State Expenditure and provincial treasuries are key sources in this regard.

Revenue information identifies the type of revenue and types of taxes. Expenditure information is available according to which national department or provincial government is responsible for the expenditure. Expenditure data are further classified according to its economic characteristics (current, capital, expenditure on goods and services, and transfers), the broad function (protection services, social services, economic services, general administration and interest) and type of expenditure (e.g. personnel, administration, equipment).

While provincial (regional) incidence of some expenditure is therefore available, information on the incidence of expenditure by race, gender and income level is not compiled by the Department. However, a key intention is to improve the information content of budgets by moving beyond expenditure data ("inputs") to information on departmental outputs and the impact of expenditure. This is, however, a longer-term undertaking closely linked to the Medium Term Expenditure Framework. The *Budget Review 1998* (pp.9.35- 9.38) provides some information on incidence and tax burdens by broad income classes. It is the intention to expand this exercise in future years.

The compilation of fiscal data by the Department of Finance is available in the annual *Budget Review*, published by the Department to coincide with the Budget Speech of the Minister of Finance. It is available from the Department of Finance.

#### **4. Vulnerable groups**

*What groups have been identified by your department as more vulnerable than others, and which need special attention?*

In line with the conclusions of studies on poverty and the conclusions of various policy documents, women and children are seen as vulnerable groups. To this end the Division Financial Planning was involved in a pilot project aimed at engendering the budget process. This resulted in the incorporation of gender analysis alongside discussions of policy into the **Budget Review 1998**. The Department has also participated in the activities of the National Programme for Action on Children. Gender aspects of the budget and the NPA are key responsibilities of the recently established Directorate Social Services in the department.

The formula for the division of the equitable share also incorporates indicators of poverty and vulnerability:

the health share is weighted in favour of women, children and the elderly;  
the social security component is based on the estimate number of people entitled to social security grants (which are the elderly, the disabled and children); and the basic share is adjusted in favour of provinces with large rural communities.

#### **5. The obligation to respect these rights**

- a) *What current laws and other measures have the effect of denying or depriving people, including children, of their socio-economic rights?*
- b) *What current laws and other measures unfairly discriminate against any groups of people and their rights to the socio-economic rights?*

No laws or measures for which the Department of Finance is responsible deny people their socio-economic rights or discriminate unfairly. The South African economic situation and the fiscal stance of government do imply that there are limits to government expenditure or budget constraints. The constraints that are currently in place are often seen, either as irrationally imposed, or as responsible for the slow movement in securing the socio-economic rights.

It has already been argued that fiscal restraint and balance are necessary for progress with regard to the socio-economic rights. (See 1 and 2). While the loosening of fiscal constraints (increasing deficits, rising tax rates) might have seemingly positive economic effects in the short run it will lead to macroeconomic imbalance and deflation in the longer-term. This will have negative effects for the socio-economic position of the majority of South Africans.

Empirical evidence is also clear on the fact that the South African government spends substantial shares of the budget and total production on the social services relative to comparable countries and even some richer countries. This and other evidence indicates that the level of spending in South Africa cannot be seen as the only reason for low levels of service delivery in the social services. These must be looked for in the unequal distribution of spending in the social services, the inappropriateness of services and lack of economy and inefficiency in service delivery. Before these problems are not dealt with, increased expenditures cannot be guaranteed to improve the socio-economic standing of the most vulnerable South Africans and will have significant macroeconomic effects.

*(c-d) What steps have been taken to by your department to get rid of any past laws and other measures which impacted on people's rights to the socio-economic rights and the socio-economic rights of children?*

After the release of the Katz Commission Interim Report in 1994 several steps were taken to ensure that the Income Tax Act should no longer discriminate against taxpayers on the basis of gender or marital status. These, in effect, led to the separate taxation of married taxpayers and included:

The introduction of a single rate structure in respect of income tax applied to all individual irrespective of gender or marital status;

The introduction of a single primary rebate for all individual taxpayers to replace the different primary rebates for married persons, unmarried persons and married women;

The withdrawal of the election by a married woman (a the breadwinner of the family) to have her income included in the income of her husband; and

The granting of the same deduction for tax purposes in respect of contributions to retirement annuity funds, irrespective of a taxpayer's gender or marital status.

## **6. The obligation to protect these rights**

Refer to Department of Labour.

The Department of labour was not requested for information to the Commission

## **7. The obligation to promote and fulfil these rights**

*a) What percentage of the National Budget is set aside to promote and fulfil the socio-economic rights? How much will have been spent at the end of the 1997-1998 financial year?*

Social services expenditure contributes most directly to the promotion and fulfilment of socio-economic rights as outlined in the Constitution. Social Services expenditure (defined as education, health, social security and welfare, housing and other social services) comprised 46,6% of consolidated national and provincial expenditure in

1997/98 and 49,8% in 1998/99. Social Service expenditure totals over 60 % of non-interest expenditure. A more detailed outline of the relative importance of the different components of expenditure and also social service expenditures is set out in the table below.

Although social service expenditure therefore makes up the bulk of government expenditure and is a clear sign of the commitment to promoting the socio-economic rights, other expenditures are also relevant in this regard. The assessments of which government expenditures assist in the promotion and fulfilment of socio-economic rights is not a clear-cut issue. Protection services safeguard the income and assets of people and thus protect and promote people's ability to attain their socio-economic rights. The absence of such expenditure would lead to greater precariousness of people's socioeconomic standing. It could thus be included under this category. Similarly, expenditure on economic services contributes to protecting livelihoods, for example by preserving jobs, the environment, or promoting work place productivity.

**Table 1: Consolidated national and provincial expenditure; functional allocation as % of total expenditure**

Budget	MTEF projections					
	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01
Protection Services	15,87	15,82	15,56	16,08	16,01	15,78
Social Services	46,78	45,83	46,58	49,76	48,70	47,72
<i>Education</i>	<i>21,87</i>	<i>22,07</i>	<i>21,19</i>	<i>22,81</i>	<i>22,37</i>	<i>21,80</i>
<i>Health</i>	<i>10,18</i>	<i>10,42</i>	<i>10,62</i>	<i>12,23</i>	<i>12,01</i>	<i>11,73</i>
<i>Social Security and welfare</i>	<i>9,61</i>	<i>9,23</i>	<i>9,67</i>	<i>9,65</i>	<i>9,41</i>	<i>9,27</i>
<i>Housing</i>	<i>1,90</i>	<i>0,90</i>	<i>2,21</i>	<i>1,90</i>	<i>1,96</i>	<i>1,</i>
<i>Other</i>	<i>3,22</i>	<i>3,21</i>	<i>2,89</i>	<i>3,17</i>	<i>2,96</i>	<i>3,13</i>
Economic Services	11,06	10,98	9,94	8,33	8,46	8,60
General administration	6,83	7,60	6,94	4,39	4,87	4,89
Interest	18,65	19,48	20,29	20,96	20,60	20,08
Reserve	0,82	0,28	0,68	0,49	1,36	2,92
Total	1100	1100	100	1100	-1100	100

Source: Department of Finance, *Budget Review 1998* (Table 7, page B25)

**b) What percentage of the National Budget is set aside to assist provincial and local governments to ensure delivery of the socio-economic rights within their jurisdictions?**

The total funds available to the national government for 1998/99 are about R202 billion. Of this amount:

- R79 billion (39%) is allocated to the provinces as their equitable share;
- R9 billion (4,5%) goes to the provinces in the form of conditional grants;
- R1 billion (0,5%) to local government as its equitable share; and
- R2,3 billion (1,1%) will go to provinces for improvements in conditions of service.

Provinces and local government will therefore receive about 45% of the funds available to national government. It should be noted that R 1.1 million allocated to provinces is also earmarked for local government.

**c) *What percentage of the National Budget is set aside to cover socio-economic development?***

As with 5 (a) ambiguity in classification of different expenditures as to their relationship with socio-economic development preclude a clear-cut answer. Table 1 above provides a categorisation of government expenditure according to broad functions. Central Statistical Services publishes a more disaggregated functional allocation of expenditure on a regular basis. Further details are set out in the Budget Review. Social services take up 49,8% of the budget and economic services take up 8,3%.

*How much of the National Budget is set aside for:*

*Human resource development,  
Land restitution and redistribution;  
Job creation;  
Research for labour intensive job creation; and  
Reconstruction and development programmes and projects?*

National government and the provinces plan to spend R46,8 billion (or 22,8% of expenditure) on education as a function. This also includes educational expenditure by departments other than the education departments. The major components of this human resource expenditure are:

National expenditure on universities and technikons of R6,0 billion;

Provincial spending on education of R38,9 billion;

R200 million on the national Education vote for improving management systems and quality;

R325million for human resource development on the labour vote (Budget review 1998 p.1.11) & A total of R685 million or 0,43% of total national expenditure has been allocated to the Department of Land Affairs in 1998/99. Of this amount R468 million is allocated under the programmes Land Reform Policy and Land Reform Implementation. About 45% of total departmental expenditures are allocated to capital transfers (grants).

A diverse range of government expenditure has implications for job creation. The *Budget Review 1998* (pp. 1.7-1.9) provides an outline of some of the relevant projects and expenditures. Some of the more substantial programmes are listed. The Department of Trade and Industry allocated R771 million to investment support, R77 million to small business promotion and development, and R785 million for trade facilitation. The Department of Public Works will spend approximately R1 665 million on land and building programmes. The Department of Public Works is also involved in developing and managing the Community-based Public Works Programme, developing policies for affirmative procurement policies for the state and developing strategies for transformation of the construction industry to encourage participation of small contractors and labour intensive methods of construction.

Several large water projects will be financed over the next few years (R596 million in the Northern Province over the next 4 years and an estimated R632 million on the Skuifraam dam near Cape Town.) while the Working for Water programme of the Department of Water Affairs has been very successful. In terms of the Consolidated Municipal Infrastructure Programme R583 million will be transferred to local governments. The Department of Transport will spend about R742 million, mostly on road construction. Hospital rehabilitation will absorb R100 million during this financial year and is expected to increase in future years.

The Department of Labour has budgeted about R22 million for the programme "Labour Policy". This includes R2 million for research and development in general. Refer to the Department of Labour for more detail. In addition the Department of Public Works and the Scientific and Industrial Research Council supports research and planning for labour intensive public procurement and construction.

The Reconstruction and Development Programme is the Policy framework for the entire budget. Departmental budgets do not separately identify RDP projects. The *Budget Review 1998* (pp. 1.2 to 1.13) outlines key projects serving RDP objectives such as expenditures to meet basic needs, accelerated infrastructure development, promotion of growth, development and job creation and the promotion of human resource development.

- e) *What national government departments are involved in developing the budget?*
- f) *What parliamentary portfolio committees are involved in developing the budget?*
- g) *How much are provincial and local governments involved in developing the budget?*
- h) *What structures in civil society are involved in developing the budget?*

National and provincial departments are responsible for developing their own budgets, in collaboration with their political heads. Responsibility for preparing budgets rests with the executive, and not with the legislatures.

Budget making in South Africa is the responsibility of all three spheres of Government: national, provincial and local. The spheres of Government are "distinctive, interdependent and interrelated".

In terms of the Constitution, the responsibility and the accountability for their budgets lie with the national, provincial and local government respectively. But the Intergovernmental Fiscal Relations Act 1997 creates new intergovernmental forums, the Budget Council and the Budget Forum, to co-ordinate national financial planning and fiscal policy within this decentralised decision-making process.

Reforms of the budget process over the past year have enhanced the co-operation between spheres of government in the Budget process and increased the involvement of national government departments and political office bearers of national and provincial governments. It also increased involvement of national and provincial

legislatures and introduced greater transparency and openness to allow participation of all stakeholders and representatives of civil society.

The Constitution requires that nationally raised revenues be divided equitably between the three spheres of government. This sharing of funds, called the *vertical division*, takes account of various criteria in the Constitution. In general the funds are allocated so that each level of government is able to provide basic services and perform the functions assigned to it. The allocation also takes into account each sphere's ability to raise their own revenue to pay for these activities. Local government, which is largely self-supporting, gets a much smaller share than provinces, which presently have limited sources of own revenue.

Because local government is largely self-financing, the national budget process focuses mainly on spending by national and provincial government. Over half of spending on national and provincial services is the responsibility of provinces. Provinces are responsible for drawing up their own budgets, and accountable for the delivery of services within a national determined policy framework. The Division of Revenue is proposed by the national Cabinet, taking account of advice from the Financial and Fiscal Commission, and approved by the National Assembly through the Division of Revenue Act.

While respecting the autonomous role of provincial governments in drawing up their own budgets, the Medium Term Expenditure Framework process is designed to build co-operation between national and provincial governments in developing their budgets within their allocations. The process is designed to assist representatives of national and provincial line departments to analyse the policy options and consider their implications for budgets and the delivery of public services. The process is intended to elucidate the choices that the governments confront in delivering their reconstruction and development priorities within an affordable total level of public expenditure.

The compilation of the medium term expenditure framework for national departments is primarily the responsibility of the department of State Expenditure. In compiling the detailed allocations of the national government's budget, each national government department is consulted and there are detailed discussions between the Department of State Expenditure and the line department concerned. A summary of outstanding issues is presented to Cabinet to enable political office bearers to take the final decision on the allocation between departments, reflecting their policy choices and priorities.

A similar process occurs at provincial levels in which provincial treasuries interact with provincial line departments to enable the Treasury to make recommendations to provincial executive council on allocations within the provincial budget total.

The National Department of Finance endeavours to track the allocations being made by national government and the nine provinces to enable the national government to monitor the overall allocations to different public services. This analysis, based on preliminary budgets, was published in the Medium Term Budget Policy Statement,



and updated figures reflecting near-final provincial budgets were published in the Budget Review.

In December 1997, Government published the Medium Term Budget Policy Statement for the first time. This document sets out the economic and fiscal framework within which the budget will be finalised, early indications of likely trends in the allocation of spending over the next three years, and a number of detailed policy choices facing government. It is a frank discussion of the framework within which the budget will be finalised. The publication of a Medium Term Budget Policy Statement several months before the budget enables parliament, the public and representatives of civil society to provide inputs into the budget process which are informed by an understanding of the economic constraints within which the budget is framed, and the policy choices which the government is considering. This enables representations to be better informed, more realistic and targeted on the real issues.

During the course of the Budget process, submissions were made by NEDLAC in the areas of health and education. In addition, a number of other formal and informal representations are received from representatives of business and organised labour, and from the non-governmental sector. These representations are considered carefully in the budget process.

The introduction of rolling three-year budgets provides new opportunities for parliament and civil society to contribute to the budget. Medium term plans for each national and provincial line department are set out in the budgets. This enables departments to plan the delivery of services within realistic estimates of what can be afforded. It enables stakeholders to interact with government about the best uses of available funds, and to comment on the policy priorities represented by the medium term allocations. Because these are rolling budgets, amended each year in the light of new information, representations, analysis and evolving policy priorities, reactions from stakeholders can be reflected in subsequent budget proposals.

- j) Has the legislation dealt with in section 215(2) of the Constitution been put into effect?***
- k) What has your department done to inform and educate all South Africans, and particularly the identified vulnerable groups, about how to get their socio- economic rights?***
- l) What has your department done to inform and educate all children about how to get their socio-economic rights?***

The various publications of the Department provide South Africans with important information to evaluate government actions and expenditures. This enables citizens and parliament to participate in the formation of government policies that will result in honouring government's commitment to fulfilling the socio-economic rights of citizens. These publications are the annual *Budget Review*, the *Medium Term Budget Policy Statement*, first published in December 1997, and the *People's Guide to the Budget*. The People's Guide is an accessible summary of the Budget which is widely distributed, among others as inserts to newspapers and magazines, to local government offices and to libraries.

- m) *What is your department's understanding of the core minimum obligations posed on it by the socio-economic rights and the socio-economic rights of children?*

See 2 (a-b)

- n) *What minimum requirements for making sure the socio-economic rights and the socio-economic rights of children are applied in a uniform way across the country have been set by your department?*

The division of revenue between provinces is based on an equitable revenue-sharing formula, to be phased in over 5 years. This aspect is more fully discussed below (o-p).

- o) *Give a brief description of any current law and other measures which have been adopted to improve or advance the rights to socio-economic rights.*
- p) *Give a brief description of any current law and other measures which have been adopted to improve or advance the rights of children to their socio-economic rights.*

Not being a department delivering services to individuals, no laws or measures directly affecting rights or access to rights were introduced by the department. In ensuring sound public finances through its participation in the budget process the department facilitates the fulfilment of constitutional requirements by departments in a sustainable way.

A central feature of the apartheid past was the unequal access to resources by sub-national governments to supply social services to their population. A key task of the department in the recent past was the preparation of the **Intergovernmental Fiscal Relations Act** (which came into effect on January 1 1998) which establishes a process for considering intergovernmental budget issues. The Act requires the Financial and Fiscal Commission to make recommendations concerning the division of revenue between the three spheres of government - national, provincial and local - and to submit these recommendations ten months before the start of the financial year. It further requires the Minister of Finance to consult the provinces, local government and the FFC about these recommendations. The Act establishes intergovernmental bodies such as the Budget Council and the Budget Forum, to facilitate such consultation. The Act specifies that the Minister must present a Division of Revenue Bill indicating the final allocations to the different spheres and the nine provinces and submit along with the Bill a memorandum of explanation (Annex E in *Budget Review 1998*).

The **Division of Revenue Bill** for the 1998/99 financial year, introduced by the Minister on Budget Day, gives effect to Section 214 of the Constitution, which requires that an Act of Parliament must provide for:

the equitable division of revenue raised nationally between the three spheres.,  
the determination of each province's equitable share; and

any other allocations to the provinces, local governments or municipalities from the national share and any condition associated with these allocations.

Accordingly, the Division of Revenue Bill states the allocations to each of the three spheres as well as each province's equitable share. It also provides details of other allocations from the national sphere to provinces, local government and municipalities. A number of the factors which the Constitution requires to be considered, aim at ensuring that sub-national governments are in a position to provide services to their citizens and thus contribute to the fulfilment of the socio-economic rights. The most pertinent factors listed in Section 214(2) of the Constitution are:

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 the provinces and municipalities; developmental and other needs of provinces, local government and municipalities;  
economic disparities within and among the provinces; and obligations of the provinces and municipalities in terms of national legislation.

In determining the provincial equitable share a formula is used which takes into account the demographic and economic profile of provinces. It presents an important step in dividing revenue according to socio-economic need and demand for social services rather than on the basis of historical privilege. The formula is composed of the following six components:

an education share, based on the average of the size of the school-age population and number of learners actually enrolled;  
a health share, based on the proportion of the population without private health insurance and weighted in favour of women, children and the elderly;  
a social security component, based on estimated numbers of people entitled to social security grants (elderly, disabled and children);  
a basic share, based on total population with a 50 per cent weighting in favour of rural communities;  
An economic output share, based on the estimated distribution of gross geographic product (GGP); and  
An institutional grant, equally divided among the provinces.

***q) Have any new laws and other measures been introduced in the past year which have a negative impact on the progressive realisation of the right of access to the socio-economic rights or which have a negative impact on the socio-economic rights or the socio-economic rights of children?***

Measures introduced in the Department of Finance will ensure the sustainable provision of social services and an expansion over time of the resources available to the government to provide services.

- r) *What structures or mechanisms has your department put in place to:  
 Review laws and other measures which relate to the socio-economic rights?  
 Monitor whether laws and other measures were implemented  
 Work with other departments, levels of government or sectors of society to make sure everyone gets access to their socio-economic rights  
 Work with other departments, levels of government or sectors of society to make sure children get access to their socio-economic rights  
 Make sure the principles of equality and non-discrimination in the Constitution are integrated into all department programmes relating to this right  
 Consult and involve civil society and people needing their socio-economic rights*

The Department of Finance is guided by the objectives of the government's Reconstruction and Development Programme. This embodies a commitment to the elimination of poverty in a rapidly growing and more equitable economy and in the context of an open, peaceful and democratic society. It implies the progressive realisation of the socio-economic rights of South Africans. Most of the activities of the Department will contribute to this. The following can be mentioned specifically:

The department routinely interacts with other departments, and also those providing social services on their policy proposals. In these activities we are guided by the need to ensure sound public finances, reprioritisation of government expenditure to ensure equitable and appropriate service delivery and to reform financing mechanisms to ensure efficient service delivery. Most relevant to the socio-economic rights is the Directorate Social Services in the division Financial Planning which is focused on monitoring and analysing the financing of social services. In promoting sound public finances the department will contribute to the sustainability of service provision and, because sound public finance contributes to more rapid growth and development, to increasing capacity to provide social services.

The division Intergovernmental Relations monitors provincial budgets, through which most of the social services are provided. As a result the department is well informed with regard to trends in service delivery and in a position to contribute to improvement in policies over time.

The department will again be responsible for the MTEF process during 1999. This will again focus on the appropriateness of government expenditure and the tradeoffs involved. This will lead to opportunities for reprioritisation and redesign in order to more effectively address the issue of socio-economic rights.

## **8. Future goals**

- a) *What new laws and other measures will your department put in place to respect, protect, promote and fulfil the socio-economic rights and the socio-economic rights of children?*

- b) What will your department do to get rid of existing laws and other measures which make it difficult for people, including children, to get their socio-economic rights?*

The publication of the Medium Term Budget Policy Statement in December 1997, and the publication in March 1998 of three-year budget projection were the first steps in a wider overhaul of the budgetary process, emphasising transparency, output-driven programme budgeting and political prioritisation. This process is continuing. In particular, the MTEF processes established in 1997 will be built on and strengthened in 1998.

Legislation is also currently being prepared to give effect to Sections 215 ("National, provincial and municipal budgets") and Section 216 ("Treasury control"). This legislation must be implemented by 1 January 1998. This will enhance budget processes and therefore the equitable and division of revenue and equitable and efficient service delivery. See also 7(r).

## **9. Land Affairs**

Socio-economic right: Section 25 (5) (6) (7) and (8)

### **Note:**

The Department of Land Affairs Land Reform initiative consists of three interlinked programmes: restitution, tenure reform and redistribution (see question 7(f) for an explanation of these programmes). The following questions have, wherever possible, been answered with a broad focus, encompassing issues from all three programmes. However, the three programmes have different objectives and face different problems, and often therefore cannot be conceptually combined. In these circumstances, a number of answers (one from each programme) have been provided. Additional input specific to Land Use Development has been included where appropriate.

A number of the questions posed require extremely detailed integrated answers. Due to the limited time allotted for the completion of the answers, it has not always been possible to provide an exhaustive reply.

Please note also that much of the information requested is available in the White Paper on South African Land Policy. The answers provided here provide a broad framework and highlight some of the important issues. More detail is available in the White Paper.

### **1. Past Overview**

**a. Please give an overview of the impact of past discriminatory laws and other measures on particular groups' land rights. How have these affected your department's ability to realise the rights set out in Section 25 of the Constitution?**

### ***Introduction:***

The importance of land reform in South Africa arises from the scale and scope of land dispossession of black people which has taken place at the hands of white colonisers and apartheid. For most of this century, indeed since the *Natives Land Act, 1913*, rights to own, rent or even share-crop land in South Africa depended upon a person's racial classification.

Millions of black people were forced to leave their ancestral lands and resettle in what quickly became over-crowded and environmentally degraded reserves - pools of cheap migrant labour for white-owned farms and mines. Under the *Native Trust and Land Act, 1936*, black people lost even the right to purchase land in the reserves and were obliged to utilise land administered by the government or by tribal authorities appointed by the government.

Black families who owned land under freehold tenure outside the reserves before 1913 were initially exempted from the provisions of the *Natives Land Act*. The result was a number of so-called '**black-spot**' communities in farming areas occupied by whites. These were the subject of a second wave of forced removals, which took place from the 1950's through to the 1980's. The government expelled most of these farmers to 'homelands', often without compensation for their lost land rights. Dispossession forced successful farmers to seek employment as farm labourers.

Meanwhile, the South African government continued to intervene in the administration of land within the homelands, where tribal chiefs were accorded special land-ownership rights and far-reaching powers over land allocation, often beyond those normally sanctioned under customary law. Some blacks who were moved from freehold land, and others removed from outlying pockets of tribal lands, became tenants of the South African Development Trust (SADT) which bought up farm land occupied by whites for the consolidation and enlargement of the homelands.

The combined affect of past racially based legislation, not only land legislation, but on several other apparently unrelated areas, left a legacy of many people living on land under complete insecure tenure circumstances. These laws were contrary to the ordinary principles of respect for human dignity, justice, and the values essential for society to be termed as just and fair. Racially based legislation and legislative frameworks (comprising of policy, programmes, rules and regulations) pertaining to the following areas contributed towards insecure rights to land:

- (i) education
- (ii) The justice system and its discriminatory application
- (iii) Land and property (Including criminal law pertaining to the prevention of squatting and trespassing)
- (iv) Contracting
- (v) Population registration
- (vi) Constitutional development
- (vii) Local government
- (viii) Housing
- (ix) Labour

***Issues being addressed by Tenure Reform programme:***

Until the 1990's, it was government policy that black people should not own land. In townships and ex-homeland areas, the form that land rights took was generally subservient, or 'held in trust'. This policy was implemented through various laws, e.g. the 1913 *Native Land Act*, the 1936 *Development and Trust Land Act*, the 1927 *Black Administration Act*, the *Group Areas Act*, and various proclamations such as *Proclamation R188* which provided for the issuing of permits to black people to reside on land in the former homelands.

The land was generally registered as the property of the government or the South African Development Trust. Almost 17 million hectares, 13% of the country, is still held in this manner and includes most of the former "homelands" and coloured reserves. In many areas, the administration of this land is inefficient and chaotic so that people who have lived on land for generations may find that they have no legal right to the land in question, even if nobody disputes that they are the rightful owners of the land. Some people have permission to occupy certificates (PTOs). Others do not.

This creates legal insecurity and makes it difficult for people to protect their land, whether from confiscation, or from others coming to settle amongst them. Residents who may have lived on land for decades can find it sold by others who purport to own it.

It also causes confusion and unnecessary disputes. There are many communal areas, which have been occupied by groups, communities or 'tribes' for decades and sometimes over 100 years. These groups regard themselves as the owners of the land; it is only because of racially discriminatory laws that their ownership is not reflected in the title to the land. Because the land is registered as state property, local and provincial authorities may decide to use it without realising the nature of the underlying ownership. This is often resisted by the group with the historical rights to the land. These situations all too often degenerate into a power struggle between the different parties claiming ownership of the land, and makes the communities vulnerable to abuse by government, since power over land provides control over people.

In general the problems which are caused by the lack of legally enforceable rights to land include the following:

- vulnerability to interference with or confiscation of rights whether by the state or others.
- difficulty in securing housing subsidies and other development finance; no administrative support for the system of land rights which operates in practice, which in turn contributes to internal breakdowns and administrative chaos giving rise to abuses of power by officials, some chiefs and powerful elite; the position of the poor and the vulnerable is exacerbated by the lack of legal certainty and administrative protections;
- unscrupulous individuals take advantage of the lack of enforceable land rights to bring others onto the land in exchange for money and to bolster their personal power.

These difficulties are not limited to people who live in ex-homeland areas and townships. During the last decades millions of people illegally established homes in the 'white only' parts of South Africa. They did so because they had no other means of living near to employment. A pattern of land occupation was created which is unlawful, but in a sense legitimate. It is legitimate because most South Africans acknowledge that such people had no alternative means of acquiring land. Over time, such settlements have become a fact of life. They need to be brought within the ambit of a stable legal system.

### ***The Restitution Programme:***

Forced removals in support of racial segregation have caused enormous suffering and hardship in South Africa and no settlement of land issues can be reached without addressing such historical injustices. The interim Constitution provided a framework for the restitution of land rights, instructing the legislature to put in place a law to provide redress for the victims of acts of dispossession that took place after 1913, in the form of restoration of the land that was lost, or alternative remedies. Accordingly, Parliament enacted the *Restitution of Land Rights Act, 22 of 1994*, creating the Commission on Restitution of Land Rights and the Land Claims Court.

Rural claimants suffered dispossession under a variety of policies, including clearance of 'black spots' and 'poorly situated areas', betterment schemes, cancellation of provisos in title deeds and acquisition of land by the former South African Development Trust. Many rural claimants received no compensation or only nominal recompense.

More than 130 000 families, involving 73 000 properties, were dispossessed under *the Group Areas Act, 1950*, the *Community Development Act, 1966* and the *Resettlement of Blacks Act, 1954*. Some received consideration for their property from the state. Others, following the proclamation of racial residential areas, were forced to sell on the open market under circumstances, which favoured buyers. Since then, much urban land has changed hands, or has been earmarked for the provision of land and housing for disadvantaged communities. All stakeholders face difficult negotiations. In a number of cases, it will not be feasible to restore land from which the claimants were moved, and demands on the government to provide alternative compensation will be great.

### ***Discrimination in Town Planning and Development:***

Town planning and township establishment legislation, together with segregatory legislation such as the Group Areas Act, allocated almost all land use and development rights to white landowners while restricting both black land ownership and occupation of urban land as well as denying blacks the benefits of land development rights (e.g. commercial and industrial development of land). In addition this same combination of laws ensured a high environmental quality in white residential areas, and very low environmental quality in black areas. Town planning laws still effectively exclude poor people from residing in areas formerly zoned as white because of factors such as minimum property sizes, low residential densities and the excessive requirements of building regulations. The distribution of urban and peri-urban land rights is thus grossly skewed in favour of whites.



**b. What has been the effect of consolidation or non-consolidation of departments and legislation from the previous homelands on your department's ability to realise the land rights in Section 25?**

***Restitution:***

The main difficulty encountered after the consolidation of the previous homeland departments and legislation has been the uncertainty generated by the consolidation. This uncertainty extends through a wide range of functional areas, such as state asset inventories and land management policies, delegation of authority and areas of jurisdiction. In the context of restitution, two of the most significant difficulties include identifying which organ of the state is the legal owner of land and how to access state records of removals.'

The combined effect of the uncertainty has been to retard the rate of delivery under the restitution program.

***Tenure Reform:***

The non- consolidation of some legislation from the previous homelands has not had a completely disastrous effect on the Department's ability to protect tenure security in the former homelands. The issue for tenure reform and land administration is not so much the consolidation of the old legislation (dealing with permits to reside), but the replacement of the system with a new efficient and democratic system. Although the previous system is in disarray, the Department has decided not to repeal it until it can be replaced with a new system. In the meantime, legislation such as the *Interim Protection of Informal Land Rights Act 31 of 1996* provides protection for occupiers of land in the former homelands.

***Redistribution:***

Former self governing territories and TBVC states implemented their own version of making land available to beneficiaries. Until the amendments to the Provision of Certain Land for Settlement Act 126 of 1993 have been approved by Parliament, this legal mechanism is still not applicable in the former TBVC areas.

***Land Use Development:***

The legal framework for developing land in formerly black areas - urban and rural -remains complex and incoherent. In many parts of the country there is in fact no precise knowledge of which laws currently apply. The *Development Facilitation Act, 67 of 1995*, provides an alternative 'route' for certain land development projects, a route that sidesteps the uncertainty and unpredictability of the existing laws. The legal mess thus remains, effectively preventing the lawful development of land in formerly black areas for land uses other than residential. In many cases even residential development is virtually impossible. The Development and Planning Commission, appointed under that Act, is preparing proposals for a coherent legal framework for land use planning and development.

2. Your department's understanding of its Constitutional obligations a. What does your department understand it is obliged to do to: respect; protect; promote; and fulfil the land rights in Section 25 of the Constitution?

The Department's understanding can be summarised by its stated goals for land reform. The goals of the land reform program vary according to programme and are set out separately below.

**restructuring.**

These records are vital to the restitution process and much material has been lost or destroyed during the

***Restitution:***

Forced removals in support of racial segregation have caused enormous suffering and hardship in South Africa, and no settlement of land issues can be reached without addressing such historical injustices. The interim and 1996 Constitutions provided a framework for the restitution of land rights, instructing the legislature to put in place a law to provide redress for the victims of acts of dispossession that took place after 1913, in the form of restoration of the land that was lost, or alternative remedies. Accordingly, Parliament enacted the *Restitution of Land Rights Act, 22 of 1994*, creating the Commission on Restitution of Land Rights and the Land Claims Court.

***Tenure Reform***

Tenure security is regarded as playing an inherent role in the protection of socio-economic rights. From a human rights perspective, we recognize that the Charter of Economic Rights and Duties of States (which is applicable both nationally and internationally) provides that states have a "responsibility" to "promote" the rights inherent in the Right to Development. This entails the responsibility to "choose the means and goals of development, fully to mobilise and use its resources, to implement progressively economic and social reforms and to ensure the full participation of the people in the process and benefits of development". In the national context this albeit vague statement is geared toward "forming" or working toward the fulfilment of the material or substantive content of development as it relates to and interacts with tenure security. The gist is geared toward the integration of substantive reality with formal, "progressive" implementation.

Tenure security is a key area for the integration of substantive reality with progressive implementation. Yet it is currently expected to occur within the context of the South African law of property, which is individualistic and exclusive, and not geared to cope with the social values and communal norms reigning on the ground.

Thus an accommodation in law of the differences between African and Western conceptions of the individual and society is necessary, particularly in the South African context. This requires an interpretation of the content of individual rights, which is geared to the preference of human rights, oriented economic development over economic growth.

Such an interpretation requires a balancing and/or merging of African and Western legal and philosophical conception, and the arena for such merging is likely to lie in the implementation of the principle of participatory development and the enabling of strong local government along with the clarification of land allocation and administration rights and duties.

The role of tenure reform is not only to ensure that the future system of land rights is equal for all South Africans, but also to recognize and confirm those pre-existing black rights and interests in land which have come to exist in practice, if not yet in law. This framework adopts the approach that tenure reform must achieve two objectives: One is to set in place viable future institutions and tenure forms, which address and resolve the current endemic problems of insecurity, inequality, lawlessness and development bottlenecks.

The other is that tenure reform must resolve current tenure disputes and unravel the chaos of overlapping tenure rights, conflicting claims, and restricted and thereby internally compromised forms of tenure.

This second function is of vital importance. It must be done in a way, which confirms and reassures rather than in a way, which ignores or wipes away pre-existing rights or interests. Unless this second process is built into the tenure reform process to create a stable base for the introduction of the new rules and institutions envisaged in the first, these innovations will be doomed to failure as they intersect with a status quo which is often violently and deeply contested. No new system will be accepted unless it is built on the secure foundation of recognizing and consolidating the current vested interests in land of the disadvantaged majority.

### ***Redistribution***

The purpose of the land redistribution programme is to provide the poor with access to land for residential and productive uses, in order to improve their income and quality of life. The programme aims to assist the poor, labour tenants, farm workers, women and emergent farmers. Redistributive land reform will be largely based on willing-buyer willing-seller arrangements. Government will assist in the purchase of land, but will in general not be the owner of buyer. Rather, it will make available land acquisition grants and will support and finance the required planning process. In many cases, communities are expected to pool their resources to negotiate, buy and jointly hold land under a formal title deed.

### **b & d. What is your department's official interpretation of the words "access to land in section 25 (5) and of the words "equitable basis"?**

There are no official interpretations of these two concepts. Access to land is a broad concept, which includes both registered and unregistered rights, and accommodates the concept of different overlapping rights and interests in the same land.

**e. What is your department's official interpretation of the words "legally insecure" in section 25 (6)**

There is no formal official definition. The concept is used to refer to situations where people would be unable protect their use or occupation of land in a court of law or other relevant structures because they do not have properly registered rights to such use or occupation, even though their use and occupation is uncontested by the owner of the land (generally the state) or any of their neighbors. It does not include land invaders unless they had occupied land for at least 5 years by the end of 1997 - (this provision occurs in terms of the *Interim Protection of Informal Land Rights Act*). It would also include people who hold valid or invalid permits to occupy such as permission to occupy certificates which, in terms of the These permits do not provide secure tenure, because they can be cancelled by the state.

**f. What is your department's official interpretation of the words "tenure which is legally secure"9**

There is no formal official definition. It would however be any form of tenure which can be legally defended, and which cannot be arbitrarily cancelled by the state, as set out above.

**g. What is your department's official interpretation of the words "comparable redress"?**

There is not official definition. The test appears to be one of equity having regard to all of the circumstances.

**h. What is your department's official interpretation of the word "restitution" in section 25?**

Restitution encompasses restoration of the land concerned, or just and equitable compensation. However, the purpose of the restitution process is to restore land and provide other remedies to people dispossessed by racially discriminatory laws and practice.

**j. What is your department's official interpretation of the words "equitable redress"?**

Equitable redress simply means fair redress considering all relevant circumstances and the interests of all role players.

**3. Information gathering**

**3.1 Does your department have systems (or access to systems) to collect and analyse statistical and other information relating to the implementation of the rights of access to land, security of tenure (or comparable redress) and land restitution (or equitable redress)**

Yes

**a. If your answer is yes, please: describe this system; state what information is collected; state whether or not this information is broken down according to race, gender,**

The system is located within the Directorate: Monitoring and Evaluation, called the M&E information system. The primary purpose of the Directorate is to address the question of information as it relates to the posed questions. It is managed by a Director, and works with all persons within and outside the organisation in order to ensure that the information collected is credible, timeous and of a high-quality.

The system has the following elements:

1. Monitoring of processes for each of the (3) programmes, prior to the actual designation or transfer of land. The aim is to identify and resolve bottlenecks, which is done by establishing norm times between sequential events, and reasons for variation (negative) to these norms. This allows the programme managers and implementers to have at their disposal a management tool for remedial action.

The system collects the following elements of information:

Beneficiary profile (race, gender.)  
Geographical location to the scale of the district  
Rural and urban  
Socio-economic information  
Community dynamics i.e. Community participation  
Financial information as it relates to the project

2. A second element is assessing the impact of the project, and this is done post-transfer.

The key aim here is to assess the extent to which the quality of life of the beneficiaries improves.

The categories of information for the post-settlement aspect are:

The Environmental Impact of the Project  
Socio-Economic Impact  
Land Holding Patterns  
Quality of life

These "formats" are administered periodically, and the raw data made available to institutions for analysis. This is part of the commitment to the public access to information.

It can be noted that both quantitative and qualitative information is collected. As an overlay to this, independent investigations are commissioned when problems are identified in the M&E system.

The information is collected at the level of the project, by the Provincial Planners, and verified by the Provincial M&E Officer. The national M&E Directorate, which works in close collaboration with the Land and Agricultural Policy Centre (LAPC), further verify it. This relates to the pre and post-transfer data.

With reference to the post-transfer data, the information is collected by teams comprising:

The Directorate: M&E the LAPC NGOs Contracted SA Universities.

With reference to Universities, the contracted Universities conduct analysis of data. A specialized study on the Environmental Impact of Land Reform has also been commissioned by the Directorate, and a preliminary presentation will take place in February.

#### 4. Public access

A mailing list comprising internal and external clients has been prepared, and on a monthly basis information is disseminated. The key document is the monthly Land Reform Barometer. Other information can be accessed on the M&E Home Page.

All public queries are dealt with within 48 hours of the request. Data is also made available to the press on an on-going basis.

#### 5. Vulnerable groups

**What groups have been identified by your department as more vulnerable than others and which need special attention?**

**Restitution:** Section 6(2)(d) of the *Restitution of Land Rights Act, 1994* states that: (The Commission shall) ... ensure that priority is given to claims which affect a substantial number of persons, or persons who have suffered substantial losses as a result of dispossession or persons with particularly pressing needs.

**Tenure Reform:** Groups who are vulnerable to poverty and discrimination, and in particular women, have been specifically selected as a vulnerable group. The protection of the environment is also targeted as a criterion in the decision-making of the Department.

**Redistribution:** Since the Constitution outlaws discrimination against women, the redistribution programme require the removal of legal restrictions on woman's access to land, the use of procedures which promote women's active participation in decision making and the registration of land assets in the names of beneficiary household members, not solely in the name of the household head.

Farm dwellers, including farm workers, labour tenants, ordinary farm tenants, women and children staying on farms, are also singled out for special attention in the redistribution programme, as some of the most insecure sectors of the population. Government will direct the subsidy to the farm workers and their families in a way, which improves tenure security and at the same time contributes to reconciliation and harmony.

**Land Use Development:** Subsections 3 (1)(d) and (e) of the *Development Facilitation Act* require that: Members of communities affected by land development should actively participate in the process of land development" and "The skills and capacities of disadvantaged persons involved in land development should be developed.

## 6. The obligation to respect these rights

### **a. What current laws and other measures have the effect of denying or depriving people of their land rights?**

Section 25(1) of the Constitution protects people against arbitrary deprivation of property. "Property" is understood to include unregistered, customary and informal land rights. The *Abolition of Racially Based Land Measures Act 108 of 1991* (as amended) was passed:

(t) to repeal or amend certain laws so as to abolish certain restrictions based on race or membership of a specific population group on the acquisition and utilization of rights to land; to provide for the rationalisation or phasing out of certain racially based institutions and statutory and regulatory systems; for the regulation of norms and standards in residential environments; and for the establishment of a commission under the name of the Advisory Commission on Land Allocation; and to provide for matters connected therewith.

Much of the legislation which overtly precludes people from exercising their rights in land has therefore been repealed.

The fight to restitution is constitutionally entrenched and should therefore take precedence over rights claimed in terms of ordinary legislation. However, the *Prevention of Illegal Squatting Act* still denies rights of due process in eviction matters. An amendment Bill has been submitted to Parliament by the Department of Housing, with the assistance of the Department of Land Affairs. Even though no national law as such prevents people from being deprived of their rights in land, the application and interpretation of current laws by the legal justice system often leads to situations where people lose their rights to land.

Several provincial and local government laws pertaining to spatial planning, land use control, resource conservation and health by-laws may be used to prevent people to obtain or secure their rights in land. It is however not the purpose of these laws to achieve that specific outcome as such, but in their application may have the said result.

### **b. What current laws and other measures unfairly discriminate against any groups of people, particularly the identified vulnerable groups, and their access to land rights?**

Various Proclamations providing for permit based rights in the previous homelands. In practice however, these are not however being implemented in a discriminatory manner, and in many cases the system has completely fallen by the wayside. Also, there is often a tied relationship between housing and employment. Despite the commercial nature of agriculture, people often find themselves evicted from not only a house, but also their whole livelihoods. This can include for instance a place to cultivate food and graze animals, essential to supplement meager cash wages, access to farm schools and a place for old people to retire. Farm housing is consequently more than just shelter. As such, employment practices and the way they are reflected in labour legislation fail to recognize this and perpetuate the insecurities marginalised farm dwellers have to suffer.

Finally, there are not effective legal mechanisms to limit the exercise and abuse of powers by chiefs.

The *Extension of Security of Tenure Act, 1997*, has been enacted to deal with this situation.

**c. What steps have been taken by your department to get rid of any past laws and other measures which impacted on people's land rights?**

***Restitution:***

New legislation has been past to amend discriminatory laws and to redress the injustices that resulted from the application of these laws. Such new legislation includes the *Abolition of Racially Based Land Measures Act*, the *Constitution of the Republic of South Africa Act 200 of 1993*, and *The Restitution of Land Rights Act 22 of 1994*.

***Redistribution:***

The passing of and amendments to Act 126 will allow redistribution throughout the whole country, including the former TBVC states.

***Tenure Reform:***

The *Interim protection of Informal Land Rights Act*, the *Land Reform (Labour Tenants) Act* and the *Extension of Security of Tenure Act* have been enacted to lay a basis for secure tenure. As discussed below, the Directorate: Tenure is drafting legislation, which will replace the old "permit" and "trusteeship" system and simultaneously repeal the past laws.

***Land Use Development:***

The Department of Land Affairs has enacted the *Development Facilitation Act* which: a) provides a means of suspending the operation of any law which can be shown to be unnecessarily or inappropriately delaying development of land in terms of the Act; and b) enables municipalities to draw up new plans (Land Development Objectives) which have the effect of automatically replacing apartheid plans which still exist; and c) provides general principles which now govern all decisions taken in terms of any law relating to land development and planning.

**d. What has been done to remedy the effects of these past laws and other measures, which impacted on people's land rights?**

Landlessness as a result of past discriminatory legislation is dealt with in a programmatic way in terms of the Land Reform Programme. Structural imbalances in society that prevents occupiers from asserting their right to land are the main effects of past legislation. New legislation attempts to change that by trying to shift the scales of justice in an affirmative, but just and fair way, in favour of landless people. This is done in terms of specific legal requirements introduced by the new laws as well as by



introducing specific implementation strategies and programmes focussing on eradicating the remaining effects of past legislation. The passing of the *Labour Tenants Act*, the *Interim Protection of Informal Land Rights Act*, amendments to the *Upgrading of Land Tenure Rights Act* and the *Extension of Tenure Security Act* as well as the *Communal Property Associations Act* all go some way towards remedying the effects of past discriminatory laws. In addition, a planning and land acquisition grant is available for the surveying and registering of currently insecure rights. Noteworthy requirements or specifications introduced by the new laws in this regard are:

***Land Reform (Labour Tenants) Act, 1995:***

Giving a labour tenant the right to purchase the land he/she occupy and granting financial support to him or her to purchase the land; Termination of a labour tenancy right only in terms of specific provisions laid down in law - no unilateral termination or eviction from the owner's side.

***Extension of Security of Tenure Act, 1997:***

Introduces a statutory right of occupation for any person occupying land with the permission of the owner; confirming the fundamental rights stated in the Constitution making it applicable among individuals as a basic part of the right to occupy; making any unlawful eviction a criminal offence punishable by a fine or a term in prison or both eviction in most cases only possible if suitable alternative accommodation is available to the occupier. Binds the state to release financial support to implement alternative settlement options.

***Restitution:***

The right to claim restitution has been entrenched in both the *Interim Constitution (Act 200 of 1994)* and the *1996 Constitution of the Republic of South Africa (Act 108 of 1996)*.

The *Restitution of Land Rights Act 22 of 1994* is intended to provide for the restitution of rights in land in respect of which persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law or practice. The same legislation also created the Commission on Restitution of Land Rights and the Land Claims Court.

***Redistribution:***

The redistribution programme was launched in 1994 after the enactment into law of the *Provision of Certain Land for Settlement Act, 126 of 1993*. Amendments to the act have now been proposed and will be put before parliament in March 1998.

***Land Use Development:***

The Development and Planning Commission is currently engaged in drawing up proposals for a new system of land development and planning law in South Africa.

## 7. The obligation to protect these rights

### **a. What laws and other measures protect people against arbitrary eviction?**

The general principles established in chapter one of the *Development Facilitation Act* ensure that the way in which land is developed, subdivided and allocated cannot be discriminatory and must be based on effective public participation of all interested parties. Other legislation includes:

*Interim Protection of Informal Land Rights Act 31 of 1996*

*Extension of Tenure Security Act 67 of 1997*

*Land Reform (Labour Tenants) Act of 1996*

*Upgrading of Land Tenure Rights Act 112 of 1991* as amended

*Communal Property Associations Act of 1996*

### **b. What laws and other measures protect people against unfair discrimination in the allocation and availability of land in the private sector?**

None, if this question is referring to "private" contractual arrangements to prevent the members of certain groups from purchasing or leasing land in certain areas. *The Communal Property Associations Act* does so with regard to community members who intend to form, or have formed, a CPA.

### **c. What laws and other measures protect people against any other practices in the private sector which have a negative effect on their land rights?**

In former homeland areas, one practice of the private sector is to attempt to obtain ownership rights in communal land for business purposes such as the building of shopping malls and the establishment of eco-tourism projects, often on prime land. The land acquired by them would be surveyed and transferred, so that it no longer forms part of the communal land, and its earning potential is lost to the communal "landowning" group, which is generally not familiar with business models and options.

Sometimes, the procedures to obtain land followed by individuals in the private sector can be described as corrupt. This must be seen in the context of the chaos and contestation in land allocation practices currently occurring in the former homeland areas. In a context where chiefs and civic committees are both struggling for power, payment can consist of cash and a bottle of brandy in some cases, without any community consultation. Where this land is registered in the name of the Minister of Land Affairs, it is possible for the Department to prevent these transfers and to insist on proper consultative processes. The Department does this because it believes it has an obligation to protect the land rights of vulnerable groups, and also because it believes that the Minister has a fiduciary duty as trustee of the land to protect their rights. Other law includes the *Labour Relations Act*, *Basic Conditions of Employment Act*, and the common law pertaining to property rights.

The general principles established in chapter one of the DFA ensure that the way in which land is developed, subdivided and allocated cannot be discriminatory and must be based on effective public participation of all interested parties.

# 1 Provincial and Local Governments<sup>1</sup>

## 1.1 Housing

Of the questionnaires sent out to all of the provincial governments in the country, Mpumalanga, Free State, KwaZulu-Natal, Northern Cape and Gauteng Provincial Governments were the only ones that responded. The Eastern Cape, Northern Province and North-West did not respond at all to the questionnaire. The Western Cape, Department of Health was the only department within the province to respond.

### 1.1.1 Mpumalanga Provincial Government: Department of Local Government, Housing and Land Administration

At the outset it must be noted that different parts of the questionnaire were responded to separately by the different directorates within the Department which consists of: The Directorate of Management Services, the Development Facilitation Act, Councilor Training, The Masakhane Campaign and Housing Administration.

#### **(a) Provincial Government's Understanding of its Constitutional Obligations**

The Director-General in the Office of the Premier provided a comprehensive and accurate analysis of its constitutional obligations, which accords with the analysis provided earlier on in this paper, and, will accordingly not be repeated.

#### **(b) Initiatives Undertaken by the Department to Respect, Protect, Promote and fulfil the Right of Access to Adequate Housing**

Through a range of tenure options more than 45 000 households within the province have gained access to a housing subsidy. This has enabled households to acquire a residential stand and some form of top structure which is registered in the name of the qualifying beneficiary. Furthermore, in addition to the Mortgage Indemnity Fund (MIF), a Mortgage Indemnity Scheme Provincial Forum has been established which serves as a communication channel between MIF and the residents of Mpumalanga and is also involved in consumer education and the normalisation of lending and dispute resolution. The Development Facilitation Act (DFA) was enacted to speed up the acquisition of land and its development. Thus far, 4 500 sites have been approved for township development within the Province. The Provincial Task Team on the implementation of the DFA, drafted Provincial Regulations for the establishment of Land Development Objectives, the workplans of which are to be submitted in March 1998. There are also policies drafted for macro planning in the province.

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<sup>1</sup> The summaries done by Researchers were used to provide information by the Mpumalanga, Free State provincial governments because their responses to the protocols were too long.

To resolve the non-payment for services and the lack of visible delivery on the part of government, the Masakhane Campaign was launched. During 1996 the Department availed funds to all Transitional Local Councils for 2 major programmes: The Municipal Infrastructure Programme and the Extension of Municipal Infrastructure Programme.

**(c) Initiatives Undertaken by the Department to Satisfy its Responsibilities in terms of Part A of Schedules 4 and 5 of the Constitution**

The Housing Administration Directorate within the Department is responsible for the planning of housing delivery, budgeting and processing of applications for the housing subsidy scheme and to facilitate and co-ordinate with developers.

Elected provincial political representatives as well as Housing Board members play an important role in determining priorities. There are also provincial initiatives to satisfy the housing needs of disadvantaged communities. For example, housing rural people through housing subsidies by actively involving developers and local governments in the area who were not actively taking up the matter was undertaken. It similarly mobilised banks to enter into joint ventures with major developers, local authorities and provincial governments.

Furthermore, progress was made with empowering local authorities to prevent disasters and to alleviate the effects of disasters. Assistance was given to local authorities to maintain fire-fighting services through the promotion of rural disaster management associations.

**(d) Initiatives Undertaken by the Department to satisfy its Additional Responsibilities in terms of Part B of Schedules 4 and 5 of the Constitution**

When considering an application for development, the Development Facilitation Act requires that the prescribed conditions be met such as storm water drainage. The Department assisted local authorities that lack capacity to apply building regulations.

The Municipal Infrastructure Programme referred to above focused on:

- Water provision and sanitation;
- cleansing/ refuse removal; and
- stormwater drainage/ municipal roads.

Continuous support is being rendered to enable local authorities to regulate air pollution, building regulations, electricity reticulation, health services, storm water management, water and sanitation services, cleansing services, abattoirs, municipal roads and noise pollution. The Department has also undertaken to provide temporary accommodation (tents) in the event of homeless people whose homes were destroyed by storm water etc.

**(e) Laws and Other Measures of National or Local Governments in the Province that Assisted the Department to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing as well as to Satisfy its Responsibilities and Additional Responsibilities**

- The Constitution;
- Local Government Ordinance 1939 as amended;
- Local Government Transition Act 209 of 1993 as amended;
- Civil Defence Act 1977, applied in this province by the Civil Defence Ordinance (No. 20 of 1977);
- The Fire Brigade Act 99 of 1987;
- Aspects of the Occupational Health and Safety Act, 85 of 1993 (b) and (c) applicable;
- The Housing Amendment Act No. 8 of 1994;
- The Housing Second Amendment Act 33 of 1994; and
- The Housing Amendment Act No. 6 of 1996.

**(f) Laws and Measures from National or Local Governments in the Province which made it Difficult for the Department to Respect, Protect, Promote and Fulfill the Right of Access to Adequate Housing as well as to Satisfy its Responsibilities and Additional Responsibilities**

The Department provides a list of legislation that needs to be rationalised to ensure that it is in accordance with the Constitution. This legislation has presented difficulties for the Department.

**(g) New Laws or Other Measures that Will be Put in Place to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing**

- Promulgation of new planning and development legislation that will rationalise the planning legislation - mid 1999.
- The Department is also investigating all legislation on land development and planning to rationalise this to form one Act.
- A further assessment of new laws or other measures will be made once the new legislation that emanates from the White Paper processes on Local Government and Disaster Management is in force.
- The Housing Act will become law on 1 April 1998. There will also be a supportive Provincial Housing Act for planning, which will be in effect in July 1998.

**(h) Goals, Targets and Timelines for Implementing New Laws or Other Measures**

The New Housing Act will take effect on 1 April 1998. Delivery targets in housing are set in accordance with the availability of funds. However, the housing allocations for the province will only be available in April. The national target has been scaled down to 800 000 for the period 1995-1999 of which Mpumalanga will be allocated its own target.

### **(i) Structures or Mechanisms to Chart Progress and Evaluate Plans**

- Mpumalanga Housing Board;
- Provincial Housing Delivery Support Team;
- Departmental Project Management Office; and
- Departmental and the Operations Committee.

### **(j) Measures to Eliminate Existing Laws or Other Measures that Make it Difficult for People to Get Access to Housing**

- The enactment of the Housing Act 107 of 1997 as well as the Mpumalanga Housing Act which is to be enacted in July 1998 will amend and repeal existing laws and other measures which make it difficult for people to obtain access to adequate housing and which make it difficult for the Department to deal with its responsibilities and additional responsibilities.
- Improve emergency communication in remote areas where communities do not have access.
- Promote the empowering of local authorities and especially rural communities to prevent or lessen the effects of possible disasters.

## **1.1.2. Free State Provincial Government: Department of Local Government and Housing**

### **(a) Provincial Government's Understanding of its Constitutional Obligations**

The Department respects the right that all South Africans have to housing in which to live in peace and dignity, by striving to facilitate the establishment of viable, socially and economically integrated communities situated in areas allowing convenient access to economic opportunities as well as health, educational and social amenities, within which all people will have access on a progressive basis to:

- A permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements;
- potable water; adequate sanitary facilities including waste disposal and domestic electricity supply.

The Department passes laws and issues directives aimed at protecting socio-economic rights. It also provides guidance and supervision to local authorities to ensure that these rights are protected.

The Department promotes the right of access to adequate housing by disseminating information about its role, powers and functions. It further provides training programmes to strengthen knowledge of its constitutional obligations.

The Department fulfils its responsibilities by rendering the following functions:

- Managing development planning in urban and rural areas;
- managing land use and land tenure;
- handling housing development and community liaison;

- managing housing projects, assets and finance; and
- rendering administrative support services on traditional affairs and civil disaster claims.

The Department understands the term “*access to*” adequate housing in Section 26 to refer to the right of all South Africans to have opportunities to a place in which to live in peace and dignity to ensure fully integrated and viable communities.

The Department understands the terms “*adequate housing*” in Section 26 to refer to a formal top structure on appropriately developed land with basic municipal services, community facilities and employment opportunities within the affordability levels of the people. The Department understands the “*progressive realisation of the right of access to adequate housing*” as referring to a variety of processes through which habitable, stable and sustainable public and private residential environments are created for households and communities.

**(b) The Department’s Obligations to Satisfy its Responsibilities in terms of Part A of Schedules 4 and 5 of the Constitution**

- The overall implementation of the housing policy and programmes and the provision of affordable housing in particular;
- administration of provincial legislation and policy regarding disaster management;
- the approval of land development objectives (LDO’s) and integrated development plans (IDP’s) to ensure the provincial plan is informed by regional plans and vice versa.

**(c) The Department’s Obligations to Satisfy its Additional Responsibilities in terms of Part B of Schedules 4 and 5 of the Constitution**

- Regional planning and development (urban and rural);
- housing and infrastructure cluster - inter sectoral cluster that co-ordinates and leads implementation of projects such as housing. It aims to achieve maximum alignment of public and private sector investment;
- land reform process - assists the Department of Land Affairs with technical advice to promote orderly and sustainable development in the rural areas.

**(d) The Department’s Performance to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing**

In respecting the right, the Department helps people become homeowners by providing assistance with subsidies.

The Department has protected the right of access to adequate housing by a right sizing programme, which has been introduced to curb evictions from properties owned by banks. The programme allows occupants to occupy property whilst paying a rental they can afford. Such persons are further assisted to find alternative accommodation for which the government pays relocation costs. Furthermore, the Department is part

of the Mortgage Indemnity Fund. The MIF aims at solving problems, disputes, and conflicts arising from non-payment and possible evictions.

In efforts to promote the right, the Department has embarked on road shows to educate communities on their rights to housing. Regional offices were established in major centres to allow access to information and assist with subsidy applications. Radio talk shows, circulars and brochures have further publicised the functions of the Department.

In order to fulfil the right, the Department has set a target of 69 000 houses to be built over 5 years at a rate of 13 800 per year. The statistics provided that refer to the fulfilment of the right are as follows:

- Subsidies allocated to projects : 29 379
- Houses completed : 14 958
- Houses under Construction : 1 7 33
- Individual Subsidies Completed : 3 419

(Figures at 15 December 1997)

In addition, in order to fulfil the right, the following initiatives have been embarked upon:

Hostel Upgrading - has been undertaken in 8 towns in line with availability of resources. To date 127 hostel units (family and single) could be upgraded.

Extended Housing Benefit scheme (R 7 500 Discount Scheme) - Statistics regarding this scheme are as follows -

- Houses built with government funding : 31 5 113
- Discounts finalised : 16 301
- Properties transferred to beneficiaries : 3 618

Housing Support Centres - 3 Housing Support Centres have been established with 5 more having been approved by the provincial housing board.

Rural Housing - 1 pilot project was approved by the Housing Board for 1000 subsidies provided that the Department of Land Affairs finances these subsidies.

Informal settlements - Planning and surveying of 15 000 sites is in process to allow informal settlers to be settled formally.

The National Electricity Regulator electrification funds supplied 30 344 connections.

Disaster Management - initiation, maintenance and co-ordination of disaster management programmes is being strengthened. In particular, previously disadvantaged communities have been mainstreamed.



**(e) Laws and Other Measures of National or Local Governments in the Province that Assisted the Department to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing as well as to Satisfy its Responsibilities and Additional Responsibilities**

- Development Facilitation Act
- Free State Land Development Objectives Regulations
- The Township Ordinance (9 of 1969)
- The Local Government Transition Act (Second Amendment) 1996
- Removal of Restrictions Act (84 of 1967)
- The Less Formal Township Establishment Act (113 of 1991)
- Environment Conservation Act and Amendments (115 of 1962)
- Subdivision of Agricultural Land (70 of 1970)
- Physical Planning Act (88 of 1967)
- Physical Planning Act (125 of 1991)
- Housing Arrangement Act (155 of 1993)
- Housing Act (4 of 1966)
- Free State Mission on Rural Investment;
- Rural Development Framework;
- White Paper on SA Land Policy;
- RDP White Paper.

**(f) Laws and Other Measures of National or Local Governments in the Province which made it Difficult for the Department to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing as well as to Satisfy its Responsibilities and Additional Responsibilities**

Local Government Ordinance, 8 of 1962 - Section 119 made it difficult for houses to be transferred to first time home-owners who were in arrears, to qualify for subsidies. It has subsequently been amended.

**(g) New Laws or Other Measures that Will be Put in Place to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing**

***Management of Urbanisation and the Combating of Squatting***

The Department acknowledges that it has a direct responsibility in managing urbanisation and combating squatting, and accordingly seeks to pro-actively and humanely deal with the matter.

***Upgrading and Rendering Tenure Rights***

Efforts are being made to upgrade inferior forms of tenure to allow full ownership.

*Facilitation of the Development of Land Development Objectives/Structure Plans by Local Authorities*

Although the compilation of Land Development Objectives in terms of the DFA, is the primary responsibility of local authorities, the Department will facilitate and co-ordinate these LDO's.

**(h) Measures to Eliminate Existing Laws or Other Measures that Make it Difficult for People to get Access to Housing**

The Department merely acknowledges that such laws or other measures need to be repealed or amended.

1.1.3. Northern Cape Provincial Government: Department of Housing

**(a) Provincial Government's Understanding of its Constitutional Obligations**

The Northern Cape Provincial Government undertakes to do all in its power to allow citizens to have access to their basic human rights as defined in the Constitution. It understands the obligation to protect the right as imposing a duty on the state to remove all impediments that have or may have the effect of denying citizens access to such rights. It understands the duty to promote as referring to the duty to hold workshops, conferences, etc. where such rights are explained to the citizens or pamphlets, notices etc. are disseminated. The duty to fulfil the right is understood as referring to the obligation on provincial government to ensure that the rights of citizens are not denied.

It understands the term "access to" adequate housing as an obligation to make land and financial resources available to those in need of them. It understands the term "adequate housing" as being sufficient to provide accommodation taking account of the available resources within the provincial government. "Progressive realisation" is understood so as to refer to the obligation on provincial government to put policies, guidelines and directives in place to realise the right.

**(b) The Department's Obligations to Satisfy its Responsibilities in terms of Part A of Schedule 4 and 5 of the Constitution**

It understands its responsibilities as being to provide training and capacity building to officials of the provincial administration in order to be able to carry out its mandate towards provision of these services.

**(c) The Department's Obligations to Satisfy its Additional Responsibilities in terms of Part B of Schedules 4 and 5 of the Constitution**

It understands its additional responsibilities to be the same as its responsibilities as has been referred to.

**(d) The Department’s Performance to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing**

The Provincial Department has set certain targets and timeframes in accordance with its available resources, for the provision of houses in the province. Furthermore, capacity building courses are offered in various areas such as, urban and rural development, development facilitation, processing of housing subsidies etc.

**(e) Laws and Other Measures of National or Local Governments in the Province which have Assisted the Department to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing as well as to Satisfy its Responsibilities and Additional Responsibilities**

- Northern Cape Housing Bill;
- The Development Facilitation Act.

**(f) New Laws or Other Measures that Will be Put in Place to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing**

- It is drafting the Provincial Housing Bill, which is to come into operation later this year.
- The local government sphere will be streamlined when the new Act on Local Government comes into operation in the course of this year.

1.1.4. Gauteng

**Gauteng Provincial Government: Department of Housing**

**(a) Provincial Government’s Understanding of its Constitutional Obligations**

The Department recognizes that it has an obligation to respect, protect, promote and fulfil the right of access to adequate housing. It understands these obligations to accord with the interpretation provided in the section dealing with the analysis of these obligations, and will accordingly not be repeated.

The Department understands “*access to*” adequate housing in Section 26 of the Constitution as imposing an obligation on the State to create an enabling environment within which the right can be realised. The Department has failed to provide any interpretation as to what constitutes adequate housing. It has noted that whilst the Housing Bill is under preparation, there is no official guidance on the interpretation of the term. As regards an interpretation of “*progressive realisation*,” the Department recognizes that the realisation of the right requires programmatic action, which, in turn implies planning, and prioritisation.

**(b) The Department's Obligations to Satisfy its Responsibilities in terms of Part A of Schedule 4 and 5 of the Constitution**

The Report notes that the Department bears the responsibility of implementing the right of access to adequate housing as provided for in terms of Section 26 of the Constitution. It does, however, provide no insight as to what its obligations to satisfy its responsibilities in Part A of Schedule 4 and 5 of the Constitution are.

**(c) The Department's Obligations to Satisfy its Additional Responsibilities in terms of Part B of Schedules 4 and 5 of the Constitution**

The Department makes reference to numerous responsibilities aimed at ensuring the provision of public transport. It does however, provide no information on other additional responsibilities in terms of the said Schedules.

**(d) The Department's Performance to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing**

*Gauteng Department of Housing*

- A Provincial Housing Bill is under preparation - the time frame for its completion is dependent on the National Housing Act.
- The Residential Landlord and Tenant Act (Gauteng) - was promulgated in April 1997.

*Gauteng Department of Development, Planning and Local Government*

- A comprehensive Draft Gauteng Development Planning Bill is under preparation. It aims to provide a single system of development planning, land management and development in the province.
- An Urban Development Framework has been designed.
- Many project proposals from different communities were submitted and accessed. A Project Facilitation Unit was set up to facilitate projects that will be financed by the Urge Fund.
- A policy instrument has been put into place to promote regeneration and integration: City Improvement Districts which makes available public/private sector partnerships to regenerate city centres.
- White Paper on Regeneration and Integration of City, Town and Township.
- White Paper on Rural Development, Strategy.
- Land Development Objectives have been set that are monitored by the MEC as part of the implementation of the DFA.

**(e) Laws and Other Measures of National or Local Governments in the Province that Assisted the Department to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing as well as to Satisfy its Responsibilities and Additional Responsibilities**

The Department has been unable to answer this question due to insufficient information.

**(f) Laws and Other Measures of National or Local Governments in the Province which made it Difficult for the Department to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing as well as to Satisfy its Responsibilities and Additional Responsibilities**

The Department notes that obstacles have been created by the lack of a national framework in some important areas such as procurement policy.

**(g) New Laws or Other Measures that Will be Put in Place to Respect, Protect, Promote and Fulfil the Right of Access to Adequate Housing**

Neither the Department of Housing nor that of Development Planning and Local Government have provided any input on new laws or other measures that will be put in place to address the right.

**(h) Measures to Eliminate Existing Laws or Other Measures that Make it Difficult for People to get Access to Adequate Housing**

The relevant Departments have not responded to this question.

## **2. HEALTH**

The information was received from the following provinces:

### **2.1. Free State**

The Free State has submitted a lengthy document specifically on the right to health care. The definitions of respect, protect, etc are not very clear, although their interpretation of "access" is very useful. Access to health services is seen as geographical access (proximity to the community); physical access (ease of entry into the building - e.g. wheelchair access); hour of service (must be open at convenient times); and economic access (affordability).

Core indicators are set out, and information on efforts to improve the overall standard of health care are set out, as well as impending factors.

### **2.2. Mpumalanga**

The Province has provided a detailed reply to questions on health, setting out measures, which have been taken and legitimate changes that have been affected. It is also set out clearly where the Province takes initiatives on where they fit in with national strategies. Primary health care is described as the highest priority.

### **2.3. Gauteng**

A paragraph on health was included in a general response on socio-economic rights, in which steps taken to improve health services are set out.

## **3. FOOD**

The following questions in the provincial protocol dealt with the right to food: questions 2(b), (d), (g), and (h); question 3 in its entirety; question 4 and question 5. The responses of different departments of the different provincial government did not always follow the prescribed format as prompted by the protocol. The responses will simply be summarised as they relate to the right to food for each department, without necessarily relating the information to specific questions in the protocol.

### **3.1. Free State**

A number of departments of the government of the Free State included references to the right to food in their reports. The response of each of the departments is summarised:

*a) Office of the Premier:* The office of the Premier of the Free State, makes reference to its Department of Agriculture's 3 year business plan, which includes support to new farmers and the establishment of community food gardens.

*b) Department of Finance, Expenditure and Economic Affairs:* This Department reports extensively on its consumer protection policy which includes as one of its primary objectives the fulfilment of what is referred to as the right to satisfy basic needs, including to have access to adequate food.

*c) Department of Agriculture:* This Department reports extensively on its efforts to implement socio-economic rights including the right to food. With regard to the

constitutional obligations imposed by the right to food it discusses the phrase “access to sufficient food”.

Access is defined as the existence of an environment within which people can realise their own rights. Examples given of the efforts of the Department to enhance access to sufficient food are training of community members to establish their own food gardens and the provision to small and subsistence farmers of “start-up” packages, including seed and instructions.

The Department furthermore discusses its three year business plan, the primary aim of which is to expand access to agriculture for small and subsistence farmers and to increase the number and plurality of commercial farmers in the Province. The intended result would be enhanced food production and an increase in food self-sufficiency. The three year plan includes training of small and subsistence farmers and the provision of material support.

*d) Department of Social Welfare:* The Department sees as one of its primary responsibilities the responsibility to enhance the nutritional status of people in the Province. It aims to fulfil this responsibility through a number of training programmes designed to empower people economically. These training programmes include training in food self-sufficiency and commercial food production.

The Department furthermore interprets the phrase “sufficient food” as the absolute basic amount of food needed to survive.

*e) Department of Health:* The Department runs a nutritional programme in primary schools (323 943 children were fed last year on a regular basis) and also a campaign ensuring food safety, dealing with issues such as food hygiene and safe food storage.

### 3.2 Mpumalanga

Different departments of the Mpumalanga Provincial Government reported separately.

a) The *Office of the Premier* referred to the right to food only in its discussion of the term “sufficient food”, which it defines as enough food to maintain a healthy regimen.

b) The *Department of Agriculture* addressed the right to food in two ways: it enhanced access to sufficient food through establishing several community food gardens and providing training for the establishment of home food gardens; it addressed the right of children to basic nutrition through its household upliftment programme which includes advice on nutritious food production in homes and community food gardens, and its advice on preservation of food for use in off seasons.

c) The *Department of Health and Welfare* provided an extensive and detailed report. It deals with the right to food only with reference to its Primary School Nutrition Programme, which it is currently redesigning in order to incorporate the Integrated Nutritional Programme.

## 4. SOCIAL SECURITY

Provincial governments that did not respond at all to the protocol were those of the Eastern Cape, Northern Province and North West.

The Social Welfare Departments of most of the Provincial Governments that provided responses had a fair, general understanding of the constitutional provisions relating to social security. The Mpumalanga Department of Health and Welfare provided an excellent analysis of the shortcomings of past welfare policy, and how it continues to

affect the delivery of the right to social security. The prospect of duplication and conflicting legislation appears to exist although the Mpumalanga Provincial Government expressly indicates that it will be guided by national policies on welfare to ensure uniformity and consistency.

None of the Provincial Governments gave a detailed account of how they understand their obligations in relation to the right of children to social services.



## **5. EDUCATION**

### **5.1 Free State**

#### ***Office of the Premier - Chief Directorate Development and Planning***

The Chief Directorate stated in general what it understood under its obligations to “respect,” “protect” and “promote and fulfill” socio-economic rights.

The Chief Directorate Development and Planning, listed the following achievements in the field of basic, adult basic and further education:

- ◆ a policy manual for the control of adult learning centres, as well as manuals on the evaluation and re-evaluation of these centres was published by the Department of Education;
- ◆ the Provincial School Education Act 1996, which provides for the manner in which the language policy of a school is decided upon.

#### ***Department of Agriculture***

The Department stated that it believed that further education to adults had to be made progressively available and accessible to all. To this end, the Department stated that it has a formal training division, which will provide 1-3 year diploma courses and short, non-formal courses, as well as a non-formal training division, which works on client demand basis. In addition to this, the Department stated that it was involved in the upliftment of farm schools. The Department conceded that education is mainly the responsibility of the education department.

#### ***Department of Education***

##### ***Respect***

The Department understands that it should not hinder the community in accessing their rights - its measures, regulations and laws should not be in conflict with the Bill of Rights and should promote equality of all before the law.

##### ***Protect***

There should be a positive action by the Department to do away with any undue invasion of the rights of the Community, for example the Department should ensure that it criminalises contravention with the laws that entrenches the rights of learners to education.

##### ***Promote and Fulfil***

The Department of Education understands that it has to engage parents and learners in education matters, in so far as their rights are affected. There should be an ongoing workshopping of the community about their rights and how to access them.

##### ***Access to***

The Department interprets it as meaning that the community should have physical access, bearing in mind physically disabled people and geographical access in terms of distance of location of schools including economic access as well as affordability.

### ***Adequate***

The Department's interpretation of adequate is that service rendered should be of a reasonably good standard based on the available resources, for example school buildings and the quality of education.

### ***Sufficient***

The service rendered should be well calculated to cover all affected.

### ***Progressive realisation***

The Department should, in realising this right, consider the financial shortfalls and manage its finances so that financial constraints do not impede on its progress.

### ***Progressive availability and accessibility***

Availability and accessibility of services should be based on sustainability. The Department should ensure that their services are sustainable at the same level throughout.

### ***Additional responsibilities***

With regard to Additional Responsibilities, the Department stated that it should cooperate with other departments and government structures in performance of their responsibilities and assist where possible and should also work with them in performing its functions.

### ***Concrete measures taken to respect, protect, promote and fulfill the right to education***

In its endeavor to respect, protect, promote and fulfil the socio-economic rights, the Department of Education stated that it has removed all the pre-conditions to learning and made learning compulsory to all learners under 15 years and has criminalised non-compliance with this by the parents and or anyone else.

To ensure that the past inequalities in the education system are addressed the Department stated that it will implement a system of funding of public schools which ensures that the previously disadvantaged schools are favoured - depending on the hierarchy of need.

The Department also ensured participation of parents and learners as equal partners in education by including them in the Governing Bodies of the schools.

### ***Adult basic education***

There are twelve districts in the Province with a total of 139 adult education centres which are fully functional and 1461 teachers. There is, however, a shortfall of about 20 centres which can be provided for in the next financial year, if there is enough money.

The Department understands that the availability of a sufficient number of classrooms is a prerequisite, not only for accommodation of all learners but also for restoration of the culture of learning and teaching. There are currently 36 new schools under construction. Sixteen schools were completed in 1997 and fifteen are to be completed in 1998 and five in 1999, totaling thirty six. Some old schools were also renovated by

Public Works Department and one hundred and fifty schools were identified for the electrification programme by ESKOM.

### ***Future goals***

Regarding its future goals, the Department stated that it has elected a task team to work on various issues which are still pending and that have to be performed by the provinces in terms of South African Schools Act. The Department is also currently working on the amendment of the Act to bring it in line with the Constitution and South African Schools Act.

### ***Office on the Status of Women***

This office was created with a view to the achievement of equality between men and women. In general, statistics to illustrate that women are always disadvantaged were provided. As far as education goes, the statistics showed that in education, women were in the majority - for this reason according to the office, action-oriented research is necessary in order to establish reasons for the *status quo*.

### ***Department of Social Welfare***

It is important to note that there appears to have been some discrepancy with regard to the Department of Social Welfare - two reports were submitted. For the sake of comprehensiveness, a summary of both reports is provided

*The Department of Social Welfare (I)* interpreted section 29(1)(b) to mean that the government must continue to make basic education available for all children and adults by means of financial support.

*The Department of Social Welfare (II)* stated that section 29(1)(b) is to be interpreted to mean that such educational facilities will become available within the limits of the given financial and human resources, as soon as possible. The Department included a draft policy on life skills education in the material. This programme focuses on the personal and social development of children, youth and adults, with a view to promoting the development of children and youth into responsible, mature and empowered adult citizens and contributing to the ongoing empowerment of adults and their successful parenting capacity.

### ***Department of Sports, Arts, Culture, Science & Technology***

The Information Directorate stressed the importance of library services in the fulfilment of socio-economic rights. Particularly, with regard to adult basic education, the role of the Directorate is shown to be an active one. There are officials qualified to teach adults. Furthermore certain libraries also make their facilities available for adult education classes. The Directorate has also entered into a partnership with the National Literacy Co-operation (NGO umbrella body of adult educators). As an incentive and in order to encourage libraries to provide adult basic education and children services, the Directorate organises an annual Library of the Year competition (factors in the evaluation process include the library's involvement in adult education/literacy promotion and the children's library section). One of the future goals of the Directorate is the tabling this year of the Free State Library and Information Bill which amongst other things aims to provide for easy access to reading and information sources in order to promote a culture of reading and lifelong learning.

## 5.2 Mpumalanga

### ***Department of the Premier***

The Director General provided a comprehensive overview of the provincial government's understanding with regard to socio-economic rights. With regard to section 29(1)(b), the following comprehensive definition was given: In its ordinary meaning, according to the *Oxford Dictionary* (1995), "progressive" means "moving forward; proceeding step by step; cumulative; favouring or implementing rapid progress or social reform". "Available" means "capable of being used; at one's disposal; obtainable". "Accessible" means "that can readily be reached, entered or used ... readily available". Consequently, what is envisaged with this phrase, is the sequential attainment of the stated right, namely further education, as and when the Mpumalanga Provincial government has the necessary resources at its disposal. At first blush it might seem that the right granted in section 29 is limited by the State obligation to secure progressive realisation "within its available resources". However, another interpretation might be more compelling: section 29(1)(b) encapsulating the mandatory State obligation of "progressive realisation", amplifies rather than qualifies the right. The obligation on the State in subsection (1)(b) can be viewed as an indispensable facet of the primary right, instead of as a limitation.

The consequences of interpreting this category of State obligations as amplifications rather than as qualifications, could be the following: Firstly, and perhaps most importantly, it allows for a coherent, free-standing interpretation section 29, rather than an interpretation conceived around built-in and imprecise limitations. Secondly, it grants citizens a Constitutional claim to adequate policies and measures to achieve these socio-economic rights in a progressive manner, even though such rights may not be immediately realizable. The third consequence relates to governmental obligation. On this view, the State will not be entitled to shirk its obligation on a simple plea of limited resources under section 29(1)(b). Instead it would have to articulate rational justification for the inability to comply with its obligations through the parameters contained in the general limitations section, as it must with other rights in the Bill of Rights.

The Director-General stated that, as tertiary education does not fall within its competence, the Mpumalanga Provincial Government's official views, are purely of academic value.

### ***Department of Agriculture***

The Department of Agriculture stated that it offers formal agricultural training to prospective farmers and agriculturists, through its Lowveld College of Agriculture. In addition to this, needs based non-formal short courses are also offered. The participants in the latter include emergent and established farmers, farm workers and officials. The Department stated that it rendered assistance to certain school teachers in lecturing agriculture. It also rendered assistance to a neighboring province in upgrading training at Agricultural College.

It stated that the difficulties encountered with relation to education were due to the new Constitution, which provides that tertiary education (which includes agricultural colleges), are a national competency which falls under the Department of Education.

## ***Department of Education***

### ***Measures taken to respect, protect, promote and fulfill the right to education***

In view of the fundamental rights as contained in section 29 of the Constitution the Department of Education has made it its first priority to provide all public schools with stationery and textbooks. The Department has also made it possible for adults to get education by creating more adult basic education centres in the province.

The Department has also promulgated regulations which will enable all stake holders in education to promote and practice democratic governance at public schools.

The Department of Education relies on the South African Schools Act, 1996 and on regulations promulgated in terms of the provisions of the South African Schools Act, 1996.

### ***The following legislation has assisted the Department to respect, protect, promote and fulfill the right to education***

- ◆ the South African Schools Act, 1996 (Act No. 84 of 1996);
- ◆ the National Education Policy Act, 1982 (Act No. 25 of 1982);
- ◆ the Mpumalanga Schools Education Act, 1995 (Act No. 8 of 1995);
- ◆ regulations promulgated in terms of Mpumalanga Schools Education Act;
- ◆ provisions of Child Care Act, 1960 (Act No. 33 of 1960);
- ◆ regulations promulgated in terms of the Child Care Act.

### ***Responsibilities***

The Department of Education stated that it is still providing financial assistance to independent schools through subsidies and through payment of salaries of educators in public schools.

The Department stated that it is always trying to promote sound labour practices between educators and itself

The Department promulgated various regulations as prescribed by both the South African Schools Act, 1996 (Act No. 84 of 1996) and the Mpumalanga Schools Education Act, 1995 (Act No. 8 of 1995). These regulations enable all stake holders to run education affairs efficiently and accurately.

In further fulfilling its responsibilities, the Department stated that it is busy with its own policy formulation regarding adult basic education in the province.

### ***Laws and other measures which have assisted the Department***

The Department has in line with the regulations as provided for in the Mpumalanga Schools Education Act, 1995 (Act No. 8 of 1995) established the Mpumalanga Education and Training Council.

### ***Additional responsibilities***

The Department has since the commencement of the South African Schools Act, 1996 (Act No. 84 of 1996), conducted workshops and seminars in order to enable the public at large to understand the said Act and its implications.

The Department has created a committee which, will attend to the promotion of a culture of learning and teaching in the province.

The Department has also through the Directorate Curriculum Services, conducted workshops to promote the introduction of Curriculum 2005. Teachers have been retrained to understand and to be able to implement Curriculum 2005.

***Laws or measures which have made it difficult to respect protect, promote and fulfill the right to education***

The Department stated that some provisions of the Constitution are contradictory and thus it make it difficult for the Department to properly respect, promote and fulfil its socio-economic rights. In addition to this, provisions of the Child Care Act are unconstitutional.

***Laws or measures which have made it difficult to satisfy its responsibilities***

The Department could not as its responsibility, protect the rights of learners or children placed in places of safety. Officials in these institutions are permitted to meet out punishment which, is humiliating.

The lack of well-defined measures for educators and the lack of regulations relating to the conduct of learners and educators, negatively impacts on the Department.

***Goals and targets set by the Department***

- ◆ the Department is currently formulating regulations for the registration of learners to receive education at home;
- ◆ the Department has published the Mpumalanga Schools Education Amendment Bill, 1997 for comments;
- ◆ the Department is also working on code of conduct for learners in the Province. Stakeholders have been consulted in respect of the code.

***Timeframes for implementing these goals***

- ◆ the Department of Education is aiming at:
  - ensuring that culture of learning and teaching in the Province is restored;
  - promoting sound labour relations between educators and the Department;
  - providing schools with necessary text books and stationery and furniture;
  - ensuring participation of stakeholders in education;
  - ensuring that Curriculum 2005 is well received and implemented;
- ◆ the Department is in the process of implementing a new strategy (Curriculum 2005 which will change the Education system);
- ◆ the Department has entered into partnership with businesses in the Province;
- ◆ the Department intends to have the Bill promulgated into a Mpumalanga Schools Amendment Act by the end of April 1998;
- ◆ the Department intends to have draft regulations regarding the registration of a learner to receive education at home finalised by the end of April 1998.

***Benchmarks or indicators to be used in order to chart progress and evaluate whether the goals are successful***

The Department will forward submissions to the National Department of Education or Welfare or any Department that initiated such legislation and further come up with recommendations.

In respect of legislation initiated by the Department - a process of consultation with stakeholders will be followed.

***Structures or mechanisms to chart progress and evaluate plans***

The Department has set itself a task to make Curriculum 2005 a success so that Education in the Province will be accessible, affordable, efficient and equitable.

***Environmental Affairs and Tourism***

In order to satisfy the obligation with regards to the respect, protection, promotion and fulfilment of socio-economic rights, the Department stated that it has been developing a number of EEC's throughout the province which are used for outreach programmes, and for staff training purposes. Training partnerships were concluded with a number of institutions of higher learning. Finally, a booklet was produced by the Department, giving schools guidance on starting environmental clubs, furthermore, partnerships were also entered into between the Department and the wildlife society of South Africa, in order to service these clubs.

### 5.3 Gauteng

***Directorate of Legal Services***

The Directorate provided an overview of its constitutional obligations with regard to socio economic rights. It stated that it understood progressively available and accessible to mean the removal of obstacles in the law and otherwise to the establishment of institutions and creating an environment free from impediments to further education.

The following legislative measures taken from 1 March 1997 - 10 January 1998 were listed:

- ◆ an Education Policy Act;
- ◆ an Examinations Assessment Act;
- ◆ a College Education and Training Act;
- ◆ an amended School Education Act;
- ◆ an Early Childhood Development Act;
- ◆ regulations relating to governing bodies and admission of learners in public schools;
- ◆ draft regulations for the registration of independent schools, registration of adult centres and the establishment of District Councils and Specialist Advisory Councils.

### 5.4 Northern Cape

Scant information was made available. Notably absent, was a report by the Department of Education of the Northern Cape.

***The Department of Welfare,***

The Department answered the progressively available and accessible question in the following manner: "the province is actively in the process of the amalgamation of schools."

The future goals of the Department are to:

- ◆ maintain the dignity of young people and to promote self and mutual respect;
- ◆ create therapeutic, safe, caring educational environment to ensure holistic development;
- ◆ protect the rights of children;
- ◆ value young people and their families as capable of contributing towards their own development.

Department of Housing and Local Government

The Department interpreted section 29(1)(b) to mean that facilities are to be made available in all levels of schooling and that all obstacles that may have the tendency or effect of impeding the gradual ascendancy for the learner to the next and higher level of education have to be removed.

### *The Department of Works*

The Department stated that funds are not available to upgrade existing schools. However, it stated that with regard to new schools that were being built, facilities for the disabled were being incorporated at the design stage.

## **6. ENVIRONMENT**

An evaluation of the following provincial governments' reports is provided: Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape and Western Cape.

### **6.1 The Free State**

The Free State is one of the provincial governments that have supplied information from which the environmental concerns may be culled out. It throughout communicated with the Human Rights Commission about the progress it made in trying to meet the obligation.

The information explains the interpretation of the terms "respect", "protect", "promote and fulfil", and "access to". However, the explanations are general and tend to show that they were given their ordinary speech meaning; there is reference to Section 24 but only pointing out what the DEAT is doing; mention of "health care" (Section 27 of the Constitution); and, "healthy environment" in the International Charter of Consumer Rights.<sup>i</sup>

Environmental affairs appears to fall between the cracks, as it were. What is the structure of the provincial government and where is environmental affairs placed? Consumer rights, agriculture, education, status of women, sports, arts, culture, science and technology, health, welfare, local government and housing etc. are covered - apparently because of the manner of structure of the provincial government. The reports from these "departments" are relevant to other rights but the focus on Section 24 is lacking. The Free State Department of Health appears to be the "department" which has primary responsibility for the environment, but its report, which is part of the documentation, does not focus on Section 24 obligations and the Protocol. It, however,



identifies its areas of responsibility and the general policies. One of these is a focus on co-operation with local authorities on issues of environmental health service delivery. Co-operation with local governments is identified as a problem that impedes realisation of goals.

The response of the Department of Local Government and Housing has provided a useful response that focuses on specific sections of the Constitution dealing with socio-economic rights, but Section 24 is omitted. The Department, however, mentions that the Development Facilitation Act, No. 67 of 1995 and the Environmental Conservation Act (and Amendments) Act No. 115 of 1962 are the laws that "assist" the Department. Note should be made that with regard to the latter Act, the 1989 legislation (Act No. 73) is not referred to.

## **6.2 Mpumalanga**

Mpumalanga Provincial Government has a clear structure responsible for the environment - the Department of Environmental Affairs and Tourism.

The Provincial Department of Environmental Affairs and Tourism's (PDEAT) response is focused on environmental laws, policies and regulations and is useful. This demonstrates the difference it can make where a particular unit or department is specifically charged with responsibilities for Section 24, among others. The PDEAT's response, however, does not highlight Section 24. Instead its report deals with issues of education (Section 29) and then proceeds to focus on conservation and pollution control, as well as an accurate identification of national legislations that it uses in responding to a whole range of environmental issues.

The reports of the Agriculture Department, the Health Department and Local Government and Housing also have specific information on policies and activities that are relevant to the realisation of Section 24 rights. These, like that of the PDEAT, above, do not however systematically respond to the specific requirements of the Protocol with regard to Section 24.

Overall, the response of the Mpumalanga Provincial Government is encouraging and demonstrates that it intended to respond appropriately. With more interaction, the future responses should be expected to be more focused and systematic.

## **6.3 Gauteng**

The response of the Gauteng Provincial Government to the Protocol is informed by a legal approach and demonstrates an understanding of the socio-economic rights obligations from the text of the Constitution as well as its judicial interpretation.

Like the Free State response, the focus covers other socio-economic rights provisions except Section 24.ii It appears that bits and pieces of environmental issues fall into different departments (e.g. Housing, Development Planning and Local Government, Health and Arts, Culture and Heritage). This means that no department has primary responsibility for Section 24. Clearly, the Protocol reproduces schedules 4 and 5 of the Constitution where "environment", "pollution control", etc. are included. The lack of

focus on the environment in a province with serious mining, industrial and waste management environmental problems is problematic and should be addressed urgently.

## **6.4 Northern Cape**

The response of the Northern Cape Provincial Government demonstrates a genuine attempt to gather the relevant information from all the departments. Of those received - Environmental Affairs, Development, Social Welfare and Health Department's response should have focused on Section 24. Its report, like that of the Department of Housing and Local Government, specifically refers to the terms "respect", "promote", "protect" and "fulfil" but in respect to Sections 26, 27 and 29 of the Bill of Rights. There is emphasis placed on welfare of children in the response. The key terms are well understood, but the lack of focus on the obligations under Section 24 is worrying. The response of the Department of Housing and Local Government mentions the Development Facilitation Act, 1995. There is, however, no explanation how this is used, and whether or not its provisions regarding the environment are highlighted in policy formulation, implementation plans, and the actual implementation.

## **2. Original Provincial responses**

### **1. Kwazulu- Natal**

KwaZulu Natal Provincial Government

## **THE PROVINCIAL GOVERNMENTS UNDERSTANDING OF IT'S CONSTITUTIONAL OBLIGATIONS**

### **QUESTION**

What does your provincial government understand it is obliged to do to:

- respect;
- protect
- promote; and
- fulfil

the socio-economic rights?

### **REPLY**

The Kwazulu-Natal Provincial Government's understanding of what it is obliged to do to respect, protect, promote and fulfil the socio-economic rights of the citizens of this Province, can perhaps best be illustrated by reference to the provincial Vision determined and adopted by the KwaZulu-Natal Cabinet and Departmental Secretaries, in consultation with the broader community represented by business, labour, NGO'S/CBO's and local authorities in 1995. This vision, in essence provides for the dynamic Province of KwaZulu-Natal to be characterised by a peaceful, secure, prosperous, healthy and democratic society, and as being attractive and competitive in both local and global terms,

In order to achieve this:-

1. the Provincial Government is striving to create an environment which will provide the opportunity to earn a basic sustainable living, thus allowing the individual as well as urban and rural communities to give expression to their preferred quality of life;
2. A competitive and entrepreneurial environment must be created, which will attract business and investment to the province by the provision of:
  - an innovative multifaceted development strategy
  - a supportive infrastructure and technology;
  - stability and tolerance within a multi-party democracy and rich cultural diversity.
  - competent management and a skilled workforce;
  - access to global, national and strong local markets, and
  - strategic alliance, including supportive partnerships between the Provincial Government and others;
3. **and, with the view to raising standard, accepted minimum standards will be determined for health, education, water and sanitation, safety and security, welfare, shelter and an appropriate infrastructure with which to provide the above.**

Whilst it is accepted that to determine a vision is relatively easy, putting it into practice can be an entirely different matter. Reference however to the reply under the section dealing with provincial performance later in this document (your question 4), will reveal that the goals of the vision are being addressed in the Provincial Growth and Development Strategy which is being actively pursued by the Provincial government and it's local government, NGO and private sector partners in the region.

#### **QUESTION**

What is your provincial government's official interpretation of the words "access to" in sections 26 and 27 of the Constitution?

#### **REPLY**

It is the belief of the KwaZulu-Natal Provincial Government that, given the limited resources available to government at any level, the only successful way in which access can be provided to housing, health care services, sufficient food and water and social security to the population, is through sustained economic development in the region as contained in the principles spelt out in the Provincial Vision.

The limited resources within which the government must work, whether National, Provincial or Local levels, dictates that in addition to ensuring that economic development takes place, government must play a facilitating role in ensuring that economic development takes place, government must play a facilitating role in ensuring that as many of it's citizens as possible have an opportunity to access the basic necessities whether through state funding, self help schemes or private development initiatives.

In addition, it is the Provincial government's belief, that the rights of existing property owners must be protected as is their right in terms of Section 26 (3).

Achieved a balance between growth and redistribution. The strategies adopted by the province will have resulted in employment, access to water, primary health care and primary education for all communities and the promotion of peace and good citizenship

#### **QUESTION**

What is your provincial government's official interpretation of the word "adequate" in section 26?

#### **REPLY**

The determination of housing policy including the establishment of standards and norms is a statutory responsibility of the Central Government and the provincial government merely implements the National policy.

#### **QUESTION**

What is your provincial government's official interpretation of the word "sufficient" in relation to food and water in section 27?

#### **REPLY**

The Provincial Government believes that everyone in the province has a right to a basic sustainable living. Included in this is access to potable water and the ability to either purchase or grow their own food. Programmes carried out in the Department of Local Government and Housing as well as the Departments of Agriculture and Traditional and Environmental Affairs are specifically aimed at the facilitation of the provision of potable water or self help development schemes, both in agriculture/food production as well as in manufacturing goods and curios for sale.

#### **QUESTION**

What is your provincial government's official interpretation of the words "progressive realisation of this right" in sections 26 (2) and 27 (2)?

#### **REPLY**

**Given the limited resources available to government, it is obviously not possible to provide for all that is required to give the population as a whole the basic necessities of life. In the light of this, Province's opinion, that it is our responsibility to work towards this as a goal for the future. The following extract from the Provincial Vision does, we believe, more than adequately illustrate our commitment to this.**

"By 2020, all the people of Kwazulu-Natal will be sharing the benefits of this vision. Through sustainable economic growth which is grounded on the agricultural, industrial and tourism strengths of the province, and on the development of new opportunities, the province, and on the development of new opportunities, the province will be fully integrated into the national and global economy. There will be high levels of employment, high levels of productivity, a living wage and proactive development initiatives. The province would have achieved a balance between

growth and redistribution. The strategies adopted by the province will have resulted in employment, access to water, primary health care and primary education for all communities and the promotion of peace and good citizenship.”

**QUESTION**

What is your provincial government’s official interpretation of the words progressively available and accessible in section 29 (1) (b)?

**REPLY**

Included in the reply to the question above - contained in the provincial vision.

**QUESTION**

What does your provincial government understand its obligations are with regard to its **responsibilities**?

**REPLY**

Our obligations in regard to our responsibilities are:

- to protect and preserve the environment so as to ensure that both the present and future generations can benefit therefrom,
- to ensure that orderly planning takes place in the province through the medium of the spatial development framework (and its enabling legislation);
- to ensure that the agricultural potential of all communities. whether on a small or large scale, is developed in an orderly manner and that technical advice is available to all who are involved in agricultural production;
- to facilitate access to housing, whether by way of providing serviced sites, state subsidies or facilitating access to private sector funding;
- to promote sound local government;
- to promote as well as regulate both the formal and informal business sectors:
- to ensure the payment of old age pensions and disability grants as well as the provision of homes for street children and other places of safety.,
- to provide access to not only basic health care facilities but also to high quality/advanced medical care and emergency services;
- to provide support for the drive to combat HIV/AIDS through educational programmes, not only for employees but also the larger population of the province;
- to provide access to education, not only through normal schooling but also through providing community libraries, adult education to provincial employees and bursaries to officials to develop their true potential;
- to ensure that all citizens benefit from the provision of proper road access;

- most importantly, to ensure the general conditions of life of the citizens of this province is improved through sustainable economic development.

### **QUESTION**

What does your provincial government understand its obligations are with regard to the **additional responsibilities**.

### **REPLY**

Where, responsibilities have already been devolved or have been carried out by local authorities for many years, the Provincial government must, of necessity play a co-ordinating and facilitating role aimed at ensuring that integrated planning occurs and that the services necessary are provided. This Provincial Government also accepts that it has a responsibility to ensure that capacity to carry out the necessary responsibilities is pre-sent at local level and that the local government are, in fact, providing the services that they are obliged to render to those citizens who reside within their area of jurisdiction.

## **YOUR PROVINCIAL GOVERNMENT'S PERFORMANCE**

### **QUESTION**

Please provide a summary of what your provincial government has done to satisfy the obligations placed on it by the Constitution with regard to:

- the respect, protection, promotion and fulfilment of the socioeconomic rights; its responsibilities; and its additional responsibilities,

### **REPLY**

In keeping with the Provincial Vision and to ensure that it becomes a reality, a **Provincial Growth and Development Strategy**, is being implemented in the province In brief, this Development Strategy addresses the following issues:-

#### **1.2.1 Programme One: Building a Winning Province**

*"Commerce and trade, the entrepreneurial spirit of KwaZulu-Natal, will actively guide the economic energy of the province so as to continuously adapt to the changing economic environment in the province The strengths of the province through it's well developed harbours and transport sector will have been exploited to develop trade links to the Indian Ocean Rim, including East Africa, the Gulf, South-East Asia Australia and others."*(The Vision for KwaZulu-Natal)

**Objective:** To Enable the Province of KwaZulu-Natal to take advantage of economic opportunities presented by trade and tourism.

#### **1.2.2 Programme Two: Local Economic Development**

*"Clean and adequate water, primary health care and basic literacy will be available and accessible to all communities in the province. This access will not only improve the physical quality of life of these communities, but will also enhance their economic*

*opportunities through job creation and self employment " (The Vision for KwaZulu-Natal)*

*Objective.. To stimulate economic growth in specific localities through delivery of basic needs so as to encourage both local and foreign investment in such areas.*

### **1.2.3 Programme Three: Fueling the Powerhouse**

*"Through attention to opportunities available within the domestic and international market and constant innovation, the industries of the province will have experienced rapid expansion This will have been achieved by building on the province's current strengths through value added production, while, exploring new possibilities. "*

*The economic growth and social development of KwaZulu-Natal will be supported by an infrastructure that is appropriate to the needs of the people and industry of the province This will combine techno-sophisticated infrastructure such as telecommunications systems, with low maintenance, basic infrastructure such as all weather road networks. (The Vision of KwaZulu-Natal)*

**Objective.** To provide an environment which will promote competitive advantages for provincial industries while also contributing to sustainable development through high levels of employment and production and the payment of a living wage.

### **1.2.4 Programme Four: Addressing the needs of the poor**

'The government will adopt a programme of basic delivery needs that combines an appropriate mix of demand led and supply driven strategies. Poor and vulnerable communities will be identified, and assistance directed towards these areas' (The Vision for KwaZulu-Natal)

**Objective:** To reduce the problem of poverty in the Province by promoting the transfer and use of assets to poor people and through the provision of social welfare.

### **1.2.5 Programme Five: The Development and Utilization of Human Resources**

*"Through the ongoing participation of the providers of training in the strategic management of KwaZulu-Natal's development strategy, the Human resources of the province will be enhanced. Vocational training and Adult Basic Education will be encouraged. (The Vision for KwaZulu-Natal)*

**Objective:** To formulate co-ordinated approaches to the enhancement of KwaZulu-Natal's human resources in terms of capacity and utilization.

### **1.2.6 Programme Six: The formulation of an appropriate Spatial Framework**

**Objective:** To set policy in terms of the overall spatial distribution of development; to respond to the spatial implications and synergy arising from the

development strategy and other policies and to set frameworks and to co-ordinate planning.

### 1.2.7 Programme Seven: Institutional Framework

*"Provincial and Local Government will ensure that their institutions are useful, have the appropriate capacity, are development orientated and free of corruption. This will be undertaken through programmes aimed at the promotion of good government, and will ensure that the right decisions can be undertaken at the appropriate levels within government" (The Vision for KwaZulu-Natal)*

**Objective:** To ensure that all three tiers of Government facilitate the process of implementing the economic and development strategy.

Within the above programmes, a total of 37 individual elements have been identified which include issues specifically targeted at improving the socio economic position of the province such as:-

- Spatial Development initiative Process
- The SMME process;
- The Tourism Development process;
- The Local Economic Development Process;
- The Provincial Housing Strategy process;
- The development of Rural Service Centers;
- The finalization of a Human Resources Development strategy;
- The Provincial Growth and Development Spatial Framework;
- The development of an Integrated Rural Development Policy;
- The establishment of an Agricultural Task Team to co-ordinate agricultural development projects;
- Support for Survivalist Enterprises;
- A Disaster Relief Strategy; and
- The preparation of a Training and Education database.

The implementation of the PGDS is overseen by a specially appointed task team who report on progress to the Provincial Management Executive Committee (MEXCO) comprising of the Department Heads as well as to Cabinet.

In addition, as part of its responsibilities in regard to Programmes 5 and 7 of the PGDS as well as its commitment to transformation, the following programmes/projects are actively pursued:-

- a programme for Good Governance aimed at transforming the provincial administration;
- a basic Adult Literacy programme aimed at employees of the administration
- an **Anti Fraud and Corruption Campaign** in conjunction with the Auditor-general, the Attorney-General and the SAPS;



### **QUESTION**

Please provide a summary of laws and other measures of the national or local governments in the province which have **assisted** your provincial government to.,

Respect, protect, promote and fulfil the socio economic rights;  
satisfy its responsibilities; and  
satisfy its additional responsibilities.

### **REPLY**

Without the benefit of time to carry out detailed research on the Central Government legislation and policies which have a bearing on the obligations of the Provincial Government, it is difficult to provide a comprehensive reply to this question. What is of benefit to the improvement of the socio economic conditions of the citizens of **the** province is the provision of funding by the central government for schemes such as the School Nutrition Programme which is directed at ensuring that the children of the region have healthy bodies and minds, the, National Public Works Programmes which are administered by the Province and which are directed at providing infrastructure for disadvantaged communities and funding for housing.

### **QUESTION**

Please provide a summary of laws and other measures of the, national or local governments in the province which have made it **difficult** for your provincial government to: respect, protect, promote and fulfil the socio economic rights; satisfy its responsibilities; and satisfy its additional responsibilities.

### **REPLY**

Where the need exists, the Province devises measures e.g., an Affirmative Action Policy. With great effort it is negotiated and implemented and then the National Government, who should have taken the lead in the first place, suddenly comes to light and produces a White Paper which constitutes a national norm and standard. Although it is not necessarily better, it must be implemented by the provinces and this causes considerable wasted effort and confusion. There are also a number of other areas where the activities of the province suffer, particularly in regard to the agriculture and forestry, water affair and health. Of particular concern, is those Central Government policies which have a negative effect on the funds available to the province, A case in point which comes to mind is the policy decision to provide free health care to pregnant women and children under the age of 6 years which both stretched the resources of the health services as well as generating additional costs which had to be borne by the province.

### **FUTURE GOALS**

### **QUESTION**

- a. What new laws and other measures will your provincial government put in place to respect, protect, promote and fulfil the socio economic rights and deal with your responsibilities and additional responsibilities? Please give full details of these, including:

goals and targets set by your provincial government;  
time lines for implementing these;  
benchmarks or indicators you will use to chart progress and evaluate these to see whether they are successful; and  
structures or mechanisms you will use to chart progress and evaluate plans.

**REPLY**

A Youth Bill to provide for the creation of a Youth Commission to deal specifically with the problems and development of Youth has been drafted and is presently serving before the Provincial Legislature and is expected to be passed in the next Sitting of the Legislature,

The Province is presently drafting a white paper on Gender with a view to ensuring inter alia, that the provisions of the CEDAW Convention are applied in the province. It is expected that the draft will be finalised and published for comment towards the middle of the year.

As a means of measuring the performance of the Provincial Administration and the various programmes undertaken by it, a Performance Bill, designed to introduce a systematic method of performance management. The Bill provides for the introduction of minimum standards in Departments as well as its Statutory Bodies and the determination of key performance indicators against which progress can be measured. The Bill is in its final drafting stage and is due to be considered by the provincial legislature at its next Sitting.

**QUESTION**

What will your provincial government do to get rid of existing laws and other measures which make it difficult for people to get access to their socio-economic rights or for you to deal with your responsibilities and additional responsibilities?

**REPLY**

The KwaZulu-Natal Provincial Administration has embarked on a complete, review of all legislation which it administers, in order to identify any and all provisions that might be repugnant to, not only the provisions relating to the Bill of Rights as contained in the Constitution, but also the Constitution as a whole.

**5. General**

**QUESTION**

Please tell us about anything which your provincial government has done or is planning to do to deal with the socio economic rights and your responsibilities and additional responsibilities ,which has not been dealt with in your answers to these questions.

## 2 WESTERN CAPE (Department of Health)

### **Ad Question 2 (a)**

This Department understands these obligations to mean that the government may not unfairly discriminate against anyone in the delivery of services, and may only impose limitations on services which are reasonable and justifiable in an open and democratic society. We must furthermore take positive steps to ensure that the protection of constitutionally entrenched socio-economic rights is not undermined by either the public or private sector. It is also incumbent upon government to create an environment (through legislative and other measures) in which people are able to protect and advance their own basic needs and interests.

### **Ad Question 2(b)**

"Access to" means availability of basic services on an equitable basis without undue constraints based on factors such as financial resources or geography.

### **Ad Question 2(d)**

"Sufficient" in this context means enough to meet basic nutritional needs.

### **Ad Question 2(e)**

"Progressive realisation of this right" means that the government must take incremental measures, within the context of available resources, toward an ultimate objective of full realisation of the rights.

### **Ad Question 2 (d)**

This is again recognition of the fact that realisation of these rights is dependent on availability of resources. but that governments have a responsibility to actively take measures to render the relevant services on an equitable basis.

### **Ad Question 3 (a)**

In 1994, the Department formulated a comprehensive Provincial Health Plan to guide the development of health services in the Western Cape in order to meet its Constitutional obligations in this regard. Significant progress has been made toward implementing this plan. This is demonstrated, for example, by -

- (a) the establishment of 52 new primary health care facilities, and the upgrading of an additional 29, since 1994;
- (b) a projected increase of an estimated 775 000 patient visits per annum at provincial primary health care facilities between 1994/95 and 1997/98, and a corresponding projected decline of some 850 000 outpatient visits per annum at tertiary hospital between 1994/95 and 1997/98 - reflecting a reorientation of services toward primary health care;

- (c) a projected increase of some 440 000 visits to part-time district surgeons between 1994/95 and 1996/97;
- (d) achievement of an over 80% immunisation coverage rate for under-1 year olds, in terms of the Expanded Programme for Immunisation (EPI-SA);
- (e) feeding of approximately 336 000 children per day at 946 schools by means of the primary School Nutrition Programmes, in collaboration with non-governmental and community-based organisations;
- (f) performance of a total of 3792 terminations of pregnancy (TOP) in provincial facilities between February 1997 and January 1998; 58 facilities have been designated for TOP while 32 facilities are actually rendering TOP services;
- (g) the implementation of a provincial TB Plan and AIDS Plan;
- (h) the implementation of environmental health protection measures, including measures to control the outbreak of diseases.

#### **Ad Question 3(b)**

Such laws and measures include:

- ❖ the White Paper on the Transformation of the Health System in South Africa;
- ❖ the Choice on Termination of Pregnancy Act;
- ❖ national policies providing for free primary health care to all, and free provision of medical care to pregnant women and children under 6.

#### **Ad Question 3(c)**

The single most important factor limiting our ability to render services is a reduction in budgetary allocations. In addition, existing laws such as the Health Act 63 of 1977 in many respects provide an inappropriate framework for transformation of delivery of services as they are based on the fragmented approach to health care delivery. Revision of the national legislative framework for the delivery of services is crucial.

#### **Ad Question 4 (a)**

Fundamental transformation of health service delivery in the province is taking place through the establishment of a District Health System. This is to ensure that primary health care services will be provided in an integrated and sustainable manner. A Bi-Ministerial Task team was appointed in August 1977 by the Ministers of Health and Local Government to formulate recommendations around governance. In general, there is consensus that local government should become responsible for the provision of district health services in the Western Cape (at least in the metropolitan area), subject to co-ordination, monitoring and evaluation by the provincial departmental. The target is to integrate primary care services rendered by the provincial health department with those of local government by 1 July 1999, following finance and personnel issues being resolved by technical task teams during the course of 1998.

A draft Western Cape Health Facility Boards Bill was published for comment in the Provincial Gazette in January 1998, and it is anticipated that this Bill will be passed during the 1998 legislative session. A copy of the draft Bill, as it was published, is attached. Additional provincial legislation regarding governance of the provincial health system is planned, but dates for implementation are still unclear as this to some extent depends of legislative developments at national level.

#### **Ad Question 4(b)**

The foundation for a new legislative framework for health service delivery in the province has already been laid by a comprehensive review of provincial health legislation, and development of recommendations for reform through a widespread consultative process. This review was undertaken on tender by the National Progressive Primary Health Care Network (“NPPHCN”). The report, which was completed in January 1998, will form the basis for the provincial Health Department’s legislative agenda in the near future. The focus of this agenda will be to repeal obsolete or unconstitutional provincial legislation, and lay a sound legislative framework for the further development of the health system.

## **2 Local Government**

Of the questionnaires sent out to all of the local governments in the country, the Greater Johannesburg Metropolitan Council (GJMC) was the only one that responded. The original response follows in the present section.

### **1. GREATER JOHANNESBURG METROPOLITAN COUNCIL**

#### **1. Definitions**

- a. The following rights in the Constitution we known as the socio-economic rights: environment (section 24);  
access to adequate housing (section 26);  
access to health care (section 27);  
access to sufficient food (section 27);  
access to sufficient water (section 27);  
access to social security and social assistance (section 27);  
basic, adult basic and further education (section 29); and  
children's rights in section 28 to:
  - appropriate alternative care when removed from the family;
  - basic nutrition;
  - shelter;
  - basic health care services; and
  - social services.
- b. The following areas in Parts B of Schedules 4 and 5 are linked to these socio-economic rights. During this document, these will be called **responsibilities**.
  - air pollution;
  - building regulations;
  - child care facilities;

electricity and gas reticulation;  
planning with regard to housing;  
health services;  
public transport (?);  
storm water management;  
water and sanitation services;  
cleansing;  
abattoirs;  
municipal roads; and  
noise pollution.

- c. The following areas in Parts A of Schedules of 4 and 5 (which are linked to the socio-economic rights) could be given to municipalities to deal with. For the rest of this document, these will be called **additional responsibilities**.
- administration of indigenous forests;
  - agriculture;
  - animal control and diseases;
  - consumer protection (?);
  - disaster management;
  - education;
  - environment;
  - health services;
  - housing;
  - nature conservation;
  - pollution control;
  - regional planning and development;
  - soil conservation;
  - urban and rural development;
  - welfare services;
  - abattoirs;
  - ambulance;
  - libraries; and
  - provincial planning

2. Your Local Government's understanding of its Constitutional obligations

a. *What does your local government understand it is obliged to do to:*

*Our local government agrees that;  
respect means;*

The state's obligation to respect a right is understood to mean that the state must not do anything which:

*[unreasonably]* deprives people of the right (or of access to the right);

*[unreasonably]* denies or obstructs people in getting the right (or access to the right), for example, by passing a law which makes it extremely difficult for a person or group of persons to get the right (or access to it); or which

*[ unjustifiably]* *unfairly* discriminates against particular individuals and groups in getting the right (or access to it),

***Our local government agrees that;  
protect means;***

The state has an obligation to protect a right and that the state must actually do something to protect people's socio-economic rights against unjustified infringement and limitation.

***Our local government agrees that;  
promote and fulfil means;***

The state's obligation to promote and fulfil a right means that the state must take reasonable measures (including laws and other measures) to make it possible for people to meet their own needs through their own initiatives and efforts. Note that a very important part of the obligation to "promote" is the obligation to inform and educate people about the right and how to get access to it, the socio-economic rights?

***b. What is your local government's official interpretation of the words "access to" in sections 26 and 27 of the Constitution?***

*Section 26 and 27 refer to areas, which are within the functional areas of concurrent national and provincial legislative competence. Section 27 relates to 'local government in so far as municipal health services, emergency medical treatment and water services are concerned.*

*In this context, our local government interprets the words "access to" as meaning; e.g. with water, ensuring the provision of a water supply to paying consumers.*

*We are currently determining the quantity or quality of a basic service to meet the requirement of "sufficient" in section 27(1)(b) in line with a policy of access to the service for the indigent.*

*Our municipal health services is provided to augment the constitutional obligations of the national and provincial governments and is targeted at the provision of specific services only.*

*With regard to emergency medical treatment, we accept full responsibility for the provision of emergency services within the limitations of our fiscal restrictions.*

***c. What is your local government's official interpretation of the word "adequate" in section 26?***

*The obligations to provide access to adequate housing in Section 26 is not within the functional area of competence of local government.*

***d. What is your local government's official interpretation of the word "sufficient" in relation to food and water in section 27?***

*The obligation in section 27 relates to local government only in the context of the provision of access to "sufficient" water. In this regard our local government is currently determining the quantity or quality of a basic service to meet the*

*requirement of "sufficient" which is in line with a policy of access to the service for the indigent*

- e. What is your local government's official interpretation of the words "progressive realisation of this right" in sections 26 (2) and 27 (2).?**

*Here to, the obligation of these rights refer to local government only with the context of municipal health services and water. In this regard our local government interprets the words "progressive realisation of these rights" as meaning that we have an obligation to strive, within our financial and administrative capacity, to achieve the provision of the services in a incremental, sustainable and equitable manner.*

- f. What is your local government's official interpretation of the words progressively available and accessible in section 29 (1) (b)?**

*The obligations to provide further education as set out in Section 29 (1) (b) Is not within the functional area of competence of local government.*

- g. What does your local government understand its obligations are with regard to its responsibilities?**

*With reference to your definition of responsibilities; health services, public transport, and abattoirs are confined only to a municipal service, and municipal planning with regard to housing does not relate to the provision of houses or access thereto by local government. In this context, our local government understands its obligations to be the provision of the basic infra structural services, the maintenance of the services and the development of equality and parity in the service provision.*

- h. What does your local government understand its obligations are with regard to the additional responsibilities.**

*Many of the "additional responsibilities" are already being performed by our local government, e.g.; Pollution control, ambulance services and libraries, others like health services and pollution control are provided in conjunction with provincial and national government. We see no distinction in our obligations its regard to these "additional responsibilities" except for the fact that where local government is assigned the administration of a matter it must be subject to ensuring that it has the capacity and that it is provided with sufficient resources for the exercise of such power or the performance of such duty.*

### **3. Your Local Government's performance**

- a. Please provide a summary of what your local government has done to satisfy the obligations placed on it by the Constitution -with regard to:**

the respect,

*Our local government has restructured itself and its budget to focus on service delivery and is continuing to do so. It has created departments like the Human Rights Information Centre, the City User Rights Office, the Gender Initiative and the*



*Accessible Transportation projects. All with the aim of ensuring that all groups are treated equally. It is developing an equity in employment policy and has taken various steps to ensure equity in employment, like the development of uniform Conditions of Service for all employees across the Metropolitan area. It has also implemented a ten point affirmative action policy in its Tender Process. It has further introduced and implemented a uniform property rating system across the Metro - thus ensuring equity in payment of municipal services.*

protection,

*We have established a Greater Johannesburg Legal and Constitutional Working Group to review all our By-laws and bring them inline with the Constitution. We also have a Constitutional, Human Rights and Legal Services Department to ensure the legality and constitutionality of our actions.*

promotion and fulfilment

*Our Local Government has created a Human Rights Department with the specific function of advising Council on Human Rights Issues and to actively promote the creation of a Human Rights Culture. This Department has dedicated staff and budget to focus on human rights awareness, including workshops, literature and functions that foster a human rights culture.*

*Our Local Government has adopted a policy on access to meetings and minutes of meetings, to ensure transparency and openness in how we govern.*

*We have also created an Economic Development Department to investigate and implement mechanisms to bring about economic development within our disadvantaged groups.*

*The Human Rights Information Centre has in addition produced various publications ranging from bulletins on the latest constitutional developments to a booklet on the Bill of Rights and the Labour Relations Act. It has also produced a book called "A Practical Guide to Human Rights in Local Government" which is distributed at a minimum fee as well as a "Pocket Guide for Councilors".*

of the socio-economic rights; its responsibilities; and its additional responsibilities.

- b. Please provide a summary of laws and other measures of the national or your provincial governments in the province which have **assisted** your local government to: respect, protect, promote and fulfil the socio-economic rights; satisfy its responsibilities; and satisfy its additional responsibilities,

The following laws at a national level have been or will be assisting Local Government

❖ ***Development Facilitation Act***

*~ assists participation with local government on Access to Land*

❖ ***Landlord and Tenant Act***

*- clarifies relationship with landlord and tenant*

❖ ***Urban Regeneration and Integration White Paper***

*focuses on urban development*

❖ ***New Housing Act***

*- assists local government to manage social housing*

❖ ***Vusani Amadolobha fund***

*- a fund by the Gauteng Provincial Government for Urban Regeneration,*

- c. Please provide a summary of laws and other measures of the national or your provincial government which have **made it difficult** for your local government to: respect, protect, promote and **fulfil the** socio-economic rights; satisfy its responsibilities; and satisfy its additional responsibilities.

*The following piece of legislation has at times being a stumbling block,*

*The 1939 Local Government Ordinance*

*however;*

*National Government has attempted to assist Local Government in this regard with the Local Government Transition Act*

*Gauteng Provincial Government is currently busy with the rationalisation of Local Government Affairs Bill, 1997*

#### 4 Future goals

- a. What new laws and other measures will your local government put in place to respect, protect, promote and fulfil the socio-economic rights and deal with your responsibilities and additional responsibilities? Please give full details of these including: goals and targets set by your local government; time lines for implementing these; benchmarks or indicators you will use to chart progress and evaluate these to see whether they are successful; and structures or mechanisms you will use to chart progress and evaluate plans.

*Our local government is currently developing and implementing the following major initiatives;*

*-Organisational Review*

*-Financial Restructuring*

*-Information Management Systems Review and Restructuring*

*-Public Private Partnerships*

*-New Credit Control Policies*

*We are also in the process of implementing the White Paper on Local Government with special focus on its development vision.*

*Targets, Time frames and benchmarks are still being worked out at this stage.*

- b. What will your local government do to get rid of existing laws and other measures which make it difficult for people to get access to their socio-economic rights or for you to deal with your responsibilities and additional responsibilities?

*Our local government, through its legal constitutional working group will revise all our By-laws and bring them in line with the constitutional obligations of local government. Through our participation in GALA [Gauseng Local Government Association] we have and are actively participating in commenting on and assisting in the drafting and redrafting of legislation affecting local government. Further, we are not enforcing any of these laws that are contrary to the Constitution regardless of whether they have been formerly repealed or not.*

## 5. General

Please tell us about anything which your local government has done or is planning to do to deal with the socio-economic rights and your responsibilities and additional responsibilities which has not been dealt with in your answers to these questions.

*Our local government has established the following initiatives:*

*The Mayor's Children Fund which is focusing on Children Rights.*

*The Mayors Safer Cities Project*

*Basic Education -A holiday programme for students*

*The Indigency Policy - A welfare service in development by Council to assist with poverty alleviation.*

1 The summaries done by Researchers were used to provide information by the Mpumalanga, Free State provincial governments because their responses to the protocols were too long.

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- i. Response Doc, dated 10 March 1998.
- ii. Gauteng Provincial Government response doc dated 31 January 1997(!) (read 1998).



ECONOMIC &  
SOCIAL RIGHTS REPORT

Researcher's Evaluation of  
Government Responses  
Vol IV

1997-1998

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# Researcher's Evaluation of Government Responses

## Analysis of the Responses by Relevant organs of State<sup>1</sup>

The analysis of the responses of government departments to the Commission's socio-economic rights protocols was to be carried out by the Human Science Research Council. However, due to unavoidable circumstances, the HSRC could not do so. The Commission then had to find persons with the necessary expertise to carry out this task. Professor Christof Heyns was thus commissioned to analyse the responses to the Commission's socio-economic rights. His team of researchers included most of the strategic partners of the Commission in this process. The team comprised amongst others, representatives from the Community Law Centre, Centre for Applied Legal Studies (CALS) and the Centre for Human Rights. The HSRC funded the remuneration of the researchers.

In analysing (descriptive and normative analysis) the responses of relevant organs of state to the Commission's protocols, the responses in question were measured against relevant provisions of the protocols. It was also measured against the guidelines, norms and standards provided by various international instruments such as the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, the general comments of the Committee on Economic, Social and Cultural Rights on reporting obligations of state parties to the International Covenant on Economic, Social and Cultural Rights, the provisions of the International Covenant on Economic, Social and Cultural Rights itself and the provisions of the Bill of Rights of the Constitution.

## 1 Housing

### 1.1 Understanding of Obligations in Respect of the Right of Access to Adequate Housing

#### 1.1.1 National Department of Housing

As has been mentioned, the Department has a fairly clear understanding of the terms "access" to housing as "the opportunity of everyone to exercise choice in respect of housing options and access such elected options."

However, its definition of "adequate housing" does not expressly reflect the definitions of the International Covenant on Economic, Social and Cultural Rights' (ICESCR). The actual definition provided makes no reference to the legal security of tenure, availability of services, materials, facilities and infrastructure, the affordability, the accessibility, the location or cultural adequacy of the housing. Nevertheless, many aspects of these definitions are reflected in the laws and policies

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<sup>1</sup> See Annexe 2 for government's responses to the Commission's Socio-Economic Rights Protocols.

of the Department. The Extension of Security of Tenure Act 62 of 1997 reflects a commitment to ensuring legal security of tenure, the policy relating the special needs of disabled people seeks to ensure that housing is accessible, the Development Facilitation Act 67 of 1995 makes references to the location of the housing. Furthermore, the definition of “housing development” as provided for in the Housing Act expressly makes reference to “habitable, stable and sustainable public and private residential environments”. It further refers to such structures allowing convenient access to economic opportunities, health, educational and social amenities to allow access on a progressive basis to permanent residential structures with secure tenure, ensuring privacy and providing adequate protection against the elements as well as potable water, adequate sanitary facilities and domestic energy supply.” (Section 1(vi)). It is accordingly clear that many of the core elements of adequate housing as has been recognised by the ICESCR are, in fact, similarly recognised in the South African context.

The Department has a clear understanding of the term “progressive realisation”. The Department understands that the right has to be realised on the basis of economic principles and should reflect sustainable housing assistance measures to ultimately award everyone the right of access to adequate housing. This accords with the Limburg Principles on the interpretation of the term as has been referred to above.

The Departmental Report to the Human Rights Commission reflected some of the issues that would constitute the relevant circumstances in Section 26(3). The Extension of the Security of Tenure Act further refers to such termination being just and equitable, and having regard to all relevant factors and in particular to -

- The fairness of an agreement, provision in an agreement or provision of law on which the owner or person in charge relies;
- the conduct of the parties giving rise to the termination;
- the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
- the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, and
- the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier has or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

The Prevention of Illegal Evictions from and the Unlawful Occupation of Land Bill makes further reference to the consideration of relevant circumstances. Section 4(7) provides as follows:

*If an unlawful occupier has occupied the land in question for more than 6 months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances including, except where the land is sold in a sale of execution pursuant to a mortgage, whether the land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner, for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.*



With regard to evictions at the instance of organs of state, Section 6(3) of the same Act provides the following:

In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to -

- The circumstances under which the unlawful occupier occupied the land and erected the building or structure;
- the period the unlawful occupier and his or her family have resided on the land in question; and
- the availability to the unlawful occupier of suitable alternative accommodation or land.

None of the provisions above provide for an exhaustive list of the relevant circumstances that should be considered preceding a court order for an eviction. Yet, they point to the seriousness of evictions by providing for a broad range of interests that need to be considered prior to an eviction order being issued. These interests point to an overall consideration of what is just and equitable before an eviction order is granted.

The Department has a clear understanding that it has an obligation to respect, protect, promote and fulfil the right of access to adequate housing as is required in terms of Section 7(2) of the Constitution. However, in terms of its Report to the Human Rights Commission, it has drawn no conceptual distinctions between these obligations. Rather, it recognised that overall, they refer to the introduction of enabling legislation in which appropriate housing policy, strategy and delivery systems can be developed.

Nevertheless, reference to legislation from the Department indicates that it has aimed to respect, protect, promote and fulfil the right of access to adequate housing to provide for a holistic and comprehensive approach to securing access to adequate housing. Reference will be made to the relevant legislation and other measures to assess the department's understanding of its obligations to respect, protect, promote and fulfil the right of access to adequate housing. The Housing Act 107 of 1997 and the White Paper on Housing will be referred to first as both these instruments represent the primary legislative and policy frameworks within which housing development should take place. Reference will then be made to other legislation and/or policy and/or other measures as they pertain to each of the state's obligations.

### **The Housing Act 107 of 1997**

The Housing Act 107 of 1997 seeks to respect, protect, promote and fulfil the right of access to adequate housing. It aims to provide for the facilitation of a sustainable housing development process by laying down general principles applicable to housing development in all spheres of government, to define the functions of national, provincial and local governments in respect of housing development and to provide for the establishment of a South African Housing Development Board, the continued existence of the provincial boards and the financing of national housing programmes. A National Housing Code will also be published in terms of the Act, which will detail national norms and minimum standards for housing in South Africa.

### **The White Paper on Housing**

As has been mentioned, the White Paper on Housing represents the primary policy framework that seeks to give effect to Section 26 of the Constitution. It analyses the housing sector within the context of the macro economy and outlines the current housing context in South Africa. It further proposes a national housing strategy and speaks to the institutional arrangements within which housing will be tackled as well as speaks to the issues of housing subsidies.

## **1.1.2 Provincial Governments**

### ***1.1.2.1 Mpumalanga Department of Housing***

The Director-General in the Office of the Premier has provided an excellent analysis of its understanding of its obligations to respect, protect, promote and fulfil the right of access to adequate housing, which accords with international law on the subject. It has further referred to numerous initiatives, which, though not a comprehensive indication of its duties to respect, protect, promote and fulfil the right of access to adequate housing, reflect its commitment to fulfilling these obligations. The Department's undertaking to provide temporary accommodation (tents) in the event of homeless people whose homes were destroyed by storm water etc. is a particularly impressive initiative by the Department.

### ***1.1.2.2 Free State Department of Housing***

The Free State Department of Housing has a clear and accurate understanding of its obligations in respect of implementing the right of access to adequate housing. It further provides for an excellent definition of adequate housing, which as has been mentioned, takes account of both the definition of "housing development" as provided for in the Housing Act as well as the affordability levels of the people. The latter is particularly significant because affordability has been listed by the ICESCR as one of the factors to determine the adequacy of housing, yet has been accorded very limited attention in the South African context. It further refers to various initiatives it has undertaken to comply with its obligations in respect of the right.

### ***1.1.2.3 Gauteng Department of Housing***

The Department has a fairly clear understanding of its obligations in respect of the right of access to adequate housing. However, it has failed to provide any definition for "adequate housing," which, it responds, is due to the Housing Bill not having been finalised, although the Housing Act came into being in December of 1997, approximately 2 months before the Department responded to the questionnaire. It is accordingly suggested that the Department keep abreast of national developments pertaining to housing in order to fulfil its duties. It further refers to a Provincial Housing Act, the completion of which is dependent on the finalisation of the National Housing Act, which as has just been mentioned, is already finalised.

### ***1.1.2.4 KwaZulu-Natal Department of Housing***

In responding to its understanding of its obligations in terms of the right of access to adequate housing, the Department refers to its Provincial Vision. Whilst the aims set out in this Provincial Vision are laudable, it fails to reflect any concrete understanding of what the different obligations in respect of the right of access to adequate housing impose on provincial government. It does however, recognise that minimum standards will have to be set in respect of socio-economic rights. Whilst its recognition of this obligation is laudable, the fact that it makes reference to minimum standards being required for “shelter” as opposed to adequate housing raises concerns as to the kind of attention is being accorded to “adequate housing”. The criteria being employed to determine the adequacy of housing within the province also raises concern. Further, the Department provides no definition of adequate housing, since such a definition is considered a function of provincial government. Despite providing this response, the Department made no reference to national legislation or policy that provide some indication of what is considered to be adequate housing. In short, on the basis of the information provided, the Department reflects a very poor understanding of the concept of “adequate housing”.

It must further be noted that the provision of homes for street children is considered to be one of the responsibilities of the KwaZulu-Natal Provincial government. Whilst it makes no reference as to which Department bears this responsibility, the recognition of this obligation is laudable.

Finally, although the province has a Programme in place to address the needs of the poor, the relevance of this programme to ensuring access to adequate housing has not been provided.

#### ***1.1.2.5 Northern Cape Department of Housing***

The Department has provided a vague response on its understanding of its obligations to realise the right of access to adequate housing. It has failed to recognise its obligation to protect the right of access to adequate housing. It has further provided an extremely vague understanding of the term “adequate housing” (i.e. “sufficient accommodation”). It has failed to provide any understanding of what is meant by “sufficient”.

It has understood its responsibilities and additional responsibilities as merely providing training and capacity building in the provincial administration to enable staff to fulfil their duties. The Department has provided no input on the exact measures that it has undertaken to ensure the realisation of the right of access to adequate housing. The Department either has a very limited understanding of its obligations in relation to the said right or a very limited understanding of the vital importance of having socio-economic rights monitored.

### **1.1.3 Local Governments**

#### ***1.1.3.1 Greater Johannesburg Metropolitan Council - GJMC***

The GJMC provides a clear understanding of the duties to respect, protect, promote and fulfil socio-economic rights. However, in fulfilling these duties, it expressly notes that the right of access to adequate housing is within the competence of national

and provincial government, as is provided for in Part A of Schedule 4 of the Constitution and that it, accordingly has no role to play in the implementation of the right of access to adequate housing. With regard to its responsibility in municipal planning relating to housing, it understands its obligations to be the provision of basic infrastructure, the maintenance of services and the development of equality and parity in the provision of services. It undertakes pollution control together with national and provincial government.

It is suggested that the GJMC make reference to the legislation referred to above and the Housing Act in particular as regards its actual obligations in relation to the realisation of the right of access to adequate housing. In addition to local government's obligation to deal with certain specific areas regarding housing development, it bears a further obligation to deal with numerous other areas that are closely related to housing (such as certain factors relating to the adequacy of housing). It is accordingly recommended that instead of viewing its duties as regards housing in as simplistic a way as it does, that it use the Constitution and appropriate legislation (an analysis of the sections that support local government's important role as regards housing in terms of both the Constitution as well as the Housing Act has been provided for above) to determine its actual role as regards the implementation of the right of access to adequate housing and undertake the necessary measures to fulfil these duties.

## 1.2 Measures taken to Respect the Right of Access to Adequate Housing

### 1.2.1 National Department of Housing

As is clear from the analysis of the duty to respect the right of access to adequate housing, this duty requires that the government refrain from taking any action which prevents people from satisfying the right when they are able to do so themselves. In addition to the Housing Act, The Prevention of Illegal Evictions from and Unlawful Occupation of Land Bill further aims to respect this right. It seeks to provide for the prohibition of unlawful evictions and to provide procedures for the eviction of unlawful occupiers. It further repeals the Prevention of Illegal Squatting Act of 1951 and other obsolete laws. These aims accord with the international recognition that the prohibition of unlawful evictions forms an integral component of the state's duty to respect the right of access to adequate housing.

The Development Facilitation Act further aims to introduce measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land. It accordingly lays down general principles governing land development throughout the country. It further seeks to provide for nationally uniform procedures for the subdivision and development of land in rural areas so as to promote the speedy provision and development of land for residential, small-scale farming or other needs and uses. Finally, it aims to promote security of tenure while ensuring that end user finance in the form of subsidies and loans become available as early as possible in the land development process.

Furthermore, as has been noted, the duty to respect the right prohibits unfair discrimination in the provision of access to adequate housing. The Department has accordingly recognised that the goal of equality in access to adequate housing requires

special measures for certain sectors of the population. In this regard, it has outlined the following groups as being in need of special measures as regards access to housing:

- The poor;
- the disabled;
- female headed households, children and the youth;
- the elderly;
- farmworkers;
- rural households.

The Housing Subsidy Scheme is intended to assist the poor in gaining access to adequate housing. It is also in the process of developing a policy for the variation of the subsidy amount to cater for the special needs of the disabled. However, due to documentation regarding the exact details of this policy not having been provided, no assessment can be made as regards its content. Whilst, the Department has listed female headed households as a group requiring special measures, an excursus of the relevant legislation fails to make clear as to exactly what special measures are in place or planned for female headed households. There is one vague reference to the fact that female-headed households must be considered as a relevant factor in the granting of an eviction order. (The Prevention of Illegal Evictions from and the Unlawful Occupation of Land Bill, Section 4(7)) Furthermore, whilst the Department has also listed children and the youth as a group in need of special measures as regards housing/shelter, this group's housing needs fall within the domain of the Department of Welfare. Similarly, from the information received, there is little clarity as to what special measures are in place or intended to be put in place to address to housing needs of the elderly except for their interests being considered a relevant factor in the granting of an eviction order. In undertaking special measures with regard to farm workers, the Department makes vague reference to investigations that are afoot to determine the basis upon which subsidies will be made available for farmworker housing. Finally, it is in the process of finalising its rural housing subsidy policy so as to cater adequately for rural households in the provision of housing. However, due to the relevant documentation not having been provided, an assessment of this policy cannot be made.

The Department has further repealed all laws and other measures that unfairly discriminate against persons or groups of persons and their housing rights as part of its duty to respect the right of access to adequate housing. Such laws have been repealed in terms of the Housing Act. It has further undertaken other measures (such as the housing subsidy scheme) to remedy the effects of past discrimination.

Whilst the aforementioned issues clearly point to the Department's commitment to respecting the right of access to adequate housing, an in-depth assessment as to how these measures have actually ensured respect for the right cannot be made due to the absence of relevant documentation.

### 1.3 Measures taken to Protect the Right of Access to Adequate Housing

#### 1.3.1 National Department of Housing

As is clear from the analysis of the duty to protect the right of access to adequate housing, this duty requires that the state take measures to ensure that any possible violation of this right by other more powerful individuals and groups in society is prohibited.

Tenants should, in terms of the state's duty to protect the right of access to adequate housing, be protected against unreasonable or sporadic rent increases. The Rent Control Act 80 of 1976 (although not referred to in the Department's report to the Human Rights Commission) seeks to consolidate the law relating to rentals and provide for "reasonable rentals" of premises. The Act accordingly protects the rights of tenants against unreasonable or sporadic rent increases as is required by the ICESCR.

In order to protect this right of people from acts such as forced evictions, government should, in terms of the ICESCR, take immediate measures aimed at conferring legal security of tenure upon all persons and households in society who currently lack such protection. The Prevention of Illegal Evictions from and Unlawful Occupation of Land Bill accordingly aims to protect this right from other more powerful groups or individuals in society.

The Extension of Security of Tenure Act has also been passed in an attempt to confer such legal security of tenure. The Act aims to provide for measures with state assistance to facilitate the long term security of land tenure, to regulate the conditions of residence on certain land and to regulate the conditions on, and circumstances under which persons, whose right of residence has been terminated, may be evicted from land.

The National Homebuilders Registration Council Bill will further ensure that people building homes will be protected in the event of defects and other problems arising in their homes caused through the negligence of the builder.

Finally, the Mortgage Indemnity Fund has ensured that banks are not discouraged from making available homeloans to poorer homebuyers because such risks were insured by the fund.

All of the aforementioned measures ultimately aim to protect the right of access to adequate housing as is required in terms of international law.

## 1.4 Measures taken to Promote and Fulfil the Right of Access to Adequate Housing

### 1.4.1 National Department of Housing

As has been noted, the duty to promote the right of access to adequate housing means that the government must educate the public about their rights, and must strive to create a culture in which the right of access to adequate housing can become a reality. The Department has accordingly undertaken an ongoing communication campaign aimed at informing the public of the National Housing Programme. Furthermore, it has established Housing Support Centres which, as has been noted, are established within communities which are involved in the Peoples' Housing Process to provide

more detailed and targeted information to a specific audience. In addition, it is in the process of establishing a Website. Whilst these measures seemingly accord with international law on the issue, a detailed assessment of them cannot be made in the absence of the relevant documentation explaining the details of such measures.

In order to fulfil the right of access to adequate housing, the National Housing Subsidy Scheme has been implemented. As the national housing subsidy scheme is the cornerstone of government adhering to its obligation of fulfilling the right of access to adequate housing, it will be briefly discussed in the present section.

The amount available for subsidies are allocated between the provinces on the grounds of criteria like population, income categories, existing informal housing, backlogs, urbanisation etc. which is in accordance with the departmental policy of providing housing for the poor.

Individual ownership subsidies are allocated to beneficiaries to assist them to acquire ownership of fixed residential properties for the first time. The subsidy levels are linked to household income. There are two types of individual ownership subsidies: project linked subsidies and individual subsidies. The project-linked subsidies provide housing opportunities for individuals on an ownership basis in projects approved by the Provincial Housing Board. The individual subsidy affords persons access to acquire ownership of an existing property or a property not approved by the provincial housing board.

The Consolidation Subsidy allows for persons who before the Housing Subsidy Scheme, received housing assistance from the state in the form of ownership of serviced sites, to apply for a further benefit from the state to improve their existing housing circumstances.

Institutional subsidies are available to institutions that create affordable housing stock to enable eligible persons to live in subsidised residential properties based on secure tenure.

All subsidies are paid out of the National Housing Fund in order to allow a qualifying beneficiary to acquire a residential property with secure tenure at a price that he/she can afford, that satisfies the minimum health and safety requirements and one that allows as many housing delivery options and opportunities. The national and provincial housing boards who receive subsidy applications from local authorities, developers or individuals control housing subsidies. The Subsidy Implementation Manual provides a comprehensive input on the housing subsidy scheme.

Furthermore, as has been mentioned, the Rural Housing Subsidy Policy as well as the Policy on the Variation of the Subsidy Amount for Disabled Persons are in the process of being developed so as to fulfil its duties to promote and fulfil the right of access to adequate housing as regards rural households and disabled persons. Finally, the Mortgage Indemnity Fund has also sought to ensure that the right of access to adequate housing is fulfilled.

In addition, the Department has set up various bodies such as the National Housing Finance Corporation and the Rural Housing Loan Fund to enable people to access finance.

These measures accord with the ICESCR's recognition that housing subsidies should be made available as they are an important part of the state's duty to fulfil the right of access to adequate housing.

#### **1.4.2 National Department of Correctional Services**

Whilst the Department of Correctional Services has made reference to many aspects regarding the type of accommodation provided for prisoners, no mention is made of protection from the cold, damp, heat and rain, structural hazards and disease vectors. Furthermore, no reference is made to ensuring accessible accommodation for prisoners (for example prisoners who are disabled). The question of adequate space for prisoners might be called in question given the fact that they may be accommodated together with three or more other prisoner's in-group cells, or in dormitories. As there is no information as to exactly how many prisoners are accommodated in-group cells or dormitories or how large these cells or dormitories are an assessment as regards possible overcrowding and inadequate space cannot be made. Finally, no supporting documentation has been provided to confirm that the accommodation provided is in accordance with public health legislation. Hence, an assessment of the type of accommodation provided couldn't be made in relation to the public health legislation, nor can an assessment of the constitutionality of public health legislation be made.

### **1.5 Establishing Minimum Core Obligations for the Right of Access to Adequate Housing**

#### **1.5.1 National Department of Housing**

As has been noted, under international law, minimum core obligations and specific benchmarks are required for the right of access to adequate housing. However, the Department's response to its minimum core obligations reflected an extremely poor understanding of the concept of minimum core obligations. Vague reference was made to the Housing Act and its commitment to give priority to the needs of the poor, with no information having been provided as to exactly what the minimum core obligations of the right of access to adequate housing were.

Whilst the ICESCR has outlined certain minimum core obligations relating to housing, the Department has not expressly referred to any of these. However, some of these factors are implicit in certain legislation such as legal security being provided for in the Extension of Security of Tenure Act. Furthermore, Section 3(1)(c)(iii) of the said Act refers to policy, administrative policy and laws promoting efficient and integrated land development in that they promote the availability of residential and employment opportunities in close proximity to or integrated with each other which relates to the location of housing as has been recognised by the ICESCR. Section 3(1)(c)(iv) of the same Act further refers to optimising the use of existing resources including such resources relating to agriculture, land, minerals, bulk infrastructure, roads transportation and social facilities. Finally, the Department's commitment to



ensuring the accessibility of housing is reflected in the Policy dealing with the variation of the subsidy amount so as to cater for the needs of the disabled people. The aforementioned has sought to ensure that whilst certain components of the ICESCR as regards core minimum obligations have been incorporated in the laws and policies of the Department, their actual report to the Human Rights Commission has reflected a very poor understanding of the concept.

## 1.6 The Baseline provided for the Realisation of the Right

### 1.6.1 National Department of Housing

The information received from the Department does by no means present a comprehensive overview of the housing situation in South Africa. It has failed to refer to all relevant legislation that deal with the right in question. For instance, it has not made mention of the Extension of Security of Tenure Act, the Development Facilitation Act or the Rent Control Act. It has further failed to provide an adequate summary of the legislation that it has referred to. In those cases where reference has been made to laws or other measures that are of relevance to the questionnaire, it has failed to provide any supporting documentation regarding such laws or other measures, except for an extremely brief input as to what they entail in certain cases.

In addition, the Department has not responded to certain questions such as those relating to the percentage of the Department's budget set aside to promote and fulfil the right of access to adequate housing nor any information as to how much of this budget will have been spent by the end of the 1997/8 financial year. Furthermore, it has not provided any information on the laws and other measures introduced in the past year which have had a negative impact on the progressive realisation of the right of access to adequate housing.

### 1.6.2 Provincial Governments

#### 1.6.2.1 Mpumalanga Department of Housing

As different directorates within the Department responded to the questionnaire, a full picture of the housing situation within the province cannot be gauged. Whilst numerous initiatives were referred to, they failed to provide a comprehensive overview of the housing situation in the province. Instead, the information provided was fragmented and vague. Furthermore, the comments made regarding NGO input are similarly applicable to the information of provincial departments, so as to ensure an accurate picture of the housing situation within the province.

#### 1.6.2.2 Free State Department of Housing

The Department provides for a comprehensive list of initiatives that were undertaken to ensure the realisation of the right, which reflect a clear overall picture of the housing situation within the province. However, due to the absence of NGO input as well as the lack of supporting documentation, the accuracy of the information cannot be determined.

#### 1.6.2.3 Gauteng Department of Housing

The Department provides for two initiatives that were undertaken to ensure the realisation of the right (The Provincial Housing Act and the Landlord and Tenant Act). These initiatives, do, by no means reflect a clear overall picture of the housing situation within the province. Furthermore, due to the absence of NGO input as well as the lack of supporting documentation, the accuracy of the information cannot be determined.

#### ***1.6.2.4 KwaZulu-Natal Department of Housing***

The Department refers to some initiatives such as the Provincial Housing Strategy to address the realisation of the right. However, due to no input having been provided as regards what such initiatives aim to do, nor any supporting documentation having been provided, a full picture of what is being done to address the realisation of the right cannot be gained. Furthermore, due to the absence of NGO input the accuracy of such information cannot be tested.

#### ***1.6.2.5 Northern Cape Department of Housing***

Due to the vague and incomplete response that was provided, a full and accurate picture of the housing situation in the province cannot be gauged. The absence of NGO input has further contributed to this.

### **1.6.3 Local Governments**

#### ***1.6.3.1 Greater Johannesburg Metropolitan Council - (GJMC)***

As the response of local government's obligations in relation to the right of access to adequate housing reflected an extremely poor understanding of its actual obligations in relation to the right of access to adequate housing, which is clearly contrary to the provisions of certain legislation on the issue, a full picture of the housing situation within its area of jurisdiction cannot be gauged. Furthermore, the comments made regarding NGO input are similarly applicable to the information of local governments, so as to ensure an accurate picture of the housing situation within the jurisdiction of the GJMC.

## **1.7 Information Systems to Monitor the Progressive Realisation of the Right - Focus on Desegregated Data regarding Vulnerable and Disadvantaged Groups**

### **1.7.1 National Department of Housing**

As has been mentioned, the Department is in the process of developing Nomvula - Housing and Urbanisation Information System which seeks, amongst other things, to provide economic information which includes sector specific information and funds allocations as well as housing standards. As the system has not been adequately described and once more, no supporting documentation has been provided, an assessment of its ability to monitor the progressive realisation of right of access to adequate housing and its focus on desegregated data regarding vulnerable and disadvantaged groups cannot be made. However, the fact that it will allow regional

and national comparisons and sector specific information indicates that it might be able to monitor the progressive realisation of the right of access to adequate housing. It might further be able to focus on desegregated data relating to vulnerable and disadvantaged groups depending on what is meant by the Department's reference to "sector specific information".

Furthermore, as has been noted a pilot study which is in line with the UNCH's Global Urban Observatory Programme, has already been carried out to develop key indicators for tracking the success of the Department's policies. Whilst the initiative is laudable, an assessment cannot be made due to a lack of relevant information.

## **1.7.2 Provincial Government Departments**

### ***1.7.2.1 Mpumalanga Department of Housing***

As has been noted, the Department has numerous structures (as has been noted above) to chart its progress and evaluate its plans. However, the Department has failed to provide any information as to whether such data will be desegregated or not. An assessment of the systems to monitor the progressive realisation of the right with a particular focus on desegregated data can accordingly not be made. However, for the present purposes suffice it to note that there are systems in place to monitor the progressive realisation of the right in question.

### ***1.7.2.2 Free State Department of Housing***

The Department has provided no information as regards information systems that are in place to monitor the progressive realisation of the right and hence, whilst there might be such mechanisms in place, an assessment cannot be made due to a lack of the relevant information.

### ***1.7.2.3 Gauteng Department of Housing***

The Department has provided no information as regards information systems that are in place to monitor the progressive realisation of the right and hence, whilst there might be such mechanisms in place, an assessment cannot be made due to a lack of the relevant information.

### ***1.7.2.4 KwaZulu-Natal Department of Housing***

The Department makes reference to a Performance Bill to assess performance management. It further introduces minimum standards in Departments as well as key performance indicators against which performance can be judged. Whilst the progress that is being made is determined in terms of performance, it is unclear whether this Bill will allow for monitoring the progressive realisation on the actual right. Furthermore, it is unclear whether this Bill focuses on desegregated data. Due to no supporting documentation, it is unclear whether it will allow for monitoring both the actual progressive realisation of the right as well as provide desegregated data.

### ***1.7.2.5 Northern Cape Department of Housing***

Due to insufficient information having been provided, the possible existence of monitoring neither systems nor the nature thereof cannot be made.

### **1.7.3 Local Governments**

#### ***1.7.3.1 Greater Johannesburg Metropolitan Council - (GJMC)***

No indication has been provided as to the measures or structures that are in place to ensure the progressive realisation of the right of access to adequate housing.

## **1.8 The Existence of a Coherent Plan or Policy to Address the Realisation of the Right**

### **1.8.1 National Department of Housing**

As has been noted, the ICESCR has noted that States parties are required to adopt a national housing strategy which should define the objectives for the development of housing conditions, identify the resources available to meet these goals, as well as the most cost effective way of using them, and set out responsibilities and time frames for the implementation of the necessary measures

In view of the aforementioned information, its existing initiatives indicate that the Department possibly does have a plan to address the right of access to adequate housing in the Constitution. The Housing Act is the primary legislative framework that seeks to give effect to this right. In addition, the White Paper on Housing, the Extension of Security of Tenure Act, the Prevention of Unlawful Evictions from and the Unlawful Occupation of Land Bill, the Development Facilitation Act, the Rent Control Act, the impending National Housing Code as well as the Homebuilders Registration Council Bill together form part of the Department's plan to realise the right of access to adequate housing.

Furthermore, other policies such as the Variation of the Subsidy Amount for Disabled People Policy, the Rural Housing Subsidy, and the Policy in respect of Bridging Finance to Developers as well as the Public Sector Hostels Refinement Policy reiterate the point.

In addition, the Mortgage Indemnity Fund, the Subsidy Scheme and the ongoing education campaign lend further support to the Department's overall plan in making access to housing a reality for the people of South Africa.

However, whilst all of these laws and other measures suggest an overall plan, no documentation or input from the Department has revealed the existence of any such plan. It is accordingly suggested that in order to concretise a coherent overall plan of the Department, a document should be formulated that refers to the overall plan, as well as providing for the laws and other measures that are currently in force as well as those that are intended, together with the time frames and the available resources that the Department is working within be formulated. It is suggested that such an overall plan will also be of assistance to the provinces as it will avoid provinces introducing measures on a particular area which will need to be modified or amended when and as national measures are introduced. In short, the existence of an overall plan by the

national department will allow the provinces to have some insight on the planned measures nationally and as such, avoid time being wasted in drafting and repealing such measures at provincial level. Obviously though, in order to have such an effect, it is important that such plan be made available to all of the provincial and local governments.

## **1.8.2. Provincial Governments**

### ***1.8.2.1 Mpumalanga Department of Housing***

No reference has been made to the existence of a coherent plan at provincial level to address the realisation of the right. Random reference has been made to the types of measures that are underway to realise the right of access to adequate housing, as opposed to a coherent overall plan. Whilst this might exist, no such indication was given in its Report to the Human Rights Commission.

### ***1.8.2.2 Free State Department of Housing***

Whilst the initiatives undertaken by the Department point to an overall plan, the Report has, at no point made any reference to the existence of any such plan. It is accordingly not possible to make a determination of the existence of any such overall plan.

### ***1.8.2.3 Gauteng Department of Housing***

The Department's Report has, at no point made any reference to the existence of any such plan. It is accordingly not possible to make a determination of the existence of any such overall plan. Furthermore, due to the limited initiatives that have been referred to, no inference can be drawn on the possible existence of any such plan.

### ***1.8.2.4 KwaZulu-Natal Department of Housing***

The Report makes reference to the Provincial Vision that seems to refer to a coherent overall plan to address all of its obligations. However, due to insufficient information an assessment as regards this plan cannot be made.

### ***1.8.2.5 Northern Cape Department of Housing***

No reference was made to any such plan. Furthermore, there is no indication of any such plan.

## **1.8.3 Local Governments**

### ***1.8.3.1 Greater Johannesburg Metropolitan Council - (GJMC)***

No reference has been made to the existence of any such plan. Furthermore, the existence of any such plan to address the realisation of the right of access to adequate housing is unlikely, due to the understanding that local government has no role to play in the realisation of the right.

## 1.9 Children's Rights to Shelter

### 1.9.1 National Department of Housing

As will have been gauged, an assessment on the implementation of children's rights to shelter could not be made due to the absence of the relevant information. The absence of such information is due to the fact, that the Human Rights Commission, in its questionnaires directed the request for information on children's rights to shelter to the Department of Housing which informed the Commission in its report that the Department of Welfare was responsible for the said right. However, as the Department of Welfare was not requested for information on children's rights to shelter, limited information on the subject was provided. Whilst the Department of Welfare made brief reference to the residential care system and the youth care system for children, the information was clearly insufficient to make an assessment, due to reasons already noted.

## 1.10 Recommendations

### 1.10.1 National Department of Housing

#### *(i) The Way the Department has Reported*

Whilst recognising the constraints that the Department is operating within, it is strongly suggested that it provide a clear summary of the laws and other measures that have been taken or are intended to be undertaken so as to allow for a comprehensive analysis of its performance in relation to its ultimate goal of realising the right of access to adequate housing. In further contributing to a comprehensive analysis, it is suggested that all supporting documentation regarding measures that are in place or that are intended to be put in place be provided. The Department should bear in mind that the overall purpose of the information that it provides is to present the Human Rights Commission with a *comprehensive overview of measures that are being undertaken to realise the right of access to adequate housing* in order for an assessment to be made on these measures.

It is further recommended that the Department approach the Human Rights Commission for clarity on questions where it is unsure and cannot be clarified by the Explanatory Note provided with the questionnaires. For example, the poor understanding of the minimum core obligations reflected in the Report may necessitate such clarity. In addition, where questions are not responded to and the Department undertakes to furnish such information to the Human Rights Commission, it is strongly recommended that the Department adhere to such commitments.

Finally, it is suggested that the Department provide input on the finances available for the realisation of the right and appropriate legislation where further information on the issue can be obtained from (such as the Housing Finance Bill which the Department does not even make mention of in its Report to the Human Rights Commission).

#### *(ii) The Improvement and Strengthening of its Protection of the Right of Access to Adequate Housing*

It is suggested that, as a matter of priority the Department develop a set of core minimum standards and benchmarks in respect of the right of access to adequate housing, for the critical reasons expressed above. The National Housing Code should be formulated as a matter of priority so as to lend clarity to the national norms and minimum standards for housing in the country.

Furthermore, as has been suggested, the Department should develop a comprehensive, coherent overall plan which provides for the laws and other measures that are currently in force as well as those that are intended, together with the time frames and the available resources that the Department is working within, for reasons suggested earlier. As has been suggested, this plan should be made communicated to provincial and local governments, to avoid the duplication of legislation and the unnecessary wastage of time.

Finally, whilst the Department's recognition of special measures being required for vulnerable and disadvantaged groups is laudable, it is suggested that such special measures be adequately reflected in its laws and policies. For example, whilst female headed households have been recognised as a group in need of special measures, there has been no indication of exactly what special measures have been undertaken or are intended to be undertaken to ensure the realisation of the right to this group of persons. Should such measures exist, it is strongly suggested that they be drawn to the attention of the monitoring bodies.

## **1.10.2 Provincial Governments**

### ***1.10.2.1 Mpumalanga Department of Housing***

#### ***(i) The Way the Department has Reported***

Whilst it is recognised that different directorates work on different areas pertaining to housing, it is suggested that the information provided by the different Directorates is formulated in a way that a response by all of the Directorates follows a particular question as opposed to all 6 Directorates responding to each question in the questionnaire separately. Furthermore, due recognition should be accorded to the actual purpose of these reports, which is intended to provide the Human Rights Commission with a comprehensive overview of the measures that are being undertaken by the Department at provincial level so as to ensure the realisation of the right. The information provided should accordingly be comprehensive, accurate and clear to allow for the proper monitoring of the right.

It is further suggested that all supporting documentation be attached to the Report that is provided to the Human Rights Commission.

#### ***(ii) The Improvement and Strengthening of its Protection of the Right of Access to Adequate Housing***

It is suggested that the Department formulate a coherent plan as regards the initiatives that it is undertaking to realise the right of access to adequate housing.

### ***3.1.10.2.2 Free State Department of Housing***

### **(i) The Way the Department has Reported**

The Department has provided an excellent overview of what is being done to realise the right of access to adequate housing. However, in order to strengthen its Report, it is suggested that the Department respond to all questions in the questionnaire so as to allow for an assessment of, for instance, its monitoring mechanisms etc., in addition to measures being undertaken to ensure housing delivery. It is further suggested that all supporting documentation be provided.

### **(ii) The Improvement and Strengthening of its Protection of the Right of Access to Adequate Housing**

In order to ensure the progressive realisation of the right, it is suggested that mechanisms against which to evaluate plans and chart progress be put in place. Such mechanisms should also ensure that desegregated data is obtained. It is further suggested that the Department develop an overall, coherent plan to address the realisation of the right.

#### ***1.10.2.3 Gauteng Department of Housing***

### **(i) The Way the Department has Reported**

The Department has provided a vague, fragmented overview of what is being done to realise the right of access to adequate housing. In order to strengthen its Report, it is suggested that the Department respond to all questions in the questionnaire and, refer, in a comprehensive, clear and accurate way to initiatives that have been undertaken to realise the right of access to adequate housing. It is further suggested that all supporting documentation be provided.

### **(ii) The Improvement and Strengthening of its Protection of the Right of Access to Adequate Housing**

In order to ensure the progressive realisation of the right, it is suggested that mechanisms against which to evaluate plans and chart progress be put in place. Such mechanisms should also ensure that desegregated data is obtained. It is further suggested that the Department develop an overall, coherent plan to address the realisation of the right. Finally, as has been noted, it is suggested that the Department keep abreast of national developments in the housing arena, such as the finalisation of the Housing Act, which has implications for the provincial departments. Due to inadequate information having been provided, suggestions for improvement as regards its obligations in respect of the right of access to adequate housing cannot be made.

#### ***1.10.2.5 Northern Cape Department of Housing***

### **(i) The Way the Department has Reported**

The Department has provided little insight as to exactly what is being done to realise the right of access to adequate housing. In order to strengthen its Report, it is



suggested that the Department responds to all questions in the questionnaire and, refer in a comprehensive way to initiatives that have been undertaken to realise the right of access to adequate housing. It is further suggested that all supporting documentation be provided. The overall Report bears very limited relevance to concrete initiatives and details thereof that has sought to realise the right of access to adequate housing in the Province. It is accordingly suggested that the purpose of the information that it provides the Human Rights Commission with is borne in mind. In short, in order to allow the Commission to properly fulfil its mandate of monitoring the implementation of the said right, it is recommended that the Department provide a comprehensive, clear and accurate overview of the measures that are being undertaken to realise the right of access to adequate housing.

**(ii) The Improvement and Strengthening of its Protection of the Right of Access to Adequate Housing**

Due to inadequate information having been provided, suggestions for improvement as regards its obligations in respect of the right of access to adequate housing cannot be made.

**1.10.3 Local Governments**

***1.10.3.1 Greater Johannesburg Metropolitan Council - (GJMC)***

**(i) The Way the Department has Reported**

It is suggested that brief summaries be provided for all the laws or other measures that local government refers to. It is further suggested that all supporting documentation be attached to the Report that is provided to the Human Rights Commission. Once more, the information provided should be comprehensive, clear and accurate so as to allow the Human Rights Commission to fulfil its constitutional mandate of monitoring the realisation of the right in question.

**(ii) The Improvement and Strengthening of its Protection of the Right of Access to Adequate Housing**

It is recommended that the GJMC refer to relevant legislation to determine its role as regards the implementation of the right of access to adequate housing. It should further assume this critical role to ensure the realisation of the right of access to adequate housing. It is further suggested that the GJMC formulate a coherent plan as regards the initiatives that it is undertaking or intends undertaking to realise the right of access to adequate housing.

**1.11 General Remarks**

The information that has been provided by the aforementioned Departments is indicative of the numerous measures that are underway to implement the constitutional right of access to adequate housing. Although this Report had aimed to assess the implementation of both the right of access to adequate housing and children's right to shelter, it has only achieved the first of these aims. As has been mentioned, it has been agreed that the implementation of children's rights to shelter

would fall within the domain of the Department of Welfare which has provided little or no information on measures that have been taken to implement this right. As has been noted, this failure by the Department of Welfare to provide adequate information was due to an assumption by the Human Rights Commission that children's rights to shelter fall within the domain of the Department of Housing. The Commission accordingly failed to specifically request information on children's rights to shelter from the Department of Welfare. As a result, this Report has not been able to provide a comprehensive overview of the measures that are in place to realise this right or provide an assessment of such measures. Furthermore, the assessment provided on the right of access to adequate housing has had certain limitations due to insufficient information being provided as well as the absence of supporting documentation and the fragmented way in which many of the provincial governments have responded.

It must be stressed that the relevant organs of state should respond to the Human Rights Commission in a comprehensive, clear and accurate way so as to allow the proper monitoring of the realisation of socio-economic rights. Nevertheless, in spite of the limitations, this Report has sought to provide an accurate assessment of how the right of access to adequate housing should be understood, what is being done to implement the right and recommendations on how the state reports as well as the implementation of the rights can be improved upon, so as to ensure that the right of access to adequate housing becomes a reality for everyone in South Africa

## **2 Health Care**

### **2.1 National Department of Health**

The response to the health protocol does not reflect a clear understanding of the different obligations imposed in terms of the requirements to "respect, protect, promote and fulfil" the rights in question. Obligations, which belong under the one heading, are listed under a different heading.

The Department has reported on an impressive array of sources of information on health indicators, in desegregated form, which is available. It is not clear, however, where this could be obtained.

It is apparent that, whatever the approach of the Department might be in real life, a commitment to primary health care - the cornerstone of the WHO's Health for All programme - is hardly dealt with in the response to the protocol.

The response lacks a clear exposition of the plan of action according to which health rights in South Africa will be implemented, as well as clear targets, which the Department has set for itself in terms of health standards. In this context it is difficult to see why important public documents, such as the National Health Bill and the White Paper for the Transformation of the Health System in South Africa are not dealt with.

### **2.2 Provincial Governments**

The information provided by provincial governments, in general, is rather fragmented and it is difficult to form a clear picture of benchmarks and plans of action. There also

seems not to be a clear understanding of what the constitutional obligations in respect of health care services are.

### **3 FOOD**

#### **3.1 General Remarks**

The government departments primarily responsible for the implementation of the right to food on the national level are the Departments of Agriculture, Finance, Welfare and Health. However, at the time of the analysis of government departments' responses to the Commission's protocols, the report from the Department of Agriculture was not available. The Commission received the report in August 1998, long after the required date. Reports specifically relating to food were not requested from the Departments of Health, Finance and Welfare.

The absence of right to food reports from any of these departments on the national level made it impossible to report coherently on or to evaluate the performance of government with regard to the right to food. The only information on the right to food that was received came from the national Department of Correctional Services and from various Provincial Governments.

Although the information provided here does provide some indication of efforts toward realising the right to food, the information is at best anecdotal in nature and does not provide enough for a coherent picture that can be evaluated. There are a number of causes for this state of affairs that, could be related to the way the process was presented to the departments. In the first place it seems that many of the departments who reported did simply not understand many of the questions and consequently gave answers that were either irrelevant or incomplete.

A second factor that diminished the usefulness of many of the reports specifically on provincial level is that the government departments did not respond to the specific questions asked in the protocols. Consequently, although they provided substantial amounts of information, they did not provide the particular information required.

#### **3.2 Recommendations**

It is suggested that the negative inference be from the failure of the Department of Agriculture to respond to the Commission's protocols within a reasonable time and that the protocol on the right to food should be submitted at the very least, to the Departments of Health and Welfare in future.

More effort should be expended in future in explaining the process and the protocols to the specific persons within departments that will be dealing with the reports.

It is suggested that in future the departments should be required to organise the information they provide within the format of the protocols. In the last instance it is suggested that in future the format of the Provincial protocols be changed. Rather than a protocol dealing with socio-economic rights in the Constitution generally as one group, a protocol consisting of individual protocols dealing with each right on its own

should be prepared. The provincial government could then send relevant parts of the protocol to the relevant departments for responses. This would avoid the problem encountered in this process where provincial departments were confronted with questions in the protocol not relevant to them and would then attempt to answer them.

## **4 Water**

### **4.1 Understanding of Obligations in Respect of the Right of Access to Water**

#### **4.1.1 National Department of Water Affairs and Forestry**

The response to the water protocol, and the supporting documentation provided manifests an excellent understanding of its constitutional obligations in relation to the right to water. The Department's interpretation is in harmony with the provisions of the Constitution, and international human rights law jurisprudence on socio-economic rights.

It has clearly understood that its overarching responsibility is to “create an enabling environment” through which all in South Africa can access water and sanitation services, and to support people in gaining access to these services.

A definition of the right of access to sufficient water has been developed which incorporates practically all of the elements of the right (key elements of the right to water). The ‘sufficiency’ of water is defined in terms of its capacity to support human life and personal hygiene. The quantification of the basic minimum which must be ensured to everyone, and the medium and long term goals for water provision are derived from the relevant World Health Organisation guidelines. However, the Department has not merely focused on the quantity of water supplied, but has also taken into account the other dimensions of the right such as: quality, cartage distance, availability, assurance of supply, the upgradability of services, equitable access, just administrative action, beneficial use, sustainable management and use, and cultural and social appropriateness. These principles are given expression through the provisions of the Water Services Act, the National Water Bill and the various policy documents and White Papers of the Department.

In addition, the Department has a good understanding of its duties “to protect, promote and fulfil” the right. It did not specifically give an interpretation of its duty *to respect* the right. However, the whole thrust of the Department's policy indicates an awareness that it should not act in ways that deprive people of access to water, that legislative and other policy measures should facilitate, and not obstruct access to water, and that it should repeal legislation that has a discriminatory impact.

The Department provides specific examples of legislative and policy measures that it has taken (or is in the process of taking) that *protect* the right to water. A key measure is the setting of compulsory national norms and standards for the provision of water services and for tariffs. As observed by the Department, these norms and standards are needed “to protect the interests of consumers as water services are often provided in monopolistic or near monopolistic circumstances.” The other examples provided of how the national government protects the right to water, are also pertinent

to its duty to provide an effective regulatory framework to ensure access to water in a context in which other institutions, particularly local government, are more directly involved in water services provision.

In giving effect to the duty to *promote and fulfil* the right, the Department refers to the imperative to reform the existing water law that supports inequitable and unsustainable patterns of water usage. The National Water Services Bill is the primary mechanism through which the fundamental transformation of water law in South Africa is to be effected. The key principles on which this law is based include -

- the public trusteeship role of national government;
- the continuity of the water cycle and the conferring a consistent status in law on all water, irrespective of where it occurs;
- dispensing with the notion of ‘ownership’ of water resources: In terms of the new law there exists only a right of use for environmental and basic human needs, or an authorisation for its use in terms of the new licensing system. No authorisation to use water may be in perpetuity;
- the location of the water resource in relation to the land does not in itself confer preferential rights to usage. The riparian principle shall no longer apply.

The Department also promotes and fulfils the right by providing a framework to assist water services providers to achieve the goals of access to water, and by supporting and strengthening the capacity of local government in relation to service delivery. The White Paper identifies the provision of funds and the regulation and direction of the institutions whose task it is to provide the services as “the most important contribution to achieving equitable access to water services”. It acknowledges that while access can be improved “by changing the rules about access to water resources”, this will not in itself meet the needs and desires of people for whom piped water is still a dream.”

It can be inferred from the information provided that the following measures undertaken by the Department are intended to give effect to a “core minimum obligation” in respect of the right to water:

- the acknowledgement of the right to a basic water supply and basic sanitation in the Water Services Act.
- the definition of a basic water supply in terms of the criteria set out in the White Paper on the Water Supply and Sanitation Policy, 1994 e.g. 25 litres per person per day, cartage distance of 200m etc. It is expected that the details of “the prescribed minimum standard of water supply services” referred to s 1 of the Water Services Act will be contained in regulations to be promulgated under Act;
- protecting a basic “Reserve” in the National Water Bill intended to give a priority status to the quantity and quality of water required to satisfy basic human needs and to preserve the aquatic ecosystem. The amount of water required for the Reserve will probably be calculated on the basis of the minimum standard of water supply prescribed in terms of the Water Services Act.

The Department’s interpretation of the duty of “progressive realisation” of the right is also in line with the Constitution. It understands that it must take reasonable measures to realise the right. However, in assessing whether it has fulfilled this duty, resource and capacity constraints must be taken into account. A duty is placed on water services authorities (i.e. municipalities) in terms of the Water Services Act to

progressively ensure access to water to all consumers within its area of jurisdiction. However, this duty is subject to a number of considerations. Water Services authorities are also required to take a number of factors into account in ensuring access to water services, including “alternative ways of providing access to water services”, “the need for low costs”, “the requirements of equity”, and “the availability of resources from neighbouring water services authorities.” By regulating the provision of water services by local authorities in this manner, this legislation seeks to provide an appropriate framework for the progressive realisation of the right.

Through its responses to the protocols and accompanying documentation the Department has also demonstrated a clear understanding of the role and functions of the different spheres of government and water services institutions (e.g. Water Boards) in the progressive realisation of the right. It has specifically identified immediate, medium term and long-term goals for ensuring an effective and co-operative institutional framework for the realisation of the right.

#### **4.1.2 Provincial Governments**

Information was provided by the six provinces. Provincial governments that did not respond at all to the protocol were those of the Eastern Cape, Northern Province and North-West.

In general, the provincial governments did not provide sufficient detail on their understanding of their specific duties in relation to the right to water. The information provided in this regard is fragmentary and does not provide a coherent description of what each provincial government views as its specific role and functions in realising the right. This is probably due to the fact that the Provincial Government protocol was a general one covering all the rights listed in section 184(3), and was sent to the Director Generals of each Province. This meant that the Director General was required to gather the information requested from the relevant provincial departments. The relevant departments were also expected to identify and respond to those sections of the protocol falling within their functional jurisdiction. This is in contrast to the national sphere of government in which the protocols were specifically designed for each department primarily responsible for a particular socio-economic right.

A further complicating factor is that at provincial level it is often difficult to ascertain which Department has primary responsibility for access to water. In the case of certain Provinces, the Department of Agriculture provided the most detail on the right to water (e.g. Mpumalanga) whereas in other cases it was the Department of Local Government and Housing (e.g. Free State), or the Department of Environmental Affairs, Developmental Social Welfare and Health (Northern Province).

However, certain Provincial governments did provide a good analysis of the general nature of the obligations imposed by socio-economic rights. The analysis provided by the Director-General in the Office of the Premier, Mpumalanga is particularly thorough and insightful. Most of the various provincial government departments understood that the right to “sufficient water” means that people must have access to enough water to support life, health and hygiene (see, for example, the response of the Department of Social Welfare, Free State).

The Office on the Status of Women in the Free State also provided a very useful gender understanding of its duties in relation to the right to water i.e. to have monitoring and evaluation systems in place to assess how women benefit from water services. These services should alleviate the burden of women's reproductive roles "at an affordable price, especially those women in rural and peri-urban areas."

The Department of Local Government and Housing in the Free State was the only provincial government department that provided a more detailed interpretation of the right to water. This interpretation is in conformity with the national department's interpretation. The Gauteng Directorate of Legal Services claimed that no official guidance existed as to the interpretation of the "sufficient water", and that standards of fulfilment had not been set. KwaZulu-Natal saw the right of access to water as a component of a right to "a basic sustainable living". It identified its role as co-ordination and facilitation aiming at ensuring that the necessary services are provided by local authorities, and building the capacity of local government. Water affairs was identified as one of the areas in which national policies are to the detriment of provincial activities. However, as no details were provided, it is impossible to evaluate this statement. The Northern Cape provided minimal details of how it understood its obligations and role in realising the right of access to water, and no direct information on the right to water was provided by the Western Cape government.

#### **4.1.3 Local Government**

The only response received from local government to the protocol was from the Greater Johannesburg Metropolitan Council.

Water services are identified as falling within its functional area of competence. It interprets the right of access to water as "ensuring the provision of a water supply to paying consumers." The concern that this raises about access to water by those who cannot afford to pay is addressed through referring to its "policy of access to [water] services for the indigent." It also accurately outlines the specific roles and duties of local government in regard to ensuing access to water. These include "the provision of basic infrastructural services, the maintenance of services and the development of equality and parity in service provision." A valid concern raised by the Council is that the assignment of the administration of a matter to a local authority must be accompanied by measures to ensure that it has the necessary capacity and sufficient resources to carry out the function.

The Council reports that it is in the process of determining the quantity and quality of a basic water service that would satisfy its constitutional obligations. It is surprising that no reference is made to national standards and guidelines in this regard. A good definition is provided of the general obligation of "progressive realisation". The Council also highlights some of the steps it has taken towards the fulfilment of its obligations. These are mainly of an internal restructuring and budgetary nature.

It can be concluded that the Council generally has a fair understanding of the nature of its constitutional obligations in relation to the right to water, and of the specific roles and responsibilities of local government in advancing access to the right.

## 4.2 The Baseline provided for Realisation of the Right to Access to Water

For any assessment of the progress made in realising the right, it is critical that a proper situation analysis is made of the existing situation regarding the realisation of the right. This situation analysis must, as a minimum, provide information -

- on the numbers of people who currently lack access to the right;
- an indication of those groups who are in a particularly vulnerable or disadvantaged position in accessing the right because of factors such as race, gender, age, geographical location, disability etc;
- a qualitative assessment of the current level of the right that has been secured e.g. a basic water supply of 25 litres per person per day within a cartage distance of 200m, meeting certain defined minimum criteria in terms of quality, affordability etc.

The Department reports that more than 12 million people are without access to safe, potable water and over 20 million without adequate sanitation. African women and children in rural and peri-urban areas are particularly disadvantaged by lack of access to water. Women have to spend long hours every day collecting water, which impedes their ability to take part in other activities and impacts negatively on their health. Thousands of children die annually of avoidable diseases related to poor sanitation and the lack of clean water. In his *Introduction to the Fundamental Principles and Objectives for a New Water Law in South Africa*, 1997, the Minister of Water Affairs and Forestry, Prof. Kader Asmal, refers to the fact that among the historically privileged population, infant mortality rates are about 20 per 1000 births as compared to 370 infants per 1000 live births in some water-deprived rural areas. The Department has also produced a draft document entitled *Guide to Communities and their Water Services Levels*. The Department has also produced so-called 'vulnerability maps' which appear to indicate those sections of the rural and poor urban population who do not have access to basic water services and which are thus more vulnerable to droughts and water quality fluctuations.

As indicated above, the Department has clearly defined minimum water and sanitation service levels. It is recommended that in the next cycle of information-gathering the Department be requested to provide information on the numbers of persons who have access to basic water supply and basic sanitation services, as well as the number and location of persons who do not enjoy such access. Where possible, this information should at least be disaggregated by race and gender. The development of *Water Services Development Plans* by local authorities will be a critical instrument for generating this information. In terms of section 18 of the Water Services Act a water services authority must report on the implementation of its development plan during each financial year. This report must be given to the Minister of Water Affairs and Forestry, the Minister for Provincial Affairs and Constitutional Development, the relevant Province and every organisation representing municipalities having jurisdiction in the area of the water services authority. It must also be made available for public inspection.

As far as provincial and local governments are concerned, it is impossible from the information that has been provided to discern a clear baseline against which to measure the progressive realisation of the right in question. This will hopefully also



become clearer with the preparation of *Water Services Development Plans* by local authorities, which must also be made available to the relevant Province.

#### 4.3 Information Systems to Monitor the Progressive Realisation of the right - Focus on Desegregated Data regarding Vulnerable and Disadvantaged groups

##### 4.3.1 National Department of Water Affairs and Forestry

At a national level, the Department reports that it is in the process of developing an information system. Where the information is available, it is apparently also accumulated according to race and gender.

In terms of the Water Services Act, the Minister and any relevant Province must monitor the performance of every water services institution (i.e. a local authority, a water services provider, a water board and a water services committee) in order to ensure -

- compliance with applicable national standards;
- compliance with all prescribed norms and standards for tariffs; and
- compliance with every applicable development plan, policy statement or business plan adopted in terms of the Act.

The Act also provides for intervention by the relevant Province and by the Minister if a water services authority has not effectively performed any function imposed on it in terms of the Act. The Act also requires the Minister “to ensure that there is a national information system on water services.” The purpose of this national information system is -

- “to record and provide data for the development, implementation and monitoring of national policy on water services;
- to provide information to water services institutions, consumers and the public in order to enable them to monitor the performance of water services institutions;
- for research purposes; and
- for any other lawful reason.

The Minister may require any Province, water services institution and consumer to furnish information to be included in the national information system.

These monitoring and information systems that must be established under the Act are clearly of critical relevance for measuring the progressive realisation of the right to water. In future monitoring cycles, the Commission should request detailed information on the monitoring activities and information collected in terms of these provisions.

The proper management, development and use of water resources are also of vital importance to the availability of water to meet basic human needs on a sustainable basis. The National Water Bill places a duty on the Director-General, as soon as it is practicable to do so, to establish national monitoring networks. The purpose of the

networks will be to facilitate the continued and co-ordinated monitoring of various aspects of water resources by collecting relevant information and data from a variety of sources including organs of state, water management institutions and water users. The Director-General must also establish national information systems each covering a different aspect of water resources, such as a national register of water use authorisations, or an information system on the quantity and quality of all water resources. The objects of the national information systems include the storage and provision of data and information for the protection, sustainable use and management of water resources. In addition to its use by the Department and water management institutions, information in the national systems should be generally accessible for use by water users and the general public. Once these systems are established, they will be a valuable resource for the Commission in monitoring the realisation of the right to water in South Africa.

#### **4.3.2 Provincial Governments**

No details of information systems at provincial level were provided.

#### **4.3.3 Local Governments**

The Greater Johannesburg Metropolitan Council reported that information-management systems review and restructuring is among the initiatives it has undertaken.

### **4.4 The Existence of a Coherent Plan or Policy to Address the Realisation of the Right of Access to Water**

The White Papers on the Water and Sanitation Policy, 1994 and the White Paper on a National Water Policy for South Africa, 1997 contain the details of the Department's strategies to ensure that everyone has access to water. These White Papers are exemplary in that the rights and values in the Constitution are at the core of the policy objectives they embody. The strategies set out in these documents are clearly designed to give substance and effect to these rights. The principles of the interdependency and interrelatedness of all human rights is also taken seriously and integrated in the various goals and strategies outlined (see, for example, the White Paper on a National Water Policy for South Africa, 1997).

Reference has already been made to the *Water Services Development Plan* in terms of the Water Services Act, and the *National Water Resource Strategy* and the *Catchment Management Strategy* in terms of the National Water Bill. Once these water services development plans and strategies have been established they will constitute important plans of action for realising the right to water. No explicit time frames were set by the national Department for the realisation of short, medium and long-term goals for achieving full access to water. However, the Water Services Development Plans must provide a time frame for the plan, including the implementation programme for the following five years. It must also provide a time frame for the provision of a basic water supply and sanitation to those who cannot be provided with water services within the next five years. However, there will also be a need for the national Department to synthesise the goals, strategies and time frames contained in the

various policy documents, development plans and strategies into a coherent national plan of action for realising the right to water.

#### **4.4.2 Provincial Governments**

The Provincial Governments did not furnish sufficient information to assess whether coherent plans or policies exist for the realisation of the right.

#### **4.4.3 Local Governments**

The Greater Johannesburg Metropolitan Council reports that specific targets, time-frames and benchmarks are still in the process of being worked out. Planning of this nature will in all likelihood occur within the framework of the Water Services Development Plan.

### **4.5 Recommendations**

#### **i. The Way Relevant Organs of State have Reported**

The National Department must be congratulated for the excellent way that it has provided the information requested by the Commission in terms of section 184(3). It has provided comprehensive and pertinent responses to all the questions in the protocols as well as providing important and relevant supporting documentation, including legislation, draft legislation, White Papers, and background documents reviewing relevant law and policy etc. The way in which this Department has responded to the protocol could serve as a model.

As alluded to above, the information furnished by provincial governments, and the one local government that provided a response, lacked sufficient detail to allow a meaningful assessment of progress being made in the realisation of the right. The information provided gave a general idea of the particular provincial government's (or local government's) understanding of the obligations imposed by the various provisions dealing with socio-economic rights in the Bill of Rights. However, the following is lacking:

- a clear identification of the Provincial Government Department or Departments primarily responsible for realising the rights;
- the current state of realisation of the right in the particular province/local authority area of jurisdiction (e.g. the number and location of people who do not have access to the right);
- the concrete plans that have been adopted and measures taken to give effect to the right (e.g. specific water projects)
- how these measures have assisted people in gaining access to a basic water supply and sanitation services (e.g. how many people have benefited from particular projects etc.).

It is suggested that these questions be asked more directly of provincial and local governments in designing future protocols for these spheres of government. It is also recommended that the Commission undertakes prior research on the particular Provincial Government Departments that is primarily responsible for the realisation of

the various socio-economic rights so that a more targeted protocol can be directed to these departments.

## **ii. The Improvement and Strengthening of the Protection of the Right to Water by Relevant Organs of State**

The Ministry and Department must be congratulated for having provided an excellent legislative and policy framework for the effective realisation of the right to water. The new policy framework, the Water Services Act and the National Water Bill introduce far-reaching changes to the pre-existing water law and institutional framework that have supported inequitable and unsustainable patterns of water usage and access to water in South Africa. A solid legislative and policy foundation has been laid for realising the right of access to water in South Africa.

The effective implementation of this legislation is the critical challenge facing the Department in the next period. For example, many of the provisions of the National Water Bill empower the Director-General (or a water management institution to whom a power has been assigned under the Act) to take certain action, for example, requiring the licensing of existing water uses. It is critical that this power is exercised in a way that changes the inequitable patterns of water usage of the past and facilitates access to water by disadvantaged groups. There is provision for consultation and community involvement in many of the decision-making processes of the Bill (e.g. in preparing water allocation schedules). These provisions have the potential to promote a fairer distribution of water rights in South Africa.

One of the measures that the Department identified as having a negative impact on the progressive realisation of the right to sufficient water is its funding allocation in terms of the Medium Term Expenditure Framework. The Department indicated that although it accepted the philosophy of the Minister of Finance's approach to restructuring, "it will seriously hamper the Department's progress to deliver basic water supply and sanitation services to 12 million people." This would affect the Department "most seriously from the 1999/2000 financial year onwards." It would be useful to have the Department of Finance's comments on this prediction, and how any retrogressive impact on the realisation of the right to water could be avoided. In the White Paper on Water Supply and Sanitation Policy, 1994, the Department estimates that an additional 1% of the national budget over 7 years would be required to meet the basic goal of universal basic water supply and sanitation services. From the information provided it is not clear how the Department of Finance assesses and factors-in the costs of fulfilling constitutional obligations in the budgetary decision-making processes. This is obviously a critical issue that should be followed up by the Commission.

A related issue is the question of the affordability of water services to poor communities. Various measures have been introduced to facilitate affordability (e.g. the life-line tariff, provision for national norms and standards for tariffs, a prohibition against people being denied access to basic water services where they prove that they are genuinely unable to pay for basic services etc.).

This aspect of the right becomes even more important in a context where private sector institutions are being relied upon to deliver basic water or sanitation services.

There are provisions in the Water Services Act for requiring information from water-services providers, for intervention when a water services intermediary fails to perform its functions effectively, and for monitoring by local authorities of the performance of water services providers and water services intermediaries within their areas of jurisdiction. The purpose of this monitoring is to ensure that the prescribed norms and standards for tariffs are complied with, relevant conditions set by the relevant local authority are met, and all other relevant standards and contractual provisions are adhered to.

In the South African context of vast poverty and inequality, the issue of affordability should be closely monitored to ensure that costs do not become a barrier to a decent level of water and sanitation services for all. The regulations to be promulgated under the Water Services Act, particularly those that relate to compulsory national standards for the provision of water services and norms and standards for tariffs are clearly of vital importance in this context. These regulations should be specifically requested from the Department in the next cycle of information gathering. Information should also be requested from the Department on all steps it is taking to monitor the affordability and quality of water services being provided to low-income communities.

There is clearly an urgent need for on-going measures to build the resources and institutional capacity of local government to fulfil their critical role in water service delivery. All efforts of the Department in this regard will constitute important measures to advance and improve access to water by all in South Africa. Moreover, it is essential that synergy is created between national goals and strategies to achieve the right to water and those existing at provincial and local levels.

The programmes of other government departments are also critical to the realisation of the right. For example, the main instrument for government expenditures focusing on the provision of basic services in urban areas is the Municipal Infrastructure Investment Programme (MIP) which falls under the jurisdiction of the Department of Constitutional Development. The bulk of MIP funds goes into water and sanitation projects. It is accordingly important that the MIP also gives effect to the norms and standards set by the Department of Water Affairs and Forestry for the realisation of the right to water.

Finally, in the spirit of co-operative governance all spheres of government and relevant departments should collaborate with each other to implement a coherent, co-ordinated plan of action for the realisation of the right to water for all within the shortest possible period of time.

## **5 Social Security**

### **5.1 Understanding of its Constitutional obligations**

#### **5.1.1 National Department of Welfare**

##### ***a) The right to social security***

The broad scope of social security endorsed in the White Paper for Social Welfare, incorporating both contributory benefits (social insurance) and needs-based assistance from public funds (social assistance) is in line with international trends and standards. The policy commitment to build a comprehensive, integrated social security system is vital to the realisation of the constitutional right to social security. The White Paper explicitly endorses the provision of comprehensive social assistance to those without other means of support:

When these broad goals [an economically self-reliant public and an active labour market policy aiming at full employment] cannot be met, social assistance should be a reliable and accessible provider of last resort.

The social security system should ensure “universal access” to a “minimum income, sufficient to meet basic subsistence needs.” It should also “work intersectorally to alleviate poverty”.

The principles of a rights-based approach to social security such as equity, non-discrimination, participatory democracy, improved quality of life, transparency and accountability, accessibility and appropriateness are upheld in the White Paper.

A concern emerging from the Department’s response to the social security protocol is a tendency to view its constitutional obligations as subordinate to the prevailing legislative criteria for social security. For example, the Department’s interpretation of someone who is “unable to support themselves and their dependants” in s 27(1)(c) is that they are unable to provide for their basic needs and provided they satisfy the criteria in the Social Assistance Act and the Regulations under the Act (such as the means test). Furthermore, its interpretation of “appropriate social assistance” is that the assistance must be based on their particular circumstances and is in keeping with the Social Assistance Act and Regulations.<sup>1</sup> While this may be the current legislative position, the Department should evaluate the adequacy of the existing legislative criteria governing access to social security against the constitutional obligations pertaining to social security. This evaluation should provide the basis for progressively improving the legislative criteria governing access to social security. As the White Paper indicates, the ultimate aim is to ensure that -

- Every member of society who finds him or herself in need of care will have access to support.
- Social welfare policies and legislation will facilitate *universal access* to social welfare services and social security benefits in an enabling environment.

Similarly, while financial constraints will determine the pace of progressive realisation of the right, it is also the Department and Ministry’s role to strongly advocate for an adequate budgetary allocation to enable it to fulfil its constitutional obligations.

It would be useful to obtain greater clarity on how the national department views the respective roles and responsibilities of the different spheres of government, as well as other relevant organs of state in ensuring access to comprehensive social security. The Departments of Labour and Finance, for example, have critical responsibilities in respect of social insurance such as unemployment insurance, compensation for occupational injuries and diseases, and occupational retirement insurance. With regard

to the division of national and provincial powers, has the Department identified any negative impact on the accessibility of social security arising from the assignment of the Social Assistance Act to the Provinces and the financing arrangements for the payment of social grants at provincial level?

***b) The right of children to social services***

The Department's understanding of this right is in line with the relevant constitutional and international standards, particularly its focus on the welfare needs of children in difficult circumstances, disadvantaged and vulnerable children.

Again, it would be useful for the national Department to provide an overview of the roles and responsibilities of the different spheres of government, other relevant organs of state as well as voluntary welfare organisations in ensuring the right of children to social services. For example, which bodies have responsibility for setting norms and standards, for delivery, and for monitoring in respect of the various forms of social services rendered to children? Through what mechanisms does the national Department ensure that there is equitable access to social services of an appropriate standard by children in South Africa? This is an important issue in the context of the large role played by voluntary welfare organisations in the delivery of social services (including statutory services e.g. under the Child Care Act).

**5.1.2 Provincial and Local Governments**

None of the Provincial Governments gave a detailed account of how they understand their obligations in relation to the right of children to social services.

However, the Social Welfare Departments of most of the Provincial Governments that provided responses had a fair, general understanding of the constitutional provisions relating to social security.

The only response received from local government to the protocol was from the Greater Johannesburg Metropolitan Council.

Although the Council agreed with the interpretation of the duty to respect, protect, promote and fulfil socio-economic rights provided by the SA Human Rights Commission in their explanatory memorandum to the protocol, it did not provide a coherent account of its specific obligations in relation to the rights under review. For example, although childcare facilities are a local government competency, the Council did not elaborate on its role and responsibilities in this regard.

**5.2 The Baseline provided for the Realisation of the Rights**

**5.2.1 National Department of Welfare**

In the first instance, the information provided by all spheres of government does not reveal a detailed analysis of the number of poor people in South Africa who currently lack access to social security. These include:

- those persons who would qualify for one of the existing social security programmes, but have not exercised their entitlement (this can occur for a variety

- of reasons e.g. inadequate administrative infrastructure in their region, a lack of knowledge of their entitlement, fear of stigmatisation etc.);
- groups who are poor and in need of social security, but are excluded in terms of the rules of existing social security programmes (e.g. poor children over the age of 7 years, the long-term unemployed, domestic workers etc.).

Secondly, although the White Paper affirms that no person “should have to live below minimum acceptable standards”, the national Department of Welfare does not appear to have developed a clear measure of poverty (‘poverty line’) for determining who should qualify for social assistance. For example, the White Paper estimates that “about 60% of pre-school children live in impoverished circumstances”, however, the Department states that the new child support grant is targeted to reach approximately 48% of children under 7 years of age (see response to question 7(f) of the protocol). This implies that some impoverished children in this age group will not have access to the grant. Policy and legislation are needed to provide a more concrete definition of those “unable to support themselves and their dependants” in section 27(1)(c). Although, it may not be possible to extend social assistance to everyone in this group immediately, it would provide a clear goal for progressive efforts to extend access to the right.

Thirdly, there are no clearly defined standards for determining the adequacy of social assistance benefits. The White Paper states that “every South African should have a minimum income, sufficient to meet basic subsistence needs”. However, there is no clearly defined relationship between the setting of benefit levels and a needs-based assessment of the minimum income required to meet basic subsistence needs. In this regard, the FFC observes that “The fiscal decision has enjoyed primacy over welfare policy concerning the level of the grant”.

Once more, it may not be possible to meet these standards in the short-term, but they provide an essential yardstick for assessing the efforts of the Department to improve the quality of social security.

Information of the nature described above is needed to provide a clear baseline for measuring the progressive realisation of the right to social security.

Similar observations are apposite in relation to the right of children to social services. There is a need for a detailed situation analysis for determining the numbers of children who lack access to social services, with a particular focus on children in especially difficult circumstances, vulnerable and disadvantaged children. Where are children falling through the gaps? Which services are not available to particular groups of children in need? Such an analysis should also identify -

- inequities in the availability of social services for children;
- groups of children whose needs should be prioritised in the allocation of resources and service rendering e.g. poor children (see the goals for priority area of social welfare development in the NPA ;
- appropriate norms and standards for the rendering of these services;
- appropriate monitoring mechanisms and institutions.

### **5.2.2 Provincial and Local Governments**



At national and provincial levels, the information provided does not provide an adequate baseline in relation to the present realisation of the rights under review. For example, the information provided by the Gauteng Department of Welfare and Population Development is extremely sparse and of a very general nature. Again, this is probably due to the general nature of the protocol, and the fact that detailed questions in relation to social security and the right of children to social services were not directed to the provincial and local governments.

However the Mpumalanga Department of Health and Welfare provided an excellent analysis of the shortcomings of past welfare policy, and how it continues to affect the delivery of the right to social security.

### 5.3 Information systems to monitor the progressive realisation of the right - Focus on desegregated data regarding vulnerable and disadvantaged groups

#### 5.3.1 National Department of Welfare

The national Department reports that it does not have a system in place that monitors the social security rights of children. It does not expressly indicate whether any system is in place to collect and analyse statistical and other information relating to the implementation of social security. From the information provided by the Department of Finance it can be inferred that the different systems for administering grants have been amalgamated onto one transverse data system. In its Report on basic social services in South Africa, the FFC confirms that “a single national payments data base” has recently been established. This is obviously a critical step in monitoring access to the existing social assistance programmes. The Department of Welfare should be requested to provide more detailed information on its progress in establishing and running a nationally organised information system on social security.

With regard to the right of children to social services, the Department reports that the NPA for Children Steering Committee has a monitoring task group who monitor the implementation of the Convention on the Rights of the Child (CRC). The information needed for this purpose is collected by means of the Provincial Information System for Social Welfare (PIMWEL). The terminology of some of the categories of services on which data is collected appear to be outdated and stigmatising and should be reviewed e.g. “uncontrollable child, “work-shy”, “hobo” etc. The data collected is broken down according to race, gender, rural and urban location and published statistical review documents are available. In addition, the NPA Steering Committee submits progress reports to Cabinet. Finally, the Department has also listed a number of review and monitoring mechanisms of laws and other measures that relate to the right of children to social services.

The existence of these systems provides an invaluable information resource for monitoring the right of children to social services. It would be useful to obtain further information on the ability of these systems to detect The existence of these systems provides an invaluable information resource for monitoring the right of children to social services. It would be useful to obtain further information on the ability of these systems to detect gaps in the provision of social services to children, and to monitor whether the services provided comply with the human rights standards and the relevant policy guidelines (see, for example, articles 3(2) and (3) of the CRC).

### **5.3.2 Provincial and Local Governments**

From the information provided by provincial and local governments, it is impossible to identify whether adequate information systems have been put in place to measure the realisation of the relevant rights over time.

## **5.4 Existence of a Coherent Plan or Policy to Address the Realisation of the Rights**

### **5.4.1 National Department of Welfare**

The Department of Welfare indicates that it is engaged in on-going revision and amendment of laws that make access to social security rights difficult, and has appointed a task team to review all aspects pertaining to disability grants. It does not provide any further information on a comprehensive plan of action to progressively realise the right of access to social security. Neither is specific information provided regarding the goals and targets set by the Department, the timelines for implementation, benchmarks or indicators.

The White Paper for Social Welfare provides the overall policy framework for the realisation of the right to social security and the right of children to social services. The White Paper states that “a national plan of action for the next five years will be developed by the national and provincial departments of welfare, in consultation with all stakeholders, including Government departments, to facilitate the shift towards a comprehensive, integrated, equitable, multidisciplinary and developmental approach in the welfare field.” The White Paper will be used as a basis for the development of this plan of action. There is also reference to the “Social Welfare Action Plan” in the Department’s responses to certain questions in the protocol in relation to “Initiatives for children and youth with disabilities. This Action Plan should contain detailed time-related goals, strategies and benchmarks for realising the right to social security. However, as this Plan was not provided by the Department it is difficult to evaluate its adequacy, and the progress that has been made to date in implementing the relevant rights. It is recommended that the Department be requested to furnish this Plan to the Commission as soon as possible.

More information was provided by the Department on its future plans and goals in relation to the right of children to social services. A critical future goal is increasing the proportion of the welfare services budget to be directed to children. The NPA for Children in South Africa which lists a number of specific goals in the policy priority area of social welfare development, provides the central intersectoral programme of action for realising the right of children to social services.

### **5.4.2 Provincial and Local Governments**

Provincial Governments and the one local governments that provided information listed very general goals and plans in relation to the relevant rights. A notable exception is the Free State Department of Social Welfare that listed a number of very specific goals in conjunction with targets, timelines, indicators and monitoring

structures. The Northern Cape Province also listed a number of concrete goals relating to the rights under review.

The government of KwaZulu-Natal linked the realisation of socio-economic rights to the achievement of sustained economic development in the region is important to note that economic growth, although it may facilitate the progressive realisation of socio-economic rights, does not automatically guarantee their realisation. It is the obligation of all relevant organs of state to adopt a clear plan of action combined with deliberate strategies for improving and advancing access to the rights by everyone under their jurisdiction. The provincial government should also review progress in an on-going and systematic fashion, and adopt appropriate measures to remove obstacles that prevent the fulfilment of the rights

## 5.5 General Remarks

The Provincial Governments did not provide detailed information on how they view their specific role and function in relation to the right to social security, particularly in relation to the national and provincial spheres of government. For example, it is not clear how the Mpumalanga draft legislation (e.g. the Mpumalanga Social Assistance Bill) will relate to similar national legislation such as the Social Assistance Act, 1992 which has been assigned to the Provinces. The prospect of duplication and conflicting legislation appears to exist although the Mpumalanga Provincial Government expressly indicates that it will be guided by national policies on welfare to ensure uniformity and consistency.

Both with respect to Provincial and Local Government the lack of specific information in relation to the relevant rights is probably due to the general nature of the protocol which covers all the socio-economic rights listed in section 184(3).

## **6 Education**

### **6.1 Understanding by Relevant Organs of State of their Obligations**

#### **6.1.1 National Department of Education and Training**

The Department of Education, has a fairly clear understanding of its constitutional obligations in respect of the right to education, its interpretation, is furthermore generally in line with both international norms and the provisions of the Constitution.

In particular, the Department provides a clear interpretation of the words "basic education", as well as "adult basic education". With regard to further education and training, the Department is presently in the process of drawing up a Green Paper on further education and training.

The Department's interpretation of "progressively available and accessible" recognises the difficulties inherent in attempting to change education overnight and states that the state must make education available and accessible as trained educators and the necessary finance and infrastructure become available. However, the Department's definition does not seem to emphasise the fact that undue delay in this regard may not be tolerated.

The Department provides specific figures as to when it would be regarded to be reasonably practicable to offer education in a particular language. This approach is potentially problematic, as there may for example only be a total of 30 learners in Grade One in a particular school. It would then be impossible to require that there need to be 40 learners in this grade who request to be educated in a particular language, before it is considered to be reasonably practicable to offer instruction in that language. It may have been better to have expressed this in terms of a percentage. For example - it would be considered to be reasonably practicable to provide education in a particular language if X% of learners so request it. Reasonable educational alternatives in addition to single medium schools are double medium instruction and parallel medium classes - this is in compliance with the Constitutional obligations imposed by section 29(2).

The definition of standards that are not inferior, is also in accordance with both the Constitutional requirements and that laid down under international law.

The Department, through its answers and supporting documentation, shows a clear understanding of its duties "to protect, promote and fulfil" the right. The Department sets out specific measures that it has taken in order to respect the right. In particular, the emphasis is placed on the removal of previous discriminatory laws and the putting into place of new education laws. The Constitution, National Education Policy Act, 1996 (Act No. 27 of 1996), the South African Schools Act, 1996 (Act No. 84 of 1996) and the Act on Higher Education, 1997, (Act No. 101 of 1997), were cited as protecting persons from discrimination in private educational institutions, as well as from practices in the private sector which may have a negative impact on the right to education. The duty to promote the right to education is actively pursued through the publication of the South African Schools Act Made Easy, as a supplement to all major newspapers, to inform all citizens of their right to school education. The duty to fulfil

the right to education is advanced through various measures, such as the appointment of the National Commission on Special Needs in Education and Training, the National Committee for Education and the establishment of the Gender Equity task team. In addition to this, various education laws, are also in existence, which enhance the fulfilment of the right to education.

### **6.1.2 National Department of Correctional Services**

The Department of Correctional Services does not discuss what it understands its Constitutional obligations to be, with respect to the right to reading material.

### **6.1.3 Provincial and Local Governments**

Information was provided by the following provinces: Free State, Gauteng, KwaZulu-Natal, Mpumalanga and Northern Cape. The Department of Health was the only Department of the Western Cape to reply. Furthermore, no responses were received from the Eastern Cape, North-West and Northern Province.

In general, the reports provided by the provincial governments did not adequately provide information on their understanding of their duties with regard to the right to education. On occasion, it appeared as if Departments, which ostensibly have nothing to do with the right to education, provide for an official interpretation of the meaning of section 29(2)(b) (see in this regard the official definition of the Northern Cape Department of Local Housing and Local Government). Often information was lacking and even when it was provided, it was often done in such a haphazard style that it was difficult to form a coherent picture. This is probably due to the fact that a general protocol (dealing with all the socio-economic rights) was sent to the Director-General of the Province, who then forwarded this general protocol to each of the Departments.

Despite the general criticism that can be levelled against the provincial governments, the Free State Department of Education and the Mpumalanga Department of Education provided some useful information with regard to the right to education.

The Free State Department of Education's understanding of its duties to "respect, protect, promote and fulfil" is all generally in line with the Constitution and international law. The following concrete measures were taken - all pre-conditions to education were removed, learning was made compulsory to all learners under 15. In particular, the criminalisation of non-compliance with compulsory education, will go a long way towards the protection of the right to education. In addition, the Department stated that it will implement a system of funding in order to redress past imbalances and furthermore that it ensures the participation of learners and parents as equal partners.

The Department's definition of progressive availability and accessibility, read with its definition on progressive realisation is also in line with both the Constitution and international law. In particular, the fact that the Department emphasises that financial constraints should not impede the right is commendable.

The Mpumalanga Department of Education does not describe what it understands its constitutional obligations to "respect, protect, promote and fulfil". This is due to the

fact that the request for information forwarded to it by the Office of the Premier only asks the Department to provide a summary of what it has done in order to satisfy these obligations. From an examination of the measures taken, it would appear as if the Department only partially understands what is required of it - for example no measures are explicitly mentioned which relate to the protection of the right to education. Furthermore, steps to promote education are mentioned under the heading additional responsibilities.

## 6.2 The Baseline provided for the Realisation of the Right

### 6.2.1 National Department of Education

For any assessment to be made on the progressive realisation of the right to education, it is essential that the current situation with regard to education is provided for in full. The national Department of Education states that figures of the number of persons currently enrolled in educational institutions are provided (these figures are broken down according to race, gender and geographic location). In addition to this, the SRN provides concrete statistics with regard to the facilities available at schools throughout the country. While these statistics do provide useful guides in order to measure the progressive realisation of the right - what is clearly lacking is information and statistics on those groups who do not have access to education. There are nevertheless exceptions in this regard, for example the following information are provided: 3% of Africans aged between 10 and 14 have received no education and 2% of those aged between 15 and 19. However, even in this regard, the statistics are deficient - it is not clear how many of these persons who have received no education are for example to be found in rural areas or how many of them are women. Furthermore, the reliability of such information cannot be tested as the source of this information is not provided. Statistics relating to for example the number of children who are unable to exercise their right to education because of exploitative labour practices and the numbers of adults who have received no form of training are not provided. In this regard, indicators such as literacy rates could prove to be useful.

### 6.2.2 National Department of Correctional Services

Information that would provide a clear baseline for the realisation of the right of prisoners to reading material, is absent in the report submitted by the Department of Correctional Services. No information was given as to the facilities which exist for approved study courses, or how many inmates benefit from these approved study courses. No information was given as to how many inmates made use of the library facilities or how many prisoners do not have access to reading material. Once again, it is important to keep in mind that this right is not subject to progressive realisation.

### 6.2.3 Provincial and Local Governments

*At provincial level information that would provide a clear baseline for the realisation of the right to education is lacking. This is probably due to the rather general nature of the protocol that was sent to the provincial governments. Even the two provincial Education Departments which reported in more detail on the right to education, did not supply any information which would provide a clear baseline for the realisation of the right. What is specifically needed in this regard is not only figures relating to the*

*numbers of persons who currently enjoy the right to education, but more importantly, figures relating to persons who do not currently enjoy the right to education.*

### 6.3 Information Systems to Monitor the Progressive Realisation of the Right - Focus on desegregated data regarding vulnerable & disadvantaged groups

#### **6.3.1 National Department of Education**

The Department of Education provided a comprehensive account of information systems available in order to monitor the progressive realisation of the right to education. The Education Management Information System (EMIS) breaks down data according to race, gender and geographic location of the school. The School Register of Needs Survey (SRN) collects information on the physical facilities at the school - for example, the following type of information is given: water supply, power supply, telephones and sanitary facilities available at schools, learner-classroom as well as educator-classroom ratios, the percentages of secondary schools with laboratories, the percentage of primary and secondary schools with media centres and the percentage of schools without sports facilities. The information compiled by the SRN only provides figures relating to learners and educators - this information is not broken down further according to race or gender. Nevertheless, it does provide a birds' eye view of the facilities available - and will go a long way towards addressing the optimal use of limited resources. The South African Post Secondary Education System (SAPSE), which is used to collect information and statistics relating to universities and technikons, breaks down information according to race and gender.

#### **6.3.2 National Department of Correctional Services**

The Department of Correctional Services states that the following systems exist: Electronic Directive System and the Management Information system. With regard to the Management Information System, information is broken down according to race, gender and geographic location. However, it is apparent that neither of these systems deals specifically with the monitoring of the right to reading material of inmates.

#### **6.3.3 Provincial and Local Governments**

None of the provincial departments made any mention of information systems to monitor the progressive realisation of the right to education. However, a system such as the EMIS, was developed in collaboration with the provincial departments of education. In addition to this, the SRN, provides detailed information relating to statistics in particular provinces. In future, it is important that these systems are mentioned, as well as any other systems which the provincial government may have developed in order to monitor the realisation of the right to education, particularly of vulnerable and disadvantaged groups.

### 6.4 The Existence of a Coherent Plan or Policy to Address the Realisation of the Right

#### **6.4.1 National of Education**

The Department of Education did not directly make reference to a coherent plan. Nevertheless, the existence of a plan can be deduced from the various education laws, the White Paper, as well as other supporting documentation - for example the School Register of Needs Survey, the Culture of Learning, Teaching and Service Campaign (COLTS), Report of the Gender Equity Task Team and the Report of the National Commission on Special Needs in Education. The Department also sets out its future goals, however no benchmarks or time frames are indicated. It is important that a coherent plan be formulated in a comprehensive document which contains the goals, as well benchmarks and time frames.

#### **6.4.2 National Department of Correctional Services**

The Department of Correctional Services does not make reference to a coherent plan in order to realise the right of detained persons to reading material. It merely makes reference to a general policy in this regard. If a coherent plan exists, it is important that it is mentioned. If, however, no such a plan exists, this is something which will then need to be attended to.

#### **6.4.3 Provincial and Local Governments**

In general, the information provided by the provincial governments does not seem to indicate a coherent plan of action with regard to education. The two exceptions in this regard are the Free State and Mpumalanga Departments of Education. In both of these cases, there appears to be at least some strategy of sorts in order to realise the right to education. The Free State Department of Education sets out its future goals, however, no benchmarks or time frames are given. The Mpumalanga Department of Education provides a clearer picture - specific goals and targets are set out as well as time frames for the implementation of these goals. However, the Department has not understood what is required of it in terms of providing benchmarks/indicators. It is important that the provincial governments formulate a coherent plan in order to realise the right to education and that such a plan is contained in a single comprehensive document.

## **7 Environment**

### **7.1 Past overview**

With regard to the "impact of past discriminatory laws and other measures on particular environmental rights", the response is only partly to the point.

The emphasis here should be put on "impact" rather than on whether or not the laws and the implementing policies were explicitly discriminatory. The report indicates that homelands and urban settlements for black families and population groupings tended to be located in areas close to polluting and unhealthy industrial areas, areas not ideal for sustainable development and which are prone to, for example, flooding. The negative environmental impacts of mining, forestry and dams are highlighted.

The DEAT should have linked these comments to the specific categories such as "harmful to health and well-being", effect on "present and future generations", "pollution", "ecological degradation", "conservation" and ecological sustainability of



development and use of resources, as well as the economic and social development of the communities that were subject to discriminatory laws and policies.

The response with regards to the implications of rationalisation/non-rationalisation of laws and policies is quite to the point, although more information could have been provided. The recent judicial disputes and decisions around environmental laws and rights as required by national and international law, indicate that provincial legislation and regulations as well as laws and policies of the former-homelands, have an important and enduring relevance to the process of rationalisation, national uniformity and the pursuit of rights. It is only very recently that the rationalisation of laws was finalised. The information focuses on pollution, especially waste-disposal and purification and conservation. However, since the focus here is on how past discriminatory laws and practices affect the rights of certain groups, the report should have focused on how the rationalisation or lack of it, impacted and continues to impact on those victimised by discriminatory legal designs.

## 7.2 Understanding of Constitutional Obligations

### 7.2.1 National Department of Environmental Affairs and Tourism (DEAT)

With respect to DEAT's understanding of the Constitutional obligations in respect of Section 24, the Protocol has identified the terms "respect", "protect", "promote", and "fulfil" and the response by the Department formally conforms to these. However, the Protocol and DEAT's response ought to have realised and taken into account the additional requirements under Section 24, i.e. to "prevent" and to "secure".

#### *The duty "to respect"*

DEAT's understanding of "respect" includes developing mechanisms and exercising proper judgement in granting permits for developments. It correctly recognises its two functions: to develop overall policy, legal frameworks and to regulate activities of other public and private persons as is expected by the Constitution. There seems, however, to be no indication here that the DEAT conceives its role as also including taking corrective or remedial measures, to restore or rehabilitate the environment in situations where damage has already occurred. Damaged environment may be "respected" only by undertaking positive corrective or restorative measures.

As indicated above, there are many different government departments and organs of State that either have responsibilities over certain legislative enactment on the environment or whose activities impact positively or negatively on the environment. The DEAT's response/submission regarding "the obligation to respect these rights" clearly acknowledges this: "Sections of law may have a great impact on the environment, but often such laws are administered by other departments". The DEAT's cover letter also acknowledges that the time allocated for submission of the reports was too short and that there was no co-ordination with other departments in compiling the report. The third critical element of the DEAT's submission is the acknowledgement that "there is no effective body regulating pollution in South Africa".

In assessing the submission with regard to the implementation of the obligation to respect these rights, it is necessary to underscore the above three major limitations and to

commend the DEAT for being frank in acknowledging the gaps in and weaknesses of the report. The report then proceeds to point out, with regard to air pollution control that where enforcement measures are inadequate, air pollution may occur. This is commendable. The point, however, is to indicate precisely where such measures are lacking, to give reasons and then to indicate strategies and plans to overcome the gaps and weaknesses. The same applies to pollution in general.

It is also inadequate to focus only on air pollution, pollution in general and the natural environment as the report has done. Section 24, read together with Sections 7(2) and 184(3), conceives of the environment much more broadly.

### *The duty "to protect"*

The term to "protect" is also adequately conceived by the DEAT as requiring establishment of adequate legal and regulatory frameworks and the enforcement of the laws. But in the enforcement of laws, the DEAT should have specifically indicated that this involves civil as well as criminal judicial processes, among other measures. Environmental impact assessments, as required under the Environmental Conservation Act, is a proactive way of "protection" and should have been identified here and highlighted. The lack of an independent central regulatory and watchdog body on environmental matters is not mentioned.

Nevertheless, with regard to the over-all submission with regard to "protection" of rights, the DEAT's report is better than the information on "respect" of the rights. The air pollution part forthrightly indicates that some aspects of the Atmospheric Pollution Prevention Act, No. 45 of 1965, may require adjusting to bring it in line with Section 24. Lack of electrification is also a danger to the environment, but it is not shown how the private sector is responsible for this, and what the government's role is. Requirements for environmental assessment audits to regulate activities of the private sector is pointed out, so is reference to regulation of import and export of substances which may endanger the atmosphere.

"Pollution control" is better dealt with in that, the list of laws and what they regulate is reasonable, even if not as comprehensive as it could have been. Reference to the Basel Convention is commendable. However, the DEAT fails to mention the Bamako Convention which it ought also to sign so that it may provide a leadership example within the African regional context. Once again, the use of environmental management and environmental impact assessment are used as strategies for protection.

On the issue of unfair discrimination by private persons, what is reproduced here is essentially what is contained in the White Paper on Environmental Management Policy for South Africa. It is not enough to simply re-state the obvious ideal, thinking that resources and land belong to all - we know that in reality they are privatised and often used for profit without due regard to the environment. The submission should have been more forthright in confronting this present position, and to indicate how some balance could be realised. Many major private development initiatives or joint ventures between the government and the private sector are a potential threat to ordinary people. How is this addressed? Some have suggested new legislative initiatives which may be considered for many sectors.

### ***The duty “to promote and fulfil”***

The responsibility of "promotion", is also correctly interpreted in the DEAT's response, and here the civil and criminal enforcement processes are recognised. However, this "correct" interpretation is rather narrow as it does not indicate a dynamic and holistic approach which may include proper public education and information strategies and mechanisms. This latter point is only addressed later, under "information gathering".

"Promotion" and "fulfilment" are connected to "respecting" and "protecting". The response of the DEAT in this regard appears lengthy but not all of it is relevant and informative.

As regards the percentage of the DEAT's budget set aside to promote and fulfil the right and what has been spent at the end of the 1997-1998 financial year, the figures are provided. The adequacy or inadequacy of such figures (percentages) cannot be determined because the information does not indicate where the rest of the DEAT's budgetary allocations are spent. The same applies to figures for what would have been spent at the end of the 1997/1998 financial year because the figures given are in Rands and expenditure line items do not necessarily correspond to the categories used for the percentages.

Information and public education programmes of the DEAT are provided in some detail and include the use of liaison committees (for air pollution control only), educational documents (for pollution control), workshops and involvement of NGOs, CBOs, organised labour and business. The public is also invited to comment on various policy and legislative proposals. Other paper-based strategies are also used. Unfortunately, apart from the major policy papers and some extracts of legislation, none of the samples of these materials have been submitted.

### ***“Not harmful to health or well-being”***

In its conception of the words "not harmful to their health or well-being", the DEAT's response is precise but cryptic. There are three key words here: "not harmful", "health" and "well-being" which should have been explained. Reference to international standards, such as the WHO's conception of the concept 'health', should be embraced. Also cross-referencing here to constitutional provisions relating to the right to health and dignity, could have helped to broaden the approach.

### ***“Sustainable”***

The DEAT's conception of "sustainable" is commendable. It clearly recognises use and conservation of resources as well as the *intragenerational and intergenerational* concepts.

### ***“Justifiable economic and social development”***

The conception of "justifiable economic and social development" does not appear to be comprehensive and well thought out. In South Africa, there is a tendency to regard any form of construction as "development" and those engaged in such activities as "developers". This is improper. Here, "justification" for economic development should

also be linked to the level of the expected meaning under "justification" in the limitation clause. The DEAT ought to have specifically referred to the Development Facilitation Act and its environmental requirements, as well as environmental impact assessment mechanisms.

### 7.3 Information systems and information gathering

#### **7.3.1 National Department of Environmental Affairs and Tourism**

On information systems and information gathering, the DEAT's report is fairly detailed with regard to policies. The response is also systematic, in that it is broken down and organised around themes: air pollution control, general pollution control, environmental impact management, sustainable development, weather bureau and fisheries.

In terms of information dissemination, which is critical to the independent right of access to information and information with regard to administrative justice, the DEAT's response appears to indicate that it is more focused on "publications" and computer-based information systems. These are not always accessible to a significant portion of the population and more innovative and user-friendly methods of communication should have been used. There is no indication of any strategy to cover or gather information in press reports on actual daily events.

As far as the scope of information is concerned, the DEAT has not furnished a list of legislation that it has in the past identified as critical to its responsibilities.

"Environmental racism" and unequal (class-based) exposure to harmful environmental conditions, is well-known and yet the information submitted fails to address this issue as far as information gathering and analysis is concerned.

#### ***Vulnerable groups***

Just as the Third World countries are used as dumping sites for substances and waste that are harmful to the environment, so are poor communities, mainly black, condemned to live and/or work in environments that are harmful and detrimental to health and well-being. This is recognised elsewhere in the DEAT's submission and quite directly and specifically under "vulnerable groups". The problem is that the DEAT's submission merely lists 14 categories of population groups and/or circumstances of vulnerability but fails to explain the types of problems and strategies for ameliorating their conditions. This omission on the part of DEAT is perhaps because of the manner the Protocol is phrased.

As far as remedies and measures to address the plight of the vulnerable groups is concerned, the DEAT's response points out plans submitted to cabinet, joint investigations (research and development) with the Department of Minerals and Energy Affairs, and strategies for waste management.

#### ***Core minimum obligation***

The issue on understanding of the "core minimum obligations" and how implementation is reflected in the laws and other measures initiated or put in place by the DEAT, it

appears that the formulation in the Protocol repeats some of the earlier guideline points. Nonetheless, additional new information is provided here. The DEAT's response is clear but not adequate.

### ***National norms***

The DEAT's response on the issue of uniform laws and effective application throughout the country once again appears rather unclear. The response is not satisfactory and informative.

### ***People discriminated against in the past***

It appears that the concept of "discrimination" is not properly appreciated as involving direct and indirect forms, as well as fair and unfair discrimination, as expressed in the Constitution.

### ***Laws that have had a negative impact***

DEAT's response with regard to recent laws that may have impacted negatively on the right to healthy and protected environment merely avoids the question. The response is focused on budgets and vacant positions (finance and personnel issues) and not on the laws and their impact.

### ***Structures and mechanisms***

The DEAT's approach of putting into place structures and processes to effect legislation in line with Section 24 obligations appear to be clear and satisfactory. The problem, however, is that it is not the DEAT alone, which is responsible for the "environment" at the national level of government. Linkages to provincial and local governmental structures appear not to be very well streamlined.

### ***Future goals***

As far as "future goals" are concerned, the DEAT informs that it has started with audits and reviews to determine what future legislative initiatives are appropriate. But some initiatives are already in the pipeline, for example the proposed laws to give legislative effect to the Draft Policy and Integrated Pollution and Waste Management Strategy. The main objective is to achieve an "integrated pollution and waste management" regime.

Co-ordination across government departments, which is recognised in this analysis as one of the major drawbacks, is to be addressed. How this is to be done is not precisely put and the projected impact is not clearly stated. The one clearly stated plan is on implementation of environmental impact assessment through courses and market-based instruments. The report is very general when it comes to "sustainable development". Regulations with regard to "vulnerable groups", especially in the area of endangered species, wetlands, biodiversity and fisheries are well presented. There is also a strategy of getting rid of existing laws and other measures which have negative impact on peoples' environmental rights, through legal audits.

## ***General***

The DEAT's report is clear with regard to air pollution control, sea fisheries and the weather bureau as far as plans for the immediate future is concerned. But, this is not a comprehensive summary which addresses all areas of the environment covered in the report and which specifically related to the operative words: respect, protect, promote and fulfil.

Overall, the submission is a satisfactory first-attempt. Its strengths, gaps and weaknesses, as well as suggestions on how it could be improved are either pointed out or suggested in evaluation and analysis.

### **7.3.2 Provincial Governments**

An evaluation of the following provincial governments' reports is provided: Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape and Western Cape.

#### ***7.3.2.1 The Free State***

The Free State is one of the provincial governments that have supplied information from which the environmental concerns may be culled out. It throughout communicated with the Human Rights Commission about the progress it made in trying to meet the obligation.

The information explains the interpretation of the terms "respect", "protect", "promote and fulfil", and "access to". However, the explanations are general and tend to show that they were given their ordinary speech meaning; there is reference to Section 24 but only pointing out what the DEAT is doing; mention of "health care" (Section 27 of the Constitution); and, "healthy environment" in the International Charter of Consumer Rights.

Environmental affairs appears to fall between the cracks, as it were. What is the structure of the provincial government and where is environmental affairs placed? Consumer rights, agriculture, education, status of women, sports, arts, culture, science and technology, health, welfare, local government and housing etc. are covered - apparently because of the manner of structure of the provincial government. The reports from these "departments" are relevant to other rights but the focus on Section 24 is lacking. The Free State Department of Health appears to be the "department" which has primary responsibility for the environment, but its report, which is part of the documentation, does not focus on Section 24 obligations and the Protocol. It, however, identifies its areas of responsibility and the general policies. One of these is a focus on co-operation with local authorities on issues of environmental health service delivery. Co-operation with local governments is identified as a problem that impedes realisation of goals.

The response of the Department of Local Government and Housing has provided a useful response that focuses on specific sections of the Constitution dealing with socio-economic rights, but Section 24 is omitted. The Department, however, mentions that the Development Facilitation Act, No. 67 of 1995 and the Environmental Conservation Act (and Amendments) Act No. 115 of 1962 are the laws that "assist" the Department. Note

should be made that with regard to the latter Act, the 1989 legislation (Act No. 73) is not referred to.

### ***7.3.2.2 Gauteng***

The response of the Gauteng Provincial Government to the Protocol is informed by a legal approach and demonstrates an understanding of the socio-economic rights obligations from the text of the Constitution as well as its judicial interpretation.

Like the Free State response, the focus covers other socio-economic rights provisions except Section 24. It appears that bits and pieces of environmental issues fall into different departments (e.g. Housing, Development Planning and Local Government, Health and Arts, Culture and Heritage). This means that no department has primary responsibility for Section 24. Clearly, the Protocol reproduces schedules 4 and 5 of the Constitution where "environment", "pollution control", etc. are included. The lack of focus on the environment in a province with serious mining, industrial and waste management environmental problems is problematic and should be addressed urgently.

### ***7.3.2.3 KwaZulu-Natal***

KwaZulu-Natal is a province with a long coastal line, industrial centres and natural resources that provide a context for different environmental challenges. The response to the Protocol is too general and does not focus on the key terms "respect", "protect", "promote", "fulfil" in so far as all the socio-economic rights provisions are concerned. The environment, and in particular Section 24, is not a focus at all.

The present and future plans include those focusing on tourism, rural services, housing etc. These are areas where clear environmental strategies are imperative.

### ***7.3.2.4 Mpumalanga***

Mpumalanga Provincial Government has a clear structure responsible for the environment - the Department of Environmental Affairs and Tourism.

The Provincial Department of Environmental Affairs and Tourism's (PDEAT) response is focused on environmental laws, policies and regulations and is useful. This demonstrates the difference it can make where a particular unit or department is specifically charged with responsibilities for Section 24, among others. The PDEAT's response, however, does not highlight Section 24. Instead its report deals with issues of education (Section 29) and then proceeds to focus on conservation and pollution control, as well as an accurate identification of national legislation that it uses in responding to a whole range of environmental issues.

The reports of the Agriculture Department, the Health Department and Local Government and Housing also have specific information on policies and activities that are relevant to the realisation of Section 24 rights. These, like that of the PDEAT, above, do not however systematically respond to the specific requirements of the Protocol with regard to Section 24.

Overall, the response of the Mpumalanga Provincial Government is encouraging and demonstrates that it intended to respond appropriately. With more interaction, the future responses should be expected to be more focused and systematic.

#### ***7.3.2.5 Northern Cape***

The response of the Northern Cape Provincial Government demonstrates a genuine attempt to gather the relevant information from all the departments. Of those received - Environmental Affairs, Development, Social Welfare and Health Department's response should have focused on Section 24. Its report, like that of the Department of Housing and Local Government, specifically refers to the terms "respect", "promote", "protect" and "fulfil" but in respect to Sections 26, 27 and 29 of the Bill of Rights. There is emphasis placed on welfare of children in the response. The key terms are well understood, but the lack of focus on the obligations under Section 24 is worrying. The response of the Department of Housing and Local Government mentions the Development Facilitation Act, 1995. There is, however, no explanation how this is used, and whether or not its provisions regarding the environment are highlighted in policy formulation, implementation plans, and the actual implementation.

The information provided by the Department of Transport refers to the policy to promote accessible physical and social environment - but without linking these to the requirements of Section 24. Similarly, the Department of Work's response refers to a plan to use building regulations to upgrade facilities for the Health Department but fails to link this to the specific obligations under Section 24.

Overall, the existence of a department or unit charged with environmental affairs is a positive sign. However, more information which is focused and systematic as per the Protocol ought to have been submitted.

#### ***7.3.2.6 Western Cape***

The Western Cape Provincial Government only sent a three page response from one department - the Department of Health. Nothing in the communication directly focuses on the requirements of Section 24.

### **7.3.3 Local Governments**

Only one local government reported back - The Greater Johannesburg Metropolitan Council.

#### ***7.3.3.1 Greater Johannesburg Metropolitan Council***

The nine-page response by the GJMC is quite to the point in terms of the meaning given to the key terms "respect", "protect", "promote and fulfil" and "responsibilities". The so-called "negative" and "positive" obligations on the State come out quite clearly.

The focus on the specific rights, like that of the responses from the provinces, relate to Sections 26, 27 and 29 but not Section 24. The response mentions the establishment of a Human Rights Information Centre within the Department of Constitutional, Human Rights and Legal Services. The Department promotes human rights through workshops,



literature, seminars and other delivery strategies. It has produced a book called *A Practical Guide to Human Rights in Local Government* and a *Pocket Guide of Councillors*. The book mentioned does cover issues relevant to Section 24, although a copy was not submitted with the report. The response further mentions the Development Facilitation Act (national) and its Urban Regeneration and Integration White Paper.

It is commendable that a local government is awake to the Constitutional and human rights responsibilities and is engaged in efforts to meet some of the obligations, including a reasonably focused, although not detailed, reporting as required under Section 184(3). This example ought to be emulated by other local authorities in the coming year

## 7.4 General Remarks

Although the environmental protocol identifies the following Departments as relevant organs of state: Environmental Affairs & Tourism, Labour, Health, Forestry & Water Affairs, only the Department of Environmental Affairs & Tourism responded specifically to the Protocol. No report was received from the Department of Labour (a report was, however, not asked from this department) and the Departments of Health & Water Affairs submitted reports, which dealt with the right to health & water respectively.

The Department of Environmental Affairs & Tourism's submission comprises a one page cover letter and twenty-five accompanying documents. The cover letter frankly indicates that because of time constraints "it was not possible to consult with other departments," except in so far as the information contained in the various documents may have been the product of "normal co-ordination and interaction between departments and provinces." Was the time given not realistic? At any rate, the DEAT's submission has not been informed by an adequate information-gathering process as expected in the "Explanatory Memorandum (Environment)", which accompanied the questionnaire which was sent to them.

The DEAT's submission is nonetheless quite systematic and has adhered to the nine-point Protocol.

## 8 Finance

### 8.1 Department's Understanding of its Obligations in Respect of Socio-Economic Rights

An important feature of the Bill of Rights is that many of the rights are interrelated and it is often difficult to delineate the rights and assign responsibility to specific state organs. It can also be stated that the human rights are inextricably interdependent. Resultantly, even when responsibilities are specifically assigned, high levels of co-operation and co-ordination are required between the relevant departments and between the relevant national, provincial and local levels of government if a comprehensive approach to the relevant rights are to be assured.

It should also be noted that the Department of Finance does not have an independently specified obligation in terms of the fulfilment of these rights, but rather an overarching

responsibility to ensure that these rights are taken into account and provided for when determining the annual and medium term budgets for the national economy.

It should therefore be noted that, in addition to the inputs provided by the Department of Finance, significant reference was also made to the following documentation:

- Department of Finance Budget Review 1998
- Department of Finance Budget Review 1997
- Medium Term Budget Policy Statement 1997

As has been stated previously, the rights outlined in the Bill of Rights are generally the responsibilities of the stated relevant departments, on national provincial and local levels and the Department of Finance's responsibility can be stated as the facilitation of the development of and how to implement government's fiscal policy particularly, with reference to the fulfilment of its obligations in terms of the rights, how revenue is divided between the spending authorities. Additional to this is how revenue is raised and how deficits are financed. It is important to mention that the Department of Finance is not responsible for delivering services to individuals, but rather plays a facilitating role in ensuring that, within the constraints of available resources, sufficient provision is made to the relevant departments, on both national and provincial level, so that said departments can allocate resources to fulfil their obligations to ensure delivery of the rights.

It is therefore not in the domain of the Department of Finance to provide official interpretations of concepts such as "*access to*", "*adequate*" and "*sufficient*". In general, however, the Department seeks to ensure that the financing of public resources promotes universal access to a full and balanced spectrum of services. This means that the concepts "*adequate*" and "*sufficient*" include reference to the relative cost, efficiency and effectiveness of public services in meeting social and economic needs.

The Department views the phrases "*progressive realisation*" and "*progressively available*" as recognition of the reality of limited resources and capacity which entails that time will be required to move towards comprehensive fulfilment of socio-economic rights. It also implies that socio-economic rights do not imply fixed levels of service provision but that standards that can be provided for will change over time because of, among other things, increasing resources and wealth available to society. It also implies a recognition that the State need to concentrate on the needs of the poor in the context of income inequality.

The Department has not interpreted the terms "*access to*", "*adequate*" and "*sufficient*". The definition of these terms is not considered to be the domain of the Department of Finance. It is thus unclear whether the Department does have a comprehensive understanding of these terms. These are rather regarded as the domain of the departments responsible for health, welfare and education, and other line functions.

It is, however, relevant that the *Budget Review 1998* (section) takes full cognisance of the socio-economic rights with specific reference to the obligations to respect, protect, promote and fulfil these rights. Whilst the inputs received from the Department do not therefore attempt to define these terms it is apparent that the Department does have a comprehensive understanding of these obligations.

In respect of the terms "*progressive realisation*" and "*progressively available*", the Department recognises that resources and capacity are limited and that time is required to fulfil these rights. It is clear that the Department has an adequate understanding of these terms. The interpretation of these terms may also be said to include that movement towards these rights must take place as quickly and effectively as possible.

The input from the Department does not provide any information on expenditure in respect of the environment, although it does deal comprehensively with the social services. It is worthwhile noting that budgetary commitment to environmental affairs remains comparatively small in view of the fact that protection of the environment is a basic human right, as defined in the Bill of Rights.

## 8.2 The Baseline provided for the Realisation of Socio-Economic Rights

The first feature regarding this issue is in respect of the "*relevant right*". Once again, it is noted that the Department of Finance does not have any specific obligation in terms of realising the rights of individuals. As such the question cannot be considered as relevant.

## 8.3 Information Systems to Monitor the Progressive Realisation of Socio-Economic Rights

The Department of Finance has reasonably made the assumption that data collection and its disaggregation is assumed to be the responsibility of the provinces and national departments. Furthermore, as the Department is not responsible for ensuring the realisation of the socio-economic rights, it cannot reasonably be expected that the Department measure the extent to which the rights are being realised.

The Department of Finance does, however, require considerable information resources in order to ensure that the budgets are capable, within the available resources, of meeting the basic needs of society in general. To this end, data is received from a number of public institutions, as was stated in the previous section by the Department.

The Department of Finance compiles fiscal data on a macro level in order to monitor public finance. This data can be classified as revenue (income) and expenditure data. Certain provincial data is available on expenditure, but it is useful to note that the budgetary process allows for national and provincial departments to develop their own budgets. Resultantly, expenditure data in accordance with race, gender and income level is not compiled by the Department.

It is, however, trite to suggest that this type of information is not taken into account in the compilation of annual budgets. The Department of Finance is responsible for allocating resources to the provinces and in order to comply with the principle of equitable distribution and to ensure that revenue is divided according to socio-economic need and demand for social basis, a formula has been devised which takes into account, where relevant, school children, woman, the elderly, the disabled, the poor and rural populations. This formula will be discussed further in the following section of this document.

As has already been stated, it is beyond the scope of the Department's responsibilities to monitor the progressive realisation of the socio-economic rights. It is relevant though that the Department has devised further means through which various bodies can contribute to the budget such as the Medium Term Budget. This allows stakeholders to provide inputs into future budgets in respect of their specific needs. It also allows the Department of Finance to glean the information necessary to determine whether future budgets will be capable of meeting the basic needs of society.

A further point worth mentioning is that the new intergovernmental fiscal system allows for decentralised budgeting. This has caused a separation between programming and funding and implies that accurate financial management information and effective expenditure control, procedures are often absent. Instituting a new fiscal framework with new institutions, rules and policy priorities has proved to be a demanding task and, because of backlogs and structural problems left by the past, has resulted in significant pressure on, particularly, welfare and education budgets. Identifying and addressing these problems have become priorities for, not only the Department of Finance, but also the Department of State Expenditure, the Budget Council and provincial treasuries.

#### 8.4 The Existence of a Coherent Plan or Policy to Address the Realisation of Socio-Economic Rights

The inputs received from the Department of Finance are clear and concise in terms of the laws currently being developed to give effect to various aspects of the Constitution and the rights contained therein. It should however be noted that little has been said about the other measures currently being adopted to improve/advance the realisation of the socio-economic rights.

For these purposes, one other Department of Finance initiative is worth mentioning. Although reference was made in the input from the Department, the following paragraphs provide further expansion of the Medium Term Expenditure Framework, one of the most significant advances made by the Department to date.

The MTEF is the initial spending estimate within which the more detailed 1999 Budget will be compiled. It will also serve as a basis for inputs into the 2000 and 2001 Budgets. Government departments must plan their spending programmes and accommodate proposed policy changes within this medium term expenditure envelope.

The MTEF is the outcome of a co-operative process, in which political office-bearers and officials of national and provincial departments have examined the expenditure implications of policy commitments, considered the options available for meeting these commitments and made sometimes difficult choices between competing priorities. The advice of the Financial and Fiscal Commission (FFC) has played a cardinal role, particularly in the evolution of provincial financing arrangements. Deliberations in the National Economic Development and Labour Council (NEDLAC) have contributed to the budget process. The work of the Parliamentary Portfolio Committee on Finance is crucial, both in its oversight of the integrity of the budget and in translating these proposals into law.

The 1998 Budget and the three-year MTEF estimates give effect to the following shared commitments:

- meeting the basic needs of the people;
- accelerating infrastructure development;
- laying the basis for sustained economic growth and job creation;
- developing our human resources;
- ensuring the safety and security of the citizen and the state; and
- transforming the organs of government to reflect the developmental and people-centred nature of our democratic state.

## 8.5 RECOMMENDATIONS

The national Department provided sufficient and, sometimes, pertinent inputs in terms of the information requested by the Commission. It is, however, acknowledged that the Department of Finance is not a department responsible for the realisation of individual rights and, as such, some of the questions posed proved to be inadequate to obtain the necessary information. The inputs were consequently somewhat cryptic.

It was also noted that no information was provided by provincial governments, which implies that progress on the budgetary reforms aimed at allocating resources to the provincial departments, could not be assessed.

It is suggested that brief summaries are provided of all the relevant laws, measures and initiatives and that these be provided to the Human Resources Commission in the report. It is noteworthy that the Department provided excellent summaries of two relevant items of legislation, i.e., the Intergovernmental Fiscal Relations Act and the Division of Revenue Bill.

It is suggested that some questions be asked more directly and some be discarded as much of the input received was unusable in terms of the brief. It is furthermore suggested that adequate inputs be obtained from the Provincial Governments and, possibly, responsible divisions within local government. Finally, it is suggested that the intentions of the Department, in terms of their final response to the protocol, be obtained before finalisation of the report to the Human Rights Commission.

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**ECONOMIC &  
SOCIAL RIGHTS REPORT**

**SANGOCO'S REPORT ON  
POVERTY AND HUMAN  
RIGHTS VOL V**

**1997-1998**

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# **SANGOCO's Report on Poverty and Human Rights**

*Written by Sandy Liebenberg and Karrisha Pillay, Social and Economic Rights Project, Community Law Centre, (University of the Western Cape)*

Through the Truth and Reconciliation Commission we've heard about the political and civil rights violations under apartheid. But what about the violations of social and economic rights? Understanding this legacy is critical to the success of strategies to eradicate poverty and inequality, and to secure a better life for South Africans.

Speak Out on Poverty aimed to provide a platform to both understand the legacy of social and economic right violations and the extent to which our new Bill of Rights in the Constitution addresses this legacy.

A joint initiative by the South African National NGO Coalition (SANGOCO), the South African Human Rights Commission (SAHRC) and the Commission on Gender Equality (CGE), Speak Out on Poverty provided a unique opportunity to listen to the experiences and opportunities of the poor.

Ten nation-wide hearings were held over 35 days from 31 March to 19 June. One of the social and economic rights was selected as the primary theme for seven of the hearings. The remaining three were non-thematic open hearings. Nearly 600 people made oral submissions and over 10 000 people participated in the process either by making written submissions, attending the hearings or mobilising others to participate.

*"We live in a society in which there are great disparities in wealth to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order."*<sup>1</sup> The inclusion of social and economic rights in the 1996 Constitution reflects the understanding that dignity, freedom and equality are not just about the absence of civil and political violations. Along with torture, killings, detentions without trial and censorship, violations of human rights in South Africa also consisted of mass forced removals, racially restricted 'group areas' and a denial of equal access to education, health care services and social security. Laws and policies in these areas have left a legacy of deep poverty and inequality in South Africa today.

The equal status of all human rights in the Bill of Rights is recognition that formal civil and political freedoms on their own, will not lead to an improvement in people's quality of life.

The economic and social rights recognised in our Bill of Rights relate to labour relations, the environment, access to land, housing, health care, food and water, social security and education. In addition, South Africa has ratified certain international human rights treaties that also recognise economic and social rights. These include:

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<sup>1</sup> Judge Arthur Chaskalson, President of the Constitutional Court in *Soobramoney v Minister of Health, KwaZulu-Natal* 1997(12) BCLR 1696 (CC), paras. 8 - 9.

the *Convention on the Elimination of All Forms of Discrimination against Women*, 1979 [CEDAW], the *Convention on the Rights of the Child*, 1989, and the *African Charter on Human and Peoples' Rights*. Furthermore, the government has announced that it will shortly ratify the major international treaty protecting economic, social and cultural rights - the *International Covenant on Economic, Social and Cultural Rights*, 1966. It is also due to ratify the *Convention on the Elimination of All Forms of Racial Discrimination*, 1966.

By their very nature, economic and social rights imply that conditions of poverty and deprivation will be eliminated, and basic human needs will be satisfied. By recognising these rights, the eradication of poverty becomes not merely a policy choice for the State, but a legally binding responsibility for which it is accountable. There are various ways in which accountability can be demanded from the State for the realisation of these rights. These include: monitoring policy and parliamentary processes, lobbying and advocacy, political pressure, interventions by the South African Human Rights Commission and the Commission of Gender Equality, and court applications.

Like civil and political rights, a court can enforce economic and social rights. The Constitution provides another important mechanism for monitoring the fulfilment of economic and social rights. Every year, the South African Human Rights Commission requires relevant organs of the State to provide it with information on the measures they have taken towards the realisation of these rights [section 184(3)]. The Commission has announced that it will compile a comprehensive report, analysing and assessing the information it has received from relevant government departments and incorporating information received from civil society. The report will be tabled in Parliament. This mechanism provides an important opportunity, for participation by civil society, in the monitoring of economic and social rights. In addition, the Commission of Gender Equality has a broad mandate to monitor, investigate, research and lobby on issues concerning gender equality. This includes women's full and equal enjoyment of economic and social rights.

The Constitution requires the State to "respect, protect, promote and fulfil the rights in the Bill of Rights." In the context of socio-economic rights, this means that it must not deprive people of their rights, make it difficult for them to gain access to the rights, or discriminate unfairly against people. In addition, it must take reasonable measures to improve and advance access to decent housing, clean water and so on, by everyone.

The measures to be adopted include legislation, policies, financial, administrative, educational and social measures. Both under the Constitution, and international human rights law, the primary duty of the State is to create an enabling environment. This environment should make it possible for people to gain access to economic and social rights through their own efforts and initiatives. This requires that it remove those barriers that stand in the way of people gaining and enjoying access to the rights. In the case of groups who are particularly vulnerable and disadvantaged, the State has a special duty to assist them to gain access to these rights. These include, for example: rural women, persons living with disabilities or chronic illnesses, poor children, and elderly persons. The State should ensure that everyone at least has access to basic levels of economic and social rights necessary to sustain human life, health and dignity. This is what the UN Committee on Economic, Social and Cultural

Rights refers to as the “minimum core obligation” of States. The fulfilment of this core duty should have a priority claim on the State’s resources.

The Poverty Hearings provide a platform for poor people in South Africa to share their perspectives on what economic and social rights mean for them, the obstacles and difficulties they experience in gaining access to these rights, their suggestions for overcoming these obstacles, and the role of government in promoting their rights. The hearings also allow us to identify the gaps between constitutional rights, laws and policies on the one hand, and people’s lived realities and experiences on the other. The challenge facing human rights activists in South Africa today, is to transform the economic and social rights in the Constitution into tools of empowerment and mobilisation in the hands of the poor.

## **Methodology**

The report will focus on the following socio-economic rights in the Bill of Rights: access to land, housing, health care, food, water, social security, education and environmental rights. The following issues are examined in the context of each right:

- a) An overview of the relevant constitutional provisions and the measures adopted by government to give effect to the right;
- b) Violations of the right under apartheid, and their current impact on the poor;
- c) People’s understanding of their rights, and how they can enforce them;
- d) The main obstacles experienced by poor communities in gaining access to the right;
- e) The role of government in promoting the right.

Access to jobs emerged as a strong theme. We have therefore included a section on labour rights. Several submitters mentioned the impact of economic constraints, and the macro-economic policy, on the realisation of economic and social rights in South Africa, a section has also been included.

We have focused on the testimony and submissions presented at the hearings by poor people and the organisations that work closely with them as a basis for our reflections and conclusions.

### **1. ACCESS TO LAND AND RURAL DEVELOPMENT**

- a) An overview of the relevant constitutional provisions and the measures adopted by government to give effect to the right

Land and rural development were predominant themes of the hearings in the Northern Province. They also emerged at other hearings - particularly in the North West Province, Mpumalanga and KwaZulu Natal.

The Constitution makes provision for the following in relation to land:

- The duty of the State to take “*reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*”;
- the right to tenure security or comparable redress through an Act of Parliament for persons or communities whose tenure is legally insecure as a result of past racially discriminatory laws or practices;
- The right of persons or communities dispossessed of property after 19 June 1913, as a result of past racially discriminatory laws or practices, to restitution of their property, or to equitable redress through an Act of Parliament.

The Constitution also expressly provides that the property rights, protected in the Constitution, may not prevent the State from taking legislative and other measures to achieve land, water and related reform to redress past racial discrimination, provided that these measures are reasonable and justifiable. [See section 25(5) - (9)] In addition Section 24 of the Constitution requires the State to take reasonable measures to secure ecologically sustainable development.

The government’s land reform programme has three main elements: restitution, redistribution and tenure. A number of pieces of legislation have been enacted to give effect to people’s land rights. These include: the *Restitution of Land Rights Act, 22 of 1994*, the *Upgrading of Land Tenure Rights Act, 112 of 1991*, the *Development Facilitation Act, 67 of 1995*, *Land Reform (Labour Tenants) Act, 3 of 1996*, the *Communal Property Associations Act, 28 of 1996*, the *Extension of Security of Tenure Act, 62 of 1997*. Through its Land Distribution Programme, the government provides a Settlement/Land Acquisition Grant, to a maximum of R15 000 per household, for the purchase of land directly from willing sellers (including the State)

#### b) Past violations of land rights, and their current impact on the poor

The dispossession of black people from land in South Africa initially took place at the hands of white colonisers, and through legislation such as the *Native Land Act, 1913*. Black people were forced off their land and made to resettle in over-crowded reserves. These became pools of cheap migrant labour for white-owned farms and mines. Under apartheid, an estimated 3.5 million people were removed from rural and urban areas between 1960 and 1980, often without compensation. Influx control legislation, which was only abolished in the mid-1980’s, prevented black people from acquiring permanent land rights in urban areas. In the Bantustans, infrastructure development was rudimentary, and the livelihood of rural people undermined through the government’s policy of ‘Betterment planning.’

Dispossession forced successful black farmers to seek employment as farm labourers thus converting them into insecure land occupiers and tenants. Large scale commercial farmers monopolise fertile land. Joseph Mokgalabie described this in his written submission: “*It is even reflecting now, because the area of land occupied by whites is fertile when coming to agriculture. Whites were commercial farmers and blacks were tenants, which means it was the issue of landlord against landless.*”

The migrant labour system resulted in a large number of women-headed households in the rural areas, most of which are impoverished. The White Paper on South African Land Policy estimates that “*three-quarters of the children in rural areas are in*

*households living below the minimum acceptable subsistence level.”* (p.11). The migrant labour system also led to the break-up of families and traditional community support structures.

Many people raised harassment, as a result of apartheid land policies, as a serious problem. As Mmanoko Evelyn Makgai testifying in the Northern Province explains: *“Our cattle were grazing all over the area [farm] and life was very wonderful then. Then we were stopped from ploughing back around 1967/8 and our cattle were restricted to a minimal number. Now they say that we have to leave the farm. These white people made our lives a mess.”*

Jasper Cloete of Spegrivier, Namakwaland described how as a child he was sold by his grandfather to work for a farmer for a year for *“’n bondel twak en 10 sjielings...Dit was slawerny.”* (a bundle of tobacco and 10 shillings..It was slavery). Magrieta Engelbrecht of Garies, Namakwaland recounted how her son had to buy her out of bonded labour to a farmer for 20 shillings because she was in debt to him.

Many of the submissions highlighted the link between past land policies and the impoverishment of black people in rural areas. The forced removals precipitated a spiral of tenure insecurity, loss of educational opportunities and poverty. In the words of Joseph Mashia, *“We tried to develop an area to grow things. The government disallowed access...We discovered we were victims of apartheid. We had no say where we reside. And that brings us to this situation of poverty now.”*

Zukwa Madlala, Chairperson of the Forum representing farm workers in Mplendle, KwaZulu-Natal, testified about the on-going impact of land dispossession and violence on communities: *“We have tried to talk about our rights to land, but what we have tried has not yet succeeded. Other families, due to a lack of land, have been removed by those in power who have been reinforcing apartheid. Other families have been destroyed by violence. Up until now many people are just squatting around the city. It’s difficult to reconstruct those families and those houses.”*

### c) People’s understanding of their land rights, and how they can enforce them

Persons who were part of an organised community claiming restitution of their land, demonstrated a better understanding of their rights. However, certain submissions indicated that people were either not aware of their right to claim restitution or were relying on traditional leaders to lodge claims with the Land Claims Commission on behalf of the community. Julia Kotelo explains: *“We have not made a claim to the Land Claims Court because we thought the chief represents us and claims on our behalf. But we are worried because we heard .... The place was sold.”*

The testimonies also strongly suggest that farm workers, as a group, are generally unaware of their new legal rights. Lennox Vusumzi Mange, representing the Bedford community at the Grahamstown hearings, said that most farm workers were illiterate and *“don’t know their basic human rights. They work long hours, do not receive UIF. Sometimes they do not have contracts and are not paid. They are evicted without alternative accommodation. Just chucked out. People are ignorant so they just move... Bedford is a place of slavery.”*

Although some of the submissions did describe people's experiences, in trying to access the Settlement/Land Acquisition grant, it is not clear whether there is widespread knowledge of the Department of Land Affairs grant.

d) The main obstacles experienced by the poor in gaining and enjoying access to land

#### ***Legal and administrative obstacles***

The inability to acquire a secure right to land was identified as a major constraint. In their written submission the National Land Committee (NLC) pointed out that the restitution process was experiencing "*a crisis of delivery*" for a number of reasons. These include its legal and bureaucratic approach, and the extreme slowness of the process. The NLC point out that, to date, only 8 claims have been finalised with 85% of the total claims received being from urban areas. The NLC believes that there has been "*no effective communication campaign to communicate the rights of potential restitution beneficiaries.*" Petrus Bahumi, the vice-chairperson of the Bethany community described how the removal of the community to Thabanchu in 1965 devastated the community, "*resulting in a loss of lives, possessions, livestock, and job opportunities.*" The community organised to claim their land back, and submitted a restitution application in September 1995. The process has been protracted, and they are still attempting to settle their claim through negotiations with the present owner: "*It has gone on until today, taking us up and down...Maybe one day we will be able to sign for us to go back to our home.*"

The NLC also claims that the redistribution programme, which is predicated on market mechanisms, will not result in an equitable distribution of land in South Africa. Even State land has to be purchased. The Lydenburg Rural Council identified a number of obstacles, which prevented it from facilitating access to land and installing basic service infrastructure for farm-dwellers. It claimed that: "*The willing buyer - willing seller Act passed by the democratic government prohibits the Lydenburg Rural Municipality to reclaim any farm for its landless subjects.*"

The NLC identifies the property clause in the Constitution as a major obstacle, inhibiting the State from embarking on any thorough land reform strategy. It also appears that communal property associations (CPAs), which were intended to facilitate access to land have not been formed and registered quickly enough. According to a written submission by the Centre for Applied Legal Studies(CALS), only 98 CPA's had been registered throughout the country by the end of May 1998.

In his testimony, at the Free State hearings, Joseph Modise ,of the South African Small and Medium Enterprise Development Initiative (SASMEDI), described how a group of aspirant farmers, in his community, applied to the Department of Land Affairs for land acquisition grants. Officials lack of clear guidance on how to complete the application forms for the grant, combined with conflicting messages regarding the criteria for accessing the grant, led to divisions and frustrations. As a result some members of the organisation withdrew.

Sophie Coetzee of Mier described how a court case, initiated by the "boereunie" (Farmers' Union), was obstructing efforts to achieve a final settlement of the land

claim: "...[R]ight now no development is taking place; money is not being invested there because of the confusion around the court case, and our people are suffering because of this." She also identified conflicting strategies within the community as a problem. Finally tension between the Coloured community and the San people, who are also claiming land in the area, is yet another obstacle to achieving a fair division of limited land resources.

### ***Lack of access to services and infrastructure***

At the hearings there was a strong feeling that access to land alone is insufficient. In order for access and control over land to be productive and sustainable, it must be accompanied by a range of other services and infrastructure. These include agricultural extension services, lowering the price of agricultural inputs, access to credit for agricultural infrastructure (for example, irrigation schemes), access to markets, water, roads, electricity and training. At the Free State hearings, Adam Dichaba said: "*We are asking government that they can support us in our farming because we have got the land, but we don't have the facilities.*"

Epang Natolweni, representing Mphatlalatsane Development Agency in the Northern Cape, echoed this. He applauded that the people of Hartdrif and Smitsdrif have had their land restored to them. He complained that these communities have had to "*start from scratch*". They have not been given the necessary financial support by government: "*It is not enough to say we have restored the land to the rightful owners when we do not assist them to live on it.*" The province has many emerging or subsistence farmers: "*Structures set up to support small farmers have collapsed and they are in dire straits. Government is obviously favouring the established commercial farmers at the expense of the small farmers,*" Natolweni went on to say.

### ***Racist attitudes***

Isaac Doktor of Victoria West claimed that communities in the Northern Cape were experiencing "*the problem of the reactionary 'grond hervolking' (land redistribution) phenomenon, where the ideal is for no blacks to be allowed on the land at all, and small businesses are not allowed to be owned.*" He said that farm workers were particularly insecure because they tended to be evicted when farms changed ownership: "*This is precisely the Oranje ideal - to do away with the farm workers.*"

### ***Forced evictions and conditions of life and work on the farms***

The high prevalence of forced evictions of farm-dwellers and labour tenants is clearly an issue of deep and on-going concern. Many of the submissions highlighted the insecurity of farm housing, as eviction from the farm inevitably follows dismissal. Maria Mooko testified that she had worked on a farm for 29 years when she was evicted: "*I was told that he [the farmer] did not want to hear my children on the farm.*"

There were also tales of the eviction of elderly or ill people from farms who were no longer able to work. After the eviction, labour tenants and farm workers are often dumped along the side of the road or in inhospitable settlements. The NLC tells of the eviction of 33 families from a farm where some of them had lived even before the

latest owner was born. The farmer demolished their houses and crops and impounded their livestock. They were dumped in the middle of the night in an informal settlement called Daggakraal, a wetland, which is neither appropriate for grazing nor for residential purposes. They missed the cut-off date for applying for reinstatement, and are presently destitute.

Cut off from their homes and sources of livelihood, farm-dwellers “*live like nomads*” according to the Rural Council of Lydenburg. They claim that magistrates ignore recent labour legislation such as the Labour Tenants Act and the Extension of Security of Tenure Act. They allegedly use “*outdated legislation of the old apartheid regime*” to assist the white Lydenburg landowners. Farm workers also face the obstacles of legal costs, the transport costs caused by frequent postponements of cases, and even negative attitudes from local attorneys.

Conditions on the farms were also a frequent subject at the hearings. According to the Lydenburg Rural Council: “*Labour laws are not applicable on the farms of Lydenburg. The farmers prohibit their employees to join unions.*” There were also accounts of children being dragged out of schools, by farmers, to work on the farms. There were similar stories of pensioners being forced to work. Timothy Motau testified at the Mpumalanga hearings on behalf of the South African Farm Dwellers Union (SAFDU). He referred to the case of Sonny Boy, a worker on a farm, “*who was tortured and assaulted then... set alight*” after losing a pair of pliers. In his statement, at the Northern Province hearings, Elias Tholo told of “*working on Mr Venter’s farm since I was a young boy with the system of working on week for money and one week without pay.*” The Lydenburg Rural Council attributed the low wages paid to farm workers to: “*unlawful migrant labourers on the farms from Mozambique and Zimbabwe who accepted without complaint low wages and even being unpaid at times.*”

The Council made an impassioned plea for concerted efforts to improve the lack of basic services and social infrastructure for farm-dwellers: “*People do not have secondary schools, churches, community halls, theatres, sports grounds, parks, libraries, clinics etc. on the Lydenburg farms...It is unacceptable to realise a lack of basic services and social infrastructure is a common phenomenon throughout 95% of the farms in South Africa.*”

Albert Mahladisa complained of his lack of time for a family life. He is forced to work on the farm “*from seven in the morning to five in the afternoon, six to seven days per week*” and gets R480 per month. His boss threatened to cut his pay if he did not report for work on Sundays. There were accounts (particularly at the Northern Cape hearings) of farmers beating their labourers, including children, at the least provocation.

There were also accounts of discrimination and lack of respect for farm workers by other service-providers and the broader community. In the words of Timothy Motau: “*The mobile clinics do not take care of us. They say we are dirty. But the farm dwellers do not have soap. But they should be taken as human beings. They must be accepted.*” Isaac Doktor identified the lack of representation of farm workers on district councils as the main problem.



## **Gender**

The submission by the Rural Consultative Forum highlights the impact of migrant labour on rural women. They bear the brunt of rural survival strategies. When migrants take a second wife in urban areas, it often creates additional difficulties - like competition between the two wives for the migrants pension benefits. Often it is the wife in the rural areas that has to bear her husband's burial costs. Women also have to bear the responsibility of caring for children and elderly relatives while also doing the bulk of manual work for cultivation.

Most rural women do not have access to land in their own names, but through a male relative. Some testified that traditional leaders obstructed women's access to land. Pauline Machai from the Northern Province reported she was not even allocated a small piece of land by the chief "*where I can grow some vegetables.*" According to the Centre for Applied Legal Studies (CALs): "*There seems to be no policy on promoting independent ownership of land - for residential, agriculture, mining or industrial use - by women.*"

### ***The special obstacles experienced by persons with disabilities***

In their submission, to the Northern Province hearings, the Disabled People of South Africa (DPSA) highlighted the difficulties experienced by persons with disabilities in gaining access to land: "*When trying to access land as a disabled adult, we are usually told that our father, or a child who has reached the age of 21, or another senior member needs to sign for us i.e. the land will belong to them.*" The underlying assumption is that disabled people are unable to use the land effectively. Accordingly, many eldest children who are disabled are denied their inheritance rights to land or a home from their parents.

Agricultural extension programmes were generally not tailored for persons with disabilities: "*We are often told that they do not work with people with disabilities, and that we need to go to the hospital or social workers office as these people know better.*" Poor roads and public transport infrastructure in rural areas also impact disproportionately on persons with disabilities, restricting them to their homes.

### **(e) The role of government in promoting the right**

It emerged from the hearings that most people believed that government had a responsibility to assist them in gaining access to land, extension services, basic social services and infrastructure. However, the mechanisms of obtaining assistance were not always clear to people. In the words of Paulina Machai: "*It is not clear to me who gets assistance from the government and how...We need land that we and our children will be able to survive on. We need land to produce our own food to be able to survive.*" According to Joseph Mashia speaking at the Mpumalanga hearings, "*we can chase away starvation if the government supports people through projects. We need our own land for our own crops. With a lack of information and procedures to follow we fail to get assistance.*" Simon Msiza wanted assistance to obtain a loan from the bank to buy a farm. Lydia Nhlahla believed that the government should assist with tractors and money "*so that we can go on with our farming.*"

Pholoshlo Malatju, speaking at the Northern Province hearings, believes there is a need for special programmes directed at women: *“I think women in rural areas must be allocated land to grow fruits and vegetables because I met many women at the dumping site looking for something to eat.”* Mmamoketwa, also from the Northern Province, told of living with the fear of being evicted from the farm where she and her seven children and five grandchildren are staying. As female head of her household, she works at the farm house of the farm, earning R250 per month: *“I just wish to have land of my own where I will be able to plough and keep livestock and if the government can increase that money [a grant for the support of her children] to the original amount, I think life might be better.”*

There is clearly an on-going need to ensure the effective implementation of legislation designed to protect the labour rights and security of tenure of rural dwellers. As the Rural Council of Lydenburg said: *“The Bill of Rights, section two of the Constitution must be followed and must be implemented so that the poverty status of the blacks can be improved...Poverty on these farms could disappear gradually if provincial and national governments could intervene and see to it, that justice takes its course on the farms.”*

Epang Natolweni had a similar view: *“We have got excellent new laws and ordinances, but we want them to be put into effect so that they are not just paper. The Development Facilitation Act, the Extension of Security of Tenure Act - these only exist on paper. Its like inventing a ship where there is no ocean for it to sail.”*

## 2. THE RIGHT TO SUFFICIENT FOOD AND WATER

### (a) Overview of the relevant constitutional provisions and the measures adopted by government to give effect to the rights

Food and water rights were not dealt with as a specific theme at any hearing, but the issues relating to these rights emerged in all the hearings.

Section 27(1)(b) of the Constitution gives everyone *“the right to have access to sufficient food and water.”* In terms of section 27(2), the State *“must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation”* of this right. In addition, every child has the right to basic nutrition [section 28(1)(c)].

The Department of Water Affairs has pioneered two important pieces of legislation designed to give effect to the right to water. They are the *Water Services Act, 108 of 1997* and the *National Water Act, 1998*. The *Water Services Act* makes provision for an institutional framework for the delivery of water supplies and sanitation. It explicitly recognises *“the right of access to basic water supply and basic sanitation necessary to secure sufficient water and an environment not harmful to health or well-being.”* (section 2). The minimum standard of water supply will be defined in regulations. *The White Paper on Water Policy* (30 April 1997), has adopted 25 litres of water per person per day, within 200 metres of a person’s dwelling, as a minimum standard. It makes provision for a life-line or social tariff in terms of which the capital

cost of the provision of the 25 litres of water is subsidised. Communities are, however, expected to pay the operation and maintenance costs of this basic supply.

The *National Water Act* effects a fundamental change to the current water law, by replacing the system of private ownership of water rights with a licensing system. The national government is given the role of “*public trustee*” of the nation’s water resources to ensure the sustainable and equitable use, management and conservation of water resources.

#### (b) Violations of the right to water under apartheid, and their current impact on the poor

The old water law, which is to be replaced by the *National Water Act*, gives private landowners extensive rights to water resources that are located on or adjacent to their land. Water rights are therefore directly tied to land ownership. Given the historical dispossession of black people from their land, these laws have perpetuated the privileged access enjoyed by white landowners to the country’s water resources.

- large scale irrigation on commercial farms accounts for over ½ the nations water resources; [I got this from Mail & Guardian article - not sure if this is reliable enough source? Consider replacing with the estimated collection time of 4 hours for women to collect water
- between 12 and 14 million people are without access to safe water;
- over 20 million people are without access to adequate sanitation.

Women and children are disproportionately affected by the lack of access to basic water services. Rural women spend more than 4 hours a day collecting water and wood for fuel, and thousands of children die annually of avoidable diseases related to poor sanitation and the lack of clean water.

Julia Kotelo expressed her feelings about the inequitable distribution of water services at the Mpumalanga hearings: “*Loskop has water, but not for us. It is only 10km away, but the water passes us. It goes to Groblersdal and Marble Hall. They are 85km away, but we have no access. The problems are caused by the lack of water. It is made for whites only. We want access to it. For irrigation. To look after our children through water. We do not want the water taken out of Loskop.*”

#### c) People's understanding of their rights, and how they can enforce them

The general trend of organisations having a better understanding of water and food rights than poor individuals persisted. The Rural Development Services Network provided a written paper for the hearings in the Northern Province. They note that water is “*a basic right,*” but that people have to pay even for the first 25 litres of water. The Network argues for a “*free 50 litres per person per day which is just below the world standard of 60 litres per person per day.*” (p. 13). A similar position is adopted by the Rural Consultative Forum.

d) The main obstacles experienced by the poor in gaining access to water and food

### ***Inadequate infrastructure and services***

The Rural Development Services Network described the difficulties faced by Mr Mhlangu and his family in collecting sufficient water for their domestic needs. They are generally forced to cross a freeway to collect water from a standpipe. Collecting water directly from a spring in the vicinity makes them sick. *“Even the borehole that is in the neighbourhood is always full of people. If we want to get water from this borehole, we end up queuing the whole day and at the same time we are not guaranteed that we will go home with water...We leave this place at six in the morning and return at eleven midmorning.”* They also have to cross the freeway to go to the bush toilet: *“We are in danger of being hit by a car when we cross the road. We are also in danger of being bitten by snakes while using the bush toilet.”* (pp. 11 - 12).

People associated their lack of access to water with an inability to meet their basic needs. The failure of many small self-help projects (e.g. gardening, small-scale chicken farming etc.) was also largely attributed to a lack of a reliable water supply. Water and infrastructure for irrigation purposes were identified as key needs.

### ***Unreliable and inadequate services and infrastructure***

Even when services and infrastructure do exist, people complained that they failed to deliver a reliable supply of clean water for a number of reasons. Lennox Fakude, of the Eco Plan Environmental Club in Hazyview, Mpumalanga, said that pipes were installed in his community: *“...but they don’t work. When the water sometimes comes, it is dirty. We approached the chief. He said the same [as the local authority] - they are working on the dam. But there is no progress.”*

Often the communities are unable to afford the costs of maintaining pumps and boreholes, or lack the skills to do so. Chayisa Motokwa of Phalaborwa said, that although they had stand pipes in the area, *“sometimes they dry-up for a long period. Even when the water comes - it is dirty.”* At the KwaZulu Natal hearings, Mlande Tokwe, of Zozo Village, complained about a lack of responsiveness from the Department of Water Affairs [DWAF] to their problem of burst pipes: *“So much so, that people who have telephones pay exorbitant fees because we ask them all the time to phone to ask them DWAF officials] to come look into the issue.”* He said that it was the community’s third month without access to piped water, and they were going back to using *“unhealthy water.”*

### ***Affordability***

Many of those who testified identified the costs of water supplies as a serious problem. *“Water is too expensive for poor people. Masakhane says we must pay for electricity and water. That is impossible if we are unemployed,”* said Magome RSA at the North West hearings. Tolwe Stokman of Grahamstown told the hearings in the Eastern Cape, *“...rates are rising, especially water. I gave up. My arrears are becoming larger and larger.”*

### ***Pollution and poor quality of water supplies***

Poor health was closely associated with the lack of access to clean water. Constance Mbele of the Rural Consultative Forum, South Coast, told the hearings that people were suffering from dysentery and cholera as a result of drinking water directly from rivers. Josiah Magula complained, at the Mpumalanga hearings, about the pollution of the river in his community. Chemicals from the local factory run down to the river. People's health was also affected by inadequate sanitation. Ipuphele Edu-Care described, at the Gauteng hearings, the unhealthy conditions caused by the bucket system of toilets. These include three households sharing one toilet, cleaning which only occurred once in two weeks, and the collapse of toilets when it rained. According to Hleziphi Banda, of the Titkimbi community in KwaZulu-Natal, polluted water supplies and lack of sanitation facilities are major problems. Sugar cane fields surround the small stream from which people get their water. Chemicals sprayed on the sugar cane, and people going to the toilet in the fields pollute the water.

### ***Gender and disadvantaged groups***

A number of persons described the long hours spent by rural women collecting and carting water either from communal taps or directly from streams and rivers. Hleziphi Banda also testified that women who went to collect water from the stream were frequently raped. Jabu Ntuli, of the Self-Employed Women's Union (SEWU) in KwaZulu-Natal, described the dangers involved in collecting water from the river: *"We find that many ladies have lost their limbs because of crocodiles while they are trying to fend for their children... When trying to fetch water, you have to put a string on the bucket and throw it there to avoid an attack from the crocodile."* Long cartage distances also pose particular difficulties for elderly people and persons with disabilities. Several women also spoke about their fears of being raped on route to remote water supplies.

### ***Local Government and traditional authorities***

At the Northern Province hearings, Casperina Mashamaite described the obstacles posed by local government structures and traditional authorities in gaining access to water in Skoongesicht: *"We have problems with local government regarding water. They told us to approach the king. There is always discrimination and they say we have to wait... Even water, we are going up and down and then the committee tell us to go to the king where they approve it. Before they help, they want you to pay first. We are on the waiting list."*

### ***Food security***

Many people who testified at the rural hearing also drew a link between their lack of access to land and water, and food insecurity. Wilson Mhana told the hearings in the North West Province: *"People are starving. There is no work and no water. The gardens fail, and people eat rotten vegetables. I teach cooking and nutrition in adult schools. But people are too poor to buy fresh food."* Louise Mnisi Mabuza told the Mpumalanga hearings: *"The police and communities come to complain about starvation. I find people who have had no food for a week. Just water. What to do? The local authorities should extend the areas for growing vegetables."*

Many people also highlighted the critical role played by pensions and other social grants in feeding families. The absence of school feeding schemes in certain areas, or the limited nature of the schemes, has a detrimental impact on the right of children to basic nutrition. Nombeko Qeja, of the Eastern Cape, described his battle to find sources of food for his young grandchild: *“The clinic only provides medicine, not food. In school – only the sub-A’s and sub-B’s get food. That’s what makes my child faint. He sees others eat and he has nothing to eat.”*

The link between proper nutrition and education was also highlighted in the testimony of Lydia Monoale at the Free State hearings. She described how she and her siblings were unable to *“listen in class because we were always hungry.”* Michael Phungula of Ndumakazi Health Care Project in KwaZulu-Natal described the nutrition project they initiated for children in the age-group 0 – 11 years when it was discovered that the majority of children were anaemic. A lack of information in the community about nutritional principles was identified as a key issue. They drew on the experience of this project to disseminate information to the community about proper nutrition and to encourage them to grow vegetables.

Sipho Khuzwayo representing Operation Hunger in KwaZulu-Natal confirmed that there is starvation and malnutrition in the rural areas. They try to introduce programmes *“for communities to function without expecting help from outside. They grow their own gardens, and they can sell some of it.”*

#### (a) The role of government in promoting the rights to food and water

People who testified clearly regarded government, particularly local government, as having a duty to ensure access to clean, reliable and affordable water supplies by communities. Government also has a key role to play in facilitating food security, and in giving effect to the right of children to basic nutrition through accessible programmes. Most people were aware of their role in providing for their basic needs through farming or self-help projects etc. However they pointed out that to be successful these initiatives depended on access to decent water supplies and infrastructure.

### 3. THE RIGHT OF ACCESS TO ADEQUATE HOUSING

#### (a) Relevant constitutional provisions and the main measures adopted by government to give effect to the right to housing

The Poverty Hearings that took place in the Western Cape focused on housing, a theme that also featured in other provinces.

Section 26(1) of the Constitution gives everyone the right to have access to adequate housing. Section 26(2) places a duty on the State to take *“reasonable legislative and other measures, within its available resources,”* to progressively realise the right. In addition no one may be evicted from their home, or have their home demolished, without a court order made after all the relevant circumstances have been considered [section 26 (3)]. The section further prohibits any legislation that permits arbitrary

evictions. The Constitution also gives every child the right to shelter in section 28(1)(c). Finally, section 35(2)(e) provides for the right to adequate accommodation for detained and sentenced persons.

The constitutional right of access to adequate housing clearly does not oblige the government to provide free housing to everyone on demand. Instead, the government is obliged to create an enabling environment for people to access this right. The housing subsidy scheme is the cornerstone of government's initiatives to assist people in this regard. Housing subsidies, of varying amounts (with an upper-most limit of R17000), are available to those who qualify. Individual income levels determine the amount that an individual may receive for a housing subsidy. Should the subsidy amount be inadequate, the individual is responsible for any additional costs.

The Department of Housing has also established the Mortgage Indemnity Fund to promote lending patterns by the private sector to poor communities. Finally, the *Prevention of Illegal Evictions from and the Unlawful Occupation of Land Act 19 of 1998* was recently passed. The Act prohibits unlawful evictions and establishes fair procedures for the eviction of unlawful occupiers.

The Constitution provides for a right of access to *adequate* housing. International law has made reference to a number of factors that should be taken into account when defining the adequacy of housing. Many of these were referred to by the participants in the hearings namely: legal security of tenure, the availability of services, materials and infrastructure (such as clean drinking water, energy for cooking, heating, lighting, sanitation, washing facilities and refuse disposal). Affordable housing, habitable housing (housing that offers protection against severe weather or disease vectors and ensures the safety of the inhabitants), location (to allow easy access to all amenities), as well as culturally adequate housing were also regarded as important.

#### (b) Violations of the right to adequate housing under apartheid and their current impact on the poor

The current housing situation in the country is a result of past policies, and participants frequently referred to the effects of the *Group Areas Act 36 of 1966* on people's housing rights. People spoke about being evicted from their homes without any form of compensation, and being relocated to remote, racially defined group areas that often deprived them of work, educational opportunities, etc. Mxolisi Dada commenting at the Free State Hearings said: "*Now those laws no longer exist, but their effects are still working until now.*"

The pass laws were particularly detrimental as they affected people's ability to earn a living and to secure basic needs like housing. As Nowethu Ngwane explained: "*Later, I was told I could not work because I had no pass.*"

Violence, during the apartheid era and more recently, has resulted in many homes being destroyed or burnt down. The type of housing that many people construct due to financial constraints often has a higher risk of being destroyed. Freddie Arries commented: "*We should get away from the wooden houses which burn easily.*" Finally, the psychological impact of apartheid further limits people's capacity to gain

access to housing. In the words of Jerry Elridge: *“Apartheid let us think we are no good. We have that mind set. So we don’t even try.”*

c) People’s understanding of their housing rights and how they can enforce them

Most people understood that the right of access to adequate housing imposed a duty on government to facilitate the release of land for housing purposes. At the Gauteng Hearings, Benedicta Mahlangu spoke of the laudable initiatives of the Homeless People’s Federation and People’s Dialogue in empowering people and working together to build houses. She spoke of sharing skills and involving the community in the process of building houses. She said: *“We are also asking for the subsidy for people who are still looking for land - and that is very important .because we cannot build without land.”* Once land is obtained, legal security of tenure and the stopping of arbitrary evictions were the calls of participants.

Related to the adequacy of the housing, people referred to services such as water and sanitation, the size of the housing, the lack of privacy as well as the extremely unhygienic environments in which they were situated. Lucy Dyakala said: *“Five to six families are living in three-roomed houses, consisting of a kitchen and two bedrooms. Daughters and sons sleep together. Married couples and children in the same room. TB, the whole family gets it. Streets are dirty, there are holes and it is unhealthy. Children must go to clinics everyday for a rash or something. The houses are dirty and there are no inspectors to look and do something. We have been complaining for years. We are crying for houses.”* Vuyani Ncamaza reiterated the point: *“They are hokkies, pondokkies. They are not houses. I know a house but these are pigsties. But people take them.”* The point was supported by James Mantalna who described government houses as: *“Not plastered. One electricity light. No ceiling. No bath or basin. Rain water seeps through walls. Only two windows. Sewage pipes run under plots.”*

Submissions revealed that people living in hostels are subjected to similarly appalling conditions. Access to housing for fishing communities was also emphasised, and in particular the connection between inadequate housing and sexual abuse. Gert Christie said: *“There are problems with the way fishing communities live. There are two rooms and a toilet outside. The man is at sea while the family is at home. If women go to the toilet at night, many are raped.”*

Violence against women impacts on their right to enjoy adequate housing. A submission from *Tshwaranang Legal Advocacy Centre to End Violence Against Women* noted that issues of economic dependence often compelled women to remain in abusive relationships. The proximity of living arrangements contributed to this violence in the home.

The need for recreational, sporting, health and educational facilities was also stressed. Lottie Damana said: *“We youth need sports fields.”* Katie Clarke noted that there is limited access to health care services, libraries and other basic facilities. Proximity to places of employment was also high on people’s agendas . Kate Ntombomzi explains: *“Our wish is to be close to our workplaces.”*



People understood that they were entitled to equal access to housing. References to inequality between urban and rural areas were frequent. Gert Talmakkies spoke of the variations between different areas in terms of the amounts subtracted from the housing subsidy for services.

The need for equality for disabled people was stressed in the housing sector. Marjorie January said: *“We [the disabled] request houses, not a separate village. We want to be amongst other people.”* Randall Bomela recounted the problems for those lucky enough to secure housing: *“If a disabled does get a house, it is difficult to get in the door and the toilets are inappropriate.”* Gender discrimination in the housing sector was also raised as a rights violation.

d) The main obstacles experienced by the poor in gaining access to adequate housing

#### *Lack of awareness and information of relevant rights and programmes*

The lack of knowledge and information regarding access to housing is a significant obstacle to the realisation of the right. For example, Willard Nodlela said: *“We have never tasted this subsidy. No channels. If you can tell me we will flock there.”* Even in cases where people did receive housing subsidies, they were often oblivious to the details. For example, Mxolisi Dada at the Free State Hearings said: *“No details were explained to the people.”*

#### *Lack of access to land*

Government’s failure to assist people in gaining access to land for housing was considered a significant obstacle to the enjoyment of adequate housing. Kate Ntombomzi said: *“Each has a right to a decent place of their own. Government should contribute to our getting land.”* [repetition!]

#### *Lack of infrastructure and services*

The lack of access to basic services such as water, sanitation, refuse removal and electricity were considered major obstacles to gaining access to adequate housing. Furthermore, many participants complained about the remote areas in which housing was situated and the absence of infrastructure to ensure access to other basic services such as health care.

#### *Obstructive attitudes by officials*

A lack of assistance by municipalities and their failure to release money for housing purposes was stressed. Rose Claasen complained that: *“Government gives plots but no deeds of sale.”* The absence of deeds of sale are particularly problematic when two or more families occupy a single plot of land as neither family is allowed to build. Freddie Arries said: *“The municipality is refusing to hand over government subsidies of R 17 000.”* The need for people to control the monies received from the subsidies themselves was also emphasised, and submitters complained that the bureaucracy involved in utilising the subsidy was a further obstacle.

## ***Financial***

According to Martha Jobs: *“Many say R15 000 at a time is too little.”* Others echoed the same concerns. Nosipho Managli complained that contractors refuse to build two roomed houses and the community did not have the additional money to pay for anything bigger. The payment of R11 000 for serviced sites often leaves only R4000 for building materials which is insufficient to build adequate housing.

Many spoke about the difficulties facing poor people in gaining access to housing finance from banks. They were criticised for not providing a service that accommodates the needs of poor people’s saving schemes. Benedicta Mahlangu remarked: *“What I ask from the banks is that their laws or regulations should be flexible. When I am talking flexibility, what I am saying is that they must be able to accommodate everybody. When we started our savings schemes there was this law that we should save from this amount.”* Finally, the costs of paying for services such as water, electricity and refuse removal were also cited as obstacles.

## ***Lack of security of tenure***

The absence of legal security of tenure for farm workers was a further obstacle. Harry Lavendal said: *“Farm workers are dependent on farm owners for housing – they enjoy no security of tenure.”* In speaking of arbitrary evictions, Martha Molwantwa, at the Free State Hearings said: *“The owner of the farm evicted us, being nine families, without any reason.”*

## ***Social, cultural and gender factors***

Corruption amongst police officials and the impact of gangsterism also undermined people’s housing rights. Some participants referred to gangsters demolishing their homes and selling the materials. People also referred to a lack of adequate protection and intervention from police officials in these circumstances.

Lack of security of tenure affects women disproportionately. As Harry Lavendal recounted: *“If a man dies, the woman must move [from the house]. Women have no rights on farms.”*

### **(a) The role of government in promoting the right of access to adequate housing**

Whilst many were aware of the channels in applying for a housing subsidy, some participants obviously had an extremely poor knowledge of even the existence of a subsidy. Whatever their knowledge the majority of the participants were generally frustrated and disillusioned with the poor assistance from local government in creating an awareness of their rights and providing assistance on how to access them.

The role of government in complementing the self-help approach of organisations, like the Homeless People’s Federation, is critical. For instance, Benedicta Mahlangu referred to a large donation from the Ministry of Housing. It is vital that initiatives of this kind continue. Further, support from government in making sufficient land available for housing is vital.

#### 4. THE RIGHT OF ACCESS TO HEALTH CARE SERVICES

##### a) Relevant constitutional rights and the main measures adopted by government to give effect to the right to health care services

The poverty hearings that took place in KwaZulu-Natal focused primarily on the right of access to health care services.

Section 27(1)(a) of the Constitution provides for a right of access to health care services, including reproductive health care. The State is under a duty to take “reasonable legislative and other measures, within its available resources,” to progressively realise the right [section 27(2)]. In addition, section 27(3) provides that no one may be refused emergency medical treatment. The Constitution also provides for the right of every child to basic health care services in section 28(1)(c). Finally, section 35(2)(e) gives detained and sentenced persons to medical treatment at State expense.

The primary health care approach is one of the key mechanisms through which the right to health care services is being implemented. It places extensive emphasis on participation, education and equality, and it seeks to ensure preventative and affordable health measures. The right of access to health care services is being implemented, for example, through the government policy of free health care services to pregnant women and children under the age of six. The right to reproductive health care services is being implemented through a number of measures, including the *Choice on Termination of Pregnancy Act 92 of 1996*. There are a large number of other policy and legislative measures that seek to promote affordable and accessible health care services.

##### b) Violations of the right to health care services under apartheid and their current impact on the poor

The legacy of apartheid has created a fragmented and discriminatory health care system. Many people stressed the effects of discriminatory laws such as the *Group Areas Act No. 36 of 1966* on people’s health status. For example, the Group Areas Act has ensured that health care services remain located largely in formerly white areas, making access difficult for the majority. [Karrisha worked on this section, and I am not confident that this direct link can be drawn - Jacqui to decide] Health has also been compromised by the endemic levels of violence, both during the apartheid era as well as more recently. The costs of this are borne by the current health system. As Gugu Betty Zuma noted: “*My daughter was hunted by vigilantes. She got sick because of fear, she is mentally disturbed, she is disabled.*”

##### c) People’s understanding of their right to health care services and how they can enforce the right

Many people understood that government has an obligation to bring access to health care services closer to the people. “*Clinics need to be brought closer to the people,*” pleaded Hilda Gumede. Others added a call for mobile clinics on a more regular basis. In all cases there was a cry for properly equipped health facilities.

Many submitters noted that an efficient ambulance service is a critical dimension of health rights. Hleziphi Banda explains: *“When we call an ambulance, the ambulance would not come on time. We had about six people who died before the ambulance arrived.”* Adelaide Ngidi added: *“You find people being wheeled in a wheelbarrow being taken to the main road [clinic].”* People spoke about instances of discrimination in access to health care services on the grounds of race, language, disability and gender.

The need for government to subsidise medication to make it more affordable to disadvantaged communities and individuals was emphasised was identified as another crucial dimension of the right.

People felt that government had a duty to fund the salaries of community health workers, and to assist them in terms of training, resources, capacity-building as well as infrastructure.

The duty of the Department of Health together with other departments to contribute to the nutrition of school children to combat the health effects of poor nutrition was stressed.

d) The main obstacles experienced by the poor in gaining access to health care services

#### ***Lack of awareness and information of relevant rights and programmes***

Lack of knowledge of government structures is an obstacle to the realisation of the right to access health care. Lucky Lebenya explains: *“These government structures are not close to where the people are. If you are an ordinary person you don’t know where to start looking for the Human Rights Commission.”*

In her submission Adelaide Ngidi bemoaned the lack of capacity: *“There is quite a number of diseases, including people with HIV. But we don’t have people coming to our communities to teach people to know and to take precautions.”*

#### ***Lack of health care services and infrastructure***

*It is apparent that the main cause of poverty is the absence of infrastructure such as roads and bridges, which are corridors that will connect people to places of health, where they can get help in terms of health. As well as in telecommunications which makes it extremely difficult to communicate with hospitals as well as clinics,”* said Nason Ntshangase.

The absence of an efficient ambulance service and the lack of health workers in far flung areas are additional obstacles to the enjoyment of the right. The point was made by Winifred Nontubeko Sifumba: *“Rural clinics and areas totally lack health facilities. there are no visiting doctors, there is insufficient medicine ....”*

The lack of co-operation and co-ordination between different government departments was also considered a problem. As Constance Mbele noted: *“For example, there may*

*be an agreement to erect a clinic, but the infrastructure may not be there, like a road to convey the goods. People perish trying to cross a river.”*

The lack of access to clean water, sanitation, nutrition, electricity, facilities, health personnel and medicines were all identified as contributing to the poor health status of disadvantaged communities.

### ***Financial***

Most of the participants saw the transport costs of getting to health care facilities as major obstacles. Hilda Gumede explains: *“The majority of clinics are too far from the places where we stay. From my place, when trying to approach a clinic, I need to pay at least R10.”* The costs of getting to telephones was noted by Zephania Zondo when he said: *“There are no phones. When you have to phone you pay R10 transport only to find out that the telephone is out of order.”*

On the costs of medication, Elisabeth Joseph noted: *“Pensioners have no medication. They say medication is free but it is not. They go to the clinics and there is nothing. There’s no money to buy medication so they must just sit and rot.”* Given the high levels of unemployment people stressed that they were unable to afford proper nutrition.

### ***Physical obstacles***

Many clinics are inaccessible for disabled persons impeding their access to health rights. Disabled submitters spoke about the discrimination they suffer at the hands of taxi owners. *“There is a problem of people being charged double if they are in a wheelchair,”* explained Sarah Rule. For Zephania Zondo the problem is: *“The doctor in our area [who] does not know how to care for disabled people.”*

### ***Social, cultural and gender factors***

The low social standing of women in society, the high levels of poverty and illiteracy among women, as well as the prevalence of violence against women were noted as major obstacles to their enjoyment of health rights. More specifically people spoke about the effects of rape, domestic violence and economic dependency as significant factors contributing to the HIV-infection amongst women. Many women who work as sex workers in order to earn a living have an increased susceptibility to HIV/AIDS and sexually transmitted diseases. In this regard, The Centre for Applied Legal Studies said the lack of access to treatment for sexually transmitted diseases further increases susceptibility to the HIV-infection.

A number of submissions highlighted problems faced by pregnant women in accessing health care facilities for delivery as well as pre and post-natal care.

Participants often referred to the discriminatory and unhelpful attitudes among certain doctors and nurses. Particular reference was made to such attitudes in the context of family planning. Many participants noted that health care workers are often rude and insulting to single women who go to clinics for family planning. Certain doctors also

displayed racist attitudes. James Batwali, in the Northern Cape, commented: “[We] have a doctor who doesn’t like blacks.”

#### e) The role of government in promoting the right to health care services

Many people stressed that government health media and messages were not reaching the people. “*The people in need are those unable to go to school enough, and to be literate. They are unable to get hold of the messages on how to avoid such a disease [HIV],*” said Ncumisa Nongogo. Dexter Livingstone Zama added: “*We see that these diseases are not caused by a lack of infrastructure, but sometimes the ignorance of people.*”

In short, government was seen as bearing a two-fold responsibility in realising the right: providing easy access to effective and affordable health care services, and educating people on how to live healthier lives through accessible mediums of communication. People saw local government as bearing an important responsibility of co-operating, educating, sharing ideas and advising people on health issues *are too old. Now, when I apply for a pension they say, no, you are too young.*”

## Gender

### 5. The Right to Social Security

#### (a) Relevant constitutional provisions and the main measures adopted by government to give effect to the right to social security

The poverty hearings that took place in the Eastern Cape focused on social security.

Section 27(1)(c) of the Constitution gives everyone “*the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*” In terms of section 27(2) the State “*must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation*” of this right. Every child has the right to social services in terms of section 28(1)(c) of the Constitution.

The White Paper for Social Welfare commits government to establishing a comprehensive and integrated social security system to which there is universal access. Everyone should have “*a minimum income, sufficient to meet basic subsistence needs,*” and should not have to “*live below minimum acceptable standards.*”

Comprehensive social assistance to those without other means of support, and the restructuring of social insurance, (including the retirement industry, unemployment insurance and health insurance) are the two pillars of a transformed social security system.

A key policy measure, adopted by government, to give effect to the socio-economic rights of children is the introduction of the new Child Support Grant, with effect from 1 April 1998. This grant will provide a basic benefit of R100 per month to the primary

care-givers of children under the age of 7 years. To qualify the care-giver must comply with a means test and a number of other conditions. The Child Support Grant replaces the old system of State maintenance grants that is being phased out over a three-year period.

The Department has also introduced a Flagship Programme for unemployed women with children under 5 years to help these women gain employment.

#### (b) Violations of social security rights under apartheid, and their current impact on the poor

Racial discrimination characterises the history of social security in South Africa: For example, the exclusion of black persons from coverage under various public and private schemes, the application of different eligibility criteria, and the provision of unequal benefits.<sup>2</sup> Racial parity in State old age pensions, the government's largest social assistance scheme, was achieved in 1993. The social security system was segregated under 14 separate administrations. The new Department of Welfare inherited a fragmented, inefficient system that was highly susceptible to fraud and corruption.

There were testimonies at the hearings from retired or retrenched black workers who, after many years of service, obtained only minimal benefits. This was a result of only being allowed to join a pension or provident fund scheme late in their working lives. At the Gauteng hearings, Easter Momone told commissioners that her husband had worked for a company for six years before his death. All she received as his widow was "*a condolence of R888.*"

#### c) People's understanding of their social security rights and how they can enforce them

Generally the advice offices and organisations like Disabled People of South Africa (DPSA) displayed a good understanding of people's constitutional rights to social security. DPSA provided a submission to the hearings in the North West Province which asserts: "*We have Constitutional rights since 1996. In our region we are deprived of those rights. Only 17% get grants. In deep rural areas, we can only wonder. There is poverty, disability and exclusion.*"

Similarly representatives of the Paterson Advice Office, Dusa Malene and Mnimimzi Elliot Masewu, who testified at the Grahamstown hearings claimed that the State is not protecting the Constitution and Bill of Rights. Among the reasons given for this view are: no access to information, "*government makes decisions without the grassroots,*" poor infrastructure at pay-points, long delays and back-logs in the processing of grant applications, and the restriction of social grants' back-pay by government.

In contrast, many poor individuals who testified demonstrated a lack of understanding of their rights, and how to go about claiming them. Boy Philis testified that he believed that his pension was too little, but went on to say that, "*we must accept what*

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<sup>2</sup> See Poverty and Social Security in South Africa background paper (1998)

*we are given. Beggars can't be choosers.*" The testimonies suggested that many people did not know that they could qualify for one of the social grants. Neither did they understand the criteria for eligibility (for instance the qualifying ages for old age pensions), and the process for making an application.

Dolly Moso, of the Matatiele Advice Office, described the impact of illiteracy on people's ability to enforce their social security rights as follows: *"For uneducated people the law has no meaning. People were never explained how the UIF card works. People keep it until it has expired. They don't know what to do with it. They never get their money."*

d) The main obstacles experienced by the poor in gaining access to social security

#### ***Lack of awareness and information of the right and relevant programmes***

The lack of awareness and information by people of their rights discussed above is obviously a critical constraint, blocking access to social security. Being illiterate also poses major problems – pay-out dates are missed, and the accuracy of grants and benefits cannot be checked. Paul Lesiba Swartz described how his third party claim prescribed as he lay paralysed in bed for 7 years without a wheelchair after a motor vehicle accident. *"No-one told me about insurance claims,"* he said.

#### ***Administrative obstacles***

The testimony of Anastasia Molefe, at the North West hearing, echoed a common theme emerging from the hearings – the multiple difficulties experienced by old people in accessing their pensions. These ranged from the long distances that people have to travel to pay-out points, transport costs, the conditions at pay-out points (inadequate shelter, chairs, ablution facilities), the exhaustion of long hours of queuing, the stealing of pension money, etc

Lamkelo Qojana identified similar problems in relation to the collection of disability grants. Persons with disabilities are pushed around at pay-out points due to the absence of chairs, and the pay-out points are sometimes physically inaccessible due to stairs or other such features. The absence of doctors in some areas was also a major obstacle in accessing disability grants or reviewing a beneficiary's medical condition. The private company *"with its guns"* that has been contracted to deliver social grant payments intimidates people, complained Jamani Batwali of Philipstown in the Northern Cape.

Sometimes access to grants is impossible due to difficulties experienced in obtaining new ID documents. *"I requested an ID because I have never been able to get one. We were told to count to ten. The others had to go home. We just stared at the officials. I became fed up,"* recalled Constance Momoza from the Eastern Cape. Long delays in the processing of grants, administrative bungling (such as sending money to the wrong location or depositing it in the wrong bank account), computer malfunctioning, and the unexplained stoppage of payments for a certain period of time, were among the common complaints presented.



A large number of those who testified identified obstructionist and unresponsive attitudes of welfare officials as a major issue. These included: a failure to give relevant information regarding grant applications; a failure to give reasons for the arbitrary reduction or stoppage of grants; and sending people “from pillar to post” in complete disregard of the burden of time, money and inconvenience this imposes on poor people.

Some even gave testimony of being mocked or abused by officials. “*You get thrown around,*” described Vuyisa Mantaga, a 68 year old man from East London, who tried to track reduced grant money deposited into a wrong bank account: “*Up and down, always. They use English words you don’t understand. They play around with you.*” It appears that social workers don’t always advise people that they may qualify for one of the social grants.

### ***Government conduct***

A large number of the submissions at the Eastern Cape hearings focused on the devastating consequences suffered by poor people when grant payments were suspended and beneficiaries were required to re-register. This was a major part of the provincial government’s efforts to eliminate fraudulent beneficiaries (“ghosts”) from the system. Many of the elderly, disabled and poor families who testified at the hearings are teetering precariously on the breadline. Grants received monthly save them from falling into utter destitution. Many beneficiaries of these grants found themselves in desperate straits when their grants were suspended late last year in the re-registration drive. Rent, electricity, burial policy payments, school fees and food needs could not be met. The debt burden of these families increased as they struggled for survival. Many claimed that their grants had not yet been reinstated. Doreen Ellison, who cannot walk, described how the stoppage of her and her diabetic husband’s disability grants plunged the family into crises. They have three children, one of whom is paralysed and mentally disabled. They can no longer pay rent, and depend on their landlord for food and leniency regarding their accommodation. **PIC**

Many people claimed they were not warned about the cut-off, nor told why their grant payments were suddenly stopped. Others do not understand how to go about re-registering for their grants. The chronically disabled, bed-ridden elderly persons, and those that cannot afford transport costs, are simply unable to do what is required to get their grants reinstated.

McDonald Nkosiyanane in Umtata described the impact of this stoppage as follows: “*The government tried to find out who is existing. But they removed from the list those who are existing, and disabled. Now they say re-apply. But it takes years, and meanwhile there is suffering. The disabled usually take an overdose, commit suicide.*” Henna Arendse, chairperson of the Social Grants Association, described how the organisation was formed to deal with the crisis around the stoppage of social grants: “*Educated people did not care. Nor in Parliament. So we established this organisation. Irrespective of colour, we help in various ways...Apartheid was of the past, but now things are worse. We were never punished before by the removal of pensions.*”

The chairperson of the Standing Committee on Welfare in the Eastern Cape legislature, Mr Serache, said that some welfare officials are suspected of foul play. They place the “ghost beneficiaries” on the system and pocket grant payments. In the re-registration process, it is possible that they are eliminating genuine beneficiaries, and keeping the lucrative “ghosts” on the system.

### ***Lack of comprehensive and adequate social security provision***

Some people complained that the size of the grant was insufficient to meet their needs and those of their dependants. This places a particular burden on elderly persons who are expected to use their pensions to support a wide net of relatives. Melita Bojang described, at the Free State hearings, how she struggled to stretch her pension. She paid her granddaughter’s school fees and clothing as well as paying electricity, telephone and services: *“After paying that, I don’t have anything to eat.”*

People complained about the reduced amount to be received for child maintenance, and the fact that children over 7 years will not qualify for the child support grant. Mrs Vuyelwa Duma of the Disabled Children’s Action Group described the cut-back in child maintenance as pathetic: *“These people need the money most to send children to school. We tried to reason with government. To no avail.”*

Jane Finger, a representative of SANCO in Phuthadijhaba commented as follows: *“Concerning maintenance, we hear that the government will feed these children from zero up to seven years. Now we ask ourselves, as the community organisation, what is going to happen after seven years? What are they going to eat? Because the money is already reduced – they only get hundred and something. Now we ask ourselves, if a child is over seven years, now when the clothes are expensive, what is going to happen?”*

She went on to say that the government should not be reducing maintenance at the present stage. There are no jobs, and black people were still in the process of improving their skills: *“Let the government stop. Let us find ourselves. It can use this strategy maybe later. Not now.”*

The SA National Council for Child and Family Welfare state in their written submission that children in the age group 7 to 18 years *“are left extremely vulnerable”*. They believe the abandonment and institutionalisation of children, increased child labour, child prostitution and children living on the streets will result in a large cost to society.

The testimony of a number of people suggests inadequacies in social insurance schemes usually tied to formal employment such as occupational retirement, unemployment insurance or compensation for occupational injuries and diseases. Mrs Nomthandazo Bewana of the Umtata Advice Centre claimed that they experienced frequent problems assisting miners to claim UIF benefits and pension and provident fund benefits.

Mr Skwebu told the Free State hearings that he did not receive an occupational pension when he retired after a number of years working in the mining industry. He was told that he did not qualify for benefits under the company’s pension fund

because he had joined the mining industry when he was over the age of 55 years. His main source of income now is a State old age pension.

Mohau Kitime, of Young Christian Workers, highlighted the insecurity of temporary and casual workers as they often do not receive any employment benefits: *“After getting work, they say you are a casual worker. That doesn’t make sense. There is no permanent work. They say it’s just temporary. They do this purposely so that we shouldn’t get our benefits. They are just interested in making profits. You cannot even feed or clothe your family.”*

The evidence of many highlighted large gaps in South Africa’s social security system, particularly for the long-term unemployed. Thami Ramton, of Gauteng, described his dilemma as follows: *“Everywhere when I look for a job they say, how old are you? When I say I am over 51 years they say, you* Many women described their up-hill battle to obtain maintenance from the father of their children through the private maintenance system. Faldiela de Vries who works at the Mannenberg People’s Centre, described the hostile attitude women experience from some magistrate’s and court officials. *“Men are able to manipulate the system successfully,”* she said, adding: *“Women do not have access to their rights, leading to poverty of women.”*

The testimony presented by some women suggests that those that do have access to social grants are able to reduce their dependency on indifferent or abusive partners. These grants also provide some relief in shouldering the burden of child care that falls disproportionately on women’s shoulders.

Lulama Kosi testified that after her divorce she was given custody of the children. In 1986 she received a disability grant: *“That helped because the father does nothing.”* Hilda Mahobe said that her greatest wish was that she could access child support grants for her five grandchildren. They were dumped in her care by her daughter after her boyfriend landed in jail: *“That will solve a lot of our problems and place us in a position where we can pay their school fees and buy their own uniforms.”*

At the Free State hearings Mrs Skwebu highlighted the effect of interrupted employment and pre-defined gender roles on women’s access to social security benefits. She had been a teacher for 45 years when she was forced to retire on short notice: *“Then they said I don’t qualify for a pension because I had many breaks. Those breaks were not through my wish. I remember in Transkei, after being married, you were not supposed to go back and teach. You were teaching for three or six months and then you were supposed to leave. Now I am in this because of that Transkei government.”*

### ***Lack of support for social services***

Many of the formal and informal welfare organisations that testified described their struggle to provide an adequate service in the face of inadequate government subsidies. The Gompo Welfare Society for the Care of the Aged in East London includes a subsidised home nursing programme. It receives a subsidy for 250 people, but serves 1000 ambulant and 500 house-bound elderly people.

The problems experienced in running day-care centres for children in informal settlements were also described. Many parents children cannot afford to pay for the service provided. Pinky Mthambo runs a crèche for children with mental disabilities in Orange Farm, Gauteng. The crèche suffers from inadequate facilities, and Mrs Mthambo finds herself in a “Catch 22” situation. In order to register and qualify for a fund-raising number, she was told by social workers that they have to build a formal structure: *“My problem is, I can’t build. I don’t have the money...The place in Orange Farm is not proclaimed. We will never get a place to build.”*

Masechabe Malejwa, who testified at the Free State hearings on behalf of the Sechaba Feeding Scheme and Life Skills Training, described the difficulties her organisation encountered in attempting to obtain a government subsidy for the work they do with street children. The initial obstacle appeared to be the absence of a clear policy on street children by the Department of Welfare. She participated in drafting a policy document on street children, and since then the project has been permitted to register for a subsidy.

NGOs in rural areas also complained about the difficulties they experience in accessing resources to render social services to children. SA Stop Child Abuse (SASCA) based in Mpumalanga believes rural children are discriminated against in the provision of services. The SA National Council for Child and Family Welfare state in their written submission that less than R2 billion rand is spent directly on supporting children and families through the welfare budget.

#### e) The role of government in promoting the right to social security

The evidence presented at the various hearings strongly suggests that social grants play a vital role in saving people from hunger and destitution. When asked by Commissioner, Vivienne Taylor what would happen if she didn’t receive her pension, Christina Momoza of Umtata responded: *“I would die of hunger. My daughters have children out of wedlock so they are my burden. I need money for food and school. The pension feeds us.”* These grants also reduce their dependency on the charity of others.

However, what emerges is the need for a concerted education campaign around social security rights and their application. The numerous complaints concerning unhelpful attitudes of welfare officials also point to the need for a special code of conduct, for officials dealing with welfare beneficiaries. Social security beneficiaries and applicants are entitled to be treated with respect and in a way that promotes their human dignity. The manner in which the Eastern Cape Welfare Department conducted the re-registration process demonstrates a complete disregard for people’s social security rights.

Finally, the testimonies highlight the critical importance of the progressive expansion of access to social security through a comprehensive, integrated social security system.

## 6. THE RIGHT TO AN ENVIRONMENT THAT IS NOT HARMFUL TO ONE'S HEALTH AND WELL-BEING

### (a) Relevant constitutional rights and the main measures adopted by government to give effect to the right to a healthy environment

The poverty hearings that took place in... in the Eastern Cape [state venue more precisely to avoid confusion with venue of socsec theme focused on the right to an environment that is not harmful to one's health and well being.

Section 24 of the Constitution provides that everyone has the right "*to an environment that is not harmful to their health and well-being.*" It further provides for the right of everyone "*to have their environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.*" Such measures should 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 recently released White Paper on Environmental Management Policy for South Africa, is the primary policy framework through which the government seeks to give effect to Section 24 of the Constitution. It acknowledges that sustainable development requires an integrated and co-ordinated environmental management policy from all spheres of government. It incorporates principles such as the 'polluter pay'. The White Paper also provides for increased participation and consultation with communities who are going to be affected by particular projects.

### (b) Violations of the right to a clean and healthy environment under apartheid, and their current impact on the poor

Oppressive apartheid laws have resulted in most black communities being located in areas that are close to polluting industries and dumping sites. The health and safety of a significant number of black people, forced into working in mines or industries that cause excessive pollution, has been compromised. Apartheid policies further created overcrowded settlements that are poorly serviced or not serviced at all. For example, trees are cut down for firewood in unserviced areas. Removals and farm evictions have resulted in black rural areas having a much higher population density than commercial farming areas. Chronic erosion is a natural consequence of such overcrowding. Bishop Davies explains: "*The areas like the Transkei are so over-utilised that the ground never has a chance to grow, to rehabilitate itself, because people have to find a meal for themselves for the next day. There is a constant demand on it.*"

### (c) People's understanding of their right to a clean and healthy environment and how they can enforce the right

Many participants referred to industries in the immediate vicinity of their homes that emit toxic gases, and complained of the harmful effects of such gases on those living close by. Most participants believe that preventing and prohibiting such practices is the obligation of the Department of Environmental Affairs, in consultation with the

community. Kgakishi Morewane notes: *“The Department of Environmental Affairs together with the communities could achieve something by going to them [the polluting industries].”*

Submitters objected to dumping of toxic waste close to their homes. Nelson Fezi said: *“Waste-Tech were dumping close to our houses. They did not even build a wall or a fence. Chemicals from Durban and Johannesburg were brought in huge trucks to be dumped here....People are sick, they suffer from diseases.... Those diseases came here since Waste-Tech came here....We are situated between an incinerator which collects chemical wastes.”* Francis Uithale said: *“We don’t know why government allowed Waste-Tech to operate among people.”* She and others believed government is responsible for prohibiting the dumping of toxic waste if their rights are to be protected.

Mark Butler said: *“Dirty industrial processes have moved from rich to poor countries. When they move within poor countries, they still move away from the rich communities and are situated in the poor communities.”* Submitters emphasised government’s duty to ensure that the poor do not suffer the brunt of pollution and environmental discrimination.

There was also a general view that government is obliged to provide people with serviced sites. This minimises the harmful effects on the environment when there is a lack of adequate sanitation and other facilities.

d) The main obstacles experienced by the poor in gaining access to a clean and healthy environment

#### ***Lack of awareness of rights***

Many of the submissions indicated that there was a lack of awareness of the constitutional rights relating to the environment. A further lack of knowledge of the health hazards of pollution was also evident. Lucky Thabete said: *“The problem is the public are not aware of the things that happen. The company is situated in a rural area, where people are semi or fully illiterate. One can’t expect full participation from the community in challenging the things that the company is doing.”* Nohle Tabata said: *“The community has not been told of the implications of trying to survive on the waste site....The lack of information is a problem.”* Polluting industries contribute to the lack of awareness by failing to inform employees of the dangers of working with certain chemicals. Lucky Thabete explains: *“When we worked with mercury, we were never told how dangerous the chemicals were.”* Dumisa Bangane felt one way of addressing this problem is: *“Issues concerning the environment should be part of the curriculum provided at schools.”* Financial

One of the most difficult issues is the trade-off between job creation and preservation of the environment. Chris Albertyn explains: *“That is a fundamental problem - How do we balance jobs, profits and environmental costs?”* Biased information, that exaggerates the financial gains and understates the health costs of polluting industries, is a further problem. People informed of the health hazards of pollution were often not given any viable alternatives; namely, relocation and access to alternative employment or land for farming. Finally, the keeping of livestock, though a form of

livelihood for some, was identified as being a health hazard to the community in certain situations.

### ***Lack of communication and assistance by officials***

*“If the government is of the opinion that there should be a dam in a certain area, they should talk to the residents. We have lost faith a bit in government because seemingly they are not concerned with our interests,”* said Jane Khumalo. This lack of communication is a hindrance to the realisation of the right. According to Francis Uithale: *“There is no use going to government. Last year they even granted Waste-Tech a permit for another five years. They are operating on the second site.”* Local government's lack of knowledge of the harmful effects of pollution exacerbates the problem. Dumisa Bangane explains: *“Our councillors are not expert around this area of the environment.”*

### ***Legal barriers***

Another obstacle is South Africa's inadequate laws to govern pollution by industries. Moss Phakwe was of the view that: *“Laws should be made that compel employers or these companies to have direct contact with community representatives and structures, so that they can hear what are the people's concerns. They should not be reactionary, but proactive in their activities.”* Participants also stressed that fragmented environmental laws have resulted in a lack of clarity as to who bears responsibility for their enforcement. Such confusion allows for officials to 'pass the buck' when approached by members of the community.

People highlighted their problems understanding the law and gaining access to legal structures. For Moss Phakwe the solution is: *“Firstly, let us have a simple interpretation of the law for ordinary people. Two, let us have easy access to legal structures of the country in presenting complaints of this kind.”*

### ***Poor implementation***

The lack of enforcement by government of existing laws, policies, rules or regulations, is another major obstacle to the realisation of the right. For example, Francis Uithale informed the hearings that: *“Waste-Tech is operating an incinerator without a license. They have been operating since 1982.”* According to Nohle Tabata: *“Environmental laws are not being properly implemented. They cater for a certain section of our society, forgetting about the poor.”* Chris Albertyn expressed the view that *“Government does not have the capacity to inspect, control and monitor everything in the environment.”*

### ***Lack of co-operation from industries responsible for pollution***

Another problem is the lack of co-operation from the responsible industries. Most participants had made numerous attempts to consult with the relevant industries, but to no avail. Some even referred to the possibility of reaching a compromise with the relevant industries, but noted that they were not even given the opportunity to meet. To avoid their responsibilities, industries deliberately make use of casual labour in high risk jobs. Maria Buthelezi, in KwaZulu-Natal, described how she *“was working*

*for a cotton factory as a machine operator. My hand was chopped off. I went to inquire ... I was not insured. I was a casual worker.”*

#### e) The role of government in promoting the right to a clean and healthy environment

There was a general sense that government had failed to adequately promote and protect the right to a health environment, and to deal with the health hazards of pollution. Even when local government structures did make people aware of the health hazards of pollution, they generally failed to provide alternatives (such as relocation, alternative employment or land) to individuals. The high level of illiteracy needs to be taken into account when the government engages in environmental education and awareness campaigns.

The proposed environmental legislation, when passed, will enable communities to directly prosecute environmental offenders. This legislation will unify and clarify the fragmented laws dealing with the environment. It will also improve the enforcement of environmental legislation. It gives rights to interested and affected parties as opposed to leaving enforcement to the limited capacity of the State.

## 7. THE RIGHT TO EDUCATION

### (a) Overview of the relevant constitutional provisions and the measures adopted by government to give effect to the right

Education emerged as a central theme in all the hearings, although it was the main theme of the hearings held in the Free State.

The Constitution guarantees the following rights in relation to education:

- the right to basic education, including adult basic education;
- the right to further education which the State must make progressively available and accessible through reasonable measures;
- the right to receive education in the official language or languages of one's choice in public educational institutions where this is reasonably practicable;
- the right to establish and maintain, at own expense, independent educational institutions. These institutions may not discriminate on the basis of race, they must be registered, and maintain standards that are not inferior to standards at comparable public educational institutions. [section 29].

Government's main policy framework for transforming education in South Africa is contained in the Department of Education's *White Paper on Education and Training* (1995). Among the principles endorsed in the White Paper are that education is a basic human right, lifelong learning and training of good quality should be an overarching goal, equal access to education for all, a special emphasis on redress, an improvement in the quality of education, and democratic governance in all aspects of the system. The *South African Schools Act, 84 of 1996* aims to provide a uniform system for the organisation, governance and funding of schools. The Act –

- abolishes corporal punishment at schools;
- provides for compulsory education for children between the ages of 7 and 15 years;



- establishes two categories of schools – public schools which are funded totally or largely by the State, and independent schools which are privately owned, but may receive subsidies from the State;
- the establishment, composition and functioning of governing bodies at all public schools;
- the levying of school fees at public schools to be determined by resolution at the annual meeting of parents of the school, and to be enforced by the governing body.

The resolution concerning school fees must provide for the amount of fees to be charged. It must also give “equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees.” (s. 39). The Ministry may make regulations regarding these “equitable criteria and procedures.” A decision of the governing body regarding the exemption of that parent from paying school fees can be appealed by writing to the Head of Department.

Other relevant legislation and policy measures include the *South African Qualifications Authority Act, 1996*, the White Paper on Higher Education (1997), and the Department of Labour’s Skills Development Bill, the recommendations of the National Commission on Special Needs in Education and Training (NCSNET) and the National Committee for Education Support Services (NCESS).

#### (b) Violations of educational rights in the past and their current impact on the poor

Even pre-dating formal apartheid, education policies were designed to perpetuate the inferior economic and social status of black persons, and to reproduce the racially segregated division of labour in South Africa. Under apartheid, education was administered through 19 different education departments leading to fragmentation and inter-regional inequalities. Not only were educational institutions at all levels racially segregated, but there were vast racial disparities in the funding of education. As late as 1992, four times as much money per capita was spent on white pupils as compared to African pupils.

The policy of ‘Bantu education’ left a legacy of illiteracy, in numeracy, and a lack of high-level skills in the majority of the population. These legacies pose a formidable challenge to the realisation of the constitutional right to education.<sup>3</sup>

The following statistics capture the impact of discrimination:

- 29% of the adult population is[functionally?]illiterate
  - The 53% of the population living on less than R301 per month receive only 40% of the budget allocated to education
  - 1 in 4 schools have no water in walking distance
  - 57% of schools have no electricity
  - 20% of African women older than 20 have no formal schooling
- 27 000 learners with disabilities are outside the formal school system

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<sup>3</sup> For a full description of this legacy see: Poverty and Education in South Africa occasional paper, 1998

(c) People's understanding of their rights and how to enforce them

School fees were unaffordable for many who testified. Most did not know of their rights to apply for exemption from the governing body of the school, nor of the right to appeal to the Head of Department. Ellen Motlakhana requested advice during the course of her testimony on what the family should do if the school excluded her children because they could not afford school fees. Emily Lebakeng, on the other hand, testified that by going to explain her impoverished situation to both school authorities and service providers, she was able to keep her children in school. She was also able to prevent her water supply from being cut off.

Pule Ramosweu referred to the lack of training of school governing bodies, and how this resulted in a lack of knowledge of the relevant rules and regulations.

d) The main obstacles experienced by poor people in gaining access to education

***Physical inaccessibility***

A number of people highlighted the shortage of schools within a reasonable distance, as well as the lack of subsidised transport. Travelling or walking long distances to school imposes costs and hardship on disadvantaged communities. In the words of Adam Dichaba at the Bloemfontein hearings: *"We have a problem of our children attending school from standard five up to standard eight. They are attending school far away...They travel something like seven kilometres and they walk on their feet to and from. That is affecting their education. We need more schools so that our children can be nearer to education. It is our appeal from the rural people. We need school buses so that our children can be able to use buses."* He said that his child spent 4 hours a day walking to and from school: *"A child cannot travel for so long. She is always tired. Because we are not equal, some parents are able to give their children money for buses, but others cannot."* Isaac Doktor of Victoria West said that transport to school used to be provided for farm children in the area: *"Now that has been withdrawn. Children are now walking long distances and it is not safe - rapes occur."* Mxolisi Sithukuthezi pleaded at the Eastern Cape hearings for a pedestrian bridge to be built to enable children to cross a river safely in order to get to school. He said that many children in the community had drowned, trying to cross the river to get to school.

***Poor school facilities and conditions of education***

The lack of electricity, adequate water and toilet facilities in schools was referred to in a number of submissions. Overcrowded classrooms continue to be a standard feature of education in poor communities. Annah Mokgaloane described how different grades shared classrooms in the primary school in Bofulo that was built by the community. In her submission, Tsidi Ndlala of Barkly West said that, although the teacher/pupil ratio was 1:45, *"our classes are getting bigger all the time."*

In her submission at the Kwa-Zulu-Natal hearings, Constance Mbele of the Rural Consultative Forum, South Coast, said that scholars were suffering from a lack of access to clean water: *"At the school they use river water. The schools are supposed*

*to be closed because there are no toilets.*” A lack of basic services in the broader community also impacts on children’s education. Mlande Tokwe from KwaZulu-Natal described how children woke up at 5.00am to collect water before school: “Sometimes they get to school late. and they don’t find time to rest.”

Jamani Batwali of Philipstown told the hearings in the Northern Cape that white children were withdrawn from the existing high school along with all the equipment. As a result the high school is now struggling to find equipment for the school.

### ***Quality of the education received***

Melita Bojang referred to the differential education standards between schools “*in town*” and those in “*the location .I cannot, after taking him to town, take him back to the location. The education in town is a little bit higher. He is used to it,*” explained Melita commenting on the extra education costs she incurred. Konelo Lekhafola of the Free State Unemployed Graduates Initiative (FUGI) was of the view that the standard of education was deteriorating because of the retrenchment of temporary teachers. “*This devalues of the teaching profession.*” Jamani Batwali informed the commission in Kimberly that the standard of education in Philipstown is “*very poor.*”

### ***Financial obstacles***

The inability to afford school fees and the other costs such as uniforms, shoes, books, stationery and transport are some of the major obstacles blocking access to education.

There were reports of children being barred from school because their parents can not afford school fees or uniforms. In some cases parents, or even the pupils themselves, decide to discontinue schooling as the costs of books, school uniforms and transport impose too heavy a burden on the family. Ellen Motlakhana testified that her son in Std. 5 decided to stay at home “*after realising that I didn’t have money to buy books.*” After losing her job as a domestic worker, Paulinah Sekhuthu testified that she is no longer able to afford the bus fares for transporting her children to school. Noel Kok of Prieska in the Northern Cape described how his family was forced to sell their wardrobe in order to pay examination fees.

A lot seems to depend on the attitude adopted by the governing body of particular schools. In her submission, on behalf of the Sedomasang Rural Development Organisation, Debbie Lesshope said that the schools in their area had generally been very accommodating of parents who could not afford school fees. However, from press reports, she gathers that “*in the conservative towns, when the parents can’t pay the child’s school fees, the child has been staying at home, or been sitting on the stairs and not being allowed to go into the classroom.*” As a member of a governing body of a school in the Klerksdorp area, Amelia Mathi described how they went about setting school fees and assessing whether or not a child’s family could afford school fees. She confirmed that reports were withheld if school fees are not paid.

Melita Bojang used her old age pension to pay her grandchild’s school fees and clothe him. She is required to pay the full fees of R110 per quarter. She appeared to be unaware of her right to apply to the governing body of the school for a partial or total exemption.

The broader context of poverty and unemployment in many communities also has a significant impact on children's ability to complete their schooling. Benedicat Mhlangu told the Gauteng hearings that children sometimes have to leave school to contribute to the economic survival of their family.

### ***Teaching***

The dispute between teachers and the Department of Education regarding their terms of employment continues to disrupt schooling. Joseph Mashia, of Mpumalanga, said that the children were the victims of the ongoing strikes and problems. Moses Mautsoa told the Gauteng hearings that after 10 years he was still working as a temporary teacher.

### ***Gender***

Girls are exposed to the dangers of rape when walking the long distances to school: "...and then at the end of the day they don't want to go to school.." High rates of teenage pregnancies in certain areas also contributed to girls dropping out of school. Debbie Lesshope stated that culturally many communities were resistant to addressing the need to keep pregnant girls in schools. She identified the importance of life skills training to reduce the number of teenage pregnancies.

Christina Mokoena, who is working with the Ntswananatsatsi Educare Trust, spoke about the importance of education for women's advancement: "*Because as soon as you are with these women, talking to them, asking them why are they not working, they will explain that: I am not educated. I don't know anything.*" However, even those poor women who have had some educational success are unable to make full use of their potential because of their daily struggle to survive: "*This poverty it is where women stay with children who are hungry, children who cannot be educated and women who have knowledge, but they cannot proceed with their knowledge.*" She also testified about a lack of government support for community educare organisations, like the one she is involved in.

Nohaytaze Tladi of the Adult Education Trainers Association of South Africa (AETASA) said that 80% of the users of ABET were women. This presented a problem as most of the areas in which they operated did not have crèches or educare centres. This meant that women often had to bring their children to courses with them.

### ***The special problems experienced in relation to farm schools and farm worker's education***

Veronica Kekesi described, at the hearings in the North West Province, how farmers were able to abuse their position of power in relation to farm schools: "*On the farms, there is a struggle with schools. The Boers say that the children are dirtying the place.*" There were also reports of children being taken out of school to work on the farms. According to Simon Msiza from Mpumalanga, the farmer simply says when this happens: "*This is my farm, this is my school.*" Nonene Nzuzo of the Eastern Cape complained that if there is a dispute with the farmer, he simply closes down the farm school.

The forced eviction of farm-dwellers also has a serious impact on the education of their children. Martha Motlantau and Pikiini Nameka told the Free State hearings of nine families being thrown off the farm, where they had been working, for no apparent reason. They were dumped along the side of a tar road, and the women were forced to sleep in the police station that evening. As a result of this eviction, they were forced to ask people living on other farms to assist with their children's schooling. They were also no longer able to afford the education costs of those attending school in town.

Lillian Antonie, representing the National Welfare Social Services Development Forum, focused in her submission to the Northern Cape hearings on the special problems of the "karretjiemense" - seasonal farm workers - who travel in carts from farm to farm. She said that their children don't attend school regularly "*and this is a major problem.*" Tsidi Ndlala said that adult education classes, which are held at night, are generally not accessible to farm workers.

### ***Inadequacy of support for early childhood development***

Many parents are bearing the main burden of establishing pre-school facilities and paying for staff. Adam Dichaba told the commission that these pre-schools were not registered, and that promised assistance from government had not yet materialised. Pule Ramosweu described the informal provision of child care facilities in communities in the following terms: "*We made some shacks in our villages to accommodate the small children so that the parents can be able to go to look for jobs.*" There is a general lack of toys and entertainment facilities for the children.

### ***Adult basic education and training***

Nohaytaze Tladi made a submission on behalf of the Adult Education Trainers Association of South Africa (AETASA) an NGO offering adult basic education and training (ABET) in the Free State Province. She indicated that, despite a number of important legal and policy commitments to ABET, there was not yet widespread impact "on the ground." The impression from her testimony is that NGO's are shouldering the major burden of ensuring the delivery of adult education. The demise of the National Literacy Co-operation forced many adult learning centres to close, the vast majority of which were attended by unemployed black women. She did, however, refer to the substantial financial support provided by industry for programmes such as adult learner's week, and the helpful role played by certain farmers in facilitating ABET programmes for farm dwellers. Other farmers "*will just shut us out before they can even hear what we are saying.*" ABET provision in rural and urban areas is "*so different*" because resources for people in the rural areas are very limited and not accessible.

Mxolisis Mahlangu, representing the ANC Women's League at the Mpumalanga hearings, complained about the reduction of the subsidy for ABET. It only covers literacy to Std. 5. Mrs. Khongisa, of the Gompo Welfare Society for the Care of the Aged in East London, said that they were unable to gain access to funding for the literacy project that they had initiated.

### ***The special problems experienced by learners with disabilities and special needs***

Debbie Lesshope reported that although there were some special schools in the Free State, they were generally not accessible to children in the rural areas. Manthipi Molamu of Disabled People of South Africa (DPSA), said that there were no schooling facilities for children with disabilities in the North West Province. They were forced to go to Qwa-Qwa for schooling that was prohibitively expensive. She alleged that mainstreaming in schools, for children with disabilities, was not being practised. The sheer physical obstacles in the way of disabled children gaining access to schools was described as follows by Moses Mahlangu of Mpumalanga: *“Who will carry this 9-year old child to and from school? The rights of this child have been violated. The wheelchair is broken.”*

### ***Access to tertiary education and employment opportunities***

A number of persons who testified said that even if the children in their community succeeded in obtaining a matric, they usually could not gain access to bursaries to pursue their education. This resulted in frustrated ambitions and disillusionment. Darkie Mokhoathi told the Free State hearings that his father was paying not only the school fees of his younger siblings, but also his own tertiary education fees from his pension. His parents were unable to obtain a student loan for these fees as they did not have security, and they could not afford the interest payments on this loan.

Obtaining an education does not guarantee access to a livelihood or a job. Many young people testified that they *“were doing nothing”* or *“staying at home”* after completing matric. In his submission, Pitso John Radebe highlighted the need for proper career guidance to be provided at schools. Konelo Lekhafola believes that the education received, particularly in disadvantaged communities, does not equip people adequately for employment: *“I think the way that our education was structured, it was meant for us to be disadvantaged.”* He highlighted some of issues faced by young graduates from disadvantaged backgrounds. Many graduates are highly indebted to tertiary educational institutions. This results in them being unable to obtain their qualifications or being black-listed on the credit bureau. He also believes that the procedures and regulations for voluntary service with government departments are too restrictive, and that this deprives graduates of a much-needed opportunity to obtain work experience. According to Lekhafola, the legislation, policies and programmes of government need to be transformed and made more flexible to enable the previously disadvantaged to *“partake in the governing of this country.”*

#### **e) The role of government in promoting the right to education**

A number of people testified that they believed that government was reneging on its promise to provide free education, at least for school children. According to Darkie Mokhoathi: *“Now my plea is, the government should try and look at the school children, the pupils, make sure it provides the school children with moneys. Because the government promises us that there will be a free education - I don't know how to put it - but now that type of education, its not there.”* He also believed that government should assist in establishing a programme of community service for students.

A strong view was also expressed that government should take steps to improve the conditions in schools, particularly the overcrowding and the lack of facilities, equipment and books. In the words of Tsidi Ndlala of Barklay West: *“The Government must act on this. I say to the MEC on education: he or she must cut on some budget and focus on education so that we can have more teachers.”*

The Adult Educators and Trainers Association of South Africa (AETASA) submitted that there was a need to integrate a stronger training component within adult basic education. This would make training more relevant to people’s life experiences and needs. This could only be achieved by strong inter-sectoral collaboration between government departments. Adult education should not be viewed as only the responsibility of the Department of Education.

## 8. LABOUR

### a) Labour rights and the right to work

The Bill of Rights enshrines certain rights that are applicable to the employment relationship. For example, everyone has the right to fair labour practices, and every worker has the right to form and join a trade union, to participate in its activities and to strike. Employers have the right to form and join an employer’s organisation, and to participate in its activities. Trade unions and employers also have the right to engage in collective bargaining [section 23]. The *Labour Relations Act 66 of 1995* and the *Basic Conditions of Employment Act 75 of 1997* have been enacted to give effect to these rights.

The Constitution does not explicitly recognise the right to work. This right is recognised in the *International Covenant on Economic, Social and Cultural Rights (1966)* which the government has undertaken to ratify. Article 6, State Parties to the Covenant recognise *“the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”* Among the steps to be taken by a State Party to achieve the full realisation of this right are *“technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”*

One of the consistent themes that emerged in all the hearings was the high priority people attached to obtaining employment. Moholo Kgopane of Malamulele Task Force expressed the view at the Gauteng hearings that *“People have a right to have access to jobs.”* Jabu Ntuli, of the Self-Employed Women’s Union (SEWU) in KwaZulu-Natal, said that they had decided to approach government for help in alleviating the unemployment problem: *“Every other problem stems from unemployment because you don’t have money to buy basic needs.”* Many submissions also focused on the negative social consequences of unemployment - particularly for the youth. These included resorting to drink, prostitution and low self-worth.

According to Lydia Julies of Rietfontein, the high unemployment rate in her town meant that “*most of the people are dependant on State pensions.*”

## b) Past policies

Tata Gubula of Pabellelo, Upington, gave an account of the impact of influx control legislation on his efforts to secure employment: “*In 1965 I got a green paper (a town pass) as the son of Samuel Gubula which entitled me to look for a job. In that way I could work here under certain conditions. If you stayed with one boss you could stay in Upington.*” Eventually he got section 10(1)(b) rights that meant that he could reside in the urban area of Upington: “*After that you could change jobs if you wanted.*” Hendrik van Rhyn described how for many years workers like him had no rights to protect themselves against the arbitrary use of power by their employer: “*Al wat gebeur het by die werk moes jy net aanvaar - daar was niks gepraat van regte nie. Die baas was net altyd reg.*” (*You must accept all that happens at work. There was nothing said about rights. The boss was always just right.*)

Apartheid education policy has left a legacy of illiteracy and lack of skills. According to Tsidi Ndlala of Barklay West “*unemployment and high illiteracy go together.*”

## c) The present situation

Unemployment rates in South Africa are extremely high - in the region of 30%. Women, persons living in rural areas, black people, youth, and persons with disabilities are most deeply affected by unemployment. For example, it is estimated that the unemployment rate among African women is over 50%. The majority of the unemployed have never worked, and do not have access to any form of social security.

The labour market is highly segmented with professional and managerial positions still largely dominated by white men. Workers in production and service sectors have far less job security. Their terms and conditions of employment are much less favourable. Workers in the informal sector enjoy even less security, and enjoy little regulation of their employment conditions. The prevalence of casual, temporary, home-based work, piece work, and other atypical forms of employment contribute to the phenomenon of the working poor - characterised by low wages, few benefits and a high risk of unemployment. These forms of employment also have strong gender dimensions.

The gendered division of labour is particularly acute in South Africa. Women tend to have more interrupted employment, less training and experience, and fewer marketable skills. They are concentrated in certain sectors and jobs of the economy that are generally valued less, and attract low pay and fewer benefits.<sup>4</sup>

## d) Vulnerable workers

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<sup>4</sup> Poverty and Economics in South Africa, occasional paper;1998



A number of submissions highlighted the poor working conditions and terms of employment of farm workers, domestic workers, casual workers and seasonal workers. These include low wages, long working hours, unsafe working environments and a lack of job security and social security benefits. The appalling conditions of work of many farm workers have been described in section 1(d) above.[If possible, insert page numbers for ease of reference] Paulinah Sekhuthu told the Free State hearings that she received a wage of R150 per month as a domestic worker: “Can you imagine getting R150 per month on top of five kids?”

Mohau Kitime, of the Young Christian Workers, described the special problems faced by casual workers such as being forced to do the difficult duties by the permanent staff, being spoken to in an abusive manner by the management, and deprived of overtime pay: “*And you are not supposed to say a word, or what you think or what you feel. They don’t want to hear if you agree or if you don’t. They are not taken as people like other workers...These casual workers, they don’t know their rights.* [note: repetition on p.30]He said that he did not know if the problems that casual workers experienced lay in the law itself or in its implementation. The Young Christian Workers organisation planned to mobilise casual workers to stand up for their rights: “*They must control their own futures. Because if we just sit, saying that in Parliament this law was passed, we’ve got this right, tomorrow at your job place this is not done.*” He also believed that labour flexibility and mobility as well as technological advancements that reduced labour costs were exacerbating the unemployment problem. Lilian Antonie of the National Welfare Social Services and Development Forum highlighted the lack of security and deep poverty of the “*karretjiemense*” - seasonal farm workers in the Northern Cape: “*They lack the most basic amenities like water, housing and food...The karretjies are their only shelter as well as their only mode of transport. They have absolutely no security.*”

#### e) Retrenchments

Silas Diamond of the National Union of Mineworkers told the Free State hearings that the conditions of service of mineworkers were very bad. He described how the Union initiated co-operatives to deal with the problems of retrenchments and dismissals from the mines after 1987. Most of these co-operatives have now been converted into ‘Mine Development Agencies’ (Section 21 Companies) “*in order to make these agencies viable, to generate more profit for themselves, and to train people for whatever job that they can do to sustain life.*” The communities in the rural areas are also involved in these co-operatives.

#### f) The role of government in facilitating employment

Many participants in the hearings clearly viewed the government as having a key role to play in facilitating access to employment. The measures identified to promote employment included: literacy and skills development programmes, the promotion of volunteer/community service, a more vigorous policy of promoting jobs in the rural areas, and affirmative action that should also include persons with disabilities. Certain participants like Bethwell Gugula of the Inkqubela Resource Centre in Pabellelo, Upington believed that “*the government’s macro-economic policy has led to joblessness and starvation.*” Konelo Lekhafola of the Free State Unemployed

Graduates Initiative (FUGI) informed the hearings that his organisations saw the need for a commission for unemployed people: *“That will give the unemployed full participation and full representation so that their needs and their problems can be identified.”* He believed that his organisation and the unemployed generally should be present at the forthcoming Job Summit: *“We need to be there as the unemployed because we have solutions that government and the labour movement cannot have, and also business.”* Defining its duties and responsibilities in employment creation is a key challenge for government as it goes into the Job Summit.

## 9. MACRO-ECONOMIC POLICY AND SOCIO-ECONOMIC RIGHTS

The majority of the submissions from poor people at the hearings focused on their daily lived experiences of poverty. Understandably few of these submissions commented specifically on macro-economic policy. Discussion of the government’s *Growth, Employment and Redistribution* strategy (GEAR) tended to be confined to more organised groupings such as NGO’s and academic institutions.

The background paper, ‘Poverty and Economics in South Africa,’ argues that GEAR *“should be evaluated in terms of its promised effects - job creation and growth - and the ability to provide socio-economic rights to the people living in South Africa.”*<sup>5</sup> They point out that the deficit reduction targets mean that, without strong economic growth, economic resources will be constrained: *“Fewer available resources, in turn, means that the ability to ensure adequate housing, affordable food, clean water, accessible health care, and quality education will be compromised.”*<sup>6</sup> They provide, as examples of the impact of GEAR on socio-economic rights, the fact that social pensions for the elderly have increased at a rate slower than inflation, and the restructuring of the State maintenance grant. In the latter case, the Ministry of Welfare sought to achieve greater equity in the distribution of public child support benefits within highly constrained fiscal parameters. The net result was a significant reduction in the benefits provided to poor children. To this can be added the recent 3 month restriction on the back-pay of social grants. This is clearly a retrogressive measure as previously social grant beneficiaries received full back-pay to the date of application.

The background paper is critical of the fact that one of the reasons for the reduction in social expenditure is to reduce the *“apartheid debt.”* They argue that high interest payment on this debt (over 1/5 of the combined national and provincial budgets) diverts public resources away from the realisation of the socio-economic rights in the Bill of Rights: *“GEAR has responded, not by restructuring the debt or taxing the beneficiaries of apartheid, but by cutting government spending.”*<sup>7</sup> Isaac Doktor agrees: *“the apartheid debt is crippling the delivery of services in rural area and small towns....the debt must be written off if we are to seriously tackle the problems for rural development.”*

GEAR makes the attainment of substantive gender equality more difficult. An increase in labour market flexibility will perpetuate the poor working conditions experienced by many women workers. The reduction in government spending *“means*

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<sup>5</sup> *Poverty and Economics in South Africa*, SANGOCO occasional; 1998

<sup>6</sup> p16 *ibid.*

<sup>7</sup> p16 *ibid.*

*that women will continue to perform large amounts of unpaid labour to substitute for the lack of adequate social services.”*<sup>8</sup>

The Poverty and Education occasional paper argues that the State should actively facilitate the meeting of basic human needs. This should not lead to an increase in inequality or impose the greatest burden on the most disadvantaged of our society.<sup>9</sup>

In concluding this section, it is apposite to remind ourselves that a commitment to human rights implies that the dignity and well-being of every individual is the subject of public concern. This means that we cannot be indifferent to human suffering or defer the meeting of basic human needs to some future time when higher levels of economic growth will allegedly raise everyone’s standard of living. Economic and social rights imply that the State must take deliberate, concrete and targeted measures to ensure that everyone at least enjoys basic levels of each of the rights. It also demands progressively advancing and improving access to the rights. In this process, the needs of disadvantaged and vulnerable groups should enjoy a priority claim on the State’s resources.

In the words of Prof. Philip Alston, chairperson of the UN Committee on Economic, Social and Cultural Rights, who launched the poverty hearings:

*“The pressures of globalisation and economic competitiveness have promoted a logic which, if permitted to remain unchecked, will inexorably reduce the living standards of the poorest groups in our society. Such an approach is neither economically sustainable nor morally acceptable. ...Economic policies must ultimately be judged solely on the basis of their capacity to contribute to the dignity and well-being of every individual, and not just of entrepreneurs and those allied to them.”* [‘Economic and Social Rights in the International Arena’<sup>10</sup>]

## CONCLUSIONS

In this final section we review the main themes relating to economic and social rights which emerged from the hearings, and make a number of recommendations based on these themes.

### Key themes

#### ***a) Lack of understanding and awareness of rights***

It emerged clearly from the hearings that there was a general lack of awareness and understanding by people of their economic and social rights. Participants were generally not asked directly whether they understood their rights. However one could infer from people’s narratives at the hearings that the Bill of Rights was remote from their daily experiences. When Mimi Mokoena was asked directly, at the North West hearings, whether she received information about the Constitution and Bill of Rights, she responded: *“No, I never saw them. Maybe I don’t know them.”* Generally, it was the more organised groups like NGO’s and trade unions that were more conscious of

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<sup>8</sup> p17: Poverty and Economics in South Africa, SANGOCO occasional paper;1998

<sup>9</sup> p27 Poverty and Education in South Africa, SANGOCO occasional paper; 1998

<sup>10</sup> p4: *ESR Review*, a quarterly publication by the Community Law Centre and Centre for Human Rights, vol. 1, no. 2, June 1998

rights generally, and economic and social rights in particular. Obviously the widespread problem of illiteracy has a profound impact on people's capacity to understand and enforce their rights.

***b) The close linkages between all human rights***

The testimonies at the hearings demonstrated graphically the interdependence and interrelatedness of all human rights. For example, access to land was regarded, by many rural dwellers, as crucial to ensuring food security: Access to clean water was critical to the enjoyment of health; poor education makes unemployment more likely: Finally, social security is, for many people, essential to ensuring a decent standard of living. Links were also drawn between economic and social rights and the enjoyment of civil and political rights such as the right to human dignity, equality, and full participation in democratic processes. Mrs. Xasa, Director of the Kei District Committee in Umtata expressed the link as follows: *"Poverty takes away dignity. When women here have to borrow and your neighbour swears at you, you still sit and wait for her. That's how you lose your dignity."*

***c) The role of government in giving effect to people's rights***

People believe Government has the primary responsibility for ensuring that people are able to gain access to, and enjoy, their economic and social rights. There was a general understanding that this did not imply that people should be the passive recipients of government *"hand-outs."* People acknowledged that they should be active participants in improving their standard of living, and that personal and community resources should be mobilised for development. It was the role of government to support and facilitate these initiatives and to improve the resources available to poor communities.

This perception was expressed in a number of ways throughout the hearings. Konelo Lekhafola of the Free State Unemployed Graduates Initiative (FUGI) was adamant that people *"don't want handouts. We want to be empowered, and we want resources that will help us to empower ourselves."* Benedicta Mahlangu acknowledged that *"assistance from the government as well as others was necessary to enable them to achieve what they had."* However, she emphasised that people should do things for themselves so that they could be helped. Meisie Ledagile of the Rural Women's Movement in the North West Province underscored the importance of community organisation and solidarity: *"We realised that the government can help. But not if you're just sitting. Let us stand up so people can help us."* Mrs Xasa said that, *"Today we are not waiting for manna from heaven."*

A striking feature of the large number of testimonies concerning self-help projects was how a lack of access to resources, basic social services, and infrastructure, contributed to the collapse of these projects. If projects did not collapse, they often did not achieve their full potential. Without government playing an active role in ensuring access to productive assets, basic social services, infrastructure, and employment - the socio-economic rights in the Bill of Rights will remain largely unrealised for the vast majority. Mzoli Sifiki of the Pedi district highlighted the special developmental duties of local government: *"Local government should stand up for us. They know our needs*

*- basic needs for life. We didn't just vote for promises. Government should deliver... We should have different lives from the lives we lead under oppression."*

Government also has a direct and immediate role in ensuring that disadvantaged and vulnerable groups enjoy access to basic levels of the socio-economic rights such as food, water, health care, shelter and social assistance. The hearings highlighted how groups such as children, the elderly and persons with disabilities face special obstacles in meeting their basic needs. It is the responsibility of government to ensure that these groups are not deprived of life, health or dignity due to a lack of access to basic socio-economic rights. Other groups that are particularly vulnerable include migrant workers, refugees, rural women and persons living with HIV/AIDS.

Apart from proactive measures, government must also refrain from obstructing people's access to socio-economic rights. Such actions range from obstructive attitudes of government officials and misinformation to deliberately depriving people of access to socio-economic rights. A good example of this type of conduct is the blanket suspension of social grants in the re-registration drive that was described in graphic detail at the Eastern Cape hearings (see section 5(d) above. Insert exact pg. no, if possible). Other examples include arbitrary forced evictions, barring children from school because their parents cannot afford school fees, and denying access to basic water services for non-payment where people are unable to pay for this service.

#### ***d) The role of the private sector***

Given the highly unequal distribution of wealth and resources in South Africa, the active participation of the private sector is clearly vital to the full realisation of economic and social rights. Benedicta Mahlangu emphasised the need for banks to accommodate the needs of the impoverished poor. This was echoed by Sharda Naidoo of the Alliance of Micro-Enterprise Development Practitioners when she commented that the financial sector *"is not catering to the majority of the people in the country."* At the social security hearings, people noted that private employers need to play a greater role in ensuring adequate social insurance provision for all their workers. This is particularly true for those in insecure forms of employment such as casual, temporary and domestic workers. The need for private employers to implement affirmative action policies is crucial to ensuring a more diverse and representative workforce, and facilitating access to employment by disadvantaged groups. The hearings on the environment highlighted the need for private companies, mines etc. to closely monitor their environmental practices and to refrain from violating legal and international standards relating to work-place health and safety, pollution and environmental protection.

#### ***e) Accountability, access to information, and participation in decision-making***

Many of those who testified indicated that there was a need for mechanisms and channels to hold their elected representatives accountable for meeting their basic needs. It was not enough to participate in an election once every few years.

A large volume of submissions concerned the unresponsiveness of government officials at all levels to people's complaints, and requests for information, advice and assistance. McDonald Nkosiyanane representing an organisation concerned with the

rights of persons with disabilities said: *“People do not recognise us as human beings. It is as though we are not alive. The government in 1994 pleased us when they allowed us to vote. But they have not addressed our needs. They only remember us when we have to vote.”* Tolman Stokwe of Grahamstown called on the government the people had elected to *“show us they exist”* and *“to come closer to the people.”* Elizabeth Mokobane expressed her disenchantment with the local government councillors in her region in the following terms: *“The community elects them before and when we call them, we wait and wait and they don’t come.”*

Many people complained about writing numerous letters requesting information and assistance to which no response was forthcoming. In some cases, officials appeared to be downright obstructive, and sent people from pillar to post to resolve their problem.

The long delays in processing applications for social grants and the lack of feedback on the progress of applications were a major issue for many social grant recipients.

A lack of infrastructure such as telephones, electricity and proper roads inhibits access to information and knowledge that could assist people in realising their socio-economic rights.

A further theme that emerged was the sense that poor people were often excluded from policy-making processes that have a direct impact on their socio-economic rights. Jonty Ndlanzi of the Rural Consultative Forum believes that it is insufficient to simply convey information about policy development. There is a need for materials in languages that people understand, workshops, and more time for feedback and response to calls for public comments - *“the deadlines are too quick.”* Rosalie Telela, of the Human Rights Research and Advocacy Project, National Association of Democratic Lawyers (NADEL), said that an important component of their project was empowering disadvantaged communities to make submissions to parliamentary portfolio committees etc. on their own behalf.

#### ***f) Obstacles experienced in gaining access to the rights***

In each section of this report, we have highlighted the obstacles identified by participants that impede their access to the particular rights. The most common obstacles encountered were the following:

##### ***(i) Legal obstacles***

These ranged from legal provisions that were too restrictive and administratively complex, poor implementation of existing legislation, and a lack of access to affordable, accessible legal services for enforcing rights. For example, even though substantive legal protections have been enacted to promote security of tenure for farm workers and labour tenants, a lack of access to legal services makes the enforcement of these rights extremely difficult. In addition, there were accounts of hostile attitudes from local lawyers, the police, and magistrates that discourages people from taking their cases further. The entrenched and unequal power relations in the rural areas make it very difficult for farm workers to challenge violations of their rights.

***(ii) Administrative obstacles***

This includes complex, time-consuming and bureaucratic procedures for gaining access to socio-economic assistance measures such as housing subsidies, land restitution applications, land acquisition grants, social grants, subsidies for welfare organisations etc.

***(iii) Financial obstacles***

The unaffordability of the costs of basic social services such as water, medicines, education, and housing emerged as a major theme throughout the hearings. It appears that school fees, and the associated costs of education, are major factors that are undermining the enjoyment of the right to basic education. A strong view was expressed that the government had reneged on a promise of free primary education. No general view was expressed that the delivery of all social services should be provided free of charge. However, there was a general perception that people should not be denied access to basic services when they are genuinely unable to pay, due to unemployment and poverty. In the words of Mangome RSA at the North West Hearings: *“Water is too expensive for poor people. Masakhane says we must pay for electricity and water. That is impossible if we are unemployed.”* Even when legislation does make provision for people to apply for reductions or exemptions, from the payment of fees or user-charges, many are unaware of this right or how to go about applying (see, for example, section 7(d) on financial obstacles to education. Insert pg. no, if possible).

***(iv) Physical obstacles***

Often services are not accessible to people because they are located far away from where people stay. Poor roads and other transport infrastructure and a lack of affordable means of transport aggravates this. Persons living in rural areas suffer the most disadvantage in this regard. This was highlighted particularly in relation to the location of clinics, schools and water facilities. Apartheid planning and legislation have meant that many people’s homes are located far away from employment opportunities. This has the effect of burdening disadvantaged communities with heavy transport costs and long hours spent commuting to and from work. These disadvantages are compounded for people with physical and mental disabilities who are living in these communities. The lack of facilities and the sheer extent of the physical barriers that prevent persons with disabilities from enjoying equal access to socio-economic rights was consistently highlighted. These ranged across all sectors critical to the realisation of socio-economic rights - welfare, education, health care, housing and land.

***(v) Gender obstacles***

The hearings confirmed that the disproportionate share of reproductive work performed by women, particularly in relation to the care of children and elderly or sick relatives, the deep social and cultural patterns of gender discrimination, and violence were critical factors in women’s unequal access to socio-economic rights. Clearly gender roles are still deeply entrenched with women taking primary responsibility for bringing up children - in many cases with little or no support from

the father of the children. According to Constance Momoza of the Eastern Cape: *“Men don’t care about hungry children. Women dies from worry. We look after our children. Men don’t care.”*

Due to the migrant labour system, many women struggle alone in the rural areas to eke out a living for themselves and their dependants. Remittances and social pensions provide a vital life-line in this context.

Certain submissions drew a link between women’s poverty and customary law practices such as polygamy and patriarchal inheritance principles. Traditional leaders often stood in the way of women gaining access to land in their own name.

Certain submissions demonstrated graphically how women can be deprived of income, opportunities to participate in employment and public life, and a sense of self-worth in violent and abusive relationships. Poor women have few viable options to escape from these relationships which trap them in a cycle of dependency and poverty.

### ***Recommendations***

It is not possible within the scope of this report to make detailed recommendations in relation to each right. However, based on the themes identified above a number of general recommendations can be made:

#### ***a) Human rights awareness and education***

Campaigns and training programmes to increase awareness and knowledge of the Bill of Rights among disadvantaged communities should be a priority. They should be designed so as to be accessible to persons with a low level of literacy, and should be relevant to their daily experiences of poverty. They should also pay particular attention to economic and social rights, including practical ways to enforce them. Human rights education should be a joint responsibility of government and civil society.

#### ***b) Improved access to legal services***

Intensify efforts to improve access to legal services, particularly in the rural areas. This could be achieved through revision of the legal aid system, and establishing a network of community-based legal aid centres and advice offices. It is essential, that both the public legal aid system and legal services provided by non-governmental organisations include redress for violations of economic and social rights within their respective mandates. This clearly implies that local and international donors, providing funding for legal services in South Africa, should be aware of the importance of ensuring proper mechanisms for the enforcement of economic and social rights.

#### ***c) Integrated strategies and intersectoral collaboration***

Promoting access to all economic and social rights requires an integrated strategy and intersectoral collaboration on the part of all relevant organs of the State. Because of



the interdependency of all human rights, establishing strong linkages between the policies and programmes of different government departments, is vital.

***d) Improving the responsiveness of government officials***

Government must give priority attention to improving the responsiveness of officials to the needs of disadvantaged communities. It must actively enforce and monitor the implementation of the Public Service's Code of Conduct. It is essential officials respond to requests for advice and assistance efficiently and in clear, accessible language. Officials should make every effort to advise people of their entitlements under various programmes (e.g., the new child support grant), and should minimise inconvenience and costs incurred by the public. Strong penalties must be applicable to officials who do not respect the human dignity of those that apply to them for assistance, particularly social grant recipients. Local government and other relevant officials must be trained on economic and social rights.

Efforts to promote participation by disadvantaged communities in policy-making and legislative processes should be intensified. These should include community workshops, adequate response times for public comments, and holding public hearings in informal settlements and rural areas. It is also essential that disadvantaged communities, in both rural and urban areas, are actively involved in the process of monitoring socio-economic rights by the SA Human Rights Commission under section 184(3) of the Constitution.

***e) Strengthening the role of government***

Government should play a proactive role in ensuring that everyone has access to basic social services, building a comprehensive social security system, and fostering conditions that enable people to gain access to employment and land on an equitable basis. It should explore creative ways of supporting and building on the initiatives of poor people: for example, by facilitating access to credit, providing transport and telecommunications infrastructure, and promoting skills development. In doing so the needs of groups in vulnerable and disadvantaged circumstances should be prioritised.

To achieve equitable access to basic needs and a fair distribution of resources, government must play a leading role. This is particularly important in the light of the legacy of poverty and inequality in South Africa. Market mechanisms alone cannot be relied on to achieve equitable access to economic and social rights in the South African context.

The government must also avoid retrogressive measures that reduce or deprive people of access to economic and social rights.

***f) The participation of the private sector***

This sector must also participate actively in promoting a more equitable distribution of socio-economic resources in society. This can be achieved by, for example, providing skills training, implementing affirmative action policies, and extending social insurance protection to all categories of workers. They must also adhere to the labour and environmental standards enshrined in the Constitution and legislation.

***g) Removing legal obstacles***

Legislation that is passed must make it easier, and not more difficult, for people to gain access to socio-economic rights. Enforcement, and proper implementation of socio-economic legislation, is critical. The hearings on the theme of the environment highlighted the importance of partnerships between government and communities in ensuring the proper enforcement of legislation.

***h) Removing administrative obstacles***

Administrative procedures for accessing social grants, subsidies, land, etc. should be streamlined. Much work is needed to ensure that these procedures are simple, speedy, transparent and effective. Government must eliminate the long delays in processing applications for assistance as they expose poor people to great uncertainty and insecurity.

***i) Removing financial obstacles***

It is essential that government develop and implement policies that remove financial obstacles to gaining access to economic and social rights - particularly in relation to water, medicines, land, housing and education. This may include an increased level of subsidisation and more effective procedures for reducing or exempting poor people from paying user-charges. Where such procedures do exist, for example, in relation to water services and the payment of school fees, it is vital that government and NGO's promote a more widespread awareness of these procedures.

***j) Removing physical obstacles***

Government must make on-going efforts to locate basic social services in closer proximity to people, and to eliminate the effects of apartheid rural and town planning. It must complement these efforts by improving transport infrastructure and more affordable forms of transport (e.g. subsidised bus services for school children). Programmes, aimed at improving access to social and economic rights, must be designed in such a way that people with disabilities can participate equally in them. They must also accommodate the diverse needs of women, elderly persons and other disadvantaged groups.

***k) Removing gender-based obstacles***

Promoting women's full and equal enjoyment of economic and social rights will require a range of intersectoral strategies aimed at eliminating the gendered division of labour both within the home and in the economy. These strategies should include improving the level of social assistance for child support, intensifying the efforts to make the private maintenance system more effective, and mobilising private sector resources for child care and early childhood development facilities.

Government must investigate, with the full participation of women affected by these practices, appropriate measures to eliminate discriminatory customary practices which

undermine women's rights. The elimination of all forms of violence against women continues to be a key priority for both the State and the NGO-sector.

Government must give a high priority to adopting special measures and policies that facilitate women's independent access to resources such as land, capital, credit and income-generating opportunities. Finally, efforts to improve the working conditions, social security benefits and job security of domestic workers, informal sector workers and those engaged in casual and other atypical forms of employment should be intensified. This will benefit disadvantaged women who predominate in these types of jobs.

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