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## PREFACE

The mandate of the South African Human Rights Commission is a broad and comprehensive one and includes the obligation to 'monitor and assess the observance of human rights' in South Africa. The challenges of advancing a culture of human rights and of achieving equality in a society that is as disparate as ours must mean that the issue of social and economic rights are dealt with having full regard to the current context and developmental challenges we face.

Section 184(3) of the Constitution gives power to the Commission to request information from relevant organs of state on measures taken towards the realisation of the various social and economic rights set out in the Constitution.

This report covers an important period in the realisation of economic and social rights in our country -- the fifth anniversary of our Constitution. It also represents the fourth monitoring cycle of the economic and social rights monitoring mandate of the Commission. It is important to remind ourselves that the Commission is entering its second term of its mandate to monitor and assess human rights guided by two landmark decisions of the Constitutional Court -- the *Grootboom* and *TAC* cases. With these groundbreaking cases as signposts, we are certain that we shall not falter in our mission, hence they served as building blocks in the present report.

This report has benefited from many people. We would like to thank the representatives of various government departments who responded to the protocols and provided helpful information used in the development of this report.

We extend our appreciation to the NORAD/Norwegian Embassy (Pretoria) for providing funding for the work towards the report and for continued support.

We are particularly indebted to the members of the Research and Documentation Department of the Commission for contributing selflessly toward the production of this report. The members include Tseliso Thipanyane (Head of Research and Documentation Department) for his guidance and motivation; and the research team: Agnes Mabotja, Farida Dollie, Lindiwe Mavundla, Morakane Mokoena, Vusi Shabalala, and Vusumzi Moyo. We also wish to recognise the contribution of those researchers who are no longer with the Commission, but who contributed at various stages of the report. These include David Mmakola and Phenyio Rakate (both former Deputy Directors), Tshiliso Molukanele, Zandile Nkonyane, and Aruna Dukhi. We appreciate all their efforts.

We wish to acknowledge the administrative support provided by Thandeka Mpisi and Nnono Matsaba. We also wish to extend our gratitude to the following library personnel: Lesedi Sojane (the librarian) and her assistants, Mahlape Mollo and Nozuko January, for their assistance with necessary material. Our appreciation goes to Donna Reid (Communications Technician) for designing the cover.

Our heartfelt gratitude to all members of the South African Human Rights Commission for offering their support during the writing process. As usual your comments and encouragement have been valuable.

I hope that you will benefit from reading the Report and that it contributes towards the understanding and entrenchment of how human rights play a critical role in the transformation of our society and in the achievement of it's objectives.

A handwritten signature in black ink, appearing to read 'Jody Kollapen', with a large, sweeping flourish at the end.

Jody Kollapen  
Chairperson, SAHRC

April 2003



**4<sup>th</sup> Annual Economic and Social Rights Report:  
2000 - 2002**

**Executive Summary**

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## PREFACE

This report is pursuant to the mandate of the South African Human Rights Commission to monitor and assess the observance of economic and social rights in South Africa as provided for by section 184(1)<sup>1</sup> and (3)<sup>2</sup> of the Constitution of the Republic of South Africa, Act 108, 1996. The report covers two financial years, 2000/2001 and 2001/2002, and represent the fourth economic and social rights monitoring cycle of the Commission.<sup>3</sup>

This report has benefited from many people. We would therefore like to thank representatives of various government departments who responded to the Commission's questionnaires and provided helpful information used in the development of this report.

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Our heartfelt gratitude to all members of the South African Human Rights Commission for offering their support during the writing process. As usual your comments and encouragement have been valuable.

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<sup>1</sup> Section 184(1) provides:

"The Human Rights Commission must -

- (a) promote respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in the Republic."

<sup>2</sup> Subsection 3 states that:

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

<sup>3</sup> The Commission Economic and Social Rights Reports has always been behind with a year, this is an attempt by the Commission to try and catch-up.

We hope that the report contributes towards a better understanding of the critical role played by human rights in the transformation of our society and in the realisation of the aspirations of our people enshrined in the Preamble of our Constitution.

I therefore hope you will benefit from reading this report

A handwritten signature in black ink, appearing to read 'Jody Kollapen', written in a cursive style.

**Jody Kollapen**  
**Chairperson, SAHRC**  
**April 2003**



## THE MONITORING PROCESS

In order to properly execute its constitutional mandate, the Commission developed a set of questionnaires (commonly referred to as the “Protocols”) in its first reporting cycle.<sup>4</sup> The Protocols were designed to provide the Commission with information on policy, legislative, budgetary and other measures adopted during the reporting period in order to realise the economic and social rights stipulated in the Constitution.<sup>5</sup> The Protocols have since been refined to include questions on areas such as vulnerable groups; problems experienced by organs of State in giving effect to economic and social rights and measures undertaken to address such problems; National Action Plan for the Promotion and Protection of Human Rights; indicators; and budgetary allocations.

The Protocols initially focused only on the national and provincial spheres of government, but in this reporting cycle, the Commission has included Metropolitan Councils and Parastatals. While the Protocols took a maximalist approach in soliciting information from national and provincial spheres of government, a minimalist approach was adopted when dealing with Metropolitan Councils and Parastatals. The questions posed to Metros and Parastatals required information on their broad understanding of their Constitutional obligations in terms of section 7(2) and Schedules 4 and 5 of the Constitution.

There are at least two reasons why the Commission did not include Metropolitan Councils and Parastatals in the previous monitoring cycles, despite both being “state organs” in terms of section 239,<sup>6</sup> and with their responsibilities spelt out in Schedules 4 and 5 of the Constitution. Firstly, an attempt to include the local sphere of government in the first economic and social rights report was made, but this failed due to poor responses to the Commission’s Protocols. Lastly, the Commission’s limited resources made it impossible to cover the entire sphere of local government and Parastatals. The limited resources have also made it impossible again to cover the entire sphere of local government.

Through its Research and Documentation Department, the Commission began distributing the first batch of protocols to all the relevant national Departments in early February 2002. In early March, the Eastern Cape, Free State, Gauteng and KwaZulu-Natal provinces received their sets of protocols followed by Mpumalanga, Northern Cape, Limpopo, North West and the Western Cape. The Metropolitan Councils and Parastatals began receiving protocols from 7-20 March 2002.

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<sup>4</sup> “Economic & Social Rights Report 1997-1998,” *SAHRC Vols. 1-VI*, 1999.

<sup>5</sup> Section 7(2) of the Constitution provides:

“The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

<sup>6</sup> Section 239 defines an ‘organ of state’ as including:

- (i) any state department or administration in national, provincial and local government;
- (ii) functionary or institution exercising power or performing a function in terms of the Constitution; or
- (iii) exercising a public power or performing a public function in terms of any legislation. Therefore, an organ of state performing a public function must fulfil, respect and promote [economic and social] rights by adopting appropriate means tailored towards the progressive realisation of [economic and social] rights in the Bill of Rights.

The proposed due date for the submission of reports (responses to the Protocols) to the Commission by government departments was 30 April 2002, but only a few meet the deadline. Extensions were granted following appeals made to the Commission by organs of State. Further extensions were granted until 30 June 2002.<sup>7</sup>

### **Analysis of Responses to the Commission's Protocols**

The sections are a summary of measures instituted (key developments) by relevant organs of State during the monitoring period-April 2000 to March 2002. The sections also address some of the shortcomings of these measures (key challenges) and also provide a summary of recommendations and conclusions reached by the Commission on these measures.

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<sup>7</sup> These applied to the National Department of Labour, Social Development; Social Services & Population Development (Free State), Social Development (KZN), Education, Agriculture and Economic Affairs, Social Services & Population Development (WC). These submitted their Protocols in mid July 2002.

## **RIGHT TO ADEQUATE HOUSING**

The right to adequate housing as one of the most important of all basic human rights is recognised in a number of international human rights instruments and treaties. Shelter from the elements; a place to eat; sleep; relax and raise a family are some of the basic things people need for survival. Section 26(1) of the Constitution provides that everyone shall have the right of access to *adequate* housing.

## **KEY ACHIEVEMENTS**

### **Policies, Programmes and Projects**

#### **National Sphere**

##### **National Department of Housing (NDH)**

- Amendment to the Housing Subsidy Scheme to enable persons owning unsubsidised residential properties to access housing subsidies (2000/ 2001)
- Environmentally Sound Low Cost Housing (2000/ 2001)
- Peoples Housing Process (2000/ 2001)
- Developer Driven Individual Subsidy Programme (2000/ 2001)
- Savings linked subsidy scheme (2001/ 2002)
- Rental Housing Policy Framework (2001/ 2002)
- Programme for housing development in emergency circumstances (2001/ 2002)

#### **Provincial Sphere**

The only report from the Eastern Cape Department of Housing and Local Government with regard to the measures adopted was that the department was operating within the provisions of the Amendment of the Housing Subsidy Scheme. The rest of the provincial departments of housing indicated that they have instituted the following policies: Special Needs Policy; Stabilisation of the Rental Housing Sector Policy; Protection of the Housing Consumer Policy; and Farm worker housing. They further reported that they have implemented, amongst others, the following programmes: the Rural Housing subsidy; Disaster Intervention programme; Hostel Redevelopment programme; and Rapid Land Release programme.

### **Legislative Measures**

#### **National Sphere**

Legislative measures instituted by the National Department of Housing included the amendment of the Housing Act as well as the Home Loan and Mortgage Disclosure Act No 63 of 2000. The most significant amendment to the Housing Act has been the insertions of sections 10A and 10B. These insertions serve to restrict a person that received a housing subsidy in terms of any of the national housing programmes from selling his or her dwelling within a period of 8 years after acquiring such property. The provision grants the relevant provincial departments of housing the first preference of purchasing the property were it to be sold. The Home Loan and

Mortgage Disclosure Act's main objective is to increase the level of investment in the low-income housing sector by, amongst others, promoting fair lending practices among financial institutions that provide home loans.

### **Provincial Sphere**

The legislative measures instituted by different provincial departments of housing includes: The *Free State Provincial Housing Amendment Act No. 6 of 2001* which makes provision for the establishment of institutions that evaluate, approve and fund housing development projects. The Gauteng's *Conversion of Certain Rights into Leasehold or Ownership Act of 2000* provides for security of tenure to persons occupying properties that belonged to the Gauteng Provincial Housing Advisory Board. The *First Gauteng Housing Amendment Act No. 6 of 2000* provides the legislative framework for the transfer of residential properties and to establish adjudication and appeal panels. The *Residential Landlord Tenant Act No. 4 of 2001* make provision for the repeal of the provincial Act in order to allow the landlord and tenant matters to be dealt with in terms of the Rental Housing Act No. 50 of 1999.

The KwaZulu-Natal Department of Housing passed *the Provincial Housing Amendment Act No. 8 of 2000*. One of its primary objectives is to provide regulations of state funded housing, including an 8-year pre-emptive right and provide for expropriation of land for housing development. The Mpumalanga Housing Department passed the *Mpumalanga Housing Amendment Bill, 2001*. The Bill transfers powers, duties, rights and obligations of the Mpumalanga Housing Development Board to the MEC for Housing and Land Administration. The Mpumalanga Rental Housing Regulations 2001, read with the Rental Housing Act No. 50 of 1999, seeks to promote the provision of rental housing property and access to adequate housing by providing for the establishment of mechanisms that will ensure the proper functioning of the rental housing market.

### **Budgetary measures**

#### **National Sphere**

The national government reported an under-expenditure of R109 319 000 in 2000/2001 and an under-expenditure of R64 792 000 in 2001/2002. In 2000/2001 the National Housing Fund was over-spend with R4 970 200, and was under-spend with R899 129 000 in 2000/2001.

#### **Provincial Sphere**

The Eastern Cape attributed its under-spending to insufficient capacity at municipal level. The impact of the under-expenditure was that not all the houses planned were built, and this slowed down the delivery rate of housing. The Limpopo Department of Housing attributed its under-expenditure to limited capacity for administration and the unavailability of suitable land. The Western Cape indicated that it over-spent its budget allocation due to increasing demand of housing which surpassed the financial resources allocated to the department.

## **KEY CHALLENGES**

### **Response to Protocols**

#### **National Sphere**

The reports provided by government departments still indicate a lack of understanding of the significance of Commission's economic and social rights monitoring process and the need for adequate reporting to the Commission. The response from the NDH indicated that a lot of effort was put into the compilation of the report. However, there were still some unexplained statements, phrases and acronyms used in the report that made understanding some issues difficult.

#### **Provincial Sphere**

In general, provincial departments still provide information that is incomplete, contradictory, repetitious and not relevant for the period under review. Some departments merely reported that the statistics are not kept for specific racial groups, without explaining the reasons thereof. For example, the Free State Department of Housing did not provide information for the entire budget section, and no explanation was provided for this omission.

#### **Policies, Programmes and Projects (both National and Provincial Sphere)**

Informal settlements contribute to the erosion of the environment. The reason for this is that the settlements are not properly planned, and are mostly situated on marginal land such as steep slopes and flood plains of rivers and streams. Therefore, the informal settlements impact heavily on the sensitive ecosystems such as estuaries. There is no requirement for the installation of airbricks in terms of building regulations for low cost houses. For that reason, this creates problems when the residents have to install ceilings, as the houses become more enclosed. On the other hand, the poor thermal performance, poor resistance to damp and smaller sizes, the new housing projects in South Africa fall short of the Committee on Economic, Social and Cultural Rights' definition of adequacy. This factor was substantiated by the findings of the Sustainable, Energy, Environment and Development (SEED) organisation, which conducted research on consequences of bad housing and discovered that lack of proper ventilation in low cost houses causes poor thermal performance and poor resistance to damp.

According to the national and provincial departments of housing, one of the hindrances to the delivery of housing is the unavailability of suitable land. Another problem is the delay in transferring land to the beneficiaries due to delays with the opening of township registers; issuance of clearance certificates; as well as problems of inexperienced developers; quality of delivered products; and training of local labour. The issue of security of tenure is an added impediment in the implementation of some of the housing projects. For example, most of the rural land in KwaZulu-Natal is tribal land that vests either in the Ingonyama Trust or in the Minister of the Department of Land Affairs who has to issue a letter of consent before land could be released. In traditional areas, it is often impossible to transfer land to the beneficiaries.

This poses a problem because security of tenure is a fundamental principle upon which the provision of subsidies is based.

There is also no clarity on the roles and responsibilities of traditional leaders vs. councillors. As already pointed out above, KwaZulu-Natal has developed its own rural housing guidelines. This lack of clarity is still impacting negatively in some areas. It should be noted that the provision of houses to rural communities is very important as it would make the country more viable and thus limit the inexorable migration of people from rural to urban areas.

Another problem that was experienced in the implementation of the measures instituted to realise the right to housing is the inadequate budget allocation.

The Gauteng and North West Departments of Housing experienced difficulties in the implementation of policies, programmes and projects due to lack of appropriate capacity at municipal level. KwaZulu-Natal also had a problem with municipalities lacking capacity to undertake housing developments. There has been land invasions and increasing mushrooming of informal settlements.

According to the requirements of the National Housing Subsidy Scheme, beneficiaries have to be over 21 years old and legally competent to enter into contracts in order to qualify for housing subsidies. For that reason, none of the instituted policies or legislation adopted by the national government and the respective provincial housing departments paid attention to girl children and child-headed household. This is so; notwithstanding the rapidly increasing number of orphans who lost their parents due to HIV/AIDS related conditions as well as other factors.

### **Budgetary Measures (both National and Provincial Sphere)**

Provincial housing departments identified the following as accounting for under spending:

- Under performance by developers and conveyancers.
- Section 118 of the Local Government Municipal Systems Act, 2000, which requires that all outstanding payments due to municipalities must be paid before clearance certificates are issued for property to be transferred or registered in the name of beneficiary.
- In some instances the requirements of the National Environmental Management Act, has resulted in delays in the implementation of housing projects until a proper assessment is done.
- Out of season rainfall.
- Lack of capacity of newly established local authorities to undertake approvals and provide other services.

Mpumalanga under-spent on its budget due to the unavailability of suitable land for building houses. Eastern Cape and Limpopo cited lack of capacity at the local level. Western Cape indicated that it over-spent its budget allocation due to increasing demand for housing, which surpassed the financial resources allocated to the Department.

## **RECOMMENDATIONS**

### **Response to Protocols**

The departments of housing need to put more effort in compiling responses and ensuring that the information included in the reports is relevant and properly explained. Reasons for lack of information on particular issues must be provided as well as an indication as to when information will be available. Since NDH had reported that HUIS, a mechanism to monitor the housing provision process is being revised, it is envisaged that with the help of HUIS, the respective housing departments will in future endeavour to provide information that is as comprehensive as possible.

### **Policies, Programmes and Projects**

As already pointed out above, rural housing projects cannot be implemented immediately due to the unavailability of land, as some traditional leaders are still reluctant to make land available for settlement. KwaZulu-Natal reported on this issue as impeding the provision of houses in traditionally owned land. This is a matter that needs to be addressed if government wishes to improve the quality of life for poor rural communities. Therefore, government must engage in a dialogue with traditional leaders in order to understand their reasons and be able to alleviate their concerns, and also to find ways and means to address the whole issue of land in general.

NDH should engage in policy dialogue with provincial and local governments as well as other stakeholders to establish a holistic approach on housing programs like rural development not only to ensure uniformity in all the provinces, but also to encourage rural development.

The government need to provide a national framework to the provinces to meet the goals and targets as set out in the Declaration of Commitment on HIV/AIDS adopted at the UN Special Session on the policy guideline to provide housing to people living and affected by HIV/AIDS.

### **Legislative Measures**

Girl/ Child - headed household is a reality and the national government must adopt policies and enact legislation or develop a strategy to alleviate difficulties facing these children with regard to housing. Article 21 of the Convention Relating to the Status of Refugees obliges the government to provide housing to refugees. Hence, the national government is under an obligation to develop a policy guideline as well as the criteria to provide housing to people who were uprooted from their countries of origin by circumstances beyond their control.

### **Budgetary Measures**

In order to address under-spending, there should be adequate mechanisms to ensure that allocated funds are utilised.

## **CONCLUSION**

That the government has taken steps towards the progressive realisation of the right to have access to adequate housing is beyond dispute. However, it is regrettable to note that despite the landmark decision of the Constitutional Court in *Grootboom*, millions of people are still living in peril and the measures instituted cannot be considered to be comprehensive as they neglect significant members of society. Much still needs to be done by the government in this regard.



## **RIGHT TO LAND**

### **INTRODUCTION**

The government has since 1994 developed measures that provide access to land and ensure security of tenure for people who were previously denied equitable access to land. The land reform programme has taken the shape of land restitution which seeks to restore land to those that lost land as a result of colonial and apartheid legislation, and to compensate financially those who may not opt for the restoration of land; land redistribution is aimed for residential and productive or agricultural purposes; and security of tenure to allow tenure security for those who lack it.

Section 25 of the Constitution provides for the equitable access to land, and the right to reclaim the land lost through discriminatory laws and the right to security of tenure. Section 25(5) requires the government to take reasonable measures, within its available resources, to create conditions that enable citizens to gain equitable access to land. Section 27(7) provides that individuals or communities that lost land due to discriminatory laws are entitled to restitution or some form of redress.

### **KEY ACHIEVEMENTS**

#### **Policies, Programmes and Projects**

##### **National Sphere**

##### **Restitution**

Great strides were made in the restitution programme. The number of settled cases jumped from 8 000 in 2000 to 12 094 by March 2001. By February 2002 this number has come to 32 389 settled claims. Although there is a backlog of 35 restitution cases that are still before the court, research revealed that 95% of restitution cases were resolved through administrative measures.

##### **Redistribution**

The Land Redistribution for Agricultural Development (LRAD) which was introduced in 2001, redistributed 60 000ha of land to 2 681 applicants. The LRAD was short-lived because it lacked elaborate strategies, and many people could not afford the R5 000 in-kind contribution to access a grant from the Department of Land Affairs (DLA).

##### **Legislative Measures**

##### **Tenure Reform**

The DLA is improving tenure reform, with the Communal Land Rights Bill (2002), gazetted on August 14 2002 already being discussed in workshops. Its success will foster conditions for communal land administration, which the government and traditional leaders are disagreeing on.

## **KEY CHALLENGES**

### **Response to Protocols**

#### **National Sphere**

The DLA responses to the protocols still suffer irrelevancies. Legislative amendments are not spelt out logically, thus making it difficult to decipher what they are about.

#### **Provincial Sphere**

Not all provinces responded to the protocol. The only three provinces that responded tended to refer to the national Department of Land Affairs.

### **Policies, Programmes and Projects**

#### **National Sphere**

##### **Restitution**

No major policies were introduced during the reporting period. Most of the land claims (80%) were urban based, with only 20% resolve in the rural areas.

##### **Redistribution**

The redistribution programme is still very slow. Since it started the programme has distributed only 2 % of land. The 'willing-seller, willing-buyer' notion further discouraged buyers, as sellers sold land expensively. It is for this slow pace that the DLA has postponed its date to redistribute 15 million hectares by 2005, and 30% of rural land in 15 years, instead of the 5 years goal the Department had originally set itself.

##### **Tenure Reform**

Land tenure reform is very slow. Very little progress has been made in the disposal of the 669 000 hectares of state land that the DLA promised to dispose between 2001 and 2002. Today, between 13 million and 14 million people are still without land tenure.

### **Budgetary Measures**

#### **Tenure Reform**

One of the impediments to land reform is under-spending of land reform funds. This failure to spend efficiently has resulted in the reduction of the 2002/2003 budget allocation. For instance, of the R327 million targeted for the 2001/2002 financial year, only R162 million was spent by end of 2001.

## **RECOMMENDATIONS**

The DLA needs to build capacity in order to speed up delivery. The provincial departments should reduce dependency on the national Department of Land Affairs. For land reform to meet its objectives, governments must device effective ways of spending, and more funds need to be allocated towards land reform.

## **CONCLUSION**

The land reform process is still slow. Most of the land (80%) is still owned by white commercial farmers. The State and the previously disadvantaged groups, particularly Africans, share only 20% and between 13 million and 14 million rural inhabitants are affected by lack of access to land. Poor implementation, corruption and lack of capacity continue to affect the land reform process.

## **RIGHT TO HEALTH CARE**

The right to health care services is provided for in sections 27, 28, and 35 of the Constitution. Section 27(1)(a) provides for universal access to health care services including reproductive health; section 27(3) states that no one may be refused emergency medical treatment; section 28 (1) (c) provides for "basic health care services" for children, and section 35(2)(e) provides for "adequate medical treatment" for detained persons and prisoners.

## **KEY ACHIEVEMENTS**

### **Policies, Programmes and Projects**

#### **National Sphere<sup>8</sup>**

Some of the measures instituted by the National Development of Health (NDH) during the reporting period included the following:

##### *The National Policy on Quality of Care*

The NDH developed a comprehensive set of guidelines to standardise the quality of primary health care delivery. This policy serves to accelerate the delivery of the Primary Health Care package. This means that the same norms and standards have to be observed at all public health facilities across provinces.

A survey of 445 clinics conducted by the Health Systems Trust found that there have been improvements since 1998 in areas as antenatal care, immunisation, family planning, home visits, turn around times for laboratory tests, availability of condoms, orals contraceptives and certain drugs such as penicillin in the provision of primary health care.

##### *HIV/AIDS Strategic Plan for South Africa 2000-2005*

The objective of the HIV/AIDS Strategic Plan is to reduce the number of new HIV infections and the impact of HIV/AIDS on individuals, families and communities. Priority areas are prevention, treatment, care, human rights, monitoring and evaluation. The following programmes have also been developed in line with this strategy:

- Sexually Transmitted Diseases (STD) Management,
- Reducing Mother to Child Transmission (MTCT),
- Post-Exposure Prophylaxis (PEP),
- Voluntary Testing and Counselling (VTC).
- Home base and community care

To ensure prioritisation of key objectives of the HIV/AIDS strategy, the government launched a National Integrated Plan (NIP) to implement key strategic areas: increased information, education and communication; increased VTC improved STD

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<sup>8</sup> The National Department of Health is responsible for instituting new measures, which are implemented at the provincial and local spheres. Provincial departments may also introduce measures

management and treatment of opportunistic infections, promote increased use of condoms, improved care and treatment of HIV positive persons and those living with AIDS to promote a better quality of life and limit the need for hospital care.

The NDH reported that progress had been made in the fight against HIV/AIDS:

- 220 million free condoms had been distributed
- interventions such as the syndromic management of HIV/AIDS/STIs and TB have resulted in an increased number of health workers who provide treatment, counselling, and education.
- home based and community care programmes have resulted in more people receiving care in their homes, which has resulted in freeing up hospital beds.
- 18 pilot sites in the nine provinces have been set up for the MTC programme where Nevirapine and formula milk has been made available to HIV positive mothers. The VTC programme enables patients to know their HIV status and make informed choices after counselling.

### **Provincial Sphere**

The provinces, in general reported the same policies, programmes and projects instituted by the NDH.

### **Legislative Measures**

#### **National Sphere**

*The National Health Bill (2001)*

The objective of the National Health Bill is to establish a national health system, which encompasses public, private and non-governmental providers of health services, all of which will have to conform to national legislation. The Bill is also intended to create closer cooperation between the three spheres of government.

#### **Provincial Sphere**

The Eastern Cape, the Free State, Kwa Zulu-Natal all passed provincial Health Acts during 2000. The provincial legislation provide for technical and logistical provision of health services taking into account the DHS and local structures.

### **Budgetary Measures**

#### **National Sphere**

The NDH failed to provide the requested information.

#### **Provincial Sphere**

Most of the provinces reported under- funding, in spite of the fact that some provinces failed to spend allocated funds.

## **KEY CHALLENGES**

### **Response to Protocols**

#### **National Sphere and provincial spheres**

The quality of reports received by the Commission from government departments remains unsatisfactory. The Commission could thus not rely on the reports to assess whether there was any meaningful progress achieved pertaining to the realisation of the right of access to health care services. While Gauteng, the Western Cape and the North West Province made an effort to provide information to the Commission, the quality of reports from provinces such as the Eastern Cape, Limpopo and the Northern Cape were very poor.

### **Policies, Programmes and Projects**

#### **National Sphere**

- The HIV/AIDS Policy does still not provide for universal access of anti-retroviral drugs to people living with AIDS.<sup>9</sup>
- The NDH reported that the implementation of the PHC package face challenges relating to poor communication between management and health workers; resource constraints and high expectations placed on overburdened health workers and that the VCT, MTCT, and PEP programmes lack trained counsellors and infrastructure especially in rural areas

#### **Provincial Sphere**

- The most important challenge facing the health system is to close the gap between policy initiatives and implementation. The Health Systems Trust reported that in the PHC System there are serious shortfalls that include the unavailability of tests for HIV, pap smear, Rhesus and pregnancy. There is also a lack of skills updating on TB and STD treatment, lack of piped water, telephones, electricity supply, basic equipment, incineration facilities for medical waste, certain drugs, and that TB record keeping is poor. Another important finding by the Health Systems Trust was the irregularity of feedback on reports submitted by PHC facilities.
- Implementation of the plan is further hampered by the fact that the roles of the District Health System and the newly defined Metropolitan Councils have not been clearly defined as yet.
- Lack of human resource and infrastructure capacity remains an on-going problem which is exacerbated by trained health workers leaving the country

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<sup>9</sup> NB. While this will be treated in detail in the next monitoring cycle, the Constitutional Court Order in *Minister of Health And Others v Treatment Action Campaign* (1) 2002(10) BCLR 1033 (CC), for the government to roll out Nevirapine on a national basis at public health facilities has not as yet been fully complied with nor the requirement for government to devise and implement a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health care services to combat mother-to child transmission of HIV.

- Home based and community based care have serious capacity problems in that the most vulnerable members of society, children, women and people dying of AIDS are not adequately cared for.
- Insufficient funding or the inability to spend available resources also compounds the problem and impedes delivery of quality services.
- Maladministration and corruption in some provinces such as the Eastern Cape remain challenges, which need to be addressed with urgency.
- The FS identified problems in reproductive health sector and lack of trained personnel while Gauteng reported that it lacked systems to measure baseline information for monitoring and evaluation and also a shortage of specialist skills in the public health and nutrition, managerial skills and planning. KZN LO reported similar human resource, financial and infrastructure constraints. LO also reported low staff morale. The WC reported lack of training and lack of co-ordination of information flow and time constraints

## **Budgetary Measures**

### **National Sphere**

The NDH failed to supply the requested information and what little information supplied on the AIDS budget was unsatisfactory

### **Provincial Sphere**

- Since 1998 there has been a real decline in real per capita spending on health
- Gaps between comparative spending in provinces have grown wider
- Per capita discretionary health spending shows similar trends. Gauteng and the Western Cape were above the average per capita measure (32 per cent and 25 per cent respectively)
- For the period 2001/2002 the variation in the shares received by health across provinces retains the same pattern as outlined above.
- The Eastern Cape is planning to cut its budget 2.3 percent per year which is a cause for concern, given that the Eastern Cape is one of the poorer provinces with huge problems in service delivery as well as maladministration and corruption
- The fact that there are huge inequalities among the nine provinces with regard to the adjusted provincial expenditure on health means that delivery of PHC and other programmes is highly variable among provinces. By way of example, while the Gauteng Department of Health spent an average of R6 million in 2001 and 2002, the Limpopo Department of Health only spent an average of R2 million. There is also a wide gap in per capita allocation across provinces
- Another factor is under-spending of allocated funds by some departments. The overall effect is that the goals of equity and access to care are indeed not within reach in the proposed time frames.

## **RECOMMENDATIONS (Both National and Provincial)**

- Preventative measures for the eradication of cholera and malaria, must be put in place and be closely monitored by the Department of Water Affairs and the Departments of Health at all spheres of Government.
- A National Action Plan for the universal access to Anti-retroviral drugs should be government's top priority and it is highly recommended that the National Budget reflect this.
- Capacity building at the administrative level and retention of professional health care workers should become a priority.
- Measures to stamp out maladministration, corruption and theft must be introduced and strictly adhered to
- Inter-governmental cooperation at the three spheres of government must be streamlined and the responsibilities of each must be clearly demarcated
- The capacity of NGOs and CBOs to provide home-based care should be increased by injecting sufficient funds and trained personnel. Access to health care should be made more effective and the number and frequency of mobile clinics should be increased especially in remote rural areas.
- More funds should be allocated for health services
- The provision of the right to health care is possible only if the HIV/AIDS pandemic is contained. Government, the business community and other stakeholders in the health sector need to take decisive steps to combat the spread of HIV and to minimise the loss of life. This can only be made possible if all role players and stakeholders adopt a human rights approach to health care.

## **CONCLUSION**

Policy and other measures introduced during the reporting period constitute a significant step taken towards the progressive realisation of the right to health care services. However, implementation difficulties in all the provinces remain a challenge, especially in providing access to poor rural communities. The goal of equity and implementation of quality and efficient service delivery in the public sector remains to be realised.

While some of the measures instituted provide for the needs of some of the vulnerable groups such as the elderly, children, the disabled, women, and youth, there are either few or no specific programmes in place to cater for the needs of the rural populations, refugees and asylum seekers, girl-children, people infected or affected by HIV/AIDS and AIDS orphans.



## **THE RIGHT TO FOOD**

Section 27 of the Constitution guarantees everyone the right to have access to sufficient food. In the context of basic nutrition, the State is obliged to provide legal and administrative infrastructure necessary to ensure that children are accorded basic nutrition as contemplated by section 28(1)(c).

## **SUFFICIENT FOOD**

### **KEY DEVELOPMENTS**

#### **Policies, Programmes and Projects**

##### **National Sphere**

On the question of policy formulation, the National Department of Agriculture (NDA) only mentioned the *Integrated Food Security Strategy* (IFSS). The IFSS marks the implementation of the World Food Summit resolution and was envisaged to form part of the *Integrated Sustainable Rural Development* (ISRDS). The ISRDS was designed to address food security in South Africa. In broad terms, the policy seeks to ensure that all South Africans have access to safe and healthy food on a daily basis; improve household food security; and increase wealth creation and sustainable employment.

The new policies instituted by the National Department of Health (NDH) are: the *National Nutrition Guidelines for People living with TB, HIV/AIDS and other Chronic Debilitating Conditions* (August 2001); the *INP Strategic Plan 2001/02 to 2006/07* (November 2001); and the *Manuals for growth monitoring and promotion* (September 2001). Included amongst the implemented programmes based on these new policies is the *Integrated Household Food Security* (IHFSS) whose main objective is to alleviate short-term hunger among primary school learners.

##### **Legislative Measures**

##### **National Sphere (Sufficient Food and Basic Nutrition)**

The NDA reported that the *Food Security Bill* had been drafted, however, the Department did not provide detailed information about the draft Bill. The draft Bill provides, *inter alia*, for the fulfilment of the right to food as a basic human need and also provides for the availability, accessibility and utilisation of safe, nutritious and quality food

##### **Provincial Sphere**

The following policies and programmes were implemented: the *Special Programme for Food Security*; the *National Land Care Programme* and the *Land Redistribution for Agricultural Development and Poverty Alleviation Programme*. Only five provinces, namely, the Eastern Cape, Northern Cape, North West, Free State and Limpopo adopted the Special Programme for Food Security. The Northern Cape reported that there were a total of 22 Land Care Projects through the implementation

of the Land Care Programme funded by the DLA, and five hundred jobs had been created

## **KEY CHALLENGES**

### **Response to Protocols**

#### **National Sphere**

The National Department of Agriculture (NDA) omitted the *Strategic Plan for South African Agriculture* (2001) in its report to the Commission. The *Strategic Plan* seeks to, *inter alia*, ensure equitable access in the agricultural sector; reduce poverty and inequality in land ownership; and improve national and household food security.

#### **Provincial Sphere**

The Eastern Cape attributed the failure to implement the adopted *Special Programme for Food Security* to lack of funds.

## **BASIC NUTRITION**

### **KEY ACHIEVEMENTS**

#### **Policies, Programmes and Projects**

##### **National Sphere**

The NDH instituted the following measures: the *National Nutrition Guidelines for People living with TB, HIV/AIDS and other Chronic Debilitating Conditions* (August 2001); the *Integrated Nutrition Programme (INP) Strategic Plan 2001/02 to 2006/07* (November 2001); and the *Manuals for growth monitoring and promotion* (September 2001).

##### **Provincial Sphere**

In order to prevent and eliminate Vitamin A deficiency in children younger than 6 years of age and to decrease child morbidity and mortality by up to 25 percent within the next three years from the current reporting period, the provincial departments of health in WC; Limpopo; MP; KZN; Gauteng; NW; and NC initiated the *Vitamin Supplementation Programme* which basically targets children below the ages of 6 years and mothers, and people living with HIV/AIDS. Also developed was the *Primary School Nutrition Programme (PSNP)* in collaboration with the Department of Education to feed 144 021 primary school children in 813 primary schools for 172 school feeding days. The *Baby Friendly Hospital Initiative Programme* based on the *Integrated Nutrition Programme and the National Breastfeeding policy guidelines* also contributed to child survival and maternal health.

## **KEY CHALLENGES (Sufficient Food and Basic Nutrition)**

### **Response to Protocols (General)**

The information furnished by government on the adopted policies, legislative and other programmatic measures, was insufficient for the Commission to conduct a proper assessment of the measures adopted by the State to progressively realise the right of access to sufficient food. For example, although there were policies and programmes initiated by the NDA, no sufficient information was provided by the department and by provinces regarding the phase of the programmes or the nature of the problems experienced in the implementation of relevant programmes.

### **Policies, Programmes and Projects**

#### **National Sphere**

It is not clear from the information provided by the national government on how the State proposes to provide for marginalized groups such as refugees and asylum seekers.

#### **Provincial Sphere**

Lack of capacity to implement the programmes continues to be a major challenge at the provincial sphere of government.

### **Budgetary Measures (Sufficient Food and Basic Nutrition)**

#### **National Sphere**

The NDA under spent by R89 647 000 in the financial year 2000/2001 and by R176 509 000 in 2001/2002.

#### **Provincial Sphere**

Inadequate funds continue to be cited as a major challenge for provinces.

## **RECOMMENDATIONS (General)**

- There is a need for a comprehensive review of food related programmes and projects (i.e. basic nutrition, food security and school feeding schemes) particularly in respect of the Departments of Health (basic nutrition), Agriculture (food security) and Education (school feeding schemes) to ascertain whether these programmes afford everyone the right to sufficient food.
- There should be a mechanism to alleviate hunger for all school learners.
- The government should address implementation difficulties such as human and financial resources that undermine the enjoyment of the right of access to sufficient food.

## **CONCLUSION**

The State should be commended for the Food Security Draft Bill. It is, however, not clear when it is going to become law. When the Bill finally gets passed, it will, hopefully, address all the shortfalls identified in the measures adopted by the government.

Finally, the root problem of hunger and malnutrition is not the lack of food but the lack of access to available food mainly due to poverty.

## **RIGHT TO SOCIAL SECURITY**

According to section 27(1) of the Constitution everyone has the right to social security, including social assistance for those who are unable to support themselves and their dependants. Children are also afforded the right to social services by section 28(1)(c).

## **KEY ACHIEVEMENTS**

### **Policies, Programmes and Projects**

#### **National Sphere**

- The establishment of the *Committee of Inquiry into a Comprehensive Social Security System* (May 2000) to investigate and present options to Cabinet for a comprehensive and affordable system of social protection for South Africa and to consider gaps within the existing social security system
- *A Review on the Policy of Social Grants* (2000/2001). This led to the review of social grants, assessment of Disability Grants, Care Dependency Grants, assets test and the calculation of benefits based on the regulations promulgated under the Social Assistance Act.
- *The National Norms and Standards for Social Assistance* – This policy measure was aimed at improving the efficiency and effectiveness of the administration of social assistance and ensuring that all beneficiaries have equitable access to social assistance irrespective of the provinces they reside in.

#### **Provincial Sphere**

Most provincial departments did not report on any new instituted policy measures. The departments mainly implemented policies instituted prior to the reporting period. The Northern Cape, Western Cape, Eastern Cape and the Free State implemented the recommendations of the *Review on the Policy of Social Grants* instituted by the National Department of Social Development.

### **Legislative Measures**

#### **National Sphere**

##### **Department of Social Development**

The review of the *Social Assistance Act, 1992* and the *Social Grants Appropriation Act, 2000* were the legislative measures instituted during the reporting period. There were also amendments to the *Social Assistance Regulations*, which came into effect on the 1 December 2001.

## **Department of Labour**

The Department of Labour enacted the *Unemployment Insurance Act 63 of 2001* in order to replace the exclusionary and fragmented *Unemployment Act of 1966*.

## **Provincial Sphere**

The respective provincial departments did not report on any legislative measures enacted during the reporting period. The North West province did however, report that the amendments to the Social Assistance Regulations allowed social assistance grant beneficiaries to be back paid.

## **Budgetary Measures**

### **National Department of Social Development**

An additional appropriation of R2 billion was made available to provide back payments for beneficiaries.

## **SOCIAL SERVICES FOR CHILDREN**

### **Policies, Programmes and Projects**

#### **National Sphere**

- *National Integrated Strategy for Children Affected by HIV/AIDS (Home Care/Community Based Care Programme)* – The programme focused on families and children infected with and affected by HIV/AIDS and also identified orphans and vulnerable groups; facilitated access to social grants and material assistance such as food, clothing and shelter. The National Department of Social Development established six project sites in six provinces (Northern Cape, Limpopo, Free State, Eastern Cape, North West Province and Mpumalanga) for the Home Based/Community Based Care in 2000. By the end of 2001 the sites had expanded to 49 pilot sites. The department further extended the programme to 185 sites by the end of March 2002.
- *Secure Care Programme* - The programme catered for children at risk and those in conflict with the law.
- *Transformation of the Child and Youth Care Programme* - The programme aimed at developing a child and youth care system that protects the rights of children; 30 projects were established during the reporting period.

#### **Provincial Sphere**

- *National Integrated Strategy for Children Affected by HIV/AIDS (Home Care/Community Based Care Programme)* - Mpumalanga, the Eastern Cape, Limpopo, Western Cape, North West and the Free State provinces also instituted and implemented the programme. In the Western Cape it was

difficult to place children infected with HIV/AIDS into foster care. The programme thus started by concentrating on children affected by HIV/AIDS. In Free State, the programme was piloted in the district of Motheo in Welkom. The Free State established safety nets in Welkom for children infected and affected by HIV/AIDS.

- *Transformation of the Child and Youth Care System* - The Eastern Cape, Western Cape and Gauteng provincial departments implemented the programme. In the Western Cape, child offenders/children in conflict with the law were subjected to house arrests. In Gauteng, assessment centres for children in conflict with the law were established.
- *Secure Care Programme* - Gauteng established four Secure Care Centres to provide alternative care for neglected, exploited and abused children. The Western Cape established pilot projects at children's homes. The first phase of this project was successful in six children's homes.

## **Legislative Measures**

### **National Sphere**

The National Department of Social Development reported that amendments were made to the Child Care Act.

### **Provincial Sphere**

The provincial departments did not report on any legislative developments during the reporting period.

## **KEY CHALLENGES (GENERAL)**

### **Response to Protocols**

- Some of the provincial departments did not report adequately about the measures instituted during the reporting period;
- The reports from the Eastern Cape and KwaZulu Natal had too many unanswered questions;

### **Policies, Programmes and Projects**

- *The Transformation of the Child and Youth Care System* was not effectively implemented because child offenders are still kept in prisons as awaiting trialists, as opposed to youth care centres;
- *The Norms and Standard policy* was not effectively implemented either, evident to this is the re-registration process that denied most beneficiaries access to social assistance grants and the fact that the majority of eligible beneficiaries for social assistance do not have access to social assistance grants;
- *Child Support Grant* - Eligible beneficiaries for the Child Support Grant (CSG) especially those in rural areas, found it difficult to access the grants due

to documentation requirements, such as identity documents and birth certificates. There is minimal collaboration between the Department of Social Development and the Department of Home Affairs in this regard;

- Children in child headed households have not been in a position to initiate the process of applying for child care grants because they do not have the assistance of adults;
- Children living in the streets are denied access to most social services provided by the State, especially the Child Support Grant;
- Refugee children are denied access to the CSG mainly because they are not citizens of South Africa and do not have the necessary documentation;
- HIV/AIDS orphans are in most instances not provided with the traditional support and protection. These children engage themselves in income-generating activities to support their families and thus become vulnerable to exploitation and worst forms of child labour. A number of young girls are even forced into prostitution as a result. Many HIV/AIDS orphans are also unable to go to school because of their inability to afford school fees.
- Lack of adequate co-ordination and collaboration between the national and provincial departments and amongst the provincial departments contributed to the implementation difficulties. The National Department of Social Development reported that the lack of co-ordination between the Provincial Health and Social Development departments at project level undermined the implementation of the Home Based/Community Based Care programme;

#### *Administrative Action*

- Limpopo and the Eastern Cape were provinces where grant beneficiaries were most affected by arbitrary administrative action. In Limpopo, 92 000 welfare recipients of pension and disability grants were unfairly terminated by the province's welfare department. In the Eastern Cape, applications for social assistance were often lost without any trace and pensioners waited more than a year before they could receive financial assistance from government.

#### *Maladministration and/or Corruption*

- Maladministration, fraud and corruption affected the implementation process and the realisation and enjoyment of the right to social security;
- In the Eastern Cape there were cases of maladministration and corruption, which affected the realisation of the right, in question. In Idutywa for example, syndicate fraud was uncovered. In Centane, Tsomo and in Lady Frere there were cases of social grants corruption. In October 2000, the Eastern Cape formed the Network Against Corruption as a measure to address and prevent corruption. In Mpumalanga three officials were dismissed after disciplinary action was taken against them for committing fraud. The Mpumalanga Department of Social Services launched a fraud elimination campaign in August 2001.



## *Indicators*

The National Department of Social Development reported that

- 1 208 105 beneficiaries were eligible for Disability Grants but 714 091 received the Disability Grant;
- 195 806 persons were denied access to the Old Age Pension Grant because only 1 936 553 of the 2 132 359 eligible persons received the grant. Beneficiaries of the Old Age Pension Grant wait for an average period of two hours at payout points before receiving their grants.
- 68 percent of payout points have no access to water, 64 percent have no toilet facilities and 79 percent have no facilities for persons with disabilities. This is a direct opposite of the Batho Pele principles.
- 14 374 817 persons received social security (social assistance);
- 3 421 107 households relied on social security (social assistance);
- 648 104 households had no source of income;
- 23 819 458 persons had no source of income;
- 3 741 603 households had an income below poverty line;
- 16 837 214 persons had an income below the poverty line;
- 1 574 927 children out of 3 308 467 eligible children received the Child Support Grant;
- 90 680 children out of 319 354 eligible children received the Foster Care Grant (FCG); and
- 42 474 children out of 276 776 eligible children received the Care Dependency Grants.

## **Budgetary Measures**

The National Department of Social Development reported that even though there was no under or over spending in 2000/2002, the budget allocation for the reporting period was not adequate to enable the department to implement all its programmes and projects effectively. The provincial departments of Social Development also experienced difficulties in implementing programmes because of inadequate budget and this resulted in over spending. In the Eastern Cape, for example poverty alleviation projects were allocated small amounts of funds, which did not allow projects to progress through developmental stages to the point of sustainability.

## **RECOMMENDATIONS**

- Policies and programmes have to be effectively implemented;
- The State should identify implementation problems and address them;
- The National Department of Social Development should engage with provincial departments and also try and help with funding and influence the budget allocation;
- The CSG should be extended to all children. The State should enable children in child headed households, children living in the streets and refugee children access to social security;
- There is a need for better collaboration between the National Department of Social Development and the Department of Home Affairs in order to ensure that necessary services are provided to all; and

- The State should support the extended family structure and strengthen links with Faith Based Organisations and Community Based Organisations.

## **CONCLUSION**

It can be safely deduced that the State is gradually advancing the right, through mechanisms that have been put in place such as policies, programmes, projects and legislation that enable the fulfilment of the right in question. In as far as policy and legislation are concerned the Committee of Inquiry into a Comprehensive Security System was formed to look into a comprehensive social security system for all and to transform the existing incoherent system. The State has displayed its commitment to achieving and ensuring that the right to social security is progressively realised through the programmes instituted in various government departments. The State has to be commended for reforming the unemployment insurance law and repealing the 1966 Act, which excluded the most vulnerable members of the Republic from the ambit of social security.

However, the challenges highlighted above need to be addressed as soon as possible as they constitute a denial of the right of access to social security and assistance for many South Africans

## **RIGHT TO EDUCATION**

Education is both a human right and a tool that societies can use to extricate themselves from ills such as ignorance and poverty. As a result, education is increasingly gaining recognition as one of the best financial investments States can make. Section 29(1) of the Constitution guarantees everyone the right to a basic education, including adult basic education; and to further education, which the State, through reasonable measures, must make progressively available and accessible.

## **KEY ACHIEVEMENTS**

### **Policies, Programmes and Projects**

#### **National Sphere**

*South African National Literacy Initiative (SANLI)* – This is a short-term volunteer-assisted initiative aimed at eradicating illiteracy in South Africa.

*White Paper on Early Childhood Development (ECD)* - The objective of this policy is the implementation of the pre-school Reception Year (grade R) for 5 year olds turning 6 in the year of admission. The medium-term policy goal is to progressively realise the constitutional obligation to provide all learners with ten years of compulsory school education, including the Reception Year. The government policy has 2010 as the target date for when all learners that enter grade 1 would participated in an accredited Reception Year Programme.

*White Paper on Special Needs Education* –The priority of the white paper is to bring to an end the apartheid-based organisation of special schools which used race and disability as criteria. In terms of the apartheid policy, schools that accommodated white-disabled learners were well resourced whilst the few schools for black disabled learners were extremely under-resourced and rigidly applied categories were used to admit disabled learners to special schools. The paper, amongst other things, seeks to undo the effects of apartheid policy through the inclusion of learners with mild to moderate disabilities in mainstream education whilst those with severe disabilities are accommodated in improved special schools.

*National Policy on Whole-School Evaluation* - This is intended to improve the overall quality of education in the country. According to this policy, the evaluation of schools should not be viewed as a punitive and judgmental process, but rather a process that is supportive of and developmental for educators. The following are the key areas of evaluation: basic functionality of the school; leadership, management and communication; governance and relationships; quality of teaching and learning, and educator development; curriculum provision and resources; learner achievement; school safety, security and discipline; school infrastructure; and parents and community.

*Manifesto on Values, Democracy and Education* – The manifesto promotes the following six values through the education system, namely: equity, tolerance, multilingualism, openness, accountability and social honour.

*Restructuring of the Higher Education System in South Africa* - In April 2001 the Minister of Education established a National Working Group (NWG), which was mandated to advise on the restructuring of the institutional landscape of the higher education system, as per the National Plan for Higher Education that was released in March 2001. The following are some of the significant recommendations the NWG made to the Ministry of Education on the restructuring of the higher education system:

- The reduction of the higher learning institutions from 36 to 21, though the Ministry of Education ended up recommending 22;
- Programme collaboration and rationalisation in each region, which has to be based on assessment of the programme profiles higher learning would have to submit to the Ministry of Education;
- The enhancement of the quality of technikon programmes and the capacity of technikons to undertake research and to offer postgraduate programmes linked to their vocational and career-oriented mission and focus;
- The incorporation of the College sector into the higher learning system, this had already happened by January 2001; and
- The regulation of the unplanned proliferation of satellite campuses.

### **Provincial Sphere**

Apart from the implementation of the policies formulated nationally, some of the provincial departments of education formulated their own policies. For instance, the Free State Department of Education came up with *Guidelines on Learner Pregnancy*. The policy aims to protect a pregnant learner's right to education. The Gauteng Department of Education came up with *Disciplinary Proceedings on Misconduct of Learners at Public Schools* aimed at, *inter alia*, protecting the learner against unfair disciplinary hearings that might lead to suspension from school.

The KwaZulu-Natal Department of Education and Culture provided training to the School Governing Bodies on each member's function. It also held a series of workshops and developmental sessions to make parents aware of their responsibility to send children to school; to promote the South African Schools Act; and to capacitate departmental officials to better serve the communities. The North West Department of Education was the only provincial department of education that implemented *SANLI* whilst the Western Cape Department of Education was also the only provincial department of education that reported that it implemented the *Manifesto on Values, Democracy and Education*.

### **Legislative Measures**

*The promulgation of the South African Council for Educators (SACE) Act 31 of 2000:* The purpose of the Act is to provide for the registration of educators, to promote the professional development of educators and to set, maintain and protect ethical and professional standards for educators.

*Notice No. 327 of 31 March 2000:* The notice deals with regulations that apply to school managers prior to strike action. School managers are to give notice in advance of their intention to participate in a strike action to enable the employer to make the necessary arrangements such as the appointment of temporary managers.

## **KEY CHALLENGES**

### **Response to Protocols (National and Provincial)**

Government departments need to take the work of the Commission seriously by taking time to respond to the protocols sent to them. The omission on reporting on the policy and programmatic measures indicates poor reporting by some provincial departments of education. For instance, only the North West and Western Cape Departments of Education reported on SANLI and the Manifesto on Values, Democracy and Education respectively, and yet these measures were to be implemented by all provincial departments of education. The same applies to the legislative measures that were enacted during the period under review, not even the National Department of Education reported on them. The Commission only found out about these measures through its own independent research.

### **Policies, Programmes and Projects (National and Provincial)**

The National Department of Education reported that out of a total of 27 148:

- 10 723 schools have a shortage of classrooms.
- 13 204 schools are in short of textbooks.
- 10 859 schools are without electricity.
- 2 498 schools are with inadequate toilet facilities.
- 21 773 schools lack access to library facilities.
- 17 762 schools lack access to recreational and sporting facilities.

However, the National Department of Education did not indicate whether these schools are located in rural or urban areas.

### **Budgetary Measures**

The Eastern Cape Department of Education reported a lower intake of ECD beneficiaries. It reported that out of 6 354 only 550 ECD sites benefited from the ECD Programme. The Gauteng and the KwaZulu-Natal Departments of Education under-spent by R1 083 000 and R1, 3 million respectively in the ECD Programme in the financial year 2001/2002. Three Provincial Departments of Education, namely; Mpumalanga, Northern Cape and the Western Cape indicated dissatisfaction with their budget allocations for the ECD Programme.

Only the Gauteng Department of Education indicated satisfaction with the budget allocation for Special Needs Education. The rest of the provincial departments of education, with the exception of the North West Department of Education, which did not respond altogether to the budget-related questions of the programme, submitted that the budget allocations for the Special Needs Education were inadequate.

## **RECOMMENDATIONS**

- Government should improve the intake of ECD beneficiaries, which should, of course, be followed by an allocation of more financial resources. The same would be said of the Special Needs Education. However, the injection of more financial resources into programmes is not a solution to problems

- Government departments need to improve on their financial management skills; unnecessary under-spending should be avoided to ensure that the right to education is fulfilled.
- Maintenance of school buildings and other facilities is important to ensure that more financial resources are spent on schools that are more needy.

## **CONCLUSION**

The above legislative measures are indicative of the government's sincere endeavour to fulfil its constitutional obligation to realise the right to education. The SACE is a clear indication that government is trying hard to uplift, promote and maintain the dignity of the teaching profession. Notice No. 327 clearly shows that government wants to ensure that every day of school is used effectively. The Notice is one measure that respects the right of learners to education. This is highly commendable. However, the implementation of these measures is yet to be tested.

The use of financial resources is still a problem for most provincial departments of education. Government departments can request more funding from the national government, but this is self-defeating if they are not in a position to utilise the financial resources allocated to them. It is therefore incumbent upon all government departments to ensure that the allocated funds are used and in a satisfactory manner.

A lot of work still needs to be done in the realisation of the right to education.

## **ENVIRONMENTAL RIGHTS**

Section 24 of the Constitution provides that everyone has a right to an environment that is not harmful to their health and well-being; and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. The Constitution further places an obligation in terms of section 152 (1)(b) and (d) on the part of local government as stipulated in sections 4(2)(d) and 4(2)(i), 73(1) and (2) of the Municipal Systems Act 32 of 2000 to ensure that the right to a clean and healthy environment is fulfilled.

## **KEY ACHIEVEMENTS**

### **Policies, Programmes and Projects**

#### **National Sphere**

##### **Department of Environmental Affairs and Tourism (DEAT)**

*Progressive implementation of the White Paper on Integrated Pollution and Waste Management (IP & WM) –* The DEAT focused on the progressive implementation of the White Paper on Integrated Pollution and Waste Management (IP&WM). One of the fundamental approaches of the IP&WM policy is pollution prevention, waste minimisation, impact control and remediation. DEAT, the Department of Water Affairs and Forestry (DWAF), provincial Departments of Environment, local government and other relevant stakeholders implemented action Plans of the National Waste Management Strategy (NWMS).

*Progressive implementation of the White Paper on Sustainable Coast Development (SCD) -* The White Paper on Sustainable Coast Development (SCD) is aimed at the achievement of sustainable coastal development through integrated coastal management. This is in order to ensure diverse, healthy and productive coastal ecosystems for current and future generations.

*The National Environmental Indicators Programme (NEIP) for the State of the Environment Reporting -* A set of core environmental indicators for State of the Environment Reporting was developed towards the end of 2002. The indicators are aimed at monitoring and reporting on the state of the environment at national, provincial and local spheres of government.

##### **Department of Water Affairs and Forestry (DWAF)**

*Implementation of the White Paper on Basic Household Sanitation of 2001 -* The objective is the provision of basic household sanitation, especially for in rural and informal settlements.

*Implementation of the Working for Water Programmes (WWP)* - The objective is the control of alien vegetation systems that use up a large proportion of the country's scarce water resources.

### **Department of Minerals and Energy (DME)**

*The rehabilitation of derelict ownerless mines* - Mines contribute significantly to atmospheric pollution, there is a greater need for government to ensure that the rehabilitation of mine dumps is facilitated as stipulated in the Minerals Act 50 of 1991.

### ***Provincial Sphere***

Most of the provincial Departments of Environment focused on ensuring that the Environmental Impact Assessment regulations – (which administers section 21 of the Environmental Conservation Act of 1989) and action plans for the NWMS are implemented.

Furthermore, provinces had to complete their provincial Environmental Implementation Plans (EIPs) as stipulated by National Environmental Management Act (NEMA) of 1998. The next challenge for provinces is to ensure proper implementation and compliance of these EIPs after they have been gazetted. The objectives of these EIPs is to promote co-operative governance between the departments mandated to promote environmental rights through is co-ordinating and harmonising environmental policies, plans, programs and decisions at national, provincial and local spheres of government in order to minimise and avoid duplication and on the other hand promote consistency.

### **Legislative Measures**

#### **National Sphere**

**The DEAT** did not pass any new legislation during the reporting period. However, the department drafted environmental bills on *Air Quality Management*; *Bio-diversity*; *Coastal Management* and *Pollution and Waste* amongst others. The *Bio-diversity Bill* is meant to promote conservation and at the same time focusing on a large number of protected areas, which have been mismanaged and neglected. The *Air Quality Management Bill* is meant to address pollution problems and resultant health hazards, especially in those areas located closer to industrial sites – this will prompt the department to strengthen air quality guidelines and legislation.

**The DWAF** promulgated regulations pertaining to the control and management of communal and small waste disposal sites as provided by section 20(5)(b) of the Environment Conservation Act.

**The DME** introduced the Mineral and Petroleum Resource Bill of 2002. The objects of the above bill are to give effect to section 24 of the Constitution by ensuring that the nation's mineral resources are used in an orderly and ecologically sustainable manner and to ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they operate.



## **Provincial Sphere**

The provinces did not pass any legislation, their mandate is generally to implement any legislative measures introduced by national departments.

## **KEY CHALLENGES**

### **Response to Protocols**

Some provincial government Departments of Environment failed to report on the programmes or projects instituted. There is also inadequate information on environmental indicators provided to the Commission.

### **Policies, Programmes and Projects**

- While the National Waste Management Strategy (NWMS) is the most significant policy contribution towards the progressive realisation of environmental rights, the effectiveness of this measure is questionable due to limited human and financial resources, political commitment and support by all affected stakeholders.
- All the three spheres of government are still faced with the challenge of ensuring that there is proper implementation, monitoring and enforcement of the State's regulations, policies and legislation.
- Implementation of the EIPs and EMPs is dependent on these measures being gazetted.
- Continuous implementation of the White Paper on Basic Household Sanitation so as to reduce killer diseases such as, diarrhoea (mostly in children), cholera and typhoid amongst others is needed. It has been reported that in South Africa alone, approximately 18 million people are still without adequate sanitation.
- Catering for the vulnerable and marginalized groups of our societies when introducing any programmes, projects, policies and legislation with regard to the right in question, including other social and economic rights.
- Facilitation of the rehabilitation of the remaining derelict and ownerless mines (mine dumps are known to contribute significantly to atmospheric pollution) – in this instance the asbestos mines taking into consideration the negative impact asbestos have on the health of the people exposed to it.

### **Budgetary Measures**

While under-spending is still a problem, financial and human resources constraints were a major limitation for provinces to develop and implement measures to fulfil their environmental rights obligations as stipulated as in section 24 of the Constitution.

## **RECOMMENDATIONS**

- Departments (both national and provincial sphere) should find ways of doing away with over- or under-spending allocated funds towards any programmes and/or projects introduced. In terms of the Public Service Act, over-spending

is regarded as a serious criminal offence. Furthermore, over- or under-spending contradicts/violates paragraph 46 of the *Grootboom* judgement, which clearly states that government, should strive for a balance between goals and means. Of greater concern is that though departments always point out that the budget allocated towards any programme/project is insufficient, government departments still under-spent on their allocations.

- In future, the requested information on indicators should be provided to the SAHRC due to the fact that DEAT has created a database of information for the State of the Environment Report.
- Government departments should put more effort when responding to the protocols. The socio-economic rights monitoring process is a constitutional obligation, and should be complied with.

## **CONCLUSION**

The present government is faced with the challenge of meeting both social and environmental goals in the face of a rapidly growing population. Solutions for proper environmental management for sustainable development must come from co-operative governance between the different spheres of government and from public-private partnerships. Also of concern is the fact that government is still not adequately catering for the needs of vulnerable and marginalized groups.

## **RIGHT TO SUFFICIENT WATER**

The right to have access to sufficient water is provided in section 27(1)(b) of the South African Constitution. Section 27(1)(b) read in conjunction with section 27 (2) provides that the State must take reasonable legislative and other measures to *respect, protect, promote* and *fulfil* the progressive realisation of the right to access of water within its available resources. The provision of clean water in sufficient quantities is important in its own right, as well as in its implications for health, food security and overall economic development.

## **KEY ACHIEVEMENTS**

### **Policies, Programmes and Projects**

#### **National Sphere**

##### **Department of Water Affairs and Forestry (DWAF)**

*Free Basic Water (FBW) Policy* - The primary intention of the FBW policy is to alleviate poverty by ensuring that no one is denied access to basic water supply (about 6000 litres for each household per month).

*White Paper on Basic Household Sanitation* - Provides for the provision of a basic level of household sanitation to mainly rural communities and informal settlements; for adequate funding of sanitation improvement programmes and for implementation monitoring mechanisms.

*Working for Water Programme* – Provides for techniques aimed at clearing or controlling the alien invasive vegetation, which poses threats to the country's limited water resources. So far, the project has been successful taking into consideration that a total of 313 clearing projects have been undertaken, where fifteen wetlands have been rehabilitated, including the period under review. (See section on Environment above)

##### **Department of Provincial and Local Government (DPLG)**

*Consolidated Municipal Infrastructure Programme (CMIP)* - This programme is based on the Municipal Infrastructure Investment Framework (MIIF) and its objective is to minimise infrastructure backlogs within municipalities.

*The Municipal Infrastructure Investment Unit Programme* - This programme is based on the Municipal Services Partnerships (MSPs) and its objective(s) is to persuade the private sector to invest in municipalities. The programme has been relatively successful as over 6 million people have received water and sanitation.

*Municipal Partnership Capacity Building Programme* - This programme is based on the MSPs and its aimed at enhancing capacity of municipalities to structure service partnerships. It is reported that since the programme has been introduced, 1000 municipal officials and councillors have been trained on MSP techniques.

## Provincial Sphere

The measures instituted by some provincial departments were mainly the *CMIP* and the *National Cholera Strategy*.

*Consolidated Municipal Infrastructure Programme (CMIP)* - The Gauteng, Limpopo, Northern Cape and the Western Cape departments reported that they continued to implement the CMIP. The CMIP is meant to provide capital grants to municipalities in order to fund the installation of new or upgrade infrastructure and services for low-income groups.

- In Limpopo, the achievements for the period under review include a total of 295 projects being implemented and 179 of these have been completed. To date, 116 water projects were supported by the CMIP budget of R214 million, and 28 sanitation projects to the value of R39 million. The total CMIP grant was R347 million, and to date R295, 3 million has been spent.
- With regard to the Western Cape, the CMIP was restructured for the prioritisation of projects being transferred from the Provincial Administration to the District Municipalities during the current reporting period. In addition to the above, 76 water projects were undertaken, of that total 55 were undertaken during the year 2000/2001 and the remaining 21 were for the year 2001/2002. This resulted in about 855 198 people benefiting from the projects, of those 340 102 were for the year 2000/2001 and 515 102 were for the year 2001/2002.

*National Cholera Strategy* - Only the KwaZulu-Natal Department of Traditional and Local Government Affairs reported on the above measure. The department indicated that the measure was developed in response to the cholera outbreak in the province and was also in line with the National Cholera Strategy launched in 2001. The department developed the Provincial Policy Framework Strategy in order to manage the cholera epidemic. The policy was developed as part of the KwaZulu-Natal Cholera Management Project, whose main objective is to assist in the containment of cholera outbreaks, curtailing their spreading to other areas not yet affected and to prevent future outbreaks within the province. The department's achievement during the period under review was that cholera infections were less than 10 per cent as compared to the period 1999/2000.

## **Legislative Measures**

### **National Sphere**

#### **DWAF**

*Regulations of the Water Services Act 108 of 1997* - The main objective of the Act is to ensure that all South Africans have equitable access to effective, affordable and sustainable water services. Two sets of regulations for the Act were finalised and promulgated:

1. *Section 9(1) regulations*: these regulations set compulsory national standards and measures aimed at conserving water.
2. *Section 10(1) regulations*: these regulations set norms and standards in respect of tariffs for water services.

#### **DPLG**

*Municipal Systems Act No. 32 of 2000* - This Act provides legislative framework for the Municipal Services Partnerships (MSPs) Policy.

## **KEY CHALLENGES**

### **Response to Protocols**

The Eastern Cape and Free State Department of Local Government and Housing did not provide the Commission with information on policy measures, and no explanation was provided. The Mpumalanga Department of Local Government, Traffic Control and Traffic Safety reported that the provision of water is not the core function of the department.

### **Policies, Programmes and Projects**

- *Free Basic Water (FBW) Policy* - This programme has not been on the whole very successful - of concern is that to date, free basic water has not as yet been provided to everyone, especially the poor. According to DWAF, to date, the FBW policy is implemented by only 214 of the 309 municipalities, which is estimated at about 57 per cent of the total population, whilst the other 43 per cent of the population still do not enjoy the benefits of the above policy. In some areas, lack of bulk infrastructure has impeded significantly on the delivery of such services and more funds need to be channelled towards the improvement of the infrastructure in order for the above programmes to be successfully implemented.
- The responsibility for the provision of water is currently split between various spheres of government, which results in serious challenges in terms of the co-ordination of the delivery of services. The supply of retail water (piped or tap water to individual consumers) is the responsibility of the municipalities.
- Although government has made an attempt to realise the right of access to water, statistics indicate that the most vulnerable groups of our society still do not enjoy access to clean and adequate water. The recent cholera outbreaks in

the Eastern Cape and KwaZulu-Natal highlighted the fragile and limited infrastructure for safe water supply and sanitary health.

## RECOMMENDATIONS

- Better co-ordination between all the role players, namely the national, provincial and local government including parastatal organisations should be addressed, and co-ordination of these roles and functions would enable the government to ensure, within available resources, the progressive realisation of access to sufficient water.
- The lack of bulk infrastructure is cited as one of the impediments to delivery of services such as free basic water, especially to the poor. The State has the responsibility to ensure that all those areas where the previously disadvantaged and the vulnerable groups were located, that is, rural and informal settlements areas have access to basic infrastructure in order for those people to be in a better situation to enjoy the right to access of water.
- Capacity building is a pre-requisite for a functional and competent local government and for sustainable water and sanitation development. Therefore, it is the duty of the DPLG and its provincial subsidiaries to ensure that more is done towards building capacity within municipalities.

## CONCLUSION

The right to have access to water can be seen to place two interrelated but distinct obligations on the State:

- *It must ensure that all people have physical access to water.* This means that the facilities that give access to water must be within safe physical reach for everyone, especially the vulnerable and the marginalized. Concerning the distance of tap from home, a uniform standard of a maximum distance of 200 m away from any household had been set and implemented as policy.
- *It must ensure that all people have economic access to water.* This implies that the cost of accessing water should be pegged at a level that would ensure that all people are able to gain access to water without having to forgo access to other basic needs.

While many of government's most successful initiatives have heralded the water programmes since the post-apartheid government took over, there is concern about the methods that have been used, consultation processes, the use of privatisation schemes, and most importantly the sustainability of operation and maintenance of completed projects. All in all, the 1996 Constitution of the Republic of South Africa places a duty on the three spheres of government to work together in order to ensure that the well-being of the people of the republic is secured.

It is a violation of the right if the State allows people to continue living in terrible and intolerable conditions without access to water as provided under section 27 of the Constitution. Such conditions are harmful to the health and well being of individuals.

## **RIGHT OF PRISONERS**

Section 35(2)(e) of the Constitution makes provision for conditions under which the prisoners are to be detained. It provides that every prisoner who is detained, including every sentenced prisoner, has a right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

### **Key Developments**

#### **Policies, Programmes and Projects**

##### *Overcrowding*

To address the challenges presented by overcrowding, the Department of Correctional Services (DCS) indicated that it was involved in a number of interdepartmental projects developed within the Crime Prevention, Justice and Safety Cluster which enabled it to formulate and embark on, *inter alia*, the following strategies to combat overcrowding in prisons:

- Established Multi-sectoral teams to identify blockages and devise solutions to the awaiting trial prisoner problem. As a result, the Awaiting Trial Prisoner projects; Court Process project; Inmate Tracking and Saturday Courts were set up;
- Put more emphasis on rehabilitation programmes for prisoners to prevent re-offending, by focusing on education and training, and social development programmes.

##### *Health Policy*

The Department of Correctional services reported that it is in the process of reviewing and amending the Health Policy, the HIV/AIDS Policy and existing ones based on the Correctional Services Act 111 of 1998, to ensure that it complies with the Constitution, the United Nations Standard Minimum Rules for the Treatment of Prisoners, the requirements of the National Department of Health, the World Health Organisation and International law relating to prisoners. It also indicated that it has developed a Draft Policy for Prisoners with Disabilities in order to cater for their special needs.

##### *Female Prisoners with Children*

The DCS allows mothers with infants to keep their babies in the Mother and Child Unit until they are two years old. Mothers in these units are allowed to keep the baby up to the age of five years only in exceptional circumstances. According to the Department, the surroundings and facilities in these units are conducive to sound physical, social and mental care and development of children.

##### *Prisoners with Disabilities*

The diversity of the general population in prisons, has led the DCS to establish a sub-directorate on special categories of prisoners. This special category sub- directorate

was established because of the need to provide humane custody within a human rights culture. The prisoners in the special category are treated in a manner befitting their condition.

## **KEY CHALLENGES**

Overcrowding remains the biggest challenge to the DCS. The DCS conceded that its biggest challenge is to reduce the number of people incarcerated to an acceptable level that does not pose serious health risks to inmates. One of the challenges that flow directly from overcrowding is the difficulty in rendering an effective development and rehabilitation programme for prisoners due to shortage of resources. It is common cause that homosexuality is rife amongst inmates, with stronger prisoners practising sodomy towards weaker inmates. Lack of order in prison due to overcrowding creates a conducive atmosphere for the spread of sexually transmitted diseases such as HIV/AIDS. Overcrowding in prison will automatically affect the quality and quantity of the food given to the prisoners, and prison sanitation. One of the issues highlighted in the report is the difficulty by the DCS to implement the three meals per day policy for the prisoners due to shortage of personnel to manage this system within the Department's current personnel establishment. The infringement of the right to education is one of the challenges that flows directly from overcrowding due to shortage of personnel and educational materials as the prisoners exceed the resources.

### *Budgetary Measures*

The DCS was concerned with the decrease in the budget allocated to education and training programmes between 2000 and 2002. For example, the DCS indicated that during the period under review, only 2% of the total budget was allocated to development and rehabilitation programmes and 0.9% to education. According to the DCS, these could only cover 13% of the total prison population. Only 0.19% was said to have been allocated for vocational and occupational fields. The DCS indicated that this budget inadequacy made the programme to suffer in that it only benefited a limited number of prisoners. Although the budget information indicates under-expenditure for both reporting fiscal years, the Department provided no explanation for this in spite of their complaint of the inadequate budget allocation. An under-spending of only 14%, for vocational and occupational fields, which was attributed to delays in the tender procurement processes, was reported.

## **RECOMMENDATIONS**

The DCS should adopt appropriate measures to prevent the spread of HIV infection amongst inmates. HIV/AIDS policies and programmes in prison; should put more emphasis on education, training and awareness among inmates on HIV infection so that they may be informed of the risks, and the best possible methods for prevention. Such as the minimisation of unprotected anal penetration. The DCS should put more focus and resources for the rehabilitation of prisoners, more especially child prisoners. The DCS should develop and implement a comprehensive prison education programme designed to maximise social integration after the release of the prisoner. The Department should also develop a long term prison development plan and stop upgrading the prison facilities in a piecemeal fashion as these outdated old designs are the main source of obstruction in implementing an effective policy directed towards



the rehabilitation of prisoners in order to facilitate the prisoner's social reintegration. Although it is the responsibility of prison management to develop a policy that will ensure adequate sanitation and that each prisoner is provided on regular hours, with a well balanced diet which will accommodate different types of therapeutic and medical diets for prisoners, the national government bears the responsibility to provide the DCS with financial resources in order to fulfil its constitutional obligations. The government should have a mechanism to ensure that its devised policies and programmes are fully implemented and the allocated resources effectively utilised. Checks and balances should be put in place to guard against over and under-expenditure.

## **CONCLUSION**

The government still have much to do in order to realise the rights of prisoners as guaranteed by section 35(2)(e). Although maladministration and corruption was not really highlighted in the report, the recent inquiry into the South African prisons by the Jali Commission reveals the daunting task still facing the government with regard to the treatment of prisoners.

## **PUBLIC FINANCE**

Public Finance is one of the key elements that help government departments implement their various policy and programmatic measures to progressively realise the economic and social rights in the Bill of rights of the Constitution. The budget allocation process is a tool that government uses to redistribute the country's financial resources equitably to the three spheres of government, namely; national, provincial and local.

In the 1998 budget, government introduced three-year rolling plans through the Medium Term Expenditure Framework (MTEF) for national and provincial governments. The introduction of the MTEF in the budget process was important as it strengthens the link between government policy choices, budget and delivery of services. The link between policy choices, budget and service delivery further strengthens political decision-making and accountability.

Chapter 13 of the Constitution is dedicated to General Financial Matters, including the establishment of relevant bodies and their responsibilities during the budget allocation process in each sphere of government; legal and other processes; and procedures to be followed to enable government redistribute the public funds.

## **KEY ACHIEVEMENTS**

### **Policies, Programmes and Projects**

Most provincial treasuries displayed a great commitment to the well-being and development of their provinces.

The Eastern Cape Treasury took part in an infrastructure development programme. The Gauteng Treasury designed programmes to address the spread of HIV/AIDS, environment-related issues, poverty and unemployment. The KwaZulu-Natal Treasury was allocated additional funding for job creation projects. Furthermore, the KwaZulu-Natal Department of Agriculture was allocated additional funding specifically to promote food security and emerging farmers and farmers' settlement campaigns.

The Limpopo Treasury took part in the reduction of poverty and unemployment levels initiatives. The Northern Cape Treasury had prioritised its expenditure for infrastructure backlogs: maintenance, rehabilitation and infrastructure expansion to "stimulate economic growth".

In North West, the Provincial Executive Committee (PEC) identified 5 priorities two of which had to do with the "development of infrastructure and job creation". To this end, an amount of R250 million was prioritised to address infrastructure backlogs. The Western Cape Treasury, through its Strategic Framework for Policy Formulation, focused on HIV/AIDS and the development of capacity at the local level of government to expedite the implementation of the Integrated Development Programmes.

## KEY CHALLENGES

- Most Provincial Treasuries showed that they had little if no influence on budget allocation. In most instances it showed that the budget allocation process was a political one. Whilst there is nothing wrong with the budget allocation process being political, there is a need for more input from the civil movement to also inform the division of revenue.
- The inability of provinces and government at large to cost the constitutionally-mandated basic services needs to be addressed. The costed-norms approach would give government a clearer direction in terms of its achievements and use of financial resources in providing these services.
- The monitoring of the usage of financial resources by government departments through mechanisms such as the In-Year Monthly reporting system, needs to be strengthened to address incidents of under and over-spending in government.
- The use of section 40 of the PFMA<sup>10</sup> seems to be ignored in some government departments. The incidence of under and over-expenditure attest to this.
- The overlap between some programmes and sub-programmes, especially poverty alleviation programmes was reported by some provinces to be a problem, as the utilisation of funds could not be accounted for in some instances.

The lack of skills such as project and financial management was cited as a problem by some provinces.

The budget analysis for the financial year 2001/2002 shows that both the nominal and the real values were equal. This scenario shows that not much financial resources were injected into government to implement its programmes.<sup>11</sup>

### Legislative Measures

Since both the National and Provincial Treasuries are not charged with the implementation of policies that directly seek to progressively realise the economic and social rights, they did not institute any legislative measures relevant to this obligation.

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<sup>10</sup> Section 40 of the PFMA stipulates that the accounting officer of a department must, within 15 days of the end of each month submit to the relevant treasury and the executive authority responsible for that department –

i) the information for that month

ii) a projection of expected expenditure and revenue collection for the remainder of the current financial year; and

iii) when necessary, an explanation of any material variances and a summary of the steps that are taken to ensure that the projected expenditure and revenue remain within the budget.

<sup>11</sup> See the Public Finance chapter, from page 491 to 502.

## RECOMMENDATIONS

- The Budget Council (as a role-player that represents the provincial sphere of government in the budget allocation process), and Budget Forum (as a representative of the local sphere of government in the budget allocation process), should influence the budget allocation process to be economic and social rights-inclined. This task to be performed satisfactorily requires that research be undertaken to influence policy-making in government.
- Government should, as soon as possible, ensure that the costed norms approach is implemented. This would help government channel resources where they are needed most other than funding what it cannot cost.
- The National Treasury should assist all government departments to abide by the PFMA. The failure by most government departments to abide by section 40 of the PFMA illustrates this need.
- Government departments have to ensure that qualified internal auditing personnel are employed to ensure that the departments' books are balanced and proper financial accountability takes place.<sup>12</sup>
- Ring fencing of related programmes and sub-programmes is essential if proper financial accounting is to take place in government departments.
- It is high time that section 77 of the Constitution that empowers the national parliament to amend the budget as a money bill put before it, is put into practice for Member Parliaments to thoroughly reflect on the aspirations and needs of their constituencies.

## CONCLUSION

Regardless of the fact that the Provincial Treasuries are not directly charged with the responsibility of implementing economic and social rights, their involvement in programmatic measures that seek to change the lives of ordinary people is commendable. By the same token, the National Treasury should not perceive itself as just a technical money-disbursing agent; it is important that it identifies with the daunting challenges that face provincial governments in delivering on economic and social rights.

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<sup>12</sup> According to the Report of the Auditor-General (on Audit Outcomes for the year ended 31 March 2001), only 4 of the 9 provinces complied with the legal requirement of having Internal Audit Committees in their departments. These were: Eastern Cape, KwaZulu-Natal, Limpopo and the Western Cape. However, in none of the provinces reliance could be placed on the work done by the internal audit in respect of the 2000/2001 financial year.

## **METROS AND PARASTATALS**

### **CONCLUSION**

There is inadequate understanding of constitutional obligations in most of the metros and parastatals that were sent protocols by the Commission.

## CHAPTER 1

### 4<sup>th</sup> ECONOMIC AND SOCIAL RIGHTS REPORT

#### 1. JUDICIAL ENFORCEMENT OF ECONOMIC AND SOCIAL RIGHTS

The South African Bill of Rights of the Constitution<sup>1</sup> makes provision for legally enforceable economic and social rights such as the right to education,<sup>2</sup> the right to housing,<sup>3</sup> the right to health care, food, water, social security<sup>4</sup> and the right to a clean environment.<sup>5</sup> One of the issues which have been debated since the democratic

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<sup>1</sup> The Constitution of the Republic of the Republic of South Africa, Act, No. 108 of 1996.

<sup>2</sup> Section 29(1) provides:

- “(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 education 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 of no inferior to standards as comparable public educational institutions.”

<sup>3</sup> Section 26 provides:

- “(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.”

<sup>4</sup> Section 27 provides:

- “(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.”

<sup>5</sup> Section 24 provides:

- “Everyone has the right-
  - (a) to an environment that is not harmful to their health or wellbeing; and

dispensation was whether economic and social rights are legally enforceable. That debate was put to rest by the Constitutional Court in the *First Certification*<sup>6</sup> judgement which stated:

It is true that the inclusion of [economic and social] rights may result in courts making orders, which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications...The fact that [economic and social] rights will almost inevitably give rise to such implications does not seem to be a bar to their justifiability. At the very minimum, [economic and social] rights can negatively be protected from improper invasions.<sup>7</sup>

On at least four occasions,<sup>8</sup> the Constitutional Court pronounced on the judicial enforcement of economic and social rights. In *Grootboom*<sup>9</sup> the Court emphasised the position adopted in the *First Certification* case that economic and social rights cannot exist only on paper. The Court affirmed the interconnectedness and indivisibility of [economic and social] rights with civil and political rights, that “[a]ffording economic and social rights to all people enables them to enjoy the other rights in Chapter 2” of the Constitution.<sup>10</sup> The justiciability of economic and social rights was also reiterated in the case, *Minister of Health & Others v Treatment Action Campaign and Others* (1).<sup>11</sup>

Both these cases affirm that South Africa has got a duty to observe both its constitutional and international obligations<sup>12</sup> with regard to economic and social rights. In fact, as will be demonstrated below, the *Grootboom* judgment provided a useful model of how to approach remedies on economic and social rights. In this case, the respondents (390 adults and 510 children), who were living in deplorable conditions in an informal settlement around the Cape Metropolitan area, were evicted from low-cost housing land that they had occupied illegally. They were eventually evicted and left homeless. They then applied to the High Court for an order requiring the government to provide them with alternative accommodation until such time that they could obtain adequate housing or shelter. They based their action on section 26 of the Constitution, which imposes an obligation upon the State to take reasonable legislative and other measures to ensure the progressive realisation of the right of

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(b) to have an environment protected, for the benefit of present and future generations, through reasonable legislative and other measures . . . .”

<sup>6</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (10) BCLR 1169 (CC).

<sup>7</sup> *Ibid*, paras 77-78.

<sup>8</sup> *Soobramoney v Minister of Health, Kwa-Zulu-Natal* 1997(12) BCLR 1696(CC); *Government of the Republic of South Africa & Others v Grootboom & Others* 2000(11) BCLR 1169 (CC); *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1169 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* (1) 2002 (10) BCLR 1033 (CC).

<sup>9</sup> *Ibid*, para 20. For more discussions on the *Grootboom* case see (17) *South African Journal on Human Rights* 2001 1 *et seq.*

<sup>10</sup> *Ibid*, para 23.

<sup>11</sup> *Op. cit.*, para 23.

<sup>12</sup> South Africa signed the International Covenant on Economic, Social and Cultural Rights on 3, October 1994.

access to adequate housing within its available resources; and section 28(1)(c) of the Constitution which provides that children have the right to shelter. The High Court ordered the government provide the applicants with basic shelter. The case was then taken on appeal to the Constitutional Court.

In a unanimous judgment per Justice Yacoob, it was noted that the Constitution obliges the State to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. Accordingly, the State must provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The Court emphasised that neither section 26 nor section 28(1)(c) gave any of the respondents the right to claim shelter from the State immediately. However, the programme in force in the area of the Cape Metropolitan Council at the time the application was launched, fell short of the obligations imposed upon the State by section 26. Although the overall housing programme implemented by the State since 1994 had resulted in a significant number of homes being built, it failed to provide for any form of temporary relief to those in desperate need, those with no roof over their heads, or those living in crisis conditions.

Another landmark case that added substance to the realisation of economic and social rights, as already pointed out above, was the *Treatment Action Campaign* cases. This case involved the South African AIDS activist group, the Treatment Action Campaign (TAC) and the government. In September 1999, the TAC pressured the government to accelerate the programme for the prevention of intrapartum transmission of HIV. The Minister of Health said that this could not be done because there were concerns about the safety and efficacy of Nevirapine. Following the 13<sup>th</sup> International AIDS Conference in Durban, in August 2000, the Minister announced that Nevirapine would still not be made generally available. Instead, two pilot sites would be established in each province for further research and the use of Nevirapine would be confined to those sites. This, despite the fact that Nevirapine had been registered in 1998 by the Medicines Control Council (MCC), a specialist body created by the Medicines and Related Substances Control Act 101 of 1965 to determine the safety of drugs before being made available in South Africa.

The Minister insisted that the government was concerned about the safety and efficacy of Nevirapine, thus requiring continuation of government's research programme. According to the Department of Health, the trials were needed to address issues including the potential for drug resistance to Nevirapine use, possible complications linked to breast feeding and the need for proper counselling facilities. This was so notwithstanding the recommendation by the World Health Organisation that Nevirapine be administered to the HIV-positive mother and infant at the time of birth in order to combat HIV.

A study commissioned by the Department of Health and obtained by TAC revealed that a national programme of providing Nevirapine for pregnant women would save 14 000 babies at a cost of US \$10.5 million or just US \$750 per child. TAC decided to take legal action to pressure the government to roll out a national programme to



distribute an antiretroviral drug called Nevirapine to help reduce the number of South African children born with HIV.<sup>13</sup>

The main issues in this case were, firstly, whether the government was entitled to refuse to make Nevirapine, which is a registered drug, available to pregnant women who have HIV and who give birth in the public sector, in order to prevent or reduce the risk of transmission of HIV to their infants, where in the judgment of the attending medical practitioner this is medically indicated. Secondly, whether the government was obliged, as a matter of law, to implement and set out clear timeframes for a national programme to prevent mother-to-child transmission of HIV, including voluntary counselling and testing, antiretroviral therapy, and the option of using formula milk for feeding.

In a unanimous judgment, the Constitutional Court issued a declaration to the effect that:

- the policy for reducing the risk of mother-to-child transmission of HIV as previously formulated and implemented by the government fell short of compliance;
- sections 27(1) and (2) of the Constitution required the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV;
- the programme should be realised progressively within the government's available resources and had to include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission; and
- making appropriate treatment available to them for such purposes.

The Court ordered the government to remove the restrictions preventing Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that were not research training sites, and to permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

## **2. OBLIGATIONS OF THE STATE**

Section 7(2) of the Constitution imposes four different types of obligations on the State with regard to the provision of the Bill of Rights.<sup>14</sup> The obligations to respect, protect, promote and fulfil. Section 7(2) has two components to it, the positive and negative aspects. The duty to respect is negative in nature, whereas the other three duties require positive action from the State. Failure to comply with any of these obligations with regard to any of the rights enshrined in the Bill of Rights will constitute a violation of those particular rights. The obligation to respect requires the

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<sup>13</sup> See, <http://www.aegis.com/news/irin/2001/IR010830.html>.

<sup>14</sup> Section 8(1) of the Constitution expressly states, "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

State to refrain from interfering with the enjoyment of economic, social and cultural rights.<sup>15</sup> For example, the right to housing would be violated if the State engages in arbitrary forced evictions.<sup>16</sup> The obligation to protect requires the State to prevent violations of such rights by third parties. The failure to ensure that third parties conform with the standards set in the Constitution by adopting relevant legislation and the provision of effective remedies to protect beneficiaries of the protected rights will amount to a breach of this obligation. The obligation to promote enjoins the State to create a conducive atmosphere in which people can be able to exercise their rights and freedoms by promoting tolerance and raising awareness of the rights. The obligation to fulfil requires the State to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.<sup>17</sup> The obligation to fulfil is inextricably intertwined with the obligation to promote, but needs more positive action from the State.

Each of the above obligations, contain elements of the obligation of conduct and obligation of result.<sup>18</sup> The obligation of conduct requires action reasonably calculated to realise the enjoyment of a particular right. The obligation of result requires the State to achieve specific targets to satisfy a detailed substantive framework established by both the Constitution and the international community. The State, however, enjoys a margin of appreciation in selecting the means for implementing their respective obligations. Hence, in the *Grootboom* judgment, the Court acknowledged that there is a wide range of possible measures that the State can adopt, and that it is not for the Court to prescribe the measures that the State should adopt, as long as the means selected would realise the enjoyment of a particular right.<sup>19</sup> What will then follow, according to the Court will be to assess the appropriateness of the adopted measures. While the UN Committee on Economic, Social and Cultural Rights indicated that it is incumbent upon a State to justify the appropriateness of the means it has chosen under the circumstances<sup>20</sup>, the *Grootboom* judgment held that reasonableness will be used as a yardstick to assess the appropriateness of the measures adopted by government.<sup>21</sup>

A violation of the government's obligation will only occur if it pursues, by action<sup>22</sup> or omission,<sup>23</sup> a policy or practice, which deliberately contravenes or ignores its

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<sup>15</sup> *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, “Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”, International Commission of Jurists, 1997, para 6, p. 82-3.

<sup>16</sup> Section 26(3) categorically states:

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.

<sup>17</sup> *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, *op. cit.*, para 6.

<sup>18</sup> *Ibid*, para 7, p. 83.

<sup>19</sup> *Grootboom*, *op. cit.* para 41.

<sup>20</sup> General Comment, No. 3, UN Committee on Economic, Social and Cultural Rights, 1990, para 4.

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

<sup>22</sup> *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, “Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”, , *op. cit.*, para 14, provides that:

"Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

- (a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;

constitutional and international obligations, or fails to achieve the required standard. A good example will be *Grootboom* where the government was found to have in place, a laudable nation-wide housing programme, which, however, failed to provide relief for those in peril and thus fell short of the obligations imposed by section 26 of the Constitution.<sup>24</sup>

It is, however, crucial to appreciate that economic and social rights are not absolute, but are qualified rights.<sup>25</sup> The reason they are considered to be programmatic rights is because they were never designed to be achieved immediately in general. Their fulfilment generally depends on the country's available resources. The extent of the State's obligation with regard to economic and social rights is defined by three key elements: the obligation to "take reasonable legislative and other measures"; "to achieve the progressive realisation" of the right; and "within available resources." The Limburg Principles on the Implementation of the International Covenant on

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- (b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;
  - (c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;
  - (d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;
  - (e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;
  - (f) The calculated obstruction of, or halt to, the progressive realisation of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;
  - (g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone."

<sup>23</sup> *Ibid*, para 15 provides:

"Violations of economic, social, cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include:

- (a) The failure to take appropriate steps as required under the Covenant;
- (b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;
- (c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;
- (d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;
- (e) The failure to utilise the maximum of available resources towards the full realisation of the Covenant;
- (f) The failure to monitor the realisation of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;
- (g) The failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;
- (h) The failure to implement without delay a right which is required by the Covenant to provide immediately;
- (i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
- (j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into a liberal or multilateral agreements with other States, international organisations or multinational corporations."

<sup>24</sup> *Grootboom*, *op. cit.*, para 65-66.

<sup>25</sup> *TAC*, *op. cit.*, para 23 and *Ibid*, para 38.

Economic, Social and Cultural Rights;<sup>26</sup> the Maastricht Guidelines on Violation of Economic, Social and Cultural Rights;<sup>27</sup> and the General Comment on UN Committee on Economic, Social and Cultural Rights provide a helpful interpretation for understanding the nature of the State's obligations with respect to its economic and social rights obligations. In the *Grootboom* judgment, the Constitutional Court held that the general comments of the UN Committee on Economic, Social and Cultural Rights<sup>28</sup> on the nature of States parties obligation in terms of Article 2(1) of the Covenant on Economic, Social and Cultural Rights, "progressive realisation" in particular, is in harmony with the context in which the phrase is used in the South African Constitution.<sup>29</sup> For that reason, there is no need "not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived." In fact, section 39<sup>30</sup> of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights. In *Makwanyane*<sup>31</sup> Chaskalson P (as he then was), in the context of section 35(1) of the interim Constitution said:<sup>32</sup>

International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provision of [the Bill of Rights] .<sup>33</sup>

In its interpretation, the Constitutional Court in *Grootboom* also relied on the general comments of the UN Committee on Economic, Social and Cultural Rights for interpreting the obligatory nature of the State in the context of the International Covenant on Economic, Social and Cultural Rights.

The issue of the nature and scope of State parties' obligation in the context of Article 2 of the Covenant on Economic, Social and Cultural Rights (Covenant) was addressed by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 3. What emerged from its interpretation is that State parties are

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<sup>26</sup> *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, International, The Limburg Principles on the Implementation of the International Covenant on Economic, Social & Cultural Rights, International Commission of Jurists, November, 1997.

<sup>27</sup> *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, "Maastricht Guidelines on Violations of Economic, Social and Cultural Right, *op. cit.*

<sup>28</sup> General Comment No. 3, *op. cit.*

<sup>29</sup> *Grootboom*, *op. cit.*, para 45.

<sup>30</sup> Section 39 which deals with the interpretation of the Bill of Rights provides:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum -
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law . . . ."

<sup>31</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

<sup>32</sup> Act, No. 200, of 1993.

<sup>33</sup> *Makwanyane*, *op.cit.*, para 35.

accountable to both the international community and their own subjects for non-compliance with their economic and social rights obligations. As already indicated, relevant in this report is Article 2(1) of the International Covenant on Economic, Social and Cultural Rights which provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

### **Interpretative principles relating to Article 2(1) of the Covenant**

#### *To take steps*

In terms of section 7 of the Constitution, the state has to take steps "not only to respect the various rights, but also to protect, promote and fulfil them."<sup>34</sup> As [economic and social] rights are programmatic rights, the State has an obligation to begin immediately to take steps towards the full realisation of the [economic and social] rights contained in the Bill of Rights. As already pointed out above, the State must use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their constitutional obligations.<sup>35</sup> According to *Grootboom*, the sufficiency of the steps taken by the government will be assessed against the standard of reasonableness.

The Constitutional Court in *Grootboom* stressed the importance of the national government in ensuring that laws, policies, programmes and strategies are put in place to meet the State's socio-economic obligations. Falling squarely on the national government is an equitable allocation of national revenue to the provinces and local government in order to implement the adopted measure.<sup>36</sup> Since legislative measures alone do not constitute compliance, it has to be followed by appropriate, well directed policies and programmes to be implemented by the executive.

For example, the greatest challenge facing the delivery of services to the vulnerable members of the society more often than not, lies not so much with government policies and other measures, but the implementation of such policies. This was confirmed by the recent *Report of the Committee of Inquiry into a Comprehensive System of Social Security in South Africa* ("Taylor Report") established by the government in 2000 to investigate social security in South Africa. The report, first published in March 2002 recommends a comprehensive social security package to address income as an integral component of the social security system in South

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<sup>34</sup>Pierre De Vos, "Grootboom, The Rights of Access to Housing and Substantive Equality as Contextual Fairness", *SAJHR*, Vol. 17, 2001 at 261.

<sup>35</sup> *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights", International Commission of Jurists, 1997, para 17, p. 67.

<sup>36</sup> Liebenberg S, "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa," in *SAJHR*, Vol. 17, 2001 at 246-7.

Africa. The Committee *of Inquiry into a Comprehensive System of Social Security in South Africa* observing that delivery of social services remains a major problem in the promotion and enforcement of economic and social rights, stated:

The Committee finds that Government programmes to address deprivation in health, education, housing, land, basic services such as access to water and sanitation, electricity and access to credit are well conceived and potentially well targeted. The barriers of access especially in regard to the poor remains administrative and institutional.<sup>37</sup>

These policies and programmes must in addition, be reasonable in their conception and their implementation. The national government has to ensure that it allocates responsibilities and tasks to different spheres of government, appropriate financial and human resources to ensure that the measures adopted are implemented.<sup>38</sup> In determining whether measures adopted are reasonable, one has to consider them in their social, economic and historical context.<sup>39</sup> The Constitutional Court in *Soobramoney* described the context in which the Bill of Rights was to be interpreted:

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 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 have a hollow ring.<sup>40</sup>

The measures must in addition, be co-ordinated; comprehensive; and coherent, balanced and flexible, and make appropriate provision for short, medium and long term needs.

The whole package should be directed towards the progressive realisation of the right. According to the UN Committee, such steps should be deliberate, concrete and targeted.<sup>41</sup>

Making provision for effective remedies, including where appropriate, judicial measures, is another necessity.<sup>42</sup> Such remedies should not only be accessible, but

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<sup>37</sup> *Transforming the Present – Protecting the Future, Consolidated Report*, Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, March 2002, Chapter 5, p. 55.

<sup>38</sup> *Grootboom, op. cit.*, para 40, 68.

<sup>39</sup> *Grootboom, Ibid*, para 25 and *TAC (I), op. cit.*, para 24

<sup>40</sup> *Soobramoney, op. cit.*, para 8.

<sup>41</sup> General Comment No. 3, 1990, *op. cit.*, para 2.

<sup>42</sup> *Limburg Principles, op. cit.*, para 19.

should be affordable, timely and effective.<sup>43</sup> In this regard, the UN Committee on Economic, Social and Cultural Rights stated that:

[t]he adoption of a rigid classification of economic, social and cultural rights which puts them . . . beyond the reach of the courts would . . . be arbitrary and incompatible with the principle that the two sets of human rights [civil and political rights and economic, social and cultural rights] are indivisible and interdependent, . . . . [and] would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.<sup>44</sup>

*To achieve progressively the full realisation of the rights*

The use of the phrase "progressive realisation" indicates that it was never envisaged that the full realisation of all economic, social and cultural rights would be achieved within a short period of time. According to the general comments of the UN Committee this serves as a "flexibility device, reflecting the realities of the real world and the difficulties involved for any country".<sup>45</sup> Secondly, the obligation to progressively achieve the full realisation of the rights, requires the State to move as expeditiously as possible towards the realisation of the rights.<sup>46</sup> The State can never, however, defer indefinitely efforts to ensure full realisation. On the contrary, the State has an obligation to begin immediately to take steps to fulfil their constitutional obligations.<sup>47</sup> Accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined, and where possible, lowered overtime.<sup>48</sup> Justice Yacoob cited with approval the analysis of the phrase "progressive realisation" taken from Article 2(1) of the Covenant on Economic, Social and Cultural Rights in the context of the rights pertaining to housing by the UN Committee on Economic, Social and Cultural Rights:

Nevertheless, the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring the full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'etre*, of the Covenant which is to establish clear obligations for State parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration

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<sup>43</sup> General Comment No. 9, UN Committee on Economic, Social and Cultural Rights, E/C. 12/1998/24 para 9.

<sup>44</sup> *Ibid*, para 10.

<sup>45</sup> *Ibid*, para 10.

<sup>46</sup> *Ibid*, see also *Grootboom, op. cit.*, para 46.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Grootboom, op. cit.*, para 45.

and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.<sup>49</sup>

For that reason, the progressive realisation of economic and social rights must, firstly, occur within a comprehensive, coherent and co-ordinated framework.<sup>50</sup> The Constitutional Court in *Grootboom* categorically stated that even though the measures adopted may be statistically successful, if they fail to ensure the progressive realisation of those most desperate, then the programme cannot pass a constitutional muster.<sup>51</sup> Secondly, the obligation of progressive achievement exists independently of the increase in resources, it requires effective use of resources available. The 'effective use of the resources available' means that the State would bear the burden of justifying any retrogressive measures arising from either under spending, ineptness of the government officials entrusted with the implementation of a particular programmes as well as other factors. Finally, accessibility to social services has to be progressively facilitated by examining, reviewing and lowering legal, administrative, operational and financial hurdles overtime to ensure access by a wide range of people.<sup>52</sup>

*To the maximum of its available resources*

The State is enjoined, regardless of its level of economic development, to observe its socio-economic obligation. However the obligation does not require the State to do more than its available resources permit.<sup>53</sup> This was confirmed by Chaskalson P in *Soobramoney*:

What is apparent from these provisions is that the obligations imposed on the State by [sections] 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demand on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.<sup>54</sup>

Although the Constitutional Court in *Grootboom* failed to give a clear indication of how it would assess the availability of resources,<sup>55</sup> Justice Yacoob, however, stated that although:

I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise

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<sup>49</sup>General Comment No. 3, 1990, *op. cit.*, para 9.

<sup>50</sup>*Grootboom*, *op. cit.*, para 38 - 41.

<sup>51</sup>*Ibid*, para 43-4.

<sup>52</sup>*Ibid*, para 45.

<sup>53</sup>*Ibid*, para 46.

<sup>54</sup>*Soobramoney*, *op. cit.*, para 11.

<sup>55</sup>Liebenberg, *op. cit.*, at 253.



these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.<sup>56</sup>

According to the UN Committee on Economic, Social and Cultural Rights, violation will occur should the State fail to satisfy "a minimum core obligation". In its general comments, the UN Committee on Economic, Social and Cultural Rights pointed out that it is incumbent upon every State party to ensure the satisfaction of, at the very least, minimum essentials of each of the economic and social rights. It is, however, crucial to note that although minimum core obligation is recognised in international law, the Constitutional Court did not define what the minimum core obligation entails. The Court reasoned that it could not determine with sufficient particularity what minimum core content entails due to the complexity of the task of determining a minimum core obligation for the progressive realisation of the right without having the requisite information on the needs and the opportunities for the enjoyment of that particular right. The Court based its decision on the fact that the Committee developed the concept of minimum core over many years of examining reports by reporting States and the Court does not have such a comparable information.<sup>57</sup> Although in the *Treatment Action Campaign*, the Constitutional Court held that minimum core includes at least the minimum decencies of life consistent with human dignity, it however, unequivocally acknowledged that it is not easy to define minimum core obligation.<sup>58</sup> The Constitutional Court went on to qualify this statement by holding that:

Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable, the [economic and social] rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing rights conferred on everyone under section 26(1) [footnotes omitted].<sup>59</sup>

This was premised on the fact that the State has a wide range of possible measures that it could adopt to meet its obligations,<sup>60</sup> all that is expected of the State, is that it act reasonably to provide access to the economic and social rights in question, on a progressive basis.<sup>61</sup>

### 3. THE MONITORING PROCESS

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<sup>56</sup> *Grootboom*, *op. cit.*, para 24.

<sup>57</sup> *Ibid*, para 32.

<sup>58</sup> *TAC*, *op. cit.*, para 26.

<sup>59</sup> *Ibid*, para 34.

<sup>60</sup> Note that there are other avenues that the State can utilise to determine the contents of the minimum core obligation for each right in line with section 234 of the Constitution which provides:

“In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.”

<sup>61</sup> *Ibid*, para 35.

In order to ensure that economic and social rights in the South African Bill of Rights are realised, the Constitution has provided the South African Human Rights Commission (SAHRC) with the mandate to monitor and assess the observance of these rights and report to the National Assembly. This report is pursuant to this mandate of the South African Human Rights Commission to monitor and assess the observance of economic and social rights in South Africa as provided for by section 184(1)<sup>62</sup> and (3)<sup>63</sup> of the Constitution of the Republic of South Africa, Act 108, 1996. The report covers two financial years, 2000/2001 and 2001/2002, and represent the fourth and fifth economic and social rights monitoring cycle of the Commission.<sup>64</sup>

In order to properly execute its constitutional mandate, the Commission developed a set of questionnaires (commonly referred to as the “Protocols”) in its first reporting cycle.<sup>65</sup> These protocols were designed to provide the Commission with information on policy, legislative, budgetary and other measures adopted during the reporting period in order to realise the economic and social rights stipulated in the Constitution.<sup>66</sup> The Protocols have since been refined to include questions on areas such as vulnerable groups; problems experienced by organs of State in giving effect to economic and social rights and measures undertaken to address such problems; National Action Plan for the Promotion and Protection of Human Rights; indicators; and budgetary allocations.

The Protocols initially focused only on the national and provincial spheres of government, but in this reporting cycle, the Commission has included Metropolitan Councils and Parastatals. While the Protocol took a maximalist approach in soliciting information from national and provincial tiers of government, a minimalist approach was adopted when dealing with Metropolitan Councils and Parastatals. The questions posed to Metros and Parastatals required information on their broad understanding of their Constitutional obligations in terms of section 7(2) and Schedules 4 and 5 of the Constitution respectively.

There are at least two reasons why in the previous reports the Commission did not cover Metropolitan Councils and Parastatals, even though they are covered as “state organs” in terms of section 239,<sup>67</sup> and their responsibilities spelt out in Schedules 4

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<sup>62</sup> Section 184(1) provides:

“The Human Rights Commission must -

- (a) promote respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in the Republic.”

<sup>63</sup> Subsection 3 states that:

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

<sup>64</sup> The Commission Economic and Social Rights Reports has always been behind with a year, this is an attempt by the Commission to try and catch-up.

<sup>65</sup> “Economic & Social Rights Report 1997-1998,” *SAHRC Vols. 1-VI*, 1999.

<sup>66</sup> Section 7(2) of the Constitution provides:

“The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

<sup>67</sup> Section 239 defines an ‘organ of state’ as including:

- (i) any state department or administration in national, provincial and local government;

and 5 of the Constitution. Firstly, an attempt to cover local sphere of government in the first economic and social rights report was made, but failed due to poor response to the Commissions's Protocols. Lastly, the Commission's limited resources also made it impossible to cover the entire sphere of local government and Parastatals. The limited resources have also made it impossible again to cover the entire sphere of local government, hence the decision to extend coverage to the Metropolitan Councils only.

### *The Protocols.*

Through its Research & Documentation Department, the Commission began distributing the first batch of protocols to all the relevant national Departments in early February 2002. In early March, the Eastern Cape, Free State, Gauteng and KwaZulu-Natal provinces received their sets of protocols followed by Mpumalanga, Northern Cape, Limpopo, North West and the Western Cape. The Metropolitan Councils and Parastatals began receiving protocols from 7-20 March 2002. The proposed due date for the submission of reports (responses to the Protocols) by government departments was 30 April 2002, but only few meet the deadline. Extensions were granted following appeals made to the Commission. Further extensions were granted until 30 June 2002 upon request.<sup>68</sup> The following Tables indicate the status of the responses by the different organs of states, including the Parastatals to the Protocols of the Commission.

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- (ii) functionary or institution exercising power or perforating a function in terms of the Constitution; or
  - (iii) exercising a public power or performing a public function in terms of any legislation. Therefore, an organ of state performing a public function must fulfil, respect and promote [economic and social] rights by adopting appropriate means tailored towards the progressive realisation of [economic and social] rights in the Bill of Rights.

<sup>68</sup> These included the National Department of Labour, Social Development; Social Services & Population Development (Free State), Social Development (KZN), Education, Agriculture and Economic Affairs, Social Services & Population Development (WC). These submitted their Protocols in mid July 2002.

*Responses to Protocols 2002*

**Table 1 Dates of receipt of responses from national government departments**

<b>National Departments</b>	<b>Date Received</b>
Correctional Services	29/04/02
Land Affairs	02/05/02
Environmental Affairs and Tourism	30/04/02
Agriculture	29/05/02
Housing	31/05/02
Minerals and Energy	03/07/02
Finance	06/05/02
Health	22/05/02
Education	11/06/02
Water Affairs and Forestry	03/06/02
Labour	23/07/02
Provincial and Local Government	09/07/02
Social Development	16/07/02

**Table 2 EASTERN CAPE DEPARTMENTS**

<b>Department</b>	<b>Date Received</b>
Social Development	15/05/02
Agriculture	03/05/02
Housing and Local Government	03/07/02
Finance	31/05/02
Education	31/05/02
Health	01/07/02
Social Development	18/07/02

**Table 3 FREE STATE DEPARTMENTS**

<b>Department</b>	<b>Date Received</b>
Health	02/05/02
Finance	02/05/02
Social Development	30/04/02
Agriculture	24/06/02
Tourism, Environmental and Economic Affairs	04/06/02
Local Government and Housing	03/05/02
Education	14/05/02
Social Development	03/07/02

**Table 4 GAUTENG DEPARTMENTS**

<b>Department</b>	<b>Date Received</b>
Housing	13/05/02
Health	13/05/02
Finance and Economic Affairs	14/05/02
Agriculture, Conservation, Environment and Land Affairs	30/05/02
Education	31/05/02
Social Services and Population Development	09/07/02
Development Planning and Local Government	03/06/02

**Table 5 KZN DEPARTMENTS**

<b>Department</b>	<b>Date Received</b>
Finance	18/03/02
Agriculture and Environment	30/04/02
Education	02/05/02
Traditional and Local Government	30/04/02
Housing	06/06/02
Health	06/06/02
Social Development	09/07/02

**Table 6 MPUMALANGA DEPARTMENTS**

<b>Department</b>	<b>Date Received</b>
Agriculture, Conservation and Environment	26/04/02
Education	02/06/02
Health	21/06/02
Local Government, Traffic Control and Traffic Safety	04/06/02
Finance	01/07/02
Housing and Administration	23/05/02
Social Services and Population Development	05/08/02

**Table 7 NORTHERN CAPE DEPARTMENTS**

<b>Department</b>	<b>Date Received</b>
Agriculture, Conservation and Environment	29/04/02
Health	04/06/02
Local Government and Housing	21/05/02
Education	17/05/02
Social Services and Population Development	28/06/02
Finance	22/05/02

**Table 8 LIMPOPO DEPARTMENTS**

<b>Department</b>	<b>Date Received</b>
Agriculture	02/05/02
Health and Welfare	03/05/02
Local Government and Housing	29/05/02
Education	01/07/02
Finance, Economic Affairs and Tourism	23/05/02

**Table 9 NORTH WEST DEPARTMENTS**

<b>Department</b>	<b>Date Received</b>
Finance	30/04/02
Health	31/05/02
Education	03/06/02
Developmental Local Government and Housing	10/06/02
Agriculture, Conservation and Environment	06/06/02
Social Services and Population Development	16 /08 /02

**Table 10 WESTERN CAPE DEPARTMENTS**

<b>Department</b>	<b>Date Received</b>
Development Planning, Local Government and Housing	29/04/02
Finance	02/05/02
Environmental and Cultural Affairs	14/06/02
Education	09/07/02
Agriculture and Economic Affairs	05/07/02
Health	17/05/02
Social Services and Population Development	24/07/02

**Table 11 PARASTATALS**

<b>Organ of State</b>	<b>Date Received</b>
Land bank	02/05/02
Council for Scientific and Industrial Research	03/05/02
Medical Control Council	09/07/02
SA Council for Social Service Professions	05/05/02
National Education Financial Aid Scheme	07/06/02
Umgengi Water	14/06/02
National Housing Finance Corporation	21/05/02
Agriculture Research Council	07/06/02
Rand Water	28/06/02

**Table 12 METROS**

<b>Organ of State</b>	<b>Date Received</b>
Greater JHB Metropolitan Council	01/07/02
Greater Tshwane	03/06/02
Durban Metro	12/07/02
Cape Town Metro	02/09/02
Nelson Mandela Metro	19/07/02
Ekurhuleni Metro	09/08/02

### *Difficulties and Challenges*

At the outset, the Commission wishes to emphasise that in executing its mandate in terms of section 184(3), it is performing a *constitutional duty*, and not a *political function*. The Commission has reiterated in previous reports that its mandate is to assess whether legislative, policy and programmatic measures adopted by organs of State are reasonable, that the programmes and projects are comprehensive and cater for vulnerable groups and ensure that the responsibilities of the three spheres of government have been clearly spelt out.

The challenge facing the Commission is how to mainstream the reporting process in order to properly assess the progressive realisation of economic and social rights by State organs. This reporting process has been difficult because of:

- Lack of understanding of constitutional obligations by government departments;
- Lack of adequate information management systems in most government departments;
- Insufficient and sometimes incorrect information provided by many organs of State to the Commission;

- Late responses to the Protocols by some government departments;
- Lack of adequate resources for the Commission which affects the effectiveness and quality of its economic and social rights Report monitoring process.

These are the same difficulties the Commission had experienced with the previous three reporting cycles.

In an attempt to address these and other related challenges, the Commission through its Research and Documentation Department continues to revise its protocols and request suggestions from relevant departments on how to improve its reporting and monitoring process. Workshops on economic and social rights were also conducted for government officials and relevant civil society organisations. The Commission will continue to address all these challenges.

#### **4. THE STRUCTURE OF THE REPORT**

The report follows the structure of the 3<sup>rd</sup> Economic and Social Report to a large extent, though there are few changes, which the Commission introduced in order to improve its reporting process.

The rest of the report is as follows:

1. Various chapters dealing with different economic and social rights. Each of these chapters consists of the following sub-sections:
  - 1.1 Policy Measures
  - 1.2 Legislative and other Measures.
  - 1.3 Budgetary Measures
  - 1.4 Indicators (including those from the National Action Plan for Human Rights)
  - 1.5 Critique
  - 1.6 Recommendations
  - 1.7 Conclusion

The changes on additional sections in the report are information on administrative actions, maladministration and/or/corruption and human rights indicators.<sup>69</sup> Human rights indicators were included in the Protocols as a tool to measure qualitative and

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<sup>69</sup> Human rights indicators are a powerful tool in human rights advocacy and in building "a culture of accountability" for human rights. Indicators are critical in enabling people and organisations from grassroots activists and civil society to governments and the United Nations to identify human rights violations, to assess progress, and to hold critical actors to account. These indicators can be used to make better policies and monitoring progress; identify unintended impact of laws, policies and practices; identify which factors have an impact on the realisation of rights; reveal whether the obligations of these rights are being met; give early warning of potential violations, prompt preventive action; enhance social consensus on difficult trade-offs to be made in the face of resource constraints; as well as to expose issues that had been neglected or silenced. [http://hdr.undp.org/reports/global/2000/en/pdf/hdr\\_2000\\_ch5.pdf](http://hdr.undp.org/reports/global/2000/en/pdf/hdr_2000_ch5.pdf). See also, Henry Steiner & Phillip Alston, *International Human Rights in Context – Law, Politics, Morals*, Oxford University Press, 2001 at 316-317; Maria Green, "What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement" *Human Rights Quarterly*, Vol. 23, 2001 at 1063.

quantitative changes in a given situation by using statistical information. However, human rights indicators do not always reflect the human condition due to the lack of reliable information or the use of inappropriate indicators.

The sub-section in the Protocols which requires government departments to respond on issues of maladministration and/or corruption is related in some way to the sub-section on administrative action. Even though the Constitution provides for other structures to deal with corruption of public officials such as the Public Protector<sup>70</sup> and the Public Service Commission,<sup>71</sup> corruption and/ mal-administration at all levels affects the delivery of social services and thus impacts on the Commission's reporting and monitoring process.

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<sup>70</sup> See section 182 of the Constitution.

<sup>71</sup> Section 196 of the Constitution.



## **ABBREVIATIONS**

<b>MCC</b>	Medicines Control Council
<b>TAC</b>	Treatment Action Campaign and Others

## CHAPTER 2

### THE RIGHT OF ACCESS TO ADEQUATE HOUSING

#### 1. INTRODUCTION

The right to adequate housing as one of the most important of all basic human rights is recognised in a number of international human rights instruments and treaties.<sup>1</sup> Shelter from the elements; a place to eat; sleep; relax and raise a family are some of the basic things people need for survival. Section 26(1) of the Constitution provides that everyone shall have the right of access to *adequate* housing. Accessibility means that the State must create conducive conditions for all its citizens, irrespective of their economic status, to access affordable housing. Section 26(3) of the Constitution prohibits evictions of persons from their homes and the demolition of their homes without a court order. A court of law ordering such eviction or demolition must do so after taking into account all relevant factors. Legislation permitting arbitrary evictions is also prohibited by the same provision.

In *Government of the Republic of South Africa v Grootboom* the Constitutional Court interpreted the right to have access to adequate housing as follows:

Housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling. The right of access to adequate housing also suggests that it is not only the State that is responsible for the provision of houses, but that other agents within society, including individuals themselves, must be enabled by legislative and other measures to provide housing<sup>2</sup>

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<sup>1</sup> Universal Declaration of Human Rights, 1948, Art 25; European Convention on Human Rights and Fundamental Freedoms, 1950, Art 8(1); International Convention relating to the status of Refugees, 1951, Art 21; European Social Charter, 1961, Art 16, 19(4) and Art 4 of Additional Protocol; International Covenant on Economic, Social and Cultural Rights, 1966, Art 11; International Convention on the Elimination of All forms of Racial Discrimination, 1966, Art 5(e)(iii); International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, Art 11(b) and (d); International Convention on the Elimination of All Forms of Discrimination against Women, 1979, Art 14(2)(h); International Convention on the Rights of the Child 1989, Art 27(3).

<sup>2</sup> *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169, para 41.

This point is further emphasised by the UN Committee on Economic, Social and Cultural Rights, which stipulated the following conditions, as being necessary<sup>3</sup> for a meaningful enjoyment of the right to housing:<sup>4</sup>

- Legal security of tenure
- Affordability
- Availability of services, materials, facilities and infrastructure
- Habitability
- Accessibility
- Location
- Cultural adequacy

The Court in *Grootboom* used reasonableness as a yardstick to measure policy, legislative and other measures adopted by government in order to achieve the progressive realisation of the right of access to adequate housing. Reasonableness in a sense that the courts can require an explanation from the State of the measures chosen to fulfil the right pertaining of access to adequate housing and all other economic and social rights. The courts can also require the State to give an account of its progress in implementing these measures. In short, the State has an obligation to justify the means it chooses to fulfil its obligations to realise economic and social rights.

*Grootboom*,<sup>5</sup> found that the measures taken by the State to provide housing were unreasonable because no provision was made for shelter for homeless people. Such inaction on the part of the government was unreasonable because it ignored the plight of the marginalised section of our society. However, the obligation of the State towards the realisation of the rights pertaining to housing and other social and economic rights is qualified, in that the measures to be taken by the State must be within resources available to the State and must also be progressive in the realisation of the rights.<sup>6</sup> The qualification does not mean that the State must detract from its constitutional obligation, but provide a basis for a determination of whether the reasons the State may provide as the non-fulfilment of the rights are rational and justifiable.

The Copenhagen Declaration and Programme of Action, also provides for the right to housing. Commitment 2 of the Declaration requires States to eradicate poverty and to provide basic human needs such as food, shelter, water, and sanitation.<sup>7</sup> This also includes improving access to land to enable people to improve their economic situation.<sup>8</sup>

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<sup>3</sup> For more details on these criteria please refer to the 3<sup>rd</sup> *Economic and Social Rights Report* by the South African Human Rights Commission, Chapter six: Access to Adequate Housing, 1999/2000, p.250.

<sup>4</sup> General Comment No. 4, para 8 of the Committee on Economic, Social and Cultural Rights, 1991.

<sup>5</sup> *Op. cit.* paras 41-44.

<sup>6</sup> Sections 26(2) and 27(2) of the Constitution of South Africa, Act 108 of 1996.

<sup>7</sup> ICSW *The Copenhagen Consensus - A summary of Principal Commitments of the World Summit for Social Development*, para. B, 7, 1995.

<sup>8</sup> *Ibid*, Commitment 2, para C.

This chapter, will therefore, assess the measures taken by government to provide adequate housing in view of its constitutional provisions, read together with relevant provisions of international human rights law. Relevant provisions of the *Grootboom* case on the concepts pertaining to the obligations of the State towards the realisation of economic and social rights will form part of the assessment.

## **2. POLICY MEASURES AND PROGRAMMES**

### **National Department of Housing**

This section reflects the various policies, programmes and projects that were instituted and implemented by the National Department of Housing (NDH) during the reporting period, April 2000 to March 2002:

- Amendment to the Housing Subsidy Scheme to enable persons owning unsubsidised residential properties to access housing subsidies (2000/2001)
- Environmentally Sound Low Cost Housing (2000/2001)
- Peoples Housing Process (2000/2001)
- Developer Driven Individual Subsidy Programme (2000/2001)
- Savings Linked Subsidy Scheme (2001/2002)
- Rental Housing Policy Framework (2001/2002)
- Programme for Housing Development in Emergency Circumstances (2001/2002)

These policy measures will be discussed in detail below. Note that as these programmes and policy refinements are still fairly new, much of their impact on the housing sector and communities has not been felt as yet.

#### *Amendment to the Housing Subsidy Scheme to enable persons owning unsubsidised residential properties to access housing subsidies<sup>9</sup>*

According to the NDH, the eligibility criteria for the housing subsidy was, in the past, based on a person who was acquiring fixed residential property for the first time. This means that persons who acquired ownership of residential properties with their own resources, without any assistance from the government's housing subsidy scheme, (even though they met all the other qualifying requirements of the scheme), were disqualified from applying for a housing subsidy. A substantial number of such persons, who bought sites from private developers, could not access private finance for the construction of houses. As a result, they were only able to construct a basic informal structure that seldom met the minimum health and safety requirements, and the National Norms and Standards in respect of the Permanent Residential Structures. To address these shortcomings, the NDH introduced an amendment to the Housing Subsidy Scheme in terms of which these qualifying beneficiaries could apply for subsidies on condition that a subsidy is used to building or completing a house that will comply with the Ministerial National Norms and Standards in Permanent Residential Structures.

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<sup>9</sup> This amendment came into effect on April, 1 2001

### *Environmentally Sound Low Cost Housing*

The national and provincial departments of housing are required in terms of the National Environmental Management Act (NEMA)<sup>10</sup> to prepare an Environmental Implementation Plan (EIP)<sup>11</sup> for any housing development activities that will have an impact on the environment. The implementation plan has to be monitored and reviewed regularly. The first edition of the EIP for the NDH was prepared in accordance with the imperatives of the Act. The final draft EIP of the National Department of Housing was approved in November 2000. One of the key proposals of the first edition of the EIP was the expansion of the Environmentally Sound Low Cost Housing Task Team to include a broader range of stakeholders. The task team, which was established in January 1998, has been operating as an interdepartmental committee with representatives of the Departments of Environmental Affairs and Tourism, Health, Housing, Minerals and Energy, and Water Affairs and Forestry. During the period 2000/2002, the task team completed a number of projects on housing, including the following:

- A green financing feasibility study which investigates the development of a financing mechanism to support environmentally efficient housing development, and
- A Cabinet resolution to promote energy-efficiency in the housing sector.

In addition, through the close interaction between the Department and NGOs working in the field of environmentally sound housing, the following were achieved during the period 2000/2001 and 2001/2002:

- Influencing the design of approximately 60 000 planned housing units throughout the country to promote energy efficiency through the Green Professional Programme of Sustainable Homes Initiative;
- A National Sustainable Housing Training Course and other capacity building initiatives by the Sustainable Energy Environment and Development (SEED) programme which focused on building the capacity of government officials; decision-makers; NGOs and previously disadvantaged communities; and
- Planting approximately 57 000 trees with new subsidised homes through the Trees for Homes programme and the establishment of a National Urban Greening Fund which will continue to support residential greening projects.

### *Peoples Housing Process*

The main objective of the People's Housing Process as set out in the National Housing Code is to enable the provision of adequate housing to people earning less than R3 500 per month. Between the year 2000 and January 2002, 296 268 subsidies were approved.

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<sup>10</sup> National Environmental Management Act, No. 107 of 1998.

<sup>11</sup> The EIP is meant to co-ordinate and harmonise environmental policies, plans, programmes and decisions at all spheres of government to minimise and avoid duplication of duties and functions.

### *Developer- Driven Individual Subsidy Programme*<sup>12</sup>

This programme targets small-scale developers that are unable to execute large subsidy projects. The mechanism provides flexibility and allows for the deduction of funds based on the value of work completed and milestones agreed to in a structured manner. The programme does not require the use of a conveyancer to administer the subsidy funding.

### *Savings Linked Subsidy Scheme*<sup>13</sup>

The Savings Linked Subsidy Scheme forms part of the National Savings Programme. Its aim is to engender a culture of saving in South African communities, to facilitate access to banking and other financial services for low-income people who have hitherto been excluded from accessing such services. The Savings Linked Subsidy Scheme is also aimed at mobilising additional funding for low-income housing, in order to facilitate the development of houses for a better standard and quality than is currently being delivered where the subsidy is the only funding. Through this scheme, people are encouraged to be decision-making housing consumers rather than just ‘beneficiaries’.

### *Rental Housing Policy Framework*<sup>14</sup>

The NDH has initiated investigations into the rental market with a view to developing proposals for a Rental Housing Policy Framework that could culminate in a government assisted Rental Housing Subsidy programme. It is envisaged that the Special Presidential Lead Project, also referred to as the Job Summit, will be used to enable delivery of approximately 15 000 rental units

### *Programme for Housing Development in Emergency Circumstances*

Due to the effects of natural disasters such as severe floods and other emergencies around the country that causes families to lose their homes, and in light of the *Grootboom* judgement, the NDH is presently developing a housing development programme to address the emergency housing needs of affected persons. The main objective of the programme is to provide a funding and development framework to undertake housing projects in emergencies that will ensure that people that have no

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<sup>12</sup> The programme came into effect on February, 15 2002

<sup>13</sup> The programme came into effect on 1 April, 2001.

<sup>14</sup> The policy was developed in terms of section 2 of the Rental Housing Act of 1999. The government has to:

- promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives, mechanisms and other measures that-
  1. improve conditions in the rental housing market;
  2. encourage investment in urban and rural areas that are in need of revitalisation and resuscitation; and correct distorted patterns of residential settlement by initiating, promoting and facilitating new development in or the redevelopment of affected areas.
- facilitate the provision of rental housing in partnership with the private sector.
- National Government must introduce a policy framework, including norms and standards, on rental housing to give effect to the above.

access to land, adequate housing and are living in intolerable conditions or crisis situations, receive some form of shelter. The programme is not only meant to introduce a shortened process of acquiring land, but also aimed at making provision for the township establishment processes.

## **Vulnerable and Marginalised Groups**

### *Women*

The NDH reported that the instituted measures do not discriminate against women. The Housing Subsidy Scheme's general qualification criteria have been developed on the principles of, *inter alia*, the gender equality requirements. For example, the Developer Driven Housing Subsidy Programme and the expenditure priorities for female contractors and developers reflect the department's commitment to women not only as beneficiaries, but also as active participants and service providers in the delivery of housing.

### *Child-headed households and Girl-children headed-households*

According to the NDH the instituted measures do not accommodate child-headed households as the general qualification criterion for the National Housing Subsidy Scheme requires that beneficiaries must be over 21 years old and legally competent to contract.

### *Racial groups disadvantaged by past discriminatory laws and practices*

These groups qualify for subsidies in terms of the Amendment to the Housing Subsidy Scheme to enable persons with unsubsidised residential properties to access housing subsidies as well as the National Programme for the disposal and transfer of State-financed residential properties.

### *Refugees and asylum seekers*

All the measures instituted do not apply to refugees because the general qualification criterion for the National Housing Subsidy Scheme is that beneficiaries must either be South African citizens or must have permanent resident permits.

### *Persons with disabilities*

Persons with disabilities and earning less than R3 500 per month also qualify for housing subsidies like everybody. They can enhance their subsidy with additional funds from the subsidy scheme specifically targeted at people in their position.

One of the targets of the housing subsidy scheme is homeless people. The measures identified such as the amendment to the housing subsidy scheme progress payment system, assist to streamline the processes for housing delivery to the homeless.

## **Provincial Departments Of Housing<sup>15</sup>**

The following section describes policies, programmes and projects instituted by the respective provincial departments of housing. During the period 2000/2001 and 2001/2002, the Eastern Cape Department of Housing and Local Government reported that it was operating within the provisions of the Amendment of the Housing Subsidy Scheme. As will be shown below, the other provincial departments of housing indicated that they have instituted the following measures:

- Special Needs Policy
- Stabilisation of the Rental Housing Sector Policy
- Protection of the Housing Consumer Policy
- Farm worker housing<sup>16</sup>

### *Special Needs Policy Programme*

Only the Free State, Gauteng, and the Northern Cape provinces instituted this policy. The Free State Department of Housing reported that it is currently running a housing programme for the aged in conjunction with the Free State Department of Social Development. The houses being provided are designed to suit the needs of the aged. As will be shown below, the Gauteng Department of Housing has reported that although its policy framework cuts across all the programmes within its department, its main focus was on housing people infected with and affected by the AIDS epidemic and women.

### *GDH response to HIV/AIDS*

This is part of the department's integrated approach to the provision of housing. The subsidy provided is referred to as the Transitional Housing Subsidy. The GDH developed the policy in response to numerous concerns from communities about people dying of AIDS, and leaving children without means of support. The measures adopted are meant to give assistance those affected and infected by the AIDS epidemic.

### *Women in Housing*

The policy recognises the different categories of women involved in housing, such as women in construction, professionals and beneficiaries. The policy has ensured that 10 per cent of the capital budget for housing is set aside to address the needs of women in the housing sector and put together a rooster that would ensure that women receive preferential treatment.

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<sup>15</sup> Please note that the following information is provided by the respective provincial departments of housing, and where the department is not mentioned under a specific measure, means that the information was not provided by that particular provincial department.

<sup>16</sup> No details were provided by the Western Cape Department of Housing on the policy.



### *Stabilisation of the Rental Housing Sector policy*

The only provincial housing departments that provided some information on this policy are Gauteng, Northern Cape and the North West. The policy is aimed at developing key strategic interventions that will contribute towards stabilising the Rental Housing Sector. The principal stakeholders involved are the Department of Housing, the tenants, landlords, estate agents, and civic organisations. In developing this policy the GDH considered all the needs, values and responsibilities of the stakeholders already mentioned. The department developed the policy because it was inundated with problems such as high rentals, disputes between tenants and landlords, and lack of maintenance of buildings. These problems made the department to realise the need for government to assist in order to bring law and order into the sector. The Northern Cape reported on the measure, but did not provide any information on what it entails. The North West only indicated that the Rental Tribunal as part of the Rental Policy was established to normalise relationships between landlords and tenants, and to also combat unfair practices in the rental market.

### *Protection of the Housing Consumer Policy*

The GDH reported that the policy enable it to work with the Consumer Court in addressing complaints pertaining to consumer matters. Housing consumers lodged complaints about developers that promised to build them houses but failed to fulfil their promises. The Northern Cape Department of Housing also reported on the measure, but did not provide the objectives.

## **Programmes**

Provincial departments of housing reported that during the period 2000/2001 and 2001/2002 they have implemented the following programmes within the National Housing Subsidy Scheme:<sup>17</sup>

- Rural Housing Subsidy
- Disaster Intervention programme
- Project -Linked Subsidy
- Consolidation Subsidy
- Hostel Redevelopment Programme
- Right-Sizing Subsidy
- Institutional Subsidy
- Individual Subsidy
- Relocation Subsidy
- Discount Benefit Scheme
- Social Housing Programme
- People's Housing Process
- Rapid Land Release Programme

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<sup>17</sup> Most of the measures were instituted before the reporting period, as far back as 1995. However, they are still continuously being implemented by the different provinces.

### *Rural Housing Subsidy*

This is a special housing programme that was established to cater for the special demands of rural areas in respect of minimum survey requirements and the extensive use of long term lease agreements as opposed to freehold title. According to the provincial departments of housing in the provinces of Mpumalanga, Northern Cape, Limpopo and the North West, this relaxation in terms of tenure and survey requirements, allows, for the first time, access to housing subsidies by beneficiaries in rural areas. To qualify for this subsidy the total income of the households should be less than R3 500 per month.

The KwaZulu-Natal Department of Housing (KZNDH) also submitted that as most of the rural land in that province is tribal land, which vests in the Ingonyama Trust or the Department of Land Affairs, it is often impossible to transfer erven to the beneficiaries. Since security of tenure is a fundamental principle upon which the provision of subsidies is based, it has developed its own *Rural Housing Guideline*. In this instance, the granting of long-term leases is considered sufficient security of tenure to satisfy the requirements of the housing subsidy for rural households.

### *Disaster Intervention Programme*

The Mpumalanga Department of Housing developed the Disaster Intervention Programme which was hence prescribed by the NHD directing that each province must set aside funding for housing people that are rendered homeless as a result of natural disasters. The programme seeks to ensure that provincial housing departments are able to respond swiftly whenever there is an emergency within their province. For example, in Mpumalanga the Zaaiplaas project was instituted in order to construct houses for those affected by floods in the rural areas. At the time of reporting, there were approximately 200 houses, which were already completed for 290 beneficiaries.

### *Project Linked Subsidy*

The programme seeks to give beneficiaries the opportunity to acquire ownership of fixed residential properties. The people that qualify for the subsidy are those earning less than R3 500. The provinces that provided information on this programme are the Free State, Northern Cape and Limpopo. The achievement of this programme are summarised in the table below:

**Table 1** Beneficiaries of the Project linked subsidy

<b>Province</b>	<b>Achievements/ goals attained</b>
Free State	20 708 subsidies were allocated, of which 1 460 were driven by women. To date 76 000 units have been completed
Northern Cape	4 964 people have benefited through the subsidy programme
Limpopo Province	The NPDH did not quantify the beneficiaries, but only stated in its report that shelter was provided to the needy

### *Consolidation Subsidy*

According to the provincial departments of housing in Free State and Limpopo, the objective of the programme is to assist beneficiaries who already have land to acquire funds for building the top structure.

### *Hostel Redevelopment Programme*

The objective of the programme is to create humane living conditions in the public sector hostels by converting them to family units. The only provincial departments that provided information on this programme are Free State and Limpopo. During the 2001/2002 financial year 1 284 units were converted to family units in the Free State. However, no figures were provided in the case of Limpopo Province.

### *Right-Sizing Subsidy*

The objective of this programme is to normalise the housing sector through forming partnerships with banks. It is meant for defaulted mortgage bondholders. The only achievement to date in the Free State is the approval of an application for a project with 200 beneficiaries.

### *Institutional Subsidy*

The institutional subsidy allows beneficiaries to rent houses with the option to purchase at a later stage. The Eastern Cape reported that the programme is meant to include middle income earners in the low cost housing market. The Eastern Cape built and transferred 1 345 houses to new owners. In the Free State, the programme that targets middle-income earners<sup>18</sup> had completed and allocated 300 subsidised houses. Although the Limpopo province also provided information on the programme, it did not, however, provide the number of beneficiaries.

### *Individual Subsidy*

The individual subsidy is aimed at providing people with the opportunity to acquire fixed residential properties. The programme, which is based on the provisions of the National Housing Subsidy Policy, has the same qualifying criteria as all the other housing subsidy programmes, that is, a household must be having an income of R3 500 or less per month. In the Northern Cape, 736 individuals have benefited from the programme. The Limpopo province also reported on the measure, but did not provide information on the number of people that benefited from the programme during the period under review.

### *Relocation Subsidy*

The relocation subsidy's main objective is to assist defaulting borrowers to gain access to alternative housing. The Limpopo Province Department of Housing instituted the measure in terms of the provision of the National Housing Code. The department

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<sup>18</sup> No explanation was provided as to who are the middle income earners.

indicated that there is no information on the number of beneficiaries for the period under review.

#### *Discount Benefit Scheme*

The discount benefit scheme was instituted to assist households to upgrade their security of tenure. According to the Free State Department of Housing, the scheme is targeted at residents of previously state-financed houses. It further indicated that to date 23 494 households have received title deeds. The Limpopo Province Department of Housing also reported that the scheme is aimed at promoting home ownership in terms of housing stock created in the previous dispensation, and the only people that qualify are tenants that occupied State owned houses before 16 March 1994.

#### *Social Housing Programme*

The social housing programme is based on the provisions of the Rental Housing Policy. According to the North West Department of Housing, the main objective of the programme is to provide affordable rental housing, and to normalise the rental housing market. The department's achievements to date include the establishment and operation of the Rental Housing Tribunal, the approval of approximately 1 000 rental housing subsidies in four projects and the reserved 1 200 subsidies for the financial year 2002/ 2003.

#### *Peoples Housing Process*

The peoples housing process forms part of the capital housing subsidy scheme, and its objective is to ensure the involvement of communities in the building of their own houses. Through this process, the Eastern Cape Department of Housing and Local Government indicated that skills would be developed through the provision of housing. The programme is targeted at people without homes and those living in informal settlements and rural areas.

#### *Rapid Land Release Programme*

The Eastern Cape Department of Housing and Local Government indicated in its report that this is one of its flagship programmes. It is an initiative embarked upon by the department to re-sequence the housing delivery protocol by ensuring that activities relating to the delivery of houses are carried out in advance. This programme would enable the Eastern Cape Department of Housing and Local Government to split the delivery process into two distinct phases. The land acquisition, township establishment, servicing and transfer process constitute part of the first phase. The second phase, called the Housing Impact Programme, focuses on the provision of the top structures.

### *Vulnerable and Marginalised Groups*

The Departments of Housing in the Free State and KwaZulu-Natal indicated that all the provincial policies are open to all South African citizens and do not differentiate between gender, race, age or any ethnic group. No South African citizen is deprived of a housing subsidy. A person will only be denied a subsidy if s/he is not a first time homebuyer or s/he has received government assistance before and if his/her income is more than R3 500. The beneficiary must also have dependants, be married or co-habiting. The departments further indicated that child-headed household and girl children do not qualify for a subsidy because they are under 21 years, and cannot sign a contract.

The GDH has allocated the highest number of subsidies to female-headed households, and women now have 10 per cent of the capital budget set aside for them. The needs of child headed households are catered for within the GDH's response to HIV/AIDS. Most beneficiaries of the GDH policies and programmes are people who have been victims of past racial injustices and practices. The transitional housing subsidy caters for people in transition such as refugees and asylum seekers. The GDH has through incremental housing ensured that people in informal settlements have secure tenure through the provision of land, essential services such as water and sanitation on an incremental basis. All the projects of the GDH allocate 5 per cent of their budget for people with disabilities and the housing subsidy scheme has variations for persons with disabilities. Older persons are treated as a special group as the policy on special needs caters for them as well. There is a draft policy that is being developed to cater for the needs of people living with and affected by HIV/AIDS.

In KwaZulu-Natal the qualifying criteria enables *women and female-headed households* to be eligible for assistance and not to be discriminated against. The housing subsidy amount is R20 300 and beneficiaries have to contribute R2 479 in order to access a subsidy. Female-headed households with an income of less than R800 per month, and that have children below the age of 18 years are exempt from contributing the required R2 479. They are instead, granted an extra R2 500 from the State so that they may be at par with other beneficiaries.

Special subsidies are available to provide houses with the necessary structural facilities and features suitable for people with disabilities. Extra funds are also allocated, for example, R720 for ramp access to the house or paving, R300 for kick doorplates, R1 100 for grab rails and lever action taps in bathrooms and R700 for visual bell indicators.

A specific policy called relocation assistance exists for the aged. The elderly may be allowed to continue residing in the property and be awarded financial assistance so that they may continue residing on the property. The aged persons do not have to contribute the required R2 479 in order to access a subsidy as already discussed above, but instead will receive an extra R2 500 from the State to ensure that they get houses like other beneficiaries.

The KwaZulu-Natal province has developed an Aids policy to provide specialised housing to assist HIV affected people and Aids orphans. As part of this policy the province makes provision for the establishment of cluster homes or children's villages

for Aids orphans and the provision of transitional housing for adults infected with Aids. In the Northern Cape research is still being conducted for the development of a policy that will address the needs of people infected and affected by AIDS.

### **3. LEGISLATIVE DEVELOPMENTS**

#### **National Sphere**

*Housing Act, No. 107 of 1997* is one of the central pieces of legislation that provides for the NDH to fulfil its obligations and undertake its mandate. According to the NDH, the four main objectives of this Act are to:

- Provide the framework within which the housing delivery process must operate;
- Provide for the facilitation of a sustainable housing development process;
- Prescribes fundamental principles binding all spheres of government in respect of housing development; and
- Create certainty among all role players regarding the government.

Legislative measures instituted by the National Department of Housing during the 2000/2001 financial year, included an amendment to the Housing Act<sup>19</sup> as well as the Home Loan and Mortgage Disclosure Act No63 of 2000.

#### *Housing Amendment Act No. 4 of 2001*

The most significant amendment to the Act has been the insertions of sections 10A and B. These insertions serve to restrict the voluntary and involuntary sale of State-subsidised housing. The amendment restricts a person that received a housing subsidy in terms of any of the national housing programmes from selling his or her dwelling within a period of 8 years after acquiring such property. The provision grants the relevant provincial departments of housing the first preference of purchasing the property were it to be sold. The main objective of the amendment to the Housing Act is to ensure that properties that have been developed with State subsidies are not sold for less than what the State had spent in their development.

#### *Home Loan and Mortgage Disclosure Act No.63 of 2000*

The need to mobilise housing credit is critical to the national housing programme. Access by the poor to housing credit has been limited for a number of reasons, and not just affordability. Redlining by some financial institutions and unfair discrimination in general are some of the factors limiting access to financing for the poor. The Act is thus necessary to increase the level of investment in the low-income housing sector. The Act addresses some of the limiting factors that influence access of the poor to finance by:

- promoting fair lending practices among financial institutions that provide home loans;

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<sup>19</sup> *Housing Amendment Act No. 4 of 2001.*

- requiring financial institutions to disclose information regarding the provision of home loans; and
- establishing an Office of Disclosure to monitor compliance with the disclosure requirements of the Act and to rate financial institutions in relation to their compliance.

### **Vulnerable and Marginalised Groups**

#### *Women/Female-headed households/Racial Groups Disadvantaged-by-Past Discriminatory Laws and Practices*

The Home Loan and Mortgage Disclosure Act, 2000 will assist in revealing any unfair discriminatory lending patterns by financial institutions involved in the housing loan market, especially along gender lines, towards previously disadvantaged racial groups, persons with disabilities, and persons living with HIV/AIDS. The Act also allows the Minister of Housing to institute measures to promote the provision of home loans to under-serviced segments such as women, the poor and previously disadvantaged racial groups.

#### *Persons Living in Rural Areas/Informal Settlements/Low-Income Groups*

Both the Amendment to the Housing Act and the Home Loan and Mortgage Disclosure Act are relevant to persons living in rural areas and low-income groups. The Home Loan and Mortgage Disclosure Act will reveal lending patterns of institutions and the department will be able to determine if people living in rural areas and low income groups are being discriminated against and institute measures to address this situation. This also applies to persons with disabilities, older persons, and persons living with and affected by HIV/AIDS.

## Provincial Sphere

The information provided by the provincial departments of housing on the legislative measures instituted during the period under review has been summarised in the table below:

**Table 2** Legislative measures instituted at provincial level during the period 2000/2001 and 2001/2002

Province	Legislative Measure
Free State	Free State Provincial Housing Amendment Act No. 6 of 2001
Gauteng	Conversion of Certain Rights into Leasehold or Ownership Act, 2000 First Gauteng Housing Amendment Act No. 6 of 2000 <sup>20</sup> Residential Landlord Tenant Act No. 4 of 2001
KwaZulu-Natal	Provincial Housing Amendment Act No. 8 of 2000 <sup>21</sup>
Mpumalanga	Mpumalanga Housing Amendment Bill of 2001 Mpumalanga Rental Housing Regulations of 2001
North West	Unfair Practices Regulations in terms of the Rental Housing Act.
Eastern and Western Cape	Only provided information on national legislation, and nothing on provincially instituted legislation.

### *Free State Provincial Housing Amendment Act No. 6 of 2001*

Provisions of the Act include the establishment of institutions that evaluate, approve and fund housing development projects. It also makes provision for the restriction of sale of State subsidised houses.

### *Conversion of Certain Rights into Leasehold or Ownership Act of 2000*

This Act provides for security of tenure to persons occupying properties that belonged to the Gauteng Provincial Housing Advisory Board.

### *First Gauteng Housing Amendment Act No. 6 of 2000*

The amendment provides the legislative framework for the transfer of residential properties and to establish adjudication and appeal panels.

### *Residential Landlord Tenant Act No. 4 of 2001*

This Act provides for the repeal of the provincial Act in order to allow landlord and tenant matters to be dealt with in terms of the Rental Housing Act No. 50 of 1999.

<sup>20</sup> The First Gauteng Housing Amendment Act No. 6 of 2000 is an amendment to the Gauteng Housing Act No. 6 of 1998, which provides for the promotion and facilitation of housing development within the Province of Gauteng.

<sup>21</sup> To improve on its service delivery, Kwa-Zulu Natal amended the Provincial Housing Act No.12 of 1998 which provides a vehicle for functioning of a holistic, sustainable and integrated housing delivery process in Province. The Provincial Housing Act is said to be based on the National Housing Act No. 107 of 1997.



*Provincial Housing Amendment Act No. 8 of 2000*

The Act instituted by the KwaZulu-Natal Department of Housing has the following primary objectives:

- Provide for the promotion and facilitation of housing development within the province;
- Set out powers and duties of the MEC for Housing;
- Abolish the KwaZulu-Natal Housing Development Board;
- Dispose of the KwaZulu-Natal Housing Development Board's assets by transferring them to the Provincial Department of Housing;
- Provide for the determination of procurement policy in terms of housing;
- Provide regulations of State-funded housing, including an eight year pre-emptive right; and
- Provide for expropriation of land for housing development.

*Mpumalanga Housing Amendment Bill, 2001*

The Bill seeks to amend the Mpumalanga Housing Act No. 15 of 1998 by abolishing the Mpumalanga Housing Development Board. The Bill transfers powers, duties, rights and obligations of the Mpumalanga Housing Development Board to the MEC for Housing and Land Administration. It also provides for the establishment of a panel of not more than six persons to advise the MEC for Housing and Land Administration on any matter relating to housing development, and puts in place regulatory measures to restrict the sale or alienation of State-subsidised housing.

*Mpumalanga Rental Housing Regulations, 2001*

The Mpumalanga Rental Housing Regulations 2001, read with the Rental Housing Act No. 50 of 1999, seeks to promote the provision of rental housing property and access to adequate housing by providing for the establishment of mechanisms that will ensure the proper functioning of the rental housing market. It also establishes the Rental Housing Tribunal, defines the functions, powers and duties of the Rental Housing Tribunal and lays down general principles governing conflict resolution in the rental housing sector. The Regulations provide for the facilitation of sound relations between tenants and landlords.

Mpumalanga submits that the ultimate promulgation of the Housing Rental Regulations will inevitably bring about sound and fair property lease principles whereby landlords would not have complete discretion in evicting tenants.

The regulatory measures restrict the sale or alienation of State-subsidised housing. These measures protect the people's right to have access to adequate housing by prohibiting creditors from selling people's subsidised houses for purposes of collecting unpaid debts illegally. The measures also prohibit people from alienating their subsidy houses for purposes of making a profit and thus ultimately subjecting them to homelessness.

The Mpumalanga Department of Housing (MDH) reported that it will conduct workshops with all the stakeholders on the provisions of the Mpumalanga Housing Amendment Bill of 2001 and the Rental Housing Regulations. The workshops will be aimed at setting out the practical implications of the above-mentioned legislative measures.

#### 4. BUDGETARY MEASURES

##### National Sphere

**Table 3 Budget for the National Department of Housing**

Year	Total allocation in Rand(s)	Actual amount received from other sources in Rand(s)	Actual expenditure in Rand(s)
2000/2001	3 439 355 000	19 189 000	3 330 036 000
2001/2002	3 785 031 000	-	3 721 239 625

The dash (-) in all the tables denotes that the information requested was not made available to the Commission.

Variances in the budget allocation of the NDH were due to nominal decrease in the budget allocation for the period 2000/2001 and increase for the year 2001/2002. The information in table 3 above indicates that the NDH under-spent for both the financial years. Although the NDH admits to under-spending, it does not provide any reasons.

##### *National Housing Fund*

**Table 4 Budget allocation for the National Housing Fund**

Year	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Actual expenditure in Rand(s)
2000/2001	2 998 000 000	87	3 039 702 000
2001/2002	3 225 957 000	85	2 326 828 000*

\* Expenditure up to the end of February 2002

The variance in the budget allocation for the National Housing Fund was due to the nominal increase in the budget for 2000/2001 to 2001/2002 financial years. The NDH over spent for the period 2000/2001, and under-spent for the period 2001/2002. The reason for under-spending was due to unclaimed funds for capital projects.

##### *Vulnerable and Marginalised Groups*

Currently 10 per cent of Provincial Housing Department's allocation should be utilised for housing projects undertaken by female developers and contractors. The National Housing Programmes specifically targets racial groups disadvantaged by past discriminatory laws and practices, persons living in rural areas, older persons and low income group households with an income of R3 500 per month or less. The majority of the approved beneficiaries for the housing subsidy earn less than R1 500 per month.

### *Persons with Disabilities*

The Housing Subsidy Scheme makes provision for a variation in the subsidy amount to make provision for the needs of persons with disabilities. The variance on the subsidy amount allows persons with disabilities to make design adjustments on their housing units to enable them to live independently. A national priority of 5-6 per cent has been set aside for the allocation of housing subsidies to persons with disabilities.

### *Budget adequacy*

The NDH indicated that the budget allocation was inadequate for housing programmes, especially because of the housing backlog and the number of households that are currently living in abject conditions. The lack of capacity at all levels of government influences the optimum and efficient utilisation of the funds. Therefore, to address this problem of budget inadequacy the NDH negotiated with National Treasury and managed to secure an increase in the housing budget. An increase of R3 billion was approved for the 2002/2003 financial year. Additional amounts of R579 million and R574 million were also approved for the subsequent financial years. According to the NDH the increase will result in real growth in housing expenditure to about 6 per cent a year. This increase is expected to deal with the adjustment in housing subsidies, to keep pace with annual price changes, and to meet the minimum norms and standards requirements for housing.

### *Under and over-expenditure*

There was, however, under-spending by the NDH during the period under review due to the capital nature of housing subsidy projects. Thus requiring careful planning and monitoring to ensure that the delivery of the final product is of an acceptable quality and meets the expected norms and standards. In an effort to prevent the abuse of public funds, stringent procedures have been instituted to ensure that developers comply with the necessary requirements. Provincial Housing Departments identified the following as accounting for under spending:

- Under performance by developers and conveyancers.
- Section 118 of the Local Government Municipal Systems Act of 2000, which requires that all outstanding payments due to municipalities must be paid before clearance certificates are issued for property to be transferred or registered in the name of beneficiary.
- In some instances the requirements of the National Environmental Management Act, has resulted in delays in the implementation of housing projects until a proper assessment is done.
- Out of season rainfall.
- Lack of capacity of newly established local authorities to undertake approvals and provide other services.

According to the NDH, under-spending has no impact on service delivery and the realisation of the right to adequate housing, because it does not necessarily imply a lack of housing delivery, but rather that payments are not being claimed or processed timeously. In order to address this under-spending, senior officials in the National Department of Housing visit the provinces concerned to discuss disconcerting issues.

The reasons for the under spending were investigated and corrective action identified. Furthermore, the following measures have been proposed to deal with under spending:

- Addressing the legal issues that result in delays in project implementation;
- Addressing capacity constraints of municipalities;
- Improving inter governmental co-operation between all spheres of government; and
- Improving co-ordination between national government departments.

### Provincial Sphere

The various departments of housing were requested to provide information on the total budget allocation for the provision of the right to have access to adequate housing. The information has been summarised in table 5 below:

**Table 5 Budget for the Provincial Departments of Housing**

Province	Year	Total Allocation in Rand(s)	Projected Expenditure in Rand(s)	Actual Expenditure in Rand(s)
Eastern Cape	2000/2001	756 086 000	756 086 000	762 054 000
	2001/2002	1 127 011 000	1 127 011 000	602 470 000
Gauteng	2000/2001	124 000 000	-	100 500 000
	2001/2002	143 600 000	113 842 000	-
Mpumalanga	2000/2001	272 108 000	241 864 000	241 864 000
	2001/2002	451 246 000	451 246 000	440 898 000
Northern Cape	2000/2001	58 100 000	-	58 100 000
	2001/2002	65 475 000	-	65 475 000
Limpopo Province	2000/2001	279 022 381	314 714 190	271 778 239
	2001/2002	-	-	-
North West	2000/2001	522 286 000	522 286 000	497 900 000
	2001/2002	540 838 000	540 838 000	476 338 000
Western Cape <sup>22</sup>	2000/2001	341 466 000	363 238 610	363 238 610
	2001/2002	325 861 444	327 727 588	327 727 588

### Variance(s)

For the Eastern Cape Department of Housing the variances were due to delays in the transfer of funds. Funding for the period 2001/2002 was only transferred at the close of the financial year, which led to some funds being under-spent. The GDH did not clearly explain the reasons for the variances in the budget, whilst MDH also did not provide reasons for the variance in the budget allocation.

With regard to the North West, the variance in the allocation was due to the reallocation and shifting of resources for the different projects within the department, and the delays in the disbursement of funds and tender processes for projects.

In the Western Cape, the variances resulted from over spending due to the increasing demand for housing, as well as insufficient budget to meet its target of housing the

<sup>22</sup> The same information was provided for the departmental allocation, Housing Fund and Housing Subsidy Programme.

homeless. As a result, municipalities were encouraged to enter into bridging finance arrangements with the Development Bank of South Africa.

### *Budget Adequacy*

The Eastern Cape, Gauteng, Mpumalanga and North West Departments of Housing indicated that the budget was adequate. The GDH further stated in its report that there was no over- or under-spending. With regard to the MDH budget there was an under-spending of about 2,29 per cent, which was as a result of the unavailability of suitable land for building houses.

The Northern Cape Department of Housing experienced serious budget constraints because the allocation was inadequate, and as a result it became impossible to fund development projects as planned.

### *Under- and Over-Expenditure*

The Eastern Cape Department of Housing indicated that whilst a number of subsidies have been approved, construction progress is slow, as a result the allocated budget does not get fully utilised. Therefore, the main reason for under spending was due to insufficient capacity at municipal level. The impact of this under spending is that not all the houses planned were built, thus slowing down the rate of delivery and affecting the right to have access to housing for those in need.

The Limpopo Department of Housing under spent due to the limited capacity for housing administration, and the unavailability of suitable land. The increasing demand for housing also exceeds the available funds. Measures instituted to address this problem include capacity building of departmental officials, improved expenditure patterns, and budget motivation that led to the increase in budget allocation.

The Western Cape over spent its budget allocation due to increasing demand for housing, which surpassed the financial resources allocated to the department. To address the problem of over expenditure, the WCDH instituted stricter cash-flow management and the monitoring of projects.

*National Housing Fund*

The provincial departments of housing were requested to provide information on the budget allocation for their share of the National Housing Fund. The information has been summarised in table 6 below:

**Table 6 Budget allocation for the Housing Fund for Provinces**

Province	Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
Eastern Cape <sup>23</sup>	2000/2001	520 372 908	520 372 908	470 473 337
	2001/2002	548 210 571	548 210 571	292 874 871
Gauteng <sup>24</sup>	2000/2001	718 900 000	-	614 166 000
	2001/2002	681 831 000	672 200 000	-
KwaZulu-Natal	2000/2001	587 650 199	588 700 000	560 163 353
	2001/2002	697 647 000	675 903 000	665 164 633
Mpumalanga	2000/2001	208 355 000	208 355 000	170 647 188
	2001/2002	245 988 000	245 988 000	252 042 795

*Variance(s)*

The variance in the budgetary allocation for the GDH was due to the priority shift of the National Housing MinMec to focus more on rural rather than urban housing during the 2001/2002 financial year. This resulted in the reduction of Conditional Grant allocation because in Gauteng there is less demand for rural housing than in other provinces. The increase between 2001/2002 and the 2002/2003 financial years was due to the provision made for inflation increases in the quantum of the housing subsidy, which has not been adjusted for more than two years.

*Vulnerable and Marginalised Groups*

Provincial Departments of Housing reported that between 8 and 10 percent of the budget was set aside for women contractors or those providing professional service for the financial year 2001/2002. Approximately 60-65 per cent of the beneficiaries of the housing subsidy are female-headed households. Low-income groups benefit from the housing subsidy scheme because it targets households earning less than R3 500 per month.

In Gauteng the budget allocation represents a monetary value of between R40 million and R50 million per annum for women. The GDH spends R800 million per annum to provide housing for racial groups disadvantaged by past discriminatory laws and low-income groups

<sup>23</sup> The same information was provided for the Housing Subsidy.

<sup>24</sup> This is a Conditional Grant allocation to the Gauteng Housing Fund in terms of the Division of Revenue Act only. The same information was provided for the Housing Subsidy.

*Persons with Disabilities/Older Persons*

The Eastern Cape Department of Housing indicated in its report that 5 per cent has been allocated for people with disabilities. Persons with disabilities and older persons constitute 2,5 per cent respectively, of the beneficiaries for housing subsidies in Gauteng. People infected and affected by HIV/AIDS are not catered for in the National Housing Code. However, the GDH is in the process of developing a provincial housing policy that will accommodate such persons in the housing subsidy scheme.

In Mpumalanga the financial institutions and parastatals have been brought on board to assist people with low and middle-income to access finance for housing. 4 per cent of houses built are given to people with disabilities.

*Budget Adequacy*

Although the budget was adequate for the provision of housing, lack of capacity at local government level in both the Eastern Cape and Gauteng Department of Housing, contributed to their failure to spend the allocated funds. This under spending, however, did not negatively affect the key performance indicators of the Department.

*National Housing Subsidy*

Information on the National Housing Subsidy Scheme was provided differently per provincial department of housing. Therefore, the information has been summarised in different tables per province as indicated below:

**Table 7 KwaZulu-Natal Department of Housing**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	579 500 199	524 274 000	514 517 031
2001/2002	544 303 000	544 303 000	584 820 884

**Table 8 North West Department of Housing**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	268 800 000	268 800 000	264 200 000
2001/2002	263 600 000	263 600 000	257 200 000

The North West Department of Housing indicated in its report that the budget allocation is inadequate to meet the housing demands and needs of the province. The current allocation only covers the growth in housing needs of 16 000 households per annum which represents R256 million in the form of subsidies required and does not address the backlog of an estimated 486 000 households that require funding to the value of R7, 776 billion.

*Under- and Over-expenditure*

There was under spending by the North West Department of Housing. However, the various housing programmes are multi-year programmes, thus any under-expenditure for a specific financial year is automatically rolled-over. To address this problem, expenditure was expedited and during 2001/2002, the department achieved 97 per cent.

*Rural Housing Subsidy*

Information provided by the Gauteng Department of Housing shows the budget allocation for two projects from the Gauteng Housing Fund. The GDH allocated R3, 7 million for the Rural Housing Subsidy for the financial year 2002/2003. This represented 0,36 per cent of the GGP, with a projected expenditure similar to the allocation. No information was provided about the expenditure because the project was only initiated during the period 2002/2003 financial year. Thus no information is yet available on variances. Similarly, the MDH has only one allocation for the rural housing subsidy programme. The MDH allocated R4, 6 million for the financial year 2001/2002, and expenditure for that period was R1, 9 million.

The KwaZulu-Natal Department of Housing only provided information on the actual expenditure, without indicating what the allocation was in the first place, and no reasons were provided for the lack of information. The department has spent R3 987 268 for the year 2000/2001, and R2 795 493 for the year 2001/2002.

**Table 9 Rural Housing Subsidy allocation**

<b>Year</b>	<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
Eastern Cape	2000/2001	11 761 600	11 761 600	5 372 868
	2001/2002	21 600 000	21 600 000	-
North West	2000/2001	76 000 000	76 000 000	81 200 000
	2001/2002	96 000 000	96 000 000	85 000 000

*Variance (s)*

The timeous release of land and the issuing of letters of consent by the Minister of Land Affairs are the main challenges facing the Eastern Cape Department of Housing (ECDH) in the implementation of the Rural Housing projects. These problems have resulted in the allocated budget not being fully utilised for the different financial years.

The North West Department of Housing stated in its report that the variances are due to unspent funds that are rolled over to the next financial year.



*Under and over-expenditure*

Table 9 above bears testimony to the problems being encountered by the ECDH, as less than half of the budget was not spent. However, the department has stated that it is looking at fast tracking mechanisms to facilitate the housing delivery process.

**Table 10 Western Cape Department Housing Rural Subsidy allocation**

<b>Year</b>	<b>Total Allocation in Rand(s) to housing in rural areas.</b>	<b>Allocation as a % of departments Housing allocation</b>	<b>Projected expenditure</b>	<b>Actual Expenditure</b>
2000/2001	185 193 686	54,2	185 193 686	185 193 686
2001/2002	111 349 089	34,2	111 349 089	111 349 089

In the Western Cape Department of Housing (WCDH) rural subsidies are construed to be any subsidy given to beneficiaries living outside of the metropolitan area. The budgetary allocation was available to all of the categories mentioned provided that the beneficiaries qualified in all respects for housing subsidies in terms of the prescribed criteria. According to the WCDH the budget was insufficient to meet the needs of the homeless in the province within a reasonable time.

The overall conditional grant for housing was over-spent to allow for more beneficiaries to gain access to the right to housing than would have been possible had the Department remained within the allocated budget. To address this problem the Department instituted stringent cash-flow management procedures and project monitoring measures.

*Physical Infrastructure*

For this section, only the GDH provided information. The other provinces indicated that there is no separate budget for physical infrastructure as it forms part of the housing subsidy. The information is on the Alexandra Renewal Project (ARP), which has been funded from the Department's operational budget. The project was instituted during the financial year 2000/2001, and the allocation was R74 million. The amount has nominally increased to R75 million for the financial year 2001/2002. The ARP report indicated that at the end of the 2001/2002 financial year, 89 per cent of the budget had already been spent. The original budget allocation was insufficient to address the total budget requirement for the project.

*Vulnerable and Marginalised Groups*

There is a range of supportive mechanisms that targets women under threat, as well as victim support facilities, trauma centres, referral centre and safe houses. This project, however, has no specific focus on female-headed households, or on refugees and asylum seekers. The Department of Social Development only addresses the needs of child-headed households.

Previously disadvantaged individuals are given preference in accordance with the Preferential Procurement Act, and also provided with tender and contractor training, mentoring and small medium and micro enterprises support.

As part of the Alexandra Renewal Project (ARP) persons living under hazardous conditions (floodplains, landfills, gas pipelines, and road reserves) will be relocated to the low-income houses. Others will have their homes upgraded through the provision of access to engineering services, and where possible security of tenure.

The GDH reported that persons with disabilities will benefit from the ARP, as 5 per cent of the constructed houses are earmarked for them and the aged.

## 5. INDICATORS

The national and provincial departments of housing were requested to provide information on the state of housing for both the urban and rural areas, and the different racial groups. However most of the departments did not provide the information as requested, as a result one could not include the response in one table. The following tables show the different information as provided by the national and different provincial departments.

**Table 12 National Department of Housing Statistics<sup>25</sup>**

Category	Total
Number of households granted State subsidies <i>Source: Housing Subsidy Scheme and Provincial Housing Governments</i>	1 422 285 (1994 up to January 2002) 296 268 (2000 up to January 2002)
Number of houses built by the sState <i>Source: Housing Subsidy Scheme and Provincial Housing Governments</i>	317 841 (2000 up to end January 2002)
Number of houses built through self help housing schemes with some assistance from the State <i>Source: People's Housing Process Partnership and Provincial Housing Governments</i>	13 246

The information provided in table 12 above forms part of the information on indicators, however there is no demographic breakdown. Other information provided by the NDH on the indicators was not for the period under review, therefore could not be included for the analysis.

**Table 13 Beneficiaries of female-headed households per province in December 2001**

PROVINCE	% of Female-headed households	% of Housing subsidies allocated to women
Eastern Cape	50.09	41
Free State	34.22	35
Gauteng	29.03	37
KwaZulu-Natal	39.95	47
Limpopo	35.70	45
Mpumalanga	29.25	32
Northern Cape	52.16	54
North West	37.27	33
Western Cape	27.73	28

The information in table 13 above shows the progress made by the NDH in providing housing to female-headed households and women in general. The province that

<sup>25</sup> The information provided had no annual breakdown.

seems to have benefited the most is Limpopo, where more than 50 per cent of the female-headed households have received subsidies.

**Table 14 Free State Department of Housing (FSDH) indicators<sup>26</sup>**

Category	Total	Rural	Urban	African
Number of households granted State Subsidies	19 708	1 000	18 708	-
Number of houses built by the state	10 094	1 000	9 094	10 094
Number of houses built through self-help housing schemes with some assistance from the State	1 304	-	1 304	1 304
Number of households that are eligible for subsidies	116 000	50 000	116 000	116 000
Number of houses provided for older persons	500	-	500	-
Number of households in informal settlements	13 000	N/A	13 000	-
Number of shelters provided for homeless persons	10 094	1 000	9 094	-
Number of households in illegal settlements or housing	12 905	-	12 905	12 905
Average waiting period on the waiting list	1 year			

The information in table 14 above was not provided as requested in the protocol with the complete racial breakdown. The FSDH did not provide any explanation for the lack of information.

**Table 15 Gauteng Department of Housing**

Category	Total	Rural	Urban	African	Coloured	Indian	White
Number of households granted State subsidies	50 828	-	50 828	50 320	203	203	102
Number of houses built by the State	41 805	-	41 805	41 387	167	167	84
Number of houses built through self-help housing schemes, assisted by the State	6 278	-	6 278	6 215	25	25	13
Number of households that are eligible for subsidies	535 247	26 762	508 484	529 894	2 141	2 141	1 071
Number of homeless persons	468 838	23 442	445 396	464 150	1 875	1 875	938
Number of households in informal settlements	180 000	-	180 000	178 200	720	720	360
Number of people on the housing waiting list	535 247	26 762	508 484	529 894	2 141	2 141	1 071
Average waiting period on the waiting list	+/-5 to 8 years	+/-5 to 8 years	+/-5 to 8 years	+/-5 to 8 years	+/-5 to 8 years	+/-5 to 8 years	+/-5 to 8 years

<sup>26</sup> The report from the FSDH did not clearly indicate the period, that is, whether it is 2000/2001 or 2001/2002.

**Table 16 Housing indicators**

Category	KZN	MP
Number of households granted State subsidies	60 013	13 032
Number of houses built by the State	48 343	-
Number of houses built through the self-help scheme, assisted by the State	1 842	92*
Number of households eligible for subsidies	-	67
Number of informal settlements	511	-

\* Only urban areas

**Table 17 Western Cape Department of Housing indicators<sup>27</sup>**

Category	Total
Number of households granted state subsidies	73 982
Number of houses built by the State (complete and under construction) <sup>28</sup>	25 119- houses 23 578-sites serviced
Number of houses built through self-help housing schemes with assistance from the state	5 691
Number of households that are eligible for subsidies	Not Known
Number of homeless persons	312 000 families
Number of households in informal settlements	267 000 (estimate)
Number of households in illegal settlements or housing	Not Known
Number of people on the housing waiting list*	292 000 families
Average waiting period on the waiting list	10 years

\* There is no consolidated waiting list kept at Provincial level. Waiting lists are kept individually by municipalities.

The only information provided by the Northern Cape Department of Housing was that 3 600 households were granted state subsidies. The municipalities keep the list with the number of people on the housing waiting list.

### *National Action Plan (NAP)*

The NAP identifies numerous indicators with respect to challenges affecting the right to have access to adequate housing that need to be addressed. The NDH provided information on indicators for the year 1999, and the only information provided for the year 2001 was on the number of informal settlements. There are 1 088 informal settlements in the whole country.

### **Provincial Sphere**

Only the Free State, Gauteng and Western Cape Departments of Housing provided information regarding NAP. The other provinces reported that the information is unavailable. KwaZulu-Natal only reported that there are 511 informal settlements in the province.

<sup>27</sup> The WCDH reported that statistics are not kept for individual racial categories

<sup>28</sup> Information provided relates to State Funded houses built by municipalities, developers.

**Table 18 Free State Department of Housing NAP indicators**

Category	Total	Rural	Urban	African
Number of dwellings without access to safe and healthy drinking water	12 905	-	12 905	12 905
Number of dwellings without adequate sanitation facilities	12 905	-	12 905	12 905
Number of dwellings without electricity	12 905	-	12 905	12 905
Number of persons eligible for subsidies but did not receive the same due to budgetary constraints	69 884	50 000	69 884	-
Number of informal settlements	44	-	44	44
Number of households with no security of tenure due to legislative problems	1 000	1 000	-	-

**Table 19 Gauteng Department of Housing NAP indicators**

Category	Total	Rural	Urban	African	Coloured	Indian	White
Number of dwellings without access to safe and healthy drinking water	300 000	15 000	285 000	300 000	-	-	-
Number of dwellings without adequate sanitation facilities	300 000	15 000	285 000	300 000	-	-	-
Number of dwellings without electricity	400 000	20 000	380 000	400 000	-	-	-
Number of dwellings that did not conform to the departmental construction and safety standards	180 000	9 000	171 000	180 000	-	-	-
Number of families without houses	500 000	25 000	475 000	495 000	2 000	2 000	1 000
Number of informal settlements	+/-181	-	181	181	-	-	-
Number of households with no security of tenure due to administrative problems	200 000	10 000	190 000	198 000	800	800	400

**Table 20 Western Cape Department of Housing NAP indicators**

Category	Total
Number of dwellings without access to safe and healthy drinking water	Estimated at 59 000
Number of dwellings without adequate sanitary facilities	Estimated at 59 000
Number of dwellings without electricity	Estimated at 100 000
Number of dwellings that did not conform to the departmental construction and safety standards	Not available
Number of persons that are eligible for subsidies but did not receive such subsidies due to budgetary constraints	312 000 families
Number of persons that are eligible for subsidies but did not receive such subsidies due to administrative problems	None
Number of families without houses	312 000 families (Subsidy market)
Number of informal settlements	Unknown
Number of households with no security of tenure due to administrative problems	Unknown

## 6. CRITIQUE

This section seeks to identify flaws in the measures adopted by the government to execute its obligation in terms of section 26 of the Constitution. Depending on the shortcomings identified, the next section will go on to give recommendations. The question that now needs to be addressed according to *Grootboom* is whether the measures that have been adopted by the government to execute its obligation are reasonable within the meaning of section 26 of the Constitution.<sup>29</sup>

Section 7 (2) of the Constitution obliges the State to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 8 on the other hand, states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State. In terms of section 239 of the Constitution, the term, "organ of State" includes the national, provincial and local spheres of government. Meaning that the duty to give effect to the right of access to adequate housing lies with all the three spheres of government. To address the question posed above, one has to examine whether the measures adopted establishes a coherent and co-ordinated program, involving the three spheres of government, directed towards the progressive realisation of the right of access to adequate housing within the State's available means.<sup>30</sup>

Although the government should be commended for making considerable strides in its commitment to providing access to adequate housing, <sup>31</sup> the following short-falls have however been identified:

<sup>29</sup> *Grootboom, op. cit.*, para 54.

<sup>30</sup> *Ibid*, para 41.

<sup>31</sup> Sean Jacobs, "The housing crisis" *Epolitics*, at *Politics briefing*, No. 19, 2000, <http://www.idasaacrt.org.za/bis/>.

## Reporting by Government Departments

The reports provided by government departments still indicate a lack of understanding of the significance of this exercise. The response from the NDH indicated that a lot of effort was put into the compilation of the report. However, there were still some unexplained statements, phrases and acronyms used in the report that made understanding some issues difficult. However, the same department that could not provide information has systems in place to monitor the housing provision process. For example, there is the Human Urban Information System (HUIS) which has been developed for all housing and human settlement information and the Housing Subsidy System (HSS) which was developed to assist in the management and administering of the various instruments of the housing subsidy scheme. The NDH reported that HUIS is being revised in order to be as comprehensive as possible. Therefore, it means that there must be some information that could be used to answer questions in the protocol.

In general, provincial departments still provide information that is incomplete, contradictory, repetitious and not relevant for the period under review. Some departments merely reported that the statistics are not kept for specific racial groups, without explaining the reasons thereof. For example, the FSDH did not provide information for the entire budget section, and no explanation was provided for this omission. On the other hand, the Gauteng Department of Housing made reference to their attached report for answers to some of the questions. This is unacceptable as the Commission is to analyse government responses and not compile them.

## Policy Measures

### *Environmentally Sound Low Cost Housing.*

As stated by the UN Committee on Economic, Social and Cultural Rights in its general comments, the right to housing should not be interpreted in a narrow sense which equates it to just having a roof over one's head, should be interpreted "as the right to live somewhere in security, peace and dignity."<sup>32</sup> This was also reiterated by the Constitutional Court in the *Grootboom* case, where it was held that all the rights in the Bill of Rights are mutually supportive, and that there is a close relationship between right of access to adequate housing and other economic and social rights.<sup>33</sup> The interconnectedness of these rights should be considered, particularly when interpreting economic and social rights and determining whether the State has met its obligations.<sup>34</sup> In the same breath, there is a need for the NDH to understand that housing is not merely about numbers and targets, but involves the quality of the living environment. This is crucial as most of the housing projects have an impact on the environment. Housing projects may contribute to the inefficient use of energy and water resources, through the loss of topsoil during construction and pollution of the environment if adequate sanitary services are lacking after completion.<sup>35</sup>

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<sup>32</sup> General Comment No. 4, para 8 of the Comment on Economic, Social and Cultural Rights, 1990.

<sup>33</sup> *Grootboom, op. cit.*, para 24.

<sup>34</sup> *Ibid.*

<sup>35</sup> Department of Housing Environmental Implementation Plan - Executive Summary at [http://www.housing.gov.za/Pages/Enviro\\_Impl\\_Plan/executive\\_summary.htm](http://www.housing.gov.za/Pages/Enviro_Impl_Plan/executive_summary.htm).

Informal settlements contribute to the erosion of the environment. The reason for this is that the settlements are not properly planned, and are mostly situated on marginal land such as steep slopes and flood plains of rivers and streams. Therefore, the informal settlements impact heavily on the sensitive ecosystems such as estuaries.<sup>36</sup> An example of one such settlement is Alexandra, where the GDH embarked on a project to relocate people residing on the Juskei riverbanks. Residents were being moved as part of a project to rehabilitate the area, which was overcrowded, and described as unsanitary and ungovernable.<sup>37</sup> Because of improper planning of most informal settlements, government is unable to conduct a proper environmental impact assessment. As a result, the informal settlement's negative impact on the environment is usually more significant than that of formal housing development.

### *Programme for Emergency Housing*

The Constitutional Court in the *Grootboom* judgement found that the housing programme adopted by the government fell short of obligations imposed upon it by section 26 in that it failed to make any provision for emergency needs.<sup>38</sup> It was within this context that the NDH developed a programme to address the emergency housing needs of poor communities. It is interesting to note that only the MDH provided information on this measure. As already stated in the report, the main objective of the programme is to provide a funding and development framework within which departments can undertake housing projects in emergency situations. To pass the constitutional muster, the programme in question must be flexible to respond to those in desperate need and to cater for immediate and short-term requirements whenever such a need arises.<sup>39</sup>

### *People's Housing Process*

In its general comments, the UN Committee on Economic, Social and Cultural Rights identified, *inter alia*, "habitability" as one of the factors that must be taken into account in determining whether a particular form of shelter can be considered to constitute adequate housing for the purposes of the Covenant. According to the Committee, adequate housing will be habitable if it provides the inhabitants with "adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors".<sup>40</sup> Unfortunately, because of their poor thermal performance, poor resistance to damp and smaller sizes, the new housing projects in South Africa fall short of the Committee's definition of adequacy. This factor was substantiated by the findings of the Sustainable, Energy, Environment and Development (SEED) organisation, which conducted research on consequences of bad housing and discovered that lack of proper ventilation in low cost houses causes poor thermal performance and poor resistance to damp.<sup>41</sup> There is no requirement for the installation of airbricks in terms of building regulations for low cost houses. For

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Sowetan*, 'Removals mean a better Alex,' March 2, 2001, p.13.

<sup>38</sup> *Grootboom*, *op. cit.*, para 66.

<sup>39</sup> *Ibid*, para 56.

<sup>40</sup> *Op. cit.*, para 9(e).

<sup>41</sup> Housing Portfolio Committee Sustainable Low Cost Housing Development: Presentation by SERD at <http://www.pmg.org.za/docs/2001/appendices/010516.htm>. Site visited on 20/ 03/ 2002.



that reason, this creates problems when the residents have to install ceilings, as the houses become more enclosed.<sup>42</sup>

#### *Stabilisation of the Rental Housing Sector Policy*

Only Gauteng, Northern Cape and North West Provincial Departments provided some information on this policy. The only information that was submitted is that the policy is aimed at developing key strategic interventions that will contribute towards the rental-housing sector, but does not substantiate how that will be done and how the law and order is going to be restored in that sector.

#### *Protection of housing consumer policy*

Gauteng and the Northern Cape are the only housing departments that submitted information on this issue. They however, failed to substantiate on how this policy is going to be implemented, but only gives the objectives. Although the Northern Cape Department of Housing reported on the measures it has adopted, it however, failed to provide the objectives and the intended effects of the measures. Nothing was received from other provincial housing departments on this matter.

#### *Relocation Subsidy and Individual Subsidy*

The information received regarding these policies is vague respectively. It is not very clear what these two subsidy programmes entails.

### **Implementation Difficulties**

#### *Access to land*

According to the national and provincial departments of housing, one of the hindrances to the delivery of housing is the unavailability of suitable land.<sup>43</sup> Another problem is the delay in transferring land to the beneficiaries due to delays with the opening of township registers, issuance of clearance certificates, as well as problems of inexperienced developers, quality of delivered products, and training of local labour. The Eastern Cape indicated that its major problem is the delay in the implementation of projects because municipalities have to obtain consent from the Minister of Land Affairs before any housing development can take place, particularly since most land in the province is State-owned.

The issue of security of tenure is an added impediment in the implementation of some of the housing projects. For example, most of the rural land in KwaZulu-Natal is tribal land that vests either in the Ingonyama Trust or in the Minister of the Department of Land Affairs who has to issue a letter of consent before land could be released. In traditional areas, it is often impossible to transfer land to the beneficiaries. This poses a problem because security of tenure is a fundamental principle upon which the provision of subsidies is based.

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<sup>42</sup> *Ibid.*

<sup>43</sup> Land that is closer to economic activities and amenities.

There is also no clarity on the roles and responsibilities of traditional leaders vs. councillors. As already pointed out above, KwaZulu-Natal has developed its own Rural Housing Guidelines. This lack of clarity is still impacting negatively in some areas. It should be noted that the provision of houses to rural communities is very important as it would make the country more viable and thus limit the inexorable migration of people from rural to urban areas.

The general comments of the UN Committee on Social and Economic Rights identified facilities and infrastructure and legal security of tenure as amongst the necessary conditions necessary for a meaningful enjoyment of the right to housing. The Constitutional Court also mentioned land as one of the requirements for a meaningful enjoyment of the right to housing. Failure by the government to provide mechanisms to address this issue constitute a breach of both its constitutional and international obligations.

#### *Adequate Housing*

Contrary to the general comments of the UN Committee on Economic, Social and Cultural Rights, which had adopted the definition of the Commission on Human Settlements and Global Strategy for Shelter to the Year 2000, which defined adequate housing to mean, *inter alia*, "adequate basic infrastructure and adequate location with regard to work and basic facilities all at reasonable costs", many new housing projects built between the period 2001 to 2002, are located in peripheral areas and their respective residential environments lack the elements necessary for an improved quality of life.

#### *Inadequate Budget Allocation*

Another problem that was experienced in the implementation of the measures instituted to realise the right to housing is the inadequate budget allocation. For example, the lack of funds was problematic in the Free State province especially in areas where there is no township establishment. Therefore, the FSDH decided to form a partnership with the Department of Land Affairs for the purpose of availing funds for the acquisition of land.

In KwaZulu-Natal, problems pertaining to funds relate to subsidy programmes and end user finance. During the reporting period, the subsidy amount was R16 000, which was not adequate to provide a good quality house. This amount covers the provision of both a serviced site and top structure. The subsidy amount since its inception has only increased by R1 000, and has not kept pace with the rate of inflation. The province has continuously appealed to the NDH to increase the subsidy amount. The subsidy however, was subsequently increased to R20 300 with effect from 1 April 2002. The KZNDH further reported that despite its continuous lobbying, banks and other financial institutions are unwilling to provide finance to low-income housing consumers because of risk factors. This continues to adversely affect the low-income housing market sector.

The Northern Cape also encountered problems due to financial constraints and as a result, the department has indicated that it has drafted a five-year housing strategy that will address the needs of the vulnerable groups to secure funding.

Although the need to develop rural areas has been highlighted within the report, there seems to be no financial support for the measures being instituted. Only the North West and Western Cape Departments of Housing provided a complete breakdown of the budgetary allocation for the rural housing subsidy. The Eastern Cape, Gauteng, Mpumalanga and KwaZulu-Natal either did not provide information or provided incomplete information.

It is crucial for the government to note that a reasonable housing program capable of facilitating the realisation of the right to adequate housing involves, amongst others, the allocation of the appropriate funding for implementation, as effective implementation requires adequate budgetary support by the national government.<sup>44</sup> Even if the measures are in place, failure to implement them effectively will amount to breach of the government's failure to comply with its constitutional obligation. The Constitutional Court in *Grootboom* held that one of the State's primary obligations lies in unlocking the system by facilitating access to finance.<sup>45</sup> The Court further pointed out that the requirement for progressive realisation means that accessibility should be progressively facilitated by examining and where possible lowering legal, administrative and financial hurdles over time.<sup>46</sup>

### *Lack of Capacity*

The Gauteng and North West Departments of Housing experienced difficulties in the implementation of policies, programmes and projects due to lack of appropriate capacity at municipal level. KwaZulu-Natal also had a problem with municipalities lacking capacity to undertake housing developments. In terms of the new Municipal Systems Act, no development within any municipal area can be undertaken without the involvement of the municipality concerned. The lack of capacity of municipalities is problematic because it slows the delivery process. The KwaZulu-Natal Department of Housing has established a Municipal Housing Support Directorate to assist municipalities with housing and has initiated a Capacity Building Programme to enhance their skills.

Section 26 obliges the "State" to take reasonable legislative or other measures within its available resources to ensure the progressive realisation of the right. Section 7(2) of the Constitution states that the "State" must respect, promote and fulfil the rights in the Bill of Rights. In terms of section 8, the rights in the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and "all organs of State". Section 239 defines "organ of State" to include the national, provincial and local sphere of government. In terms of section 152(1)(b) of the Constitution, local governments have an obligation to provide services in a sustainable manner to communities that fall under them.<sup>47</sup> Section 153(a) of the Constitution, on the other hand, obliges the municipalities to structure and manage their administrations and budgeting and planning process to give priority to the basic needs of the community to promote the social and economic development of their communities. Sub-section (b) states that municipalities must participate in the national and provincial development. Access to adequate housing programme is crucial for social and

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<sup>44</sup> *Grootboom, op. cit.*, para 68.

<sup>45</sup> *Ibid*, para 36.

<sup>46</sup> *Ibid*, para 45.

<sup>47</sup> *Ibid.*, para 39.

economic development and municipalities have a constitutional obligation in terms of section 152(2) to strive to fulfil its obligations. Failure to comply with the provisions of section 152 amount to constitutional breach, and lack of capacity will not absolve a municipality from its obligation.

It is irrelevant whether the failure to implement occurred at a local level due to lack of capacity or any other reason, since the formulation of a reasonable programme is the first stage in meeting the State's obligation. Failure to reasonably implement such a programme will not constitute compliance with the State's obligation.<sup>48</sup>

### *Community Involvement*

During the period 2001/2002, there was a delay in the delivery of housing in Gauteng due to lack of coordination, which made consultation in the development process difficult. Most beneficiaries started complaining of lack of consultation before the implementation of projects. The GDH, however, indicated that every effort was made to consult on a regular basis with beneficiaries and municipalities. In the North West, housing delivery was said to have been delayed due to conflicts with community based organisations.

This lack of consultation and conflicts with community based organisations, clearly points to lack of proper planning. The Constitutional Court in *Grootboom* unequivocally stated that a haphazard program, which is not coherent and comprehensive, or capable of addressing the pressing social needs of the beneficiaries, cannot qualify as reasonable.<sup>49</sup>

### *Maladministration and Corruption*

During the period 2001/2002, it was found that corruption and maladministration have marred the process of allocating subsidies as part of the Housing Subsidy Scheme. Although the NDH has attempted to address the problems of maladministration and corruption, some of the problems which still persist include, discrepancies in the allocation of subsidies due to fraudulent applications (subsidies allocated to non-qualifying beneficiaries), queue jumping in the allocation of subsidies as well as the granting of double subsidies to persons, irregularities in the payment of subsidies (payments not in accordance with the approved procedures and fraudulent claims), professional practitioners providing false information and certifying aspects of work not yet completed, and the improper use of identity documents to acquire housing subsidies. The GDH, MDH and KZN also reported similar occurrences.

Maladministration and corruption has prompted the NDH to appoint a task team during the year 2000/2001 to investigate these allegations. The task team submitted its final financial report to the Minister of Housing in December 2002. The GDH has established a Legal Services and Investigation Unit, an Operational Fraud Prevention Committee, and developed a Fraud Prevention Plan and Policy. The MDH has promoted the extensive involvement of municipalities in the houses inspection and verification process. In KwaZulu-Natal an investigative unit within the department

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<sup>48</sup> *Ibid*, para 42.

<sup>49</sup> *Ibid*, para 54.

was established. In addition to the unit, the, KZN utilises external forensic investigators to ensure that all complaints are properly investigated.

Other problems experienced within the departments of housing is that some housing beneficiaries were found selling or renting out their starter houses. The new buyers then end up experiencing difficulties when applying for the title deeds of such houses. The NDH has amended the Housing Act to restrict the voluntary and involuntary sale of State-subsidised houses. Subsequently, provincial departments of housing have also amended their Acts in line with this provision. It is envisaged that the amendment of the Housing Act No. 107 of 1997 might alleviate the corruption that exists through ensuring that the selling of State owned houses is procedurally.

### *Land Invasions*

The housing backlog, leads to the mushrooming of overcrowded squatter settlements outside cities and towns, and within some rural areas. According to the information provided by the NDH for the period 2001/2002, there were 1 088 informal settlements in the country.

Secondly, although there is the Prevention of Illegal Eviction, and Unlawful Occupation of Land Act No. 19 of 1998, some government departments still take action that is in violation of the Act. According to the Act there are procedures to be followed for the eviction of unlawful occupiers of land. For example, the shack dwellers of Unit F in Thokoza alleged that they were removed without any due warning by the authorities.<sup>50</sup> The Act states that the government has to find an alternative land to build houses for the communities who have lived on a piece of land for more than six months, before removing them.

Instead of complying with the provisions of the Act, and providing housing needed to improve the quality of lives of those communities, the local authorities dedicate their funds to specifically manage and monitor land invasions. In terms of the *Grootboom* judgement one of the obligations for the State is to prohibit arbitrary evictions. According to section 269(3), people can only be evicted from their homes through an order of court, made after taking into consideration all the relevant circumstances. This means that the constitutional rights of the shack dwellers of Thokoza to have access to adequate housing were violated. The challenge for the local authorities is to find ways and means to address this issue.

### **Vulnerable and Marginalised Groups**

Most of the reports for the period 2000/2002 do not clearly articulate the measures and the extent of the impact of the measures adopted, on the lives of the vulnerable and marginalised groups within their areas of jurisdiction. By way of example, the NDH reported that the programmes are continuously being enhanced to accommodate the diversity of needs of beneficiaries to housing projects. This provision does not clearly articulate its policies regarding the provision of housing to persons living with HIV/AIDS, girl-headed households, child-headed households, refugees and asylum seekers. This stance is contrary to the general comments of the UN Committee on

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<sup>50</sup> *Mail & Guardian*, "The Rooigeaar strikes again," February 23 to March 1, 2001, p 5

Economic, Social and Cultural Rights which urges State parties to ensure that disadvantaged groups such as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas, and other groups are ensured some degree of priority consideration in the housing sphere.<sup>51</sup>

#### *Persons Living with HIV/AIDS*

When adopting the Declaration of Commitment on HIV/AIDS at the UN Special Session on 27 June 2001, the South African government like other State parties to the United Nations, acknowledged that HIV/AIDS epidemic constituted the most formidable challenge to human life and dignity which undermines social and economic development throughout the world and noted that it was deeply concerned with the devastating effect of the disease.<sup>52</sup> It is regrettable, however, to note that neither the NDH nor the respective provincial departments of housing has developed policy guidelines to provide housing to persons living and affected with HIV/AIDS.<sup>53</sup> Although the GDH has developed a policy to afford housing to persons living and affected by HIV/AIDS, it is not clear what the policy entails.

#### *Girl/Child-headed Households*

According to the requirements of the National Housing Subsidy Scheme, beneficiaries have to be over 21 years old and legally competent to contract to qualify for a housing subsidy. For that reason, none of the instituted policies or legislation adopted by the national government and the respective provincial housing departments pays attention to girl children and child-headed household. This is so, notwithstanding the rapidly increasing number of orphans who lost their parents due to HIV/AIDS related conditions as well as other factors.

#### *Refugees and Asylum Seekers*

Despite the fact that South Africa acceded to the 1951 Convention Relating to the Status of Refugees, none of the instituted measures by the national government and the respective provincial departments make provision to provide transitional housing for refugees and asylum seekers.<sup>54</sup> Reasonableness should be interpreted within the context of the Bill of Rights. Section 26 guarantees "everyone" the right to have access to adequate housing. The word "everyone" includes refugees and asylum seekers and is not only restricted to citizens of the Republic. The Constitution requires that everyone be treated with care and concern irrespective of their country of origin or background, as long as they are within the Republic. It is common cause that South Africa like any other politically stable country has a significant number of

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<sup>51</sup> General comments No. 4 of the UN Committee on Economic, Social and Cultural Rights, para 8.

<sup>52</sup> A factor which was also acknowledged by the Department of Health in their 2000 publication of "*HIV/AIDS & STD strategic plan for South Africa 2000-2005*", see also Minister of Health and Others v *Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)* at 1035, para 1.

<sup>53</sup> With exception of the KwaZulu Natal, which has developed policy guidelines to provide housing to people living and affected with HIV/AIDS.

<sup>54</sup> The Gauteng Department of Housing have got a provision for transitional housing subsidies which caters for persons who are in transition.

refugees. According to *Grootboom*, a programme that excludes a significant segment of the society cannot be said to be reasonable.<sup>55</sup>

### *Homeless*

None of the instituted measures caters for the homeless. Devising a plan that excludes the most marginalised members of the society cannot be said to be reasonable. To progressively realise a right to adequate housing involves more than counting heads and ensuring that each year more people benefit from the programme. Progressive realisation requires focus on the "minimum essentials" for the poor or those living in desperate conditions.<sup>56</sup>

### *Disaster/Emergency Management Programme*

None of the instituted measures provides guidelines regarding disaster. The only information on this issue was submitted by Mpumalanga, which pointed out that provinces were directed by the national government to set aside funding from the housing budget in order to respond to emergency situations. A key principle established in *Grootboom* is that to be reasonable, the measures adopted must provide relief for people in "desperate need" who are living in intolerable conditions or crisis situations.<sup>57</sup> The test of reasonableness will not be met if a programme adopted by government to give effect to the right to access adequate housing fails to cater for people in desperate situations.

### *Under-spending*

The NDH could not spend its entire allocated budget for the period 2001/2002, yet in the same report states that the budget was inadequate. The same trend is evident in the provincial departments of housing. The reasons provided by most departments is that there was under spending because of lack of capacity at municipal level. Other reasons are that the Housing Subsidy Programme is capital in nature, therefore although development might have occurred, the funds have not been paid out to contractors. The provinces that did not spend their allocated budget are the Eastern Cape, Gauteng, Mpumalanga, and the North West.

The Eastern Cape, Limpopo and North West Department of Housing indicated in their reports that the budget for 2000/2001 and 2001/2002 was inadequate and that there is still a huge backlog in respect of the housing needs by the various communities within their provinces, yet the above departments under-spent their allocated budget. The only explanations advanced by the Eastern Cape Province, without substantiating, was that the money was only transferred to the province at the close of the financial year. They also complained of lack of capacity at the local level. The Limpopo Province, on the other hand, provided incomplete information on its budget section, and advanced no reasons for that.

## **7. RECOMMENDATIONS**

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<sup>55</sup> *Grootboom, op. cit.*, para 43.

<sup>56</sup> General comments No. 3 of the UN Committee on Economic, Social and Cultural Rights, 1990, para 10.

<sup>57</sup> *Grootboom, op. cit.*, para 44.

These recommendations are not directed at prescribing to the government the type of policies or legislative measures that they should adopt in order to execute its obligations. According to *Grootboom*, the government has got a margin of appreciation in this regard. The recommendations are, instead aimed at assisting the government to remedy the loopholes identified in the measures that have been adopted in the execution of its obligations in terms section 26 of the Constitution.

#### *Reporting by government departments*

The departments of housing needs to put more effort in compiling responses and ensuring that the information included in the reports is relevant and properly explained. Reasons for lack of information on particular issues must be provided as well as an indication as to when information will be available. Since the NDH had reported that HUIS, a mechanism to monitor the housing provision process is being revised, it is envisaged that with the help of HUIS, the respective housing departments will in future endeavour to provide information that is as comprehensive as possible.

#### *People's Housing Process*

One of the objectives of the government, in its process of providing access to adequate housing is to create sustainable and habitable environments. The principles of sustainable housing need to be considered in the design and implementation of housing projects if people's quality of life is to be improved in the long term. Contextually sustainability can be defined as development that meets the needs of the present without compromising the ability of future generations to meet their needs. There is therefore a need to look after the ecological support systems upon which all life depends. Methods of doing this include minimising the negative impact on natural systems, for example, pollution and soil erosion. This will include minimising the use of non-renewable resources. For example, the design of houses should reduce the amount of energy necessary to heat and cool them, and ensure that water supply and sanitation systems make efficient use of water.<sup>58</sup>

#### *Adequate Housing*

As prescribed by the UN Committee on Economic, Social and Cultural Rights, adequate housing has to protect one from natural elements, provide suitable living space for the inhabitants, be located within a pleasant living environment, and be well located for economic and social opportunities, such as shops and entertainment centres. This is also reiterated by Article 60 of the UN Habitat Agenda (1996),<sup>59</sup> which states that:

adequate housing means more than a roof over one's head. It also means adequate privacy and space; physical accessibility; adequate security; security of tenure; structural stability and durability;

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<sup>58</sup> Towards the Right to Adequate Housing at <http://www.usn.org.za/Toadhouse/Chapter1.htm>.

<sup>59</sup> Signed as part of the Istanbul Declaration on Human Settlement at the United Nations Conference on Human Settlements (Habitat II) in Istanbul, Turkey from 3 to 14 June 1996.



adequate lighting, heating and ventilation. Adequate housing should have basic infrastructure, such as water supply, sanitation and waste management facilities; suitable environmental quality and health related factors. Sustainable housing means there should be adequate access to work and basic facilities at an affordable cost. Adequacy should be determined together with the people concerned, bearing in mind the prospect for gradual development.

Housing the poor in the periphery, where there is no infrastructure cannot be said to be reasonable.

### *Access to Land and Security of Tenure in Rural Areas*

The availability of suitable land for the building of houses seems to be the biggest barrier to development. The measures adopted by the State must be geared towards the progressive realisation of the right of access to adequate housing. Improving access to land is thus inherent in the concept of "progressive realisation." As already pointed out above, rural housing projects cannot be implemented immediately due to the unavailability of land, as some traditional leaders are still reluctant to make land available for settlement. KwaZulu-Natal reported this, as a matter that impedes the provision of houses in traditionally owned land. This is a matter that needs to be addressed if government wishes to improve the quality of life for poor rural communities. Until the reasons are known for the reluctance to make land available for community development, no agreement can be reached. Therefore, government must engage in a dialogue with traditional leaders in order to understand their reasons and be able to alleviate their concerns, and also to find ways and means to address the whole issue of land in general.

### *Rural Development*

NDH should engage in policy dialogue with provincial and local governments as well as other stakeholders to establish a holistic approach on housing programs like rural development not only to ensure uniformity in all the provinces, but also to encourage rural development.

### *Lack of Capacity*

Section 41(1)(h) (ii) and (iii) of the Constitution provides that all spheres of government should co-operate with one another in mutual trust by assisting, supporting, informing, and consulting with one another on matters of common interest. In addition, it is the responsibility of both the national and provincial governments to strengthen the role and responsibilities of municipalities through exchange of expertise and experience, in line with the principles of co-operative governance to locally implement the adopted housing programme.<sup>60</sup>

### *Vulnerable and Marginalised Groups*

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<sup>60</sup> Chapter 3 of the Constitution.

The government must take steps towards the constitutional goal of effectively meeting the basic needs of all in society especially the most vulnerable and marginalised. These steps must be "deliberate, concrete and targeted" allowing the state to show progress in achieving the goal realising the right of access to adequate housing.

#### *Persons Living with HIV/AIDS*

The government need to provide a national framework to the provinces to meet the goals and targets as set out in the Declaration of Commitment on HIV/AIDS adopted at the UN Special Session on the policy guideline to provide housing to people living and affected by HIV/AIDS. According to the Declaration, the government bears the primary responsibility for implementing the provisions of the Declaration of Commitment.<sup>61</sup>

#### *Girl/Child -Headed Household*

Girl/Child-headed household is a reality and the national government must adopt policies and enact legislation or develop a strategy to alleviate difficulties facing these children with regard to housing.

#### *Refugees and Asylum Seekers*

Article 21 of the Convention Relating to the Status of Refugees obliges the government to provide housing to refugees. Hence, the national government is under an obligation to develop a policy guideline as well as the criteria to provide housing to people who were uprooted from their countries of origin by circumstances beyond their control.<sup>62</sup> As already pointed out above, section 26 guarantees everyone the right of access to adequate housing.

#### *Community Involvement*

There should be a national regulatory framework to encourage public consultations, debates and round tables at all levels of government with community based organisations and all the stakeholders on the housing programs and projects within communities to ensure that the beneficiaries get involved.

#### *Inadequate Budget*

It is the primary responsibility of the government to play the role of a catalyst by mobilising financial resources and capital investments between the private sector and other stakeholders in implementing the housing program. This will obviously involve providing access to housing stock as well as a national legislative framework to facilitate access to finance.

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<sup>61</sup> Item 65 of the Declaration of Commitment on HIV/AIDS commits governments that [by] 2003, develop and by 2005 implement national policies and strategies to: build and strengthen governmental, family and community capacities to provide a supportive environment for orphans and girls and boys infected and affected by HIV/AIDS . . . by . . . ensuring . . . access to shelter. . . ."

<sup>62</sup> The term "Refugee" is defined in Article 1 of the Convention.

### *Housing Subsidy Programmes*

The NDH should in addition to allocating resources, provide a national framework to establish clear roles and responsibilities for all levels of government on how to prioritise and respond to needs. This will not only curb corruption and maladministration, but will assist in ensuring that all the housing projects are effectively implemented.

### *Under-spending*

The national government should provide measures calculated to expeditiously and effectively within its available resources, fulfil its section 26 obligation. For that reason, national government should provide a mechanism for checks and balances to ensure that the programmes and targets set for a particular financial year are achieved. Legal issues that results in delays in the implementation of specific projects, as highlighted under the critique section, should be addressed as a matter of urgency. Lack of capacity as already pointed out, should be addressed within the context of the principles of co-operative governance as demonstrated above.

## **8. CONCLUSION**

That the government has taken steps towards the progressive realisation of the right to have access to adequate housing is beyond dispute. What is apparent, however, is that as demonstrated in the critique section, the steps adopted by the government cannot be said to be reasonable, as they cannot pass a constitutional muster. It is regrettable to note that this is so despite the landmark decision of the Constitutional Court in *Grootboom* as millions of people are still living in peril and the programme adopted is not comprehensive as it neglects significant members of the society.

## **ABBREVIATIONS**

<b>ARP</b>	Alexandra Renewal Project
<b>ECDH</b>	Eastern Cape Department of Housing
<b>EIP</b>	Environmental Implementation Plan
<b>FSDH</b>	Free State Department of Housing
<b>GDH</b>	Gauteng Department of Housing
<b>HUIS</b>	Human Urban Information System
<b>KZNDH</b>	KwaZulu-Natal Department of Housing
<b>MDH</b>	Mpumalanga Department Housing
<b>NAP</b>	National Action Plan
<b>NDH</b>	National Department of Housing
<b>NEMA</b>	National Environmental Management Act
<b>SEED</b>	Sustainable Energy Environment and Development
<b>WCDH</b>	Western Cape Department of Housing



## CHAPTER 3

### RIGHT TO LAND

#### 1. INTRODUCTION

The government has developed policies and passed several pieces of legislation with a view to redress inequalities in land distribution resulting from the unjust laws of the colonial and apartheid governments. In 1994, the government adopted the Reconstruction and Development Programme (RDP) which provided for the redistribution of 30 per cent of agricultural land over five years<sup>1</sup> as one of its aims. In 1997, the government adopted the White Paper on South African Land Policy to inform land reform in this country.<sup>2</sup>

In order to meet these objectives, the White Paper had three guiding tenets, namely, Land Redistribution, Land Restitution, and Land Tenure Reform. Land redistribution seeks to facilitate the right of access to land for residential and farming purposes; land restitution seeks to compensate and restore land to those who lost land because of colonial and apartheid laws; and secure land tenure programme is directed towards people without land tenure security. For the government, tackling the land question would enhance poverty reduction.

Thus, the right to gain access to land is based on the idea that there are people who need land and those who are not secure on the land they live on. It entails satisfying that need for the landless to acquire land and have resources to sustain a livelihood.

#### Constitutional Provisions

The Constitution of the Republic of South Africa guarantees equal access to land for all the citizens. According to section 25(5) of the Constitution the government ‘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’.<sup>3</sup> Land rights are viewed in the context of property rights that are protected under the Constitution. Section 25 (7) states that a person or a community that lost property post-1913 due to discriminatory laws is entitled to restitution or redress.<sup>4</sup>

Property rights, particularly land rights, are closely connected to the problem of housing. It has been estimated that over a billion people in the world lack adequate housing, whereas another million do not have a home.<sup>5</sup>

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<sup>1</sup> *The Reconstruction and Development Programme: A Policy Framework* (1994). At <http://www.polity.org.za/govdocs/rdp/> visited 31 May 2002.

<sup>2</sup> White Paper on South African Land Policy, (April 1997). According to the White Paper, the land policy was pronounced with four objectives, namely: to correct past injustices; to engender reconciliation and stability; to promote economic growth; and to improve lives through the alleviation of poverty.

<sup>3</sup> Section 25 (5) of the Constitution.

<sup>4</sup> Section 25 (7) of the Constitution. Thus, a person or community that lost property because of the Land Act of 1913 ‘is entitled, to the extent provided by an Act of Parliament, either to restitution or equitable redress’.

<sup>5</sup> *Global Strategy for Shelter to the Year 2000*, UN doc. A/43/8/Add.1.

The Constitution is in agreement with international standards set by the United Nations on ensuring equal rights to property. For instance, the United Nations Declaration on Social Progress and Development “recognises the social functions of property including land and calls for land ownership that ensures equal rights to property for all.”<sup>6</sup>

The idea of gender equality in acquiring land for agrarian reform and land resettlement schemes is advanced by the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).<sup>7</sup> The CEDAW position emanates from the fact that women have been treated unfairly where tenure reform is concerned. It is from this departure that we also look into the problem of land tenure in relation to women.

The Constitutional Court in the *Grootboom* case recognised access to land as a socio-economic right. The Court concluded that economic and social rights provisions in the Constitution ‘entrench the right to land, to adequate housing and health care, food, water and social security. They protect the rights of the child and the right to education.’<sup>8</sup> This means that the State may use its resources to secure, redistribute or purchase land, actions which, by implication, would constitute reasonableness.<sup>9</sup> *Grootboom* views implementation as constituting the supreme act in the fulfilment of the constitutional obligation of the State. Reasonableness is measured by meeting the goals for which the policies and programmes were conceived.<sup>10</sup>

Therefore, reasonableness in this sense will comprise satisfying the desire by the landless to have access to the right to shelter and land.

Section 25 (1) of the Constitution is explicit in providing that no person ‘may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.’ *Grootboom* made a link between the right of access to land and the right of access to adequate housing.<sup>11</sup>

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<sup>6</sup> See SAHRC 2001. 3<sup>rd</sup> *Economic & Social Rights Report 1999/2000*. South African Human Rights Commission, 2001, p. 279. Several articles of the Convention Concerning Tribal and Indigenous Peoples in Independent Countries, 7 (1), 13, 14, 15, 16, 17, 18 and 19 (1991), give detailed account on the provisions for the said groups of people. The SAHRC’s 3<sup>rd</sup> Economic and Social Rights Report also refers to the Peasant Charter of the United Nations Food and Agricultural Organisation and the Convention Concerning Indigenous and Tribal People in Independent Countries, which require tenure reform and redistribution for the landless and emerging farmers, and indigenous people, respectively.

<sup>7</sup> Article 14(2)h of the Convention on the Elimination of all Forms of Discrimination Against Women (1979).

<sup>8</sup> *Government of the Republic of South Africa v Grootboom and others 2000* (11) BCLR 1169, para 19. Emphasis was on section 25(5) of the Constitution, which places responsibility on the State to create conditions enabling ‘... citizens to gain access to land on an equitable basis.’

<sup>9</sup> In defining reasonableness, the *Grootboom* judgment goes beyond mere passage of legislation and conception of policies and programmes, which are viewed as the initial steps in fulfilling the obligation of the State.

<sup>10</sup> These policies and programmes must be reasonable both in their conception and their implementation. The formulation of programmes is only the first stage in meeting the state’s obligations... An otherwise reasonable programme that is not reasonably implemented will not constitute compliance with the state’s obligation. *Grootboom*, para 42.

<sup>11</sup> Thus effectively recognising a linkage to section 26 of the Constitution, that provides that the State has an obligation to take reasonable measures to ensure the “progressive realisation of the right to adequate housing.” That right can only be realised when the right of access to land is itself realised.

This chapter seeks to examine the progress made between 2000 and 2002 by the Department of Land Affairs, provincial and local authorities with regard to land reform as provided for in section 25(5) of the Constitution.

## **2. POLICY, PROGRAMMES AND PROJECTS**

### **National Sphere**

Several policy developments took place during the reporting period that related to land restitution, redistribution and tenure reform programmes. The National Department of Land Affairs (DLA) reported the following policies instituted during the reporting period:

#### Land Restitution Policy

##### *Standard Settlement Offer Policy*

The Standard Settlement Offer Policy, which was developed during the reporting period, seeks to determine alternatives for restitution packages in respect of urban claimants. The main objective of this policy was to establish which options to consider for urban restitution claims. The report from the Department of Land Affairs revealed that this policy, which benefits urban restitution claimants, was introduced to facilitate negotiation for speedy settlement of a large number of claims. A number of goals were attained. For instance, through this policy, settlements were negotiated, the settlement process speeded, and more claims resolved.

##### *Policy on Betterment of Claims*

The DLA also adopted the Policy on Betterment of Claims, which seeks to determine guidelines and options regarding claims lodged on land rights lost under the apartheid government. The policy, which enhanced the processes of negotiating claim settlements, benefits mostly rural communities.

There was during the reporting period the implementation of the Policy on Labour Tenancy and submission of claims to the Minister for Approval in terms of section 42D of the Restitution of Land Rights Act, 1994. This policy seeks to benefit labour tenants and their families by recommending settlement and the restoration of the dispossessed land, alternative land or redress. According to the DLA, land was given back to labour tenants in several areas through this policy. In some instances, labour tenants received more land than was originally lost.

#### Redistribution Policy

In 2000, the Department of Land Affairs refined the Municipal Commonage Policy to include other agricultural activities as part of the programme. This policy addressed itself to land owned and controlled by municipalities and was supposed to be made available for grazing purposes for those people who lived near towns. The department did not supply further information on this issue.



### *Land Redistribution for Agricultural Development (LRAD)*

In August 2001, the Department of Land Affairs introduced the Land Redistribution for Agricultural Development (LRAD): a sub-programme of the Land Redistribution Programme (LRP). The DLA introduced this policy to stimulate development and to encourage commercial farming by African farmers.

This policy, according to the DLA, has two parts. One part has to do with the transfer of agricultural land to individuals and groups; the other part has to do with commonage projects to improve access to municipal and tribal land mainly for grazing purposes. Other beneficiaries of this sub-programme include historically disadvantaged rural people, particularly women and young people who live in rural areas. In December 2001, the programme had made available 60 ha of land to 2 681 applicants.

### Tenure Reform Policy

The Minister of Agriculture and Land Affairs approved a document on entitlements of people who were protected by the Interim Protection of Informal Land Rights Act (IPILRA), 31 of 1996 and the Extension of Security of Tenure Act (ESTA), 62 of 1997 with regard to the Disposal of State Land Act. Also, provision of grants for purposes of acquiring land for upgrading tenure security for previously disadvantaged groups. The IPILRA is aimed at disposing State land to people who actually own but have limited rights to the land and at transferring the right to land to long-term communal tribal or traditional areas. IPILRA is an interim measure instituted to protect the position of people with untitled land rights.

The department also instituted the Tenure Security Grant, which benefits labour tenants. This programme has four objectives, namely:

- to acquire land or rights in land for people who are protected under ESTA and the Labour Tenants Act;
- to provide tenure redress in terms of the Draft Communal Land Rights Act (2002);
- to acquire land for commonage in traditional areas; and
- to take charge of the process of land rights inquiry so as to determine the nature of certain rights and their rightful holders.

The draft proposal for this grant is still under review by provincial offices and the national office is still awaiting comments and inputs.

### *Benefits Policy*

The *Benefits Policy* provides for leasing of land in mostly communal areas to private users on behalf of various communities, commuting limited rights in State land to full ownership, and extending benefits of land to everyone in the community. However, no conclusion has been reached yet as discussions are in progress.

## **Provincial Sphere<sup>12</sup>**

### **Policy Measures**

#### *Formalisation and Upgrading and Development Programme*

Mpumalanga Province has put in place programmes that consider numerous categories of vulnerable groups. For example, the Formalisation and Upgrading and Development Programme which has two objectives: the promotion and transfer of land ownership rights to targeted and prioritised communities, and drafting of a Communal Land Rights Register. These programmes are directed towards beneficiaries in twelve existing rural communities (R188 villages) that have 48 000 households and the urban communities (R293 townships) and adjacent informal settlements that have informal settlements.

#### *Tenure Rights Dispute and Mediation Programme*

Tenure Rights Dispute and Mediation Programme, which is part of the provisions of the Interim Protection of Informal Land Rights Act, 1996 and the evolving reform legislation, was instituted to resolve disputes through development of viable settlement options. So far, six cases are at different stages of resolution, and involve 3306 households. Four of these cases have been resolved and formal tenure rights acquisition processes are at different levels.

The department has also instituted the resolution of farm worker and labour tenants eviction cases, under ESTA and LTA provisions. Thirteen cases are at different resolution and settlement stages, involving about 3 000 individuals. Eight cases have been resolved and a combination of on-farm and off-farm settlement development planning is underway. In addition, there are cases that are under investigation for purposes of identifying settlement compatible to state land for resolution.

The Eastern Cape's response bore no relevance to the report,<sup>13</sup> while Gauteng did not respond at all to this issue.

#### *Obligation to respect*

According to the Mpumalanga Land Reform Office, the targeted and prioritised communities are fully involved and participate in the tenure rights acquisition process, which is concerned with processes of signing community resolutions.

#### *Obligation to Protect*

The Mpumalanga Land Reform Office reported that the affected communities in the evictions/labour tenant cases are informed on their rights through workshops and information sessions, and there exists a task team to investigate the cases.

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<sup>12</sup> Only three provinces – Gauteng, Mpumalanga and the Eastern Cape have submitted their reports. Even so, the protocols were responded to scantily, as these provinces simply state that most of the questions can be sufficiently answered by the national Department of Land Affairs.

<sup>13</sup> The response to the protocol was mainly on agricultural issues, and not land reform.

### *Obligation to Promote and Fulfil*

The land reform programme, as driven by the Department of Housing and Land Administration, and jointly with the Department of Land Affairs and Department of Agriculture, Conservation and Environment, ensures that the tenure rights acquisition programme is strengthened for these affected communities.

The *Gauteng Farmer Settlement Programme* provides access to land ownership for the historically disadvantaged persons, thereby contributing to redressing race and gender imbalances to gaining access to land ownership patterns.

The department states that the integrated land eviction strategy deals with land eviction matters in a proactive, systematic and preventive manner. Through education on the Extension of Security of Tenure Act, landowners and occupiers can exercise their right of access to land in a formal and systematic way.

### *Vulnerable and Marginalised Groups*

According to the Mpumalanga department, all the categories of vulnerable groups are considered and addressed in all the policy programmes. According to the Gauteng Province Department of Land Affairs and Department of Agriculture, Conservation and Environment, the measures consider all people listed as marginalised, through workshops on relevant matters relating to land. These workshops are conducted in areas where the problems are occurring.

Each of the instituted measures create space and enabling conditions in which stakeholders on land issues, including categories of vulnerable groups, can relate in a sustainable and progressive way. The department has noted, however, that the effectiveness of the measures has yet to be assessed.

## **3. LEGISLATIVE MEASURES**

### **National Sphere**

The DLA reported that most of the legislation enacted in the previous reporting periods has not changed. However, few amendments were effected during the 2000/2002 reporting period:

- The Land Affairs General Amendment Act 11 (2000) amended section 2 of the Provision of Land and Assistance Act 126 of 1993. The amendment seeks to speed up land reform.
- Section 13 (1A) of the Land Reform (Labour Tenants Act) amended section 33 (1) to the effect that few labour tenants would gain tenure security on land.<sup>14</sup>

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<sup>14</sup> Other amendments were made to the Extension of Security Tenure Act 62 of 1997, but were minor and had no effect on policy direction.

*Obligations to respect, protect, promote and fulfil the right of access to land*

The DLA reports that its policies are intended to give effect to constitutional provisions pertaining to land rights. To meet constitutional specifications, policy development and implementation respect the realisation of the right to gain access to land. The implementation of land reform protects the right to gain access to land without unfair discrimination. The policies and their implementation target mostly vulnerable (particularly previously disadvantaged) groups.

Accordingly, the Department meets its obligation towards fulfilment of the right to access to land by constantly monitoring legislation.

*Provision of Land and Assistance Act, 126 of 1993*

The DLA reports that amendments to this Act allow the Minister to delegate power to designate land, and to approve the release of funds for development of managers. The amendments form part of the measures to increase the pace of land reform.

*Labour Tenants Act*

The Land Reform (Labour Tenants) Act ensures that labour tenants gain secure tenure on land, which makes them less vulnerable to abuse as well as arbitrary and illegal evictions. The guidelines developed by the DLA promote the efficient acquisition of this security. The amendments to the act were minor and do not have significant bearing on the policy direction and legislation.

*Extension of Security of Tenure Act (62 of 1997)*

As with Labour Tenants Act, the DLA reported that the amendments to the act were minor and do not have significant bearing on the policy direction.

*Vulnerable Groups*

According to the DLA, amendments stated above did not affect vulnerable groups, because these groups are already catered for in the original legislation.

**Provincial Sphere**

The provinces that have submitted reports indicated that legislative measures are the preserve of the DLA.

#### 4. BUDGETARY MEASURES

The tables below are a representation of the budgets as submitted by the DLA and provincial departments that deal with land issues.

**Table 1 DLA Budget Allocation**

Year	Total allocation in Rand(s)	Allocation as a % of GDP	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure (in millions of Rand)	Actual expenditure (in millions of Rand)
2000/2001	920 655 000	0.101	-	-	768 200 000
2001/2002	1 039 671 000	0.105	-	986 655 000	976 612 043

Source: Department of Land Affairs Protocol Submission

Note: The dash (-) in all the tables denotes that the information requested was not made available to the Commission.

The budget (for redistribution and tenure reform), according to the department, has generally been adequate, except for the deficit of R16 million on the title deeds trading account for the 1999/2000 and 2001/2002 financial years. This means that the DLA over-spent during these financial years. For the 2000/2001 financial year, there was under-spending of R152 855 000, and there was an estimated R26 million surplus for the 2001/2002 financial year.

Table 2 below gives a representation of the budget allocations in question.

**Table 2 Land Redistribution and Tenure (Land) Reform**

Year	Total allocation in Rand(s)	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure	Actual expenditure
2000/2001	349 270 000	-	-	252 600 000
2001/2002	455 772 000		415 643 000	444 200 000

Source: Department of Land Affairs Protocol Submission, Ref. ME5/2/2

Over R43 million that was not spent in the 1999/2000 financial year, while R87 million was unspent in the 2000/2001 financial year. The 2001/2002 financial year, with more money allocated than the previous year, reflects an under-spending of over a R11 million. The statistics show that whereas there has been under-spending over consecutive financial years from 1999 to 2002, the budget allocation for redistribution and land reform has increased.

**Table 3 Budget for Land Restitution Programme**

Year	Total allocation in Rand(s)	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure	Actual expenditure
2000/2001	265 138 000	-	-	265 331 000
2001/2002	309 242 000	-	291 622 000	291 622 000

Source: Department of Land Affairs Protocol Submission

The DLA reports that the restitution budget for the years 2000/2001 and 2001/2002 was not adequate. However, in order to meet other costs, funds were shifted from other programmes within the department. The department also indicated that there was under-spending in the restitution programme due to similar reasons as in the redistribution and land tenure programmes. However, there was over-spending related to transfer payments, for which funds were diverted from other programmes to make up for the extra expenditure. This resulted in the increase in the number of settled claims.

#### *Variance(s) in Budget Allocation*

The DLA reported that there was budget inflation due to the roll over of funds, which was allowed in the previous years, that is, 1999/2000, 2000/2001 and 2001/2002, which accounted for variance in the department's budget.

#### *Vulnerable and Marginalised Groups*

##### Redistribution

The DLA has reported that all categories of the vulnerable groups were catered for in a comprehensive planning approach. Female-headed households, according to the protocol report, are given preferential treatment. The land distribution programme has until 2001 focused on low income households that earned below R1 500. All expenditure utilised was directed to this category of beneficiaries. 30 per cent of the budget of all land reform programmes was put aside for acquisition of land for settlement or residential purposes.

However, according to the DLA, the homeless do not appear to be a special category of beneficiaries.<sup>15</sup>

##### Restitution

As with the redistribution programme, the restitution programme also considers all categories of the marginalized groups in its approach. Restitution, according to the DLA, is a rights-based programme, which prioritises all claimants, rich or poor. For that matter, there are efforts being made to increase the number of rural claims to be settled. Also, the DLA has reported that there was no audit conducted to determine which category of the vulnerable groups do the 35 litigation cases fall under.

#### **Provincial Budgets**

Only Mpumalanga Province provided information on this section. However, the information provided is not complete.

The Mpumalanga Department of Housing and Land Administration indicates that for the past two financial periods, from 2000/2001 to 2001/2002, the amount allocated for tenure reform and land redistribution was far less compared to the budgeted amount for these two periods. For example, of the more than R200 million budgeted for the

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<sup>15</sup> This, of course, contradicts the *Grootboom* ruling.

period 2000/2001, only R8 610 250 was spent for tenure reform, for the 2001/2002 period only R4 127 369 was spent for tenure reform.

The table below represents the land reform budget of Mpumalanga Province.

**Table 4 Total Budget Allocation Measures for Mpumalanga Department of Housing and Land Administration.**

<b>Year</b>	<b>Total Revenue in Rand(s)</b>	<b>Total Allocation in Rand(s)</b>	<b>Allocation as a % of GDP</b>	<b>Per capita allocation in Rand(s) after inflation adjustment</b>	<b>Projected expenditure</b>	<b>Actual expenditure</b>
2000/2001	212 350 000	-	-	-	-	-
2001/2002	218 927 000	-	-	-	-	-

The programme, according to the department, needed R400 million to upgrade tenure reform, but the money “is not readily available....” The department recommends a phased approach to be applied over a ten-year period after more funding had been allocated. So far, the department has applied for more funds of which the National Treasury Department approved R17 million.

The department spent only R96 million toward the redistribution programme. However, it does not state how the allocated amount was spent. The fact that so much money had to revert to treasury shows lack of planning by the provincial department.

*Variance (s) in budget allocation*

The variance, according to the Department of Housing and Land Administration, is a result of treasury’s yearly allocation.

**Table 5 Mpumalanga Land Redistribution Budget**

<b>Year</b>	<b>Total Revenue in Rand(s)</b>	<b>Total allocation in Rand(s)</b>	<b>Allocation as a % of GDP</b>	<b>Per capita allocation in Rand(s) after inflation adjustment</b>	<b>Projected expenditure</b>	<b>Actual expenditure</b>
2000/2001	-	-	-	-	-	-
2001/2002	-	96 000 000	-	-	96 000 000 for 24 community resolutions	48 000 000 for the 12 resolutions signed up to 31 March 2002

Source: Mpumalanga Department of Housing and Land Administration

The Mpumalanga Department of Housing and Land Administration reported that the land redistribution budget is the responsibility of the national DLA office, and therefore cannot provide much information regarding that. However, the Department of Housing and Land Administration indicated that the DLA has approved 5 out of 19 projects under redistribution for settlement planning and housing development. The Housing and Land Administration office, which reported that the redistribution budget

was adequate, did not account for variance for the same reason that it is the national office's responsibility.

However, the Department of Housing and Land Administration disclosed that the tenure reform programme covers all the categories of the vulnerable groups. In 2002, the department started a program to draft a Communal Land Register for the 15 rural communities in the R188 Villages and neighbouring informal settlements, and reported that they could present a comprehensive statistical analysis on the above beneficiary category and specifics, as soon as it has compiled a comprehensive database.

*Measures instituted for budget inadequacy*

To address budget inadequacy, the Mpumalanga office prioritised the Tenure Reform programme to look into the dimensions of different alternative tenure models and systems targeted for rural development.

**Table 6 Mpumalanga Tenure Reform Budget**

Year	Total allocation in Rand(s)	Allocation as a % of GDP	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure	Actual expenditure
2000/2001	8 610 250	-	-	-	8 610 250
2001/2002	4 127 369	-	-	-	4 127 369

Source: Mpumalanga Department of Housing and Land Administration

*Variance*

Variance in the allocation is a result of the yearly allocation made to the department by the National Treasury in accordance with the Medium-Term Expenditure Framework (MTEF).

*Vulnerable and Marginalised Groups*

According to the Mpumalanga Department, tenure upgrading refers to the upgrading of deeds of grant, and permission to occupy and informal land rights in Proclamation R293 towns and informal settlements. Existing land rights as protected by legislation are upgraded into full ownership. In terms of the departmental tenure up-grading program, it relates to:

- Women
- Female headed households
- Persons living in rural areas
- Persons living in informal settlements
- Low income groups
- Racial groups disadvantaged by past discrimination
- Persons with disabilities

The department reported that the budget was adequate. In fact, the amount needed for tenure reform was in excess of R4 million. This funding is not readily available and,



therefore, a phased approach staggered over a 10-year period will follow. Through this approach, additional funding will have to be acquired and partnerships secured with relevant role players in order to ensure that all areas in need of upgrading are addressed.

*Measures taken to address budget inadequacy*

The Mpumalanga department has submitted an application to the DLA for additional funds. As a result, an amount of R17 million has been approved to co-fund the departmental tenure upgrading.

No information was received from other provinces on this subject.

## **5. INDICATORS**

The indicators<sup>16</sup> for the realisation of access to land, according to the DLA, centre around numerous factors including the number of people involved; the racial composition of the beneficiaries; grants for land redistribution; size of land; availability of land; and other criteria.

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<sup>16</sup> Maria Green indicates that the human rights community uses the term ‘indicators’ in two different ways. One where ‘indicators’ refers to ‘statistics’, and the other where the term “covers any information relevant to the observance or enjoyment of a specific right.” See for instance, Maria Green, “What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement,” *Human Rights Quarterly* Vol. 23 (2001) 1077.

Below are tabular representations from the Department of Land Affairs.

**Table 7 Indicators for Access to Land 2000-2002**

	<b>Total</b>	<b>Rural</b>	<b>Home-less</b>	<b>Farm labour-ers</b>	<b>African<sup>17</sup></b>	<b>Coloured</b>	<b>Indians</b>
Area of land needed per family	-	-	-	-	-	-	-
Size of land made available to those who were previously denied access to land	1 098 008 ha	768 605 ha	17 812	50 000 ha	-	-	-
Size of land made available to those who were dispossessed of land	406 120 ha	325 000 ha	-	-	406 120	-	-
Number of land redistribution grants awarded	98 958	80 000	-	29 687	-	-	-
Number of compensation awards awarded	R938 268 710	Restitution compensation awards were made mainly to people in urban areas					
Number of families that have acquired land tenure security	50 792	40 633	-	15 238	-	-	-

Source: Department of Land Affairs Protocol Submission

<sup>17</sup> According to the DLA, the collected information does not provide for racial categories as requested by the SAHRC. Rather, the classification is limited only to Black and White. Thus, the beneficiaries of land reform would be “black” people, comprising Africans, Indians and Coloureds.

The system used by the DLA does not provide for information breakdown as required by the SAHRC's protocol. According to the DLA, the information provided in the table for rural areas is based on percentage estimates. For land redistribution, the DLA reports that it is working on a ratio of 80:20 in favour of rural areas. More than 80 per cent of the total allocated land, grants released and families that benefited are from rural areas.

For restitution, although the total claims reflect 80:20 in favour of urban areas the total number of people tends to be higher in the rural areas since one community claim may involve more than 100 claims, whereas urban claims each individual is recorded as an independent claimant. In terms of land allocation, most of the restored land tends to be for rural claimants.

Not a single province submitted a table for indicators, and none provided reasons.

## **6. NATIONAL PLAN**

Like the indicators above, the National Plan seeks to statistically show how far the Department of Land Affairs has gone in effort to meet its objectives. Table 8 below represents the number of households and people that benefited from the programmes of the DLA, and how much land was redistributed for tenure reform. Other factors include cases that were in court because of evictions, land invasions and recorded land claims.

**Table 8 National Action Plan**

	<b>Total</b>	<b>Rural</b>	<b>Urban</b>
Number of rural households without access to land for farming	No audit conducted	-	-
Number of households who were removed from land since 1913 who have not been compensated	Information not yet available. Subject to completion of the validation process.		
Size of state owned land that is not in use	48 675.80 ha	40 000 ha	-
Number of people who do not have security of land tenure or secure ownership	No audit conducted	-	-
Number of unlawful invasion incidents for purposes of establishing informal settlements	No audit conducted	-	-
Number of lawful eviction cases	6 in terms of ESTA (that the department is aware of)	5	1
Number of unlawful eviction cases	-	-	-
Number of land restitution court cases	35 before court	30	5
Number of land restitution court cases prolonged due to administrative problems	All cases attended to	-	-
Number of farm workers evicted legally	Information available is on number of cases	-	-
Number of farm workers evicted illegally	No audit conducted	-	-
Number of persons seeking access to land redistribution without legal assistance	The programme does not require legal assistance. None of the applicants use the option		
Number of persons seeking access to land restitution without legal assistance	95% of restitution cases are resolved using administrative measures		
Number of rural women denied access to land redistribution programmes due to customary law	None	None	None
	-	-	-
Number of rural women denied access to land restitution programmes due to customary law	-	-	-
Number of rural women denied access to land tenure programmes due to customary law	-	-	-
Number of persons/communities that have lodged land claims	Subject to finalisation of the validation process to be completed in June 2002		
Total number of claims instituted before the cut-off date	68 878	19 140	48 852
Total number of claims awarded up to the year under review	29 421	23 400	5884
Total number of claims this reporting period	26 000	23 400	2 600
Total number of claims dismissed	328 (as at 03/01)	-	-
Total number of claims in litigation	35	No audit conducted	No audit conducted
Total number of claims pending	35	No audit conducted	No audit conducted

Source: Department of Land Affairs Protocol Submission

The DLA disclosed that the statistics on evictions are limited on the number of cases it has received. These cases include those that happened without the knowledge of the DLA. Most of the cases handled by the department have to do with threats of eviction that are mostly resolved by the DLA intervention and through the use of alternative

mechanisms of dispute resolution. Of the 4 860 evictions and threat of eviction cases entered during the 2000/2002 period, only 450 were resolved through mediation, mostly by DLA officials whilst only 2 cases still have to appear before court, a process which takes time to finalise.

### *Measures Pertaining to Indicators*

At the time of putting this report together, the DLA was in the process of gathering statistics of eviction cases reported at various institutions.<sup>18</sup> The department is also redesigning its system to provide further breakdown of information to address issues concerning projects that are established in rural areas, and improving information on beneficiary profiles to allow for classifications such as whether people are homeless or not.

Some of the indicators require information that can be acquired through detailed research. According to its submission, the DLA will commission some of the research through the Monitoring and Evaluation Directorate over a reasonable period of time and within available resources.

## **7. CRITIQUE**

This part of the document seeks to determine whether the respective departments dealing with delivery of land have met their constitutional obligations.

### **Constitutional Obligations**

#### *Obligation to respect the right of access to land*

The Land Redistribution for Agricultural Development programme (LRAD) is demand-driven and is designed to provide grants to black people who wish to access land specifically for agricultural development. According to the DLA, LRAD meets the constitutional responsibility in terms of section 25 (5), wherein “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.”

LRAD is implemented in terms of legislation and takes into account the Provision of Land and Assistance Act, 126 of 1993 that calls for the provision and protection of the rights to land.

#### *Obligation to protect the right to gain access to land*

A policy on the entitlements of people protected by the Interim Protection of Informal Land Rights Act (IPILRA) 31 of 1996 and the Extension of Security of Tenure Act, 62 of 1997, provides protection, and recognises the rights of people who have occupied state land for prolonged periods.

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<sup>18</sup> By so doing the department would, supposedly, be in a position to provide a comprehensive report in this regard in the next protocols.

*Obligation to promote and fulfil the right to gain access to land*

The DLA reports that the policies mentioned above do promote and fulfil the rights of vulnerable groups. For example, LRAD considers farm workers and their families who wish to acquire land and improve their tenure conditions. This helps farm workers who previously could not have rights on the land they worked and lived on. Among other considerations, LRAD, according to the DLA, looks at the interests of the landless people who have limited access to land, particularly women and youth who now have a right to land which they previously could not have access to.

The DLA reports that the Policy of Labour Tenancy and submission of claims to the Minister for Approval in terms of section 42D of the Restitution Act, fulfils the right of labour tenants who made applications through the Restitution Act to gain access to land.

**Vulnerable and Marginalised Groups**

The Department of Land Affairs contends that the policy measures it has put in place do not unfairly discriminate against any group of people, and thus have considered the wishes of farm workers and their families to have access to land and to improve their tenure conditions. In addition, there are considerations for the interests of the landless people, especially women who have limited access to land they want for productive purposes.

*Provision for vulnerable groups per policy measure*

Land Redistribution

The DLA has set aside a limited amount of land under LRAD for women, youth, people with disabilities, farm workers and labour tenants. At the national level, the LRAD caters for everyone, but women have first priority in accessing land for agricultural development.

To that effect, the DLA emphasises that its policies do not discriminate against anyone, although the only group of people that can benefit from this programme are those that were disadvantaged by past discriminatory laws in terms of access to land. The department did not specify whether this particular group referred only to Africans or if other racial groups were also included.

Farm workers, labour tenants, homeless people and people in informal settlements benefit from the Tenure Security Grant which provides such vulnerable people with grants to upgrade or acquire land to improve their living conditions on farms, including housing and other amenities. IPILRA and ESTA, in accordance with the Disposal of State Land Act, provide for State land to be apportioned to farm workers, labour tenants and people living in informal settlements on state-owned land.

Tenure Reform

The DLA emphasised that the Tenure Security Grant is targeted at people without secure tenure including farm workers, labour tenants and people living in communal

areas (including women). Although there is no specific mention of the homeless and people living in informal settlements, the DLA contends that this category of the vulnerable groups is also eligible to benefit from this programme. The policy provides for this group of people to receive grants for upgrading or acquiring land to improve their tenure security.

The DLA contends that the Policy of Entitlements of people protected by the Interim Protection of Informal Land Rights Act, 31 of 1996 and the Extension of Security of Tenure Act, 62 of 1997, in respect of the Disposal of State Land, makes specific provision for farm workers, labour tenants, and people living in informal settlements (on state-owned land).

The DLA does not indicate, however, how and whether these measures have been put into practice.

### **Reasonableness of Measures**

The Constitutional Court, in interpreting reasonableness, explained in *Grootboom* that the State must take measures which are “capable of facilitating the realisation of the right...” Below is the examination of how reasonable the land reform programmes and policies have been.

#### Restitution

The measures instituted during the reporting period have proved to be reasonable. For example, the number of claims processed by the DLA has escalated within a short space of time, after a backlog was reported. For instance, whereas there were about 8000 claims settled in 2000, the number escalated to 12 094 settled claims by March 2001.<sup>19</sup> In February 2002, the Institute for Democracy in South Africa (Idasa) reported that there were 32 389 settled claims, with about 80 per cent accounting for urban cases, while approximately 20 per cent accounting for rural ones.<sup>20</sup>

This, as the DLA accounts, is mainly the effect of changing restitution approaches in settling cases or disputes from judicial to administrative. For instance, the report states that 95 per cent of restitution cases were resolved through administrative measures. All of the 35 restitution cases before the court were attended to, although their resolution is still pending.

The number of settled claims attests to the fact that the adoption of the measures, and the resultant improved relationship between the DLA and the Restitution Commission translated into speeded delivery.

Meanwhile, interim arrangements are in place to deal with pending cases before the long-term strategy was finalised and adopted.<sup>21</sup>

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<sup>19</sup> Department of Land Affairs. *Annual Report 2000-2001*.

<sup>20</sup> Mingo, C. “The 2002 Land Affairs Budget: Is Land Reform on Track?” *Budget Brief* No. 89 (February 2002), at <http://idasa.org.za/bis/> visited 21/02/02.

<sup>21</sup> The DLA has indicated in their submission the audit would be available in June 2002. However, that has not been forthcoming.

## Redistribution

The land redistribution programme slowed delivery following the 1999 elections. By the year 2001, the DLA had redistributed only 2 per cent of the land. The SAHRC 3<sup>rd</sup> Economic and Social Report shows that this was the case in 2000. A report by the Department of Land Affairs Director-General, Dr. G.P. Mayende, revealed that 1 006 135 ha (0.81 per cent or less than 1 per cent) of the total land area had been transferred between 1994 and 2001.<sup>22</sup> Hence, most of (agricultural) land is still in the hands of white owners.

One of the significant redistribution measures instituted during the reporting period is the Land Redistribution for Agricultural Development (LRAD). It took only three months since its adoption for the DLA to redistribute 60 000 ha of land to 2681 applicants through the LRAD programme. It would seem that this programme has done much in a short space of time. However, this programme got stalled because only few people could afford the R5 000 in kind contribution to access the R20 000 to R100 000 grant from the DLA.

This should not have happened as, according to *Grootboom*, the State must guarantee equal opportunity for all citizens to gain access to land. The Court ruling put it thus: “The State must also foster conditions to enable citizens to gain access to land on an equitable basis...”<sup>23</sup> The Court further emphasised that those poor citizens who cannot afford the in-kind contribution have an obligation to demand the State to create those conditions that would make it possible for them to gain access to land.

The number of people who cannot access land shows that the majority are still left without land. Only those people with savings will be able to access the grant, thus gain access to land. Lahiff and Rugege argue that the reason LRAD, (the only policy since the 1997 White Paper on Land) could not deliver effectively is that it lacked elaborate land redistribution strategies.<sup>24</sup> To this effect, the LRAD as a measure is not fulfilling the constitutional obligation to create conditions for accessing land.

In the manner in which the redistribution programme is conceived and implemented, land may only be accessed through a “willing-seller, willing-buyer” notion. This programme fails those people who do not have funds, irrespective of whether they get money from other sources, for instance, the Land Bank.

## Tenure Reform

The DLA is gradually improving tenure reform. Presently, the department is in the process of drafting amendments to both Extension of Security of Tenure Act and the Labour Tenants Act. At the time of reporting, legislation dealing with tenure issues within the communal areas was being finalised.<sup>25</sup> According to the DLA, there are

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<sup>22</sup> Dr. G.P. Mayende, *Media Briefing*, DLA, 2001 at <http://land.pwv.gov.za>.

<sup>23</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), para 93.

<sup>24</sup> Edward Lahiff and Sam Rugege, “A Critical Assessment of State Land Redistribution Policy in the Light of the *Grootboom* Judgement,” (Draft), 18<sup>th</sup> February 2002.

<sup>25</sup> Communal Land Rights Bill, 2002 was gazetted on August 14, 2002, and would go through several review workshops, the first having been in Pretoria on October 14, 2002.



ongoing training programmes aimed at empowering farm workers on land rights issues. The DLA also reported that there was a special fund being established to support farm occupiers in litigation. This fund is a joint effort between the Department of Land Affairs and the Department of Justice.

Even so, the report shows that despite the plethora of legislative and other measures, little has changed in the direction of tenure reform.

### **Availability of Resources**

According to Article 2(1) of the Covenant on Economic, Social and Cultural Rights (ICESCR), the State must take necessary measures “to the maximum of its available resources” in order to satisfy access or enjoyment of a particular right. The CESCRs insists that a State must successfully demonstrate that its failure to meet its obligations is attributable to lack of available resources. Therefore, the success or failure of the programmes and measures implemented by the DLA, thus far, should determine whether resources (both personnel and financial) were available, or even adequate.

### **Restitution**

The budget for land reform shows that the money allocated for restitution for the years 2000/2001 was not enough. However, after some funds were shifted from other programmes, the programme showed over-spending of R193 000 000 after actual expenditure. This was largely because of more claims being processed during that period. For the year 2001/2002, R309 242 000 was allocated. However, spending fell again over R128m. This over-spending is a result of speeded delivery in settlement of restitution claims.<sup>26</sup>

The DLA reported that it has spent close to a billion Rand (R938 268 710) so far, on restitution, mainly to urban claimants; however there is no indication how much was awarded to rural claimants.

It is inexcusable that the DLA could not spend just over R128 million, when there are still many people whose claims have not been settled.

### **Redistribution<sup>27</sup>**

The DLA has stated that there was lack of personnel qualified for distributing land. However, it is not clear what these people were supposed to be tasked with. This shortage of personnel was mentioned even during the last reporting period. It is not clear why the DLA should allow itself to continue to work while it fails to deploy qualified personnel for land redistribution.

The budget for the redistribution programme indicates that it was adequate for the three financial years beginning in 1999/2000 financial year. For all these years, there

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<sup>26</sup> Whereas there were 12 094 claims settled by year 2000/2001, it was projected that there would be 20 295 settled claims at the end of financial year 2001/2002. See for instance, Chris Mingo, “The 2002 Land Affairs Budget: Is Land Reform on Track,” *Budget Brief* No. 89, Idasa (February 2002).

<sup>27</sup> This accounts for both the redistribution and tenure reform as the budget was a combined one for the two programmes.

were funds that were not spent. For example, of the R319 405 000m allocated for the 1999/2000 financial year, more than R50m was unspent. More than R80m was not spent for the 2000/2001, while R40 129 000 accounted for funds under-spent during the 2001/2002 financial. It is for this reason that the land reform programme has been slow.

The reasons given for under-spending by the DLA relate to the following:

- shortage in skilled or qualified personnel, transfer payments, and professional and special services;
- delay in developing a policy framework that would enable or facilitate handling of tenure cases;
- funding agreements between the DLA and local or district structure have not been forthcoming; and
- implementation difficulties due to massive service delivery.

Vacant posts were not filled as part of the transformation and decentralisation process of the DLA. Lack of capacity has been reported by the DLA in the 3<sup>rd</sup> economic and social rights report of the South African Human Rights Commission. Why these vacancies have not been filled is beyond reason.

### **Progressive Realisation**

As explained in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, realisation of economic, social and cultural rights can only be attained progressively,<sup>28</sup> that is, in an incremental manner and over time.

### **Restitution**

With regard to the restitution programme, more claims were settled within a short period during the reporting period compared to other financial years. Restitution is generally viewed as the slowest of the land reform programme. It was only in June 2001 since the 1998 implementation of the Restitution Review that the pace of restitution was increased, with 12 314 claims lodged.<sup>29</sup> However, by financial year 2001/2002, there were only 12 150 claims settled, most of which the Minister said were from the rural areas.<sup>30</sup>

As at 10 January 2002 the figure of 63 455 lodged claims<sup>31</sup> was put at 68 878 lodged claims, owing to adjustment after the completion of the validation process.<sup>32</sup> Of the total number of the lodged claims, 191, 940 accounted for rural claims, while 48, 852

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<sup>28</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht (22-26 January 1997.)

<sup>29</sup> Lahiff, E. (2001). *Land reform in South Africa: Is it meeting the challenges?* Programme for Land and Agrarian Studies (PLAAS), UWC, Policy Brief No. 1, (September 2001). <http://www.uwc.ac.za/plaas/> (Accessed 20/03/02).

<sup>30</sup> Department of Land Affairs, *GCIS: South Africa Yearbook 2001/2002*, 403. See also DLA, "Restitution Statistics", Department of Land Affairs, January 2002, at <http://land.pwv.gov.za/restitution/new%5Fstats%5Frest%5Fgraph.htm>, visited 18 March 2002, and Minister Thoko Didiza, "Land Affairs Budget Speech, 2001/2002" National Assembly, 15 May 2001.

<sup>31</sup> *GCIS: South Africa Yearbook 2001/2002*, p. 403.

<sup>32</sup> *Ibid.* This number represents the number of claims lodged by the cut off date in 1998.

were urban. However, more claims were awarded during the period under review. The present reporting period shows that the 191, 940 rural claims far exceeded the 20 rural claims reflected in the previous SAHRC economic and social report.

The statistics above show that there were more claims settled during the 2001/2002 financial year than the previous years. There was a steady increment of settled claims in 2001, compared to the previous year. For instance, by March 2000, there were 3,916 claims settled, accumulating to 6,525 settled claims at the end of September 2000.<sup>33</sup>

Even so, there still are many cases that have to be dealt with. Restitution cases in rural areas far outnumber those from urban areas. But more settlements are in urban areas. This is an anomaly that has to be corrected, especially that one case in the rural areas may involve many individual families. The DLA report has stated that there are only 35 (30 rural and 5 urban) restitution cases before the courts due for settlement.

While the DLA was requested to fill a survey about statistics concerning racial groups affected by land loss, Whites, Indians and Coloureds were left out. This gives an impression that only Africans in this country had claims compensation for loss of land. For example, in a recent research project by Potchefstroom University (PU) and the University of the North West (UNW) on behalf of the North West provincial government and the Department of Land Affairs, it was found that white farmers and Indians have lodged claims.

According to the project manager, Professor Willie van Wyk,

some of the claims are submitted by white farmers, and many are also submitted by Indians, who primarily lost their businesses in urban areas. The perception that land claims are being made by black people only, is therefore not always true.<sup>34</sup>

The project is assessing 922 land claims by Whites and Indians, and has already submitted 238 to the Land Claims Commission for further assessment.

### Redistribution

By the year 2000, there was a clear decrease in land transfers, compared to other periods since the beginning of the programme. In October 2000, it was reported that only 0.81 per cent of land had been transferred.<sup>35</sup> The 1994 objective of the government to redistribute 30 per cent of land within 5 years was thus not realised.

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<sup>33</sup> DLA, "Restitution Statistics", Department of Land Affairs, January 2002, at <http://land.pwv.gov.za/restitution/new%5Fstats%5Frest%5Fgraph.htm>, visited 18 March 2002.

<sup>34</sup> Frikkie Kotÿe, "White farmers claim land," Marketing and Public Relations Department, Potchefstroom University, 25 February 2002, at <http://www.puk.ac.za/nuus/eng/news26.html> accessed 21 October 2002.

<sup>35</sup> Dr. GP Mayende, "Less than 1% of farmland redistributed", *Media Briefing*, Department of Land Affairs, 2001, at <http://land.pwv.gov.za> accessed 14 February, 2002. See also *Business Day* 9 October 2000 and Lahiff and Rugege, p. 46.

This slow pace in delivery resulted in policy shifts. Having realised its failure to meet its initial objective, the DLA set yet another date for delivery, where 15 million hectares should be redistributed by the year 2005, and a further 30 per cent of rural land within the next coming fifteen years.<sup>36</sup> So far, the DLA has just stated its intention to extend its land disposal.

It is commendable, however, that within three months of the launch of LRAD in August 2001 the DLA, was able to deliver 60 000 ha of land to 2681 applicants. This was done through grants of between R20 000 to R100 000, which the DLA has made available to all beneficiaries who in turn contributed a minimum of R5 000.

The idea that the DLA depends on the willingness of the landowners to sell their land, without regulation, is troublesome. This delays the process unnecessarily, especially that expropriation is a tool that can reduce the time for land redistribution process and thus avoid what the *New African* called “a ticking time bomb.”<sup>37</sup>

On 11 February 2000 Minister Thoko Didiza, publicised her first statement on land policies since the suspension of the Land Rights Bill, 1999. The Minister also recommended a freeze on new projects. However, this moratorium was lifted when a new redistribution programme was introduced in August 2000. This affected the introduction of other land redistribution projects. Thus, in the 2000/2001 financial year, there were only 72 implemented projects, a glaring decrease compared to the 140 projects which were approved in the 1997/1998 financial year.<sup>38</sup>

Programmes that have been operative include the Settlement/Land Acquisition Grant (SLAG) and the Grant for the Acquisition of Municipal Commonage.<sup>39</sup> SLAG’s contribution, in excess of R16 000, was meant for qualifying beneficiaries who sought to acquire land and other farming implements. On the other hand, the DLA had aimed to use the Grant for the Acquisition of Municipal Commonage to help beneficiaries of commonage to refine their farming ventures by using their grants for extensive agriculture.

The Minister’s 11 February 2000 statement was unclear about commonages. It said that municipal commonages were still “a useful instrument in the attainment of broader land reform objectives’ while at the same time sounding a warning that ‘it must be clearly reasserted that it cannot take budgetary priority over the objectives over the redistribution of land to the poor.’”<sup>40</sup>

During the same month, the DLA organised a commonage workshop that recommended the revision of the commonage policy to “allow for both ‘subsistence’

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<sup>36</sup> Ministry of Land Affairs and Agriculture, “The Minister and the Land Affairs Programme: Briefing,” Minutes of the Agriculture and Land Affairs Portfolio Committee, June 20, 2000. See also Human Rights Watch. *Unequal Protection: The State Response to Crime on South African Farms*. Washington, D.C. 2001, p. 38.

<sup>37</sup> Pusch Commey. “Land: A ticking time bomb” *New African* (November 2002).

<sup>38</sup> Mingo, C. “The 2002 Land Affairs Budget: Is Land Reform on Track?” Budget Brief No. 89 (February 2002), at <http://idasa.org.za/bis/> visited 21/02/02.

<sup>39</sup> A commonage is a municipality-owned land which is made available to town dwellers for grazing purposes.

<sup>40</sup> Turner, S & H Ibsen. *Land agrarian reform in South Africa: A status report*. Agricultural University of Norway (November 2000), p. 44.

and emergent farmers.” By March 2000, approved commonage projects constituted about 23 per cent of all approved commonages.<sup>41</sup>

At this point, the DLA had two objectives in the revised approach to redistribution. First, it sought to hand over settlement projects to the Department of Housing, so that the DLA could be able to concentrate on agricultural production; secondly, it sought to move from a demand-driven approach to a supply-driven one that focused on district level planning.<sup>42</sup>

### Tenure Reform

It has been determined that although no statistics are readily available, more people in the former homelands and the former South African Development Trust (SADT) regions do not have secure tenure. It was for this reason that the DLA wanted to satisfy the needs of between 10 per cent and 15 per cent of these people (between 600 000-900 000 households) within 10 years.<sup>43</sup>

Tenure reform has thus become an area of priority for the DLA. The government had aimed to engage both national and provincial offices to part with a sizable amount of land by the financial year 2001/2002. According to the Minister of Agriculture and Land Affairs, 669 000 hectares of state land would be disposed throughout the country between 2001 and 2002.<sup>44</sup> Very little progress has been made in this direction.

The fact that there are large tracts of available land, yet there are people who are without land raises concern. There is a total of 1 098 008 ha of available land. According to the DLA, 836 417 ha of this land is marked for all people who were previously denied access to land, while 406 120 ha is marked for dispossessed people. The SAHRC's 3<sup>rd</sup> report revealed that 696 346 ha was made available to people previously denied access to land, with 268 306 ha meant for redistribution programme.

While more land (140 071 ha) was made available to those denied access, there is no evidence that these people accessed the land. Availability and access are not well defined – availability does not necessarily mean accessibility; it could mean available to be accessed. In this case, it then becomes difficult to determine whether the DLA has not fulfilled its obligation to create grounds for access to land for the vulnerable

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<sup>41</sup> The commonage programme was 'extensive' in the formerly coloured areas of the Northern Cape. In the Free State there was progress in helping commonage projects develop into agricultural infrastructure. In other areas, it was concluded that the beneficiaries could not use their land rights in a productive, profitable and sustainable manner.

<sup>42</sup> Turner, S and H Ibsen. *Land agrarian reform in South Africa: A status report*. University of the Western Cape (November 2000), p.37.

<sup>43</sup> Ministry for Land Affairs. "Demand and Access to Land Amongst Black South Africans" at <http://land.pwv.gov.za/rep2%5F98.html> Visited 20-02-02.

<sup>44</sup> Minister of Agriculture and Land Affairs, "Budget Vote Speech by the Minister of Agriculture and Land Affairs," Ministry of Agriculture and Land Affairs, 5 April 2001, at <http://www.polity.org.za/govdocs/speeches/2001/sp0405a.html> accessed February 2002. Ministry of Agriculture and Land Affairs, "Budget Vote Speech 2002/2003 for Land Affairs by the Minister of Agriculture and Land Affairs, Ms. Thoko Didiza," National Assembly, 31 May 2002.

groups in question, for example, female-headed households, labour tenants and landless people.

So far, the number of families that have benefited from land reform is 507 792, comprising 40 633 rural families and 15 238 families who are landless. Again, it is not clear whether these statistics include people without land generally or people who do not have tenure security. It is not clear whether these are overall statistics since the beginning of the reform programme or they include those within the period under review.

By the time of the budget vote speech 2002/2003, only 47 978ha was disposed in terms of the Power of Attorney held by provincial Members of the Executive Council (MECs), with agricultural state land delivered in May 2001 only in Port St. Johns in the Eastern Cape. A historic handing over of 190 hectares of communal land that took place in April 2002 when Minister Didiza transferred the missionary village of Clarkson to six hundred Mfengu families.<sup>45</sup> The idea behind this land disposal was to make sure that successful (African) farmers gain title to acquired land. According to the information supplied by the DLA in the questionnaire, state land that is not in use equals 48 675.80 ha, with 40 000 ha available for rural habitation. However, there is no explanation why so much land lies idle when millions of people do not have for residential and farming land.

Despite some achievements, poor implementation still accounts for the slow delivery of land to the landless. To date the colonial and apartheid inequalities in land ownership remain almost the same, with whites owning more than 80 per cent whilst the remaining 20 per cent is shared between Africans and the government. The lack of access to land, therefore, affects between 13 million and 14 million people who are predominantly inhabitants of rural areas.<sup>46</sup>

Thus, despite all the strides made in land reform, there is growing concern that much time will pass before most of the landless people realise their right of access to residential and/or agricultural land.

There is a marked deterioration in the observance of land rights and land administration in the former homelands. In November 2001, the DLA admitted that they did not have a clear land ownership policy. Its Deputy Director, Mampho Malgas, said:

Government is still working on a land ownership policy. At the moment people in rural areas are still allocated land on a permission to occupy basis. We have to realise that people cannot secure loans from commercial banks as they do not have the relevant documents. However traditional leaders have been empowered to extend the land lease.<sup>47</sup>

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<sup>45</sup> The Moravian Church had decided in June 2001 to hand over 30 mission stations.

<sup>46</sup> Human Rights Watch revealed that 68 per cent of rural dwellers want to have their own farming land. See *Unequal Protection: The State Response to Crime on South African Farms*, p. 37.

<sup>47</sup> "Land tenure rights cause confusion," *SABC News*. 24 November 2001, at [http://www.sabcnews.com/south\\_africa/land\\_affairs/0,100924458,00.html](http://www.sabcnews.com/south_africa/land_affairs/0,100924458,00.html) visited 19-03-02.

According to the Minister, the DLA is consulting with the traditional leaders regarding the administration of communal land with the view of finding solution to “land use and development.”

Meanwhile, there is a Communal Land Rights Bill (which was gazetted in August 2002). The bill is viewed as the answer to “the role, powers and functions of traditional leaders and institution in local government.”<sup>48</sup> For that reason, the bill is an endorsement of the security of tenure for people in the former Bantustans and South African Development Trusts (SADTs).

At present, relocating landless African people is overcrowding them in the already dense 13 per cent of the land since allocated for Africans during colonial days. Such a move does not address the land issues effectively; hence, the population density in the urban areas. This is evidence of failure by the authorities to implement land tenure programmes effectively -- coupled with an inadequate allocation of resources to realise the right programme in question.

## **Provincial Sphere**

### **Mpumalanga Province**

The response from Mpumalanga Province shows that a rapid state land release programme was pursued during the reporting period. The main objective is to avail state land to those that need it. Such land will also serve to create tenure security, prevent illegal invasions and evictions, to improve utilisation of resources and government land release. State land was released to various municipalities to benefit about 5000 homeless people. According to the Mpumalanga report, such projects, some of which have not been approved, are done in collaboration with the DLA.

### **Gauteng Province**

Gauteng, on the other hand, revealed that the province disposed of state land through the Farmer Settlement Programme with an option to buy the land after three years. This land is also solely for agricultural purposes. It is not clear whether this option serves as a condition, but it would appear that it is restrictive to warrant it as such. For example, what happens if one does not buy the land after three years, does one evacuate the land or does one continue to rent the land?

## **Budget**

Data from the DLA shows that between 1999/2000 and 2001/2002, the budget for land redistribution and land tenure reform experienced nominal increment of funds.

The fluctuating nature of the land reform budget, as well as under-spending, has also contributed to the slow pace of delivery. The reason for the cutback in the 2002/2003 budget for land reform is that great amounts of money have been unspent.

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<sup>48</sup> “Contralesa calls on speeding up for legal transfer of communal land,” *SABC*, November 27, 2001, at [http://www.sabcnews.com/south\\_africa/land\\_affairs/0,1009,24290,00.html](http://www.sabcnews.com/south_africa/land_affairs/0,1009,24290,00.html) Accessed March 19, 2002. The discussion of the bill, gazetted on 14 August 2002, does not fall within the scope of this report.

On face value the DLA budget shows gradual increment for the years under review; and the projected estimates for 2002/2003 and 2003/2004 are sumptuous, put at R938 420 000 and R1 016 826 000, respectively. However, after adjustment for inflation, which Land Affairs does not highlight, the budget will indicate no increase.

Under-spending has generally undermined the pace of land reform programme. This, according to Idasa, occurred at the time that the DLA had targeted for meeting its objectives, only R162 million of the R327 million for the 2001/2002 budget having been spent by the end of 2001.<sup>49</sup> The DLA under-spending of funds allocated for land reform resulted in the reduction for the year 2002/2003 budget.<sup>50</sup> In fact, there has been a trend of under-spending of the land reform budget.

Idasa estimates that because of the shrunk restitution budget and “given the projected allocation and cost of restitution...” the outstanding claims would only be settled in 22 years.<sup>51</sup> The budget decrease greatly affected the implementation of programmes.

Thus, instead of more money being injected into the land reform programme, the DLA received minimal funding from the national budget. Idasa concludes that given these budget constraints, there is little chance that the restitution programme will bear fruit in the direction of land reform. The government’s budget allocation of 0.3 per cent for land reform is problematic in the sense that more and more people will be left without access to land. This fact is more visible in the budget allocated for the various land reform programmes.

### **Administrative Action and Maladministration and/or Corruption**

There have been other issues that hamper the progress of land redistribution. For instance, the DLA has reported gross mal-administration resulting from corruption by some officials. The DLA reported that there have been acts of sabotage by members of the DLA. A case is pending against the DLA where an employee is alleged to have deliberately destroyed records. Another case involves a staff member who “has sold posts to a member of the public.” This case, and others that involve nepotism and favouritism are rife and could be linked to acts of sabotage. For example, any person who wins an appointment in the manner just described is most likely to be unqualified for the job.

The DLA’s human resources directorate has undertaken every investigation into a case of fraud where an employee attempted to defraud a claimant. The department thought it best to dismiss the fraudster.

Such cases may be curbed should the department step up capacity building programmes. Indeed, the DLA has put some measures in place that reduced the number of cases involving mal-administration and corruption. For a start, the DLA has drawn policies and procedures on corruption and mal-administration that are

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<sup>49</sup> Mingo, C. “The 2002 Land Affairs Budget: Is Land Reform on Track?” *Budget Brief* No. 89 (February 2002), at <http://www.idasa.org.za/bis/> visited 21/02/02.

<sup>50</sup> Edward Lahiff and Sam Rugege, “A Critical Assessment of State Land Redistribution Policy in the Light of the *Grootboom* Judgement,” (Draft), 18<sup>th</sup> February 2002, p.46.

<sup>51</sup> Mingo C. 2002. “The 2002 Land Affairs Budget: Is Land Reform on Track?” *Budget Brief* No. 89, Idasa, Budget Information Service (February 2002) at <http://www.idasa.org.za/bis/> visited 21-02-02.



readily available in brochures throughout the department. Also, staff members, including managers, were trained to be sensitive to inappropriate behaviour.

Because of the Risk Assessment study that was conducted by the Department, it has become easier to deal with potential risks and, consequently, unbefitting acts could be arrested early. Managers can now deal with cases without asking for support from the Human Resource Management Directorate.

From an operational standpoint, this is a step in the right direction. Such mechanism to root out corruption, and to prevent maladministration shows that the DLA department appreciates the tasks entrusted to it. This indicates that in future the programmes adopted for land redistribution, tenure reform and restitution will be carried out as expected and expeditiously.

The provincial departments that submitted their protocols -- Eastern Cape, Gauteng and Mpumalanga -- did not report any mal-administration.

It is recommended that the DLA conduct serious investigations to stamp out corruption and fraud.

## **8. RECOMMENDATIONS**

The grey areas between programmes, for instance the LRAD and the commonage programs should be eliminated. There is confusion as to where one ends and where the other begins. The scope of programmes should be clear to prevent them from overlapping.

Some of the measures applied by the DLA to curb corruption and to improve awareness raising, should be equally applied to the provincial and local authorities. Programmes as well as policies addressing land redistribution for vulnerable and marginalised groups in the provinces must be clarified.

It is necessary for the government to acquire land and institute approaches that can efficiently redistribute it to the landless. Where ownership is doubtlessly legitimate, the government should compensate landowners for the acquired land.

The DLA should turn around its strategy of emphasising urban restitution and concentrate more on rural settlements, as this is where most people are in need.

The DLA, as well as the provincial departments, should organise its research unit so it could be able to provide sufficient information. The idea that no audit was available for certain required information in the indicators and National Action Plan for Human Rights sections creates difficulty for clearer assessment. More research has to be carried out so that the number of households and the racial composition of people deprived of land since 1913 is known. Doing so would help the DLA in determining and planning how land or monetary compensation could be dispatched over time.

It is important that the DLA devise a way to correct under-spending of budgetary allocations. The continued decline of the land reform budget would only imply less work toward effectively fulfilling and promoting the obligation of accessing the right to land.

The required amount of R5 000 for LRAD is serving as a stumbling block for landless people who cannot afford it. The DLA should reduce, or even abolish this sum if most of the landless people are to benefit from the programme.

The provinces should be given greater responsibility regarding land reform. The idea that they always refer to the DLA is also contributing to the slow pace in land reform.

## **9. CONCLUSION**

Land reform in South Africa continues to be a challenge. Programme implementation problems experienced in the past seven years are persistent. Problems relating to the slow pace of delivery and the capacity to see to the implementation of projects and programmes have not been meaningfully effected.

The fact that the DLA does not specify some of the measures it has put in place makes it difficult to assess effectively how these measures are implemented to fulfil the obligation of providing land to the landless.

Matters of policy are still posing as obstacles; this affects the progress of land reform. Given all this, the land reform budget has also suffered cutbacks over the years, particularly for the period under review. This tremendously affects any policy worth implementing.

Consequently, without effective implementation, measures instituted by the DLA in respecting, promoting, fulfilling, and protecting the rights of people to have access to land will be rendered ineffectual. This is evidenced by the fact that there are many landless people who are still dissatisfied by the pace of land reform.

While the DLA is striving to deliver land to the landless, it still does not do so in an efficient and opportune manner. The *Grootboom* judgement has shown that “reasonableness” and “progressive realisation” can be achieved only when measures are applied to attain a particular goal “expeditiously and effectively.” The slowness with which the DLA is directing land reform remains a cause for concern.

A mechanism must be established which must link the operations of the provinces and the DLA, since the provinces always refer to the DLA as the main body of dealing with land reform.

## **ABBREVIATIONS**

<b>CEDAW</b>	Convention on the Elimination of all Forms of Discrimination against Women
<b>ICESR</b>	International Covenant on Economic, Social and Cultural Rights
<b>CRLR</b>	Commission on Restitution of Land Rights
<b>DLA</b>	Department of Land Affairs
<b>IDASA</b>	Institute for Democracy in South Africa
<b>IDP</b>	Integrated Development Plan
<b>ESTA</b>	Extension of Security of Tenure Act
<b>IPIIRA</b>	Interim Protection of Informal Land Rights Act
<b>LRAD</b>	Land Redistribution for Agricultural Development
<b>LRP</b>	Land Redistribution Programme
<b>LTA</b>	Labour Tenants Act
<b>MECs</b>	Members of the Executive Council
<b>NAP</b>	National Action Plan
<b>PU</b>	Potchefstroom University
<b>RDP</b>	Reconstruction and Development Programme
<b>SADTs</b>	South African Development Trusts
<b>SAHRC</b>	South African Human Rights Commission
<b>SLAG</b>	Settlement/Land Acquisition Grant
<b>UNW</b>	University of the North West

## CHAPTER 4

### RIGHT TO HEALTH CARE

#### 1. INTRODUCTION

The right to health is fundamental to the physical and mental well-being of all individuals and is a necessary condition for the exercise of other human rights<sup>1</sup> including the pursuit of an adequate standard of living. The right to health care services is provided for in three sections of the South African Constitution. These provide for access to health care services including reproductive health and emergency services; basic health care for children, and medical services for detained persons and prisoners.<sup>2</sup> Universal access is provided for in section 27(1)(a) which states that "Everyone has the right to have access to health care services, including reproductive health care..." Section 27(1)(b) provides for the State to "take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right." According to the Limburg Principles, progressive realisation does not imply that the state can defer indefinitely, efforts for the full realisation of the right. On the contrary, state parties are to "move as expeditiously as possible towards the full realisation of the right" and are required to take immediate steps to provide minimum core entitlements.<sup>3</sup> Section 27(3) states that no one can be denied emergency medical treatment. Section 28(1)(c) provides for "basic health care services" for children, while section 35(2)(e) provides for "adequate medical treatment" for detainees and prisoners at the State's expense.

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the "enjoyment of the highest attainable standard of physical and mental health conducive to living a life of dignity".<sup>4</sup> This means that health care facilities, goods and services have to be available in sufficient quantity; must be physically and economically accessible to everyone, must be ethically and culturally acceptable, and must be of a medically appropriate quality.<sup>5</sup>

According to section 7(2) of the Constitution<sup>6</sup> the State is obliged to respect, protect, promote and fulfil all the rights in the Bill of Rights). In the case of the right to

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<sup>1</sup> *General Comment No.14 (2000) The Right to the Highest Attainable Standard of Health*, (Article 12 of the International Covenant of Economic, Social and Cultural Rights). UN Committee on Economic, Social and Cultural Rights, 2000. para 1

<sup>2</sup> Sections 27 (1) (a), (b) &(c); Section 28 (1) (c) and Section 35 (2) (e) of the Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>3</sup> Limburg Principles on the Implementation of the International Covenant of Economic, Social and Cultural Rights Para 21 pp 63-78 in *Economic, Social and Cultural Rights: A Compilation of Essential Documents* International Commission of Jurists, 1977.

<sup>4</sup> The steps to be taken by State Parties to the ICESCR to achieve the full realization of the right to health include those necessary for the provision of the reduction of the still-birth rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial health; the prevention, treatment and control of epidemics: endemic, occupational and other diseases; and the creation of conditions which would assure to all, medical services and medical attention in the event of sickness.

<sup>5</sup> *General Comment No. 14 of Committee of ESCR*, 2000, para 12.

<sup>6</sup> Section 27 (2) of the Constitution of the Republic of South Africa, Act 108 of 1996.

health, these fourfold obligations are defined in General Comment No.14<sup>7</sup> and include the following: The obligation to respect the right, obliges the State to refrain from denying or limiting access to health care services to any one. These should be available to all on a non-discriminatory basis. The obligation to protect include, *inter alia*, adopting legislation and other measures to ensure equal access to health care facilities provided by third parties; to ensure that privatisation does not constitute a threat to the availability, acceptability and quality of services provided; and to control the marketing of medicines by third parties. The obligation to promote requires the State to disseminate appropriate information; foster research and support people to make informed choices. The obligation to fulfil requires that the State facilitates and implements legislative and other measures in recognition of the right to health and adopts a national health policy with detailed plans on how to realise the right. The State is also obliged to provide the right for people in disaster situations or in dire need when an individual or group is unable, for reasons beyond their control, to realise that right themselves with the means at their disposal.<sup>8</sup>

Since 1994 there have been several court cases which have served to add to the normative content of the right to health care. These have thrown light on the concepts of "available resources" and "reasonable measures" in terms of section 27 (1) (b) of the Constitution. In the *Soobramoney* case<sup>9</sup> the Constitutional Court opined that the scarcity of resources available to the State were constraints to the enjoyment of the right by the appellants, given the socio-historical context of South Africa. In the *Grootboom* case,<sup>10</sup> the Constitutional Court defined the parameters of what constitutes "reasonable measures". In addition to these, it concluded that measures that do not include meeting the needs of the most vulnerable groups in society, were unreasonable. Furthermore, it was stated that implementation plans that failed to be "reasonable" would not meet the State's obligations in terms of section 7(2) of the Constitution. Another important case dealt with the prevention of mother to child transmission of HIV in which the Treatment Action Campaign (TAC) requested that the anti-retroviral drug, Nevirapine be made available to all HIV positive pregnant women in the public health sector. In this case the Constitutional Court upheld the High Court order to make Nevirapine available to all HIV positive pregnant women.<sup>11</sup> This judgement is of great significance given the high prevalence of HIV/AIDS in the country and the growing number of AIDS orphans.

The objective of this chapter is to critically assess whether the measures taken by organs of State comply with constitutional obligations with respect to health care as outlined above. Responses to the SAHRC's protocols will be analysed and assessed. Where the information supplied by organs of state, is incomplete, it will be augmented

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<sup>7</sup> Katarina Tomasevski, "Health Rights" in Asbjorn Eide, Catarina Krause and Allan Rosas (eds.), in *Economic, Social and Cultural Rights: A Textbook*. Dordrecht, Kluwer Academic Press, 1995. p.125. See also Christof Heyns and Gina Bekker, Christof Heyns and Gina Bekker, "Introduction to the Rights Concerning Health Care in the South African Constitution," in Gina Bekker (ed.), *A Compilation of Essential Documents on the Right to Health*, Economic and Social Rights Series, Vol 4, Centre for Human Rights, 2000, p. 14-17.

<sup>8</sup> *General Comment No. 14* of UN Committee of ESCR, 2000, para 34-37.

<sup>9</sup> See *Soobramoney v Minister of Health, Kwa-Zulu Natal*, 1997 (12) BCLR 1696 (CC).

<sup>10</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC)

<sup>11</sup> See Chapter 1 of this Report for a discussion of the *Grootboom* and *TAC* cases.

by information gathered from other reliable sources, such as academic institutions to facilitate an informed assessment.

The first part of this chapter endeavours to capture the responses from National and Provincial departments of Health. The second part is devoted to a critique of the measures instituted by organs of State, followed by recommendations to expedite access to the right to health care.

## **2. POLICIES, PROGRAMMES AND PROJECTS**

Organs of state were requested to list and describe the policies, programmes and projects instituted during this reporting period and to outline how they respect, protect, promote and fulfil the right to health care. Responses from National Department of Health<sup>12</sup>(NDH) and the provincial departments are summarised below. Information gathered through independent research has been included to give a more comprehensive picture of instituted measures.

### **National Sphere**

The National Department of Health (NDH) instituted the National Telemedicine Policy, the HIV/AIDS Strategic Plan for South Africa 2000-2005 and the National Policy on Quality of Care during 2000/2001. Policies, programmes and project are discussed below.<sup>13</sup>

#### *The National Telemedicine Policy*

The objective of this policy is to deliver health care and tele-education at a distance to health care workers in rural areas by connecting them to health centres which can provide these services. An amalgamation of medical schools provide a cost-effective service which include training and education of health care providers in remote areas. The system facilitates recruitment and retention of health care providers in rural communities. Images can be sent from the referring site to the provincial receiving site or the centre of excellence, which provides medical consultations. The consultations can be interactive and provide immediate advise to rural centres.

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<sup>12</sup> The NDH is responsible for formulating national legislation, policy, guidelines and setting norms and standards. Implementation and delivery of public health care services are the responsibility of the nine provinces and local authorities. They may also formulate programmes and projects of their own to implement policy.

<sup>13</sup> The NDH failed to report the HIV/AIDS Strategic Plan, the Human Genetics Policy and the Health Research Policy for South Africa. In addition, some of the titles of policies and programmes were inaccurate. e.g. the National Policy of Quality of Care. Additional information was obtained from the NDH's Annual Rreport and also its website.

*Annual Report 2000*, Pretoria, Department of Health, 201. [http://www.196.36.153/Department\\_of\\_Health/norms/contents.html](http://www.196.36.153/Department_of_Health/norms/contents.html) Accessed April 11, 2002

### *HIV/AIDS Strategic Plan for South Africa 2000-2005*

The objective of the HIV/Strategic Plan is to reduce the number of new HIV infections and its impact on individuals, families and communities. Priority areas are prevention, treatment, care, human rights, monitoring and evaluation. The following programmes have been developed to prevent the spread of AIDS: Sexually Transmitted Diseases (STD) Management, Reducing Mother to Child Transmission (MTCT), Post-Exposure Prophylaxis (PEP), and Voluntary Testing and Counselling (VCT).

#### *Sexually Transmitted Diseases Management*

Interventions are clustered into various categories where programmes/projects may be developed around one or more policies, which have common goals. One of these interventions is the syndromic management of HIV/AIDS/STIs and TB, which is an opportunistic infection commonly found in people living with AIDS (PLWA). The objective is to train health workers to diagnose and to treat a given set of symptoms effectively. Health workers also contact sexual partners and provide counselling and education.

#### *Reducing Mother to Child Transmission*

MTCT is a pilot project designed to provide anti-retroviral drugs (ARVs) and breast milk substitutes (formula milk) to HIV-positive pregnant women in the public health sector in order to reduce the risk of transmitting the virus to the newborn child. Two pilot sites in each province have been established.

#### *Voluntary Testing and Counselling*

The VCT programme provides for confidential testing and counselling at public health facilities to ascertain a person's HIV status. The programme will enable patients to know their HIV status and make informed choices after counselling. The programme requires trained personnel and funding for rapid AIDS testing. It also requires a separate space which will ensure privacy and respect for the patient's right to confidentiality.

#### *Post- Exposure Prophylaxis*

The PEP programme is designed to provide ARVs to health workers who accidentally become infected with HIV in the workplace. This programme has now been extended to include all rape victims who can obtain ARVs free of charge at state hospitals.

#### *Home and Community Based Care*

Another intervention is the management and care of PLWA, AIDS orphans, as well as people living with physical or mental disabilities. Home based and community based care, programmes provide palliative care in the home or at the community level. These programmes require special training for health workers who visit patients in their homes and provide appropriate care which will result in the reduction of the



number of hospital beds occupied by chronic care patients for long periods of time and also in a reduction of hospital costs.

#### *Life Skills Programme*

This is a prevention programmes which includes the distributing of information and condoms at no cost to target groups who are most at risk of contracting AIDS. The Life Skills Programmes, which was introduced into the outcomes based curricula in schools, educates school children around issues surrounding AIDS and how to deal with them.

#### *Psycho-social Rehabilitation of the Mentally Disabled*

The programme for the psycho-social rehabilitation of mentally disabled persons is designed to de-institutionalise patients from psychiatric hospitals and to encourage community and home- based care as discussed above.

#### *National Policy on Quality of Care*

The NDH has developed a comprehensive set of guidelines to standardise the quality of primary health care delivery across all the provinces.<sup>14</sup>

#### *Cervical Screening for Cancer (CS)*

This programme is designed to reduce the high number of death from cervical cancer in women. Cervical cancer is one of the leading causes of death in women and can be treated if diagnosed early. Regular screening serves to detect early onset which can then be treated.

#### *Maternal Death Notification (MDN)*

The latter is designed to record all causes of maternal deaths in order to reduce the mortality rate and also for statistical purposes so as to improve monitoring.

#### *The Human Genetics Policy*

This policy is aimed at testing and counselling couples with genetic disorders, in order to reduce the incidence of birth defects. It is also aims at ameliorating the psychosocial and fiscal impact on the individual, the family and society in general. The objective is to provide a national, PHC-based, medical genetic service for the diagnosis, management and prevention of genetic disorders and birth defects. The target population are women of reproductive age, individuals and families at high risk for genetic disorders and birth defects.<sup>15</sup>

#### *Health Research Policy in South Africa*

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<sup>14</sup> <http://www.Department of Health.gov.za/docs/policy/norms/contents.html> Accessed February 19, 2002.

<sup>15</sup> <http://www.Department of Health.gov.za/docs/policy/humangenetics.pdf>

This policy articulates the development of a national health research system which will contribute to equitable health development and promote innovation in service delivery. The objective is to advance knowledge that promotes quality health care through creating a national framework for research that would improve quality, impact, effectiveness and efficiency of the research.<sup>16</sup>

The table below summarises key policies/programmes/projects and their beneficiaries reported by the NDH.<sup>17</sup>

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<sup>16</sup> <http://www.Department of Health.gov.za/docs/policy/healthresearch-2001.pdf>

<sup>17</sup> Note that some of these programmes and projects were instituted previously and are on-going.

**Table 1 A summary of policies, programmes and projects instituted by the NDH**

<b>Policy on which programme/project is based</b>	<b>Programme/Project</b>	<b>Objectives</b>	<b>Beneficiaries</b>	<b>Achievements</b>
HIV/AIDS	Prevention of Mother to Child Transmission (MTCT)	Reduce transmission of HIV from HIV positive mothers to new-borns	Babies of HIV-positive mothers	18 pilot sites established in four provinces
	Post-Exposure Prophylaxis (PEP)	Provide ARVs to rape victims	Victims of rape	–
	Voluntary Counselling & Testing (VCT)	Increase awareness of HIV status	Members of the public	Pilot sites provide VCT
	AIDS/DOTS	Combat AIDS related TB	HIV positive people with TB	All patients
	Beyond Awareness Campaign	Promote awareness and support prevention, HIV/AIDS	Youth and the public	250 million free condoms were distributed
	Home-based care	Move chronic care to families and communities	AIDS sufferers and orphans, elderly and mental health users	Staff trained to deliver home-based care
Stopping Violence against women & children	Victim Empowerment Programme	Reduce morbidity and mortality	Women and children, victims of rape	National guidelines on management of victims of violence being reviewed
Mental Health Policy	Deinstitutionalisation Rehabilitation	Move patients to community and home based care, treatment and rehabilitation	Mental health users	Increased number of beds available in hospitals
National Policy on Quality Care	Training of health workers to provide quality care	Improve standards of delivery at PHC	General public	Guidelines for all sectors established
Women's health and Reproductive Care	Screening for cervical cancer	To increase access screening services	Women	Pilot sites were set up in Gauteng Limpopo and the Western Cape
	Maternity Care	Decrease mortality	Pregnant women	
	Maternal Death Notification (MDN)	To establish reliable databases for monitoring maternal deaths		
National Strategy on Elder Abuse	Campaign held in 2001 & 2002	Raise awareness around abuse	Elder persons	1000 elders reached

Note: The dash (-) in all the tables denotes that the information requested was not provided.

## Provincial Sphere

The provincial departments of Health reported similar policies and programmatic measures to those instituted by the NDH. A summary of these is provided in table 2 below. In addition to these, the Western Cape Department of Health (WC Department of Health) reported the *Kangaroo Mother Care Policy (KMC)*<sup>18</sup> instituted in 2001. This was described as an intervention for low birth weight infants (LBW) which consists of four components- the kangaroo position, nutrition, support and discharge. This policy has proved to be a safe, effective, and affordable method for caring for LBW infants.

**Table 2** A summary of programmes/projects reported by provincial departments of health<sup>19</sup>

Programme/project	Beneficiaries	Provinces which instituted programmes/projects
MTCT	Babies born to HIV positive women	Free State, Gauteng, Limpopo, North West, Western Cape
Voluntary Testing and Counselling	General Population	Free State, Limpopo, Western Cape
Post Exposure Prophylaxis	Survivors of rape and needle stick injuries	Free State, Western Cape
Home Based Care	Mental health clients, the elderly, the terminally ill, PLWAs and orphans	Eastern Cape, Free State, Limpopo, KwaZulu-Natal, North West, Northern Cape, Western Cape
Life Skills, Contraception	School children/Youth	Free State
Maternal Deaths Notification Register	Improved records to monitor and record causes of maternal deaths	Eastern Cape, Free State, Gauteng, North West, Northern Cape, Western Cape
Cervical Cancer Screening	Women	Free State, Gauteng
Stopping violence against women & children	Women, sexual assault victims, rape survivors	Gauteng, North West, Northern Cape
Training of nurses on Genetic Disorders-Haemophilia, Albinism	Patients	Free State

<sup>18</sup> Independent research shows that this programme has been successfully adopted by other provinces but none of them reported it.

<sup>19</sup> Some of these programmes/projects were developed on policies instituted before this reporting period and are ongoing at the time of writing. The responses did not supply information on how these policies catered for specific vulnerable groups.

### 3. LEGISLATIVE MEASURES

Certain sections of the National Health Laboratory Services Act<sup>20</sup>, Act 37 of 2000 came into operation in 2001. The Act provides for the establishment of a juristic person to be known as the National Health Laboratory Service. The Act will introduce a significant change to the way laboratory services are provided in the public sector. It creates a new service, as an autonomous body, bringing together the staff and assets of the South African Institute for Medical Research (SAIMR), the National Institute for Virology, the National Centre for Occupational Health, the forensic chemistry laboratories owned by the State (with the exception of those operated by the police and military) and all provincial health laboratories. A national laboratory service will regulate and standardise services.<sup>21</sup>

Since March 2000 two draft bills were tabled before Parliament for discussion providing a broad framework of the government's strategy on health. The National Health Bill and the Mental Health Bill.

#### *The National Health Bill (2001)*

The National Health Bill is a national framework legislation for the delivery of health care by creating closer cooperation between the three spheres of government. It is designed to improve access to health care facilities, improve quality of care by building capacity of health professionals. In the preamble, it is stated that the proposed law is pursuant to section 27(1) of the Constitution which provides for everyone to have access to health care services, including reproductive rights. The objective of the national framework legislation is to establish a national health system which encompasses public, private and non-governmental providers of health services; provides the population of the Republic with the best possible health services that available resources can afford and to set out the rights and duties of both health care providers and users.

Section 7 of the Bill provides that the Minister or the relevant MEC responsible for health, may prescribe that a private or public health establishment shall not deny any person seeking emergency medical treatment if such an establishment is open and able to provide such services. "Emergency treatment" is defined in the Bill as "treatment which is needed to treat a life-threatening but reversible deterioration in person's health status and it continues to be emergency treatment until the condition of the person has stabilised or has been reversed to a particular extent."

#### *The Mental Health Care Act (2002)*<sup>22</sup>

The main purpose of the Act is to regulate, integrate, co-ordinate access to mental health care, treatment and rehabilitation services on a non-discriminatory basis. It also proposes to integrate mental health into Primary Health Care. Other areas of focus are the development of community, district and regional mental health services; de-institutionalization from psychiatric hospitals through the development of

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<sup>21</sup> *South African Year Book 2001/02*. Pretoria, Government Communication and Information System, 2001. p. 329.

<sup>22</sup> The Mental Health Care Act No. 17 of 2002.

community support services (group homes; day programmes; rehabilitation groups and home based care).

The Act entitles mental health care users to legal representation and to be informed of his/her rights. It further provides, that a prisoner, who after an investigation by prison authorities, is considered mentally unfit may be transferred to a mental health institution on recommendation of a health practitioner. He or she may be released after the expiry of the term of imprisonment.

### **Provincial sphere<sup>23</sup>**

#### Eastern Cape

The Eastern Cape Provincial Health Act (Act 10 of 1999) was assented to on 24 January 2000. The objectives of the Act included the restructuring and provision for the implementation of Eastern Cape health service delivery in accordance with national and provincial health policies and procedures. It aims to provide for the management of a comprehensive provincial and district health system. The provincial health policy emphasises consultation and community participation. Consultation and co-operation between spheres of government (national, provincial and local) are the cornerstones of co-operative governance. Accordingly, provision is made for the relevant Member of the Executive Council (MEC) to consult with municipalities to coordinate service delivery.

#### Free State

The Free State Provincial Health Act (Act 8 of 1998) was assented to by the Premier on 15 February 2000. The Act lists the functions of the provincial sphere of government, which include the coordination of funding, financial management, technical and logistical support of District Health Authorities. However, the province is still responsible for rendering comprehensive primary health care services and community hospital services. All three governance options (provincial, local, statutory) expected to be included in the National Health Bill are provided for, with the functions of District Health Authorities (DHAs) being those determined by the Provincial Health Authority (PHA) and the MEC.

#### Gauteng

The Gauteng District Health System Act was passed during 2000 and the draft regulations developed. These provide for the delivery of primary health care services through a district system in the province, by creating a Provincial Health Authority as well as statutory District Health Authorities. However, the exact relationship between the DHAs and local government was not clearly stipulated and but makes provision for a framework for a phased approach of service delegations to Local Government; development of an Interim Memorandum of Agreement with the City of

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<sup>23</sup> The following provinces reported that no new legislation had been passed during the reporting period: EC, FP, LP, NW, MP and the NC and they failed to provide information on constitutional obligations, vulnerable groups and implementation difficulties.

Johannesburg; functional integration of services; and the adoption of the PHC package of services.

#### KwaZulu-Natal

The most recently passed provincial Health Act was that emanating from the KwaZulu-Natal legislature in mid August 2000, after an initial delay in June. The objectives of the Act include to "structure and provide for the implementation of the district health system". In addition, the Act seeks to establish an integrated provincial health care network and health service delivery in accordance with provincial health policy. As the Act is the most recent to have been finalised, it does take into account the new local government demarcations resulting from the work of the Municipal Demarcation Board and indicates matters to be prescribed by Regulation.

#### Mpumalanga

The Mpumalanga Health Facilities and Services Bill of 2000 seeks to provide for the establishment, maintenance and management of health facilities and services and for nursing and emergency health services colleges in the province.

#### Northern Cape

The Northern Cape Nursing Education Bill will provide for the provision of nursing education, the establishment, maintenance and control of nursing colleges for the education and training of nurses and midwives. More expansive is the ambit of the Northern Cape Health Bill: this will consolidate the laws relating to health services facilities, and provide for the establishment, maintenance, organisation and management of health services and establishments in the province.

#### Northern Province

Regulations in terms of the Northern Province Health Services Act 5 of 1998 have been published for comment. These regulations deal with the following: the demarcation and variation of new health district boundaries; the naming and variation of health districts and facilities; appeals against these procedures; the abolition of the health facility board; membership of the district hospital board, the regional hospital board, the provincial tertiary hospital board and of District Health Authorities; and the establishment of a Provincial Consultative Health Forum.

#### North West Province

The Provincial Health Bill has been published for public comment and the Bill has provisions relating, to the following: the establishment of the Provincial Health Consultative Forum; the empowerment of the MEC to demarcate districts and the establishment of District Health Authorities; public-private partnerships; and the establishment of a Provincial Health Information Committee and a Provincial Health Research Committee.

Anticipated legislation includes amendments to the North West Health and Development and Social Welfare Hospital Governance Act. The amendments are

directed towards the separation of governance structures relating to health institutions from institutions relating to welfare. Furthermore, provision will also be made for elected representatives at local level to form a simple majority in forums and Health District Committees and will also permit hospital managers to be part of the governance structure.

#### Western Cape

The Western Cape Health Facility Boards Act 7 of 2001 provides for the establishment, functions, powers and procedures of private health facilities. The Act enables the inclusion of community organizations on the Boards. This means that communities can now participate in the running of health care institutions and influence the quality of care they receive.

### 4. BUDGETARY MEASURES

#### National Sphere

The national department did not provide any information on budgetary allocations which was the case for the two previous Economic and Social Rights reports. Figures obtained from the National Department of Health's Annual Report are summarised in the table below:

**Table 3 National allocations for the Department of Health**

Year	Total Revenue in Rands	Total Allocation in Rands	Total Expenditure in Rands	Under-expenditure in Rands
2000/2001	6 773 823 000	6 765 145 000	6 666 810 000	107 013 000
2001/2002	-	-	-	-

The under-expenditure of R107 013 000 was not accounted for.

According to figures published by the National Treasury<sup>24</sup> the total expenditure estimates for the National Department of Health are as follows:

#### *AIDS Prevention*

The total allocation for 2001/2002 was R243 081 000, and the actual expenditure was R245 417 037. There was an over-expenditure of R2 336 037, the NDH gave no reasons for this.

#### *AIDS Treatment*

The total allocation for HIV/AIDS treatment for 2001/2002 was R17 858 000 of which the actual expenditure was R10 450 248. An unspent amount of R7 397 752 was not accounted for.

<sup>24</sup> *Estimates of National Expenditure 2002*, National Treasury of the Republic of South Africa, p 349.



**Table 4 Total revenue and allocations**

Province	Year	Amount received from other sources in Rands	Total allocation in Rands	Allocation as a % of GGP in Rands	Per capita allocation after inflation adjustment in Rands	Actual Expenditures in Rands
Eastern Cape	2000/2001	30 433 000	-	-	583	3 650 636
	2001/2002	29 395 000	-	-	720	3 892 198
Free State	2000/2001	48 667 223	1 833 067 000	0.020	-	1 777 203 000
	2001/2002	67 058 519	1 970 476 000	0.020	721.75	2 035 536 068
Gauteng	2000/2001	5 562 252 000	5 562 252 000	2	786	5 942 208 000
	2001/2002	6 771 374 000	6 771 374 000	3	868	6 805 610 000
KwaZulu-Natal	2000/2001	110 010 000	5 832 108 000	-	593.47	5 775 995 000
	2001/2002	118 226 000	6 743 749 000	-	691.44	7 032 951 000
Limpopo	2000/2001	2 368 169	2 368 169	6.28	450.36	2 565 894
	2001/2002	2 634 907	2 634 907	6.62	470.49	2 674 094
North West	2000/2001	-	1 576 29 000	-	-	1 561 485 000
	2001/2002	-	1 734 817 000	-	-	1 698 928 000
Western Cape	2000/2001	98 781 000	3 391 224 000	-	-	3 366 689

#### *Variance, Adequacy and Remedies*

The Eastern Cape reported the under-spending of R328 468 890 due to lack of capacity to spend in areas such as infrastructure and equipment. This figure cannot be reconciled with the figures provided. No annual breakdown was provided. The budget was reported to be inadequate resulting in curtailment of services and deterioration of infrastructure. More efficient management of funds had been introduced to address these problems.

The Free State did not account for variances in its budget and claimed that it was inadequate even though it under-spent for 2000/2001. The issue of under-spending and its impact on service delivery were not addressed. The department considered over-spending by less than 2 percent for 2001/2002 to be a small deviation. To address budgetary problems the department intended improving control measures and realigning the budget.

The Gauteng Department of Health reported that inflation adjustments, additional allocations for capital expenditure and HIV/AIDs accounted for variances. The budget was inadequate and referred to the appropriate authorities

The KwaZulu Department of Health reported that variances were due largely to personnel budgets which could not be effectively managed at the district level. In 2000/2001, the department overspent its budget by some R158 million. In 2001/2002, an over-expenditure of R289 202 000 was reported to be mainly due to the cholera outbreak in KwaZulu-Natal.

The department also reported that the budget was inadequate since the weaker Rand resulted in increased costs of fuel, imported medicines and equipment. In order to address budget inadequacy enforced saving took place at all levels, with intended expansion of PHC services being limited to the absolute essentials.

The Limpopo Department of Health reported a negative variance for R220 178 000 for 2000/2001 due to insufficient funding. This was a result of the increased costs of additional infrastructure, purchase of medicines, and appointment of personnel and also for debts which had to be settled from the previous year. The budget had not been adequate for the past four years and the department experienced over-spending.

The Western Cape Department of Health reported that under-spending in the 2000/2001 financial year was mainly due to claims received after 31 March 2001 which were paid in the following financial year.

The Eastern Cape, Limpopo, and the Northern Cape Departments of Health gave no budgets for PHC. The Mpumalanga Department of Health gave irrelevant figures. The Gauteng Department of Health and the Western Cape Departments of Health provided figures but no other information.

**Table 5 Provincial budgets for Primary Health Care**

Province	Year	Total allocation in Rands	Allocation as % of total revenue in Rands	Per capita allocation after inflation adjustment in Rands	Actual expenditure in Rands
Free State	2000/2001	657 030 000	-	-	183 753 490
	2001/2002	700 123 000	-	-	763 712 317
Gauteng	2000/2001	1 410 217 000	24	181	1 458 755 000
	2001/2002	1 513 249 000	22	194	1 582 598 000
KwaZulu-Natal	2000/2001	2 750 031 000	-	-	2 892 473 000
	2001/2002	3 244 479 000	-	-	3 487 391 000
North West	2000/2001	920 571 000	59	-	951 739 000
	2001/2002	989 947 000	57	-	989 945 000
Western Cape	2000/2001	870 789 000	-	-	874 256 000
	2001/2002	939 774 000	-	-	-

*Variance, Adequacy and Remedies*

The Free State Department of Health reported that the budget allocation has increased annually. Some of the reasons for the increase include, improvement in the provision of new services such as Health Promotion and the Occupational Health Unit. The department reported that the budget was adequate.

The KwaZulu-Natal Department of Health reported that in 2000/2001 an over-expenditure of R142 442 000 was mainly due to rank upgrading, the re-introduction of personal profiles, which were suspended from 1997/1998, as well as the cholera epidemic. In 2001/2002 a shortfall of R242 912 000 was mainly due to the cholera epidemic, and inflation related to foreign exchange rates resulting in increased costs of medicines and fuels.

The North West Department of Health reported variances for 2000/2001, which were due to an increased demand for drugs for the treatment of AIDS and related illnesses. Under-expenditure in 2001/2002 was due to late submission of invoices by suppliers. The department considered the budget inadequate for PHC which is not calculated according to needs. The department had to reprioritise services to fit into the available resources and reported no negative impact on the realisation of the right to health.

The following tables summarise provincial AIDS budgets

**Table 6 Prevention of HIV/AIDS**

Province	Year	Total allocation in Rands	Per capita allocation in after inflation in Rands	Projected expenditure in Rands	Actual expenditure in Rands
Free State	2000/2001	4 810 412	-	-	3 107 336
	2001/2002	4 455 783	-	-	-
Gauteng	2000/2001	12 881 000	-	-	-
	2001/2002	15 533 000	-	-	-
KwaZulu Natal	2000/2001	-	3 437 9	34 437 9	30 403 000
	2001/2002	-	52 576 728	52 576 728	49 363 497
Limpopo	2000/2001	6 900 000	-	-	3 452 814
	2001/2002	8 013 000	-	-	5 664 456
North West	2000/2001	2 006 000	-	2 006 000	2 006 057
	2001/2002	4 641 000	-	4 641 000	2006 000
Western Cape	2000/2001	7 300000	-	-	-
	2001/2002	14 825000	-	-	-

*Variance, Adequacy and Remedies*

**Provincial Sphere**

The Eastern Cape and Northern Cape Departments of Health did not provide any information. The Gauteng Department of Health reported that there was no dedicated

budget for the prevention of AIDS which is included in the total Public Health Directorate budget.

The Free State Department of Health reported that the budget increased every year. Conditional grants for HIV/ AIDS increased in line with implementation of various programmes such as the Home Based Care programme, MTCT pilot projects and others. The allocation for 2001/2002 includes VCT R3 455 783 and NGO transfers of R1 000 000 no inadequacies in the budget were reported. For the fiscal year 2000/2001 an under-expenditure of R1 703 078 was reported. The department gave the following reasons for this under-expenditure which include allocations for specific projects, late receipt of conditional grants, and in some cases, there were delays in processing funding.

The measures the department put in place to address under-spending included efficient management of programmes and projects. The budget provided was enough to realise the goals of the unit.

The KwaZulu-Natal Department of Health reported that in 2000/2001, an under-expenditure of R6 897 000 was mainly due to difficulty in finalising acceptable contracts/agreements on special projects. In 2001/2002, the under-expenditure of R6 928 503 was due mainly to difficulties in finalising contracts with lay counsellors.

The Limpopo Department of Health provided the following variances: for 2000/2001, there was an under-expenditure of R3 447 186. for 2001/2002, the variance was R1 642 115. The fund was stagnant for a long time due to delays in appointing managers for the HIV/AIDS/STIs and TB Programme.

The North West Department of Health does not have a specific budget for AIDS prevention except for a conditional grant for MTCT which was implemented in 2001/2002. Under-expenditures were due to delays in tender procedures and finalisation of NGO funding. The department reported that the budget was insufficient to cover needs, so a revision of targets and re-prioritisation of programmes and projects had to be made based on available resources. The impact of under-funding and under-spending resulted in delay of service delivery. It hoped that pre-planning and a revision of the procurement process would alleviate some of the problems related to under-spending.

The Western Cape Department of Health reported that the budget for AIDS was inadequate. To address this the department increased the total allocation in 2000/2001 from R7.3 million to R14 825 million in 2001/2002 and to R43 138 million in 2002/2003 in an attempt to prevent the disease from spreading. This allocation includes national conditional grant funding for VCT as well as home based care. Only the conditional grant funds were under-spent because of the late transferral of funds and delays in the approval of business plans. These funds have been rolled over to the next financial years. Under-spending resulted in optimal delivery of services being impeded. A lack of spending capacity by NGOs also hampered service delivery which might have compromised the right in some ways.

To address these problems the department improved the monthly reporting system as well as its cash flow projection mechanisms. The department also created specific

objective codes for some of the conditional grants, which will improve the monitoring of spending. This will improve the chances of the department being aware of possible over/under spending well in advance.

## 5. OUTCOMES AND INDICATORS

### National Sphere

The National Department of Health reported that much of the information requested was not available in the format required by the SAHRC. Much of the information requested was not provided even such important statistics such as the infant and maternal mortality rate and the general life expectancy. The following tables are a summary of the information provided. It must be noted that no breakdown for the two fiscal years was provided.

**Table 7 Public health care clinics**

	<b>Year</b>	<b>Number of Patients</b>
	2000	83 352 903 <sup>25</sup>
	2001	68 301 226 <sup>26</sup>

**Table 8 Public hospitals**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>
Patient/ doctor ratio	-	-	-
Patient/nurse ratio	-	-	-
Number of hospitals	376	143	233
Number of patients for the year (headcount)	3 901 350	1 599 554	2 301 797
Number of available beds	101 829	39 713	62 116
Average number of days in hospital stayed per patient	6.1%	5.3%	6.8%

The figures provided by the NDH do not indicate the patient/doctor ratio nor the patient/nurse ratio which are important indicators of the level of care received. The figures provided for the total number of patients per year using public hospitals seems low. A breakdown for the two fiscal years requested was not provided.

**Table 9 Private hospitals**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>
Patient/ doctor ratio	-	-	-
Patient/nurse ratio	-	-	-
Number of hospitals	238	188	50
Number of patients for the year (headcounts)	-	-	-
Number of available beds	31 937	27 775	4 162
Average number of days in hospital stayed per patient	6.6%	6.6%	6.6%

Information for private hospitals was not provided by the NDH This is especially disturbing since they are to be regulated by the NDH under the National Health Act.

<sup>25</sup> The NDH reported that data for Gauteng is from April 2000 – December 2000.

<sup>26</sup> The NDH reported that data for Gauteng is from Jan 2001 - March 2001.

**Table 10 Access to Health Care Clinics**

Distance	Total Number of Cl
(a) 5km radius	3 382 710
(b) greater than 5km radius	2 419 815

The NDH reported that the average distance to a clinic was 12.5 kms but no breakdown by province was reported nor access to clinics in rural areas.

**Table 11 Disease indicators**

		Total
Percentage of population with HIV/AIDS		-
Percentage of population with Tuberculosis		-
Percentage of population with STDs		64
Percentage of population with Hepatitis B		-
Incidence of population with Malaria		392/100 000
Incidence of population with water-borne diseases	Cholera Incidence	242/100 000 population
	Total Typhoid Fever Incidence	8 000 000

The incidence for malaria was based on the three provinces where malaria is endemic, which are KwaZulu-Natal, Mpumalanga and Limpopo. The numerator includes both active and passive cases. Malaria incidence for the whole RSA population is: 161/100 000.

The NDH reported that the only data available for water borne diseases is for cholera and typhoid fever, and this data is not broken down in terms of the demographics as requested.

**Table 12 Primary Health Care indicators**

	Total
Percentage Clinics with STDs Services every day	73.5 <sup>27</sup>
Percentage Clinics with Cervical Cancer Screening Service	15 144 <sup>28</sup>
Percentage Clinics with Family Planning Services	206 1955
Percentage Clinics with Antenatal Care Services	10 254 222

The figures provided by the NDH are not percentages of clinics that provide these services, except for clinics which provide STD services every day.

<sup>27</sup> The figure excludes Gauteng as they are currently using the old version of the software.

<sup>28</sup> Only Gauteng province collects data on cervical smear. As they are currently using the old version of the software the figure cannot be calculated. The total reflected is the number of smears for the period April 2000 – March 2001.

## Provincial Sphere

**Table 13** Number of public health care personnel

Type of Personnel	EC Total	FS Total	GP Total	KZN Total	LP Total	MP Total	NC Total	NW Total	WC Total
Nurses & midwives	14 796	5 499	18 141	23 091	10 781	45 000	1 737	3 550	8 289
Doctors	709	427	2 198	1 290	586	375	221	254	870
Specialists	220	119	1 708	294	39	16	15	27	910
Dentists	55	-	241	72	36	43	13	37	63
Pharmacists	116	58	341	326	128	42	25	57	173
Other Allied Medical Personnel	586		1384 <sup>29</sup>	700	398	95	82	221	98
Ambulance Drivers	851	599		1 514	-	490	217	222	-

The figure for Gauteng includes nurses, matrons and midwives. Matrons are now known as Chief Professional Nurses (CPNs) and ambulance drivers are included in category of allied medical personnel.

**Table 14** Public Health Care Personnel: Provinces showing urban/rural breakdown

Type of Personnel	KZN Urban	KZN Rural	LP Urban	LP Rural	NW Urban	NW Rural	WC Urban	WC Rural
Nurses (includes midwives)	17 644	5 437	1 454	9 327	1 823	1 727	6 779	1 510
Matrons	85	58			25	12	1,960	626
Doctors	1 143	147	151	435	162	92	727	143
Specialists	288	6	38	1	27	0	883	27
Dentists	56	16	10	26	17	20	43	20
Pharmacists	285	41	33	95	35	22	173	56
Allied Medical personnel	615	85	103	295	113	108	1 234	98
Ambulance drivers	1 403	111			86	136		

The Eastern Cape, Free State, Gauteng, Mpumalanga and the Northern Cape did not provide a breakdown of urban and rural figures.

<sup>29</sup> This figure includes ambulance drivers

**Table 15 Private health care personnel**

Type of Personnel	Eastern Cape Total	Free State Total	Western Cape Total	Western Cape Urban	Western Cape Rural
Nurses	1 545	892	2275	2067	208
Matrons	12	33	70	60	10
Midwives		-	104	84	20
Doctors	-	14	-	-	-
Specialists	-	120	-	-	-
Dentists	-	3	-	-	-
Pharmacists	26	15	86	71	15
Allied medical personnel	-	84	31	21	10
Ambulance drivers	-	4	116	98	18

EC reported that the data was collected from 7 out of 27 private facilities. The NDH, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape and the North West provincial departments of Health reported that they were not responsible for collecting statistics.

**Table 16 Access to health care clinics**

	Eastern Cape	Gauteng	KwaZulu-Natal	Limpopo	Mpumalanga	North West	Western Cape
Patient/doctor ratio	-	-	-	-	-	-	57 598
Patient nurse ratio	-	-	-	-	-	-	15 561
Number of Clinics per 1000 population	716	0.6	-	43	359	1	-
Number of Patients for the year 2000/2001	4.6 mil <sup>30</sup>	10.2 mil	28.9 mil	1.8 mil	5.1 mil	17.1mil	11.9 mil
Number of PHC patient visit per capita	-	-	-	-	-	-	36
Number of available beds	-	16 744	-	8 939	-	1 358	-

The Northern Cape and the Free State Department of Health provided no information.

<sup>30</sup> Note that mil denotes million as in R1 000 000



**Table 17 Public hospitals**

	Eastern Cape	Free State	Gauteng	KwaZulu-Natal	Limpopo	Mpumalanga	North West	Western Cape
Patients/Doctor ratio	7 830:1. 666 in-patients:1	-	950;1	-	-	302;1	7686:1	-
Patients per nurse	66 in-patients: 1	-	-	-	-	-	550:1	-
No. of Hospitals	98	31	32	60	43	24	32	58
No. of Patients for the year	In-patients 1 379 526 Out-patients 396 103	205 000	3.8 mil	9.5 mil	1.8 mil	1.2 mil	1.9 mil	3.1 <sup>31</sup> mil
Available beds	19 953	5 492	16 744	22 563	8 939	2 226	7 701	10 400
Average No. of days in hospital per patient	District hospitals: 6 Regional hospitals: 7 Specialised hospitals: 55	4.5	6	6.3	7	-		7.2

The Northern Cape failed to provide any information.

**Table 18 Access to health care clinics**

	Eastern Cape	Limpopo
Average distance to PHC clinics	11	20
% of persons who reside Within 5kms radius	75	-
Greater than 5kms radius	22	-
Greater than 25kms radius	3	-
Greater than 50kms radius	-	-

The other provinces provided no statistics and indicated that mobile clinics provide services to remote areas. None of the provinces provided information on access to hospitals.

<sup>31</sup> April 2000 to March 2001

**Table 19 Disease indicators**

	EC	FS	KZN	LP	MP	NC	NW
	Total	Total	Total	Total	Total	Total	Total
Percentage of population with HIV/AIDS	-	-	-	13	40	11	23 <sup>32</sup>
Percentage of population with Tuberculosis	0.4	0.49	0.4	0.12	-	1.2	0.34
Percentage of population with STDs	15	6.	3.8	5	-	3	10
Percentage of population with Hepatitis B	-	0.0008		0.003	-	0.005	30 cases
Incidence of population with Malaria	-	0.0034	0.34	0.22	18	0.6	0.03
Incidence of population with water-borne diseases e.g. cholera, typhoid etc.	-	0.7	0.81	-	-	0	-

No breakdown of figures for urban, rural, and females was provided. Gauteng did not provide any figures at all while the Eastern Cape, Free State and Kwa-Zulu Natal failed to provide figures for HIV/AIDS in spite of the fact that antenatal surveys are established in all the provinces especially in Kwa-Zulu Natal which has one of the highest incidence of AIDS in the country.

**Table 20 Primary Health Care indicators**

	EC	FS	LO	NW	NC	WC
% of clinics with TB services every day	85	86	100	79	100	-
% of clinics with STD services every day	91	100	100	100	100	-
% of clinics with cervical cancer screening services	49	71	6	90	-	-
% of clinics with family planning services	97	100	100	60	100	100
% of clinics with antenatal care services	80	100	100	80	100	100
% of clinics where condoms are freely available	85	100	100	100	100	100

In view of the fact that some of the provinces did not respond, while others failed to provide figures for the outcomes of PHC package is unacceptable, given that delivery of quality care is a priority of government.

**Table 21 General Indicators**

	EC	FS	NC
Infant Mortality Rate per 1000 live births	62	12 (1,2%)	5.8
Maternal Mortality Rate per 100, 000 live births	135	100 (0,1%)	1,4
Life Expectancy (years)	60,7	56,1	-

No urban/rural and "racial" breakdown was provided as requested. Some of the provinces reported that such data is not kept. Most of the provinces did not provide any information at all. This is difficult to understand since they reported that recording notification of maternal mortality as one of the programmes which has been implemented. The figures for life expectancy should easily be available to the NDH and to the provinces.

<sup>32</sup> The percentage of the population testing positive for HIV is extrapolated from antenatal surveys of pregnant women.

## 6. NATIONAL ACTION PLAN (NAP)

### National Sphere

**Table 22 Public Clinics**

	<b>Total</b>
Number and % of clinics reporting	4 497 & 95%
Number and % of population without a medical clinic within a 5km	1041514
Number and % of clinics with inadequate supply of medication	-

**Table 23 Public hospitals**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>
Number of hospitals	376	143	233
Bed occupancy rate	65%	58%	69%
Number and % of overcrowded hospitals	31/8%	10/7%	21/9%

**Table 24 Private hospitals**

	<b>Total</b>	<b>Urban</b>	<b>Urban %</b>	<b>Rural</b>	<b>Rural %</b>
Number and % of hospitals	238	188	79%	50	21%
Bed occupancy rate	40%	39%	-	46%	-

### Provincial Sphere

**Table 25 Public clinics**

	<b>Free State*</b>	<b>North West</b>	<b>Northern Cape</b>	<b>Western Cape</b>
Number	330	344	140	519
Number of clinics with inadequate supply of medication for patients	0	0	-	-
Number of clinics with inadequate staff provision	73*	-	-	-
Number of the population without a medical clinic within a 5 km radius	-	-	-	-
Number of overcrowded clinics	68	0	-	-
Number of population denied access to medical services because of fees	0	0	0	-

\*The FS reported that some facilities did not provide data.

**Table 26 Public hospitals**

	Eastern Cape	Free State	Gauteng	KwaZulu-Natal	Western Cape
Number and % Hospitals	98 of which 66% are urban & 33% rural	31	32	60	58/100 of which 22 (38%) are urban and 36 (62%) are rural
Bed Occupancy Rate %	District hospitals: 6 Regional hosp: 90 Specialised hosp: 90	54.8	89	68	80
Number and % hosp with inadequate supply medicine	Unknown	Nil	-	Nil	-
Number and % hosp with inadequate staff provision	-	Nil	-	-	-
Number and % hosp with inadequate supply beds	Nil	Nil	-	Nil	-
Number and % hosp with inadequate supply linen	Unknown	Nil	4%	-	-
Number and % hosp with inadequate supply clothes for patients	Unknown	Nil	-	-	-
Number & % of over crowded Hospitals	-	-	-	-	-

The Eastern Cape reported that hospitals in the Kokstad, Umtata and PE area short staffed while those in the East London area generally have sufficient or excess staff.

## 7. CRITIQUE

### National Sphere

The information provided by the NDH lacked clarity, accuracy and was incomplete. Descriptions of policies were either very brief or omitted. The NDH failed to mention a major policy developed by the Department: the HIV/AIDS/STD Strategic Plan for South Africa 2000-2005. It also failed to mention policies developed in 2001/2002 which were identified through independent research. Furthermore, the NDH's failed to distinguish policies from programmes or projects.

The NDH erroneously reported the launch of the Primary Health Care Package which had occurred in 1996. Independent research shows that a comprehensive set of norms and standards for improved quality of delivery standards was developed, namely, the Standard Package of Primary Health Care Services. A comprehensive list of guidelines to promote quality care, for both public health clinics and for community based initiated services was distributed.<sup>33</sup> These guidelines do not constitute new

<sup>33</sup> See the NDH's website, [http://196.36.153/Department of Health/policy/norms/contents.html](http://196.36.153/Department%20of%20Health/policy/norms/contents.html). Accessed April 11, 2002.

policies or programmes as reported by the NDH and many of the provinces, but are in keeping with the NDH's strategic five-year goal of improving service delivery.

The information provided did not include a comprehensive account of the outcomes and achievements of the measures instituted. Similarly, the information provided on budgets and indicators suffered the same poor treatment.

### **Provincial Sphere**

The North West Department of Health must be commended for its comprehensive coverage of policies and for providing a description of each. The Western Cape Department of Health's report was more comprehensive than the other provinces. Many of the policies and programmes reported were consistent with national policies on improved service delivery and care.

The Eastern Cape, Northern Cape, Mpumalanga and Kwa-Zulu Natal Departments of Health provided no information on policy and programmatic measures while the other provinces provided only cursory information. Many of the departments did not state the goals of the programmes/projects, nor their achievements. Only three provinces reported new legislation and instances of corruption. The Eastern Cape and Northern Cape Departments of Health failed to provide any information on budgetary measures.

It is not possible to make an assessment of the progressive realisation of the right to health care based only on the information provided by organs of State because of the inaccuracies and gaps in the information. For this it was necessary to consult other sources.

### ***Constitutional Obligations***

Organs of State were requested to show how the instituted measures met their constitutional obligations to respect, protect, promote and fulfil the right to health. The responses are discussed in the section below.

### **National Sphere**

#### ***Respect***

The NDH stated that policy and programmatic measures instituted respect the right by making health care services available to all on a non-discriminatory basis as provided for in the Patients' Rights Charter which prohibits denial of services on the basis of age, disability, race, gender, sexual orientation, marital status, religion, educational level, colour, beliefs, values, culture, and health status.

#### ***Promote***

The NDH promoted the right by disseminating information regarding availability and quality of services to the public. Education is also provided to groups such as the elderly and women to inform them of their rights and assist them against abuse.

### *Fulfil*

The PHC package is available to all at health care facilities. Special programmes for women, children, previously disadvantaged groups, the elderly, rural communities and other vulnerable groups ensure that health care is accessible to all.

## **Provincial Sphere**

### *Respect*

The North West Department of Health reported that a range of quality services are offered to all who need them without any discrimination in accordance with the Patient's Rights Charter and the Batho Pele Principles. Programmes that ensure appropriate services for safe pregnancy and childbirth, taken together with the TOPS programme respects women's reproductive rights. The Free State Department of Health made a similar statement regarding the obligation to respect the right. The Western Cape Department of Health reported that by recognising and implementing all policy and programmatic measures to which all citizens have a right ensures respect for the right. Other departments did not respond to this part of the protocol.

### *Protect*

The North West and Free State Departments of Health, respectively have put a mechanism in place to protect against violation of patients' rights in the form of a complaints register available at all service delivery points. This enables patients to register their complaints and have them addressed through the Clinical Investigation Committee.

### *Promote and Fulfil*

The North West Department of Health has instituted intensive awareness campaigns especially around AIDS prevention. It has also instituted a large number of measures ranging from building new hospitals and clinics, infrastructure upgrading, and ensuring availability of basic amenities at clinics, such as water and electricity. The allocation of community service pharmacists to outlying districts has increased the availability of medicines to rural communities. Implementation of the national HIV/AIDS/TB syndromic intervention programme, provides services to youth and women. The expansion of services through the use of mobile clinics has promoted the right to health care especially in the rural areas.

The Western Cape Department of Health reported that the training of health workers raises awareness regarding the standards to be employed in the delivery of quality care as well as the rights of beneficiaries to access services. Strong health promotion interventions have been developed in such areas as HIV/AIDS, TB, maternal and child health, chronic diseases and nutrition. Education of clients creates an awareness of their rights to access available services. Implementation of health policies and programmes ensures access to primary, secondary and tertiary health care.

The Free State Department of Health reported conducting numerous awareness campaigns including the dissemination of information regarding HIV/AIDS, women and elder abuse.

### ***Vulnerable and Marginalized Groups***

#### **National Sphere**

The NDH made a general statement that the PHC Package provides "a range of services arranged according to life cycle." It identified programmes for older persons and people with disabilities but failed to report on the efficacy of these. The National Telemedicine policy was erroneously reported to benefit women and children in rural areas. Similarly, the PEP programme was reported to provide for women and children and not rape survivors and the MTC programme was reported to "provide for people infected with HIV" rather than for neonates born of HIV positive mothers.

#### **Provincial Sphere**

##### *Women*

The Western Cape and Free State Departments of Health, identified the following policies and programmes which make provision for the women and children. Prevention of MTCT programme according to the WC Department of Health will save more than a thousand babies. The VCT, PEP will benefit *women* and health workers against HIV infection, while the KMC programme will benefit *infants*. The EC Department of Health, and NW Department of Health, identified TOPs, Maternal Care and Maternal Death Notification programmes to benefit *women*. The EC Department of Health and the NW Department of Health reported early detection of cancer through cervical screening to reduce the risk of cancer in women.

##### *Older Persons*

The Eastern Cape, KwaZulu-Natal and Western Cape Departments of Health identified Chronic Care, the Elder Abuse Programme, and the Cataract Removal Programmes to benefit older persons.

##### *Girl-children*

The Eastern Cape, Western Cape and Northern Cape Departments of Health identified child health programmes and the policy on the Management of Rape Survivors to benefit and *girl-children*. The Gauteng Department of Health stated that 97 per cent of the province is urbanized and that children in rural areas have mobile clinic services and that all children have access to PHC services at no charge, and terminally ill children have home based care and hospices.

### *Previously Disadvantaged Racial Groups and Refugees and Asylum Seekers*

The Western Cape and Eastern Cape Departments of Health reported that these groups had equal access to PHC services.

### *People Living in Rural Areas*

The North West Department of Health reported that *people living in rural areas* had access to health care through mobile clinics. None of the provinces mentioned telemedicine services.

### *People with Disabilities*

The Free State and Western Cape Departments of Health listed the Assistive Device Policy and the National Rehabilitation Policy to benefit *people with disabilities*. The Gauteng Department of Health stated that wheel chairs are made available for children with disabilities.

### *People Infected and Affected by HIV/AIDS*

The Eastern Cape, North West, and Western Cape Departments of Health identified the HIV/AIDS policy and related programmes and projects, the home-based care programme, the establishment of youth centres to specifically cater for this group. The North West Department of Health has established 5 regional teams totalling 280 health workers to provide home-based care. and to provide voluntary testing and counselling.

The NDH's, as most of the provincial responses did not respond to satisfactorily to the question and did not show a clear understanding of how programmatic measures respect, protect, promote and fulfil the right to health care, including reproductive health.

Responses from the Eastern Cape, Gauteng, KZN, Northern Cape demonstrate a lack of understanding on the meaning of these constitutional obligations. Mpumalanga did not respond at all.

## **Legislative measures**

### **National Sphere**

The National Department stated that new legislation effected changes to prior legislation that obstructed the promotion and fulfilment of the right. In response to how the legislation caters for vulnerable groups, the NDH's response was that the legislation caters for all vulnerable groups.

### **Provincial Sphere**

The Gauteng Department of Health stated that preventative, promotive, curative and rehabilitative health care is accessible to all. This meant that all vulnerable groups are



catered for. The other provinces did not respond to this section of the protocol or provided irrelevant information.

Although the responses from government show that the policies and programmatic measures do not follow a human rights based approach, the PHC package does however provide universal access which grants free access to mothers and children. Some of these measures also provide for the needs of some of the vulnerable groups such as the elderly, children, the disabled, women, and youth. However, there are either few or no specific programmes in place to cater for the needs of the rural populations where 75 percent of the people are poor and access to clinics and hospitals is made difficult by distance and lack of transport and money, refugees and asylum seekers, girl-children, people infected or affected by AIDS and AIDS orphans.

Where measures are in place they are either inadequate or do not have sufficient trained health workers to implement them effectively and efficiently. Insufficient funding or the inability to spend available resources also compounds the problem and impedes delivery of quality services.

### **Policy and programmatic measures**

In this section key policies, and programmatic measures will be examined in the light of the NDH's stated goals. In this reporting period there are few new policy measures. The most notable one is the one on AIDS. Most of the programmes and projects are aimed at accelerating or improving quality of care at the primary level. This is in line with NDH's five year strategic plan, *The Health Strategic Framework 1999-2004: Accelerating Quality Health Service Delivery* which proposes that the next five years will be devoted to the implementation of efficient service delivery. The Strategic Plan outlines a ten point programme which identifies the areas in which quality service is to be delivered over the next five years:

The Health Strategic Framework 1999-2004: Accelerating Quality Health Service Delivery.<sup>34</sup>

1. Decreasing morbidity and mortality through strategic interventions
2. Revitalisation of public hospitals
3. Accelerating delivery of an essential package of Primary Health Care (PHC) services through the District Health System (DHS)
4. Improving mobilization and management of resources
5. Improving human resource development and management
6. Improving quality of care
7. Enhancing communication and consultation in the health system and with communities
8. Initiating legislative reform
9. Reorganisation of certain support services
10. Strengthening co-operation with international partners

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<sup>34</sup>For the full report see [http://196.36.153.56/Department of Health/docs/policy/framework/index.html](http://196.36.153.56/Department%20of%20Health/docs/policy/framework/index.html). Accessed March 2002.

While it is too early to assess the overall success of the ten point plan, it is possible to make a preliminary assessment on the progress made to date by examining key developments. With regards to *decreasing morbidity and mortality through strategic interventions* the following observations can be made.

### *The Cholera Outbreak*

According to the NDH's Annual Report,<sup>35</sup> the worst recorded outbreak of cholera began in August 2000, by the end of March 2001, 81 265 cases had been recorded. The outbreak 'underscored the extent to which poverty and underdevelopment still blight our society is the NDH's view. The low rate of fatalities of 0,22 percent is attributed to the effective response by the KwaZulu-Natal authorities and to the NDH's supportive role.

No mention is made in the NDH's Report of the unavailability of clean drinking water and proper sanitation in the rural areas of KZN and in Alexander township in Gauteng and in other informal settlements where cholera outbreaks occurred. However, the Department of Water Affairs has since undertaken to supply sanitation facilities to under serviced areas.

As a result of the cholera outbreak, emergency medical services have become a provincial responsibility. Formally, local authorities were contracted to deliver on their behalf. This will ensure uniformity of response across provinces. All the provinces had training programmes in place except for Mpumalanga and the North West who were in the process of establishing training colleges.

At the time of writing there were reports of more cholera outbreaks. This indicates that sanitation facilities are still lacking in many areas and that education on prevention has to be stepped up.

### *Tuberculosis*

There were 119 638 reported TB cases. The DOTS programme was being expanded, and by March 2001 there were 134 Demonstration and Training Districts established with cure rate of 60 percent in 2000. Ten districts reported a cure rate of 85 percent while further thirty-one reported a cure rate of between 75 percent and 84 percent. While these are significant gains, the NDH Annual Report does not give any statistics to show the overall reduction of the incidence and infection rate. Since TB is one of the most common opportunistic diseases associated with AIDS it is important to disaggregate cure rates and mortality rates due to TB alone and TB associated with AIDS.

### *Malaria Control*

In 2000 there were 61 934 recorded cases of malaria. Co-Artem, DDT and bed nets sprayed with insecticide have been introduced in the malaria endemic areas of KwaZulu-Natal, the Northern Province and Mpumalanga. In spite of these

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<sup>35</sup> Statistics are quoted from the National *Department of Health Annual Report 2000/2002*.

interventions, the disease is on the increase and fatalities rose to 423 in 2000. According to the NDH, about R93 million was spent on control in 2000.

### *Women's Health*

The NDH's Report list interventions targeted at the improvement of women's health to include the reduction of maternal mortality rates, expansion of the awareness for screening for cervical and breast cancer. It highlights the fact that trends in maternal deaths pointed to HIV/AIDS being the leading contributor to maternal deaths and inadequate referral systems at primary care level.

### *TOPS*

Safe abortions are legalized but many rural women are effectively without such a service.

### *Mental Health and Substance Abuse*

In accordance with the policy on mental health, de-institutionalisation of persons from psychiatric institutions into the community was initiated but this requires, adequate funding and training for community involvement. A pilot programme at Tower Hospital Eastern Cape is underway and a formal evaluation was scheduled to begin in 2001. No information of the evaluation is currently available from government sources.

Violence prevention and surveillance systems are also being piloted in the Eastern Cape, KwaZulu Natal and Mpumalanga. Violence prevention programmes were being run at nine schools in three provinces and efforts to promote mental health through parent-child bonding in high risk families.

Reducing substance abuse is an intersectoral responsibility. A Central Drug Authority was formed to co-ordinate all activities which include the incorporation of prevention programmes into the Life Skills strategy in secondary schools, research into campaigns to reduce foetal alcohol syndrome and advertising of alcohol-linked sponsorships was being planned. A ten percent reduction of substance abuse was reported.

The department's performance in relation to the ten point programme has been assessed by Erich Buch<sup>36</sup> and some of the salient features are discussed below:

According to Buch, the diseases focussed upon are relevant to the health needs of South Africa. While progress is being made in most areas adequate funding, effective resource allocation stakeholder participation is required to scale up targets which start from a low baseline.

As far as the needs of the disabled are concerned there is a huge backlog in the supply of assistive devices . Only 324 wheelchairs, 140 hearing aids and 430 spectacles were

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<sup>36</sup> For a comprehensive review of the ten point Strategic Framework see Eric Buch, "The Health Sector Strategic Framework: A review" in *South African Health Review* 2000. Also [http:// www.hst.org.za](http://www.hst.org.za) Accessed March 2002.

supplied to provinces to assist their efforts. It is clearly unacceptable that paraplegics have no wheelchairs and the hearing impaired have no hearing aids.

Much planning has gone into the revitalisation of public hospital services but implementation is still not a reality. A uniform patient billing system has been introduced across all provinces. There are approximately 2.8 000 000 public hospital beds per 1 000 population but there is no objective set of criteria in place to guide the suggested number of between 1 million and 3 million per 1 000 population. Overcrowding in hospitals and reports of patients sleeping in corridors and on the floor are common in spite of the introduction of home based care chronically ill patients. Addressing the imbalances of the past by making health care available to all has stretched the resources of the health system which is now facing the additional burden of the AIDS pandemic.

#### *The Acceleration of Delivery of an Essential Package of PHC Services*

The establishment of the DHS is still in its early stages and there is much confusion regarding the organisational arrangements and responsibility for service delivery. This is due to the lack of clarity of definition of municipal health services in the Constitution is a stumbling block which is compounded in the rural areas by lack of resources and infrastructure.

A survey conducted by the Health Systems Trust in 2000 looked at 445 clinics, including mobile clinics in all the provinces.<sup>37</sup> They found that while there was an improvement, since 1998, in many of the parameters they looked at such as antenatal care, immunisation, family planning, home visits, turn-around times of laboratory tests, availability of condoms, oral contraceptives and penicillin. However, there were serious shortfalls which included the unavailability tests for HIV, pap smear, rhesus and pregnancy tests. There was also a lack of skills updating on TB and STD treatment, lack of piped water, telephones, electricity supply, basic equipment, incineration facilities for medical waste, certain drugs, and TB record keeping was poor. Another important finding was the irregularity of feedback on reports submitted by PHC facilities. Only 52 percent, 27 percent and 46 percent respectively, of fixed, satellite and mobile clinics received regular feedback.

#### *HIV/AIDS*

It has been estimated by the joint United Nations Programme on HIV/AIDS and the World Health Organisation (WHO) that more than seventy percent of all human immuno-deficiency viral infections in the world occur in sub-Saharan Africa. In South Africa, there has been an alarming increase in the incidence of AIDS in the last decade. According to the Department of Health, in the year 2000, there were 3.8 million people living with AIDS in 2000 and this figure will rise to 6 million by 2005, which is the fastest growing pandemic in the world.

Life expectancy has been significantly reduced amongst the 15-49 year age group where young women between the age of 20-30 have the highest prevalence rates and

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<sup>37</sup> Dingle van Rensburg, Renier Viljoen, Christo Heunis, Ega Janse van Rensburg and Annalize Fourie, "Primary Health Care Facilities Survey 2000," *The South African Health Review*, 2000 <http://www.hst.org.za/sahr/2000/>

women under 20 have the highest percentage increase. This translates to early deaths amongst youth and economically active people, which will impact negatively on the economy of the country, not to mention the tragic loss of life and suffering caused to families and AIDS orphans.

*HIV/AIDS/STD Strategic Plan for South Africa 2000-2005*<sup>38</sup>

The Aids Strategy is a national plan and its implementation involves a range of government departments, local authorities and civil society structures. Oversight of the direction for the AIDS programme is provided by an Inter-Ministerial Committee chaired by the Presidency. The Health Department plays a key role in providing technical guidance and in co-ordinating implementation.

The proposed national strategy to fight the pandemic consists of essentially of four areas: prevention; treatment, care and support; human and legal rights; and monitoring, research and surveillance. Youth will be targeted as a priority population groups especially for prevention efforts. The primary goals are to reduce the number of infections and reduce the impact of the disease on individuals, families and communities.

To ensure prioritisation of key objectives the government launched a National Integrated Plan (NIP) to implement key strategic areas: increased information, education and communication; increased voluntary counselling and testing, improved STD management and treatment of opportunistic infections, promote increased use of condoms, improved care and treatment of HIV positive persons and those living with AIDS to promote a better quality of life and limit the need for hospital care.

For effective implementation, the plan proposes monitoring and evaluation in the areas of policy development, institutional strengthening and service delivery where implementing agencies, partners and stakeholders contribute to the accomplishment of policy aims. The plan also proposes research on the cost effectiveness of selected interventions. The following data was extracted from the NDH's Annual Report 2000.

*Preventing HIV Infection*

The programme is involves social mobilization to increase public awareness of HIV/AIDS, education and communication strategies, condom distribution, effective management of sexually transmitted diseases, ensuring blood safety, promoting voluntary counselling and counselling, exploring viable interventions to reduce mother-to-child transmission of the virus.

The 13<sup>th</sup> International Conference on AIDS in Durban served to highlight the plight of the African continent where the disease has the highest prevalence. Although the debate around the causes of AIDS was heated, it served to established that poverty and poor health are linked and that poverty is an aetiological factor in many diseases.

*The Beyond Awareness Campaign*

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<sup>38</sup> [HIV/AIDS/STD Strategic Plan for South Africa 2000-2005](http://196.36.153/Department%20of%20Health/policy/norms/contents.html) [http://196.36.153/Department of Health/policy/norms/contents.html](http://196.36.153/Department%20of%20Health/policy/norms/contents.html)

R26 million was spent on this programme which involved mass media, tertiary institutions and other organizations. It succeeded in distributing 25 million leaflets, posters, and other items and boosted the AIDS help line calls by 32 percent. 250 million condoms were distributed in 2000/2001 and it documented social factors that shape teenage response to the disease. An information system to manage the logistics of condom distribution has also been put in place.

#### *The School Life skills Programme*

This is major effort to educate the youth on prevention in schools. Models for community based care, the care of orphans and strengthening the capacity for voluntary counselling received R75 million. This does not indicate whether these programmes were monitored and how effective they were.

#### *Sexually Transmitted Infections*

Through the antenatal surveillance system, the incidence of syphilis has been halved in the last two years but other STIs have not shown a similar decline. This is of particular concern since HIV infection has a high correlation with STI prevalence. In fact, the incidence of HIV has increased dramatically.

#### *Treatment, Care and Support*

Guidelines for care and treatment were established in order to train health workers in their use, but no data is available on the effectiveness of these interventions. Since TB is one of the major opportunistic infections associated with HIV, and since TB already has a high prevalence rate in South Africa, an integrated strategy was piloted in four provinces.

#### *Voluntary Testing and Counselling*

According to the NDH Annual Report, this strategy was successful: the number of patients testing for HIV quadrupled, 99 percent of returned for their test results, and more than one out of three received drugs to prevent active TB. It can only be assumed that the NDH considers the increase in the number of people testing for HIV and TB a positive development in so far that they would now be treated under the pilot project whereas previously they would have gone undetected.

The challenges of providing affordable drugs to fight HIV and opportunistic infections are huge for poor and middle income countries. However, Pfizer entered into a partnership with the government to supply fluconazole free for two years to treat cryptococcal meningitis and oesophageal thrush- two common opportunistic infections in immune deficient patients. The government, sceptical of the long-term efficacy of triple ARV treatment, began to develop guidelines, but no universal roll out of ARVs nor were short course treatment of Neviripine for the MTCT or PEP

programmes instituted. The government has argued that 18 pilot projects were testing the efficacy of Neviripine and that universal roll out was not affordable.<sup>39</sup>

### *Community Based Care, including Orphans*

Given the shortage of hospital beds and limited capacity in the public sector, it was impossible to give palliative care for extended periods and home-based projects are an alternative. Lack of trained personnel and budget constraints remain a major impediment to the success of this programme.

### *Research, Monitoring and Surveillance*

The most important initiative is government's commitment of R10 million to research efforts in developing an AIDS vaccine appropriate to all strains prevalent in South Africa. Although significant advances have been made, no vaccine has yet been developed. Annual ante-natal surveys to establish the prevalence of HIV and syphilis has been successful and the model has been adopted by WHO. Surveillance will in future encompass establishing incidence as well as prevalence, surveying sentinel sites and establishing trends in social and sexual behaviour. Increased use of condoms and declining rates of STD infection has been shown amongst sex workers in Gauteng and the Free State, but not amongst the target group of youth.

### *Human and Legal Rights*

The focus is on advocacy campaigns to achieve an environment of tolerance and minimize the stigma attached to people living with HIV/AIDS. The governments AIDS Action Plan "Men make a difference" to the containment of AIDS was a response to the disempowered status of women in South Africa, their subservient position, the prevalence of cultural machismo and the high rates of sexual violence and rape.

Despite the creation of one of the most comprehensive policies and enabling legislation in the world, South Africa has not succeeded in implementing these plans sufficiently to make an impact on the reduction of the prevalence of HIV/AIDS and deaths due to the disease. What then are the factors which contribute to the failure to stem the tide of the pandemic? Some of these which can be identified include poverty and inequality of access to adequate prevention and care. This also includes the inability to access adequate and nutritious food by the poor and indigent. Another factor is the uncertainty and confusion restructuring of the public sector, a high turn over of medical staff, lack of capacity and commitment, lack of strong leadership and the failure to mainstream HIV activities at all levels of society.

While South Africa has made huge strides in the area of policy and the introduction of a universal health system, the AIDS pandemic currently ravaging South Africa and sub-Saharan Africa has had a negative impact on the already scarce resources available to the state to provide access to health for all. The World Health Organisation's (WHO) goal of Health for All by the Year 2000<sup>40</sup> remains a distant

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<sup>39</sup> At the time of going to print the government was ordered by the Constitutional Court's ruling to roll out Neviripine at all public health care facilities. See the Introductory chapter of this Report for details

<sup>40</sup> WHO Global Strategy Health for All by the Year 2000. <http://www.who.org>.

goal. It is estimated that the number of deaths worldwide is higher than the sum of lives lost in both world wars. HIV prevalence in South Africa has risen from 0.7 percent in 1990 to 24.5 percent in 2000. Despite a comprehensive HIV/AIDS plan there has been a continuous increase in the prevalence rate indicating the inadequacy of the implementation of the plan.<sup>41</sup> Life expectancy has fallen from 67 years to 53 years in the same period.

The AIDS pandemic impacts negatively on sectors such as education, housing, agriculture, transport, the economy and security as it affects the economically active population. It is a sad fact that South Africa has one of the highest incidences of violence against women and rape. Both are gender issues and need to be addressed effectively. The "Men make a difference" campaign focussed on the role of men in our society. However, in order to change power relations between women and men will require more than one campaign it requires on going education as well as structural changes in society. Changing the power relations between the sexes, societal denial, stigmatisation, and the lack of an effective human rights approach to the problem are other important factors which have not been adequately addressed. What is required is first of all an acceptance of the enormity of the problem and a recognition of the enormous costs in terms of human lives, the cost to economic development and the negative impact on development plans such as NEPAD, not only locally but in sub-Saharan Africa.

### **Budgetary measures**

In his review of the Strategic Framework, Buch<sup>42</sup> outlines the fault lines in the assumptions made by the NDH which provide some insight into some of the reasons of why the department has not been able to achieve stated goals in the proposed time frames. The first assumption regarding the availability of sufficient financial resources, financial stability and the absence of unfunded mandates is cited here since it is crucial to the success of implementation plans:

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<sup>41</sup> Chris Kenyon, Mark Heywood and Shaun Conway, "Mainstreaming HIV/AIDS: Progress and Challenges" in *South African Health Review 2001*, Health Systems Trust, 2001, p. 163.

The assumptions made by the NDH are:

- The availability of sufficient financial resources, the assurance of financial stability during and between years and the absence of unfunded mandates
- The ability to train, retrain, retain and deploy health personnel as needed
- Removal of legislative and other obstacles so as to implement more responsive management systems and an appropriate workforce configuration
- Solid co-operation from all partners, notably other national departments, provincial and local government, the private sector, non-governmental and community based organisations and communities
- The ability to reverse the HIV/AIDS epidemic

<sup>42</sup> For a comprehensive review see Eric Buch "The Health Sector Strategic Framework: A review" in *South African Health Review 2000*, 68.



This assumption has arisen out of the experience of funding not matching requirements for services, decreases in real health expenditure and expectations of meeting decisions that have financial implications from savings, rather than from an additional fiscal allocation, such as was the case with rank and leg promotions. The financial pressures are not just from the complex inheritance,

limitations on and of management and inadequate controls on spending, but seemingly also from under budgeting for desired services. The question of "sufficient financial resources" raises the question of what "sufficient" is. Unless it is a tactical decision not to, it could have been expected that a sector strategic framework would broadly spell out what it requires to meet its responsibilities, and develop a case to sustain this... In the ongoing negotiations with the national and provincial Treasuries and political decision-makers the core issues need to be opened up clearly for those not familiar with the complexities of health economics and financing.

One of the most important factors impeding the realisation of stated goals of the Strategic Framework is undoubtedly, financial constraints. According to the Director General of Health, financial constraints have created a difficult context for redistribution of resources. Since 1997/1998 there has been a real decline in real per capita spending on health.<sup>43</sup> In addition the gaps between comparative spending in provinces have grown wider.

According to Whelan, most provinces plan to increase their total spending on health on real terms over the period starting in 1999/2000 and ending in 2003/2004 but despite these real increases, there continues to be a great deal of variation between provinces. For the period 2000/2001, provinces with a well-established set of health facilities, inherited from the past, continue to allocate over 20 percent of their discretionary funds on health, while the poorer provinces allocate between 16 percent and 17 percent.

Per capita discretionary health spending shows similar trends. Gauteng and the Western Cape were above the average per capita measure (32 percent and 25 percent respectively) while the other provinces were between 10 percent and 20 percent below the average. All provinces except the Western Cape plan to reduce spending on personnel when they lack management tools. This may have a negative impact on service delivery. Capital spending is projected to increase. Over 50 percent of total health budgets are spent on DHS by provinces who have substantial hospital complexes.<sup>44</sup> An important gap identified in budgetary information is the actual or proposed spending on HIV/AIDs.

For the period 2001/2002 the variation in the shares received by health across provinces retains the same pattern as outlined above. Mpumlanga and the Northern Cape are planning the fastest real expansion of 5.2 percent and 3.7 percent respectively, while the Northern Province and the North West are planning more

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<sup>43</sup> A. Ntsaluba, 'Director-General's Review' *Department of Health Annual Report* (2000/2001).

<sup>44</sup> Paul Whelan, "A Review of Provincial Health Budgets 2001" <http://www.idasa.org.za/bis> Accessed December 2002.

modest expansion. The Eastern Cape is planning to cut its budget 2.3 percent per year. KwaZulu-Natal and the Western Cape small real decrease over the period from 2001/2002 and 2004/2005. This means that health's share in total provincial spending declines from 22.8 percent to 21.3 percent.

The national average per capital discretionary spending is highest in Gauteng, KwaZulu-Natal, the Northern Cape and the Western Cape while the Eastern Cape moves from 7.7 per cent to 6.5 percent, which is a cause for concern, given that the Eastern Cape is one of the poorer provinces with huge problems in service delivery. Real concerns have also been raised about the Eastern Cape's budget between 2001/2002 and 2002/2003 regarding the large real decreases projected in total health, personnel, district health, and medicines which calls into question the credibility of this budget.<sup>45</sup>

Furthermore, the fact that there are huge inequalities among the nine provinces with regard to the adjusted provincial expenditure on health, means that delivery of PHC and other programmes is highly variable among provinces. By way of example, Table 4 shows that while the Gauteng Department of Health n average of R6 million in 2001 and 2002, the Limpopo Department of Health only spent an average of R2 million. There is also a wide gap in per capita allocation across provinces

Another factor is under-spending of allocated funds by some departments. The overall effect is that the goals of equity and access to care are indeed not within reach in the proposed time frames. This holds true for all the programmes outlined in Strategic Framework.

Other factors identified by the NDH relating to implementation difficulties include stigmatisation by communities of mental health patients and PLWAs, the Telemedicine Policy was stalled due to lack of digital lines in rural area, the lack of trained staff, the high attrition rate of health care workers, financial constraints, lack of adequate infrastructure especially in rural areas and poor communication between management of and health workers and the high expectations placed on overburdened staff. Similar difficulties were identified at the provincial sphere.

The Gauteng Department of Health reported that it lacked systems to measure baseline information for monitoring and evaluating progress on implemented measures. It also reported a shortage of specialist skills in public health, nutrition, planning and financial management. In addition to these the Limpopo Department of Health reported low staff morale while the Western Cape Department of Health reported lack of coordination of information flow.

## **8. RECOMMENDATIONS**

The reporting by national and provincial departments of health can be much improved. The previous reports ESR Reports of the SAHRC have identified the poor quality of government reporting as an impediment to carry out its mandate. It is crucial that departments put in place a mechanism to deliver reports of a high quality. It is suggested that the national and provincial departments of Health appoint an

officer, trained in a human rights approach to health care provision, to oversee their responses to the SAHRC's protocols. The person tasked with this responsibility will ensure that the response from the department is of a high quality by ensuring that the information requested by the SAHRC is gathered during each monitoring period and is available when requested.

Since many of the departments indicated that their databases were not designed to collect much of the information requested it seems appropriate that the SAHRC should meet with the NDH so as to reach a common understanding of the type of information which departments are able to provide.

The cholera outbreak shows that preventative measures for the eradication of cholera, malaria, STIs and other endemic diseases must be put in place and be closely monitored. Department of Water Affairs and the Department of Health at the three spheres of government need to work in close cooperation to avoid further outbreaks, and deaths due to cholera are avoidable.

Capacity building at the administrative level and retention of professional health care workers should become a priority. One of the ways to retain doctors, nurses, and other professionals is by providing incentives such as competitive salaries and benefits and generally to improve the conditions of work and the availability of adequate infrastructure, drugs and other resources for an improved standard of service delivery.

Measures to stamp out maladministration, corruption and theft must be introduced and strictly adhered to.

Inter-governmental cooperation at the three spheres of government must be streamlined and the responsibilities of each must be clearly demarcated.

The capacity of NGOs and CBOs to provide home-based care should be increased by injecting sufficient funds and trained personnel. Access to health care should be made more effective and the number and frequency of mobile clinics should be increased especially in remote rural areas.

Many of the difficulties experienced by the government departments have been identified in the previous ESR Report. It is essential for government departments to address these challenges by putting effective mechanisms in place in order to delivery effective and quality health care to all.

## HIV/AIDS

The Constitutional Court's ruling regarding the treatments of HIV positive mothers and their newly born infants must be implemented immediately. A National Action Plan for the universal access to ARVs should be government's top priority and it is highly recommended that the National Budget reflect this. The urgency of reducing new infections and treating people living with AIDS requires not only political commitment but additional funding to tackle this pandemic which is affecting the lives of millions of South Africans especially the very poor whose right to health care and human dignity are being jeopardised.

A culture of caring needs to be instilled so that a human rights approach falls on fertile ground not only amongst citizens but especially amongst care givers in all sectors of all society. Most importantly, life style changes and sexual behaviour patterns must be changed. Women and girls must be empowered and be regarded as potential victims of abuse. Leaders from all sectors of society must exert their influence in the call for a moral regeneration in our society.

The National Department of Health should lobby more vigorously for the health envelope to be increased during the budget process since financial constraints remain a major obstacle to service delivery. It is also incumbent on the Minister of Health and MEC's for Health to impress a rights based approach to health budgets at both the national and provincial levels.

The provision of the right to health care is possible only if the pandemic is contained since available resources are not sufficient to provide universal quality care. Government, corporations and other stakeholders in the health sector need to take decisive steps to combat the spread of AIDS and to minimise the loss of life.<sup>46</sup> This can only be made possible if all role players and stakeholders adopt a human rights approach.

## 9. CONCLUSION

The democratic government, after 1994, set itself the task of transforming the fragmented health system inherited from the apartheid era, into a single National Health System, based on equity and accessibility to all. Substantial progress has been achieved in establishing a Primary Health Care System (PHCS); bringing health care to many previously under serviced areas;<sup>47</sup> and the introduction of a District Health System. Enabling legislation has been passed in support of these measures including the regulation of medical schemes. Many changes in processes of restructuring have resulted in a state of uncertainty and flux. In some instances, the roles and responsibilities of the different spheres of government are still unclear leading to delays in service delivery.

Policy and other measures introduced during this reporting period are significant steps taken towards the progressive realisation of the right to health care services. These conform to international best practice. The introduction of the National Health Bill is especially to be welcomed since this will provide a framework legislation binding all stakeholders involved in the provision of health care. However, implementation difficulties in all the provinces remains a challenge especially in the providing access to the poor rural communities. The goal of equity and implementation of quality and efficient service delivery in the public sector remains to be realised. In his judgement in the *Grootboom* case, Justice Yakoob stated that:

Policies and programmes must be reasonable both in their conception and their implementation. An otherwise reasonable

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<sup>46</sup> See the United Nations report. [http:// www.who.org](http://www.who.org)

<sup>47</sup> See 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Economic and Social Rights Reports, (1999, 2000, 2001), SAHRC for a comprehensive discussion on right to health up to 31<sup>st</sup> March 1999.

programme that is not implemented reasonably will not constitute compliance with the State's obligations.<sup>48</sup>

## **ABBREVIATIONS**

<b>AIDS</b>	Acquired Immune Deficiency Syndrome
<b>ARVs</b>	Anti-retro Viral drugs
<b>CS</b>	Cervical Screening
<b>DOTS</b>	Directly Observed Treatment Short-Course
<b>HIV</b>	Human Immunodeficiency Virus
<b>ICESCR</b>	International Covenant of Economic, Social and Cultural Rights
<b>IMCI</b>	Integrated Management of Childhood Illnesses
<b>INP</b>	Integrated Nutrition Program
<b>MCC</b>	Medicines Control Council
<b>MEC</b>	Member of the Executive Committee
<b>MTCT</b>	Mother-to-child transmission
<b>MTEF</b>	Medium-term Expenditure Framework
<b>MDN</b>	Maternal Death Notification
<b>NDH</b>	National Department of Health
<b>NDP</b>	National Drug Policy
<b>NGO</b>	Non-Governmental Organisation
<b>NHISA</b>	National Health Information System of South Africa
<b>NHLS</b>	National Health Laboratory Services
<b>NHS</b>	National Health System
<b>PEP</b>	Post Exposure Prophylaxis
<b>PFMA</b>	Public Finance Management Act
<b>PHC</b>	Primary Health Care
<b>PHCS</b>	Primary Health Care System
<b>PLWA</b>	People Living With AIDS
<b>STD</b>	Sexually Transmitted Diseases
<b>STIs</b>	Sexually Transmitted Infections
<b>TAC</b>	Treatment Action Campaign
<b>TB</b>	Tuberculosis
<b>TOP</b>	Termination of Pregnancy
<b>UN</b>	United Nations
<b>UDHR</b>	Universal Declaration of Human Rights
<b>VCT</b>	Voluntary Counselling and Testing

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<sup>48</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), para 42.

**WHO**

World Health Organisation

**Provinces of the Republic of South Africa**

**EC** Eastern Cape

**FS** Free State

**GT** Gauteng

**KZN** KwaZulu-Natal

**LO** Limpopo

**MP** Mpumalanga

**NC** Northern Cape

**NW** North West

**WC** Western Cape

## CHAPTER 5

### THE RIGHT TO HAVE ACCESS TO SUFFICIENT FOOD

#### 1. INTRODUCTION

Section 27 of the Constitution<sup>1</sup> guarantees everyone the right to have access to sufficient food. Food for human beings is like fuel is to cars. It is needed for human survival. It gives strength to move, the ability to think, warms the body and above all, keep the body system working. Malnutrition on the other hand, affects people for life by causing under development of brain cells, growth retardation and susceptibility to infectious diseases.<sup>2</sup> The right to have access to sufficient food is recognised in a number of international instruments. Article 25(1) of the Universal Declaration of Human Rights (UDHR) guarantees everyone the right to a standard of living adequate for the health and well being of himself and his family, including food. Member States to the International Covenant on Economic Social and Cultural Rights (ICESCR), on the other hand, acknowledges the right of everyone to an adequate standard of living for himself and his family, including adequate food and bind themselves to take appropriate steps to ensure the realisation of this right.<sup>3</sup> The State Parties further acknowledges the fundamental right of everyone to be free from hunger.<sup>4</sup> Article 1 of the Universal Declaration on the Eradication of Hunger and Malnutrition, also states that every man, woman, and child has the unalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties.<sup>5</sup>

A narrow interpretation of the right entails that everyone has the right to obtain food unhindered through one's own efforts.<sup>6</sup> In a wider sense, the right guarantees adequate nutrition when work or land are not available.<sup>7</sup> "The ultimate purpose of the right of access to food is to secure nutritional well-being for a life to be lived in dignity."<sup>8</sup> There can be no doubt that those who do not have food, are denied human dignity, freedom and equality, which are the foundational values of the Constitution.

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<sup>1</sup> Section 27 of the Constitution of the Republic of South Africa, Act, No. 108 of 1996 provides:

"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 dependents, 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 . . . ."

<sup>2</sup> This was also reiterated by the General Comments of the Committee on Economic, Social and Cultural Rights, General Comment 12, Right to adequate food (Art. 11), U.N. Doc. E/C.12/1999/5 (1999), para 15. See also, the Guidelines: A Human Rights Approach to Poverty Reductions Strategies, Guideline 6: Right to Adequate Food, 10 September, 2002, para 88. <http://www1.umn.edu/humanrts/instree/povertyreductionguidelines.html>.

<sup>3</sup> Article 11(1) of the International Covenant on Economic Social and Cultural Rights, 1966.

<sup>4</sup> *Ibid.*, Article 11(2).

<sup>5</sup> Universal Declaration on the Eradication of Hunger and Malnutrition, 1974.

<sup>6</sup> See <http://www.fao.org/worldfoodsummit/english/newsroom/focus/focus6.htm>.

<sup>7</sup> *Ibid.*

<sup>8</sup> Cheadle M.H, Davis M.D and Haysom N.R.L, *South African Constitutional Law: The Bill of Rights*, Butterworths, 2002, p. 498.



thus affording socio-economic rights to all people enables them to enjoy the other rights enshrined in the Bill of Rights.<sup>9</sup>

The UN Committee on Economic, Social and Cultural Rights considered that the core content of the right to adequate food implies the availability of food in quantity sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture.<sup>10</sup> The right to be free from hunger is the minimum core content (minimum essential level) of the right to food. The accessibility (which encompasses both economic and physical accessibility)<sup>11</sup> of such food should be in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

The Guidelines on the Human Rights Approach to Poverty Reduction Strategies defines the right to adequate food as the right of all individuals to enjoy physical and economic access to adequate food or the means for its procurement.<sup>12</sup> They further state that the right to food should be understood as the right to feed oneself rather than the right to be fed.<sup>13</sup> To be adequate, food should be in sufficient quantity and quality to satisfy the dietary needs of all individuals in a form that is culturally acceptable.<sup>14</sup> The fulfilment of this right is, however, in terms of section 27, subject to the phrase the “state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the right to have access to sufficient food. This chapter will assess whether the measures adopted by the National Department of Agriculture (NDA), the National Department of Health (DoH) and the provincial departments give effect to the right to have access to sufficient food and the right of every child to basic nutrition within the meaning of section 27 and section 28(1)(c) of the Constitution.<sup>15</sup>

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<sup>9</sup> *Ibid.*

<sup>10</sup> CESCR General Comment 12 (The right to food), *op. cit.*, para 12: *Availability*: refers to the possibility of either of feeding oneself directly from productive land or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand. *Dietary needs*: implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance. And physical activity that are in compliance with human physiological needs at all stages through the life cycle and according to gender and occupation. *Free from adverse substances*: sets requirements for food safety and for a range of protective measures to by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins. *Culturally or consumer acceptability*: implies the need to take into account, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.

<sup>11</sup> *Economic accessibility*: implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. *Physical accessibility*: implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled and the terminally ill.

<sup>12</sup> *Ibid.*, para 91.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, para 92.

<sup>15</sup> Note that while the right to basic nutrition is part of the right to have access sufficient food, it is treated separately in this chapter, but only in the context of child rights.

### *Obligation of the State*

The right to adequate food, like any other human right, imposes four types of obligations on the State in terms of section 7(2) of the Constitution: the obligations to respect, to protect, to promote and to fulfil the right of access to sufficient food.<sup>16</sup> The obligation to respect the right of access to sufficient food requires the State not to take any measures that result in preventing such access.<sup>17</sup> The obligation to promote obliges the State to create a conducive atmosphere to ensure that people have access to sufficient food. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to sufficient food. The obligation to fulfil means the State must proactively engage in activities intended to strengthen people's access to and utilisation of resources and means to ensure their livelihood, including food security. Whenever an individual or group is unable to enjoy the right to sufficient food by the means at their own disposal, the State has an obligation to fulfil the right directly.<sup>18</sup>

## **2. POLICY PROGRAMMES AND PROJECTS**

### **National Sphere**

The National Department of Agriculture was requested to report about policy measures taken towards the realisation of the right of access to sufficient food during the reporting. On the question of policy formulation, the national department only mentioned the Integrated Food Security Strategy (IFSS). The IFSS marks the implementation of the World Food Summit resolution and was envisaged to form part of the Integrated Sustainable Rural Development (ISRDS).

#### *Integrated Sustainable Development Strategy (ISRDS)*

The ISRDS was designed to address the food security situation in South Africa. In broad terms, the policy seeks to ensure that all South Africans have access to safe and healthy food on a daily basis; improve household food security; and increase wealth creation and sustainable employment.<sup>19</sup>

#### *Strategic Plan for South African Agriculture*

The NDA omitted the Strategic Plan for South African Agriculture (2001) in its report. The Strategic Plan seeks to, *inter alia*, (i) ensure equitable access in the agricultural sector; (ii) reduce poverty and inequality in land ownership; (iii) ensure global competitiveness and profitability in the agricultural sector; (iv) ensure sustainable resource management and (v) ensure efficiency and improve national and household food security.

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<sup>16</sup> Section 7(2) of the Constitution of the Republic of South Africa

<sup>17</sup> CESCR General Comment 12 (The right to food), *op.cit.*, para 15.

<sup>18</sup> *Ibid.*

<sup>19</sup> Department of Agriculture. *Food Security Policy for South Africa*, November 1997.

## **Provincial Sphere**

At the provincial level the following policies and programmes were instituted: the Special Programme for Food Security; the National Land Care Programme and the Land Redistribution for Agricultural Development and Poverty Alleviation Programme.<sup>20</sup>

### *Special Programme for Food Security*

Food security in South Africa is informed largely by the *Food Security Policy in South Africa* of 1997.<sup>21</sup> The objectives of the policy are to establish short-term food programmes such as food gardens to augment food shortages in rural households and to sustain long-term food security for all. It is against this backdrop that the Special Programme for Food Security Programme (SPFS) was initiated by the NDA to improve household food security for poor households in rural and semi-urban areas in South Africa.

Only five provinces, namely, the Eastern Cape, Northern Cape, North West, Free State and Limpopo adopted the programme.

The Eastern Cape reported that while it continued with the SPFS, the programme had no impact in the agricultural sector due to the lack of funds. The Northern Cape reported that it was in the process of implementing eight projects on food security. In the North West province, twenty-eight households benefited from the food security project and the beneficiaries of the project included women and youths in rural areas. The Limpopo Province indicated that the programme is expected to be implemented at the beginning of July 2002 and no further information was provided.

The provinces of the Western Cape, Free State, KwaZulu-Natal and Mpumalanga did not provide information relating on the Special Food Security Programme nor was there any indication that the programme existed at all.

### *Land Care Programme*

The Northern Cape reported that there were a total of 22 Land Care Projects through the implementation of the Land Care Programme funded by the DLA, and five hundred jobs had been created during the reporting period.

### *Land Distribution for Agricultural Development Programme*

The Land Redistribution for Agricultural Development (LRAD) programme is a partnership between the National Departments of Land Affairs (DLA) and Agriculture. The aim of the programme is to promote land reform for agricultural development and infrastructure to previously marginalised communities in South Africa.

The Eastern Cape provincial government indicated that lack of funds has been a major obstacle in helping farmers to acquire land under the LRAD programme. The

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<sup>20</sup> See SAHRC, *3rd Economic & Social Rights Report* (1999/2000), Chap. 4.

<sup>21</sup> Department of Agriculture, *Food Security Policy in South Africa*, *op. cit.*

province of Gauteng reported on the Farmer Settlement Support & Established Agriculture Programme, which like the LRAD seeks to change gender and race ownership of agricultural land by providing infrastructure to emerging black farmers. However, no statistics or targets were provided during the reporting period.

In the Western Cape, the LRAD programme had benefited 484 beneficiaries, including infrastructure projects in rural communities. The Western Cape further submitted that, limited staff compliment, changes in the organisational structure and conflict within communities were some of the factors, which contributed to the lack of implementation of the LRAD.

The Northern Cape indicated that the programme focused on the previously disadvantaged groups, which were not identified. No information was provided by the Free State and Northern Province on the LRAD.

#### *Poverty Alleviation Programme*

The Limpopo province reported that twenty-six food gardens, nine poultry houses and one pig unit were completed. Training on management, technical and record keeping were conducted. No statistics were provided regarding the beneficiary of the skills training programme. The Eastern Cape reported that no funds had been allocated for this programme.

Gauteng reported that 147 projects were undertaken and new partnerships were established in collaboration with the Agricultural Research Council (ARC) to speed up the delivery process. The provinces of the Free State, KwaZulu-Natal, Mpumalanga, North West did not provide information regarding the Poverty Alleviation Programme.

### **3. LEGISLATIVE MEASURES**

#### **National Sphere**

The NDA reported that the Food Security Bill had been drafted, however the department did not provide detailed information about the draft Bill.

#### *Food Security Draft Bill*

The Draft Food Security Bill was developed in 2001. The Draft Bill provides for the fulfilment of the right to food as a basic human need and also provides for the availability, accessibility and utilisation of safe, nutritious and quality food, including providing for the following:

- procurement and maintenance of emergency food supplies in the interest of human health;
- co-operative food security governance establishing principles for decision making matters affecting food security;
- institutions that will promote co-operative governance and procedures for co-ordinating food security functions exercised by organs of state; and
- the environment and capacity to ensure the creation and maintaining of an honest and responsible food trading system.

### *Meat Safety Act*

The objective of the Meat Safety Act<sup>22</sup> (2000) is to provide for the safety of animal products; maintain national standards in respect of abattoirs and to control the exportation and importation of meat products in South Africa. Generally, meat safety is important to the extent that it minimises health risks and hazards consistent with the right to health<sup>23</sup> and human dignity.<sup>24</sup>

## **4. BUDGETARY MEASURES**

### **National Sphere**

National Department of Agriculture (NDA)

**Table 1** Total budget allocation for the NDA

Year	Actual amount received from other sources	Total allocation in Rand(s)	Allocation as a % of GDP/ <sup>25</sup>	Per capita allocation in Rand(s) after inflation adjustment	Actual expenditure
2000/2001	69 563 000	765 344 000	0.094	17.52	675 697 000
2001/2002	72 552 000	899 362 000	0.1	20.18	722 853 000

### *Accounting for variance between the financial years*

The NDA ascribed the variance between the two financial years in the table to understaffing for which no explanation was given.

### *Budget Adequacy*

The NDA reported that the budget allocated to it during the reporting period<sup>26</sup> was sufficient.

At the time of reporting, the NDA reported that it was in the process of filling vacant posts within the department. During the financial year 2000/2001 the NDA underspent by R89 647 000 whilst in 2001/2002 it underspent by R176 509 000.

<sup>22</sup> No. 40 of 2000.

<sup>23</sup> Section 27(1)(a) of the Constitution.

<sup>24</sup> Section 10 of the Constitution.

<sup>25</sup> The NDA did not specify whether the financial resources allocated to it was the percent share of the Gross Geographic Product (GGP) or the Gross Domestic Product (GDP).

<sup>26</sup> Reporting period refers to 1<sup>st</sup> April 2000 to 31<sup>st</sup> March 2002.

## SPECIAL PROGRAMME FOR FOOD SECURITY (2001/2002)<sup>27</sup>

**Table 2 Total budget allocation for the Special Programme for Food Security**

Province	Region/s	Preparatory Phase	Implementation	No. of sites	Total
Eastern Cape	*East *Griqualand *Port St Jones	R250 000	R2 386 727	24	R2 637 727
KwaZulu-Natal	*North East	R250 000	R2 386 727	24	R2 637 727
Limpopo	*Bushbuckridge *Northern *Southern	R350 000	R4 374 540	27	R4 724 540
<b>TOTAL</b>		<b>R850 000</b>	<b>R9 147 994</b>	<b>75</b>	<b>R10 000 000</b>

## LAND REDISTRIBUTION FOR AGRICULTURAL DEVELOPMENT (LRAD) SUB-PROGRAMME

**Table 3 Total budget allocation for the LRAD sub-programme**

Year	Actual amount received from other sources	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Actual expenditure
2000/2001	-	2 277 000	-	-	-
2001/2002	-	11 753 000	-	-	-

The dash (-) in all the tables denotes that the information requested was not made available to the Commission.

### *Accounting for variance between the financial years*

The NDA did not account for the variance between the financial years in the table.

### *Vulnerable and Marginalised Groups*

The NDA reported that it made land available to previously disadvantaged groups (Africans, Coloureds and Indians) for agricultural purposes. Furthermore, it reported that it facilitated projects that catered for but not limited to:

- Food safety net
- Equity schemes
- Production for markets
- Communal agriculture

### *Budget Adequacy*

The NDA reported that the budget was inadequate for the programme as there was no provision for infrastructure development; training and skills development for emerging farmers; and innovation and technology development.

<sup>27</sup> The NDA did not give any explanation on how the financial resources allocated to this programme were used.

In order to address budget inadequacy, the NDA embarked on a reprioritisation exercise and also approached the National Treasury for more financial resources. However, the NDA reported that the National Treasury did not offer any help in this regard. The NDA asserted that it did not experience any over/under-expenditure during the reporting period. This would mean that the NDA used all the financial resources allocated to it in the two financial years. The only problem with such a response is that it is not reflected in the table above.

### Provincial Sphere <sup>28</sup>

**Table 4 Total budget allocation for the provinces**

Name of Province	Year	Actual amount received from other sources	Total allocation in Rand(s)	Allocation as a % of GDP/GGP	Per capita allocation in Rand(s) after inflation adjustment	Actual expenditure
Free State	2000/2001	109 068 000	142 087 000	-	-	-
	2001/2002	125 874 000	176 395 000	-	-	-
Gauteng	2000/2001	-	118 576 000	-	-	-
	2001/2002	-	140 338 000	-	-	35 567 000
KwaZulu-Natal	2000/2001	8 196 000	565 393 000	-	64.25	561 531 000
	2001/2002	9 053 000	671 107 000	-	76.26	709 020 000
Limpopo	2000/2001	12 611 300	669 429 000	-	-	656 409 000
	2001/2002	13 749 300	581 453 000	-	-	581 253 000
Northern Cape	2000/2001	-	48 595 000	-	-	49 962 000
	2001/2002	-	-	-	-	-
North West	2000/2001	-	280 412 000	-	-	219 719 000
	2001/2002	-	263 301 000	-	-	263 300 000
Western Cape	2000/2001	10 094 000	96 777 000	-	-	83 676 000
	2001/2002	10 053 000	115 182 000	-	-	105 308 000

#### *Accounting for variance between the financial years*

The Free State Department of Agriculture (FSDA) indicated that it could not account for the variance between the two financial years in the Table as the allocation of funds is a political decision. The Gauteng Department of Agriculture, Conservation, Environment and Land Affairs (GDACELA)<sup>29</sup> ascribed the variance between 2000/2001 and 2001/2002 to conditional grants for Capital Projects and Special Projects that did not exist in the department before the reporting period. The only information given by KwaZulu-Natal Department of Agriculture and Environmental Affairs (KZNDAEA) is that the allocation and expenditure were within the accepted norms. The NCDA did not account for the variance between the two financial years in

<sup>28</sup> The Eastern Cape Department of Agriculture (ECDA) did not write their figures in the table as provided for in the protocol. The ECDA claimed that it had had a number of projects that had a food security/access to food component in them, and as such, the department finds it difficult to say how much was spent on the food security/access to food component. Furthermore, the ECDA did not specify when exactly during the reporting period the projects referred to took place. The Mpumalanga Department of Agriculture, Conservation and Environment (MDACE) is another department that did not fill in the table the required figures. The MDACE indicated that the national Treasury would have all the financial information required in the table.

<sup>29</sup> According to the GDACELA, its budget includes the Agriculture and Veterinary Services Directorates since the activities in which both the Directorates engage directly contribute to the realisation of the right to food.

the table. The North West Department of Agriculture, Conservation and Environment (NWDACE) ascribed the variance to a restructuring process that took place in the department. However, the NWDACE did not explain the under-expenditure incurred in 2000/2001.

The Western Cape Department of Agriculture and Economic Affairs (WCDAEA) ascribed the variance to additional funding resources that were made available to it for construction, maintenance and the upgrading of various rural infrastructure projects (Provincial Infrastructure Grant).<sup>30</sup> The WCDAEA did not account for the over-expenditure committed during the 2000/2001 and 2001/2002.

### *Vulnerable and Marginalised Groups*

The FSDA reported that in catering for the needs of the vulnerable and marginalised groups, it has developed a special programme that specifically deals with people with disabilities, youth, and people living with HIV/AIDS. Furthermore, the FSDA reported that it provides extension and agricultural development services and technical agricultural services such as agricultural economics, agricultural engineering, farming information, research and training to the above-mentioned categories of vulnerable and marginalised groups.

Apart from the afore-mentioned services, the FSDA reported that it has a joint venture programme with the European Commission where communities, especially women, are financially assisted to start community projects to generate income in order to alleviate poverty. Each household is given R10 000. The initiative is called Community Projects Fund Support Programme. The LDA was silent on the vulnerable and marginalised groups in this programme. The MDACE only reported that it prioritised the vulnerable and marginalised groups in its budget allocation for the programme and did not specify how it did this. The NCDA did not say how it catered for the vulnerable and marginalised groups. It, however, only reported that the over-expenditure experienced in 2000/2001 was in favour of the vulnerable and marginalised groups. The NWDACE did not report on how it caters for the vulnerable and marginalised groups in its budget allocation.

### *Budget Adequacy*

The FSDA did not state whether the budget allocation for the financial years 2000/2001 and 2001/2002 was adequate. The GDACELA, on the other hand, indicated satisfaction with the budget allocation for the period 2000/2001 and 2001/2002. The GDACELA attributed the underspending to the vacancies that existed in the department at management level in 2001/2002. These unfilled vacancies have created some backlogs in the work of the department. GDACELA further submitted that an underspending was experienced in the Farmer Settlement programme due to a botched show as one of the stakeholders withdrew from the event. It was reported that the committed underspending had “a little” impact on the realisation of the right to sufficient food since the previous year’s resources were used.

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<sup>30</sup> According to the WCDAEA it was allocated R4 524 000 in 2000/2001 and R9 621 000 in 2001/2002.



The LDA indicated that the budget was inadequate and as a result, it resorted to the restructuring of its assets. The LDA committed underspending in 2000/2001, which it ascribed to stringent budget control. In 2001/2002 the LDA committed overspending, which it ascribed to unforeseen budget requirements. In addressing the incidence of over/underspending the LDA trained its personnel on financial management as well as appointed a Chief Financial Officer. The NCDA reported that its budget was inadequate and that that is the reason it overspent in 2000/2001.

Like the NWDACE, the WCDAEA indicated satisfaction with its budget allocation. The WCDAEA, however, ascribed overspending to slow community participation in provincial infrastructure and Land Care projects; shortage of personnel; and the long time required for tendering. According to the WCDAEA, the under-expenditure impacted on the realisation of the right to sufficient food in two ways:

- less vulnerable and marginalised groups were reached; and
- the objectives of the proposed projects were delayed by a year or two.

In order to address the under-expenditure, the WCDAEA established a new directorate, Farmer Settlement.

### **SPECIAL PROGRAMME FOR FOOD SECURITY<sup>31</sup>**

**Table 5 Total budget allocation for the Special Programme for Food Security**

Name of Province	Year	Actual amount received from other sources	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Actual expenditure
Gauteng	2000/2001	-	8 813 000	6	-	-
	2001/2002	-	5 699 000	7	-	4 023 000
KwaZulu-Natal	2000/ 2001	-	39 560 000	-	4 50	47 106 799
	2001/2002	-	56 390 000	-	6 40	39 915 306
North West	2000/2001	-	67 645 00	-	-	85 826 00
	2000/ 2002	-	82 562 00	-	-	88 820 00

<sup>31</sup> The FSDA, ECDA, LDA, MDACE, NCDA and the WCDAEA did not provide the required financial information. The NWDACE provided wrong financial information. The FSDA reported that no budget is allocated to the programme and as such, only responded to questions pertaining to vulnerable and marginalised groups. The ECDA advised that the NDA and the Food and Agricultural Organisation (FAO) manage the budget for the programme jointly. The ECDA is responsible for the facilitation of the programme as part of normal extension activities. The ECDA advised that the decision on whether the programme was going to be continued would be taken in 2002/2003. The LDA advised that the programme is implemented in partnership with the FAO and that the NDA controls the budget. Although the implementation of the programme lies with the provincial department. Furthermore, the implementation of this programme was to commence in July 2002. The MDACE did not respond to questions pertaining to the variance and budget adequacy. The MDACE referred the SAHRC to Mpumalanga Treasury regarding the information on the two sections. The NCDA indicated that it had not yet started with the Special Programme for Food Security as it intended to start with the programme in 2002/2003. The NWDACE did not account for the variance between 2000/2001 and 2001/2002. It also did not say how it catered for the vulnerable and marginalised groups. The WCDAEA advised that the Chief Directorate: Agriculture does not have a special programme for food security as several of its programmes address food security issues. The commercial agricultural sector is also strengthened as farmers contribute to the availability of food.

*Accounting for variances between the financial years*

The GDACELA cited delays in the completion of business plans as a result of an experienced difficulty in drilling boreholes for water as well as in designing irrigation and electrical systems. Another cause of the variance cited was the vacant management positions. The said positions were vacant until the end of 2001/2002.

*Vulnerable and Marginalised Groups<sup>32</sup>*

The FSDA reported that in its budget allocation it catered for the vulnerable and marginalised groups by providing assistance in the making of communal and backyard gardens and designing poultry projects. However, the FSDA reported that it did not give any special consideration in its budget allocation to the following categories of vulnerable and marginalised groups:

- refugees and asylum seekers
- persons affected and/or infected with HIV/AIDS
- persons affected and/or infected with TB

Although the LDA indicated that it catered for the vulnerable and marginalised groups in its budget allocation, it, however, did not state how it did this. The LAD, like the FSDA, indicated that it did not cater for the three above-mentioned categories of vulnerable and marginalised groups, including “persons living in informal settlements” and “homeless persons”. The MDACE indicated that it prioritised vulnerable and marginalised groups in its budget allocation with the exception of “persons who are affected/infected with HIV/AIDS” and “persons affected/infected with TB”.

*Budget Adequacy*

The GDACELA indicated satisfaction with the budget allocated to it during the reporting period. The department cited an under-expenditure of R1 676 000 that was incurred in 2001/2002 as a result of the delayed completion of business plans and vacant management positions. The delays resulted in the project approval being delayed. The KZNDAEA was another department that also indicated satisfaction with the budget allocation during the reporting period. However, the department did not explain the over-expenditure incurred in 2000/2001 as well as the under-expenditure incurred in the following financial year. The NWDACE indicated satisfaction with the budget allocation.

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<sup>32</sup> The GDACELA did not say how it catered for the vulnerable and marginalized groups in its budget allocation. It did not give any reasons for not responding to this section. It also did not account for the variance between the financial years nor explained the over-expenditure incurred in 2000/2001 and the under-expenditure incurred in 2001/2002.

**NATIONAL LAND CARE PROGRAMME****Table 6 budget allocation for the National Land Care Programme**

Name of Province	Year	Actual amount received from other sources	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Actual expenditure
Free State	2000/ 2001	-	735 000	-	-	65 000
	2001/2002	-	1 370 000	-	-	729 000
Gauteng	2000/2001	-	118 576 000	3.6	-	4 156 000
	2000/ 2002	-	140 338 000	3	-	4 085 000
Northern Cape	2000/2001	-	1 648 160	-	-	-
	2001/ 2002	-	783 000	-	-	-
North West	2000/ 2001	-	1 185 000	-	-	1 185 000
	2001/ 2002	-	5 000 000	-	-	5 000 000
Western Cape	2000/2001	-	315 000	0.76	-	105 000
	2001/2002	-	878 000	1.00	-	1 088 000

*Accounting for variance between the financial years<sup>33</sup>*

In 2000/2001 the ECDA was allocated R4 818 370 whilst in 2001/2002 it was allocated R4 691 000. The ECDA ascribed the variance between the two financial years above to the approval of specific projects by the NDA. The GDACELA ascribed the variance to allocative inefficiency. The WCDAEA ascribed the variance between 2000/2001 and 2001/2002 to an amount of R210 000 that was rolled over from 2000/2001 to 2001/2002. A delay in the implementation of the programme was another cause of the variance cited.

*Vulnerable and Marginalised Groups*

The ECDA reported that it catered for these groups as all its projects are based in rural areas. The GDACELA reported that its policy on Land Care is biased towards the following categories of vulnerable and marginalised groups:

- persons living in rural areas
- persons living in informal settlements
- low-income groups
- the unemployed

The LDA indicated that it considered all the vulnerable and marginalised groups in its budget allocation with the exception of “refugees and asylum seekers.” The MDACE

<sup>33</sup> The FSDA did not respond to questions in this section and did not give reasons for not responding to the questions.

The KZNDAEA and the LDA advised that Land Care is a national programme and as such, the budget for this programme is managed by the NDA.

The MDACE referred the Human Rights Commission (HRC) to the Mpumalanga Treasury for the required financial information. However, the MDACE stated that Land Care spending in smaller projects has declined due to a change in leadership at regional level as the leading official has become involved in the international Land Care initiative. The NCDA did not account for the variance between the financial years in the table. The department simply reported that the budget came from the NDA. The NWDACE did not respond to questions related to vulnerable and marginalised groups and budget. The department did not give reasons for not responding to these questions.

indicated that each category of the vulnerable and marginalised groups was prioritised differently from each other. For instance, “persons living in rural areas” were a top priority; “persons living in informal settlements” were a high priority, *etc.* The department did not advise what informed the prioritisation of each category of the vulnerable and marginalised groups.

The NCDA reported that all of their projects were based in the previously disadvantaged communities and that the department’s policy takes into account other categories of vulnerable and marginalised groups. The WCDAEA reported that it catered for all the vulnerable and marginalised groups in its budget allocation with the exception of “refugees and asylum seekers” which are said not to be beneficiaries of this programme.

#### *Budget Adequacy*

The ECDA reported that it found it difficult to spend all the budget allocated to the programme in one financial year owing to considerable community facilitation and participation required in the implementation stage of each project. ECDA further contended that rural communities’ priorities and seasonal workload make it difficult for these communities to implement land care work within the confines of “artificial” financial years. The ECDA has had to embark on an internal reorganisation exercise to be able to provide more support to the rural communities to improve implementation. It further reported that it had to modify rural communities’ goals to fit into the medium term framework. The GDACELA indicated satisfaction with the budget. The MDACE indicated that it was satisfied with its budget allocation. The NCDA was not satisfied with its budget allocation. As a result of the dissatisfaction with the budget allocation, the NCDA injected R283 000 into the programme.

The WCDAEA complained of insufficient funds. As a result of the limited funds, the department made a submission to the NDA requesting more funds. In 2001/2002 the WCDAEA committed an over-expenditure of R210 000, which had been rolled over from the previous financial year.

## LAND REDISTRIBUTION FOR AGRICULTURAL DEVELOPMENT (LRAD) PROGRAMME<sup>34</sup>

**Table 7 Total budget allocation for Land Redistribution for Agricultural Development Sub-programme**

Name of Province	Year	Actual amount received from other sources	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Actual expenditure
KwaZulu-Natal	2000/2001	-	-	-	-	-
	2001/2002	-	800 000 00	0.1	-	504 616 00
North West	2000/2001	-	-	-	-	-
	2001/2002	-	2 728 000	-	-	2 547 000
Western Cape	2000/2001	-	10 399 000	-	-	3 592 000
	2001/2002	-	15 068 000	-	-	5 738 000

### *Accounting for the variance between the financial years<sup>35</sup>*

The WCDAEA ascribed the variance between the financial years 2000/2001 and 2001/2002 to the following factors:

- Changes in the organisational structure, that is, the establishment of a new directorate: Farmer Settlement; and
- The conflict within communities, which eventually led to a slow implementation of land reform prior to August 2001.

### *Vulnerable Groups*

The KZNDAEA reported that the state land is located in rural areas and has to be redistributed to satisfy the needs of the rural people. The response went further stating that “persons in informal settlements” are due to apply as beneficiaries but are not targeted as such unless they are living on state land with the power of Attorney.

<sup>34</sup> The ECDA did not fill in the table the required financial information as it advised that the national NDA is responsible for the sub-programme's budget. Furthermore, the ECDA did not respond on the LRAD instead it responded on the Integrated Land Redistribution for Agricultural Programme (ILRAD). The two programmes are different from each other. The FSDA did not respond to the question relating to this section, including the table on budgetary measures. Furthermore, the FSDA did not furnish the SA in 2000/2001HRC with reasons for not responding to the questions in this section. The GDACELA and the LDA indicated that the sub-programme is not applicable to them. The KZNDAEA reported that the land in the Power of Attorney became its responsibility from the 18<sup>th</sup> of April 2000 and the sub-programme was officially launched on the 13<sup>th</sup> of August 2001. According to the KZNDAEA, the financial resources expended prior to the 18<sup>th</sup> of April 2000 were only on the administrative and management of state land. The MDACE referred the SAHRC to its provincial Treasury for all information related to the budgetary measures taken during the reporting period. It was further reported that the LRAD in Mpumalanga became operational in August 2001. The NCDA did not respond to the questions related to the sub-programme. It only stated that the sub-programme was meant for the previously disadvantaged groups.

<sup>35</sup> Like most provincial Departments of Agriculture, the NWDACE did not furnish the HRC with the financial figures for the financial year 2000/2001 and therefore could not account for a variance between the financial years 2000/2001 and 2001/2002, in case there was going to be one.

The KZNDAEA clarified that the LRAD programme is aimed at developing commercial farmers. The NWDACE did not explain how it catered for the vulnerable and marginalised groups in its budget allocation.

In catering for the vulnerable and marginalised groups in its budget allocation, the WCDAEA reported that it provided support services needed by small-scale farmers and also provided infrastructure development to assist with the expansion of agricultural production. However, the WCDAEA reported that it did not make any special considerations for “persons with disabilities” and the “elderly persons.”

### *Budget Adequacy*

The KZNDAEA was satisfied with the budget allocation for the two financial years. In 2001/2002 the department incurred under-expenditure, which it ascribed to planned activities such as mentoring that ended up not taking place. To address under-expenditure the department revised the budget allocation and plans to accelerate the implementation of the programme in 2002/2003. The NWDACE expressed satisfaction with the budget allocation for 2001/2002. However, the department did not explain the under-expenditure it committed in the same financial year.

The WCDAEA was satisfied with its budget allocation during the reporting period. According to the WCDAEA, the over-expenditure it committed in both the financial years as seen in the table, impacted on the realisation of the right to sufficient food in two ways. Firstly, less of the vulnerable and marginalised groups were reached. Secondly, the proposed projects had to be delayed by a year or two. However, the WCDAEA reported that the new Directorate: Farmer Settlement has been given a full responsibility for the implementation of LRAD and infrastructure development.

## **POVERTY ALLEVIATION<sup>36</sup>**

**Table 8 Total budget allocation for the Poverty Alleviation Programme**

Name of Province	Year	Actual amount received from other sources	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Actual expenditure
Western Cape	2000/2001	-	1 058 400		400	628 200
Western Cape	2001/2002	-	1 058 400		400	384 600

<sup>36</sup> The following provincial departments of Agriculture did not respond to the questions posed in this section: the FSDA, GDACELA, LDA, and the NWDACE. There were no reasons given for not responding to this section of the protocol. The ECDA reported that it does not receive poverty alleviation funds. It further added that most of the department's budget is aimed at creating an economic basis for the rural communities to improve their household income and food production. The KZNDAEA indicated that information on the programme is available from the NDA, which manages it. Once more, the MDACE referred the SAHRC to the Mpumalanga Treasury for information on the programme, and reported that the Poverty Alleviation Programme is linked to other areas such as extension development and capacity building. The NCDA advised that most of its programmes are geared towards poverty alleviation for the poor.

*Accounting for the variance between the financial years*<sup>37</sup>

The WCDAEA reported that the beneficiaries of the programme were farm labourers based at a demarcated drought-stricken area in the Southern Cape region. The farm labourers were initially miscalculated. As a result of the miscalculation, there was still a surplus of funds even after the money had been disbursed to the beneficiaries.

*Vulnerable Groups*

The MDACE reported that in its budget allocation it ranked each vulnerable and marginalised group on a scale of top priority. However, no explanation was given as to the meaning of the scale.

*Budget Adequacy*<sup>38</sup>

The MDACE only said that it is experiencing “serious financial problems” with the programme.

## **5. OUTCOMES AND INDICATORS**

### **National Sphere**

The National Department of Agriculture did not provide information on indicators on the right to have access to sufficient food.

### **Provincial Sphere**

Except for the Western Cape and the North West provinces, all the other provinces furnished information, which was either incomplete or inappropriate to be used qualitatively and quantitatively to measure the progressive realisation of the right.

## **6. NATIONAL ACTION PLAN (NAP)**

The NDA and all the provinces did not provide information on the NAP.

## **CHILDREN’S RIGHTS TO BASIC NUTRITION**

## **7. INTRODUCTION**

Section 28(1)(c) of the Constitution makes specific provision for the economic and social rights of children. It guarantees to every child the right to basic nutrition, shelter, basic health care services and social services. The Constitutional Court in *Grootboom* held that sections 28(1)(b) and 28(1)(c) must be read together.<sup>39</sup> Section 28(1)(b) states that every child has the right “to family care or parental care, or to

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<sup>37</sup> The WCDAEA reported that the programme came as a result of the drought that once hit the province. The Provincial Cabinet, at the request of the Minister of Agriculture approved the amount seen in the table. The money was made available as a transfer payment to and managed by the Route/Little Karoo District Municipality.

<sup>38</sup> It is important to note that in the Western Cape the programme has come to an end. Surplus funds are now under the management of the Minister of Agriculture.

<sup>39</sup> *Grootboom, op.cit.*, para 76.

appropriate alternative care when removed from the family environment.”<sup>40</sup> This means that if ever children are cared for by their parents, section 28(1)(c) does not create any primary obligation on the State. The primary obligation for providing for the child lies with the parents. As will be demonstrated below, this does not, however, absolve the State. This part of the report focuses only on the right of every child to basic nutrition.

In the context of basic nutrition, the State is obliged to provide legal and administrative infrastructure necessary to ensure that children are accorded basic nutrition as contemplated by section 28(1)(c). This obligation would include, amongst others, the passing of laws and the creation of mechanism for the maintenance of children. In line with the General Comments of the Committee on Economic, Social and Cultural Rights, one of the mechanisms will be for the State to provide landless families with access to land to enable those families to provide for their children.<sup>41</sup> Another way that the State would meet its section 28(1)(c) obligation, would be through a social welfare program providing maintenance grants and other material assistance to families in need.<sup>42</sup> The State would be obliged to provide basic nutrition to children who are not cared for by their parents. Such as orphans, abandoned children, or children whose parents cannot afford to take care for them for a variety of reasons.

#### *Obligations Arising from International Treaties in Respect of Basic Nutrition*

A number of binding regional<sup>43</sup> and international treaties provide guidelines to government regarding the protection, promotion, respecting and fulfilling the right to basic nutrition.<sup>44</sup> The most significant international human rights instruments is the International Covenant on Economic, Social and Cultural Rights,<sup>45</sup> and the UN Convention on the Right of the Child (CRC), which South Africa ratified in June 1995.<sup>46</sup> Article 24(2)(c) of the CRC specifically requires State Parties to the Convention to “combat disease and malnutrition...through *inter alia*, the provision of *adequate nutritious foods*” in respect of children. In order to realise this objective, State Parties are obliged “...in case of need, to... provide material assistance and support programmes, particularly with respect to *nutrition*...”<sup>47</sup>

## **7. POLICY MEASURES AND PROGRAMMES**

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<sup>40</sup> *Ibid.*

<sup>41</sup> General Comment, No. 12, *op. cit.*, para 13.

<sup>42</sup> *Ibid*, para 77.

<sup>43</sup> African Charter on the Rights and Welfare of the Child, 1990. South Africa ratified the Convention on 12 January 2000. South Africa is also a member the African Committee of Experts and Welfare of the Child, a treaty monitoring body consisting of eleven members created in terms of the African Charter on the Rights and Welfare of the Child until 2006.

<sup>44</sup> See in particular the Convention on the Rights of the Child (1990); ICESCR (Article 10(3)); International Covenant on Civil and Political Rights (Article 24); Universal Declaration of Human Rights (Article 25(2)).

<sup>45</sup> ICESCR, Article 12(1) provides that “everyone has the right to adequate *nutrition* which guarantees the possibility of enjoying the highest level of physical, intellectual and emotional development.” Emphasis added.

<sup>46</sup> South Africa ratified the Convention on 16 June 1995 (National Youth Day).

<sup>47</sup> Emphasis added.



## National Sphere

The DoH reported that it is continuing with the *Integrated Nutrition Programme* (INP), an intervention mechanism adopted in 1995 to respond to nutritional and food insecurity as well as responding to starvation and hunger by augmenting food in households.<sup>48</sup>

The new policies instituted by the DoH during the reporting period are:

- The National Nutrition Guidelines for People living with TB, HIV/AIDS and other Chronic Debilitating Conditions which was instituted in August 2001;
- The INP Strategic Plan 2001/02 to 2006/07 instituted in November 2001; and
- The Manuals for growth monitoring and promotion instituted in September 2001.

Included amongst the implemented programmes based on these new policies is the Integrated Household Food Security (IHfSS) whose main objective is to alleviate short-term hunger among primary school learners by ensuring that 100 percent of targeted schools and learners are reached on a 100 of targeted feeding days, and that food servings comply 100 percent with the requirements of the standardised menu options. During the period 2001/2002, school feeding schemes were reported to be in place in 15 400 schools reaching about 4.7 million learners. Poverty Relief Projects were established in all the provinces.

## Provincial Sphere

In order to prevent and eliminate Vitamin A deficiency in children younger than 6 years of age and to decrease child morbidity and mortality by up to 25per cent within the next three years from the period of reporting, the WCDoH started the Vitamin Supplementation Programme. The Vitamin A Supplementation Programme is not a blanket supplementation for all children younger than 6 years, but only target at risk children. It also developed the Primary School Nutrition Programme (PSNP) to feed 144 021 primary school children in 813 primary schools at an efficiency rate of 100 percent for 172 school feeding days. 784 schools is reported to have participated in the tender while 29 schools fed independently. The feeding scheme is said to be done in collaboration with the Department of Education. It mainly targets primary school children from poor households from Grade R to Grade 7. The WCDoH further submitted that it developed Health Facility Based Nutrition Programme (HFBNP) in order to decrease the prevalence of malnutrition through nutrition supplementation and support and to contribute to the reduction in prevalence of Low Birth Weight (LBW) from 15 percent to 13 percent.

Limpopo Department of Health developed the Primary School Nutrition Programme from Malnutrition/Under Nutrition Policy. The main objective of this programme is to alleviate temporary hunger. About 2 700 schools are reported to have participated in the programme and 1.17 million children are fed. The main objective of the second policy, the Vitamin A Supplementation Programme, which is based on the Micro

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<sup>48</sup> Department of Health, *Integrated Nutrition Programme for South Africa: Broad Guidelines for Implementation*, Document No. 5, Pretoria, 1998.

Nutrient Deficiency Service, is to eliminate Vitamin A deficiency. The programme targets children under 6 and mothers, and people living with HIV/AIDS. Also effected, is the Baby Friendly Hospital Initiative Programme based on the Breastfeeding Policy, which is aimed at promoting child survival growth, survival and development.

MPDoH submitted that it had implemented the following national policies:

- Exclusive breastfeeding up to the age of 6 months;
- Baby Friendly Hospital Initiative, that is, the promotion and protection of breastfeeding after birth in institutions;
- Breastfeeding and HIV in terms of the right of the mother to decide;
- Basic nutrition and HIV for the protection of PWA's in terms of good nutrition;
- Nutrition and Chronic Debilitating Diseases to ensure basic nutrition to children and people with diseases;
- Vitamin A policy;
- Primary School Nutrition Programme; and
- Contribution to Household Food Security.

MPDoH instituted and implemented the following provincial policies:

- The policy on Growth Monitoring. Under this policy all children are monitored on the Road to Health chart by the correct anthropometrics methods to ensure that malnourished children could receive the correct support, and
- the policy on Malnutrition Intervention, a supplementation to high risk malnourished children below the age of 5 years and pregnant and lactating women.

The KZNDoh indicated that it had implemented, amongst others, the following programmes and projects:

- The Baby Friendly Hospital Initiative programme based on the Integrated Nutrition Programme and the National Breastfeeding policy guidelines. The programme is reported to have contributed to child survival and maternal health;
- Vitamin A Supplementation based on the Policy Framework and the Draft Provincial Vitamin A policy Integrated Management of Childhood Illness (IMCI) Guidelines; and
- Primary School Nutrition Intervention, based on the INP Policy Framework and the Provincial Financial Guidelines. This programme which mainly targets primary school learners is reported to have helped improve concentration of school children in class; and school attendance and decreased incidence of minor ailments.

The GDoH submitted that during the reporting period it instituted, amongst others, the following programmes and projects:

- Breastfeeding programme based on the South African Breastfeeding Guidelines for Health workers and A Health Workers Guide to the International Code of Marketing of Breast milk Substitutes Policies to create an enabling environment and adequate information to promote breast feeding;
- Primary School Feeding Scheme based on the National policy aimed at enhancing the learning capacity among primary school children by alleviating short-term hunger in needy children. The report did not give the number of beneficiaries to this programme;
- Nutrients and Malnutrition control based on the National Vitamin Supplementation Guidelines and National iodine Deficiency Guidelines, Road to Health Chart (RtHC) Policy to reduce the prevalence of malnutrition in children under 6 years of age; and
- Supplementary Feeding Scheme based on the Criteria/Guidelines on malnourished children in order to reduce the prevalence of malnutrition in children.

The NWDoH submitted that it had adopted the following strategies in order to give effect to INP in the province:

- The Promotion, Protection and Support of breastfeeding. Its main objective is to improve breastfeeding and appropriate infant feeding practices as well as to reduce infant and child malnutrition, particularly underweight, stunting and wasting children.
- Micronutrient Malnutrition control which aims at preventing micronutrient deficiencies particularly of Vitamin A deficiency in children.
- Growth Monitoring and promotion to promote optimum nutrition and prevent faltering in children under five years of age and below.
- Contribution to Household food Security to augment household food security through targeted feeding and promotion of community-based actions around household security and nutrition.
- The Primary School Feeding Project.
- Vitamin A Supplementation

The NCDDoH submitted that it implemented the following programmes:

- Kharkams Food Gardening based on the Primary School Nutrition Programme (PSNP) in order to improve the nutritional value of the meals given to primary school children.
- Bankara and Bodulong crèche feeding based on the Household Security. The programme's main objective is to improve the nutritional status of crèche children.

## 9. LEGISLATIVE MEASURES

### National Sphere

The DoH indicated that it was planning on formulating a legislative framework to, amongst others:

- promote, protect and support breastfeeding in South Africa;
- provide input on replacement feeding aspect of Prevention of Mother to Child Transmission (PMTCT) of HIV; and
- provide support on training on feeding options.

### Provincial Sphere

No new legislative developments were instituted by provinces.

## 10. BUDGETARY MEASURES

### National Sphere

**Table 9 Total Budget Allocation for the Integrated Nutrition Programme (INP)**

Year	Actual amount received from other sources	Total allocation in Rand(s)	Allocation as a % of GDP	Per capita allocation in Rand(s) inflation adjustment	Actual expenditure
2000/2001	589 699 366	595 699 366	-	102 – 30 <sup>49</sup> (Average)	509 347 627
2000/2002	592 411 000	596 947 000	-	120 073 (Average)	511 596 271

#### *Accounting for variance between the financial years*

The National Department of Health (NDoH) did not account for variance between the financial years in the table. Instead the NDoH cited the causes of under-expenditure, which include, amongst others:

- Insufficient human resources capacity in the DoH;
- Fragmentation of funding for communities and the lack of co-ordination thereof;
- Late release of funds by the Provincial Treasuries; and
- Delays in the tendering processes.

<sup>49</sup> The budget allocation for the INP is made up of the normal departmental budget allocation, the INP Conditional Grant and the Poverty Relief allocations. The per capita allocations (after inflation adjustment) given in the table are for the INP Conditional Grant only. The DoH did not supply the SAHRC with the per capita allocations for the normal departmental budget as well as the Poverty Relief allocation figures.

### *Vulnerable and Marginalised Groups*

In considering the vulnerable and marginalised groups, the NDoH reported that the INP Conditional Grant allocation is distributed to the provinces according to an index comprised of the two following indicators:

- Average poverty (average amount by which poor households' income differ from poverty line counting 60 percent); and
- Population figures for the 5 to 14 year old age group counting 40 percent.

The DoH advised that much as the Index it is using is sensitive to poverty and children, it is outdated. It does not cover the scope of the INP and is based on the old census figures. Moreover, the Index does not include nutritional indicators. The DoH blames the obsolescence of the Index on the National Treasury.

The DoH further advised that the Poverty Relief budget allocation is distributed to provinces according to an Index consisting of two indicators (after subtracting 15 percent for use at national level):

- Average poverty gap counting 75 percent; and
- Population figures (total) counting 25 percent.

### *Budget Adequacy*

The DoH expressed dissatisfaction with the budget allocation for the INP. It said that the budget allocated was insufficient to fund the planned Information, Education and Communication activities and to print enough Road-to-Health charts to provide a new-born child with one. However, an interim measure was used in which case the 15 percent allocated to the DoH was used to augment funding for the activities that required some more funds.

In 2000/2001 the DoH under-spent by R86 351 739 and by R85 351 729 in 2001/2002. To address such under-expenditure incidence the DoH took the following actions, amongst others:

- Provided capacity-building and training of employees; and
- Strengthened technical support.

## Provincial Sphere

**Table 10** Total budget allocations for the Integrated Nutrition Programme<sup>50</sup>

Name of Province	Year	Actual amount received from other sources	Total allocation in Rand(s)	Allocation as a % of the department total revenue	Per capita allocation in Rand(s) inflation adjustment	Actual expenditure
Free State	2000/2001	-	1 499 087	-	-	993 780 00
	2001/2002	-	2 603 965	-	-	1 806 303
Gauteng	2000/2001	5 956 252 000	63 700 000	1	8	61 449 409
	2001/2002	6 771 374 000	70 684 996	1	9	62 736 717
KwaZulu-Natal	2000/2001	132 471 473	-	-	-	119 804 00
	2001/2002	5 000 000	-	-	-	-
Limpopo	2000/2001	-	106 032 000	-	-	91 901 000
	2000/2002	-	106 032 000	-	-	89 527 000
Mpumalanga	2000/2001	1 271 652	41 000 022	-	-	38 591 205
	2001/ 2002	319 337 00	40 047 707	-	-	35 963 376

Accounting for variance(s) between the financial years

The Free State Department of Health (FSDoH) reported that the money allocated to the INP was determined on the basis of quotations, while from 2001/2002 tenders were obtained for the programme. The Gauteng Department of Health (GDoH) reported that in 2000/2001 food parcels were phased out and income-generating projects introduced. The KwaZulu-Natal Department of Health (KZNDoH) reported that some more funds were made available for the implementation of the INP especially for administrative and personnel costs which comprise 10 percent of the total budget allocation. Moreover, some roll-over funding was provided to assist the department pay its outstanding accounts. However, the department said that during the financial years 2000/2001 and 2001/2002 the roll-over funding has been inadequate to offset the outstanding financial claims submitted by School Governing Bodies. The Mpumalanga Department of Health (MDoH) did not necessarily account for variance; instead, it referred to under-expenditures incurred during the financial years in the table.

### *Vulnerable and Marginalised Groups*

On how it catered for the vulnerable and marginalised groups, the WCDoH submitted that the Department of Education has developed a poverty index under the Primary School Nutrition Programme. The poverty index classifies schools on a scale of 0 to 1, with 1 being the most impoverished. All the children, Grade R to Grade 7, in all the poorest schools (which include all rural and farm schools) are being fed. HFBNP and Vitamin A supplementation programme targets the children affected by poverty when they become underweight or shows signs of growth faltering. Mothers and caregivers are empowered through nutrition education in order to prevent long-term treatment of malnutrition. Nine Community Based Nutrition and Developmental Projects were established.

<sup>50</sup> The provincial departments seen in the table are the only ones that responded to the questions posed on the INP.

The FSDoH reported that it targeted the school-going groups and that the Department of Social Development and Welfare has a responsibility for other vulnerable and marginalised children.<sup>51</sup> The GDoH reported that it considered the vulnerable and marginalised groups as it ran programmes on school feeding and poverty alleviation for the first six categories of vulnerable and marginalised groups.<sup>52</sup> It also reported that it provided a Supplementary Feeding Scheme Programme for two categories of vulnerable and marginalised groups.<sup>53</sup>

The KZNDoH simply said that the INP targets all the vulnerable and marginalised groups. It nonetheless, did not explain how this is achieved. The Limpopo Departments of Health and Welfare did not say anything regarding how they cater for the vulnerable and marginalised groups in their budget allocations. The MDoH reported that in its implementation, the INP aims to cover all the vulnerable and marginalised groups.

### *Budget Adequacy*

The FSDoH reported that during the reporting period it experienced under-expenditure owing to a delay in the processing of food tenders that were characterised by long procedures. This situation resulted in some of the community needs not being met. However, a lunch box scheme was introduced to address this problem. Furthermore, to avoid similar problems happening in future the Free State Provincial Tender Board was decentralised and the FSDoH created its own Tender Administration Office to expedite tendering.

The GDoH indicated satisfaction with the budget allocated to it during the two financial years referred to in table 2 above. The GDoH, however, experienced an under-expenditure in 2000/2001 as a result of a lack of capacity within the department. The department hopes to address this problem by recruiting more skilled human resources. The KZNDoH was particularly dissatisfied with the budget allocated to it during the reporting period. The following were the reasons it put forward:

- the number of beneficiaries has increased and this has been further complicated by the emergence of diseases such as HIV/AIDS;
- the increase in food prices; and
- the increasing rates of unemployment and poverty.

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<sup>51</sup> This refers to the following groups of vulnerable and marginalised children:

- Children living in rural areas
- Children living in informal settlements
- Girl-children
- Children from low-income groups
- Children from unemployed families
- Children with disabilities
- Children infected with TB
- Children infected with and/or affected by HIV/AIDS
- Children headed households

<sup>52</sup> See n.51 above.

<sup>53</sup> *Ibid.*

In order to deal with the challenges mentioned above, the department has made motivations for more funds to both the provincial and national spheres of government. However, the department reported under-expenditure in the Primary School Nutrition Programme (PSNP) in 2000/2001. The under-expenditure was ascribed to the malfunctioning financial management system used in the PSNP. The malfunctioning financial management system resulted in the deep rural schools being compromised. The system was, however, reviewed in 2001/2002, the review of the system saw an improved expenditure in the programme afterwards. The department has put in place more measures to ensure that the programme meets its objectives. The following are some of them:

- capacity building;
- streamlining of the administrative procedures and processes in the INP;
- review of the monitoring tool; and
- decentralisation of the programme to three districts in 2001/2002 and to two more in 2002/2003.

The Limpopo Departments of Health indicated dissatisfaction with its budget allocations during the reporting period. However, an under-spending of R84 131 000 was committed in this programme in 2000/2001, and in 2001/2002 an under-spending of R16 505 000 was committed as well. The MDoH said that its budget allocation was inadequate. It further suggested the following:

- that the Primary School Feeding Programme should be extended to at least another 100 000 primary school learners in need of a school meal; and
- that it will have to provide supplementations such as Vitamin A capsules out of its own funds as from 2003/2004. During the time of reporting UNICEF had donated the supplementation which was not provided for in the budget allocation.

## **11. OUTCOMES INDICATORS**

### **National Sphere**

According to the NDoH' submission, there are only 16 percent of live infants born in health facilities with low birth weight of below 2.5 kg (low birth weight). 10.3 percent of children under 5 years of age are below two standard deviations from median weight for age (underweight). 21.6 percent of children under 5 years of age are below two standard deviations from median height for age (stunted). Only 3.7 percent of children under 5 years of age are below standard deviations median weight for height (wasted). The report did not, however, provide information on the number of infants and children who benefited from the Health Facility Based and Nutrition Programme and the Community Based Nutrition Programme.

### **Provincial Sphere**

According to the GDoH, there is 89 percent of live born infants in health facilities with birth weight of below 2.5kg. Only 10 percent of children under five years of age are underweight and 24 percent of the children under five years of age are stunted. Only 1.5 percent of children are wasted. No information was submitted on the



number of children who benefited from the Health Facility Based Nutrition Programme. 89 933 children are reported to have benefited from the Community Based Nutrition Programme.

KZNDoh reported that there 0.93 percent live born infants in health facilities with low birth weight. Only 6.5 percent of children under five years are underweight and 25.1 percent of children under five years are stunted. 6.5 percent of children are wasted. There are 5879 children who benefited from the Health Facility Based Nutrition Programme, and 3665 children who benefited from Community Based Nutrition Programme respectively.

MDoH indicated that there are only 14.46 percent of live born infants in health facilities with low birth weight, and only 1.6 percent of children under five years are underweight. It was reported that no recent survey was done on the stunted and wasted children under five years of age. About 6600 children benefit from the Health Facility Based Nutrition Programme every year and 1847 children benefited from the Community Based Nutrition Programme in 2001.

WCDoh reported that only 15 percent of live born infants born in health facilities with low birth weight, and 7 percent of children under five years of age are underweight. 11.6 percent of children under five years of age are stunted. No information was submitted on the number of the under five children who are wasted, the number of children who benefited from the Health Facility Based Nutrition Programme, and the number of children who benefited from the Community Based Nutrition Programme.

NWDoH submitted that it could not provide the nutrition information on indicators due to underdeveloped nutrition information gathering system.

## **12. IMPLEMENTATION DIFFICULTIES**

### **National Sphere**

The NDoH highlighted the following difficulties in attaining its objectives:

- Insufficient human resources capacity;
- Lack of financial management infrastructure to support managers contributed to underexpenditure;
- Decentralisation of services without adequate capacity at lower levels;
- Insufficient involvement of intra- and intersectoral partners to deliver the broadest range of services, especially in terms of school feeding in the most efficient and effective way; and
- Irregular monitoring due to capacity constraints.

### **Provincial Sphere**

MDoH of complained of budget inadequacy. It submitted that the National Conditional Grant for the implementation of the NIP was limited to the same amount of R39 million for the past three years and that this does not meet the provincial needs.

KZNDoh highlighted some of the factors, which hampered its progress:

- Lack of human resource to implement some of the programmes;
- Treasury regulations limited buying procedures;
- Devolved funds were not spent optimally;
- There was inadequacy of funds; and
- Lack of staff to monitor projects.

The department also pointed out the measures it had put in place to address these difficulties:

- More field staff was employed;
- 80 percent of vacant posts were filled;
- Put in place tender procedure to facilitate procurement; and
- Evaluation of spending pattern was undertaken and technical support rendered.

### 13. CRITIQUE

Subsection (2) of section 27 of the Constitution imposes a positive obligation upon the State in order to realise the right to sufficient food. According to the general comments of the Committee on Economic, Social and Cultural Rights, every State has got a margin of discretion in choosing the most appropriate ways and means of implementing the right to adequate food.<sup>54</sup> The Constitutional Court in the *Government of the Republic of South Africa & Others v Grootboom & Others* also acknowledges that the State has got a discretion to adopt the measures it deems appropriate to fulfil its obligation.<sup>55</sup> In terms of subsection (2), the State will have to devise a comprehensive and workable plan to meet its obligations. While the general comments of the Committee on Economic, Social and Cultural Rights state places the burden of justifying the measures adopted, on the State, the *Grootboom* judgment held that reasonableness will be used as a test to assess the appropriateness of the adopted measures.

In this context, to be reasonable, the adopted measures must, amongst others, include: the production; processing; distribution; marketing and consumption of food. According to *Grootboom*, the extent of the State's obligation is based on three key elements, which are, the obligation to "take reasonable legislative and other measures"; to "achieve the progressive realisation" of the right; and "within available resources".<sup>56</sup> The reasonableness of the measures adopted by the State will depend on the extent of its compliance with these three key elements.

#### *National Framework*

The provision of a comprehensive and workable national framework in the form of national laws, policies, programmes and strategies is one of the requirement for the adopted measures to pass a constitutional muster. It is not clear from the report

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<sup>54</sup> CESCR General Comment 12, *op. cit.*, para 21.

<sup>55</sup> *Grootboom*, *op. cit.*, para 41.

<sup>56</sup> *Ibid*, para 38.

provided by the national government on how the State proposes to provide for marginalised groups such as refugees and asylum seekers and victims of natural disasters. For the measures to be considered comprehensive, they should include “every person” within the Republic. Secondly, it is incumbent upon the national government to give direction to the provinces on how the poor, particularly in the rural areas will access land.<sup>57</sup> The General Comment of the Committee on Economic, Social and Cultural Rights views the right to adequate food as being crucial for the enjoyment of all rights and applies to everyone.<sup>58</sup> The Constitutional Court in the *Grootboom* judgment indicated that the reasonableness of measures adopted by the State will be assessed in the context of the Bill of Rights as a whole, especially the constitutional requirement that everyone be treated with care and concern as well as the fundamental constitutional value of human dignity.

Right of access to adequate food, according to the Guidelines on the Human Rights Approach to Poverty Reduction Strategies, entails, amongst others, the right to feed oneself rather than to be fed.<sup>59</sup> The Committee on Economic, Social and Cultural Rights, on the other hand, interprets the availability of food as the possibility of either feeding oneself from productive land or other natural resources. According to *Grootboom*, failure to make provision for those who are living in peril cannot be considered compliance.<sup>60</sup> The Constitution requires that everyone be treated with care and concern, because even if measures are statistically successful, if they do not respond to the needs of those most desperate, they may not pass the test of reasonableness.<sup>61</sup>

When allocating tasks and responsibilities to the different spheres of government,<sup>62</sup> the national government should give provinces a clear direction on how to deal with different sectors of the society. More so that the socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.

In addition, the national report does not articulate how the government is going to ensure well functioning distribution, processing and market system that can move food from the site of production to poverty stricken areas in order to ensure access by everyone.<sup>63</sup>

### *Information*

The information furnished by government on the adopted policies, legislative and other programmatic measures, was insufficient for the Commission to conduct a proper assessment of the measures adopted by the State to progressively realise the right of access to sufficient food.

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<sup>57</sup> The only marginalised groups cited by the government are people living with HIV/AIDS, TB and other communicable diseases and chronic debilitating conditions.

<sup>58</sup> CESCR General Comment, No. 12, *op. cit.*, para 1.

<sup>59</sup> Guidelines: A Human Rights Approach to Poverty Reduction Strategies, *op. cit.*, para 91.

<sup>60</sup> *Grootboom*, *op. cit.*, para 44.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, para 40.

<sup>63</sup> CESCR General Comment, No. 12, *op. cit.*, paras 12 – 13.

For example, although there were policies and programmes initiated by the NDA, no sufficient information was provided by the national department and the provinces regarding the phase of the programmes or the nature of the problems experienced in the implementation of those particular programmes. In general, the information submitted by the NDA was vague and not specific on what each measure entails.

### *Food Production*

Sugar and maize are the most frequently and consistently consumed foods in the country followed by tea, whole milk, brown bread and margarine.<sup>64</sup> It is regrettable to note that most households purchase these items. The root problem of hunger and malnutrition is not the lack of food but the lack of access to available food, because of poverty.<sup>65</sup> As subsistence farming is not encouraged or emphasised, the household income appears to be a decisive factor in the consumption and procurement of foods.<sup>66</sup>

### *Reasonableness of the measures*

Policies and programmes for food security tend to focus more on food production which in most instances happens in rural areas. The Land Care programme also targets small farm groups. Even though there are food garden programmes in urban areas most people in urban areas purchase food. The right of access to sufficient food does not only involve the production of food but also covers the financial means to purchase food. Not much has been done by government to ensure that those who do not have the financial means and are unable to produce food have access to sufficient food.

### *Administrative Action/Maladministration Corruption*

In addition, the NDA and the provinces were required to provide information on maladministration and corruption and they failed to submit such information except for the KwaZulu-Natal Province, which was also insufficient.

### *Budgetary Allocation*

Eastern Cape Province cited lack of funds as the main reason for its failure to impact on the agricultural sector. Other provinces either failed or submitted insufficient information. It is incumbent on the national government to allocate financial resources to the different spheres of government to ensure compliance with its constitutional obligations. The national government should also develop and maintain mechanisms to monitor progress towards the realisation of the right to adequate food, identify the factors and implementation difficulties and then adopt corrective measures to ensure proper implementation.<sup>67</sup> This was reiterated in the *Grootboom* judgment, where the court pointed out that accessibility should be progressively

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<sup>64</sup> National Food Consumption Survey, vol. 2, p. 511

<sup>65</sup> CESCR General Comment 12, *op. cit.*

<sup>66</sup> *Ibid.*

<sup>67</sup> General Comment, No. 12, *op. cit.*, para 31.

facilitated. Legal, administrative, operational and financial hurdles should be examined, and where possible, lowered over time.<sup>68</sup>

### *Basic Nutrition*

The NDoH's response on accounting for variance between the financial years in the table is not helpful, as it does not help the public understand what informs the fluctuation in the INP budget allocation. The issue of the outdated index used to determine the INP Conditional Grant allocation is disturbing. It is important for government to use an updated Index to ensure that each province is allocated what is commensurate with its needs. The allocation of financial resources to government departments, whether conditional grants or equitable share, should always be based on an updated information.

A mere indication by government departments that they do consider the needs of vulnerable and marginalised groups in their budget allocations is not enough. Government departments should illustrate how they consider the vulnerable and marginalised groups in their budget allocations. It is important to remember that no matter how comprehensive a programme may be, if it does not consider the vulnerable and marginalised groups it would fail the *Grootboom* test of reasonableness. The following elucidates the concept of reasonableness:

A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of a right.<sup>69</sup>

It is not appropriate for government departments to decry budget allocations if they cannot demonstrate that they can manage their financial resources properly. For instance, the KZNDoH incurred an undisclosed amount of under-expenditure in the PSNP during the reporting period, and yet it has made a motivation for the allocation of more funding to the provincial and national spheres of government. The KZNDoH is not alone in this; the MDoH also incurred alarming under-expenditures but it was dissatisfied with the budget allocated to it during the reporting period. The onus is on government departments to demonstrate that they are capable of using and managing their financial resources efficiently and effectively.

The Integrated Household Food Security policy, which targets primary school learners, is inadequate, as it does not cater for learners beyond Grade 7 who are from equally poor family household.

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<sup>68</sup> *Grootboom, op. cit.*, para 45.

<sup>69</sup> *Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR (CC)*

According to *Grootboom*, the State is obliged to create conducive conditions by providing landless families with access to land and maintenance grants and other material assistance to families in need to enable the parents to provide for their children. There is nothing in the measures adopted by the government that make provision for such families.

#### **14. RECOMMENDATIONS**

In order to give effect to the right to sufficient food, government programmes projects and other related measures on food security should be properly co-ordinated. The realisation of the right to food cannot be left to the Department of Agriculture alone; there should be a collaboration of different departments to ensure that this right is realised.

There is also a need for a comprehensive review of food related programmes and projects (i.e. basic nutrition, food security and school feeding schemes) particularly in respect of the Departments of Health (basic nutrition), Agriculture (food security) and Education (school feeding schemes) to ascertain whether these programmes afford everyone the right to sufficient food.

There should be creation of employment to alleviate the plight of poverty, as unemployment contributes to food insecurity because people do not have the means to fend for and feed themselves. There is a need for the creation of employment to enable people to feed themselves and be self-reliant in order to retain their right to dignity. Especially in the form of subsistence farming. Incentives should also be introduced to reduce food prices to enable everyone access to sufficient food. Nutrition education plays an important role in improving food nutrition security.<sup>70</sup> Agricultural, income generating and other efforts to improve food security and dietary diversification should all include a nutrition education component.<sup>71</sup>

The State should address implementation difficulties such as human and financial resources, which hamper on the right to access sufficient food.

Proper information gathering system should be established to enable the Commission get a clear understanding of the strong points and shortfalls of the steps adopted by the government realise its obligation of ensuring that everyone has access to sufficient food.

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<sup>70</sup> National Food Consumption Survey, *op. cit.*, p. 517

<sup>71</sup> *Ibid*, p 518

*Progressive realisation of the right*

As indicated in the *Grootboom* case<sup>72</sup>, a mere adoption of a policy measure by the government is not on its own sufficient to realise socio-economic rights. The government must strike a balance between the goal and the means, that is, the government must set out how in the long, short and medium terms it seeks to achieve the goals outlined in its policy framework. Monitoring system should be established to evaluate and assess the extent to which the right is realised in terms food production processing; distribution; marketing and consumption of food.

The DoH should work hand in hand with the provincial departments of Health to ensure that an updated and all-representative Index for the determination of the INP Conditional Grant is developed to help bring about a well-informed allocation of funds to these departments.

There should be collaboration amongst the different government departments to ensure that vulnerable and marginalised groups are adequately catered for. In this context, it will be the Departments of Land Affairs, Social Development and Health. Secondly, government departments should demonstrate clearly how they cater for the vulnerable and marginalised groups in their budget allocations. Such accountability is important to ensure that government departments do meet the objectives of their programmes.

It is important for government departments to demonstrate good financial management to justify the need for more funding. Asking for more financial resources when departments fail to even manage the so-called insufficient funding defies logic. Proper financial management and accountability are the basis for the support for more financial resources.

There should be a mechanism to alleviate hunger for all school learners.

## **15. CONCLUSION**

The State should be commended for the Food Security Draft Bill. It is, however, not clear when it is going to become law. When it finally becomes passed, it will hopefully address all the shortfalls identified in the measures adopted by the government.

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<sup>72</sup> *Grootboom, op. cit.*, para 42

## **ABBREVIATIONS**

<b>ARC</b>	Agricultural Research Council
<b>DoH</b>	Department of Health
<b>ECDA</b>	Eastern Cape Department of Agriculture
<b>FSDA</b>	The Free State Department of Agriculture
<b>GDACELA</b>	The Gauteng Department of Agriculture, Conservation, Environment and Land Affairs
<b>HFBNP</b>	Health Facility Based Nutrition Programme
<b>UDHR</b>	Universal Declaration of Human Rights
<b>NDA</b>	National Department of Agriculture
<b>IFSS</b>	Integrated Food Security Strategy
<b>IMCI</b>	Integrated Management of Childhood Illness
<b>ISRDS</b>	Integrated Sustainable Rural Development
<b>KZNDAEA</b>	KwaZulu-Natal Department of Agriculture and Environmental Affairs
<b>KZNDoH</b>	KwaZulu Natal Department of Health
<b>LRAD</b>	Land Redistribution for Agricultural Development
<b>MDACE</b>	The Mpumalanga Department of Agriculture, Conservation and Environment
<b>MPDoH</b>	Mpumalanga Department of Health
<b>NCDA</b>	Northern Cape Department of Agriculture
<b>NWDACE</b>	The North West Department of Agriculture, Conservation and Environment
<b>PSNP</b>	The Primary School Nutrition Programme
<b>RtHC</b>	Road to Health Chart
<b>SPFS</b>	Special Programme for Food Security Programme
<b>WCDAEA</b>	The Western Cape Department of Agriculture and Economic Affairs
<b>WCDoH</b>	Western Cape Department of Health





## CHAPTER 6

### RIGHT TO SOCIAL SECURITY

#### 1. INTRODUCTION

The Constitution<sup>1</sup> of the Republic of South Africa provides that everyone has the right to have access to social security including, appropriate social assistance for those who unable to support themselves and their dependants.<sup>2</sup> The State has a further obligation to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right.<sup>3</sup>

Children, like adults have the right of access to social security. The Constitution<sup>4</sup> also affords children the right to social services. The right is entrenched in a cluster of other child economic and social rights found in section 28(1)(c) of the Constitution. This section provides that, every child has the right to basic nutrition, basic health care services and social services.

The White Paper for Social Welfare<sup>5</sup> provides that social security covers a wide variety of public and private measures that provide cash or in kind benefits or both. The provision of these measures takes place, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing or being exercised only at unacceptable cost and such person being unable to avoid poverty. Secondly, in order to maintain children.

The White Paper defines the domains of social security as poverty prevention, poverty alleviation, social compensation and income distribution.<sup>6</sup> The White Paper further defines social security as policies which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child - rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs.

At the International arena, the International Labour Organisation (ILO) Convention, Social Security (Minimum Standards) 102 of 1952 defines social security, as the protection which society provides for its members through a series of public measures against economic and social distress that would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death. These measures include the provision of medical care, and the provision of subsidies for families with children.

The Convention on the Elimination of all Forms of Racial Discrimination puts an obligation on the State to afford everyone the right to social security and prohibit racial discrimination in all its forms.<sup>7</sup> The Convention on the Elimination of all

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<sup>1</sup> The Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>2</sup> Section 27(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>3</sup> Section 27(2) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>4</sup> The Constitution of the Republic of South Africa Act 108 of 1996.

<sup>5</sup> White Paper on South African Social Welfare Policy 1997 chapter 7.

<sup>6</sup> *Ibid.*

<sup>7</sup> Article 5(e)(iv) of the *Convention on the Elimination of all Forms of Racial Discrimination* provides that State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to

Forms of Discrimination Against Women also advocates for the elimination of discrimination against women especially in as far as social security is concerned.<sup>8</sup>

In terms of the White Paper, the social security system in South Africa is based on four fundamental and inter-related elements, namely; private savings, social insurance, social assistance and social relief.<sup>9</sup> Private savings means that people voluntarily save for unexpected contingencies such as disability, retirement and chronic diseases. Social insurance is the joint contribution made by the employers and employees to pension or provident funds. Government may also contribute to social insurance covering accidents at work. Social assistance is the non-contributory and means-tested benefit provided by the State to people with disabilities, elderly people and children. Social relief is the short-term measure to tide people over a particular individual or community crisis, it is non-contributory and it is means-tested.

Little content analysis has been attempted in commentaries in South African literature on the meaning of the right to social services.<sup>10</sup> In the *Grootboom* case<sup>11</sup> the court found that section 28 (1)(c) must be read in conjunction with section 28 (1)(b) of the Constitution. These sections imply that parents have the primary responsibility to provide economic and social rights of their children. The State intervenes only where the guardian/parents fail or are unable to provide for children. The primary responsibility to take care of children thus lies with their parents. Children's growth, development and well-being depend largely on the ability of their parents or guardians' ability to provide for them.

The Convention on the Rights of the Child (CRC)<sup>12</sup> provides that every child has the right to benefit from social security, including social insurance. The State is thus under an obligation to take the necessary measures to achieve the full realisation of the right in accordance with national law.<sup>13</sup> The CRC further provides that every child has the right to a standard of living adequate for its physical, mental, spiritual, moral and social development.<sup>14</sup>

Article 9 of the International Covenant on Economic, Social and Cultural Rights provides that State parties should recognise the right of everyone to social security including social insurance. This provision binds the child's economic security with

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guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of economic, social and cultural rights, in particular the right to public health, medical care, social security and social services.

<sup>8</sup> Article 11(1)(e) of the *Convention on the Elimination of all Forms of Discrimination Against Women* provides that State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to have paid leave.

<sup>9</sup> White Paper on Social Welfare.

<sup>10</sup> J Sloth-Nielsen, "The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*," Vol. 17, Part 2, *SAJHR*, 2001.

<sup>11</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

<sup>12</sup> The *Convention on the Rights of the Child* (1989) was ratified in 1995 by South Africa.

<sup>13</sup> Article 26(1) of the *Convention on the Rights of the Child*, 1989.

<sup>14</sup> Article 27(1) of the *Convention on the Rights of the Child*, 1989.

that of their adults. The African Charter on the Rights and Welfare of the Child ratified in 2000 makes provision for the survival and development of a child.

Despite these provisions the reality, however, is that the majority of children in South Africa live in poverty, even those in parental care face the same hardships as those without parental care. This is to a large extent caused by the fact that their parents are unable to provide them with the basic necessities. The infant mortality rate is high so is malnutrition. The number of child headed households is increasing at an alarming speed, which to a large extent is caused by the impact and effects of HIV/AIDS. Children heading households have been tasked with the huge responsibility of taking care of their siblings.<sup>15</sup> These children and others such as, those with disabilities and chronic illnesses; living on the streets; child offenders/children in conflict with the law as well as refugees and asylum seekers are amongst the most vulnerable children and marginalised.

The purpose of this chapter is to review the measures that have been taken by the government to realise the rights of access to social security including access to social services for children during the reporting period. The chapter will ascertain and assess whether the rights to social security including the right to social services have been realised and the extent to which the rights have been realised. The measures will include policies, programmes and projects and legislation instituted by government at both national and provincial sphere. This will also include the budgetary allocations for the realisation of the rights and the outcomes (indicators) of the measures instituted. Most importantly, the review will be based on the reasonableness and effectiveness of the instituted measures.

In order to pass the test of reasonableness, the measures have to be reasonable and effective in their conception and implementation, and must also take into account the needs of the vulnerable and marginalised. The critical review of government measures will be assessed against constitutional and international provisions. The adherence of the State to constitutional, regional and international instruments and the obligations thereto, will be specifically looked at in this chapter, and recommendations will be made on how best government can promote and fulfil the right in question.

## **2. POLICY, PROGRAMMES AND PROJECTS**

The government departments, namely; the Department of Social Development and the Department of Labour (DOL) were requested to report on policy, legislative and budgetary measures instituted between 2000/2001 and 2001/2002, including the outcomes (indicators) thereof.

### **National Sphere**

#### **National Department of Social Development**

The National Department of Social Development (NDoSD) reported that a Committee of Inquiry into a Comprehensive Social Security System was established; the

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<sup>15</sup> Children's Entitlement to Social Security, National Consultative Workshop Report, Cape Town, March 2001, 5.

Department also instituted a Review Policy on Social Grants policy and the National Norms and Standards for Social Assistance during the reporting period.

#### *Committee of Inquiry into a Comprehensive Social Security System*

The Committee established in May 2000, to investigate and present options to Cabinet for a comprehensive and affordable system of social protection for South Africa and to consider gaps within the existing social security system.<sup>16</sup> The brief of the Committee was not only confined to social assistance programmes but included matters relating to the health sector, the Unemployment Insurance Fund and the Road Accident Fund. The Committee submitted its first report to the Ministerial Sub Committee in 2002 for comment.<sup>17</sup>

The Committee's report reveals that most people do not have access to social security and that there is no income support for children between 7 and 18 years as well as for adults between 18 and 59 years of age. The Committee found that the lack of policy to address income poverty has been a constraining feature in South Africa's socio-economic programmes. The report paid considerable focus to a comprehensive social security system, with particular attention to children, disability, unemployment, health and retirement. The Committee recommended a comprehensive and integrated medium- to- long- term framework for income support. The framework will ensure that all citizens have a minimum acceptable standard of living and enjoy universal coverage.<sup>18</sup>

#### *Review on the Policy of Social Grants*

During 2000/2001 the department conducted a review of the regulations promulgated under the Social Assistance Act to identify policy improvements. This led to the review of social grants, assessment of disability grants as well as the care dependency grant, assets test and calculation of benefits.

#### *The National Norms and Standards for Social Assistance*

The department reported that it embarked on a comprehensive review of the delivery and administration of social assistance, with the view of developing national norms and standards. The policy aims at improving the efficiency and effectiveness of the administration of social assistance and ensuring that all beneficiaries have equitable access to social assistance irrespective of the provinces of their residence.

#### *Financial Management Improvement Programme*

The Financial Management Improvement Programme was implemented with the assistance of a conditional grant from the National Treasury in May 2000 for a period of 22 months. The grant was used to contract financial experts to assist the departments with the implementation of the Public Finance Management Act(PFMA)

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<sup>16</sup> Department of Social Development, Annual Report, 2000/2001, 17.

<sup>17</sup> Department of Social Development, Progress Report, March 2002, 8.

<sup>18</sup> Transforming the Present-Protecting the Future, a Consolidated Report, Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, March 2002, 154.

of 1999 in order to build capacity in financial management and in improving the management of social security budget allocations and conditional grants in provinces.

The programmes instituted by the NDoSD are illustrated in the table below:

**Table 1 Programmes and projects**

<b>Programme/projects</b>	<b>Policy on which programme/project is based</b>	<b>Objectives</b>	<b>Beneficiaries</b>	<b>Achievements or goals attained</b>
Norms and Standards	White Paper on Social Development  Ten Point Plan	Improve efficiency, effectiveness and equity in the delivery of social assistance	Recipients of social grants	Implementation plan completed
Audit of pension paypoints	White Paper on Service Delivery (DPSA)	To improve infrastructure at pension pay points, with focus on provinces that are predominantly rural	Recipients of social grants	50 percent of 8200 pension pay points have been audited
Technology infrastructure and Rural connectivity project	White Paper on Service Delivery	To improve communications and technology infrastructure in provinces	Recipients of social grants	Upgrading and replacement of computer and office technology in provinces
Social Grants Awareness Campaign	White paper on Social Welfare  White Paper on Service Delivery	To inform eligible beneficiaries about rights and procedures for accessing social grants	Recipients of social grants,	There was a total number of 4 374 817 beneficiaries as at March 2002
Financial management improvement	Public Finance Management Act	To improve financial management in the national and provincial department, with emphasis on social assistance	departments and social grants beneficiaries	10 departments had the benefit of financial experts to assist with implementation of PFMA improvement in financial management varied from province to province Good results achieved in national department and there was no under expenditure

**Department of Labour**

The DoL reported that Provincial Benefit Committees were appointed in ten regions. The Benefit Committees which consisted of an equal number of representatives from business and the labour movements were established to hear appeals against the decisions of claims officers who refused payment of unemployment insurance benefits to the beneficiaries.

The DoL further reported that it was engaged in a programme to improve the social security safety net. Though the department did not explain much about the programme, it did state that the programme was aimed at improving the coverage of the workers redistribution of wealth and improving financial viability of the unemployment insurance fund. All the workers especially poor members of the working class, are classified as beneficiaries of the programme.

In responding to implementation difficulties the DoL reported that the unavailability of major banks in remote rural areas forces beneficiaries to travel to the nearest town with a financial institution to have access to payment. The beneficiaries travelling from rural areas experienced problem as there was no form of safety and security from criminals. To address this problem the department engaged in talks with service providers such as TEBA Bank and the Post Office to try and afford beneficiaries in remote areas access to the unemployment benefits.

## **Provincial Sphere**

### **Provincial Departments of Social Development**

The departments that responded to the policy section were the Northern Cape, Western Cape, Eastern Cape and the Free State. Gauteng reported that there were no policy measures instituted during the reporting period, except for the Poverty Alleviation Programme and the Financing and Monitoring Programme. Mpumalanga indicated that it was implementing policies that were instituted prior to the reporting period. Limpopo and KwaZulu Natal were the only provinces that did not respond to the policy section.

#### *Norms and Standards Policy*

The Northern Cape indicated that the Norms and Standards Policy repealed the three month-processing period for social assistance applications.

#### *Review Policy*

The Northern Cape reported that the Review Policy aimed at reviewing the provisions relating to disability grants in the Social Assistance Act in order to maintain nation wide uniform standards on grants for people with disabilities. The department further established review panels through the Review Policy, and they were formed in all regions of the province.

The Western Cape Department established appeal panels to deal with rejected disability grant applications. The Eastern Cape reported that the Review Policy was instituted to govern the review of all grants that were approved as at the 1<sup>st</sup> of

December 2001. The department further reported that the policy ensured that only qualifying beneficiaries had access to the grants and also focused on administrative review and medical reviews.

The Free State Department reported that an appeals panel was introduced to allow persons who were aggrieved by the decision of the Head of the Department in the administration of the Social Assistance Act 59 of 1992 to appeal against such a decision. The appeals panel therefore had to ensure that appeals are conducted independently and objectively.

### **3. LEGISLATIVE MEASURES**

#### **National Sphere**

The NDoSD reported that the following legislative measures were instituted:

- Amendments to the Regulations: Social Assistance Act, 1992
- Review of the Social Assistance Act, 1992
- Social Grants Appropriation Act, 2000

#### *Social Assistance Regulation (Social Assistance Act as amended)*

Information from other sources provides that during 2000/2001, the Department of Social Development reviewed the procedure for assessing people for the Disability Grant and proposed amendments to the Regulations of the Social Assistance Act of 1999.<sup>19</sup> The amendments to the Social Assistance Regulations came into effect on 1 December 2001.<sup>20</sup>

The amendments include the introduction of assessment panels for disability grants and care dependency grants. These panels will improve access to social assistance grants by applicants, who do not have easy access to a District Surgeon. The three-month limitation on the payment of arrears has been removed. The beneficiaries will no longer be penalised for the delays in the processing of their applications. The procedures for review of eligibility for grants have been simplified. Beneficiaries are required to submit an affidavit stating that they are still alive and that they do not have other sources of income. Only those beneficiaries with other sources of income will be subjected to further review. Beneficiaries with permanent disabilities are no longer required to undergo medical reviews every five years, unless there is an indication on their medical report that their condition is likely to improve.

The income means for the Care Dependency Grant was increased, and applicants are required to declare the income of the parents only, rather than that of the entire household. The amendments make requirements for people to be properly informed about decisions made with respect to their grant and grant applications.<sup>21</sup>

Prior to 1998, disability pensions could be terminated only after an annual medical review and where the person concerned was less than 100 percent disabled. The new

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<sup>19</sup> <http://www.gov.za/yearbook/2001/social.html> Site visited on the 05/03/02.

<sup>20</sup> *Ibid.*

<sup>21</sup> Department of Social Development, Progress Report, March 2002, 8.



1998 regulation provided for the automatic lapsing of temporary disability grants granted before 1998. The regulations and the way they were administered did not properly consider temporary status or period of disability.

The other legislative developments during the reporting period was the Social Assistance Bill. However the department did not report on this piece of legislation.

### **Department of Labour**

The Department of Labour reported that the Unemployment Insurance Bill was instituted in 2000.

#### *Unemployment Insurance Bill*

The Bill aims at extending the coverage to all workers in the labour market, and avoiding the exclusions of the past. The Bill also linked maternity benefits from the unemployment benefits, ensuring that female employees do not lose employment benefit days once they are on maternity leave. The Bill further proposes that, domestic workers and high-income earners be included as contributors and beneficiaries of the unemployment insurance fund.

The department further reported that in terms of the UIF 63 of 2001 everybody who contributed to the fund qualified for benefits, thus nobody was discriminated against. The problem however was with accessing the benefits, because most people from groups disadvantaged by past discriminatory laws did not have banking/savings accounts, and as a result they were given non-negotiable cheques upon claiming unemployment benefits from the fund. Beneficiaries with savings accounts had to wait for seven days for the funds to be cleared by the banks; those without savings accounts were forced to seek assistance from dealers who deducted commissions for cashing the cheques. Beneficiaries also had to wait in long queues to collect their cheques.

Beneficiaries in rural areas had to walk long distances or spend money travelling to reach the offices. The beneficiaries now receive the benefits on the same day and those without savings accounts are paid in cash, the fund contracted the Cash Payment Services Company to ensure that beneficiaries received their money in cash instead of cheques. Offices have also been increased to accommodate beneficiaries in rural areas. Refugees and asylum seekers do not qualify for benefits under the Act.

## Provincial Sphere

### Provincial Departments of Social Development

The respective provincial departments did not report on any legislative measures enacted during the reporting period, except for Regulation 11 under the Social Assistance Act 59 of 1992 as amended. The North West reported that Regulation 11 allowed beneficiaries who applied for social assistance grants to be back-paid depending on the application dates.

## 4. BUDGETARY MEASURES

### National Sphere

#### National Department of Social Development

**Table 2** Budget for the National Department

Year	Total revenue in Rand(s)	Total allocation in Rand(s)	Allocation as a % of GDP/GGP	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure	Actual Expenditure
2000/2001	-	383 265 000	0.04	-	-	382 046 000
2001/2002	-	2 334 847 000	0.23	-	2 334 847 000	-

The dash (-) in all the tables denotes that the information requested was not made available to the Commission.

#### *Variance(s)*

In accounting for variances the department reported that its operational budget remained stable over the period 2000/2001 and 2001/2002 and that the variances in the department's budget over the period in the table above reflect the variations in the Special Allocations or Conditional Grants to the department. An amount R2 billions was appropriated in 2000/2001 for the payment of arrears. As a result of adjusted appropriation, an amount of R50 million was provided for the disaster relief in 2000/2001.

There were variations in the Poverty Relief Allocation for the period 2000/2001, R120 million and R50 million for the respective financial years. The Conditional Grant for the improvement of social security varied over the period, depending on the nature of the projects for which the funds were allocated. The allocation for HIV/AIDS varied over the periods, in 2000/2001, R5.62 million was allocated, the allocation increased to R14.9 million in 2001/2002.

The department reported that even though there was no under or over spending during the reporting period, the budget allocation was not adequate to enable the department to implement all its programmes and projects effectively. To address the problem of

budget inadequacy, the department established an Expenditure Review Task Team, to closely monitor over and under expenditure in all programmes and also redirect unused funds to priority areas. Cost saving measures in administration were introduced. The department also implemented the Early Warning System to monitor expenditure. Monthly expenditure reports were discussed at EXCO meetings to address signs of over or under expenditure.

The table below shows the budgetary allocations made by the NDoSD for the various programmes

**Table 3 National budgetary allocation**

<b>Programme</b>	<b>Year</b>	<b>Total allocation in Rands</b>	<b>Actual expenditure in Rands</b>
Social Security	2000/2001	147 272 000	148 370 000
	2001/2002	2 112 226 000	-
Old Age Pension Grant	2000/2001	12 291 619	12 450 854
	2001/2002	14 190 833	-
Social Assistance	2000/2001	24 225 000	21 901 000
	2001/2002	10 096 000	-
Disability Grant	2000/2001	3 928 056	3 978 943
	2001/2002	4 534 991	-
Poverty Alleviation	2000/2001	157 678 000	157 678 000
	2001/2002	50 000 000	-

*Variance(s)*

The department indicated that the allocation in the table above only refers to the allocation for the social security function and excludes the actual payment of social grants. The department indicated that the allocation for the Old Age Pension Grant as a proportion of the total budget allocation remained constant during the reporting period. The proportion represented by the welfare service budget in 2001/2002 has been distorted by the special allocation of R20 billion for arrears payments to social grants beneficiaries. The under expenditure was in the area of conditional grants where provinces and departments were not ready to receive their allocations. These amounts were rolled over to the subsequent financial years.

The department reported that the budget allocation for the Poverty Alleviation Programme in 2000/2001 was R120 million, plus the rollover funds from 1999/2000. The roll over from 1999/2000 was for projects funded but which were not ready to receive the final payments as well as funds that had been committed for the Integrated Rural Development Programme. In 2001/2002 the department had a provisional allocation of R203 million.

## Provincial Sphere

### Provincial Departments of Social Development

**Table 4 Allocations of Provincial Departments**

Province	Year	Total allocation in Rands	Actual expenditure in Rands
Western Cape	2000/2001	2 273 821 000	2 201 479 000
	2001/2002	2 401 622 000	2 377 548 000
Northern Cape	2000/2001	6 342 700 000	6 544 460 000
	2001/2002	6 716 530 000	6 103 138 000
Mpumalanga	2000/2001	1 214 328 000	1 320 880 000
	2001/2002	1 580 218 000	1 531 229 000
Eastern Cape	2000/2001	99 077 000	79 294 000
	2001/2002	87 584 000	87 668 000
North West	2000/2001	1 792 707 000	1 778 660
	2001/2002	2 048 396 000	2 041 815
Gauteng	2000/2001	647 733 000	2 626 920 000
	2001/2002	2 934 062 000	3 017 507 000
Limpopo	2000/2001	2 335 253 000	382 036 623
	2001/2002	243 809 000	243 876 000

The Western Cape Department (WCD) reported that the allocated budget was adequate. The phasing out of the State Maintenance Grant, the staggering process in the filing of vacancies and the non implementation of the re-design of district service delivery model contributed to the under spending by the WCD in 2000/2001. Conditional Grants were not utilised during 2001/2002, the unspent funds however were to be rolled over to the next financial year. The WCD reported that strategic business plans, were put in place to improve spending. The WCD further indicated that some funds could not be utilised mainly because there were no policies in place. The Northern Cape Department (NCD) reported that the budget allocation for transfer payments, payments for social grants and old age pension grants was less than the projected budget requested.

Mpumalanga Department (MD) reported that it was under funded in the 2000/2001 financial year. The MD had to overspend due to the budget inadequacy. The MD further reported that to address the problem of over and under spending, they were developing self-sustainability projects to also broaden the scope and extend funding to projects not previously funded. The Free State Department (FSD) reported that the budget, which was allocated for the FSD, was inadequate. To address the budget inadequacy, bilaterals were held with the Provincial Treasury to highlight the problem, hence there was no over or under spending for the period under review.

The Eastern Cape Department (ECD) reported that the budget for the department was not adequate. To address budget inadequacy, the Treasury was approached with motivational letters requesting additional funding for posts for the period 2000/2001. Gauteng reported that there was over spending during the period 2000/2001. In 2001/2002 the department overspent on the allocated budget, this may be attributed to the unforeseen increase in the number of beneficiaries for social security.

**SOCIAL SECURITY****Table 5 Allocation for social security**

Province	Year	Total allocation in Rands	Actual expenditure in Rands
Western Cape	2000/2001	1 681 875 026	1 681 875 026
	2001/2002	1 909 220 027	1 909 220 027
Northern Cape	2000/2001	526 589 000	-
	2001/2002	582 666 000	-
Mpumalanga	2000/2001	1 117 468 000	1 079 044 000
	2001/2002	1 298 565 000	1 370 251 000
Eastern Cape	2000/2001	3 740 586 580	-
	2001/2002	4 921 637 000	-
North West	2000/2001	1 558 964 000	1 558 964 000
	2001/2002	1 747 552 740	1 747 552 740
Gauteng	2000/2001	2 108 798 000	2 059 147 000
	2001/2002	2 306 431 000	2 396 500 000
Limpopo	2000/2001	2 335 253 000	-
	2001/2002	2 438 309 000	-
Free State	2000/2001	1 104 497 000	1 085 424 000
	2001/2002	1 321 207 000	1 297 328 000

The North West Department (NWD) reported that the budget allocations for the social security programme was adequate and there was no over or under spending. The Northern Cape Department (NCD) reported that the budget for social security was inadequate. The social security unit overspent on its allocated budget, but such overspending did not affect the realisation of the right of access to social security. To address the problem of budget inadequacy the NCD made recommendations to the Treasury for additional funding.

MD reported that the budget allocated for social security was not adequate, thus the MD overspent on direct transfer payments. To address budget inadequacy, cost curtailment measures were introduced and the Provincial Cabinet and Provincial Treasury were informed of the budget inadequacy. The overspending had no impact on the realisation of the right of access to social security. Measures were put in place to address the overspending and the MD adjusted projections and increased allocations to the MD for the subsequent year.

**OLD AGE PENSION GRANT****Table 6 Allocation for old age pension grant**

<b>Province</b>	<b>Year</b>	<b>Total Allocation in Rands</b>	<b>Actual Expenditure in Rands</b>
Western Cape	2000/2001	884 209 085	884 209 085
	2001/2002	993 027 000	970 937 799
Northern Cape	2000/2001	2 732 790 000	2 683 580 000
	2001/2002	2 785 180 000	2 687 480 000
Mpumalanga	2000/2001	729 201 000	851 257 000
	2001/2002	745 995 000	914 384 000
Eastern Cape	2000/2001	2 467 323 000	-
	2001/2002	2 696 265 032	-
North West	2000/2001	1 042 501 000	1 042 501 000
	2001/2002	1 130 756 000	1 130 756 000
Gauteng	2000/2001	1 449 773 000	1 466 863 000
	2001/2002	1 488 886 000	1 545 311 000
Limpopo	2000/2001	1 955 651 000	2 433 623 000
	2001/2002	2 014 283 000	2 014 742 000
Free State	2000/2001	707 466 000	720 250 000
	2001/2002	788 626 000	787 577 000

Gauteng reported that the budget for the Old Age Pension Grant was inadequate and as a result the department had to overspend. However none of the Old Age Pension Grant beneficiaries were denied access to social grants and all grants were received. The North West reported that the budget allocations for the Old Age Pension Grant was adequate and there was no over or under spending. The Northern Cape reported that the budget for Old Age Pension Grants was inadequate. To address the problem of budget inadequacy the (NCD) made recommendations to the Treasury for additional funding.

**SOCIAL ASSISTANCE****Table 7 Allocation for social assistance**

<b>Province</b>	<b>Year</b>	<b>Total Allocation in Rands</b>	<b>Actual Expenditure in Rands</b>
Western Cape	2000/2001	3 465 000	3 465 000
	2001/2002	6 215 000	1 104 991
Northern Cape	2000/2001	2 823 200	2 189 000
	2001/2002	2 836 900	2 703 970
Mpumalanga	2000/2001	3 427 200	3 125 400
	2001/2002	5 298 900	4 848 900
Gauteng	2000/2001	5 000 000	8 960 000
	2001/2002	3 808 000	7 310 000
Limpopo	2000/2001	2 850 300	-
	2001/2002	2 992 500	-
Free State	2000/2001	5 200 000	8 735 430
	2001/2002	5 200 000	6 587 230

Gauteng reported that the expenditure on social assistance decreased over the last financial year, however the expenditure was expected to increase as changes in the qualifying requirements make it easier to qualify for Social Relief. The North West

reported that the budget allocations for the social assistance programme, was adequate and there was no over or under spending. Mpumalanga reported that the budget for social assistance was adequate in terms of meeting existing commitments. The MD indicated that the budget for Social Assistance was inadequate and as a result the department had to over spend for the programme.

## DISABILITY GRANTS

**Table 8 Allocation for disability grants**

Province	Year	Total allocation in Rands	Actual expenditure in Rands
Western Cape	2000/2001	585 799 337	585 799 337
	2001/2002	635 867 000	657 640 651
Northern Cape	2000/2001	140 397 000	201 096 000
	2001/2002	200 759 000	208 185 000
Mpumalanga	2000/2001	211 576 000	226 945 000
	2001/2002	226 204 000	-
Eastern Cape	2000/2001	847 171 000	-
	2001/2002	1 176 495 151	-
North West	2000/2001	383 986 000	383 986 000
	2001/2002	391 232 624	391 232 624
Gauteng	2000/2001	419 717 000	397 408 000
	2001/2002	414 078 000	460 309 000
Limpopo	2000/2001	379 602 000	-
	2001/2002	424 026 000	-
Free State	2000/2001	245 328 000	211 536 000
	2001/2002	284 675 000	285 864 000

Gauteng reported that the allocated budget was not adequate for the Disability Grant programme as a result of the increase in the uptake that was not anticipated. Hence the department overspent on the allocated budget. The North West reported that the budget allocations for the Disability Grant Programme was adequate and there was no over or under spending. The Northern Cape reported that the Disability Grant allocation was inadequate. To address the problem of budget inadequacy the NCD made recommendations to the Treasury for additional funding. In responding to variances for the Disability Grant, Limpopo reported that in 2000/2001 the deficit was as a result of under funding by the Provincial Treasury. In 2001/2002 the savings were as a result of beneficiaries who did not collect their grants. The budget for the programme was inadequate and to address the inadequacy of the budget, the department designed a model for costing of beneficiaries and submitted the results to the Provincial Treasury to validate the departmental budget.

**POVERTY ALLEVIATION PROGRAMMES****Table 9 Allocation for poverty alleviation**

Province	Year	Total Allocation in Rands	Actual Expenditure in Rands
Western Cape	2000/2001	11 250 000	11 250 000
	2001/2002	10 959 000	10 959 000
Northern Cape	2000/2001	5 000 000	-
	2001/2002	2 657 000	-
Mpumalanga	1999/2000	3 159 748	3 159 748
	2000/2001	9 700 000	9 700 000
Eastern Cape	2000/2001	1 486 480	-
	2001/2002	6 530 000	-
Gauteng	2000/2001	12 478 000	-
	2001/2002	12 411 000	-
Limpopo	2000/2001	5 085 000	-
	2001/2002	5 400 000	-

Limpopo reported that there were no variances for the Poverty Alleviation Programme. The budget for the programme was inadequate because the department had designed a model for costing of beneficiaries to the Treasury to validate the departmental budget. The department further reported that there was no over or under spending on the programme. The Eastern Cape reported that poverty alleviation projects targeted populations from previously disadvantaged communities, the unemployed and female headed households. The poverty alleviation projects were allocated small amounts of funds, which did not allow projects to progress through developmental stages to the point of sustainability. The only measures that were taken by the ECD to address the inadequacy was to approach the Provincial Treasury, to increase the budget for the 2001/2002 financial year.

Gauteng reported that there was under spending for the poverty alleviation programme. The North West reported that the budget allocation for the poverty alleviation programme was adequate and there was no over or under spending. The Northern Cape reported that the budget allocation for the poverty alleviation programmes was inadequate. To address the problem of budget inadequacy the NCD made recommendations to the Treasury for additional funding. The department further reported that in making budgetary allocations for poverty alleviation programmes the needs of the vulnerable and marginalised were taken into account. A large percentage of the total poverty alleviation funds were allocated to projects in rural areas. Persons living in informal settlements were particularly targeted for food security projects. Mpumalanga reported that the budget for poverty alleviation programmes was sufficient in terms of the number of projects funded but insufficient to deal with the need for income security.



## **5. OUTCOMES AND INDICATORS**

### **INCOME INDICATORS**

#### **National Sphere**

##### **National Department of Social Development**

The NDoSD reported that there were 6 726 730 persons with incomes inadequate to provide minimum food and shelter; 1 494 829 was the total number of households with incomes inadequate to provide minimum food and shelter; 1 648 104 was the total number of households with no source of income; 23 819 458 was the number of persons with no source of income; 3 741 603 was the number of households with income below poverty line; 16 837 214 was the number of persons with income below the poverty line; 4 374 817 was the number of persons receiving social security (social assistance); 3 421 107 was the number of households relying on social security (social assistance); 2 469 561 was the number of persons receiving social assistance and 2 469 561 was the number of households relying on social assistance.

#### **Provincial Sphere**

##### **Provincial Departments of Social Department**

*The number of persons with income inadequate to provide minimum food and shelter*

In Mpumalanga the total was 1 151 899 and out of that number 466 796 were males and 685 107 were females. In the Western Cape the total number is 2 795 530 with 2 431 144 from urban areas and 364 386 from rural areas and consisting of 1 273 males and 1 521 676 females. The Northern Cape reported that, 17 250 was the total number of persons with inadequate income. In the Free State the total number of persons with inadequate incomes was 150 270, with 95 332 persons in urban areas and 54 938 in rural areas, consisting of 106 365 males and 43 906 females. In Gauteng 538 403 was reported to be the total number of persons with inadequate incomes.

*The number of households with incomes inadequate to provide minimum food and shelter*

The MD reported that 369 717 households had incomes inadequate to provide minimum food and shelter, 116 108 consists of households in rural areas and 253 609 are households in urban areas, of that number 118 818 are female-headed households. The Western Cape reported that the total number of households was 357 670 and out of that number 126 040 are female headed households 286 786 are households in urban areas and 70 884 are households in rural areas. In the Northern Cape there are 19 011 households with inadequate income to provide for minimum food and shelter. The FSD indicated that 76 060 was the total number of households with an inadequate income, of that number 41 783 were households in urban areas and 43 277 in rural areas, with 63 386 males and 64 543 females. Gauteng reported that 561 917 households had incomes inadequate to provide minimum food and shelter.

*The number of persons with no source of income*

In Mpumalanga 820 212 persons had no source of income, 312 883 of that number were males and 507 329 were females. In the Western Cape 1 807 301 were reported to be without income, of that number 780 805 were males and 1 026 496 were females. In urban areas the number was 1 625 015, 182 286 consists of persons in rural areas. The Northern Cape had 2780 persons with no source of income. In Free State the number of persons with no source of income was 1 554 685, out of that number there were 684 057 males and 873 628 females, with 1 092 499 people in urban areas and 465 186 in rural areas. Gauteng reported 1 773 687 persons with no source of income.

*The total number of households with no source of income*

In Mpumalanga 74 390 households have no income, of that number 23 673 are households in urban areas and 50 717 in rural areas. Female headed households with no income are 20 698 in the Western Cape, the total number being 50 855. There are 48 946 households in urban areas and 1 909 in rural areas. The total number of 171 178 households has no source of income in the Free State, the total number consists of 72 905 households in urban areas, 25 368 households in rural areas, 81 981 males and 79 378 females. In Gauteng 389 927 households had no source of income.

*The number of persons with income below the poverty line*

In Mpumalanga it was reported that the total number of persons with an income below the poverty line was 1 151 899, out of that number 466 792 were males and 685 107 were females. Free State reported that 2 127 827 was the total number of persons without income, with 963 537 males and 1 445 568 females, of that number 1 515 396 were persons in urban areas and 612 431 were persons in rural areas. The Western Cape reported that 2 795 530 was the total number of persons with income below the poverty line, 2 431 144 of those people was from urban areas and 364 386 was from rural areas. The total number of persons with income below the poverty line consists of 1 273 854 males and 1 521 676 females. The Northern Cape reported that 642 persons were living below the poverty line and 538 403 people were reported in Gauteng.

*The number of households with income below poverty line*

In Mpumalanga the number of households with income below poverty line is 369 717. In urban areas the number is 116 108 and 253 609 in rural areas. In the Western Cape the total number of households with income below the poverty line was reported to be 357 670 of that number are 286 786 households in urban areas, 70 884 households in rural areas and 126 040 female headed-households. The Free State reported that the total number of households was 174 333, consisting of 145 367 males and 143 921 females. Households in urban areas were 114 688 and 59 645 in rural areas. In Gauteng 561 917 households have incomes below the poverty line.

**GRANT INDICATORS****National Sphere****Table 10 National grant indicators**

	<b>Total</b>	<b>Rural</b>	<b>Urban</b>	<b>Female-Headed Households</b>
Number of persons eligible for disability grants	1 208 105	559 353	648 752	-
Number of persons receiving disability grants	714 091	330 591	383 428	-
Number of persons eligible for old age pension grants	2 132 359	987 282	1 145 077	-
Number of persons receiving pension grants	1 936 553	896 624	1 039 929	-
Number of persons benefiting from poverty alleviation programmes	149 157	140 410	44 747	-
Number of households benefiting from poverty alleviation programmes	33 146	23 202	9 944	727 (flagship programmes)

The dash (-) in all the tables denotes that the information requested was not made available to the Commission.

**Provincial Sphere****Table 11 Provincial grant indicators**

	<b>Province</b>	<b>Total</b>	<b>Rural</b>	<b>Urban</b>	<b>Female-Headed Households</b>
Number of persons eligible for disability grants	Mpumalanga	13003	-	-	-
	Northern Cape	-	-	-	-
	Western Cape	-	-	-	-
	North West	6575	-	-	-
	Free State	173102	-	-	454934
Number of persons receiving disability grants	Mpumalanga	35320	-	-	-
	Northern Cape	-	-	-	-
	Western Cape	91782	-	-	-
	North West	63648	-	-	-
	Free State	45537	-	-	-
Number of persons eligible for old age pension grants	Mpumalanga	123 805	-	-	-
	Northern Cape	-	-	-	-
	Western Cape	-	-	-	-
	North West	42000	-	-	-
	Free State	138404	-	-	454934
Number of persons receiving pension grants	Mpumalanga	135045	-	-	-
	Northern Cape	-	-	-	-
	Western Cape	148370	-	-	-
	North West	169505	-	-	-
	Free State	115169	-	-	-
Number of persons benefiting from poverty alleviation programmes	Mpumalanga	3224	90%	-	-
	Northern Cape	966	360	360	313
	Western Cape	2151	-	-	-
	Free State	6246	-	-	-
Number of households benefiting from poverty alleviation programmes	Mpumalanga	3224	90%	-	-
	Northern Cape	966	360	360	313
	Western Cape	-	-	-	-
	Free State	800	-	-	-

The Eastern Cape did not respond to the outcomes section. The department reported that the information requested was not available from their provincial office.

## INFRASTRUCTURE INDICATORS

### National Sphere

**Table 12 National Infrastructure Indicators**

	<b>Total</b>	<b>Rural</b>	<b>Urban</b>
Number of social grants payout points	8 200	6 150	2 050
The average distance to social grant payout point	5km	-	-
The average time taken by the beneficiaries at social grants payout points before they receive payment	2hrs	-	-
Number of beneficiaries who reside within the following distances from social grant payout points:			
a) 5 km radius	2 754 780	-	-
b) Greater than 5km radius	1 441 455	-	-
c) Greater than 25 km radius	576 582	-	-
d) Greater than 50 km	48 048	-	-
Number of old age homes	481	360	121

### Provincial Sphere

The respective departments reported that the total number of social grant payout points was 356 in the Western Cape, 143 in Gauteng, 198 in Mpumalanga, 243 in the Northern Cape which consisted of 109 in rural areas and 134 in urban areas. The average walking distance to the social grant payout points was reported to be 5km in the Northern Cape and the Western Cape. In Gauteng the majority of beneficiaries reside within a 5-10 km radius from a pay-point. In Mpumalanga it was reported that the average walking distance was 20km. The Western Cape reported that 30 minutes was the average time taken by beneficiaries at social grant payout points before receiving payment, the Northern Cape reported that the average time taken by beneficiaries at social grant payout points was 1 hour in urban areas and 30 minutes in rural areas. In Mpumalanga the average time taken is 1-3 hours. Gauteng reported that beneficiaries waited for less than 2 hours for their payments.

In the Northern Cape 106 000 beneficiaries reside within 5km radius from social grant payout points. In the Western Cape 70 percent of beneficiaries reside within 5km radius from the social grant payout point, 20 percent reside within a distance greater than 5km radius and 5 percent reside within a distance greater than 25km and 50km radius.

## 6. NATIONAL ACTION PLAN (NAP)

### National Sphere

**Table 13 National Action Plan**

	<b>Total</b>	<b>Rural</b>	<b>Urban</b>
Number of households denied social assistance due to administrative procedure	-	-	-
Number of children between the ages of 7-18 who have been denied social assistance as a result of the phasing in of the child maintenance grant	1 924 188	-	-
Number of children who cannot be accommodated at children's homes and places of safety due to the lack of facilities and accommodation	1 853 982	-	-
Number of payout points that do not have access to water	5 576	-	-
Number of payout points that do not have access to toilet facilities	5 248	-	-
Number of payout points that do not have facilities for the disabled and the infirmed	6 478	-	-
Number of old age homes	415	-	-
Number of persons in old age homes	29 200	-	-

### Provincial Sphere

The Western Cape reported that there are 6 pay-out points without access to water, 6 without access to toilet facilities and a total of 23 pay-out points with no facilities for the disabled and the infirm, 17 in rural areas and 6 in urban areas.

The section below is given particular attention, as it deals specifically with social services provided for children. Basically, it is concerned with programmes pertaining to child welfare.

## **SOCIAL SERVICES FOR CHILDREN**

### **1. POLICY, PROGRAMMES AND PROJECTS**

#### **National Sphere**

The NDoSD was required to provide information on the measures (policy, legislative, budget) instituted to realise the right to social services for children as well as the outcome of such measures. In responding to the policy section the department reported that the National Integrated Strategy for Children Affected by HIV/AIDS, Secure Care Programme and the Transformation of the Child and Youth Care System were instituted during the reporting period.

#### *National Integrated Strategy for Children Affected by HIV/AIDS*

The department reported that the National Integrated Plan for Children Affected by HIV/AIDS, is a plan through which the department implements the Home Based/Community Based Care Programme. Thus the Home Based/Community Based Care Programme is a collaboration between the Departments of Health, Education and Social Development aimed at encouraging community participation in taking care of children. Furthermore it focuses on families and children infected with and affected by HIV/AIDS. The programme thus identifies orphans and vulnerable groups, facilitates access to social grants and material assistance such as food, clothing and shelter.

The department further reported that the programme facilitates alternative care and the establishment of child care committees and provides counselling and support and training for caregivers and volunteers. In 2000 the department established six project sites in six provinces (Northern Cape, Limpopo, Free State, Eastern Cape, North West Province and Mpumalanga)<sup>22</sup> for the Home Based/Community Based Care, by the end of 2001 the sites had expanded to 49 pilot sites. While aiming at shifting the emphasis of care to the community, the intention is to ensure access to care and follow-up referral system. Up to so far, 55 integrated projects sites have been established. Limpopo has established a consortium of churches, which assists with care, outreach, counselling and support to families by HIV/AIDS.<sup>23</sup> The department further extended the programme to 185 sites by the end of March 2002.

#### *Secure Care Programme*

The department reported that the programme caters for children at risk and those who are in conflict with the law. During the reporting period 15 Development Quality Assurance Assessments and 12 case audits were conducted in 2001/2002 to evaluate compliance with minimum norms and standards for children's residential care facilities. Facilities not in full compliance with were given advice and assistance to meet the required standards.

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<sup>22</sup> Department of Social Development, Annual Report, 2000/2001, 69.

<sup>23</sup> Department of Social Development, Progress Report, March 2000, 10.

### *Transformation of the Child and Youth Care Programme*

The department reported that the programme is based on the White Paper and aims at developing a child and youth care system that protects the rights of children, 30 projects were established during the reporting period. The department continued to support a number of projects, which were instituted prior to the reporting period. The national department provided all provinces with funds to extend the range in early intervention programmes which included appointment of Assistant Probation Officers and family finders and the expansion of One Stop Early Intervention Centres.

### **Provincial Sphere**

#### *National Integrated Strategy for Children Affected by HIV/AIDS (Home Care/Community Based Care Programme)*

Mpumalanga, the Eastern Cape, Limpopo, Western Cape, North West and the Free State reported that the National Integrated Strategy for Children Affected by HIV/AIDS was instituted during the reporting period. The Western Cape reported that the programme made special provision for children infected and those affected by HIV/AIDS in both residential care and foster care settings. The department further reported that it was hard to place children infected with HIV/AIDS into foster care, hence the programme started by concentrating on children affected by HIV/AIDS.

The North West reported that the programme provided a model of Home Based/Community Based Care on the indigenous care models to care for the sick by community selected care-givers. In Free State the programme was piloted in the district of Motheo in Welkom. The Free State established safety nets in Welkom for children infected and affected by HIV/AIDS.

#### *Transformation of the Child and Youth Care System*

The Eastern Cape reported that it instituted the Transformation of the Child and Youth Care System. The Western Cape reported that child offenders/children in conflict with the law were subjected to house arrests. The project was initiated with the sole purpose of keeping children away from prisons and police cells. Gauteng reported that children in conflict with the law were assessed through the programme, three centres were established for these children to be assessed.

#### *Secure Care Programme*

Gauteng established four Secure Care Centres to provide alternative care for neglected, exploited and abused children. The Western Cape reported that pilot projects at children's homes were instituted, the projects were based on the Funding Policy and the Norms and Standard Policy. The project aimed at advancing the rights of vulnerable children who required special support. The department further reported that the first phase of the project was successful in six children's homes.

In responding to constitutional obligations, the Eastern Cape reported that the Transformation of Child and Youth Care System Policy recognises the degree to which a child could be responsible for crimes and strives to mete rehabilitation and

punishment accordingly. The Transformation Policy protects the right to social services for children, in that Secure Care Centres undergo developmental quality evaluation, the policy also ensures the increase in the number of secure care centres, diversion programmes, developmental assessment of all children awaiting trial. To promote and fulfil the right to social services, the policy provides for the assessment of all arrested children within 48 hours and ensuring that the arresting officers advise the children of their rights on arrest.

In catering for the vulnerable groups, Mpumalanga reported that through Operation Nakekela the department was able to identify child-headed households and also provides services such as food parcels, counselling and life skills programmes to these children. The Free State reported that the instituted policies did not cater for the needs of children in child-headed households. The department further reported that homeless people and (children living in the streets) were catered for under different services, which included shelter, drop-in programmes and the reunification with families.

Mpumalanga reported that, homeless people, refugees and asylum seekers benefited from the social relief programmes. Children with disabilities benefited from the Care Dependency Grant and girl-children were part of the overall focus on children. The Eastern Cape reported that the Children's Homes approved during the reporting period focused on admitting children infected with HIV/AIDS.

In responding to implementation difficulties, the national department reported that the early stages of implementing the Home Based/Community Based Care Programme were slow as a result of limited capacity at the provincial level and the identification of Vulnerable and Marginalised Group was not easy as communities and households were reluctant to disclose the HIV/AIDS status. The department further reported that the lack of co-ordination between the Provincial Health and Social Development Departments at project level hampered the implementation of projects. The department also reported that financial constraints affected the implementation of already existing programmes. The Victim Empowerment Programme, which had established 100 projects, was facing financial constraints and could not be further implemented.

To address the implementation difficulties in the case of the Home Based Community Based Programme, the involvement of NGOs and FBOs expanded the delivery capacity because the FBOs and NGOs were in a better position to identify communities and children in need of care and assistance.

The provincial departments responded to the question of implementation difficulties and Mpumalanga reported that it faced problems because of insufficient resources. The Foster Care Programme could not be implemented in relation to extended families due to the interpretation of Guardian in the Child Care Act of 1993. The Northern Cape, North West and Free State reported that staff shortage and financial constraints were the problems.

The Free State reported that children in child-headed households were not adequately catered for under the instituted policy measures, mainly because child headed households were not reported as a vulnerable group deserving special consideration to the NDoSD before the beginning of 2001. The Integrated Strategy for Children



Infected and Affected with HIV/AIDS Programme was not properly managed by the consortium that was rendering the services and did not receive attention.

The department further reported that it was difficult to implement the programme because statistics on girl-children who take care of their siblings in the absence of adults was reported to be unknown and also on children living in informal settlements were not easy to find due to the non-existence of a proper structure to find and locate addresses and offices of the department were not accessible to children living in rural areas due to the geographic distance between towns.

To address the difficulties experienced during the implementation of policies, programmes and projects, the MD participated in the deliberations at national level to give inputs on the issue of legally placing children in foster care with extended members of their families. Volunteers were recruited and trained through the NPOs and CBOs. Provisions were made by Free State to appoint more personnel and funds were also made available to subsidies programmes.

Research was also conducted on the origin of child headed households in co-operation with the Departments of Health and Education. The North West reported that the department was developing infrastructure at a district level, more staff was appointed and training was offered on policy implementation. In the Eastern Cape the National Treasury was approached to approve the finance package of the programmes to address difficulties enable effective implementation.

KwaZulu Natal did not provide complete and relevant information to enable a proper analysis of policies, programmes and projects instituted during the reporting period.

## **2. LEGISLATIVE MEASURES**

### **National Sphere**

The national department reported that during the reporting period, the Child Care Act was reviewed, the Probation Service Amendment Bill was also reviewed and the Advisory Board on Social Development Act, 3 of 2001 was enacted.

### **Provincial Sphere**

#### *Child Justice Bill*

Mpumalanga reported that it participated in the processes of developing the Child Justice Bill. The North West reported that it was planning for the implementation of the of the Child Justice Bill, which would cater for the youth awaiting trial and providing several options for sentencing and establishing Child Justice Centres.

### *Child Care Act*

Gauteng reported that the provisions of the Child Care Act were implemented.

### *Social Assistance Regulations*

The Western Cape reported that amendments were made to the Regulations with effect from December 2001.

The Northern Cape, Mpumalanga, Limpopo, KwaZulu-Natal reported that no legislative measures were instituted during the reporting period.

## **3. BUDGETARY MEASURES**

### **National Sphere**

The national department reported that the budget was as follows:

**Table 1 Budget for the National Department**

Year	Total revenue in Rand(s)	Total allocation in Rand(s)	Allocation as a % of GDP/GP	Per capita allocation in Rand(s)	Projected expenditure	Actual expenditure
2000/2001	-	383 265 000	0.04	-	-	382 046 000
2001/2002	-	233 484 700	0.23	-	233 484 700	-

The dash (-) in all the tables denotes that the information requested was not made available to the Commission.

The variances in the national department's budget over the period in the table above reflect the variations in the special allocations or conditional grants to the department. The department's operational budget has remained relatively stable over the period. The variations in the special allocations or conditional grants are as follows:

- The Social Grants Appropriation Act, 2002 appropriated R2 billion in 2001/2002 for the payment of arrears.
- The Adjustment Appropriation provided for an additional R50 million for disaster relief in 2001/2002.
- There were variations in the Poverty Relief Allocation for the period 2000/2001 to 2002/2003, R120 million and R100 million, for the respective financial years.
- The conditional grant for the improvement for the improvement of social security varied over the period, depending on the nature of the projects for which the funds were allocated.
- The allocation for HIV/AIDS varies over the period: R5.62 million in 2000/2001; R14.9 million in 2001/2002; and R50.19 million in 2002/2003.

It should be noted that about 90 percent of the funds are for transfer to the provinces. The department reported that the budget was not adequate and as a result the department was unable to implement all its priorities effectively. The department indicated that the allocation for the past three years was small for personnel and

operational costs. This limited the capacity to manage the spending of relatively large conditional grants.

To address the budget inadequacy, the department appointed an Expenditure Review Task Team, to monitor over and under spending in all programmes. Unused funds were redirected to priority areas. The department also introduced cost-saving measures in administration. The department reported that there was no under or over spending in 2000/2001 and 2001/2002.

To address over and under spending the department has implemented the Early Warning System to monitor expenditure. Monthly expenditure reports are discussed at EXCO meetings and decisions are made to address any signs of over or under spending.

**Table 2 National budgetary allocation**

<b>Programme</b>	<b>Year</b>	<b>Total allocation in Rands</b>	<b>Actual expenditure in Rands</b>
Poverty Alleviation	2000/2001	157 678 000	157 678 000
	2001/2002	50 000 000	-
Child Support Grants	2000/2001	902 137 000	913 824 000
	2001/2002	104 152 900	-
Care Dependency Grants	2000/2001	208 564 060	197 995 000
	2001/2002	240 319 740	-
Foster Care Grants	2000/2001	206 740 000	209 418 000
	2001/2002	238 684 000	-
Secure Care Facilities	2000/2001	1 223 000	231 000
	2001/2002	-	-

*Variance(s)*

To account for variances for the poverty alleviation programme, the department reported that the allocation in 2000/2001 was R120 million plus the rollover from 1999/2000. In 2001/2002 the department had a provisional allocation of R203 million.

The department reported that in making the allocation to the projects consideration is given to vulnerable and marginalised groups. In responding to whether the budget was adequate. The department reported that the budget was adequate to fund the programme and the spreading of the allocation over a three year period. This also allowed the department to manage the programme more effectively. The department also reported that there was no over or under expenditure in the current reporting period.

To address the under and over spending the department established a National Manager and a Finance and Administration Manager, additional staff was appointed. The administration systems were streamlined and the monitoring and reporting on the Poverty Relief Programme were improved. All of this has assisted in addressing the problems of underspending.

In accounting for variances for the CSG(CSG) the department reported that there has been an increase in the budget allocation for the CSG each year to cater for the increase in take up rate for the grant. The department further reported that Gauteng and the Western Cape have had a take up rate higher than the original projection,

thereby placing considerable pressure on the social security budgets of these provinces. In all years except 2001/2002 an over expenditure was projected for the CSG budget.

The department reported that the budget allocation for the CSG was not adequate, this being based on the projected expenditure for the CSG. To address this problem the provincial departments negotiated with their respective Provincial Treasuries to acquire additional funds through the Adjustments Estimates. These shortfalls were brought to the attention of the National Treasury. Not all provinces were successful in securing additional funds to cover the shortfalls, and this resulted in the delay in the payment of approved applications for the CSG. Limpopo was one of the provinces that did not secure additional funds for the programme. The department reported that there has been over spending on the CSG and the Care Dependency Grant (CDG).

The department, in accounting for variances for the CDG reported that there was projected over spending on the CDG. The variation between the provinces has been prevalent but the problem of overspending was more pronounced in the Northern Cape.

In responding to considerations being given to the needs of vulnerable and marginalised groups, the department reported that the CDG targets children from low income groups, children in female headed households, children in rural and informal settlements. These groups are least likely to afford care and support services needed by children with severe disabilities.

The department further reported that the budget for the CDG was not adequate, hence there was overspending on the overall allocation for the CDG. To address the problem of budget inadequacy, the provincial departments negotiated with the Provincial Treasury to acquire additional funds through the Adjustments Estimates. The provincial departments in some instances, where it was possible redirected funds from other programmes, to the programmes which had insufficient funding. The national department has brought these shortfalls to the attention of the National Treasury.

To account for variances for the Foster Care Grant the department reported that there has been a steady increase in the take up rate for the Foster Care Grant, hence the need to increase the budget allocation for the grant. The increase in the take-up rate may be indicative of the increasing number of children in need for foster care as a result of HIV/AIDS.

The department reported that the needs of the marginalised and vulnerable are taken into account, in that in the past the allocations for the Foster Care Grant were based on previous take-up rates for the grant. Over the past two years it has become necessary to take into account the impact of HIV/AIDS. Through the Home Based/Community Based Care Programme, the department has become aware of the increasing number of children in rural areas and in informal settlements who are in need of care and who should be assisted through the Foster Care Grant. Changes in the practices of Magistrates with regard to foster care by relatives with low income are also expected to increase the demand for the Foster Care Grant.

The budget allocated for the Foster Care Grant was inadequate and as a result the department has overspent. There are, however variations between the provinces, the allocations were adequate in some provinces.

The department reported that the needs of the most vulnerable were taken into account, even though not every child had access to secure care facilities. The centres in the various provinces operate close to capacity, there were over 2000 children awaiting trial in prison and in police cells. The Western Cape experienced a great deal of pressure on its facilities. In the Northern Cape and North West two facilities were established and one facility was established in Mpumalanga, Limpopo, and the Free State. The department is however of the view that by expanding the number of secure care facilities and places of safety will not adequately address the needs of children awaiting trial.

The department further reported that the budget was adequate for the programme. However there was underspending on the budget. The underspending reflects administrative delays in obtaining invoices from the North West and Mpumalanga, rather than not spending the funds.

To address the underspending, the national department made a number of interventions in these provinces to obtain invoices and also ensured that the funds could be rolled over so that the relevant provincial departments could be reimbursed.

**Table 3 Allocation for Provincial Departments**

Province	Year	Allocation in Rands	Expenditure in Rands
Eastern Cape	2000/2001	-	-
	2001/2002	-	-
Free State	2000/2001	1 301 566 000	1 259 433 000
	2001/2002	1 518 700 000	1 482 166 000
Gauteng	2000/2001	2 647 733 000	2 626 920 000
	2001/2002	2 934 062 000	3 017 507 000
KwaZulu Natal	2000/2001	3 486 760 000	1 244 210 520
	2001/2002	-	-
Limpopo	2000/2001	1 174 190 000	1 741 900 000
	2001/2002	2 959 740 000	2 997 400 000
Mpumalanga	2000/2001	1 214 328 000	1 320 880 000
	2001/2002	1 580 218 000	1 531 229 000
Northern Cape	2000/2001	6 34 270 000	6 544 460 000
	2001/2002	6 716 530 000	6 103 138 000
Western Cape	2000/2001	2 273 821 000	2 273 821 000
	2001/2002	2 401 622 000	2 401 622 000

Mpumalanga reported that it was under funded in the 2000/2001 financial year, as a result the department overspent on the allocation but this was done after informing the Treasury. The budget had an impact on the realisation of the right to social services in that expenditure on other programmes was curtailed to provide for the budgetary shortfall on social security. Subsidies could not be extended to more NGOs rendering services to children, neither could increases be effected. To address the problem of over and under spending the department applied the 85/15 principle to Medium Term Expenditure Framework allocations.

In accounting for variances Limpopo reported that there were no variances. The Eastern Cape and Limpopo reported that the allocated budgets for the programme were inadequate. No over or underspending was experienced in Limpopo as a result of the inadequate budget.

To address the problem of budget inadequacy an amount of R650 000 was allocated from the departmental budget to cater for the projects that did not meet the requirements of the conditional grant. The department gave attention to the developing the self-sustainability of projects in order to broaden the scope by extending funding to projects not previously funded.

In accounting for variances, the Western Cape reported that during the reporting period there was underspending. The R1,5 million conditional grant for the Criminal Justice System and the R430 000 for the Victim Empowerment Programme, received from the NdoSD was not spent because the grants were transferred at a late stage of the financial year. The department received R10 million from the casino bid fees for poverty relief and this amount of money was not utilised as there was no poverty desk in place.

In 2000/2001 underspending was due to the staggering process in the filling of vacancies and the non-implementation of the Re-design of District Service Delivery Model. In 2001/2002 the non-utilisation of the i.r.o. Conditional Grant was the reason for the underspending, the computerization of the registry was not effected and the help desk was not established.

The department reported that the budget allocations were adequate, however to address budget inadequacy savings in programmes were utilised to defray excess expenditure in other programmes. The department also reported that strategic plans, business plans and measurable objectives had been put in place to improve spending.

To account for the variances the Gauteng Department reported that the funds were insufficient for the period 2000/2001. The department further reported that the budget was inadequate and the uptake for the grant was higher than anticipated and the funds were insufficient. The department received insufficient funds. The budget was not adequate for the CDG.

The department reported that the majority of people in the Eastern Cape are poor and live in rural areas. The poverty programmes are allocated small amounts of funds, which do not allow projects to progress through the developmental stages to the point of sustainability. No measures were taken by the department to address budget inadequacy, except for the planned submission to the Provincial Treasury for the budget for the year 2001/2002.

The Free State reported that in 2000/2001 a conditional grant to the value of R1,5 Million was received for the conversion of the Monument Place of Safety into a One stop Youth Justice Centre. Due to the long tender process, only R470 000 was spent. A request to the Provincial Treasury to roll over the amount of R1 030 000 was approved, of this amount R680 000 was spent in 2001/2002. The remaining funds will be spent in the current year, provided that the roll over request is approved. The department further reported that there was no special consideration for vulnerable and

marginalised groups as the admission of children in a secure care facility is based on the fact that they are in conflict with the law. The department indicated that the budget was adequate.

The Free State reported that for both the CDG Foster Care Grant, variances reflected overspending during the reporting period, due to the under estimation of the growth rate in both the CDG and the Foster Care Grant. The budget for both the Care Dependency Grant and the Foster Care Grant was not adequate, to address this problem funds were shifted from a saving to cover the shortfall. To address the problem of under and overspending the department has allocated enough funds for both the CDG and the Foster Care Grant.

## POVERTY ALLEVIATION PROGRAMMES

**Table 4 Allocation for poverty alleviation**

Province	Year	Allocation in Rands	Expenditure in Rands
Eastern Cape	2000/2001	1 486 480	-
	2001/2002	6 530 000	-
Free State	2000/2001	7 800 000	7 800 000
	2001/2002	3 680 000	3 680 000
Gauteng	2000/2001	-	12 478 000
	2001/2002	-	-
KwaZulu Natal	2000/2001	-	-
	2001/2002	-	-
Limpopo	2000/2001	17 200 000	-
	2001/2002	11 100 000	-
Mpumalanga	2000/2001	9 700 000	9 700 000
	2001/2002	4 350 000	-
Northern Cape	2000/2001	5 000 000	5 000 000
	2001/2002	2 657 000	2 657 000
Western Cape	2000/2001	10 959 000	10 959 000
	2001/2002	5 600 000	5 600 000

In accounting for variances Mpumalanga reported that the Poverty Alleviation Programme is supported through the conditional grants funded from the national department and Limpopo did not account for any variances. In as far as the adequacy of the budget was concerned, Mpumalanga, and the Northern Cape reported that the budget was inadequate. KwaZulu Natal did not provide information on the programme except to report that the funds for the programme are received from the national department.

**CHILD SUPPORT GRANT****Table 5 Allocation for the child support grant**

Province	Year	Allocation in Rands	Expenditure in Rands
Eastern Cape	2000/2001	141 600 000	-
	2001/2002	69 071 619	-
Free State	2000/2001	40 321 000	42 269 532
	2001/2002	104 132 000	103 163 327
Gauteng	2000/2001	75 469 000	61 270 000
	2001/2002	195 527 000	220 948 000
KwaZulu Natal	2000/2001	50 112 000	41 923 472
	2001/2002	656 975 000	504 237 170
Limpopo	2000/2001	83 556 000	83 556 000
	2001/2002	239 470 000	239 470 000
Mpumalanga	2000/2001	68 436 000	-
	2001/2002	143 367 000	-
Northern Cape	2000/2001	45 360 000	17 204 000
	2001/2002	30 003 000	36 109 960
Western Cape	2000/2001	32 574 601	32 547 601
	2001/2002	127 325 000	127 325 000

*Variance(s)*

Gauteng reported that the funds were insufficient for 2000/2001 and the Western Cape reported that there were no variances to account for. The Eastern Cape, Limpopo and Gauteng reported that the budget allocated for the programme was inadequate. However, the Western Cape and KwaZulu Natal had an adequate budget.

**CARE DEPENDENCY GRANTS****Table 6 Allocation for care dependency grants**

Province	Year	Allocation in Rands	Expenditure in Rands
Eastern Cape	2000/2001	32 000 000	-
	2001/2002	51 229 539	-
Free State	2000/2001	-	-
	2001/2002	-	-
Gauteng	2000/2001	14 000 000	16 766 000
	2001/2002	22 000 000	25 317 000
KwaZulu Natal	2000/2001	36 702 000	16 513 210
	2001/2002	88 770 000	76 456 318
Limpopo	2000/2001	17 742 000	17 742 000
	2001/2002	31 380 000	31 380 000
Mpumalanga	2000/2001	6 703 000	5 201 564
	2001/2002	7 707 000	15 992 753
Northern Cape	2000/2001	3 187 000	4 307 000
	2001/2002	6 306 000	5 929 000
Western Cape	2000/2001	19 772 807	19 772 807
	2001/2002	28 274 000	28 274 000



## FOSTER CARE GRANTS

**Table 7 Allocation for foster care grants**

Province	Year	Allocation in Rands	Expenditure in Rands
Eastern Cape	2000/2001	70 819 000	-
	2001/2002	103 164 159	-
Free State	2000/2001	18 743 000	34 662 932
	2001/2002	24 055 000	45 657 267
Gauteng	2000/2001	59 550 000	61 270 000
	2001/2002	63 865 000	73 649 000
KwaZulu Natal	2000/2001	30 701 000	15 075 886
	2001/2002	44 609 000	105 244 951
Limpopo	2000/2001	16 121 000	16 121 000
	2001/2002	25 124 000	25 124 000
Mpumalanga	2000/2001	12 804 000	10 338 465
	2001/2002	10 930 000	13 275 924
Northern Cape	2000/2001	22 608 000	-
	2001/2002	29 382 000	-
Western Cape	2000/2001	88 032 917	88 032 917
	2001/2002	96 700 000	96 700 000

Limpopo reported that there were no variances. The budget was inadequate for the programme for both Limpopo and Gauteng. As a result Gauteng had to overspend, Limpopo was not faced with any over or underspending.

## SECURE CARE FACILITIES

**Table 8 Allocation for secure care facilities**

Province	Year	Allocation in Rands	Expenditure in Rands
Eastern Cape	2000/2001	4 970 705	525 282 617
	2001/2002	6 909 000	649 585 215
Free State	2000/2001	1 500 000	-
	2001/2002	1 030 000	-
Gauteng	2000/2001	55 869 000	54 763 316
	2001/2002	69 251 709	69 258 768
KwaZulu Natal	2000/2001	21 985 000	21 985 000
	2001/2002	-	-
Limpopo	2000/2001	6 519 000	17 742 000
	2001/2002	7 321 000	31 380 000
Mpumalanga	2000/2001	3 200 000	1 436 316
	2001/2002	3 227 544	2 483 078
Northern Cape	2000/2001	9 027 000	-
	2001/2002	4 403 000	-
Western Cape	2000/2001	43 623 706	11 293 100
	2001/2002	52 116 424	4 409 400

## **4. OUTCOMES AND INDICATORS**

### **SOCIAL GRANTS**

#### **National Sphere**

The national department reported that 3 308 467 children were eligible for the CSG, 1 574 927 children, were receiving the CSG. Children eligible for Foster Care Grant were reported to be 319 354, 90 680 children were receiving the Foster Care Grant. The department reported that 276 776 children were eligible for the CDG and 42 474 children were receiving the CDG. The department further reported that 15 778 children were eligible for care at children's homes, secure care and places of safety and 13 815 children were receiving care at children's homes, secure care and places of safety.

#### **Provincial Sphere**

##### *Children eligible for assistance through the Child Support Grant*

The MD reported that the total number of children eligible for assistance through the CSGs was 240 660. Out of that number 69 519 were children from rural areas and 171 141 from urban areas. The number of African children eligible for assistance through the CSG amounted to 228 820, coloured 9 577, Indian 166 and white 2 097. The Western Cape reported that the total number of children eligible for assistance through the CSG was 180 000, 1 7250 in the Northern Cape and 346 888 in Free State. In KwaZulu-Natal 745 000 children were eligible for assistance through CSGs. In Limpopo 286573 children were eligible for assistance through the CSG. The Gauteng Department reported that 244 762 was the total number of children eligible for assistance through the CSG, of the total number 228 857 were from urban areas and 17269 were from rural areas. The highest number of children eligible for assistance were reported to be Africans, with a total number of 238 813, followed by whites with a number of 563, then 510 coloureds and 48 indians.

##### *Children receiving assistance through the Child Support Grant*

In Mpumalanga, the total number of children receiving assistance through the CSG was 92 522. In the Western Cape 140 000 children were receiving assistance through the CSG, 19 011 in the Northern Cape, 100 974 in Free State, 467 000 in KwaZulu Natal, 181 864 in Gauteng and 286 573 in Limpopo.

##### *Children eligible for assistance through the Foster Care Grant*

The number of children eligible for assistance through the Foster Care Grant was reported to be 2780 in the Northern Cape, 20 467 in Free State, 62657 in Limpopo and 80 760 in Gauteng. KwaZulu Natal reported that there were 12 706 grants in payment for approximately 25 000 children. The number was unknown in the Western Cape and in Mpumalanga.

*Children receiving assistance through the Care Dependency Grant*

The number of children receiving assistance through the CDG was 1400 in Mpumalanga, 642 in the Northern Cape, 1 823 in Free State, 5 437 in Limpopo, 4 264 in Gauteng and 4 381 in the Western Cape. In KwaZulu Natal 12 395 children had access to the CDG.

*Children eligible for assistance through the Care Dependency Grant)*

The Free State reported that the number of children eligible for assistance through the CDG was 41 542. In KwaZulu Natal the number of children eligible for assistance through the CDG was reported to be between 21 872 and 78 815. In Limpopo 5 437 children were reported to be eligible for assistance through the CDG. Gauteng reported that 27 355 children were eligible for assistance through the CDG, of that number 26 744 were from urban areas and 609 were from rural areas, 10007 children were reported to be female, 25 357 were africans, 523 coloureds, 150 indians and 1 077 whites.

*Children receiving care at children's homes and secure care facilities*

The number of children receiving care at children's homes and secure care facilities was 366 in the Northern Cape, 395 in Mpumalanga, 3 058 in the Western Cape. In KwaZulu Natal 3058 children were receiving care at children's homes and secure care facilities, 1 824 were children in urban areas and 1 234 were from rural areas. In the Free State 1 065 children were receiving care at secure care facilities.

## **ECONOMIC INDICATORS**

The respective government departments were asked to answer questions relating to statistics on the number of children in households with incomes below the poverty line, the number of children assisted through social assistance, and the number of children relying solely on social assistance.

### **National Sphere**

In responding to these questions, the national department reported that 8 207 770 children were in households with income below the poverty line, 1 882 126 children were assisted through social assistance, 1 709 103 children were receiving social assistance and 1 042 553 children relied solely on social assistance.

### **Provincial Sphere**

The MD reported that 776 406 children were in households with incomes below the poverty line, 95 325 children were assisted through social assistance and the number of children relying solely on social assistance was unknown. The Northern Cape indicated that there were 17250 children in households with incomes below the poverty line, 19 091 were receiving social assistance and 30 000 were relying solely on social assistance.

The Western Cape only provided that 73 495 children were assisted through social assistance and the number of children in households with income below the poverty line as well as the number of children relying solely on social assistance was unknown. The Free State Department reported that the statistics were not kept. Gauteng reported that the number of children in households with incomes below the poverty line were 538 403. Children in rural areas were reportedly pegged at 19 930 and 518 473 in urban areas.

## **INFRASTRUCTURE INDICATORS**

### **National Sphere**

The NDoSD reported that the total number of social grant payout point was 8 200, of that number 6 150 payout points were in rural areas and 2 050 in urban areas. The average distance to social grant pay-out points is 5km and the average time taken by beneficiaries at social grants pay-out points before they receive payment is 2 hours. The number of beneficiaries who reside within a distance of 5km radius was reported to be 2 754 780 (57 percent), 1 441 455 (30) was the number of beneficiaries who reside within a distance greater than 5km radius, 576 582 (12 percent) was the number of beneficiaries who reside within a distance of 25 km radius and 48 048 (1percent) was the number of beneficiaries who reside within a distance of 50km.

## Provincial Sphere

The table below represents the infrastructure indicators in the provinces:

**Table 9 Infrastructure Indicators**

	Province	Total	Rural	Urban
Number of social grants pay-out points	Mpumalanga	198	-	-
	Western Cape	356	-	-
	Northern Cape	243	109	134
	Free-State	256	31%	69%
	KwaZulu-Natal	2003	-	-
	Limpopo	1764	-	-
	Gauteng	143	-	-
The average distance to social grant pay-out point	Mpumalanga	20km	-	-
	Western Cape	5km	-	-
	Northern Cape	5km	5km	5km
	Free-State	7km	10km	5km
	Limpopo	5km	-	-
	Gauteng	-	-	-
The average time taken by the beneficiaries at social grant pay-out points before they receive payment	Mpumalanga	1-3hrs	-	-
	Western Cape	30 min	-	-
	Northern Cape	1hr	5km	5km
	Free-State	2hrs	10km	5km
	Limpopo	2hrs	-	-
	Gauteng	2hrs	-	-

Number of beneficiaries who reside within the following distances from social grant payout points:

a) 5 km radius	Western Cape	70%	-	-
	Northern Cape	106 000	-	-
	Free-State	-	-	-
	Limpopo	566712	-	-
b) Greater than 5km radius	Western Cape	20%	-	-
	Northern Cape	-	-	-
	Free-State	-	-	-
c) Greater than 25 km radius	Western Cape	5%	-	-
	Northern Cape	-	-	-
	Free-State	-	-	-
d) Greater than 50 km	Western Cape	5%	-	-
	Northern Cape	-	-	-
	Free-State	-	-	-

The dash (-) in all the tables denotes that the information requested was not made available to the Commission.

The Eastern Cape Department reported that the information on indicators was not available in their provincial system. Mpumalanga reported that the information on indicators was unknown to their department.

## 5. NATIONAL ACTION PLAN (NAP)

The NAP is indicated in the table below:

### National Sphere

**Table 10 National Action Plan**

	<b>Total</b>	<b>Rural</b>	<b>Urban</b>
Number of households denied social assistance due to administrative procedure	4 404 049	-	-
Number of children between the ages of 7-18 who have been denied social assistance as a result of the phasing in of the child maintenance grant	1 963	780	1 183
Number of children who cannot be accommodated at children's homes and places of safety due to the lack of facilities and accommodation	5 576	-	-
Number of payout points that do not have access to water	5 248	-	-
Number of payout points that do not have access to toilet facilities	6 478	-	-
Number of payout points that do not have facilities for the disabled and the infirmed	28	3	25
Number of secure care facilities	-	-	-

In reporting about the pay-out points, the department, indicated that 68 percent of the pay-out points did not have access to water, 64 percent did not have toilet facilities and 79 percent did not have facilities for the disabled and the infirmed.

## Provincial Sphere

**Table 11 National Action Plan**

	<b>Province</b>	<b>Total</b>	<b>Urban</b>	<b>Rural</b>
Number of households denied social assistance due to administrative procedure	Gauteng	-	-	-
	Northern Cape	-	-	-
	Mpumalanga	-	-	-
	Western Cape	-	-	-
	KwaZulu Natal	-	-	-
	Free State	-	-	-
	Limpopo	-	-	-
Number of children between the ages of 7-18 who have been denied social assistance as a result of the phasing in of the child maintenance grant	Gauteng	-	-	-
	Northern Cape	13313	-	-
	Mpumalanga	-	-	-
	Western Cape	-	-	-
	KwaZulu Natal	-	-	-
	Limpopo	-	-	-
	Free State	-	-	-
Number of children who cannot be accommodated at children's homes and places of safety due to the lack of facilities and accommodation	Gauteng	-	-	-
	Northern Cape	-	-	-
	Mpumalanga	-	-	-
	Western Cape	-	-	-
	KwaZulu Natal	-	-	-
	Free State	-	-	-
	Limpopo	-	-	-
Number of pay-out points that do not have access to water	Gauteng	-	-	-
	Mpumalanga	59	-	-
	Western Cape	6	6	-
	KwaZulu Natal	-	-	-
	Free State	-	-	-
	Limpopo	-	-	-
	Northern Cape	2%	69%	31%
Number of pay-out points that do not have access to toilet facilities	Gauteng	-	-	-
	Mpumalanga	51	-	-
	Western Cape	6	6	-
	KwaZulu Natal	-	-	-
	Free State	-	-	-
	Northern Cape	17%	69%	31%
	Limpopo	-	-	-
Number of payout points that do not have facilities for the disabled and the infirmed	Gauteng	-	-	-
	Mpumalanga	-	-	-
	Western Cape	23	17	6
	KwaZulu Natal	-	-	-
	Free State	-	-	-
	Northern Cape	80%	69%	31%
	Limpopo	-	-	-
Number of secure care facilities	Gauteng	-	-	-
	Mpumalanga	1	0	1
	Western Cape	5	1	4
	KwaZulu Natal	-	-	-
	Free State	-	-	-
	Northern Cape	2	2	0
	Limpopo	-	-	-

Gauteng in the policy section reported that 52 children's homes rendered services to 3000 children, 800 children were afforded services at 6 places of safety and 6000 children were in foster care.

## 6. CRITIQUE

The State has an obligation to respect, protect promote and fulfil the access right to social security and social assistance.<sup>24</sup> The Maastricht guidelines give a clear explanation of the four obligations. The obligation to respect means that the State must not thwart the efforts of individuals to realise the right and must also remove barriers to the realisation of the rights. The obligation to protect requires that the State take measures to prevent third parties from violating the rights of affected parties.

The obligation to promote requires the State to raise awareness about the existence of the rights that people can be able to exercise them. The obligation to fulfil requires the State to make direct provision, which may involve budgetary measures, where individuals are not, on their own, able to realise the rights. In addition to the obligations, the State has a duty to take action that is reasonably calculated to realise the enjoyment of any given socio-economic right and the duty to achieve specific targets in order to meet set standards in the enjoyment of the rights.

A positive obligation is imposed upon the State by section 27 of the Constitution and the extent of the obligation is defined by three key elements, which are the obligation to “take reasonable legislative and other measures, to achieve the progressive realisation of the right; and within available resources.”<sup>25</sup>

### *Reasonable Measures*

In the *Grootboom* case it was stated that a reasonable programme had clearly to allocate responsibilities and tasks to the different spheres of government and to ensure that the appropriate financial and human resources were available.<sup>26</sup> Each sphere of government must accept responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the State’s obligation. The national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis.<sup>27</sup>

A reasonable programme must be balanced and flexible and make appropriate provision for short, medium and long term needs. To be reasonable measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. The measures should respond to the needs of those most desperate to pass the test of reasonableness. Policies and programmes must be reasonable both in their conception and their implementation. A reasonable programme that is not implemented reasonably will not constitute compliance with the State’s obligations. Reasonable programmes do not exclude the significant segment of society.<sup>28</sup>

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<sup>24</sup> Section 7(2) of the Constitution of the Republic of South Africa, Act 106 of 1998.

<sup>25</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

<sup>26</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) 1190 para (39).

<sup>27</sup> *Ibid* at para (40).

<sup>28</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) 1191 para (42-44).



### *Progressive Realisation*

The Committee on Economic, Social and Cultural Rights provides that the concept of *progressive realisation* reflects a recognition of the fact that the full realisation of socio-economic rights cannot be achieved all at once in a short space of time. However, the concept imposes a duty on the State to move as expeditiously and effectively as possible towards the realisation of economic and social rights. The Limburg principles define *progressive realisation* to mean that the State must move as expeditiously as possible towards the realisation of the rights. The State, therefore does not have the right to defer indefinitely efforts to ensure the full realisation of the right, it has to take immediate steps to fulfil the obligation and realise the right and in realising the right available resources have to be effectively utilised.<sup>29</sup> The realisation of the right is not dependant on the increase in resources and as such cannot only be affected by an increase in resources but also by the development and tapping of broader societal resources necessary for the realisation by everyone of the rights recognized in the Covenant.<sup>30</sup>

### *Within available resources*

The obligation of the State to take reasonable legislative and other measures, *within its available resources*, to achieve the realisation of the right,<sup>31</sup> means that the State is not expected to do more than its available resources permit.<sup>32</sup> According to the Limburg principles, a State party is obliged to take measures to the maximum of its available resources and “*its available resources*” refers to both the resources within a State and those available from international community through international co-operation and existence.<sup>33</sup> The Limburg Principles further provide that, in determining whether adequate measures have been taken for the realisation of the rights recognized in the Covenant attention should be paid to equitable and effective use of and access to the available resources.<sup>34</sup>

The South African government cannot deviate from the commitments made at Copenhagen through the Copenhagen Declaration. The government is also under an obligation to ensure that the provisions of New Partnership for Africa’s Development (NEPAD) are implemented and do not remain on paper.

### *The Copenhagen Declaration*

The World Summit on Social Development held in Copenhagen, March 1995 adopted a Declaration and Programme of Action, which presented a new consensus on the need to put people at the centre of development. The world’s leaders pledged and agreed on ten commitments,<sup>35</sup> to make the conquest of poverty, the goal of full

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<sup>29</sup> Article 21 of the Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights, 1986.

<sup>30</sup> Articles 23 and article 24 of the Limburg Principles.

<sup>31</sup> Section 27(2) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>32</sup> *Grootboom* case.

<sup>33</sup> Article 26 of the Limburg Principles.

<sup>34</sup> Article 27 of the Limburg Principles.

<sup>35</sup> The ten commitments of the Copenhagen Declaration are: the eradication of absolute poverty by a target date to be set by every country; supporting full employment as a basic policy goal; promoting social integration based on the enhancement and protection of all human rights; achieving equality and

employment and the fostering of social integration overriding the objectives of development.

NEPAD also aims at eradicating poverty in Africa and placing countries on a path of sustainable growth and development and at the same time to participate actively in the world economy and body politics. The programme is anchored on the determination of Africans to extricate themselves and the continent from the malaise of underdevelopment and exclusion in a globalising world. Amongst other things, the goals of the programme are to reduce the proportion of people living in poverty by half between 1990 and 2015.

The current social security system in South Africa is fragmented and incoherent. It is due to past policies that the system is so fragmented. However, it cannot be accepted that even with the new constitutional dispensation the system is still fragmented and denies those most in need of assistance their constitutional rights. The Constitution provides that *everybody has the right to have access to social security, including if they are unable to support themselves and their dependants, appropriate social assistance*. In as far as social assistance is concerned, the State only provides five forms of social assistance namely, the Old Age Pension Grant; the Disability Grant; CSG; the Foster Care Grant and the CDG. These grants cater for the elderly, persons with disabilities and children below the age of seven.

The social insurance schemes like the Unemployment Insurance Fund (UIF) are restricted predominantly to those in formal employment those in informal employment are not catered for. Persons who do not qualify for the social grants and those who are denied access to social insurance, are thus denied their constitutional right to social security and social assistance.

Even though everybody has the right to have access to social security,<sup>36</sup> the fact of the matter is that not everybody is afforded access to social security or basic social services. The state has an obligation to respect, protect, promote and fulfil the right of access to social security,<sup>37</sup> the reality is that the State has not fully complied with its obligation as set out in the Constitution and other binding international instruments. Therefore, it can be concluded that the State has not fully realised the right to social security.

However, it can be deduced that the State is gradually advancing the right, through mechanisms that have been put in place such as policies, programmes, projects and legislation that enable it to fulfil the right. In as far as policy and legislation are concerned, the Committee of Inquiry into a Comprehensive Security System was formed to look into a comprehensive social security system for all and to transform the existing present incoherent system. The Child Care Act is also being reviewed and redrafted to include provisions of social security for children.

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equity between women and men; accelerating the development of Africa and the least developed countries; ensuring that structural adjustment programmes include social development goals; increasing resources allocated to social development; creating “an economic, political, social, cultural and legal environment that will enable people to achieve social development”; attaining universal and equitable access to education and primary health care; and Strengthening co-operation for social development through the United Nations.

<sup>36</sup> Section 27 and section 28(1)(c) of the Constitution Act 108 of 1996.

<sup>37</sup> Section 7(2) of the Constitution of the Republic of South Africa Act 108 of 1996.

## **Policies, Programmes and Projects**

The reporting by government departments has improved tremendously, and there is also an indication that the departments both Nationally and Provincially are dedicated to ensuring that the rights are progressively realised. Be that as it may there are still barriers to the realisation of the right of access to social security and the right to social assistance.

During the reporting period the State instituted policies, programmes and projects. Some of the policies were very good and aimed at improving the lives of people, however when it came to implementing the policies, most of them were not effectively implemented. The National Department failed to report on the Ten Point Plan and the Financing Policy.

### *Ten Point Plan*

In January 2001 the Minister of Social Development identified areas to be addressed over a five-year period, in order for the State to comply with constitutional obligations and to enable everyone the right of access to social security. The following are the ten priority areas to be addressed:

1. Restoration of the ethics of care and human development into all departmental programmes. This includes the rebuilding of families and communities;
2. Developing and implementing an integrated poverty eradication strategy that provides direct benefits to those who are in greatest need, within a sustainable development approach;
3. Development of a comprehensive social security system that links contributory and non-contributory schemes and priorities the most vulnerable households;
4. Responding to the brutal effects of all forms of violence against women and children as well as effect strategies to deal with the perpetrator;
5. Providing a range of services to support the community-based care and support for people living with HIV/AIDS as well as those affected, such as AIDS orphans;
6. Developing a national strategy to reduce youth criminality and unemployment within the framework of the National Crime Prevention Strategy;
7. Making social welfare services accessible and available to people in rural, peri-urban and informal settlements as well as ensuring equity in service provision;
8. Redesigning services to people with disabilities in ways that promote their human rights and economic development;
9. Basing social welfare work on a commitment to co-operative governance that includes working with different spheres of government and civil society; and
10. Training, educating, re-deploying and employing a new category of workers in social development to respond to the realities of South Africa's crisis. Review the training and re-orientation of social service workers to meet the development challenges of South Africa and link these to our regional and global demands.<sup>38</sup>

The State should be commended for initiating and adhering to the Ten Point Plan. It is two years since the inception of the plan and so far, the State has conformed to

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<sup>38</sup> <http://www.welfare.gov.za/Documents/Doc%202001/Annual%20Report/road.htm> site visited on the 27/07/01.

developing a comprehensive social security system by introducing the Committee of Inquiry into a Comprehensive Social Security System. The Home Based/Community Based Care Programme demonstrates the commitment of government to providing services and support to people infected and affected by HIV/AIDS. The programme has been effectively implemented because it expanded from 6 to 185 project sites. The State is encouraged to support the extended family structure and strengthen links with Faith Based Organisations and Community Based Organisations.

### *Financing Policy*

Though the Financing Policy was adopted in 1999 a rapid review of the Financing Policy was initiated in February 2001,<sup>39</sup> with the aim of transforming the sector through changing the approach to the subsidizing of national councils and other non-governmental organisations. The rapid review found that a more comprehensive approach was required to accelerate the transformation of the sector. The department has been tasked to undertake a major review process, with the aim of developing a comprehensive transformation programme, which includes:

- developing national norms and standards for service delivery;
- a human resource plan and human development strategy;
- costing of welfare services;
- a programme for improving welfare infrastructure;
- revised policy and legislation; and
- designing a monitoring evaluation programme.<sup>40</sup>

### *Norms and Standard Policy*

The Norms and Standard Policy was initiated in 2000 and forms the basis for the re-engineering of service delivery in the area of social assistance. The programme aims at improving the efficiency and effectiveness of the administration of social assistance. Other than forming the basis for re-engineering service delivery, it is not clear how the department plans to re-engineer the service delivery and improve the efficiency and effectiveness of the administration of social assistance. Since its inception the project has not been effectively implemented. Evident to this is the re-registration process that denied most beneficiaries access to social assistance grants and the fact that the majority of eligible beneficiaries for social assistance do not have access to social assistance grants.

### *Flagship Programme for Unemployed Women with Children under the Age of Five*

The Flagship Programme for Unemployed Women is a very good programme which, caters for women as well as children. Good as it is, the programme has its shortfalls, the programme excludes unemployed women who have no children and children above five years of age. Children below the age of five also benefit from the CSG, unlike children above the age of seven who are also excluded from the flagship programme. Persons in need of social assistance need not necessarily have to benefit from all the social assistance programmes, however they cannot be excluded from all

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<sup>39</sup> Department of Social Development, Annual Report, 2000/2001, 68.

<sup>40</sup> *Ibid.*

the programmes neither. The State should ensure that a person in need of social assistance is afforded the right to social assistance.

#### *Review Policy*

The Review Policy aims at addressing shortfalls and inconsistencies in the Social Assistance Regulations. The most significant amendments were the appointment of Disability Assessment Panels for applicants who had no access to district surgeons and the amendment of the accrual date of grants from the date of application to the date of approval. The policy also provides for the abolition of the assets test for social grants, simplification of procedures for regular review of beneficiaries to lessen the burden of beneficiaries, clarifying the distinction between temporary and permanent disability.

#### *The National Integrated Plan for Children Affected by HIV/AIDS and the Home Based /Community Based Care Programme*

The department reported that the early stages of implementing the Home Based Community / Based Care Programme were slow as a result of limited capacity at the provincial level and the identification of Vulnerable and Marginalised Group was not easy as communities and households were reluctant to disclose the HIV/AIDS status.

The department further reported that the lack of co-ordination between the Provincial Health and Social Development Departments at project level hampered the implementation of project. The very same department reported that the programme has been expanded to 185 sites as at 31 March 2002 from the initial 6 sites that were established in 2000. This information gives an impression that all is well and also shows that the lives of those affected by HIV/AIDS are being improved and government respects and fulfils the rights of vulnerable people. It is highly impossible that a programme can experience difficulties with implementation and at the same time be extended to other sites without addressing the problems. It is thus difficult to understand how the department expanded its project sites when in fact there were problems experienced with the implementation of the programme.

#### *Transformation of the Child and Youth Care System*

Policies such as the Transformation of the Child and Youth Care System were specifically enacted to protect the rights of child offenders and ensure alternative accommodation, instead of prisons. Even though the policy programme exists, child offenders are still kept in prisons as awaiting trialists, therefore not much protection has been afforded to children nor has there been the fulfilment of the right to social services.

### *Poverty Alleviation Programme*

The national department failed to give a detailed explanation about the Poverty Alleviation Programmes<sup>41</sup> and none of the provinces targeted by the Poverty Alleviation Programme bothered to give information about the programme. Most poverty alleviation programmes/projects are located in the three provinces with the highest rate of poverty, namely the Eastern Cape, Limpopo and KwaZulu-Natal. The projects are mostly based in rural areas and informal settlements.<sup>42</sup> The poverty relief programme targets the women, youth, children and the disabled.

In Gauteng a programme (Zivuseni) to combat poverty was initiated but the department failed to report on the programmes. The Zivuseni Poverty Alleviation Programme was launched in March 2002. The programme is funded by the Gauteng provincial government and seeks to contribute towards social upliftment and empowerment of disadvantaged communities by providing short-term poverty relief to poor and vulnerable people residing in the Gauteng province.

The programme has two main objectives, to alleviate poverty by promoting activities that put emphasis on the renewal, preservation and maintenance of community assets. The second objective is to build local capacity through the development of local skills in an effort to brake the poverty cycle. Unemployed women, people with disabilities and the youth in Gauteng within the Metropolitan areas such as Johannesburg, Ekurhuleni and Tshwane, and within the three district councils, Sedibeng, West Rand and Motsweding are the beneficiaries of the Zivuseni programme.

### *Child Support Grant*

Whilst the introduction of the CSG has not only been financial support for children, to ensure that children are not subjected to hunger, malnutrition and poverty, it has also afforded families with a source of income. However, serious challenges still remain for government. Through the introduction of the CSG it has been children below the age of seven who have had the benefit of the grant. Children above the age seven have not had any assistance. Therefore, the State has not promoted nor fulfilled the right of all children to social security. Though the CSG is a very good programme it has failed to include those in desperate of the grant and as such cannot pass the test of reasonableness as outlined in the *Grootboom* case.<sup>43</sup>

The Constitution defines a child as a person under the age of 18 years. The fact that the CSG should be extended to all children was reflected in the third economic and social rights report.<sup>44</sup> Thus it is unconstitutional for children between the ages of seven and 18 to be denied access to social security. The Committee on the Rights of the Child also recommended that South Africa expand the CSG to all children.<sup>45</sup>

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<sup>41</sup> The main aim of the Poverty Alleviation Programme is to reduce poverty by assisting communities in a range of development projects. The projects are funded through a special allocation of the Poverty Relief, Infrastructure and Job Creation Fund from the National Treasury.

<sup>42</sup> Department of Social Development, Progress Report, March 2000, 13.

<sup>43</sup> see para (42-44) of the *Grootboom* case.

<sup>44</sup> South African Human Rights Commission, Third Economic and Social Rights Report, 1999/2000, at 59 and 75.

<sup>45</sup> *Ibid.*

The respective government departments did not report much about children living on the streets. These children are denied access to most social services provided by the State. They do not have access to the CSG and all the other forms of assistance such as the poverty alleviation programmes and projects that are afforded to all the children in the country. These children are unable to benefit from the Primary School Nutrition Programmes because they do not go to school and they cannot even access basic health care services. They cannot access the CSG because there is no care-giver and they also do not have the necessary documentation, such as birth certificates.

Refugee children are denied access to the CSG mainly because they are not citizens of South Africa and do not have the necessary documentation. In responding to the question relating to Vulnerable and Marginalised Group most government departments reported that these children were not entitled to the CSG. Be that as it may, Article 23 of the African Charter on the Rights and Welfare of the Child provides that State parties to the Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in the Charter and other international human rights and humanitarian instruments to which the States are parties. South Africa has to ensure that whatever benefits that it gives the children, who are its citizens, it must give to all children, including those who are refugees on its territory.<sup>46</sup>

There is also no justification for the urban and rural distinction for beneficiaries of the CSG. To qualify for the CSG, care-givers of beneficiaries in rural areas should have an income of R13 200 per annum, whereas beneficiaries in the urban areas only qualify if caregivers have an income of R 9 600 per annum or below. The Foster Care Grant and CDG beneficiaries are not subjected to the urban and rural distinction. Beneficiaries are discriminated against on the basis of their location.

Eligible beneficiaries for the CSG found it difficult to access the social assistance grants due to the documentation requirements, such as identity documents and birth certificates.<sup>47</sup> This is an indication that there is minimal collaboration between the Department of Social Development and the Department of Home Affairs. Rural villages in almost all the provinces were disadvantaged in respect of availability and access to social welfare services. Many of the children were not aware that they could apply for grants. Those that were aware knew that they would require the intervention of a social worker to assist them in accessing the right and alleviate their plight. Children in child-headed households have not been in a position to initiate the process of applying for child care grants because they do not have the assistance of an adult.<sup>48</sup>

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<sup>46</sup> Article 2(1) of the *Convention on the Rights of the Child* provides that State parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national ethnic or social origin, property, disability, birth or other status.

<sup>47</sup> Nelson Mandela Children's Fund Report, on A Study into the Situation and Special Needs of Children in Child Headed Households, 2001.

<sup>48</sup> Nelson Mandela Children's Fund Report, on A Study into the Situation and Special Needs of Children in Child Headed Households, 2001.

Children with minor disabilities are also denied access to the CDG. The CDG provides for certain contingencies such as severe disability in childhood, while failing to provide for childhood chronic illnesses. These groups of children and their families have extra costs and burden due to the health condition that greatly reduce their chances of development and equal opportunities in life.<sup>49</sup>

Children without parental care due to HIV/AIDS are left in the care of the extended family.<sup>50</sup> As a result of the increase in the number of AIDS related deaths, the extended family becomes more extended and unable to provide the traditional support and protection to children. “The United Nations Children’s Fund reported in July that AIDS was pushing a large number of children into hazardous labour even in South Africa. A June 2001 report by the Mandela Children’s Fund found that a number of young girls were forced to engage in prostitution.<sup>51</sup> These children engage themselves in income-generating activities to support their families and in the process, they become vulnerable to exploitation and worst forms of child labour.<sup>52</sup> Acting as a breadwinner for their homes some are even unable to go to school because they are unable to pay for school fees.<sup>53</sup>

The only form of social security enjoyed by children is social assistance, afforded by the State in the form of grants. Basic health care services and the Primary School Nutrition Programme are some of the basic social services afforded to children by the State. Most vulnerable children are not included in the social security system. The policies and programmes instituted by government do not take into account children living in the streets as well as their needs. Children living in the streets, refugees and asylum seekers are also denied access to the CSG.

What comes out clearly in all the responses is that the only Vulnerable and Marginalised Group catered for without failure are the aged, the disabled and children. All the other vulnerable are catered for by the Poverty Alleviation Programmes, which in most instances is not effectively implemented because of budgetary and resource constraints. In all the responses it is indicated that refugees and asylum seekers cannot access social assistance because they are non-citizens.

The measures instituted do not cater for homeless persons. Most departments did not indicate on how the Home Based Care and Community Based Care Programme was going to be implemented.

#### *Constitutional Obligations*

In responding to the constitutional obligations to respect, protect, promote and fulfil the right of access to social security, the NDoSD reported that to promote the right in question, the Social Grant Awareness Campaign was instituted to inform potential beneficiaries about social grants. Print and radio media were used to raise awareness

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<sup>49</sup> Child Health Policy Institute, A Rights-Based Approach to Child Health, 2000 8.

<sup>50</sup> Human Rights Watch World Report, Children’s Rights, 2002 see <http://staging.hrw.org/wr2k2/children.html> site visited on the 26/08/02.

<sup>51</sup> Human Rights Watch World Report, Children’s Rights, 2002 see <http://staging.hrw.org/wr2k2/children.html> site visited on the 26/08/02.

<sup>52</sup> Human Rights Watch World Report, Children’s Rights, 2002 see <http://staging.hrw.org/wr2k2/children.html> site visited on the 26/08/02.

<sup>53</sup> Human Rights Watch World Report, Children’s Rights, 2002 see <http://staging.hrw.org/wr2k2/children.html> site visited on the 26/08/02.



about social grants. In addition to that, the department held Imbizos in the various provinces. The Imbizos were held to demonstrate the department's commitment to efficient, effective and people-orientated service delivery. The Charter on the rights and responsibilities of the beneficiary was instituted to respect the right and the charter provides that beneficiaries of social grants are entitled to receive services with dignity and respect. The Charter also encourages beneficiaries to report instances of degrading treatment.

#### *Vulnerable and Marginalised Groups*

In as far as Vulnerable and Marginalised Group were concerned the NDoSD reported that the appeals panel, was able to assess appeals of older persons and people with disabilities who have been refused applications for social assistance grants in the Western Cape, Eastern Cape and Free State. The Northern Cape, however, reported that no discrimination is applied in application and approval of grants.

Most provinces did not respond to the section on Vulnerable and Marginalised Group except for the Western Cape and Gauteng. The Western Cape and Gauteng reported that women in the various provinces benefited from the Flagship Programme for Women with Children under the age of five years, as their needs were best catered for under the programme. The Western Cape indicated that no specific provision has been made for the homeless but adequate linkage exist with private welfare organisations and community structures that make provision for the homeless within the service areas of each of the 14 district offices of the department. In Gauteng the needs of the homeless were addressed through the subsidies for shelter paid by the department. Refugees and asylum seekers had no access to social security mainly because they were not South African citizens. The only provision provided to them was assistance through the Social Relief Programme.

#### *Implementation Difficulties*

In responding to implementation difficulties, the MD indicated that the shortage of personnel, the lack of adequate infrastructure at pension payout points, fraud and the restrictive criteria used to determine recipients of the disability grant were some of the factors that contributed to the difficulties in implementing the instituted policies, programmes and projects. Gauteng and the Northern Cape also indicated that budgetary constraints and the lack of infrastructure had an impact on the implementation of policies and programmes.

The Western Cape reported that the database of Socpen and Allpay did not match to ensure an even-flowing pay out process. The shortages of staff at the district offices, and the inadequate liaison with the Department of Health were the difficulties experienced by the department in implementing the instituted policies. The Eastern Cape reported that the difficulties that the department was faced with, in the implementation of the policies were budgetary constraints and the inability to get correct addresses for the purpose of notifying beneficiaries to re-register.

To address these difficulties the MD developed an improved payout plan. The department approved an organisational structure which made provision for improved staffing of the social security function. In Gauteng the measures that were introduced

were an audit on all the Poverty Alleviation Projects, the decentralised service offices were engaged in reprioritising the budget and monitoring the effectiveness of programmes and projects.

The Western Cape Department reported that to address the implementation difficulties, the district office staff registered all beneficiaries of the State grants and such information was captured into the Socpen system. Better communication channels were established with all levels within the Department of Health. Poverty diversion programmes were established to make provision for work skills training and employment opportunities for women. The Eastern Cape Department reported that the budget problem was addressed, which was the main cause for implementation difficulties.

### **Legislative Measures**

Most social security legislation in South Africa is exclusionary and does not accommodate the needs of the most vulnerable and marginalised people. The self-employed, informally-employed, the long-term unemployed, poor people as well as the non-nationals are amongst the categories of persons denied access to social security. The Constitution provides that “everyone” who is unable to support himself, should be provided with appropriate social assistance by the State, however the Social Assistance Act only covers the disabled, the elderly and children. People who are unable to support themselves and who do not fall within the categories of persons specified by the Social Assistance Act do not have any form of social security from the State and this is a contravention of the provisions of the Constitution.

#### *Unemployment Insurance Act*

The State has to be commended for reforming the unemployment insurance law and repealing the 1966 Act,<sup>54</sup> which excluded the most vulnerable members of the Republic. The UIF63 of 2001 is a step in the right direction, even though there are still gaps within the Act.<sup>55</sup>

The UIF63 of 2001 was enacted to replace the UIF of 1966, with the purpose of establishing an unemployment insurance fund, to which employers and employees contribute and from which, employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits. The other purpose of the Act is to alleviate the harmful economic and social effects of unemployment.

Even though the Act has included a large number of people to benefit from the Unemployment Insurance Fund, there are some people who are excluded from the Act. The Act fails to take into account the harsh reality of the high rate of unemployment in this country, which forced a large number of people to join the informal labour market in order to escape poverty. The persons excluded from contributing and benefiting from the Unemployment Insurance are from the informal sector. Some of these people have never entered into the arena of a formal working environment e.g. school leavers, and those who were once workers and have since been unemployed because of retrenchments.

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<sup>54</sup> UIF30 of 1966.

<sup>55</sup> UIF63 of 2001.

The exclusion of employees employed for less than 24 hours a month with a particular employer is questionable, because it denies the most vulnerable the right to have access to social security. It is common practice in South Africa that black women in particular domestic workers, often work for a different employer everyday of the week. Although these workers work for five days in a week, they are effectively excluded from the protective ambit of the UIA and the Basic Condition of Employment Act only because they work less than 24 hours a month for a particular employer.<sup>56</sup>

The Department of Labour is also not moving towards a goal of instituting policies aiming at creating work for all and ensuring that the public is self-reliant and not dependent on the State.

### *Vulnerable and Marginalised Groups*

#### *Social Insurance for persons infected with HIV/AIDS*

The Medical Schemes Act<sup>57</sup> does not allow the exclusion of persons living with HIV/AIDS from membership of private medical aid schemes.<sup>58</sup> Contrary to that, life cover and disability insurance policies are not easily accessible to persons infected with HIV/AIDS. A Person infected with HIV/AIDS and who has his insurance policy approved upon application for life cover or disability insurance, is required to pay high premiums.<sup>59</sup> These insurance company policies are unfair and discriminate against persons living with HIV/AIDS. Some of the policies contain exclusion clauses, which allow the insurer to deny the insured payment when it is discovered that the cause of death was HIV-related. In some instances persons infected with HIV/AIDS do not die of AIDS-related diseases but die as a result of a car accident. The car accident as a cause of death makes no difference to the insurance companies as long as the insured is living with HIV.

The State has not complied fully with its constitutional obligations to promote and fulfil the right of access to social security and to afford everybody access to the right in question.

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<sup>56</sup> EML Strydom et al, *Essential Social Security Law*, Juta 2001, 241.

<sup>57</sup> Medical Schemes Act 131 of 1998.

<sup>58</sup> HIV/AIDS and the Law a Resource manual, 2001, 147.

<sup>59</sup> <http://wwwserver.law.wits.ac.za/cals/alp/resource/docs/pdfs/ch13.pdf> HIV/AIDS and the Law Resource manual, 2001 site visited on the 04/03/02.

### *Social Assistance for Persons infected with HIV/AIDS*

A person who is HIV positive qualifies for a disability grant, only if he/she has a CD4 cell count below 50, and a major opportunistic disease.<sup>60</sup> This therefore means that persons infected with HIV/AIDS who do not have an income, cannot be assisted by the State grants unless their CD4 count cell is below 50. The harsh reality is that most people infected with HIV/AIDS are from poverty-stricken, vulnerable and marginalized communities, where the rate of unemployment is also high. When people are unable to support themselves they have the right to social assistance.

### *Refugees and Asylum seekers*

The International Labour Organisation (ILO) Convention encourages the extension of benefits to non-nationals; non-nationals are excluded by social security legislation. The Social Assistance Act<sup>61</sup> restricts the payment of social grants to South African citizens only.<sup>62</sup> The State has failed to enable non-nationals access to social security, their right to social security is not respected nor protected promoted or fulfilled.

## **Administrative Action**

### **National Sphere**

The NDoSD reported that the re-registration process, the incorrect classification of Disability Grant beneficiaries and the suspension of social assistance grants without informing the beneficiaries were other instances of administrative action which caused gross violations of the right to social security and social assistance.

The re- registration process was intended to weed out ghost beneficiaries, corruption by public servants and the public.

The State violated the right to administrative action,<sup>63</sup> and the provisions that, the beneficiary has a right to be furnished with written reasons when an application has been refused, when an application has taken longer than a reasonable period of time to be processed, and when there has been no response to a complaint or problem after writing within the 90-day appeal.

Grant recipients were suspended without warning or hearing, and were required to re-apply for the grants. A large number of social security beneficiaries were removed from the list of beneficiaries of grants without their proper notification, some were not reinstated into the process because their applications were either lost without trace or were simply not processed. They were not paid arrears for grants, which they had lost in the process or through the rejection of their new application.<sup>64</sup> The State's attempt

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<sup>60</sup> <http://wwwserver.law.wits.ac.za/cals/alp/resource/docs/pdfs/ch12.pdf> HIV/AIDS and the Law, Resource manual, 2001 site visited on the 04/03/02.

<sup>61</sup> S3(c) of the Social Assistance Act 59 of 1992.

<sup>62</sup> EML Strydom et al, *Essential Social Security Law*, Juta, 2001, 252.

<sup>63</sup> Section 33 of the Constitution of the Republic of South Africa Act 108 of 1996, provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and everyone whose right has been adversely affected by administrative action has the right to be given written reasons.

<sup>64</sup> <http://www.lrc.co.za/4Pub/1998-1999.PDF> site visited on the 10/02/02.

to eliminate and fight fraud and corruption caused hardship and suffering for most South African grant beneficiaries.<sup>65</sup>

To address this problem a new set of Regulations under the Social Assistance Act were promulgated, and they repealed the three month-limitation on the accrual of arrear social grant benefits. The regulations came into effect on the 1<sup>st</sup> of December 2001. In February 2002 the President of South Africa, indicated that the government will ensure that the pensioners who did not obtain their pensions because of delays in their registration get what was due to them. An additional appropriation of R2 billion was made available to the Department of Social Development to provide back payments to the elderly citizens.<sup>66</sup>

### **Provincial Sphere**

Mpumalanga, Free State, the Eastern Cape reported that there were no administrative actions taken by the departments, which could have resulted in the violation of the right to social security. Information gathered from other sources indicated that The Northern Province (Limpopo) and the Eastern Cape grant beneficiaries were the most affected by the arbitrary administrative action. In Limpopo 92 000 welfare recipients of pension and disability grants, were unfairly terminated by the province's welfare department.<sup>67</sup> In the Eastern Cape, applications for social assistance were often lost without any trace, pensioners waited more than a year before they could receive financial assistance from government.<sup>68</sup>

### **Maladministration and/or Corruption**

#### **National Sphere**

The department reported that there were two official complaints of maladministration and corruption in the department relating to the realisation of rights during the reporting period. One official faced criminal charges of theft and fraud relating to the Poverty Relief Programme. The official was found guilty of theft of about R200 000 and fraud and was sentenced to eight years imprisonment. Another official faced disciplinary charges for failing to declare a conflict of interest in the approval of a poverty relief project of R4 million and for authorising payments to certain poverty relief projects without delegated authority. The official was found guilty and was dismissed.

#### **Provincial Sphere**

The Free State reported that there were three complaints of fraud and corruption against the department during the reporting period.<sup>69</sup> Mr X was charged with theft of old age pension grant money and he was demoted and transferred. Mr Y was charged with fraud and misuse of his official position. He was charged with fraud and found

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<sup>65</sup> *Ibid.*

<sup>66</sup> Department of Social Development, Annual Report, 2000/01.

<sup>67</sup> <http://www.lrc.co.za/4Pub/1998-1999.PDF> site visited on the 10/02/02.

<sup>68</sup> <http://www.lrc.co.za/4Pub/1998-1999PDF> site visited on the 10/02/02.

<sup>69</sup> [http://mpumalanga.mpu.gov.za/social\\_services\\_folder/operation\\_buyisa.html](http://mpumalanga.mpu.gov.za/social_services_folder/operation_buyisa.html) site visited on the 15/04/02.

not guilty by the court of law. Disciplinary action was taken against him by the department. Mr Z was charged internally and found not guilty for the charge of theft of pension money. In the North West, ghost beneficiaries and fraud practices were reported to be rampant.

The MD reported that three officials were dismissed after disciplinary action was taken against them for committing fraud. The MD of Social Services launched a fraud elimination campaign in August 2001. The Campaign known as Operation Buyisa (bring back) aimed at addressing the high prevalence of fraud within the system in the province, wherein unknown children and those who did not qualify for the disability grant were registered.

The Eastern Cape reported that there were no complaints of maladministration and or corruption. However, information from other sources reveals that in Idutywa, syndicate fraud was uncovered. In Centane, Tsomo and in Lady Frere persons drawing grants fraudulently, were identified and they were under investigation.<sup>70</sup> In October 2000 the Eastern Cape formed the Network Against Corruption as a measure to address and prevent corruption.<sup>71</sup>

The Public Finance Management Act of 1999 has been passed by the State to fight corruption.<sup>72</sup> The NDoSD is in the process of developing an Anti-Corruption and Fraud Prevention Strategy. The strategy will be used as a tool to deal with fraud and corruption within the department.<sup>73</sup>

In all its efforts to eradicate fraud and corruption the State has not instituted any measures to deal with migrant workers who have access to social assistance grants when in fact they are not entitled to such grants. The budget allocated for the social security programme is shared with the neighbouring States. A number of migrant workers from the neighbouring states on a monthly basis cross borders to collect their social security benefits.<sup>74</sup> It is not clear as to whether during the re-registration process, the department was able to identify and separate nationals from people who were once migrant workers during the apartheid period since social security legislation in South Africa only affords social security to South Africans.

### **Budgetary Measures**

The budget plays a crucial role in the implementation of programmes and projects which is basically the delivery of services. The responses from the respective departments reflect that budgetary allocation has been inadequate and as such make the implementation of instituted programmes difficult. In as far as children were concerned the budget allocated for children was minimal in the sense that it did not reflect on the First Call to Children. The provincial inequalities also influence access to the programmes and projects provided. This is largely because some provinces are rich and some are poor and provinces have the responsibility of delivering services.

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<sup>70</sup> <http://www.ecprov.gov.za/speeches/welfare/2000/socialsecurity.htm> site visited on the 15/04/02.

<sup>71</sup> *Ibid.*

<sup>72</sup> <http://www.ecprov.gov.za/documents/report/2000/corruption.htm> site visited on the 15/04/02.

<sup>73</sup> Department of Social Development, Annual Report, 2000/01, 120.

<sup>74</sup> <http://www.kwazulu.net/Welfare/Bud%20Speech/Poverty.htm> site visited on the 15/04/02.

The department experienced implementation difficulties, which to a large extent were caused by resource constraints. The resource constraints have had an impact on the realisation of the right and in actual fact they hampered on the realisation of the right in question. The budget inadequacy was also highlighted in all the responses from the respective departments and the measures introduced by the different departments to address budget inadequacy were far from solving the problem. This aspect needs to be critically looked at and addressed by the NDoSD, the Treasury and provincial departments. It can therefore be concluded that the State is not complying with provisions of Chapter three of the Constitution in particular section 41(1)(h).<sup>75</sup>

It is important that section 41 is highlighted because from the information provided by government departments both at nationally and Provincially, it is clear that this section is not adhered to. The respective departments are not assisting and supporting one another, if the national department was assisting and supporting provincial departments, provinces would not be overspending on their allocated budgets for the programmes and there would be no material or substantive difference in terms of sustainability and service delivery in the Eastern Cape, KwaZulu-Natal and Limpopo. The national department should engage with provincial departments and also try and help with funding and influence the budget allocation.

The Committee on the Rights of the Child made recommendations to South Africa's first report to the Committee. The recommendations stipulate that South Africa should pay full attention to the full implementation of article 4 of the Convention by prioritising budgetary distributions to ensure the implementation of the economic, social and cultural rights of children to the maximum extent of its available resources and, where needed, within a framework of international co-operation.<sup>76</sup>

The right of access to social security has not been adequately respected, protected, promoted and fulfilled,<sup>77</sup> it is not fair that when people in all provinces have access to social assistance and inhabitants and residents of the Eastern Cape, KwaZulu-Natal and Limpopo are denied access due to the fact that their provinces are not able to implement policies because of financial constraints or any other reason. People should be afforded full and equal enjoyment of rights for everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>78</sup>

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<sup>75</sup> Section 41 of the Constitution provides that:

- (1) all spheres of government and all organs of state within each sphere must
- (h) co-operate with one another in mutual trust and good faith by
  - i. fostering friendly relations
  - ii. assisting and supporting one another
  - iii. informing one another of, and consulting one another on, matters of common interest
  - iv. co-ordinating their actions and legislation with one another

<sup>76</sup> See [www.unhchr.ch/tbs/docs.nsf](http://www.unhchr.ch/tbs/docs.nsf) site visited on the 27/07/01.

<sup>77</sup> Section 7(2) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>78</sup> Section 9 of the Constitution Act 108 of 1996.

## **National Sphere**

### *Budget Adequacy*

The NDoSD reported that the budget was adequate for the Poverty Alleviation Fund and there was no over or under spending for the reporting period. However the budget allocations budget was inadequate for the Old Age Pension Grant and the Disability Grants during the reporting period and inadequate for the social security programmes only for the period 2000/2001. As a result the department had to overspend on the respective programmes. The department further reported that there was under spending for the social assistance programme.

The inadequate budget allocations had an impact on the realisation of the right in question, in that the processing of social grant applications was delayed. The under expenditure had no material impact on the realisation of the right to social assistance. To address the problem of overspending, the national and provincial departments held discussions with the National Treasury to make adjustments to budget appropriation, where there was an indication of overspending.

The national department also appointed a National Programme Manager and a Finance and Administration Manager as well as additional staff to the National Project Office to assist in solving the problem of overspending. The National department further reported that there were no special measures required to address the under spending as the programme was subject to expenditure monitoring.

### *Vulnerable and Marginalised Group*

The NDoSD indicated that the needs of the vulnerable and marginalised were given consideration and were targeted through the Women's income generating project, the Food production projects for people in rural areas, the income generation projects for communities affected by HIV/AIDS, the dual purpose centres for older persons' income generation activities and children in need of care, the youth development programmes in nodal points of the Urban Renewal Programme and the Social Finance Programme for no or low income groups with no access to formal credit institutions.

The national department further indicated that the funding of alternative care for older persons was directed to Mpumalanga and the Free State. The establishment of substance abuse programmes targeted rural town in the Eastern Cape, Mpumalanga and KwaZulu-Natal. Refugees and asylum seekers benefited from the relief funds managed by the Refugee Relief Board.

## **Provincial Sphere**

### *Vulnerable and Marginalised Groups*

In as far as Vulnerable and Marginalised Group were concerned, the Western Cape reported that refugees and asylum seekers were afforded access to social security through the social relief programme. The department further reported that no specific provision was made for homeless persons, however they had access to social relief programmes. Through links and collaboration that exist between the WCD, private



welfare organisations and community structures cater for homeless persons within each district office.

Limpopo reported that applicants for the Old Age Pension Grant and the Disability Grant were subjected to a means test before they could qualify as beneficiaries. Persons living in rural areas and informal settlements were given poverty pockets. However, refugees and asylum seekers were not included in the poverty relief programmes. Gauteng reported that vulnerable and marginalised groups, in need of temporary material assistance, were offered vouchers, but for a period not more than six months.

The Northern Cape reported that 80 percent of the total poverty alleviation budget was aimed at female-headed households. The poverty alleviation programme was aimed at all previously disadvantaged racial groups. Homeless persons, refugees and asylum seekers were not targeted during the reporting period. The NCD further reported that homeless persons would be targeted during the 2002/2003 funding cycle.

### **Indicators/Outcomes**

The level of reporting by the various government departments has been very poor in the outcomes section. The information provided does not assist in assessing whether the right is progressively been realised or not.

The creation of indicators provides an opportunity to identify problems as well as progress. The question then is, how do departments measure progress in as far as realising the right to social security? The instituted policy, legislation or budgetary measures may not necessarily realise the right of access to social security. Thus indicators serve as an indication of whether the right has been realised or not, and whether the instituted measures have a positive or negative impact on the lives of people or persons accessing the right to social security.

Furthermore, the purpose of indicators is to capture the willingness and the capacity of government to protect and promote human rights,<sup>79</sup> Governments ought to monitor the realisation of human rights,<sup>80</sup> and indicators are designed to monitor the performance of government.<sup>81</sup> Indicators are a useful tool for assessing the implementation of rights entrenched in the Constitution and international instruments.

Reasonableness and effectiveness of instituted measures is weighed against information provided in the outcome section. The outcome section should serve as proof that the instituted policy measures, legislation and budgetary allocation are sufficient and reasonable and provide effective realisation of the right to social security. Failure to respond to the outcome section is an indication that the instituted measures are not reasonable and effective, and that the state is not willing to realise the right to social security.

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<sup>79</sup> Asbjorn Eide. Catarina Krause, Allan Rosas, *Economic, Social and Cultural Rights*, Netherlands, 1995, 390.

<sup>80</sup> Asbjorn Eide. Catarina Krause, Allan Rosas, *Economic, Social and Cultural Rights*, Netherlands, 1995, 391.

<sup>81</sup> *Ibid.*

It is disturbing to note that the national department reported that the total number of children eligible for the CSG was 3 308 467 and only 1 574 927 were receiving the grant, this therefore clearly indicates that a total number of 1 733 540 children were denied access to the grant. In as far as the Foster Care Grant is concerned, the number of children who do not have access to the Foster Care Grant is higher than the number of children in receipt of the grant, because the total number of children who are eligible for the grant is 319 354 and those in receipt of the grant is 90 680, leaving out 228 674 children with no access to the Foster Care Grant. The national department further reported that 276 776 children were eligible for the CDG and only 42 474 children were receiving the grant leaving 234 302 children without access to the grant. How can the implementation of programmes be reasonable if a large number of children are not afforded the right to social assistance?

It is not acceptable that social security beneficiaries, who in most instances are the elderly are expected to wait for an average period of two hours at pay-out points before receiving their grants, when in fact 68 percent of the pay-out points have no access to water, 64 percent have no toilet facilities and 79 percent have no facilities for the disabled and the infirmed. This not in the spirit of the Batho Pele programme, which advocates that people need to have access to a decent public service based on the principle of equal and improved service delivery to the physically, socially and culturally disadvantaged. A decent service would be one with proper infrastructure and where people are treated with respect and their dignity is protected.

The national department reported that the number of beneficiaries eligible for disability grants was 1 208 105 and only 714 091 received the grant leaving 494 014 without the grant. A total number of 195 806 persons were denied access to the old age pension grant because only 1 936 553 persons of the 2 132 359 eligible were receiving the grant.

The poverty alleviation programmes are not reaching out to those most in need of assistance. The National Department reported that 149 157 persons were benefiting from the poverty alleviation programme and 33 146 households were benefiting from the programme when in fact 1 648 104 households had no source of income and 23 819 458 persons had no source of income, on the other hand 3 741 603 households have an income below the poverty line and 4 374 817 persons had an income below the poverty line.

## **7. RECOMMENDATIONS**

The security system should provide a platform for the creation of a compulsory scheme that will afford everyone the right of access to social security. There is a need for legal reform and a comprehensive social security system. The provisions of the present social security legislation deny the most vulnerable members of our society access to social security. Persons who are excluded from both social assistance offered by the State as well as from social insurance need some form of social security.

The system should not exclude the informally-employed, the unemployed and the self-employed from accessing and enjoying the right to social security. Banks should be easily accessible and allow everyone to open savings accounts. People should be

enabled to have access to social insurance and take up life cover policies and disability policies. The Department of Labour should institute and effectively implement policies and programmes thus advance the rights of everyone especially workers who are not covered by pension and provident funds. Where a person is unable to support himself and his family, he must be afforded social assistance by the State.

There is a need for the State to enable non-citizens, refugees and asylum seekers access social security. The social assistance scope of coverage for persons infected with HIV should be wide enough to enable the unemployed persons to qualify for disability grants even though their CD4 cell count is not below 50 and there is no major opportunistic disease. The disability grant will enable them to sustain themselves and escape the poverty. Each individual has the right to enjoy an adequate standard of living and to have his dignity respected and protected.

Government has to implement the policies that are in place. The provisions of the White paper<sup>82</sup> as well as the Ten Point Plan have to be effectively and diligently implemented, to ensure that everyone, especially the vulnerable and the marginalized have access to social security. The State has to regulate the private social insurance schemes and ensure that insurance companies or third parties do not violate the rights of the people. By so doing the State would be discharging the obligation to respect and protect the rights of people from infringement by third parties. The State should be seen advancing and promoting the rights of everyone irrespective of whether persons are HIV positive or not, and enable everyone to enjoy proportionally the right of access to social security.

The CSG needs to be extended to all the children regardless of their age. The scope of coverage of the grant should be wide enough to cater for the special needs of children. A child infected with HIV/AIDS needs constant medical attention and as such should be provided with more than the R130 grant.

There is a need for government to institute policies and programmes to ease the plight and hardships faced by children in child-headed households as well as children who live the streets (homeless children). The State has to introduce more measures of reducing and preventing child-headed households. The State has already instituted the Home Based/Community Based Programme, however there is a need for measures to cater for the extended family structures. By the same token, the fact that it is not the sole responsibility of government to realise the rights of everyone including children, to social security and social services is recognised. Institutions such as the Faith Based Organisations and NGOs have played a role in assisting children to enjoy the right to basic social services as well as in helping government realise the rights in question.

It is therefore recommend that the department should strengthen ties and working relations with Community Based Organisations as well as Faith Based Organisations. These groups could play a crucial role in identifying and providing services to vulnerable and marginalised groups. The extended family structures should also be recognised and supported by the department. Most children without parental care due

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<sup>82</sup> White Paper for Social Welfare 1997.

to HIV/AIDS are left in the care of the extended family.<sup>83</sup> Due to the increase in the number of AIDS-related deaths, the extended family becomes more extended and unable to provide the traditional support and protection to children.<sup>84</sup>

These extended family structures need income support to be able to fulfil the role of parents. More than anything, families have an obligation to take care of their own, if they are unable, the State has to provide means of enabling them to fulfil their familial obligations. The inability of the extended family to take care of its contributes to the alarming increase of child-headed households.

### *The Basic Income Grant (BIG)*

It is recommended that the State introduce the BIG or any other measure, which will enable the poorest of the poor who are excluded from social security and social assistance to escape poverty and have some form of income. This income to households will enable everyone to meet basic subsistence needs and be able to live in accordance with human dignity.

South Africa has a high rate of poverty and inequality. Most South Africans live in poverty-stricken areas and do not have access to basic social services and social assistance. Poverty is one of the serious challenges facing South Africa and this, to a large extent was caused by past discriminatory and racial policies. The low wages earned by those employed deprives them of a decent standard of living in the midst of rampant unemployment. It is against this background that the BIG was proposed by Cosatu as a measure to reduce poverty and afford human beings a decent standard of living.<sup>85</sup>

The BIG sets out that a sum of R100 per month be paid to everyone in the country including children who are not in receipt of another grant like the CSG. The grant would thus be universal and avoid the costs and administrative burden associated with means testing. The grant would be retrieved from the tax system from middle income earners and higher income earners.

The summary of the recommendations is as follows:

- The State should adhere to and comply with constitutional provisions as well as international instruments such as the CRC and the ICESCR which have been respectively ratified and signed by South Africa.
- Policies and programmes especially those meant to alleviate poverty, should be implemented effectively and diligently.
- There should be mechanisms in place to address current problems that make the implementation of policies and programmes difficult.
- Budgetary constraints and overspending should be addressed by the National Treasury, National and Provincial Departments.

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<sup>83</sup> Human Rights Watch World Report, Children's Rights, 2002 see <http://staging.hrw.org/wr2k2/children.html> site visited on the 26/08/02.

<sup>84</sup> *Ibid.*

<sup>85</sup> Cosatu 7<sup>th</sup> National Congress Resolutions, Socio-economic Resolutions.

- The CSG should be extended to cover all children from 0-18 years<sup>86</sup>
- The CDG should be accessible to children with minor disabilities as well as those with chronic illnesses.
- All beneficiaries of the CSG should be treated equally and not be discriminated against on the basis of their location. The total income of caregivers should be R 9 600 per annum in or less all areas.<sup>87</sup>
- Children in all situations and circumstances should have access to all forms of social assistance afforded to children. There should be ways of ensuring that children who do not attend school have access to feeding programmes, health care services and the CSG. This will ensure that children in the streets and children who head households all enjoy the right of access to social security and social assistance.
- Refugees and asylum seekers should be afforded the right of access to social security and social assistance refugee children should have access to the CSG or other forms of social assistance.
- The Department of Home Affairs should be easily accessible and within reach to enable people to have access to birth certificates and identity documents.
- There should also be co-operation between the Department of Home Affairs and the Department of Social Development.
- It would be helpful to have officials of the Department of Home Affairs at each pay point station to issue out temporary birth certificates and identity documents, that will enable grant applicants to benefit from the social grants
- It cannot be over-emphasised that the recommendations that are made each year should be taken into account and put into good use, by the various government department.

## CONCLUSION

The apartheid regime catered for the needs of white South Africans and protected them against contingencies by way of social insurance and where it failed by means of social assistance and black people were excluded from social security.<sup>88</sup> However the new Constitution<sup>89</sup> affords everyone the right to have access to social security, including if they are unable to support themselves and their dependants appropriate social assistance.<sup>90</sup> The fundamental right to human dignity, equality and freedom underpins this right. The right to equality provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The right to social

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<sup>86</sup>The Committee on the Rights of the Child recommended that the CSG programme should be expanded or alternative programmes developed to support disadvantaged children up to the age of 18 years who are still in school, and take effective measures to ensure the continuation of support programmes for economically disadvantaged families.

<sup>87</sup> Recommendations by the Committee on the Rights of the Child, that South Africa should ensure efforts to make possible the implementation of the principle of non-discrimination in article 2 of the Convention, particularly in relation to vulnerable groups.

<sup>88</sup>MP Olivier, MC Okpaluba, N Smit, M Thompson *Social Security Law, General Principles* Butterworths 1999, 21.

<sup>89</sup> The Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>90</sup> Section 27(1) of the Constitution of the Republic of South Africa, Act 108 of 1996.

security in section 27 appears to be comprehensive with regard to the scope of social protection, however social legislation is limited in its application.<sup>91</sup>

Though the State has an obligation to respect, protect, promote and fulfil the right of access to social security,<sup>92</sup> the reality of the matter is that the State has not fully complied with its obligations as set out in the Constitution and binding international instruments. Most vulnerable and marginalised groups are excluded from social security legislation mainly because they do not form part of the formal workforce of the country. Those excluded from social security legislation are the unemployed, informally-employed, migrant workers and non-citizens.<sup>93</sup> Therefore, it can be concluded that the State has not fully realised the right to social security.

It can however be safely concluded that the State is gradually advancing the right, through mechanisms that have been put in place such as policies, programmes, projects and legislation that enable the fulfilment of the right in question. In as far as policy and legislation are concerned, the Committee of Inquiry into a Comprehensive Security System was formed to look into a comprehensive social security system for all and to transform the existing incoherent system. The Child Care Act is also being reviewed and redrafted to include provisions of social security for children.

The State has displayed its commitment to achieving and ensuring that the right to social security is progressively realised through the programmes instituted in various government departments. The Poverty Alleviation Programmes, the Food Security Programmes, the Free Basic Water Service Programme, the Free Health Care Services for the Aged are some of the programmes that are implemented. The only form of social security enjoyed by children is social assistance, afforded by the State in the form of grants. Basic Health Care Services and the Primary School Nutrition Programme are also some of the basic social services afforded to children by the State.

Even though the State has a responsibility to guarantee its subjects a basic standard of living, it cannot accept sole responsibility for meeting the basic needs, hence there should be shared responsibility. Social security does not mean that people should entirely depend on the State, however the State is under an obligation to ensure that people are in a position to access social security. The State has an obligation to encourage its subjects to take responsibility for their own welfare through private savings and private insurance, hence there should be legislation that governs and regulates the use of private savings and private insurance schemes.

Wilfred Jenks, the former Director-General of the International Labour Organisation made a statement to the effect that “nothing in the history of social policy has transformed the life of the common man more radically than the assurance that, in the event of loss of income through accident, poor health, unemployment, death of the breadwinner or any other misfortune, he will not be forced into destitution.”

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<sup>91</sup> MP Olivier, MC Okpaluba, N Smit, M Thompson *Social Security Law, General Principles* Butterworths 1999, 22.

<sup>92</sup> Section 7(2) of the Constitution of the Republic of South Africa, Act 108 of South Africa Act 108 of 1996.

<sup>93</sup> MP Olivier, MC Okpaluba, N Smit, M Thompson *Social Security Law, General Principles* Butterworths 1999, 31.

One of the principles of social security is the principle of solidarity which promotes the spirit of mutual support amongst fellow men. The concept of ubuntu is found in the White Paper, the concept provides for the caring of each other's well being and promoting the spirit of mutual support. South Africa has a high rate of unemployment and as long as unemployment is not reduced, those excluded in terms of the previous form of social security system cannot be adequately drawn into the economic and social mainstream. All those in need of social security should be able to gain access.

It has almost been five years since the White Paper was passed, the White Paper provided that every member of society who finds him or herself in need of care will have access to support, however not everybody in need of social assistance is afforded such assistance.

## **ABBREVIATIONS**

<b>BCEA</b>	Basic Conditions of Employment Act
<b>BIG</b>	Basic Income Grant
<b>CDG</b>	Care Dependency Grant
<b>CEDAW</b>	Convention on the Elimination of all Forms of Discrimination Against Women
<b>CRC</b>	Convention on the Rights of the Child
<b>CSG</b>	Child Support Grant
<b>DoL</b>	Department of Social Development
<b>ECD</b>	Eastern Cape Department
<b>FBO</b>	Faith Based Organisation
<b>FSD</b>	Free State Department
<b>FSG</b>	Foster Care Grant
<b>ICESRC</b>	International Covenant on Economic, Social and Cultural Rights
<b>ILO</b>	International Labour Organisation
<b>KZND</b>	KwaZulu-Natal Department
<b>MP</b>	Mpumalanga Department
<b>NAP</b>	National Action Plan
<b>NDoSD</b>	National Department of Social Development
<b>NCD</b>	Northern Cape Department
<b>NGO</b>	Non Governmental Organisation
<b>NWD</b>	North West Department
<b>UIA</b>	Unemployment Insurance Act
<b>UIF</b>	Unemployment Insurance Fund
<b>WCD</b>	Western Cape Department





## CHAPTER 7

### RIGHT TO EDUCATION

#### 1. INTRODUCTION

Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to range freely and widely, is one of the joys and rewards of human existence.<sup>1</sup>

In order to fully recognise the right to education, and to promote interdependence in human rights, the right to education must be prioritised both with a conception of rights in education, and with an understanding of the relationship between the right to education and other human rights. The right to education does not exist in a vacuum, but is intrinsically related to other widely recognised human rights. Realisation of the right to education facilitates the realisation of other human rights, and vice versa.

#### **International perspectives**

The 4-A scheme developed by the Special Rapporteur on the right to education from existing international standards provides a working model for monitoring and assessing the right to education<sup>1</sup>. According to this model, education must be available, accessible, acceptable and adaptable.

While the precise and appropriate application of these terms will depend upon the prevailing conditions in a particular state party, the overriding aim should be to achieve fundamental education. Fundamental education includes the elements of availability, accessibility, acceptability and adaptability, which are common to education in all its forms (formal or informal) and at all levels (primary, secondary, technical and vocational or tertiary).<sup>2</sup>

According to the Committee on Economic, Social and Cultural Rights, the right to education is available when functioning educational institutions and programmes are in sufficient quantity within the jurisdiction of the State party. What they require to

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<sup>1</sup> The Committee on Economic, Social and Cultural Rights - General Comment No. 13 (Twenty-first session, 1999): Article 13: The Right to Education, E/2000/22 (1999) 111 at para. 1.

<sup>2</sup> Ibid para 21.

function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.

It is [accessible] when educational institutions and programmes are within reach for everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions: (i) non-discrimination: education must be accessible to all, especially the most vulnerable groups, in law and in fact, without discrimination on any of the prohibited grounds; (ii) physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme); and (iii) economic accessibility - education has to be affordable to all. Whereas primary education shall be available “free to all”, States parties are required to progressively introduce free secondary and higher education.<sup>3</sup>

Education is [acceptable] when the form and substance of education, including curricula and teaching methods are relevant, culturally appropriate and of good quality to students and, in appropriate cases, parents; and it is [adaptable] when it is flexible so it can meet the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

### **National Legislation**

The basic domestic text guaranteeing the right to education is the Constitution. In terms of section 29 (1)(a) everyone has the right to a basic education, including adult basic education; and to further education<sup>4</sup>, which the State, through reasonable measures, must make progressively available and accessible. Other domestic legislation promulgated to give effect to the right to education guaranteed in the Constitution include, the South African Schools Act 84 of 1996, the Employment of Educators Act, 76 of 1998, the Further Education and Training Act, 98 of 1998, the Higher Education Amendment Act 55 of 1999 and the South African Council for Educators Act 31, of 2000. Apart from the key policy and legislative measures, relevant rules and regulations have been adopted by both national and provincial governments aimed at ensuring the effective realisation of the right to education. These include the Regulations on the Admission of Learners to Public Schools, National Norms and Standards for School Funding Policy, *etc.*

### **Domestic and International Standards compared**

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<sup>3</sup> The Committee on Economic, Social and Cultural Rights-General Comment No. 13, op. cit., para 6.

<sup>4</sup> Section 29 (1) (b)

South Africa adheres to a number of international human rights instruments and Declarations that guarantee the right to education, notable among them, the World Declaration on Education for All, the Vienna Declaration and Programme of Action; the Plan of Action of the United Nations Decade for Human Rights Education; the Universal Declaration of Human Rights, the Convention on the Rights of the Child; the African Charter on Human and Peoples' Rights; the African Charter on the Rights and Welfare of the Child, *etc.*

These instruments provide for the progressive realisation of the right to education and require that the basic aims and objectives of education must be upheld. The Committee on Economic, Social and Cultural Rights argues that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13, paragraph 1.<sup>4</sup> The Committee notes that education shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all ethnic groups, as well as nations, racial and religious groups and "... be directed to the full development of the human personality".

This chapter assesses the measures taken by the state between 1<sup>st</sup> April 2000 and 31<sup>st</sup> March 2002 towards the progressive realisation of the right to education. Amongst other things, it considers the implementation of the General Education and Training (GET),<sup>5</sup> Further Education and Training (FET)<sup>6</sup> and Higher Education and Training bands (HET).<sup>7</sup> It is important that government<sup>8</sup> policy and programmatic measures and legislation comply with section 7(2) of the Constitution.<sup>9</sup>

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<sup>4</sup> *Ibid.*, para 4

<sup>5</sup> This band starts from the Reception Year to Grade Nine. It is in this band that compulsory education applies.

<sup>6</sup> The Further Education and Training (FET) band consists of all education and training from the National Qualifications Framework (NQF) levels Two to Four, or the equivalent of grades 10 to 12 in the schooling system and National Technical Certificate One to Three in Technical Colleges. Learners enter FET after the completion of the compulsory phase of education at Grade Nine or via the Adult Basic Education and Training route.

<sup>7</sup> The Higher Education and Training (HET) band includes university and technikon education.

<sup>8</sup> Note that the HET band is the competence of the national sphere of government only – the National Department of Education (NDE).

<sup>9</sup> This section provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights – the right to education being one of them. Each of the constitutional obligations is defined below. The definitions of all the four constitutional obligations are those of the Centre for Human Rights (Pretoria university):

The duty to respect prohibits the state from acting in ways that will:

- arbitrarily deprive people of their right to education – for example, the closing down of school without justification;
- deny or obstruct the right to education – for example a law providing that all persons who are unable to pay school fees, will be denied the right to basic education; and
- unfairly discriminate – for example a law providing that girls and women are not to receive education.

The duty to protect implies that the state must protect people against invasion by the private sector. This would call for the state to protect individuals from discrimination in private educational institutions. It would also mean that the state would have to protect individuals from interference by individuals or by private companies in the exercise of their right to education. For example the state would have to protect children from work, which would interfere with their right to education.

## **2. POLICY AND PROGRAMMATIC MEASURES**

### **National Sphere**

The National Department of Education (NDE) reported that it launched the South African National Literacy Initiative (SANLI) during June 2000. SANLI is a short-term volunteer-assisted initiative aimed at eradicating illiteracy in the country. The NDE further reported that national Cabinet approved the following White Papers:

- White Paper on Early Childhood Development (ECD) (May 2001)
- White Paper on Inclusion of Children with Special Needs (July 2001)

The White Paper on ECD calls for the universal expansion of learning opportunities within the ten years of compulsory GET. The White Paper on Inclusion of Children with Special Education Needs provides for the inclusion of children with special needs to be mainstreamed and supported in public ordinary schools.

### **Provincial Sphere**

Various provincial education departments (PEDs) instituted measures that intended to address problems or challenges that are only peculiar to each of them.

The Eastern Cape Department of Education (ECDE), Free State Department of Education (FSDE), Gauteng Department of Education (GDE), KwaZulu-Natal Department of Education and Culture (KZNDEC), Mpumalanga Department of Education (MDE), Northern Cape Department of Education (NCDE), and the Western Cape Department of Education (WCDE) reported on the White Papers on ECD and Inclusion of Children with Special Needs.

The FSDE instituted the following programmes and /or projects during the reporting period:

- Guidelines on Learner Pregnancy
- Policy on Injuries to Learners in Public Schools

#### *Guidelines on Learner Pregnancy*

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The duty to promote requires that the state actively inform people of their right to education and explain how they can gain access to this right. This duty is related to the idea of bringing human rights to the people. It would include activities such as workshops, seminars, and publications in the written media and other medium, such as radio and television.

The duty to fulfil places an obligation on the state to take measures in order to advance the right to education. The state must take legislative and other measures in order to realize the right to education. Other measures, considered to be appropriate by the Committee on Economic, Social, Cultural and Economic Rights are – administrative, financial, educational and social measures. Under international law, the duty to fulfil imposes obligations namely the obligation to facilitate and the obligation to provide. According to Comment No. 13 this would require that the state take positive measures that enable and assist individuals and communities to enjoy the right to education and also to provide them with the right to education.

The objective of the Guidelines on Learner Pregnancy is to protect a pregnant learner's right to education.

#### *Policy on Injuries to Learners in Public Schools*

The objective of the Policy on Injuries to Learners in Public Schools is to protect a learner injured on the school premises and/or during school activities. The policy lays out procedures that have to be followed should a learner be injured in either or both circumstances, as well as types of injuries that qualify for indemnity.

The GDE instituted the following measures:

- National Norms and Standards for School Funding Policy
- Transforming ECD in Gauteng
- Admissions Policy
- Local and District Education and Training Councils
- Misconduct of Learners at Public Schools and Disciplinary Proceedings

#### *National Norms and Standards for School Funding Policy*

The aim of the National Norms and Standards for School Funding Policy is to ensure that all learners have access to education irrespective of their socio-economic background, and to set the baseline for equitable funding.

#### *Transforming ECD in Gauteng*

The measure gives effect to the national policy on ECD, and is divided into two categories. The first category provides for the implementation of the Reception Year, Grade R for five-year olds turning six in the year of admission, thereby realising the educational obligation of providing ten years of compulsory general education. The second category provides for the establishment of an ECD Institute to meet the needs of families with children younger than six years.

#### *Admissions Policy*

The aim of the Admissions Policy in Public Schools is to ensure that schools admit all school-going age learners and serves their educational requirements without unfair discrimination of any form.

#### *Local and District Education and Training Councils*

The aim of the Local and District Education Councils is to mobilise communities towards the management of education at local, district and provincial levels.

#### *Misconduct of Learners at Public Schools and Disciplinary Proceedings*

Amongst others, the aim of the Misconduct of Learners at Public Schools and Disciplinary Proceedings (Provincial Notice 2591 of 9 May 2001) is to protect the learner against unfair disciplinary hearings that might lead to the suspension of the learners, thereby denying him/her the right to basic education.

The KZNDEC reported that in fulfilling the constitutional obligations it undertook the following initiatives with regards to the right to education:

- Provided training to members of School Governing Bodies with respect to each member's function; and
- Held a series of workshops and developmental sessions to make parents aware of their responsibility to send their children to school; to promote the South African School Act 84 of 1996; and to capacitate the departmental officials so that they are better equipped to serve their communities.

The Limpopo Department of Education (LDE) instituted the following programmes and projects during the reporting period:

- Curriculum Development
- Practitioner Development
- Institutional Development
- *Rivoningo Project*
- *Ikhwelo Project*

#### *Curriculum Development Programme*

The aim of the Curriculum Development Programme is to identify the learning areas that could be taught from Adult Basic Education and Training (ABET) levels One to Four. It is also supposed to indicate the role which each operational level should play in the assessment of ABET learners from levels One to Four. Other aims include the review and development of learning programmes and lesson models.

#### *Practitioner Development Programme*

The Practitioner Development Programme aims to create an environment, which could make training possible for all ABET educators and officers to strengthen ABET provisioning.

#### *Institutional Development Programme*

The Institutional Development Programme focuses on all the elements which were not mentioned in the response, but which help establish effective public Adult Learning Centres. These comprise the employment of qualified but unemployed educators, and training of core educators and Centre Governing Bodies.

#### *Rivoningo Project*

The *Rivoningo Project* is aimed at promoting, through pilot projects, the eight learning areas in the five centres of ABET in the province. It is also aimed at establishing centres of excellence by equipping Centre Managers, educators, and Centre Governing Bodies with appropriate knowledge, skills and attitudes.

#### *Ikhwelo Project*

*Ikhwelo Project* piloted the ABET electives component of the curriculum. The focus of the elective project was on Agriculture and Small Medium and Micro-Enterprises (SMMEs).

The MDE reported on the following programmes/projects:

- Canada South Africa Teacher Development Programme (CSATDP)
- The USA Peace Corps Volunteers

#### *Canada South Africa Teacher Development Programme*

CSATDP is aimed at training teachers to handle learners with disabilities, advocating education for all, promoting awareness of and knowledge about HIV/AIDS, and sensitising everyone about gender-related issues.

The NCDE reported that it instituted the Revised National Curriculum Statement for Grades R to 9 and the National Policy on Whole-School Evaluation.

#### *National Curriculum Statement for Grades R to 9*

The National Curriculum Statement for Grades R to 9 formulates curriculum requirements at various levels and phases in clear and simple language. It also contains an overview of the background; principles; process; key elements of the eight Learning Area Statements; guidelines for the development of Learning Programmes and related qualification framework and implementation plan.

#### *National Policy on Whole-School Evaluation*

The aim of the National Policy on Whole-School Evaluation is to introduce an effective monitoring and evaluation process that is vital for the improvement of quality and standards of performance in schools. The policy is also aimed at improving the overall quality of education in South African Schools. It seeks to ensure that all children are given equal opportunity to make the best use of their capabilities. The adopted model is said to be radically different from the inspection system previously practised in South Africa. Together with the accompanying guidelines, this policy prescribes an approach that is built upon interactive and transparent processes. These processes include school self-evaluation, ongoing District-based support, monitoring and development and external evaluations conducted by the supervisory units.

The North West Department of Education (NWDE) reported that it implemented SANLI.



The Western Cape Department of Education (WCDE) reported that it instituted the following programmes and/or projects:

- Conditional Grant Programme
- Integrated Land Services Project
- Values in Education

#### *Conditional Grant Programme*

The programme attempts to prepare learners from marginalised and impoverished areas for normal school (Grade One). The programme reached 155 learning sites with an average number of 30 learners.

#### *Integrated Land Services Project*

The project is aimed at training women in charge of community schools in bookkeeping and management skills. The trainees are currently being integrated into a training programme developing their capacity to offer quality pre-school learning programmes.

#### *Values in Education Initiative*

The initiative promotes the internalisation by learners of ten fundamental values enshrined in the Constitution via the education system.

### **3. LEGISLATIVE MEASURES**

#### **National Sphere**

According to the NDE, there were no legislative developments that took place during the reporting period.

#### **Provincial Sphere**

The FSDE reported that the following legislative and related measures took place during the reporting period:<sup>10</sup>

- Measures on Financial Records, Statements and Public Schools Funds
- Regulations on Examination Irregularities and Disciplinary Action
- Regulations on Discipline of Learners at Public Schools
- Regulations on Examination Board
- Regulations on Merger of Public Schools
- Regulations on Provincial Education and Training Council

The GDE reported that it developed Regulations for the Admission of Learners to Public Schools. Like the NWDE, the LDE<sup>11</sup> reported that the Adult Basic Education Act 52, 2000<sup>12</sup> and Government Gazette No. 23087<sup>13</sup> were promulgated.

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<sup>10</sup> It was not explained how each of these fulfils the right to education.

#### 4. BUDGETARY MEASURES<sup>14</sup>

##### National Sphere

**Table 1 National Department of Education's Budget Allocation**

Year	Total allocation in Rand(s)	Allocation as % of GDP	Projected expenditure	Actual expenditure
2000/2001	7 449 464 000	0,84	-	7 329 024 000
2001/2002	7 924 560 000	0,82	-	7 806 951 000

The dash (-) in all the tables denotes that the information requested was not made available to the Commission.

##### *Accounting for variance between the financial years*

The NDE did not provide a relevant response in this section. The response it provided was more on under-expenditure rather than on the variances in budget allocation between the financial years. The following are some of the responses it provided to the question:

- A delay in the mechanisms that had to be put in place to deliver the services in the provinces with regard to the *Ikhwelo Project* coupled with incapacity which also delayed the implementation of the project and
- Tenders not meeting the requirements on the training of practitioners, management structures and the advocacy campaign for the ECD Project.

##### *Budget Adequacy*

The NDE indicated that the budget was inadequate since there were new initiatives for which more funds were required. These include Curriculum 2005, the publication of new curriculum statements, and the implementation of the whole school evaluation policy, all of which received donor funding. The NDE overspent, however, with the deviation remaining within the two percent prescribed by the National Treasury.

<sup>11</sup> The LDE only listed the Regulations for the Provincial Board for FET but did not say exactly how these meet the constitutional obligations.

<sup>12</sup> The Act lays the foundation for the establishment of Center Governing Bodies and their composition, merger and closure of Public Adult Learning Centers, the registration of Private Adult Learning Centers. Further, the Act makes room for the drawing of norms and standards for funding of both Public and Private Adult Learning Centers. Lastly, it provides for the establishment of the National Advisory Board for ABET (NABABET).

<sup>13</sup> The Government Gazette is a legislative development that calls nominations for members of NABABET as per the ABET Act referred to above.

<sup>14</sup> This section focuses on the budget allocations for the following programmes at the national level of the Education Department:

- ECD Programme
- Primary School Nutrition Programme
- Education About HIV/AIDS
- Education for Learners with Special Educational Needs (ELSEN)

**Table 2 Total Budget Allocations for the ECD Programme**

Year	Total allocation in Rand(s)	Allocation as % of the department's total revenue	Projected expenditure	Actual expenditure
2000/2001	2 256 000	0,03	-	1 177 000
2001/2002	11 450 000	0,14	-	2 231 000

*Accounting for variance between the financial years*

The NDE did not account for variance in budget allocation between the financial years referred to in the table, instead it accounted for under-expenditure it experienced. In 2000/2001 the department experienced under-expenditure due to unfilled vacancies; undeveloped ECD Policy which resulted in the consultation process not being conducted; and the delay in the accreditation process for ECD providers.

*Budget Adequacy*

The NDE reported that the budget was adequate for its initiatives. The European Union supplemented the budget for the provision of Learning Support Materials (LSMs) to Grade R. The under-expenditure delayed the setting up of the ECD Programme and the procurement and distribution of LSMs to learning sites. However, the selection of ECD sites in the provinces has been completed, and the learning support kits ordered. This should make the programme proceed smoothly in the future.

**Primary School Nutrition Programme<sup>15</sup>**

**Table 3 Total Budget Allocations for the Primary School Nutrition Programme**

Year	Total allocation in Rand(s)	Per capita allocation in Rand(s) after inflation adjustment (for school feeding)	Projected expenditure	Actual expenditure
2000/2001	582 411 000	102 – 30 Average	582 411 000	504 164 000 (87%)
2001/2002	582 411 000	102 – 30 Average	582 411 000	438 940 000 (75%)

*Accounting for variance between the financial years*

The response is inappropriate for accounting for the variance in budget allocation. It was stated as follows:

<sup>15</sup> The information given in this section was obtained from the Department of Health (DoH), which is responsible for the programme. This is also a welfare issue.

Operational delays were reported by the DoH in the implementation of the feeding scheme programme. The problems that were cited were as follows:

- Delivery problems;
- Disruptions in school programme; and
- Delays in tender processes.

#### *Budget Adequacy*

The DoH indicated that the budget was inadequate, particularly for the planned support. The department under-spent by R 78, 2 million in the financial year 2000/2001 when implementing the programme. In 2001/2002 the NDE underspent by R 143, 5 million. The following were the measures the department took to address under-spending:

- Capacity building;
- Discussions with both Provincial and National Treasuries; and
- Steps to improve the implementation of school feeding.

#### **Education About HIV/AIDS**

**Table 4 Total Budget Allocations for Education about HIV/AIDS Programme**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Allocation as % of the department's total revenue</b>	<b>Projected expenditure</b>	<b>Actual expenditure</b>
2000/2001	4 365 000	0,06	-	1 683 000
2001/2002	7 172 000	0,09	-	2 042 000

#### *Accounting for variance between the financial years*

The response given by the NDE is inappropriate for this section. The following is what was said by the NDE:

In 2000/2001 the department experienced under-expenditure due to late gazetting of the funds on 28 August 2000. In 2000/2001 the NDE under-spent by R 2, 7 million while in the subsequent financial year it underspent by R5, 1 million. During 2000/2001, Project Managers and Financial Administrative Officers were appointed in the provinces to manage the project. The printing of the learning materials was done and the materials distributed to the provinces.

#### **Education for Learners with Special Education Needs (ELSEN)**

**Table 5 Total Budget Allocations for ELSEN**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Allocation as % of the department's total revenue</b>	<b>Projected expenditure</b>	<b>Actual expenditure</b>
2000/2001	1 841 000	0,02	-	802 000
2001/2002	2 677 000	0,03	-	2 520 000

*Accounting for variance between the financial years*

The response given here is inappropriate; it does not account for the variance in budget allocation. It merely accounts for under-expenditure. It was stated as follows:

The under-expenditure of R1, 3 million that occurred in 2000/2001 was caused by the difficulties experienced with the acceptance of the White Paper on ELSEN. In 2001/2002 the under-expenditure of R157 000 was mainly due to the delay in the delivery of invoices for services rendered for a workshop on Information Production.

*Budget Adequacy*

The NDE reported that the funds for policy development, monitoring and evaluation were sufficient. The under-expenditure resulted in delays in the implementation of the ELSEN Policy.

**Provincial Departments of Education<sup>16</sup>**

**Table 6 Total Budget Allocations for Provinces**

Name of province	Year	Total allocation in Rand(s)	Projected expenditure	Actual expenditure
Eastern Cape	2000/2001	7 392 231 000	7 836 493 000	7 129 243 000
	2001/2002	8 118 856 000	8 571 364 000	-
Free State	2000/2001	3 153 466 000	2 994 343 000	2 990 236 000
	2001/2002	3 382 431 000	3 332 292 000	3 173 878 000
KwaZulu-Natal	2000/2001	8 367 837 000	-	8 172 742 000
	2001/2002	9 346 610 000	9 275 000 00	-
Mpumalanga	2000/2001	1 822 844 000	-	1 797 981 000
	2001/2002	2 001 875 000	-	1 998 700 000
Northern Cape	2000/2001	965 229 000	-	-
	2001/2002	1 028 398 000	-	-
North West	2000/2001	3 733 168 000	3 733 168 000	3 698 935 000
	2001/2002	4 029 277 000	4 029 277 000	3 972 035 000
Western Cape	2000/2001	4 226 490 000	-	4 068 995 000
	2001/2002	4 445 647 000	4 445 647 000	-

<sup>16</sup> This section focuses on the provincial budget allocations for the same programmes discussed in the NDE's section above.

*Accounting for variance(s) between the financial years<sup>17</sup>*

The ECDE and the KZNDEC did not respond to the question on the variances. The NCDE reported that while its budget has been nominally increasing every financial year due to inflation, it has, nonetheless, remained relatively constant, as a percentage of the total provincial budget.

The NWDE reported that the variance was due to goods and/or services that were not paid for before the end of the financial years in question. The reasons cited for the non-payment of these goods and/or services included non-delivery of the goods and/or services and unsubmitted invoices of the delivered goods and/or services. The WCDE only said that the variances were minimal.

*Budget Adequacy*

The ECDE reported that the budget was adequate, and that it experienced over-spending. A ratio between personnel and non-personnel expenditure has been implemented with the objective to reach the target by 2005/2006 of 85:15 between personnel and non-personnel expenditure. Programme Managers have been appointed to monitor the utilisation of funds on a monthly basis. A Departmental Finance Committee has been established where Programme Managers must account on their monthly expenditure. The KZNDEC reported that it was allocated 38,4 percent of the national budget for personnel and related costs, which consumed 83 percent during the financial year 2001/2002.

Infrastructure backlogs at schools abound, with the department estimating it will cost R1, 5 billion to bring it to a desirable standard, and a further R500 million per annum to maintain these schools. Both the Provincial and National Treasuries are addressing these issues. The KZNDEC further reported that it anticipated that an amount of R80 million would remain unspent by the end 2001/2002. R60 million of the above amount was specifically in respect of personnel expenditure which, again, was linked to a number of new College/School Educators (CS Educators) appointed in January 2002 but not paid before the close of the financial year. The department is restructuring and improving its financial administration. This is done with a view to best monitor and control future expenditure.

The NCDE indicated that the budget was inadequate to address the necessary commitments and mandates for the financial years and 2000/2001. Most of the over-expenditure in the first two year was personnel-related. The rationalisation of staff, particularly the CS Educators, was still in the process of being concluded. The expenditure in 2001/2002 reflects that the budget was adequate to fulfil basic mandates. Improved control over personnel expenditure also accounted for

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<sup>17</sup> The FSDE gave a response that was more appropriate for accounting for under-expenditure and not accounting for the variance in budget allocation. The following is the response the FSDE provided: During 2001/2002 the FSDE under-spent by R208, 553 million. In its response, the FSDE gave a breakdown of this under-spent amount of R208, 553 million as follows:

- Outstanding commitments of unpaid orders amounting to R115, 547 million;
- Unspent conditional grant funds amounting to R49, 967 million;
- Unpaid bursary contracts amounting to R16, 139 million; and
- Unspent capital projects funds amounting to R26, 900 million.

expenditure within the budget. To address the budget inadequacy the NCDE reportedly introduced improved control over personnel expenditure as well as improved financial controls.

The introduction of measures to improve expenditure control, as well as the devolution of responsibilities to managers, resulted in greater awareness to control expenditure. The improved control over expenditure could be seen as the single most important reason for addressing budget inadequacies. The availability of additional funds, including donor funds and conditional grants, assisted in improved service delivery within the constrained budget. Over-expenditure occurred in 2000/2001. This was mainly due to excessive personnel expenditure. The over-expenditure on especially personnel (educators) was necessary at the time in order to ensure minimal disruption at schools, as classes would be without educators.

The NWDE reported that the budget was adequate. The North West Education Development Trust was established to assist the department in the School Building Programme. Where funds were under-spent, they were rolled over to the following financial year. To address the problem of under-spending, the department proposed that orders be placed on time to ensure delivery and payment within the financial year the orders are placed.

The budget for WCDE was inadequate; this led to a shortage of teachers, classrooms, books and equipment. Over-spending did occur in “small amounts”, though, which the department did not mention. To correct the problem of over-spending, the department revises its business plans regularly.

**Early Childhood Development Programme (ECD)****Table 7 Budget Allocations for the ECD Programme**

Name of province	Year	Total allocation in Rand(s)	Projected expenditure	Actual expenditure
Eastern Cape	2000/2001	5 052 077 80	5 052 077 80	5 052 078 000
	2001/2002	-	-	-
Free State	2000/2001	2 678 000	3 266 000	1 603 000
	2001/2002	1 171 000	921 000	921 000
Gauteng	2000/2001	-	-	-
	2001/2002	2 583 000	-	1 500 000
KwaZulu-Natal	2000/2001	-	-	-
	2001/2002	9 441 000	8 111 447	-
Limpopo	2000/2001	1 400 000	-	-
	2001/2002	3 297 000	-	-
Mpumalanga	2000/2001	-	-	-
	2001/2002	1 533 000	-	0 <sup>18</sup>
Northern Cape	2000/2001	3 408 000	-	5 726 047
	2001/2002	5 366 725	-	8 498 878
North West	2000/2001	124 280	124 280	92 507
	2001/2002	96 613	96 613	94 933
Western Cape	2000/2001	46 170 000	-	46 170 000
	2001/2002	44 790 000	44 790 000	-

*Accounting for variance(s) between the financial years*

The ECDE reported that during 2000/2001 the financial resources allocated to ECD only helped in the implementation of the ECD National Pilot Project. During the financial year 2001/2002, a conscious decision was made to allocate a substantial amount for ECD provision. Meanwhile, the FSDE reported that the large variance between the financial years 2001/2002 is due to the conditional grants received for the implementation of ECD.

The GDE reported that the variance is a result of delays in the implementation of the entire business plan, except for the R1, 5 million utilised for LSMs. The difference was rolled over into the 2002/2003 budget. The KZNDEC reported that during 2001/2002 the ECD budget was under-spent by R1, 3 million, which was allocated the ECD conditional grant service provider to train the Conditional Grant Practitioners. The appointment of the service provider was a national responsibility. However, it was reported that the national tender process had failed such that the service was not being provided. To this end, the money has been rolled-over as training is still required.

<sup>18</sup> No explanation was given regarding this figure. One cannot tell whether the funds were allocated and not spent, for whatever reason/s in this financial year.



On the other hand, the NCDE reported that the steady increase in the budget was necessary due to the steady increase in the number of learners and learning sites. Like the MDE, the WCDE did not account for variances.

### *Budget Adequacy*

The ECDE reported that the budget was inadequate for ECD provisioning, given that there are 6 354 sites. Currently, only 550 of these sites have been reached through grant funding. There was a move to make R57 million available for the ECD Directorate in the current fiscal round, R9 million of which includes a ‘top up’ from the conditional grant. There was under-spending of R3million ascribed to delays in the national procurement process.

The pace of delivery, even of the new mandate from the White Paper on ECD is rather slow. The ECDE suggested to the NDE to borrow funds from their provincial budget and then invoice the department. Accordingly, tender specifications have already been drawn up and are ready to be forwarded to the Provincial Tender Board for review. The process will await the sanction from the NDE.

The FSDE reported that the budget was adequate. There was no under-spending experienced by the department, except that some NGOs were not paid in the financial year they should have been, which resulted in under-spending for that year. To address such problems, an action plan for the implementation of Grade R has been drawn up while an ECD Council is being established for future policy development.

The GDE reported that the budget was inadequate as it only catered for the subsidies of Grade R practitioners; hence, it augmented its financial resources to ensure the provisioning of LSMs and the training of practitioners. There was under-spending, however, owing to a delay by the department’s appointment of a Grade R practitioner. But since the implementation of Grade R only started in January 2002, there was no impact on the right.

The KZNDEC reported that its budget allocation for ECD provision was and is grossly inadequate. The department has an estimated 250 000 Grade R learners and currently only caters for about 80 539 learners. There is no budget allocated for learners below five years of age. There are currently no management structures for ECD in the province, with only one substantive post at level four available for coordinating all ECD processes. A costed proposal for the phasing in of Grade R has been formulated. This works within the parameters of the current budget and relies on continued funding after the end of the conditional grant, and the reallocation of funding, which is currently allocated to 900 fully funded Grade R educators.

A proposal on structures for ECD has been tabled while a proposal for a full investigation into using the three dividends as advocated in the ECD Policy was recommended. The delay in the appointment of a service provider has impacted greatly on the quality of teaching and learning in the selected Grade R conditional grant sites. One of the main objectives is to provide the Previously Disadvantaged Individuals (PDIs) with a career path and an opportunity to receive a full ECD qualification with the NQF status. This training is still urgently required since the appointment of a service provider is not a provincial competence.

The MDE reported that the conditional grant for provincial ECD provisioning was inadequate. The province experienced under-spending due to a late start in the process of registration and processing of information related to sites. So far, 193 sites have been identified. The department has hired more staff to continuously process the registration in order to curb under-spending.

The NCDE reported that the budget was inadequate for the provision of ECD. The current subsidies to centres are inadequate. Some donor funding and assistance through conditional grants was sought to address the budgetary constraints. The departmental allocations show a steady increase on an annual basis. Over-expenditure was ascribed to new sites opening during the course of a financial year. The increase in expenditure on subsidies and educators caused over-expenditure. The meeting of set targets (to subsidise all sites) was compromised. Budgetary constraints were addressed through increased allocations, conditional grants, and additional funding (from donors).

The WCDE reported that the budget allocation for ECD provisioning was inadequate. The Finance Directorate has increased the budget slightly to address the shortfall. According to the WCDE, there was no experience of over- or under-expenditure in ECD provisioning.

### **Primary School Nutrition Programme<sup>19</sup>**

The ECDE cited the following factors as causes of the variances:

- Non-delivery of food by women groups;
- Non-payment of transporters by women groups; and
- Suppliers not delivering food because they have not been paid either by the DoH or the contracted NGOs.

According to the ECDE, all the above problems resulted in the number of feeding days being reduced.

#### *Budget Adequacy*

The ECDE reported that the budget for the programme was inadequate. As a result, it could not feed schools for the entire calendar year. Therefore, there are attempts to use up to 70 percent of the school calendar year for feeding. As part of the solution, only certain grades are considered.

The ECDE further reported that there was under-spending that creates an impression that the department is taking more money than it needs. The response further said that the under-spending on the programme impacts negatively on both school attendance as well as learners' academic performance. The department has monitoring mechanisms in place aimed at ensuring that service delivery actually takes place to avoid under-spending. The DoH is currently reviewing its strategy in order to address the glitches in the programme.

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<sup>19</sup> At the provincial level only the Eastern Cape responded to the questions on the Primary School Nutrition Programme (PSNP). The rationale for the non-reporting on the PSNP is due to the fact that the budget for the programme is the sole responsibility of the DoH. As a result, there will not be much information on the PSNP.

## Education About HIV/AIDS

**Table 8 Budget Allocations for Education about HIV/AIDS Programme**

Name of Province	Year	Total allocation in Rand(s)	Projected expenditure	Actual expenditure
Eastern Cape	2000/2001	4 2000 000	4 2000 000	2 5000 000
	2001/2002	11 747 000	11 747 000	7 4000 000
Free State	2000/2001	1 000 000	940 000	2 093
	2001/2002	6 298 000	6 298 000	2 842 000
Gauteng	2000/2001	2 296 000	2 296 000	2 204 160
	2001/2002	7 810 000	7 810 000	7 575 700
KwaZulu-Natal	2000/2001	4 6000 000	4 6000 000	-
	2001/2002	14 000 000	18 000 000	-
Mpumalanga	2000/2001	2 340 000	-	228 000
	2001/2002	1 533 000	-	2 965 000
Northern Cape	2000/2001		-	902 622
	2001/2002	2 663 000	-	2 518 824
North West	2000/2001	2 339 000	-	2 339 000
	2001/2002	5 080 000	-	5 080 000
Western Cape	2000/2001	2 297 000	2 297 000	823 000
	2001/2002	5 017 000	6 491 000	1 200 000

### *Accounting for variance(s) between the financial years*

The ECDE reported that funding for the HIV/AIDS Programme comes from a grant which keeps fluctuating. The FSDE said that funds were provided in 2000/2001 for the implementation phase of the Education about HIV/AIDS Programme, whilst conditional grants have been received from the National Treasury for 2001/2002 and to address the issue of HIV/AIDS in the workplace. The under-spending of R3, 456 million was fully committed during 2001/2002.

The GDE reported that a number of schools did not access the budgets because of the following factors:

- no dedicated Life Skills teachers were appointed;
- lack of financial management skills;
- perceptions of ex-Model C schools that HIV/AIDS does not affect them; and
- delays/ cancellations of activities due to lack of administrative and professional human resources.

The KZNDEC's budget for 2000/2001 was transferred to the province in November. No expenditure occurred between November 2000 and January 2001 as schools were writing examinations; closed or had just re-opened. The variance between the two financial years' budget allocations was attributed to an incorrect bookkeeping procedure, which may not have correct expenditure in two of the department's

regions, viz., Vryheid and Empangeni. The LDE did not account for the variance in its budget.

The NCDE reported that in 2000/2001 there was no actual provisioning for the HIV/AIDS Programme. The intensification of the programme and the appointment of dedicated staff to drive the programme necessitated substantial increases in its budget.

The NWDE reported that the variance in its budget allocations was due to the fact that the funds from the conditional grant were transferred to the province only in September and November 2000; only training materials were ordered in 2000. The rest of the funds were rolled over to the 2000/2001 financial year for training and implementation. For the 2001/2002 financial year 99 per cent of the allocated budget was spent.

The WCDE reported that in 1999/2000 the funds came from its department, whereas the subsequent budgets came from the NDE as a conditional grant. In 2000/2001 grant funding arrived late such that R1, 5 million was rolled over into 2001/2002. The 2001/2002 actual expenditure was estimated at R1, 2 million, which excluded funds committed (R4 million) and outstanding invoices (R2, 6 million) Thus, the R6, 491 million (which includes the previous year's roll-over) would all have been appropriated by May 2002.

#### *Budget Adequacy*

The ECDE reported that the budget for HIV/AIDS Education was adequate. The department further reported that it experienced under-spending due to delays in the procurement processes and loading of budgets within the provincial departments. Under-staffing in the human resources area also contributed to under-spending. To address this problem, the department is considering employing more people in 24 of its District offices.

The GDE reported that the budget for the programme was inadequate. It further said that critical aspects of an intervention programme, (which include Care, Support and Counselling of affected and infected by HIV/AIDS and HIV/AIDS programmes) was not sufficiently provided in previous budgets.

To address the budget inadequacy, the department requested additional funding from NIP Life Skills Conditional Grant and for the HIV/AIDS Programme (workplace training). The budget was not fully utilised owing to lack of capacity at all levels, that is, provincial, district, and school. The department has since appointed short-term administrative staff at district level to support Life Skills Co-ordinators.

The KZNDEC reported that the budget for the HIV/AIDS Programme was adequate since it was based on the approved provincial business plan. The department experienced under-spending because in November 2000 the budget was transferred to the province and could only be used for the programme by the end of January 2001 when schools re-opened. Before the end of March 2000, the procurement procedures were problematic in as far as the planned expenditure was concerned.

The department reported that the under-spending did not have a negative impact on the realisation of the right to basic education as the unused amount was rolled over to 2001/2002. Subsequently, it took the following measures to address under-spending:

- Implementation plans inclusive of projected expenditure are prepared;
- Commitment registers are kept;
- Cashflow reports are obtained; and
- Monthly meetings are held with all programme implementers to evaluate progress and cashflow.

The LDE reported that the budget for the programme was adequate. The department reported that it experienced under-spending owing to the late availability of funds. To address the under-spending, the department proposed that the funds be disbursed on time. The MDE did not respond to the questions on the HIV/AIDS Programme.

The NCDE reported that the budget for the programme was inadequate, and this made the expansion of the programme into other areas and the appointment of additional staff impossible. To address the budget inadequacy, budget allocations were increased as well as donor funding mobilised. In 2000/2001 the department experienced over-expenditure. The NWDE reported that the budget allocation for the HIV/AIDS Programme was adequate. The department under-spent by 1 percent in 2000/2001 as it was awaiting the Tender Board's approval for resource materials (Afrikaans and Setswana). The department engaged the NDE to ensure that transfers are made timeously.

The WCDE reported that its budget allocation for the HIV/AIDS Programme has been adequate thus far (and in fact the conditional grant has been under-spent) due to careful financial management and inadequate structures and staffing. According to the department, the under-spending has impacted negatively on the implementation of the programme, and has reduced overall efficacy of the programme in exceeding its targets. Better planning was suggested to address under-spending.

**Education for Learners with Special Education Needs (ELSEN)****Table 9 Budget Allocations for ELSEN**

Name of province	Year	Total allocation in Rand(s)	Projected expenditure	Actual expenditure
Eastern Cape	2000/2001	18 842 000	-	18 842 000
	2001/2002	18 642 393	-	18 642 393
Free State	2000/2001	71 630 000	71 630 000	77 515 000
	2001/2002	81 817 000	80 366 000	81 243 000
Gauteng	2000/2001	51 790 152	51 790 152	51 790 152
	2001/2002	64 760 240	64 760 240	64 760 240
KwaZulu-Natal	2000/2001	183 561 000	183 561 000	155 204 000
	2001/2002	190 904 000	190 333 000	190 333 000
Limpopo	2000/2001	63 701 800	-	76 994 000
	2001/2002	68 190 718	-	90 863 000
Mpumalanga	2000/2001	52 500 000	-	50 983 000
	2001/2002	55 944 000	-	52 838 000
Northern Cape	2000/2001	27 806 000	-	24 431 336
	2002/2002	31 856 488	-	31 856 222
North West	2000/ 2001	61 477 000	61 477 000	58 828 000
	2001/2002	65 956 000	65 956 000	65 956 000
Western Cape	2000/2001	276 410 000	276 410 000	276 410 000
	2001/2002	282 976 000	282 976 000	282 976 000

*Accounting for variance(s) between the financial years*

The ECDE reported that the variance between 2000/2001 and 2001/2002 was caused by a delay in the transfer of funds from the NDE to schools. The FSDE reported that the variance was caused by the injection of conditional grants. The GDE did not account for variances in their budget allocations.

The KZNDEC reported that the variance between 2000/2001 and 2001/2002 was as a result of a delay in the inception of an allowance that was made for registration of schools located in previously disadvantaged areas. The LDE and MDE did not respond to questions relating to variances in budget allocations. The NCDE reported that the variance in budget allocations between the financial years were due to the imperatives as per the White Paper on Inclusive Education. The NWDE reported that the per capita allocations for special needs and disabled learners are determined according to a fixed formula based on disability category. The main variables in the formula are poverty and the number of learners per school. It was reported that the formula takes into account the plight of the vulnerable and marginalised groups. The WCDE reported that the cause of the variance in its budget allocations was simply influenced by inflation.

### *Budget Adequacy*

The ECDE reported that the budget was inadequate such that schools threatened to close. To augment the insufficient funds, some virements<sup>20</sup> had to be made. As a result of under-expenditure in the department, learners were deprived of a quality diet, transport, and crucially - the equipment needed for quality education. The FSDE reported that the budget was inadequate. Some Special Schools still needed to be converted to Community Centers. Others struggle with maintenance, as some learners could not afford the fees. Special Schools have had to cut down on their expenses, as the budget was inadequate. Due to some parents not affording the fees they withdrew their learners from Special Schools and placed them in public ordinary schools without any therapeutic intervention. To address over-expenditure the NDE has had to increase the budget allocations for Special Schools and also allowed 5 per cent over-expenditure. The GDE indicated that its budget was adequate.

The KZNDEC reported that the disabled learners' needs, particularly those in rural areas with infrastructure backlogs, far outweigh the budget allocations. The redress allowance as well as the collaboration between departments and other organisations has helped substantially. The under-expenditure that was committed in 2000/2001 was due to procedural delays that halted the building of Special Schools, since the funds ended up not being utilised at all. The affected learners were placed in normal schools with special units until the Special Schools that were only built afterwards were registered. As a way of addressing under-expenditure, the department has resolved to adopt the following measures:

- Focused project plans incorporating projected expenditure and regular cash-flow meetings;
- Transfer payments for Special Schools subsidies to be transferred into these schools' accounts at set intervals; and
- Review policy to guide the establishment of Special Schools to cater for the needs of the previously disadvantaged communities.

The LDE reported that its budget was inadequate due to the increasing number of learners in Special Schools. The MDE also reported that the budget needed to be increased. Currently, an attempt is being made to have the provincial grant supplementing the national grant for this sector. The NCDE reported that the budget was inadequate as the need to accommodate more disabled learners in the system of education is increasing. To augment the inadequate funds, the department had to source donor funding and conditional grants. The under-expenditure committed in 2000/2001 was a result of the lack of human resources. Much as some progress was achieved in this field, the improvement of access and support was retarded to some degree. The increase in human resources, improved financial management and capacity building helped to address the question of under-expenditure. The NWDE did not respond to the questions relating to budgetary measures. The WCDE reported that the budget was inadequate for ELSEN. However, the department did say that the services are efficient amidst the scarce financial resources and that audits are performed to help improve the utilisation of resources in schools.

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<sup>20</sup> A process in which resources are transferred between different programmes within the same department vote during the financial year.

## 5. INDICATORS

### National Sphere

**Table 10 Early Childhood Development Programme**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>	<b>Female</b>	<b>Africans</b>	<b>Coloureds</b>	<b>Indians</b>
Total number of learners	1 030 473	711 501	318 972	519 358	761 774	106 937	22 177
Number of learners in informal settlements	-	-	-	-	-	-	-
Number of homeless learners	-	-	-	-	-	-	-
Number of learners with disabilities	11 779	9 450	2 329	-	-	-	-
Number of previously disadvantaged racial groups (Africans, Coloureds and Indians)	104543	44718	55993	-	95687	8428	428
Number of learners in farm schools	-	-	-	-	-	-	-

**Table 11 General Indicators**

	<b>Total</b>	<b>Females</b>	<b>Males</b>
Literacy Rate (below 15 years)	-	-	-
Adult Literacy Rate from 15 to 18	83,3	85,4	81,1
Adult Literacy Rate from 18 and above	66,6	65,9	67,4
Number of school-going children who without good reasons are not able to attend school	-	-	-



**Table 12 National Action Plan (NAP)**

	<b>Total</b>	<b>Rural</b>	<b>Urban</b>
Total number of schools	27 148	-	-
Number of schools with buildings in a state of disrepair (1).	2 280	-	-
Number of schools that have a shortage of classrooms	10 723	-	-
Number of schools with inadequate textbooks (3).	13 204	-	-
Number of learners residing beyond 5km radius (3)	8 141 195	-	-
10 395	-	-	-
Number of schools with no electricity	10 859	-	-
Number of schools with no telephones (4)	9 638	-	-
Number of schools with inadequate toilet facilities	2 498	-	-
Number of schools with lack of access to computers	19 085	-	-
Number of schools with lack of access to laboratories (6)	-	-	-
Number of schools with lack of access to library facilities	21 773	-	-
Number of schools with lack of access to recreational and sporting facilities (5)	17 762	-	-

## Provincial Sphere

### Eastern Cape

**Table 13 Early Childhood Development Programme**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>	<b>Female</b>	<b>Africans</b>	<b>Coloureds</b>	<b>Indians</b>
Total number of learners	148325	63015	79914	58967	95687	8428	428
Number of learners in informal settlements	-	-	-	-	-	-	-
Number of homeless learners	-	-	-	-	-	-	-
Number of learners with disabilities	7103	-	-	-	-	-	-
Number of previously disadvantaged racial groups (Africans, Coloureds and Indians)	104543	44718	55993	-	95687	8428	428

## Feeding Programmes (Beneficiaries)

A total number of 884 123 learners were reportedly benefiting from the Feeding Programmes nation-wide. Nonetheless, the information was not classified in race terms.

**Table 14 National Action Plan (NAP)**

	<b>Total</b>	<b>Rural</b>	<b>Urban</b>
Total number of schools	6 520	-	-
Number of schools with buildings in a state of disrepair (1).	3 361	-	-
Number of schools that have a shortage of classrooms	3 468	-	-
Number of schools with inadequate textbooks (3).	-	-	-
Number of learners residing beyond 5km radius (3)	-	-	-
10 395	3 008	-	-
Number of schools with no electricity	3 236	-	-
Number of schools with no telephones (4)	3 821	-	-
Number of schools with inadequate toilet facilities	1 166	-	-
Number of schools with lack of access to computers	6 009	-	-
Number of schools with lack of access to laboratories (6)	5 754	-	-
Number of schools with lack of access to library facilities	5 728	-	-
Number of schools with lack of access to recreational and sporting facilities (5)	-	-	-

Northern Cape

**Table 15 Early Childhood Development Programme**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>	<b>Female</b>	<b>African</b>	<b>Coloureds</b>	<b>Indians</b>
Total number of learners	56299	17191	39108	27025	18089	32157	126
Number of learners in informal settlements	-	-	-	-	-	-	-
Number of homeless learners	-	-	-	-	-	-	-
Number of learners with disabilities	-	-	-	-	-	-	-
Number of previously disadvantaged racial groups (Africans, Coloureds and Indians)	104543	44718	55993	-	95687	8428	428
Number of learners in farm schools	5 335	-	-	2 535	2431	2810	13

**Table 16 Feeding Programme (Beneficiaries)**

Total number of learners	91604	17796	73808	45007	30705	49318	175
Number of learners in informal settlements	-	-	-	-	-	-	-
Number of homeless learners	-	-	-	-	-	-	-
Number of learners in farm schools	90586	17598	72988	44507	30346	48735	172
Number of learners with disabilities	-	-	-	-	-	-	-
Number of previously disadvantaged racial groups (Africans, Coloureds and Indians)	-	-	-	-	30705	49318	175

**Table 17 General Indicators**

	Total	Females	Males
Literacy Rate (below 15 years)	-	-	-
Adult Literacy Rate from 15 to 18	-	-	-
Adult Literacy Rate from 18 and above	53%	-	-
Number of school-going children who without good reasons are not able to attend school	2464	-	-

**Table 18 National Action Plan**

	Total	Rural	Urban
Total number of schools	459	347	112
Number of schools with buildings in a state of disrepair (1).	7	3	4
Number of schools that have a shortage of classrooms	90	55	35
Number of schools with inadequate textbooks (3).	0	0	0
Number of learners residing beyond 5km radius (3)	2749	869	1880
Number of schools with no water within walking distance	5	3	2
Number of schools with no electricity	36	36	0
Number of schools with no telephones (4)	36	31	5
Number of schools with inadequate toilet facilities	12	8	4
Number of schools with lack of access to computers	185	157	28
Number of schools with lack of access to laboratories (6)	319	247	72
Number of schools with lack of access to library facilities	275	154	121
Number of schools with lack of access to recreational and sporting facilities (5)	146	122	24

## North West

**Table 19 Early Childhood Development Programme**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>	<b>Female</b>	<b>Africans</b>	<b>Coloureds</b>	<b>Indians</b>
Total number of learners	18511	9478	9033	9330	-	-	-
Number of learners in informal settlements	-	-	-	-	-	-	-
Number of homeless learners	-	-	-	-	-	-	-
Number of learners with disabilities	-	-	-	-	-	-	-
Number of previously disadvantaged racial groups (Africans, Coloureds and Indians)	15546	459	15087	7857	-	-	-

**Table 20 General Indicators**

	<b>Total</b>	<b>Females</b>	<b>Males</b>
Literacy Rate (below 15 years)	94%	92%	96%
Adult Literacy Rate from 15 to 18	83%	86%	80%
Adult Literacy Rate from 18 and above	90%	92%	88%
Number of school-going children who without good reasons are not able to attend school	-	-	-

**Table 21 NAP**

	<b>Total</b>	<b>Rural</b>	<b>Urban</b>
Total number of schools	2333	1720	613
Number of schools with buildings in a state of disrepair (1).	275	220	55
Number of schools that have a shortage of classrooms	182	102	80
Number of schools with inadequate textbooks (3).	-	-	-
Number of learners residing beyond 5km radius (3)	168240	88455	79785
Number of schools with no water within walking distance	435	350	85
Number of schools with no electricity	936	820	116
Number of schools with no telephones (4)	1079	892	187
Number of schools with inadequate toilet facilities	397	240	157
Number of schools with lack of access to computers	1484	1227	257
Number of schools with lack of access to laboratories (6)	645	410	235
Number of schools with lack of access to library facilities	752	550	202
Number of schools with lack of access to recreational and sporting facilities (5)	875	660	225

## 6. CRITIQUE<sup>21</sup>

### POLICY AND PROGRAMMATIC MEASURES

#### Early Childhood Development

The government should be commended for its efforts to undo the apartheid system of education seen especially through the strengthening of the ECD, which is a critical pre-school phase for the child's growth and development in all aspects.

It is not insignificant that in 1995 South Africa ratified the United Nations Convention on the Rights of the Child (CRC), which is based on the survival, development, protection and participation rights of children.<sup>22</sup> In January 2000, South Africa also ratified the African Charter on the Rights and Welfare of the Child, developed by the erstwhile Organisation of African Unity to better reflect African cultural concerns and other relevant issues not adequately covered by the Convention on the Rights of the Child.<sup>23</sup>

Whilst there are efforts by the government towards the realisation of the right to basic education in the area of ECD, some attention should also be paid to the following areas:

#### *Funding of the Reception Year Programme*

The decision by the NDE to administer about 75 percent of ECD, specifically the Reception Year,<sup>24</sup> shows the willingness and a sense of responsibility toward achieving its goals of providing education for all South Africans by 2015.<sup>25</sup> The policy is also in line with Article 28 of the CRC, which, however, goes further to say that education, is also expensive and not all states will be able to meet the educational needs of their children.<sup>26</sup>

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<sup>21</sup> Inasmuch as education is a functional area of concurrent national and provincial legislative competence, excluding tertiary education, during the two financial years in question, 2000/2001 and 2001/2002, the PEDS had had to implement policies from the national sphere of government. Therefore, only national policies, programmes/projects and the implementation thereof are going to be critiqued.

<sup>22</sup> The Department of Education, *The Nationwide Audit of ECD Provisioning in South Africa 2001*, Pretoria, 2001.p.7.

<sup>23</sup> *Ibid.* p.7

<sup>24</sup> The Reception Year is part of ECD. It prepares 4 year olds turning 5 end of June of the year of admission, i.e. for Grade 1. Before the Minister of Education, Professor Kader Asmal was taken to Constitutional Court on the admissions policy that stipulated that for a child to be admitted to Grade 1 he/she must be 7, the Reception Year programmes were for 5 year olds turning 6 in the year of admission. 0 – 4 year olds' ECD provision is taken care of through a collaboration of departments such as Health, Social Development, Local Government, and the Office of the Presidency. The NDE will simply, within the context of ECD priority group of the National Programme of Action for Children, co-ordinate and support activities to develop national, provincial and local level strategies and services that are planned in an integrated and comprehensive manner in collaboration with relevant organizations, institutions and communities.

<sup>25</sup> This was one of the commitments taken at the World Economic Forum hosted by UNESCO, April 2000, Dakar, Senegal.

<sup>26</sup> Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*. Commissioned by the United Nations Children's Funds (Unicef), 1998. p. 369.

However, what is problematic about the administration of 75 percent of the Reception Year programmes, which is a combination of both public primary schools-provided ECD and Community-based sites, is the fact that government will not fund the remaining 25 per cent of independent pre-primary schools-provided ECD. The problem with the administration of the Reception Year Programme is that the government will not fund, despite the fact that independent pre-primary schools have to comply with the Policy on Norms and Standards for School Funding.<sup>27</sup>

The Reception Year at public primary schools benefit from government funding whilst independent pre-primary schools do not. It would be understandable if the state eventually funded the Reception Year programmes in independent pre-primary schools. This would be an indication that the government is taking full responsibility towards the realisation of the right to education, and that the NDE is serious about providing the Reception Year according to the 2001 Report on ECD Policies and Programmes.

According to the NDE ECD audit, approximately 200,000 children are currently accommodated within primary school-based Reception Year programmes. The departments' medium-term goal (2010) is that approximately 90 percent of all five-year olds (turning six in the year of admission); some 810,000 would be accommodated through these programmes.<sup>28</sup>

#### *Assessment Strategies for the Reception Year Programme*

The Constitutional Court's,<sup>29</sup> ruling on the unconstitutionality of the Admissions Policy, and the stipulation that the admission age be seven has had an impact on the Reception Year programmes. The change in the admission age meant that the Reception Year programmes curriculum had to accommodate the new entrants – the 5 year olds. The change in curriculum would automatically affect the assessment strategies for learners.

#### *The ECD Conditional Grant Expenditure*

Amongst other votes, the PEDs have conditional grants, which should be or are used for special projects. The special programmes comprise the following:

- Quality improvement and financial management;
- HIV/AIDS;
- Early Childhood Development; and
- Infrastructure – Classroom backlogs.<sup>30</sup>

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<sup>27</sup> The policy aims to redistribute recurrent non-personnel resources to the most needy learners within each province.

<sup>28</sup> National Education Policy Act 27 of 1996. Education White Paper 5 on Early Childhood Education, *Meeting the challenge of early childhood development in South Africa*, Pretoria, May, 2001. ([http://www.polity.org.za/govdocs/white\\_papers/education.html](http://www.polity.org.za/govdocs/white_papers/education.html)). Visited on 29 July 2002.

<sup>29</sup> *Minister of Education v Harris* 2001 (11) BCLR (CC).

<sup>30</sup> Kader Asmal, MP, *Fifth Report on the Provinces to the President from the Minister of Education*, May, 2002. (pdf file).

The Minister of Education, in his 2000 report on the utilisation of the ECD Grant, by provinces, disclosed that six of the nine PEDs under-spent the funds allocated for the ECD provision during 2001/2002.

The overall expenditure for the Early Childhood Development grant was 15 percent of the allocation. Only three provinces spent more than 30 percent of their respective allocations. These are KwaZulu-Natal (53.9 percent), Northern Cape (53.6 percent) and Western Cape (30.3 percent). These figures might improve slightly when the accounts of the 2001/2002 financial year are finalised. Two provinces, Eastern Cape and Free State respectively spent 0.28 percent and 0.9 percent. The remaining four provinces, (Gauteng, Mpumalanga, Limpopo and North West have either not submitted reports or worse still have not spent the funds at all.<sup>31</sup>

Regardless of the consolidation of the accounts for the financial year 2001/2002, it was indicated that there is a serious problem with the provision of ECD in most provinces. Only two provinces spent just more than 50 percent of their budgets on ECD, KwaZulu-Natal and the Northern Cape. Only three of the nine provinces gave narrative reports to the Minister of Education on ECD: KwaZulu-Natal, Free State and Gauteng.

**Table 22 2001/2002 Conditional Grant allocation to and expenditure by provincial departments of education for Early Childhood Development (ECD)**

Province	Allocation	Transfers	Expenditure as per last report received	Balance	% Spent	Month of last report received
	R'000	R'000	R'000	R'000		
Eastern Cape	3.885	3.885	11	3.874	0.28	Feb-02
Free State	1.323	1.323	12	1.311	0.91	Feb-02
Gauteng	2.583	2.583	-	2.583	0.00	Dec-01
KwaZulu-Natal	4.641	4.641	2.500	2.141	53.87	Jan-02
Mpumalanga	1.533	1.533		1.533	0.00	
Northern Cape	399	399	214	185	53.63	May-01
Limpopo	3.297	3.297		3.297	0.00	Dec-01
North West	1.680	1.680	-	1.680	0.00	
Western Cape	1.659	1.659	502	1.157	30.25	Feb-02
<b>TOTAL</b>	<b>21.000</b>	<b>21.000</b>	<b>3.239</b>	<b>17.761</b>	<b>15.42</b>	

-information not provided

Source: Kader Asmal, MP, *Fifth Report on the Provinces to the President from the Minister of Education*, May, 2002. (Pdf file).

It can be argued that the causes of under-expenditure in 2001/2002 are understandable in that, for Africans, tendering for ECD provision was still a new phenomenon. Those who happened to be involved in its provision, before the project was launched in 1997, provided ECD services on a small scale and depended on meager earnings that were mainly from the user-fees and fundraising.

The situation in KwaZulu-Natal needs the government's immediate attention. The provision of ECD services is 'unreasonable' if out of 250,000 Reception Year learners

<sup>31</sup> *Ibid.*

only 80,539 of them receive ECD services. According to the *Grootboom* judgement,<sup>32</sup> a measure has to be reasonable not only at conception, but also has to be reasonably implemented for it to be effective. Therefore, the reported lack of ECD management structures in the province is of grave concern. The NDE should fast track the appointment of ECD trainers to address the plight in the provinces.

### *Vulnerable and Marginalised Groups*

The NDE reported that its budget did not necessarily take these groups into consideration since it only has to facilitate the implementation of the policy at the provincial level. However, the department did say that all its policies are responsive to the needs of the disadvantaged children.

The ECDE reported that the White Paper on ECD focuses on four distinct areas: rurality, poverty, HIV/AIDS and ELSEN. These are the areas in which the White Paper mandates the Department to redress. The poverty rating scales in the policy paper ensure that those groupings that were disadvantaged by past laws are addressed.

The FSDE indicated that the ECD National Pilot Project was meant mainly to accommodate the rural areas. It further said that the ECD Pilot Project sites included many sites in informal settlements. Also, the department reported that the ECD Pilot Project allocated subsidy enabled sites to benefit financially to subsidise learners from low-income families. However, no funds were allocated for children in farming communities and children with disabilities. Nonetheless, children with disabilities are admitted to ECD sites, and children in farming communities are catered for as part of rural areas.

The GDE reported that it finds it difficult to identify the rural and urban dwellers within the province. However, the department has come up with a poverty index that ensures that those learners from the most disadvantaged areas receive amounts of the same amount as that given to learners from historically advantaged backgrounds. Moreover, the GDE has over the past seven years, continued to allocate R12 million towards scholar transport, targeting learners from both rural/farm schools as well as schools located in informal settlements. Although previous transport allocation was skewed in favour of the former Transvaal Education Department schools, there has been a deliberate shift in policy to redistribute ELSEN transport allocation to previously disadvantaged institutions. No special provision is made for this group since it comprises the mainstream schooling.

However, the GDE has other policies that complement this provision, that is, the Admissions Policy that incorporates arrangements for feeder zones. It is expected that parents/learners would access and attend school from surrounding areas. Accordingly, those that opt to go outside these boundaries may do so at their own expense.

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<sup>32</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).



The KZNDEC reported that in the 560 ECD sites selected, over 85 percent are in rural communities. About 5 percent are in informal settlements; 100 percent are from low-income groups; two specified sites cater for children with severe disabilities.

The MDE reported that it gave attention to children living in rural areas, in informal settlements, and to those with disabilities, in targeted areas such as Groblersdal, KaNyamazane and Moretele. Equally, the NCDE said the expansion of learning sites and increase in access targeted the rural areas and informal settlements. The subsidisation of ECD centres increased in low-income communities, while the expansion of programmes also targeted farms as they form part of rural areas.

The WCDE only reported on one category of this group, the racially disadvantaged group.<sup>33</sup> The department said that a subsidy per learner funding model has been applied to support the said category of vulnerable and marginalised group. Poverty ranking of centres to ensure redress through targeted subsidisation is needed.

### **Primary School Nutrition Programme**

Allocation for the Integrated Nutrition Programme (INP) Conditional Grant is distributed to the provinces according to an index comprised of the following indicators, namely:

- Average poverty gap (average amount by which poor households' income differ from the poverty line) counting 60 percent; and
- Population figures for the 5 to 14 year old age group counting 40 percent.

The DoH reported that although the index is responsive to poverty and children, it is based on old census figures; hence it does not cover the scope of the INP and nutritional indicators. Unfortunately, the National Treasury's approval could not be obtained to update the index.

#### *Vulnerable and Marginalised Groups*

The ECDE reported that it catered for the needs of the following categories of children: children living in rural areas, children living in informal settlements, and learners from low-income groups/households. All the children, from the Reception Year up to Grade Four, were fed at a cost of R1, 07 a meal. Children on farms were also considered under the programme as feeding started at a cost of R1, 07 a meal. The department did not have information on "child-headed households". This is so because some schools did not register other categories of children with the ECDE through the Education Management Information System (EMIS). The department did not have information on children infected and affected by HIV/AIDS.

### **Education About HIV/AIDS**

#### *Vulnerable and Marginalised Groups*

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<sup>33</sup> The response did not explain which group was considered to be racially disadvantaged.

Regarding the considerations given to the needs of the disadvantaged groups when making budget allocations to this programme, the NDE only reported that its policies are responsive to the needs of these groups.

The ECDE reported that its Life Skills and HIV/AIDS Programme is piloted annually with sites targeting all the following categories of learners:

- a) learners living in rural areas;
- b) learners living in informal settlements;
- c) learners in farming communities; and
- d) learners from low-income groups.

However, there is nothing the department does for the “homeless learners.” It was reported that the department’s training programme targets 90 per cent of learners and educators from racial groups disadvantaged by past discriminatory laws and practices. Again, it was reported that the department does nothing for women as the grant only targets children infected and affected by HIV/AIDS. Moreover, the department trains two educators per school on basic HIV/AIDS Counseling as well as Life Skills. During the training educators are given manuals on Care and Support for people infected and affected by HIV/AIDS. As for the “child-headed households,” the department identifies these and refers them to the Department of Social Development to access grants. However, this category does benefit from the Life Skills Programme. With regards to “girl-children”, the department reported that gender-related lessons and life skills are taught to this group.

The FSDE reported that in making the budgetary allocations its considered the needs of all learners including those infected and affected by HIV/AIDS. The GDE reported that for “learners living in rural areas”, schools are always identified in line with the GDE’s strategy of redress as it pertains to Educator Development, Advocacy, LSMs, and First Aid Kits. In terms of “learners living in informal settlements”, the department reported that school communities (which include informal settlements) are included and informed of all GDE’s School Aids Awareness Campaigns and related activities. The GDE’s Poverty Index takes into account the poverty levels of communities adjacent to schools with an aim to redress previous imbalances.

With regards to “learners in farming communities”, the department reported that schools participate in all Life Skills programmes and are recipients of subsidies distributed to rural schools. Regarding the “homeless learners”, the department reported that the HIV/AIDS Programme is part of an intersectoral strategy, which involves NGOs, Community Based Organisations, and other government departments (Social Services, Health), which have a focus on marginalised target groups such as “homeless learners”. The New Nation School for “learners living in the streets” within the GDE has access to all HIV/AIDS programmes and materials.

Coming to “learners from racial groups disadvantaged by past discriminatory laws and practices”, the department reported that currently budgets are allocated according to weighting indices, which take into account the number of departments reflecting racial composition. For the “women” category, the department reported that issues on gender-bias and violence against women are incorporated into the Life Skills Programme. Regarding the “child-headed households”, the department reported that

it considered participating in policy development with the Departments of Housing and Social Services to address issues on child-headed households.

Concerning “girl-children”, the department reported that special programmes dealing with gender issues and its relationship to HIV/AIDS are being developed and school communities are being workshopped on these issues. LSMs dealing with gender issues are also distributed to school communities. Care and Support manuals are distributed to all educators; training in collaboration with the Departments of Health and Social Services are held on an-ongoing basis to cater for “learners infected and affected by HIV/AIDS”. The existing support systems are being strengthened to deal with this category of learners.

The KZNDEC reported that the Education Conditional Grant for HIV/AIDS was allocated to the Departments of Education and Culture to meet the needs of all the learners, including those who were previously marginalised as well as those who are socially disengaged. This was achieved through the implementation of Life Skills-based HIV/AIDS Education Programme in three phases over three financial years. Phase one targeted 20 per cent of all schools; phase two targeted 40 percent and phase three in 2002/2003 the last 40 per cent. The LDE reported that the needs of all the categories of vulnerable groups mentioned in the protocol or questionnaire were considered in the budget allocation for the HIV/AIDS Programme.

The NCDE reported that the programme considered the needs of “learners living in rural areas” as it is focusing on expansion in all areas in the provinces. The Department further reported that the Programme Co-ordinators appointed in all the Districts ensure that the programme targets all the categories of learners mentioned in the protocol. Regarding the “women” category specifically, the department reported that adult women are reached in the form of educators and at ABET sites.

The NWDE reported that “learners living in rural areas” and “learners in informal settlements” were included in the selection of schools that are part of the HIV/AIDS Programme. Nothing was said about “learners in farming communities.” The department reported that the “girl-children” category was a priority in its approach. The department further reported that the other categories of learners mentioned in the protocol would be included in the programme.

The WCDE reported that the following categories of learners were its programme priority:

- learners in informal settlements;
- learners infected with and affected by HIV/AIDS;
- child-headed households;
- homeless learners; and
- learners from low-income groups.

The department reported that the “women” and “girl-children” categories constitute a fundamental component of the programme. The department further reported that it had to increase costs per head allowance for educators trained for both “learners in rural areas” and “learners in farming communities.” Lastly, the department reported

that the PDIs are prioritised according to the degree to which HIV/AIDS affects the communities within which they live.

### **Education White Paper 6: Special Needs Education, Building an Inclusive Education (2001)**

The release of this White Paper represents one of the progressive post-apartheid policies in the education system. The White Paper attempts to provide an inclusive education that recognises that learners with special needs are not the problem, per se. Rather, the system of education itself needs to be accommodative of intellectually and/or physically impaired learners to fully participate in and benefit from the education system. Against this background, the White Paper defines inclusive education and training comprehensively; that is, it involves other factors including the physical environment of learning, the language used to construct knowledge in a classroom setting, as well as factors inherent in our traditional learning environments.<sup>34</sup>

However, there is one concern regarding this policy paper. Whilst the District-based support teams are made up of experts in the area of Special Education, it is not clear how the “normal” learners will be helped to adjust to the new situation. The new situation is one in which learners with mild to moderate disabilities will be part of mainstream education.

#### *Vulnerable and Marginalised Groups*

##### *National Sphere*

The NDE reported that its budget allocation targets primarily the disadvantaged groups listed in the protocol.<sup>35</sup>

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<sup>34</sup> In this White Paper inclusive education and training:

- Is about acknowledging that all children and youth can learn and that all children and youth need support.
- Is accepting and respecting the fact that all learners are different in some way and have different learning needs which are equally valued and an ordinary part of human experience.
- Is about enabling education structures, systems and learning methodologies to meet the needs of all learners.
- Acknowledging and respecting differences in learners, whether due to age, gender, ethnicity, language, class, disability or HIV status.
- Is broader than formal schooling and acknowledges that learning also occurs in the home and community, and with formal and informal modes and structures.
- Is about changing attitudes, behaviour, teaching methodologies, curricula and the environment to meet the needs of all learners.
- Is about maximizing the participation of all learners in the culture and the curricula of educational institutions and uncovering and minimizing barriers to learning.
- Is about empowering learners by developing their individual strengths and enabling them to participate critically in the process of learning.

<sup>35</sup> The following are the vulnerable and marginalized groups listed in the protocol for ELSSEN:

- a) learners living in rural areas
- b) learners living in informal settlements learners from low-income groups
- c) homeless learners
- f) learners from racial groups disadvantaged by past discriminatory laws and practices

## *Vulnerable and Marginalised Groups*

### *Provincial Sphere*

The ECDE expressed consideration for the needs of the disabled learners as it provided appropriate facilities such as the brailled materials for the blind. The FSDE's policy initiatives do consider the vulnerable and marginalised groups, including their own learners, "learners with disabilities." Other departments such as Social Development and Health are also involved in assisting the FSDE to meet the needs of the disabled learners. Learners from unemployed and semi-employed parents within the low-income groups are placed in the "place of safety" and others are placed in normal schools. The learners who have made their disadvantaged financial status known are referred to the agencies (feeding schemes) to be contacted and can also apply for exemption from paying the school fees. The GDE reported that its policies are sensitive to the plight of the vulnerable and marginalised groups such that a top slice amount of the budget was paid to low-income groups. Transport for rural-based learners is also subsidised. The New Nation School project subsidised by government caters for homeless learners.

The KZNDEC reported that a formula is used to determine allocation of subsidies to Special Schools. The formula categorises disabilities and gives each of them a weighting and this, influences allocation of funds to each category. Issues such as equity, equality and quality are also taken into account. A redress allowance has also been instituted for previously disadvantaged schools and it recognises all the vulnerable and marginalised groups' needs. The allowance benefits 10 percent poorest of the poor learners. The MDE reported that its policies are sensitive to all the vulnerable and marginalised groups without stating how the policies achieve that. The NCDE reported that the budget allocations targeted the increased access to learners in areas where access was minimal, for example, rural areas, informal settlements, farms, and previously disadvantaged communities. The WCDE reported that its policies consider the conditions of the vulnerable groups. For instance, the "homeless learners", "learners living in informal settlements", and "learners living in rural areas" are accommodated in hostels. The department allocates more than 7 percent of its total budget to ELSN.

### **Admissions Policy**

As mentioned earlier,<sup>36</sup> the change in age requirement for admission to public schools for Grade One learners has an impact on the age requirement for Reception Year learners. Since the Constitutional Court ruling reversing the age requirement for admission to public schools for Grade One learners to five turning six in the year of admission, it stands to reason that the Reception Year age requirement for admission had to change as well.

### **National Norms and Standards for School Funding**

It is important to note that only the GDE reported on this policy. This does not necessarily mean that only the GDE implemented the policy; instead, it either means

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<sup>36</sup> Refer to the section on ECD in this chapter.

that the rest of the provinces have been implementing the policy the same way they have been doing since its inception in 1999 or they simply did not report on the policy.

This policy helps the NDE to allocate critical non-personnel funds for public schools. It makes provision for three categories of expenditure, namely, maintenance of school buildings, providing municipal services and utilities and learner support materials.<sup>37</sup> Paragraph 117 states that schools should provide each learner with a basic package of R100 for support materials. If funds are insufficient for this purpose, the provincial education departments must consider first the most needy learners.<sup>38</sup>

Each school is ranked in accordance with the following factors: poverty of the community and poverty of the school. The policy enables the PEDs to distinguish between schools on the basis of the socio-economic status of learners as well as differences reflecting broader physical conditions of schools.

After all, these indicators/ factors have been taken into account; resource allocation is undertaken on a progressive scale targeting the poorest learners in each province. Each PED is required to produce a “resource targeting table” based on schools’ ranking on the socio-economic status of learners as well as physical conditions at schools. Each of these terms, the factors/indicators referred to above, lend themselves to different interpretations. The definition of a term determines funding allocation. For instance, if a PED defines “community” as the geographical location of the school, it therefore means that a particular school’s funding will be allocated according to that area’s socio-economic status. The problem with this approach is that poor learners may be allocated relatively insufficient funding simply because they happen to attend a school that is situated in an area that is generally not considered poor. However, the GDE should be commended for their position on this issue.

Gauteng argues that learners who move from disadvantaged schools to advantaged schools did so out of choice, and this will not necessarily mean that such schools will be positively ranked on the poverty criteria. It is only when learners from disadvantaged areas moved because there are no alternatives, that the Gauteng Department of Education will be willing to allow funding to follow learners. It is thus only this percentage of learners in their newly placed schools that will gain the benefit of redress funding, and not the whole school as such.<sup>39</sup>

It is important for all the PEDs to remember the main objective of this policy, which is to redistribute recurrent non-personnel resources to the most needy learners within each province. The policy is not about enriching schools. The challenge remains for most provinces to come up with innovative indicators that will only take into account factors peculiar to each poor learner and school. For instance, the WCDE and the NCDE do recognise the fact that their schools have relatively good municipal

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<sup>37</sup> Russell Andrew Wildeman, *Redistribution of School Funding*, Budget Information Service, Budget Brief No. 48, September, 2000. (<http://www.idasa.org.za/bis/>). Visited on 12 July 2002.

<sup>38</sup> *Ibid.*

<sup>39</sup> Wildeman, 2000, *op. cit.*, p. 2.

infrastructure and as such, both these provinces plan to significantly reduce their weighting of municipal services in their indexes.

It is equally important to consider the fact that some provinces have more personnel than others such that the bulk of their funds go towards paying personnel. KwaZulu-Natal is one such province. One way to address this challenge is that such provinces should be allocated more redress funding to target the poor learners as well as satisfy their school needs. Lastly, the use of a continuous scale in allocating funds for poor learners is crucial as it vigorously targets the poorest of the poor learners.

### **The National Policy on Whole School Evaluation**

One of the principles on which the policy is based refers to inputs, processes and outcomes as elements to be evaluated. One of these elements has “the quality of leadership and management” as one of the sub-elements. The NDE should be realistic about its expectations. Efforts have to be made to ensure that school management teams are trained in this particular aspect.

It is also a concern that the policy goes into detail explaining how school evaluation supervisors would be trained. Surprisingly, the policy does not mention the training of teachers and school governing bodies on the Whole School Evaluation Policy. It is good and well to formulate policies that are aimed at improving teaching and learning in schools, but it is equally important to ensure that ways and means are devised to help familiarise policy practitioners with key aspects of such policies.

### **Draft Policy for the Management of Drug Abuse by Learners in Schools (2002)**

The NDE did not mention this important and positive draft policy framework given the common usage of drugs in schools nowadays. The Council of Education Ministers released the draft policy framework in March 2002. According to this draft policy, learners have to be helped to deal with their addiction, while at the same time protecting non-users. The draft states:

The key thrust of the policy is to help and support not only those learners who abuse drugs, but also the majority of learners and staff who do not use drugs but who may be affected by the usage of drugs by others.<sup>40</sup>

The framework complements other related policies and legislation such as the Regulations for Safety Measures at Public Schools, Government Gazette No.22754 of 12 October 2001 and the National Drug Master Plan 1999 –2004, which deals with the control and management of drug abuse in schools. The government must be commended for the efforts it is making in fighting drug abuse in schools, even if the implementation of the policy has yet to cascade through the various levels of the education system. This will ensure a conducive learning environment, and thus access to the right to education. .

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<sup>40</sup> Department of Education (DoE), Tirisano: Working together, *Draft Policy Framework For The Management Of Drug Abuse By Learners In Schools*, March, 2002. (<http://education.pwv.gov.za/Policies%20and%20Reports/Po.../draft%20drug%20abuse.ht>). Visited on 20 July 2002.

## **The Manifesto on Values and Education Democracy**

The manifesto was released in July 2001. It is one other important policy development in the education sector, particularly for the GET and FET bands. It promotes values through the country's education system. The following are the six values that the policy is promoting, namely: equity, tolerance, multilingualism, openness, accountability and social honour. Each of these values is elaborated upon in the Report of the Working Group on Values in Education.<sup>41</sup>

The report explains the strategies on how these values could be taught in schools. The report takes these values further and explores them to include ideals and concepts such as democracy, social justice, equality, non-racism and non-sexism, *ubuntu* (human dignity), the rule of law, and reconciliation.<sup>42</sup> It is only fair and reasonable to remark that the policy is desirable and is a step in the right direction for correcting past inequalities in education.

This initiative conforms to Commitment 6 (j) of the Copenhagen Declaration and Programme of Action.<sup>43</sup> It provides that "... at the national level, we will:

Develop broad-based education programmes that promote and strengthen respect for all human rights and fundamental freedoms, including the right to development, promote the values of tolerance, responsibility and respect for the diversity and rights of others, and provide training in peaceful conflict resolution, in recognition of the United Nations Decade for Human Rights Education (1995 – 2000).

### *Constitutional obligations*

#### *National Sphere*

##### *Respect*

According to the NDE, the provision of early childhood development opportunities, general school education, education for learners with special needs, literacy and adult basic education, which are fundamental to the right to a basic education, testifies to the fact that the department's policy and programmatic measures and/or projects *respect* the right to a basic education.

##### *Protect*

The NDE indicated that SANLI, the White Papers on ECD and Inclusion of Children with Special Needs did not completely protect the right to a basic education. The NDE further stated that plans and resources for universal access to inclusive education and early childhood development opportunities were put in place. Also, the NDE

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<sup>41</sup> Report of the Working Group on Values in Education, *Values, Education and Democracy*, 2000.

<sup>42</sup> The Report of the Working Group on Values in Education. ([http://education.pwv.gov.za/DoE\\_Sites/Curriculum/Values/Executive\\_Summary.htm](http://education.pwv.gov.za/DoE_Sites/Curriculum/Values/Executive_Summary.htm)). Visited on 26 July 2002.

<sup>43</sup> *The Copenhagen Declaration and Programme of Action: World Summit for Social Development*, 6 – 12 March, United Nations, 1995.



noted that universal literacy and adult education require additional private resources for its expansion.

### *Promote and to Fulfil*

The NDE stated that it promotes the right to a basic education; although it does not fulfil that right totally.

### *Provincial Sphere<sup>44</sup>*

### *Respect*

To illustrate that it respect the right to a basic education, the ECDE, as prescribed in the White Paper on Inclusive Education, allows learners who are barred from learning and development to be accommodated in the mainstream education system. The availability of the ECD and OBE serve as examples of how the ECDE respects the right to a basic education. .

According to the FSDE the Policy on Learner Pregnancy entrenches the respect for the right to a basic education in that it gives the pregnant learner the right to receive education even during pregnancy. The GDE referred to the provision of ECD by the state as a measure that respects the right to education.

The White Paper on ECD provides for the universal expansion of learning opportunities within the ten years of compulsory GET.

The MDE reported that it adopted the White Paper on Inclusive Education as it purports that education be offered to all learners and potential learners regardless of, among other factors, their disabilities and socio-economic conditions. On the other hand, the NCDE asserted that the White Paper on ECD strongly addresses improvement of access for learners and support to ECD Centres, that the White Paper on Inclusive Education makes quality education accessible to all learners.

The NWDE reported that the provision of ABET is proof that it *respects* the right to education. Meanwhile, the WCDE indicated that Circular 0003/02 on the Admission of Under-Age Learners to Public Primary Schools provided a uniform process and clear procedures that respect the right to education by ensuring that any child that was school-ready, could be enrolled in Grade One.

### *Protect*

The ECDE saw the provision of the Reception Year, which advocates for the provision of a tenth year of schooling, as provided in the Education White Paper on ECD, as an illustration of how the department protects the right to basic education.

On the other hand, the GDE referred to the Misconduct of Learners at Public Schools and Disciplinary Proceedings Policy for the same purpose. According to the

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<sup>44</sup> These are the only provinces that tried to give better responses to questions on the constitutional obligations. The rest of the provinces either gave unclear or no responses to questions on this subject.

department, the White Paper on Inclusive Education also meets the obligation to protect the learner's right to basic education by ensuring that every school accepts any child that is physically challenged.

The WCDE also used Circular 0003/02 on the Admission of Under-Age Learners to Public Primary Schools because it (the Circular), through its clear procedures, allows parents to appeal to the Member of Executive Committee (MEC) for Education regarding their child's school-readiness.

*Promote and to Fulfil*

The ECDE stated that the introduction of the White Paper on ECD into the education landscape is an indication that the South African education system recognises the need for a formal programme of School Readiness in order to address problems such as the low matriculation pass rate, school drop-outs, to name but these two. As a result, all the provinces are required to advocate the policy.

The FSDE stated that the Policy on Injury of Learners in Public Schools ensures that learners are not neglected during school activities. According to the FSDE, the policy has the effect of protecting, promoting and fulfilling the right to basic education.

The GDE stated that the Misconduct of Learners in Public Schools and Disciplinary Proceedings Policy does meet the obligation to promote and fulfil the right to basic education because it allows parents to appeal against any decision that excludes learners from school due to disciplinary problems. Also, the GDE has held workshops on learners with disabilities with the aim of changing the attitudes of both the teachers and communities towards these children.

The NCDE also cited the White Papers on ECD and Inclusive Education as measures that help promote access to education for those who were discriminated against by the previous laws. The department has also adopted the Whole School Evaluation Policy as another measure that promotes and fulfils the right to education.

The WCDE reported that the availability of Circular 0003/02 and media reports promoted the revised admission policy for Grade One, such that where the requirements were met, the child's right to basic education was fulfilled.

Through their responses, it appears that most PEDs are either not aware of the fact that their policy, programmatic, legislative and other related measures to realise the right to education have to comply with section 7(2) of the Constitution, or they have not internalised the constitutional obligations in the implementation of these measures.

Whilst most of the policy measures such as the White Papers on Inclusive Education and ECD do meet the constitutional obligations to respect, promote, and fulfil the right to education – they still fail to protect the right to education. The failure by most PEDs to respond to the questions pertaining to the state obligations is a manifestation of two things. Firstly, that at least most government departments have not internalised the state obligations in policy implementation. Secondly, government departments are not aware of the state obligations.

The *Grootboom* case serves as a guideline in this regard. In the *Grootboom* case, it appeared that the government had committed a serious mistake by implementing its “comprehensive” housing programme that failed to cater for the vulnerable and marginalised groups. It would be advisable for senior government officials to guide the implementation of state policy and legislative measures, as well as the completion of the HRC protocols.

## **LEGISLATIVE MEASURES**

### *Constitutional obligations*<sup>45</sup>

#### *Respect*

According to the GDE, the Regulations for the Admission of Learners to Public Schools ensure access to education for every learner by eliminating all discriminatory practices in the admission of learners to public schools. The FSDE reported that the legislative measures enacted during the reporting period meet the obligation to respect the right to education since they give governance structures and school communities the powers to decide and implement education-related measures.

#### *Protect*<sup>46</sup>

The FSDE adopted the Regulations on Discipline of Learners to ensure that unruly and disruptive behaviour is dealt with uncompromisingly. To that effect, punitive measures would include suspension or expulsion from school to protect the right of learners to education.

#### *Promote and to Fulfil*<sup>47</sup>

According to the GDE the Regulations for the Admission to Public Schools do meet these duties as they accord learners access to education. Furthermore, parents and learners are informed about their rights on matters of discipline.

## **Administrative Action Measures**

### **National Sphere**

The NDE mentioned the *Harris vs Minister of Education* case in which the Admissions Policy for Public Schools set out in section 3 of the South African Schools Act 84, 1996 was challenged in both the High Court and the Constitutional Court. The appellant argued that the admission age set out in the Act discriminated against learners who were school-ready but under than the age of 7. As a result, the NDE lost the appeal in the Constitutional Court. The Minister and the Council of Education Ministers agreed on an administrative procedure to admit under age learners pending the amendment of the South African Schools Act. The

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<sup>45</sup> Note that only those provinces which reported on the legislative and related measures that took place during the period under review will be dealt with in this section. The NDE reported that no legislative developments took place during the reporting period.

<sup>46</sup> The GDE did not respond to this section.

<sup>47</sup> The FSDE did not respond to this section.

administrative measure was effective as more than 12,000 under age learners were admitted to Grade One in at least two provinces.

### **Provincial Sphere<sup>48</sup>**

The ECDE reported that the only administrative action relates to a few incidents whereby learners missed their lessons because some principals excluded them from attending classes due to non-payment of fees. The department had to instruct the principals to rescind their action. Further, a circular was issued out to schools warning principals to refrain from this action. As a result of the circular, the action has stopped.

In light of the above incident, it appears that educators in general have to be aware of the learners' rights to education. One way this could be done would be to incorporate human rights education into teacher training curriculum. The issue of fees is an important one if the government is serious about achieving its 'universal education' goal by 2015.

The GDE reported that it did not receive any report from schools in respect of the administrative action that resulted in the violation(s) of learners' rights to education. However, the department indicated that as principals represent Heads of Department at the school level, some violations of the provisions of the Admissions Policy were noted that could have negatively influenced a learner's right of access to basic education. The fact that some schools do not acknowledge in writing the receipt of a parent's application for admission and whether a learner has been refused admission, may have led to the violation of some learners' rights to administrative justice.

The ongoing monitoring by district officials ensures that critical issues are brought to light and addressed. As indicated above, the department reported no specific violations. However, the Admissions Regulations have been reinforced to strengthen the requirement for administrative justice. The increased nature of the number of appeals being attended to by the GDE is indicative of two factors. Firstly, that parents are increasingly becoming aware of their rights, in terms of the policies/legislation enacted. Secondly, that schools are overlooking some of the critical constitutional provisions that have to be enforced in ensuring that the learners' right to education is being protected.

The LDE reported that the termination of the adult educators' services on 31 December 2000, and the allocation of their insufficient payment in the financial year 2001/2002, has resulted in a number of Adult Learning Centres suspended. As a result of this administrative action, a great number of adult learners have been denied their right to basic education.

The extent of the violation is great, such that about 795 Adult Learning Centres could not operate and about 34,685 adult learners were denied access to education. To address the problem, the LDE educators were encouraged to volunteer their services to some Centres that could not be opened even after the budget had been increased.

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<sup>48</sup> The Free State, KwaZulu-Natal, Mpumalanga, Northern Cape and the Western Cape provinces did not respond to the questions in this section.

However, these measures were not that effective, as some volunteers became disillusioned and were frustrated in the process. The increase in budget allocation did not necessarily mean the re-opening of all the closed Centres, and subsequently the rehiring of educators.

Using the *Grootboom* case to assess the reasonableness of the ABET Programme, one may conclude that the implementation of the ABET Programme in Limpopo was unreasonable as a measure to progressively realise the right to basic education for adult learners. In *Grootboom*, though the right of access to adequate housing was the focal point, it was said that:

The state was obliged to act to achieve the intended result, and the legislative measures would invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes had to be reasonable both in their conception and their implementation. An otherwise reasonable programme that was not implemented reasonably would not constitute compliance with the state's obligation.

It appears that ABET was well conceived. Nonetheless, the programme is experiencing some serious problems in its implementation.

To achieve the progressive realization of the right to a basic education, including adult education, would require that hurdles of any nature, be they financial, administrative, be removed over time. However, the administrative action taken by the LDE compounded the problems engulfing ABET in Limpopo and other provinces. This scenario does not bode well for the progressive realisation of the right to a basic education, including adult basic education. According to the *Grootboom* judgment, progressive realisation of the right would mean that:

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

It is not convincing that the Limpopo province exhausted all the available resources at their disposal to progressively realise the right to basic education, including ABET. This is indicated by the number of Adult Learning Centres as well as the number of adult learners that were affected when these Centres were closed down, which is symptomatic of the implementation challenges facing the department. However, due to the fact that the LDE did not provide the number of adult learners that were left without education after the closure of the Learning Centers, one cannot establish how many were reopened when ABET received more funding.

As to the words 'within available resources', these conveyed that the content of the obligation in relation to the rate at which the desired result was achieved as well as the reasonableness of the measures

employed to achieve the result were governed by the availability of resources.<sup>49</sup>

The NWDE reported that the LSMs and the School Building Programme were under-funded. Despite all these challenges, the NWDE raised, via the MEC for Education, the issue of electricity and water as the major cost-drivers of the schools expenditure with Council of Education Ministers. The Minister of Education is still dealing with the matter through service providers such as Water Affairs and Forestry and Eskom.

The area of ECD was another one that needed restructuring. The NWDE reported that its province is the only one that inherited an ECD model from the former Bophuthatswana government. Generally, the personnel in this sector of education were under-qualified. There were other problems as well, such as ECD co-ordination; lack of proper syllabus for ECD; and inadequate funding of ECD provision. However, the NWDE was to discuss this issue on the 3<sup>rd</sup> of June 2002 for the 2003 academic year.

The NWDE reported that it was envisaged that 2002/2003 financial year, an amount of R54 million would be committed to 15 projects in 15 schools in the North West in the 2002/2003 financial year. This would at least lower the infrastructure and LSMs backlogs, amongst other things, if the funds allocated to the NWDE are utilised properly. However, in his quarterly report to the provinces, the Minister of Education made the following remark on expenditure in the School Building programme.

A disturbing observation is the low level of expenditure in the Free State (17 percent) and North West (11percent). Most of the provinces have exceeded the 40 per cent expenditure level. The low level of expenditure may be an indication of the state of the financial management systems in the provincial department.

The situation in North West and Free State signifies what is happening generally in the delivery of the right to education, that the government does not necessarily need to inject more funds for the realisation of the right to education, but instead, that the PEDS must improve their financial management skills. The Financial Management and Quality Enhancement grant should be utilised properly to help people improve on their financial management skills.

Regarding the ECD provision, it is disturbing that the NWDE had problems such as lack of curriculum for ECD and its co-ordination when the ECD pilot project that was launched in 1997 and ran until 2000 was meant to have addressed such problems in the first place. The ECD Conditional Grant allocation to provinces was R21 million for 2001/2002, R52 million for 2002/2003 and R88 million for 2003/2004. According to the study undertaken by IDASA Children's Budget project,<sup>50</sup> funding for ECD is insufficient; it needs to be increased.

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<sup>49</sup>Wildeman,op.cit.

<sup>50</sup> Shaamela Cassiem and Judith Streak, *Budgeting for child socio-economic rights: Government obligations and the child rights to social security and education*, IDASA, 2001.

## **Provincial Sphere<sup>51</sup>**

Gauteng, KwaZulu-Natal, and North West came up with some commendable steps to address issues such as financial impropriety, maladministration and/or corruption, and poor resources management.

Gauteng reported that the general labour relations processes and the approved disciplinary code for dealing with acts of maladministration and corruption committed by public servants as and when necessary to deal with such issues. Furthermore, the Provincial Treasury has also established a toll free number encouraging whistle-blowers to report acts of corruption anonymously. The efficacy of the measures is yet to be determined given that there has not been any official complaint reported to the GDE.

The KZNDEC introduced the following measures to address and prevent maladministration and/or corruption:

- Appointed a Chief Financial Officer;
- Introduced extensive additional financial control measures, and asset and personnel management systems;
- Promoted the reporting of fraud, corruption, and maladministration; and
- Resolved to take effective steps against convicted transgressors.

The NWDE, on the other hand, investigated claims of financial mismanagement, corruption, financial impropriety, and poor resource management in no less than 13 schools. Both in-house and independent auditors have been deployed for this purpose. The NWDE has put in place a crime whistleblower hotline to deal with corruption within the schooling system. Further, a policy research with a forensic audit into the current ABET provisioning has also been instituted. This was done to strengthen the provision of ABET so that adult learners get value for money.

## **Budgetary Measures**

### **National Sphere**

There are different causes of under-expenditure that appear in table 2 on the budgetary measures. Nevertheless, there are three salient causes of under-expenditure. They are:

- lack of expertise in the procurement processes;
- poor logistics planning; and
- poor financial planning.

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<sup>51</sup> Limpopo, Mpumalanga, Northern Cape, North West, and the Western Cape provinces did not respond to the questions in this section. The NDE responded by saying that they did not receive any official complaints of maladministration and/or corruption from the PEDs during the reporting period, and that only the PEDS would be in possession of such information. The Eastern Cape, Free State, and Gauteng provinces reported that they also did not receive any official complaints of maladministration and/or corruption from schools during the reporting period.

This state of affairs should not be acceptable, given the importance of education as well as the level of poverty in this country.<sup>52</sup> Poor logistics planning leads to inaccurate financial planning that results in tarnished balance sheets. Some departments end up under-spending simply because they request more funds when there are adjustments to the initial allocation.

The procurement processes is increasingly becoming a cause for concern across government departments. For instance, there is delay in the tendering processes. Specifically, the ECDE delayed a procurement process and distribution for the acquisition of LSMs due to deviation from correct procurement procedures. Hence, the NDE had to halt funding for the LSMs delivery tender.

It must be understood that under-spending in general, does not only compromise initiatives and processes aimed at improving education provision, but the recipients of such an education. The under-spent funds could have been used in other areas of need in an efficient and effective manner.

Another often mentioned cause of under-expenditure is the high turnover of personnel in the department, particularly non-personnel, non-teaching employees. According to the Minister of Education, the situation varies from province to province with regard to regional, district and circuit offices. At this level, the vacancies account for approximately 40 percent of the approved establishment. The majority of these vacancies are for support staff.<sup>53</sup>

It is apparent from the NDE's responses that there is a lack of expertise in the area of business planning. Whilst the late request by the LDE to deviate from the original business plans of the National School Building Programme and the Backlog in Classrooms Project to include other schools, lends itself to suspicion of this weakness one cannot conclude on lack of expertise in business planning.

However, the Minister makes an important observation in his quarterly report on the provinces to the President:

Provincial departments have been very slow in submitting their business plans. In some cases, the plans are no more than descriptions of what the departments expect to do without any quantitative information provided. This may also be due to either lack of expertise in drawing up business plans or in extreme cases plans that have not been completed.<sup>54</sup>

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<sup>52</sup> In the 2002 Estimates of National Expenditure, Vote 15: Education document, it is said that Education is pivotal to economic prosperity, plays a crucial role in improving quality of life and contributes to a peaceful, productive and democratic nation.

<sup>53</sup> Kader Asmal, MP, *Fifth Report on the Provinces to the President from the Minister of Education*, May, 2002.

<sup>54</sup> *Ibid.*



## Provincial Sphere<sup>55</sup>

The ECDE reported that the budget was adequate, yet it over spent the funds. This over-spending is not even reflected in the table. Instead, the table only reflects under-spending during 2000/2001 and 2001/2002. The FSDE had a surplus of R163, 230 million during 2000/2001. A breakdown of this amount given by the FSDE is confusing and actually amounts to more than the amount it claims to have under-spent. Without mentioning the figures that were followed by a confusing explanation on under-spending, a conclusion can be drawn that the FSDE struggled with financial planning and management. It is impossible to mention the area in which the alleged difficulties in financial management were encountered because the department did not specify what the under-spent conditional grant was for. In 2001/2002 some commitments were not paid off which still displays a persistent financial management problem within this department.

The overall amount that was under-spent by the FSDE in 2001/2002 was R208 553 million. This is disturbing because during the financial year in question the province had 394 schools that needed 1,759 classrooms.<sup>56</sup> Again, this shows that under-spending in any area delays the efficient and effective use of funds where they are needed most.

In 2000/2001 the KZNDEC experienced some sharp under-spending. In its response, the department did not account for the under-spending that occurred in the subsequent financial year. The Minister's report to the President revealed that overcrowding was occurring at more than 2,900 schools in this province, and that between 1 April 2001 and March 2002, it was 'anticipated that 1,596 new toilet units would be completed.'<sup>57</sup> It defies logic to find out that a province that is experiencing so many backlogs in capital projects under-spent by a significant amount in the above-mentioned financial year.

The NCDE over-expenditure in 2000/2001 would have been justified given that it reported that during the financial year in question its budget allocation was inadequate. However, its about-turn statement that the improved control over expenditure could be seen as the most important reason for addressing budget inadequacies nullifies their rationale for over-expenditure during 2000/2001. The implication is that the budget allocated for these financial years might have been adequate, but because of weak financial management systems the funds were over-spent.<sup>58</sup> It is also a problem that the department did not reflect the actual expenditure figure.

Again, the department is citing an adequate budget allocation in 2001/2002 without writing down the actual expenditure figure. One needs to know by how much the

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<sup>55</sup> Gauteng, Limpopo, and Mpumalanga did not respond to the questions on budgetary measures. Therefore, the only PEDs that are going to be discussed here are those that responded to the questions that were asked in this section.

<sup>56</sup> Asmal, 2002, *op cit.*, p. 21.

<sup>57</sup> Asmal, 2002, *op. cit.* p. 22.

<sup>58</sup> Note that the department uses the term "financial administration" instead of "financial management." Financial administration simply refers to a process wherein the keeping of financial records takes place, whereas, financial management refers to a process wherein not only the keeping of financial records matters but wherein sound financial decision-making matters most.

department over-spent, and to find out if the over-spending was within or outside the National Treasury-prescribed deviation. Such information, if used properly, can be used to help the department improve on its financial management systems.

### *Primary School Nutrition Programme*

Studying the table on budgetary measures for the DoH's Primary School Nutrition Programme, one immediately notices the constant budget allocation of R582 411 000 in three consecutive financial years. Another striking factor is the level of expenditure in all the financial years. It would not be an unreasonable expectation that at least in 2001/2002 the level of expenditure improved; that is, at least surpass that of 2000/2001. This remark does not suggest that actual expenditure in this programme has been poor. On the contrary, the programme is one of those that have done well in terms of spending the financial resources allocated it.

Another disturbing factor is the reportedly outdated index used to allocate funds to the programme. It is inconceivable that the DoH is currently relying on the outdated index for funds allocation. It was reported that the index did not include nutritional indicators, latest census figures, and poverty data. The possibility is that some of the learners who should have benefited from the programme may have been excluded from it, and as such, the programme risks the possibility of missing the target. Because there was no implementation, the programme could not be said to have been reasonable.

An otherwise reasonable programme that was not implemented reasonably would not constitute compliance with the state's obligations.

The reference to the quotation above does not suggest that the department is failing the *Grootboom* test of reasonableness. The quotation serves to caution the department that if all the above-mentioned shortcomings are not heeded immediately, the department could well be on its way to failure in the process of contributing to the progressive realisation of the right to education. It is important that state organs take section 7 (2) of the Constitution<sup>59</sup> seriously.

Basing the caution on the Constitution again, the following is said in *Grootboom*:

The Constitution required that everyone be treated with care and concern. If the measures, though statistically successful, failed to respond to the needs of those most desperate, they might not pass the test.

The 'test', as explained in *Grootboom*, refers to the reasonableness.

It is ironical for the DoH and the ECDE to say that the budget allocation for the programme was inadequate when there was under-spending in both the two the two financial years. Nonetheless, as said earlier, the level of actual expenditure was reasonable in this programme. Studying the figures provided by the DoH in the table,

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<sup>59</sup> The Committee on Economic, Social and Cultural Rights, General Comment No. 13, op.cit.

it seems the DoH does not necessarily need more funds; rather, it needs to spend the funds allocated to it better. The same holds for all the PEDs.

#### *Education about HIV/AIDS Programme*

The under-spending levels experienced by the NDE in the HIV/AIDS education programme (also referred to as Life Skills and HIV/AIDS Programme) are vast. The rationale for such vast expenditure levels is not sufficiently explained in the department's response.

To a large extent, the KwaZulu-Natal and Gauteng PEDs reflect the common problems experienced by all provinces with regards to delivery on the Life Skills and HIV/AIDS Programme. A remark by the Minister of Education in his quarterly report on the provinces to the President attest to this fact:

A common explanation that is cited in the reports from provincial departments of education for under-expenditure is the lack of capacity and the associated difficulty with tender processes that result in delays regarding the procurement of services and goods. The Department of Education plans to focus on the co-ordination, planning and monitoring of the grant to the same extent it has done with the process of co-ordination of the grants for financial management and quality enhancement of education that has proved to be successful.

#### *Education for Learners with Special Education Needs (ELSEN)*

There are many instances when there are delays in the transfer of funds from one sphere of government to the other. The problem is that the causes of these delays of transfer of funds between spheres of government are not mentioned in the report. Consequently, it becomes difficult for one to provide a solution to such a problem.

The response given by the FSDE on the vulnerable and marginalised groups, specifically on “learners from low-income groups” is confusing and contradictory. Having reported that its policies are responsive towards the needs of the vulnerable and marginalised groups, the FSDE said in one of its responses that some parents had to de-register their children from Special Schools, as they could not afford the fees. If some learners could be accommodated in a “place of safety,” why couldn't the department give those who could not afford the fees some recourse?

The White Paper on Inclusive Education is aimed at mainstreaming the disabled learners with mild and moderate disabilities into public ordinary schools whilst those with severe disabilities are catered for in the Resource Centers. Another concern is that if schools accept disabled learners without any professional advice this has the potential to create more problems for both “normal” and disabled learners. This situation should not have gone unchallenged.

Studying the table on budgetary measures for ELSEN, it seems that more provinces need more funding to provide quality education to learners. However, such funding should be distributed equitably across the provinces. For instance, the Western Cape,

with one of the highest shares of schools, spends the largest share of all the provinces on ELSEN as a percentage of total provincial education expenditure, yet this province has one of the lowest shares of learners with special needs. Ironically, provinces such as the Eastern Cape with 17 percent of the provincial share of learners, only records 10, 7 percent of the provincial share of schools. Gauteng, with the third highest provincial share of learners, has the highest share of schools and allocates the second highest provincial expenditure for special needs education.<sup>60</sup>

Another challenge facing government in the provision of special education is the question of access. It is estimated that South Africa has approximately 400,000 children that are eligible for Special Needs Education. However, current statistics indicate that only about 16 percent of learners with disabilities or impairments are enrolled in approximately 380 Special Needs Schools.<sup>61</sup>

## 7. RECOMMENDATIONS

Government departments need to take the issue of skills development and staffing seriously if they are to carry out policies properly. Policies may be good on paper, but if the operational and logistical aspects are not given attention, the likelihood is that the implementation of such policies will flounder.

With the introduction of the White Papers on Inclusive Education and ECD, it is highly anticipated that the government will have to allocate even more financial resources into the education system. However, the challenge for the PEDs to spend better still remains. The injection of more financial resources into the schooling system is not a solution to the problems experienced by the sector; better use of the allocated financial resources is key to the progressive realisation of the right to education.

The Quality and Enhancement and Financial Management Conditional Grant must be put to good use so that it achieves its intended objectives. Cassiem et al., 2001 had the following to say regarding the use of the grant by some PEDs:

Evidence suggests that many provincial education departments have used this conditional grant as additional revenue for general spending, rather than applying the allocation in line with the intentions and conditions of the grant. It has been suggested that the conditionality of grants must be tightened – for example, that each provincial department first submits a business plan including financial projections, before access to the grant is approved.<sup>62</sup>

All the PEDs, including the NDE should have the statistical information on indicators and NAP. The availability of such information is important, as most of it should be used as a tool to measure the government's progress in a number of programmes aimed at improving the education system in the country as well as make its targets visible.

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<sup>60</sup> Cassiem et al., 2001, *op. cit.*, p. 156.

<sup>61</sup> *Ibid.*

<sup>62</sup> Asmal, 2002, *op.cit.*

If most government departments do not have such information available, a conclusion can be drawn that they are operating in the dark. Government must be in a position to gauge itself - it must be in a position to determine how far it is from reaching its target. Moreover, such information is valuable and required for policy planning purposes. The Maastricht Guidelines, in terms of obligations of conduct and result, reinforce this point as well:

The obligation of conduct requires action reasonably calculated to realise the enjoyment of a particular right. In the case of the right to health, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of result requires states to achieve specific targets to satisfy a detailed substantive standard.<sup>63</sup>

## 8. CONCLUSION

A number of issues have emerged out of the reports from the different PEDs. However, it has always been easy to note the sincere endeavour made by the state to improve schooling in the country. The fact that South Africa spends 6 percent of its Gross Domestic Product on education, which, according to Cassiem *et al.*, is the highest proportion worldwide, is commendable. The introduction of the White Papers on Inclusive Education and ECD in the schooling system, and other programmes such as Life Skills and HIV/AIDS, LSMs and School Building is an indication that the state is committed to the achievement of better education.

What happened in Limpopo in 2000, that 795 Adult Learning Centers had to be closed down stranding 34,685 adult learners, should be corrected as it constituted a serious violation of the right to adult basic education. The situation warrants the state's attention. It should not be allowed to discredit the state for all it has achieved towards the realisation of the right to education during the reporting period.

The challenges confronting the PEDs include the creative use of policy to achieve the intended objectives. An observation has been made that generally, all the state programmes in the schooling system are characterised by more under-expenditure than over-expenditure. Whilst neither of the two is preferred, it can be said that for the PEDs to request more financial resources they still have to demonstrate that they can spend their budget allocations better.

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<sup>63</sup> *ESCR Document Database Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, 22 – 26 January 1997.

## **ABBREVIATIONS**

<b>ABET</b>	Adult Basic Education and Training
<b>CRC</b>	The Convention on the Rights of the Child, 1989
<b>CSATDP</b>	Canada South Africa Teacher Development Programme
<b>DoE</b>	Department of Education
<b>DoH</b>	Department of Health
<b>ECD</b>	Early Childhood Development
<b>ECDE</b>	Eastern Cape Department of Education
<b>ELSEN</b>	Education for Learners with Special Education Needs
<b>EMIS</b>	Education Management Information System
<b>FET</b>	Further Education and Training
<b>FSDE</b>	Free State Department of Education
<b>GET</b>	General Education and Training
<b>HET</b>	Higher Education and Training
<b>HRC</b>	Human Rights Commission
<b>INP</b>	Integrated Nutrition Programme
<b>KZNDEC</b>	KwaZulu-Natal Department of Education and Culture
<b>LDE</b>	Limpopo Department of Education
<b>LSEN</b>	Learners with Special Education Needs
<b>LSMs</b>	Learner Support Materials
<b>MDE</b>	Mpumalanga Department of Education
<b>MEC</b>	Member of Executive Council
<b>NAP</b>	National Action Plan
<b>NCDE</b>	Northern Cape Department of Education
<b>NDE</b>	National Department of Education
<b>NGOs</b>	Non-governmental Organisations
<b>NWDE</b>	North West Department of Education
<b>OBE</b>	Outcomes Based Education
<b>PDI</b>	Previously Disadvantaged Individuals
<b>PEDs</b>	Provincial Education Departments
<b>PSNP</b>	Primary School Nutrition Programme
<b>SANLI</b>	South African National Literacy Initiative
<b>WCDE</b>	Western Cape Department of Education

## **FURTHER EDUCATION AND TRAINING (FET)**

### **1. POLICY<sup>64</sup> AND PROGRAMMATIC MEASURES**

#### **National Sphere**

The National Department of Education (NDE) reported that during the period under review<sup>65</sup> it implemented the New Institutional Landscape for FET Institutions programme: The Reform of South Africa's Technical Colleges. The programme is about restructuring the Technical Colleges sector to serve both the social and economic needs of the country.

#### **Provincial Sphere**

The Eastern Cape Department of Education (ECDE) implemented the Draft Framework for Qualifications and Programme for Public FET Colleges and the Draft National Curriculum Statement. The Gauteng Department of Education (GDE) developed a number of draft policies during the reporting period. All these draft policies are based on different sections of the FET Act 98, 1998. They are as follows:

- Draft Interim Policy based on section 11 of the FET Act: Determination of Learning Programmes at Public FET Institutions
- Draft Interim Policy based on section 15 of the FET Act: Student Representative Council (SRC)
- Draft Interim Policy based on section 16 of the FET Act: Disciplinary Measures
- Draft Interim Policy based on section 17 of the FET Act: Admission to Public FET Institutions
- Draft Interim Policy based on section 21 of the FET Act: Financial Records and Statements of Public FET Institutions

#### *Determination of Learning Programmes at Public FET Institutions*

The draft policy empowers the academic board of a Public FET Institution to determine the learning programmes provided by the Public FET Institution and determines the conditions under which the academic board of a Public FET Institution may determine the learning programmes provided by the Public FET Institution.

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<sup>64</sup> It must be borne in mind that other policy measures that took place during the reporting period in the GET band applied to the FET band as well. Such policy measures will not be repeated in this section of the chapter; they comprise the following:

- Public Schools Admissions Policy
- The White Paper on Inclusive Education (2001)
- National Norms and Standards for School Funding
- Misconduct of Learners at Public Schools and Disciplinary Proceedings (Provincial Notice 2591 of 9 May 2001)
- Safety Measures at Public Schools

<sup>65</sup> This refers to 1<sup>st</sup> April 2000 to 31<sup>st</sup> March 2002.

### *Student Representative Council (SRC)*

The aim of this draft policy is twofold. It is to:

- ensure that a policy for the establishment of an SRC is determined at every Public FET Institution by its Council after consultation with the students and educators of that institution; and
- ensure that policies, after consultation with learners and educators of that institution, are determined by its Council for the composition of an SRC; the manner of election of an SRC; the functions of an SRC; and the privileges of an SRC.

### *Disciplinary Measures*

The aim of the draft policy is to ensure that the Council of every Public FET Institution determines a Code of Conduct that every student at a Public FET Institution is subjected to. The Council of every Public FET Institution determines disciplinary measures and procedures and that the Code of Conduct, disciplinary measures and procedures may only be made after consultation with the academic board of the institution concerned.

### *Admission to Public FET Institutions*

The draft policy aims to ensure that the Council of every Public FET Institution, after consultation with the academic board of the institution, determines the Admission Policy.

### *Financial Records and Statements of Public FET Institutions*

The aim of the draft policy is threefold. It is to:

- ensure that the Council of a Public FET Institution keeps records of all assets, liabilities, income and expenses and any other financial transactions of the Public FET institution as a whole; of its sub-structures; and of other bodies operating under its auspices;
- ensure that the Council of a Public FET Institution appoints an auditor to audit the records and financial statements of the Public FET Institution; and
- ensure that the Council of a Public FET Institution, in respect of the preceding financial year, and by a date or dates and in the manner determined in this policy, provides the Member of Executive Council (MEC) with a report on the overall governance of the institution; a duly audited statement of income and expenditure; a balance sheet and cash flow statement; and any additional information as the MEC may reasonably require.



The KwaZulu-Natal Department of Education and Culture (KZNDEC) reported that it ran some programmes involving parents in the education of their children. School Governing Bodies were also trained on their related functions. In achieving the above objectives, a number of workshops were conducted to ensure that:

- parents were made aware of their responsibility to ensure that their children attend school.
- strong advocacy initiatives were undertaken to further the aims of the South African Schools Act 84, 1996.
- departmental officials developed the required skills to better serve their communities in ensuring that children do attend school.

To give effect to the FET White Paper 4, 1998, the Northern Cape Department of Education (NCDE) instituted the New Landscape for FET sector: ‘taking up the challenge of developing and maintaining a co-ordinated, flexible and responsive FET Sector of high quality.’ Like the NCDE, the North West Department of Education (NWDE) implemented a New Landscape for Public FET Programme. To this end, 11 Technical Colleges were declared FET Colleges, which are to be merged into multi-sited campuses.

The Mpumalanga Department of Education (MDE) implemented the Restructuring of the FET Landscape Policy during the reporting period. The programme saw ten Technical Colleges and one College of Education merged into three FET Colleges. According to the Limpopo Department of Education (LDE), the merger attempts to help the FET Institutions provide a further education that is responsive to the needs of their respective regions.

As a result, the LDE engaged in the following:

- Review of FET Curriculum
- Establishment of learnerships
- Establishment of Career Guidance Centres

The LDE further reported that an Out-of-school Youth Project established two Career Guidance and Placement Centres.

## **2. LEGISLATIVE MEASURES**

### **National Sphere**

According to the NDE there were no legislative developments that took place during the reporting period at the national level in as far as the FET Sector was concerned.

### **Provincial Sphere<sup>66</sup>**

The KZNDEC reported no major legislative developments took place, except the amendments that were made to existing legislation during the reporting period. The

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<sup>66</sup> The three provinces in this section are the only provinces that reported on legislative developments and/or amendments thereto.

amendments were the Education Laws Amendment Act 53 of 2000 and Education Laws Amendment Act 57 of 2001.

The LDE reported that it developed Regulations for the Provincial Board for FET. The NWDE *gazetted* the declaration and merging of the FET Landscape and established the College Councils.

### 3. BUDGETARY MEASURES

#### National Sphere

**Table 1 Total budget allocation for the National Department of Education**

Year	Total allocation in Rand(s)	Allocation as % of GDP	Projected expenditure	Actual expenditure
2000/2001	69 266 000	0.01	-	59 513 000
2001/2002	85 997 000	0.01	-	74 335 000

The dash (-) that the information requested was not made available to the Human Rights Commission. This is applicable to the rest of the tables with the dash (-).

#### *Accounting for variance(s) between the financial years*

The NDE provided an inappropriate response in this section. The response is more on accounting for under-expenditure than on accounting for the variances between the various financial years provided in the table. It reads as follows:

In 2000/2001 the NDE incurred an under-expenditure of R9 753 000. The under-expenditure was ascribed to:

- The high personnel in the department;
- The appointment of fewer commissions and committees than originally anticipated;
- A delay in the delivery of accounts for printing works; and
- Fewer legal services contracted to the Department of Justice than anticipated.

Like in the preceding financial years, in 2001/2002 the department incurred an under-expenditure of R11 662 000. The under-expenditure was ascribed to the following:

- The restructuring of the department;
- The delay in the filling of vacant posts;
- Delays in the implementation of a desktop management software;
- The rand/dollar exchange rate as well as the late approval of business plans; and
- The education management Systems Project not commencing in 2001/2001.

#### *Budget Adequacy*

The NDE indicated satisfaction with the budget allocation since it ‘largely provides a support function.’

## Provincial Sphere

**Table 2** Budget allocations for provinces<sup>67</sup>

Name of province	Year	Total allocation in Rand(s)	Projected expenditure	Actual expenditure
Eastern Cape	2000/2001	7 392 231 000	8 571 364 000	7 192 243
	2001/2002	8 118 856 000	7 863 493 000	-
KwaZulu-Natal	2000/2001	8 367 837 000	-	8 172 742 000
	2001/2002	9 346 610 000	9 275 000 000	-
Mpumalanga	2000/2001	1 215 229 000	-	1 198 654 000
	2001/2002	1 334 620 000	-	1 332 467 000

### *Accounting for variance(s) between the financial years<sup>68</sup>*

The NCDE cited the inflationary tendencies as causes of the variance between the yearly budget allocations. However, they also mentioned that as a percentage of the total provincial budget, the budget has remained relatively constant.

### *Budget Adequacy*

The ECDE and MDE indicated satisfaction with the budget allocated during the reporting period. The NCDE reported that the budget was inadequate to address their commitments in 1999/2000 and 2000/2001. However, according to the Department, the expenditure in 2001/2002 reflects that the budget was adequate to fulfil basic mandates. Improved control over personnel expenditure also accounted for spending within the budget. The Department further reported that the devolution of responsibilities to Programme Managers resulted in a greater awareness to control expenditure. More funds in the form of Conditional Grants and donor funding assisted in improved service delivery given the limited funds.

The WCDE reported that the budget was inadequate such that schools experienced a shortage of teachers, classrooms, books and equipment. Overspending was said to have occurred in “small amounts” though.

<sup>67</sup> The KZNDEC responded to the section on budgetary measures precisely the same way they did in the same section in the GET protocol. Therefore, to find out what the response of the KZNDEC is to the questions in this section, the reader should consult the section on budgetary measures in the GET section of this chapter.

<sup>68</sup> Both the ECDE and MDE gave inappropriate responses in this section. The ECDE cited two areas as the causes of under-expenditure experienced. The year in which these two causes of the under-expenditure applied was not mentioned. Moreover, it was not explained exactly how one of these caused the under-expenditure. The following are the areas that were said to have caused the under-expenditure:

- the Learning Support Materials (LSMs) programme; and
- the delay in the implementation of the School Building programme.

The MDE cited the transformation taking place in the FET band as a cause of under-expenditure since staff could not be appointed. The specific financial years in which this applied were not mentioned. Worst of all, the GDE, LDE and NWDE did not respond to the questions that relate to budgetary measures.

**Table 3** Total budget allocation for Technical Colleges

Name of province	Year	Total allocation in Rand(s)	Projected expenditure	Actual expenditure
Gauteng	2000/2001	246 528 000	-	221 875 000
	2001/2002	258 014 168	-	252 854 000
KwaZulu- Natal	2000/2001	8 172 742	124 000 00	-
	2001/2002	9 346 610	127 700 00	-
Mpumalanga	2000/2001	51 678 000	-	44 003 000
	2001/2002	57 140 000	-	50 993 000
Northern Cape	2000/2001	20 603 000	20 603 000	18 279 577
	2001/2002	20 323 000	20 323 000	19 025 350
North West	2000/2001	60 625 000	51 124 000	-
	2001/2002	60 625 000	60 625 000	-
Western Cape	2000/2001	11 046 000	-	11 410 2000
	2001/2002	12 516 000	-	12 585 9000

*Accounting for variance(s) between the financial years*

The GDE ascribed the variances to growth of learner numbers, which contributed to the need for more funds in the sector. The LDE, MDE and the NCDE did not respond to the questions related to the programme. According to the NWDE, the increase in budget allocation in 2000/2001 was as a result of the filling of vacant posts in Technical Colleges.

*Budget Adequacy*

The GDE reported that the budget was inadequate and as a result thereof, a request for more funds was lodged with the Budget Control section of the department. For the department to spend better, it resolved to pay off its debts within a financial year period. Furthermore, the department improved on its expenditure patterns by introducing a performance system that linked financial resources to policy priorities as well as introduced new procurement systems to expedite procurement processes. To augment inadequate financial resources, the NWDE sought funding from donors and the private sector.

The WCDE reported that the budget was inadequate to address its needs. The explanation further said that the real growth on the funding of Technical Colleges was far below the required levels. Nevertheless, the department did not take any significant measures to augment its funds since the allocation to FET Colleges 'compared favourably with other provinces when expressed as a percentage of the overall education budget.' It was further reported that no under or over-spending occurred in this programme.

**Table 4 Total Budget Allocations for Secondary Education**

Name of province	Year	Total allocation in Rand(s)	Projected expenditure	Actual expenditure
KwaZulu-Natal	2000/2001	2 727 258 000	-	2 693 587 000
	2001/2002	2 991 951 000	2 953 774 714	-
Mpumalanga	2000/2001	820 500 000	-	803 535 000
	2001/2002	850 500 000	-	833 831 000
Northern Cape	2000/2001	115 696 000	115 696 000	241 697 781
	2001/2002	243 199 266	243 199 266	250 777 881
Western Cape	2000/2001	1 398 246	-	1 253 209
	2001/2002	1 367 837	-	1 318 989

*Accounting for variance(s) between the financial years<sup>69</sup>*

The KZNDEC reported that the allocations for the programme were based on what was earmarked for the Policy on Norms and Standards for School Funding and calculated in terms of the Resource Targeting Funding Model. The WCDE reported that the savings that it made on the programme was as a result of the school financial year that does not end the same time as the department's.

*Budget Adequacy*

According to the ECDE, much as the budget enabled the department to fulfil some of the needs, it was still inadequate such that a reprioritisation of needs had to be done. The expenditure that was said to have occurred related to procurement processes that could not be finalised before the end of financial year. In the KZNDEC's view, allocations for the programme have significantly increased over the MTEF period. Furthermore, the department indicated that the under-expenditure that occurred in 2001/2002 has been considerably reduced compared to previous years.

However, the department cited the delay in the acquisition of goods and services and improvement and upgrading of physical infrastructure as causes of under-expenditure. The department further reported that delays in the procurement processes have been addressed to assist schools in the expenditure of their funds. The WCDE indicated budget inadequacy. On the variances seen in table 4 above, the department accounts for these by saying that it is surplus that resulted from the department's prudent fiscal hand.

<sup>69</sup> The ECDE, GDE, LDE, MDE, NCDE and the NWDE did not respond to the questions regarding the programme and did not state any reason or reasons for that. However, the NDE and NCDE did fill in the table on the total budget allocation for the programme but did not respond to the questions pertaining to this section.

**Table 5 Budget Allocations for the School Building Programme**

Province	Year	Total allocation in Rand(s)	Projected expenditure	Actual expenditure
Eastern Cape	2000/2001	75 000 000	75 000 000	75 000 000
	2001/2002	248 000 000	248 000 000	296 000 000
KwaZulu-Natal	2000/2001	100 272 000	100 272 000	77 924 000
	2001/2002	172 000 00	172 000 00	187 000 00
Mpuma-langa	2000/2001	19 965 000	-	11 452 000
	2001/2002	34 742 000	-	27 871 000
Northern Cape	2000/2001	19 087 000	-	19 087 000
	2001/2002	19 712 000	-	19 014 000
Western Cape	2000/2001	55 338 000	-	58 172 000
	2001/2002	92 361 000	-	93 840 000

*Accounting for variance(s) between the financial years*

The ECDE reported that the cause of the variance between the financial years 2000/2001 and 2001/2002 was the commitment to the projects that had to be accomplished in the former financial year. The GDE did not account for the variances between the financial years in the table. The KZNDEC responded to the question on the variance by saying that the funds allocated to building projects are a proportion of what remains after personnel costs have been deducted. As a result of changes in learner-educator ratio, capital costs have also been fluctuating during the reporting period. The NCDE reported that the budget allocations have been relatively consistent and that delivery has been accelerated through donor funding and conditional grants.

*Budget Adequacy*

The ECDE indicated that the Eastern Cape province had huge backlogs in the provision of classrooms as a result of financial constraints. However, presentations were made to the Budget Committee as well as Provincial and National Treasuries. Donor funding was also mobilised from organisations such as the European Union and British Department for International Development. In order to address any under-expenditure in future, the department appointed implementing agents to facilitate the timeous implementation of projects. The GDE indicated that the budget has always been inadequate since allocations for the programme are based on a priority list that is compiled on a yearly basis. The allocated financial resources normally do not cover the prioritised projects such that there are always backlogs in the provision of school buildings.

According to the GDE, the backlogs in the provision of school buildings have increased due to under-expenditure. This, according to the department, implies that a number of learners are still taught in overcrowded classrooms whilst others still have to travel/walk long distances to receive education. The KZNDEC indicated that the budget allocated for the programme has always been inadequate such that donor funding had to be sought. However, in some cases the department under/over-spent the allocated funds. According to the department, control measures, which were not

specifically mentioned in its response, have been introduced to address the incidence of under/over- expenditure.

According to the NCDE, the budget was adequate to address backlogs over a five-year period. In cases where the budget was inadequate, additional funding was sought through the Northern Cape Education Development Trust and the National Infrastructure Grant - a conditional grant. In the department's view, the expenditure was consistently over 90 per cent and it exceeded the budget. This was ascribed to the inadequate budget for the year. To improve on their financial management, the department introduced integrated planning and budgeting.

The WCDE gave an indication that the budget allocated to this programme was insufficient to address the classroom shortages in one financial year. As a result of inadequate budget allocation, the department's Senior Management reprioritised needs and provided an additional allocation for instruction rooms. The over-spending incidents appearing in the table were said to have resulted from delays in the procurement processes. It was further reported that small contractors were struggling to meet the deadlines such that penalty clauses became applicable. The shortage in instruction rooms led to learners using other schools' buildings for their teaching and learning longer than expected. To address the problems of under/over-spending, the Department of Roads and Public Works was reportedly trying to introduce measures that would allow for all funds to be spent in one financial year.

**Table 6 Budget allocation for Learner Support Materials (LSMs)**

Province	Year	Total allocation in Rand(s)	Projected expenditure	Actual expenditure
Eastern Cape	2000 – 2001	161 200 000	161 200 000	161 200 000
	2001 – 2002	137 900 000	137 900 000	137 900 000
KwaZulu-Natal	2000 – 2001	57 155 142	-	57 048 181
	2001 – 2002	60 694 700	59 348 129	-
Mpumalanga	2000 – 2001	22 880 000	-	19 568 000
	2001 – 2002	27 400 000	-	36 845 000
Northern Cape	2000 – 2001	-	-	-
	2001 – 2002	30 074 095	-	30 074 095
North West	2000 – 2001	57 000 000	57 000 000	57 000 000
	2001 – 2002	55 000 000	55 000 000	55 000 000
Western Cape	2000 – 2001	61 549 000	-	61 549 000
	2001 – 2002	131 902 000	131 902 000	-

*Accounting for variance(s) between the financial years*

The ECDE reported that since the books are supplied yearly, the figures become smaller as topping up is done in subsequent years. The GDE and MDE did not answer the questions relating to this section. However, the MDE did provide information on the budget allocation for LSMs. The KZNDEC reported that since the beginning of the 2000/2001 financial year, schools determine the portion of their budget to be spent on LSMs. The response further said that the figures that appear in the table reflect the amounts of money spent by the public secondary schools on LSMs. A number of schools purchase LSMs out of school funds and at times parents

are expected to provide their own. The NCDE ascribed the variance to a steady annual increase of LSMs needs as a result of the introduction of Curriculum 2005. The WCDE did not account for the variance between the financial years referred to in the table above.

### *Budget Adequacy*

Responding to questions on budget adequacy, the ECDE reported that the allocated budget was spread out evenly such that all grades were supplied with learning materials. The department further reported that in its budget allocation for the programme it aligns school requirements to the available financial resources. The KZNDEC indicated that the budget was inadequate. It further reported that allocations made to schools are based on what schools can afford as well as priorities of the department. The NCDE indicated satisfaction with the budget allocated to the programme. The WCDE indicated dissatisfaction with the allocations for the programme. It asserted that the programme needs more funds for textbooks and for the implementation of Curriculum 2005.

## **4. INDICATORS**

### Eastern Cape

**Table 7 Further Education and Training (FET)**

	<b>Total</b>	<b>Female</b>	<b>Rural</b>	<b>Learners with special needs</b>	<b>Africans</b>	<b>Coloured</b>	<b>Indian</b>	<b>White</b>
Total number of secondary school learners	306207	173639	89093	3627	278472	14960	756	12019
Number of secondary learners in farming communities	527	324	527	-	523	2	-	-

In the year 2001/2002, the ECDE reported that it had 306 207 learners, including not only learners in secondary schools but in the FET band as a whole.

The ECDE reported that there were 101 102 children aged between 15 and 18 who were not attending secondary school. The Eastern Cape Net Enrolment Ratio (NER)<sup>70</sup> was reported to be 15.65 percent with the learners above normal ending age of 18 years that complete secondary school pegged at 42 289.<sup>71</sup> Furthermore, it was

<sup>70</sup> NER refers to the number of appropriately aged learners who are in secondary school as a proportion of the corresponding age group in the population, expressed as a percentage.

<sup>71</sup> Note that since the Ministry of Education was challenged in the High Court and Constitutional Court on the decision that a child starting grade 1 must be 7 years old, it is no longer clear at which age learners should complete their high school education. The protocol or questionnaire on this was developed before the Court's ruling, and thus had 18 years as the age limit for high school education.



reported that there were 18 929 learners of school-going age who were not able to attend school.

## 5. NATIONAL ACTION PLAN (NAP)

The ECDE reported that there were 875 secondary schools, 273 of which were without water within walking distance. It was further reported that there were 282 secondary schools without electricity and 87 secondary schools without adequate facilities.

Gauteng

**Table 8** Matriculation Pass Rate <sup>72</sup>

	<b>Total</b>	<b>Female</b>	<b>African</b>	<b>Coloured</b>	<b>Indian</b>	<b>White</b>
Number of matriculants	64300	35 811	40 178	3 118	2 437	18 561
Number of learners that have passed the matriculation examination	33 713	18 353	21 505	1 940	1 875	9 393
Number of disabled learners that have passed the matriculation examination	192	60	67	7	-	118
Number of learners who obtained matriculation exemption	13 703	7 822	3 222	387	1 348	8 742
Number of disabled learners who obtained matriculation exemptions	11	6	7	-	-	4
Number of learners who passed with endorsements	-	-	-	-	-	-
Number of learners who wrote on Higher Grade	204 322	95 182	118 831	7 513	10 549	67 406
Number of learners who wrote on Standard Grade	199 573	135 813	135 736	11 562	-	47 523

<sup>72</sup> These results statistics are for January/December 1999 and January/December 2000.

**Table 9 Indicators on the Senior Certificate**<sup>73</sup>

	<b>Total</b>	<b>Female</b>
Number of matriculants	70 874	38 777
Number of learners that have passed the matriculation examination	34 196	18 201
Number of disabled learners that have passed the matriculation examination	190	64
Number of learners who obtained matriculation exemption/endorsement	13 197	7 558
Number of learners who obtained matriculation exemption/endorsement	16	6
Number of learners that wrote subjects on the Higher Grade	217 496	119 891
Number of learners that wrote subjects on the Standard Grade	222 665	120 511

**Table 10 Indicators on the NAP**

	<b>Total</b>	<b>Rural</b>	<b>Urban</b>
Total number of secondary schools	464	462	2
Number of secondary schools with buildings in a state of disrepair	290	289	1
Number of secondary schools that have a shortage of classrooms	10	10	10
Number of secondary schools without electricity	4	4	0
Number of secondary schools without adequate toilet facilities	2	2	0
Number of secondary schools that lack computers	1	1	0
Number of secondary schools that lack laboratories	-	-	-
Number of secondary schools without libraries	1	1	0
Number of secondary schools that lack recreational and sporting facilities	18	18	0

The number 0 denotes that no school fits the provided category/situation

### KwaZulu-Natal

**Table 11 Indicators on FET (Secondary Schools)**

	<b>Total</b>	<b>Female</b>	<b>Rural</b>	<b>Learners with Special Needs</b>
Learner/Educator Ratio	38:1	38:1	38:1	-
Total number of secondary school learners	931 615	484 169	±60%	-

<sup>73</sup> It must be noted that the data provided in this table was not classified in terms of race.

As part of the information provided in the table above, the KZNDEC reported that:

- about 4 percent of secondary learners are in farming communities of which 2.5 per cent are female;
- about 60 percent of the learners make up the NER;
- about 3 percent of learners who enrol and leave school early during the year; and
- about 4 percent of learners are above normal ending age of 18 years that complete secondary education.

**Table 12 Indicators on the NAP**

	<b>Total</b>
Total number of secondary schools	1466
Number of secondary schools in farming communities	6
Number of secondary schools in a state of disrepair	414
Number of secondary schools that have a shortage of classrooms	806
Number of secondary schools with inadequate textbooks	-
Number of learners residing beyond 5km radius from schools	-
Number of secondary schools without water within walking distance	-
Number of secondary schools without electricity	596
Number of secondary schools without telephones	1101
Number of secondary schools with inadequate toilet facilities	61
Number of secondary schools that lack computers	952
Number of secondary schools that lack laboratories	1025
Number of secondary schools without libraries	1013
Number of schools that lack recreational and sporting facilities secondary schools	-

## Mpumalanga

**Table 13 Indicators on Further Education and Training (Secondary Schools)**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>	<b>Female</b>	<b>African</b>	<b>Colour- ed</b>	<b>Indian</b>	<b>White</b>
Learner/Educator Ratio	34:1	34:1	34:1	-	12:1	12:1	12:1	12:1 Special 34:1 Public
Total number of secondary school learners	331062	17 725	129115	2 065	1 590	37	29	409
Number of secondary learners in farming communities	1 300	676	1 300	415	319	12	7	77
Children aged 15-18 who are not attending secondary school	0,9	0,46%	0,46%	3%	77% of 3%	0,03%	0, 04%	1,9%
Number of learner refugees and asylum seekers	53	29	13	7	41	3	0	9
Net Enrolment Ratio (NER)	92%	91%	73%	0,3%	77%	0,03%	0, 04%	22,9%
Number of learners who enroll and leave school early during the year	13 242	6 886	5 164	21 owing to ill health	16 Health	5 Health	2 Health	1 Health

The number 0 denotes that no school fits the provided category

Northern Cape

**Table 14 Indicators on FET (Secondary Schools)**

	Total	Female	Rural	Learners with Special Needs	Africans	Coloured	Indian	White
Learner/Educator Ratio	30,4:1	-	28:1	with integration of schools a realistic figure cannot be calculated				
Total number of secondary school learners	30728	15879	18196	-	-	-	-	-
Number of secondary learners in farming communities	Per learner records needed to be calculated – farm school learners do not fully constitute this category; some are in urban schools boarding privately.							
Children aged 15-18 who are not attending secondary school	19727	9582	10145	-	-	-	-	-
Net Enrolment Ratio (NER)	20%	21%	17%	Tendency in province to start school later – figure may be misleading				
Number of persons above normal ending age of 18 years that complete secondary school	2490	1252	1541	-	-	-	-	-

In addition to the information provided in the table above, the NCDE reported the following:

- the total number of matriculants was 6 619.
- the total number of learners who obtained matriculation exemption was 975.

In 2000, the Northern Cape recorded the lowest ratio in primary schools (28:1), and the Eastern Cape and Mpumalanga recorded the highest ratio in the combined schools (36:1).<sup>74</sup>

<sup>74</sup> *Brochure for the 2000 School Register of Needs Report*, op cit., p. 10.

North West

**Table 15 Indicators on the Matric Pass Rate <sup>75</sup>**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>	<b>Female</b>	<b>African</b>	<b>Coloured</b>	<b>Indian</b>	<b>White</b>
Number of matriculants	38094 41870	22035 23570	16059 18300	20800 22861	34551 37976	430 473	105 115	3008 3306
Number of learners that have passed the matriculation examination	19185 23368	11988 14071	7197 9297	10475 12759	17401 21194	216 264	53 65	1515 1845
Number of learners who obtained matriculation exemptions <sup>76</sup>	4865 2944	2814 1657	2051 1287	2657 1607	4413 2670	55 33	14 8	383 232
Number of learners who passed with endorsements	2014 2454	1258 1477	756 976	1099 1340	1826 2225	28 23	7 6	159 194

<sup>75</sup> Note that the top row of numbers in the table denotes January/December 1999 statistics whilst the bottom row of numbers denotes January/December 2000 statistics. The focus of this report is much more on the latter than on the former year.

<sup>76</sup> According to the NWDE, since these statistics are based on percentages they do not give a true reflection of the matric pass rate.

**Table 16 Indicators on the NAP**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>
Total number of secondary schools	460	231	229
Number of secondary schools in farming communities	229	231	229
Number of secondary schools in a state of disrepair	124	0	85
Number of secondary schools that have a shortage of classrooms	157	39	91
Number of secondary schools with inadequate textbooks	-	66	-
Number of learners residing beyond 5km radius from schools	71800	43078	28722
Number of secondary schools without water within walking distance	29	9	20
Number of secondary schools without electricity	128	9	119
Number of secondary schools without telephones	172	6	166
Number of secondary schools with inadequate toilet facilities	13	0	13
Number of secondary schools that lack computers	185	0	185
Number of secondary schools that lack laboratories	140	52	88
Number of secondary schools without libraries	1	1	0
Number of secondary schools that lack recreational and sporting facilities	111	50	61

The number 0 denotes that no school fits the provided category

Western Cape

**Table 17 Matric Pass Rate<sup>77</sup>**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>	<b>Female</b>
Number of matriculants	37199 38318	22949 23761	14250 14557	-
Number of learners that have passed the matriculation examination	29304 30447	17545 18258	11759 12189	-
Number of disabled learners that have passed the matriculation examination	119 120	-	-	-
Number of learners who obtained matriculation exemption	9090 9169	5800 5760	3290 3409	-
Number of disabled learners who obtained matriculation exemption	10 15	-	-	-
Number of learners who passed with endorsements	-	-	-	-
Number of learners who wrote on Higher Grade	118008 113863	75107 71489	42901 42374	-
Number of learners who wrote on Standard Grade	117612 114510	44310 44557	44310 44557	-

**Table 18 Availability of Learner Support Materials (LSMs) per subject**

<b>Subjects</b>	<b>Number of learners/schools reached: Rural</b>	<b>Urban</b>
Mathematics	20568/ 173	58242/ 200
Physical Science	11912/ 129	30153/ 183
Geography	24177/ 148	48409/ 184
History	17895/ 135	37452/ 186
Life orientation		Not available
Home Economics	6768/ 94	12041/ 138

<sup>77</sup> These statistics were not classified in terms of race. Note, as well, that the top row of numbers denotes the matric pass rate for January/December 1999 whilst the bottom row of numbers denotes the January/December 2000 matric pass rate.

**Table 19 Indicators on the NAP**

	<b>Total</b>	<b>Rural</b>	<b>Urban</b>
Total number of secondary schools	1484	774	710
Number of secondary schools in farming communities	-	-	-
Number of secondary schools in a state of disrepair	5	-	-
Number of secondary schools that have a shortage of classrooms	195	-	-
Number of secondary schools with inadequate textbooks	64%	-	-
Number of learners residing beyond 5km radius from schools	298352	86747	211605
Number of secondary schools without water within walking distance	0	8	-
Number of secondary schools without electricity	47	44	3
Number of secondary schools without telephones	17	16	1
Number of secondary schools with inadequate toilet facilities	71	68	3
Number of secondary schools that lack computers	293	245	48
Number of secondary schools that lack laboratories	113	66	47
Number of secondary schools without libraries	33	22	11
Number of secondary schools that lack recreational and sporting facilities	514	328	186



## 6. CRITIQUE

### Quality of Government Reports

Generally, there is a problem with some responses the Human Rights Commission (HRC) receives from government departments. Some departments do not take the work of the HRC seriously. This is reflected in the responses they send to the HRC. Some of the salient problems experienced with the departments' reports, include inadequate responses, skipped questions and unsatisfactory responses. The same problems are occurring in the completion of the budgetary measures tables as well. In some instances figures are written incorrectly requiring researchers to call the relevant departments to explain the figures. Most of these problems could be avoided if government departments could devote more time to respond to the HRC's protocols as well as finding out what is expected of them. The quality of the reports submitted to the HRC affects the quality of the report the HRC produces at the end of the monitoring process.

### Policy and Programmatic Measures

It is surprising that PEDs and the NDE failed to report on some important and positive developments that took place during the period under review either in a form of projects or programmes. Such developments comprise the following:

- The upgrading of approximately 65 000 unqualified and under-qualified educators;
- A programme focusing on farm and rural school educators was also initiated to deal with the needs and challenges presented by these schools; and
- The launch of the National Teacher Awards by the Minister of Education in May 2000.<sup>78</sup>

A total of R95 million was made available through the Education Labour Relations Council for this project which will assist this group of teachers to obtain the required levels of qualification by offering a National Professional Diploma in Education. In 2000/2001 financial year attention was given to assisting teachers with Outcomes-Based Education (OBE). The same group of teachers was also offered training on teaching effectively in multi-grade classrooms, a common feature of rural and farm schools.<sup>79</sup>

### *Constitutional Obligations*<sup>80</sup>

#### *National Sphere*

#### *Respect*

The NDE asserted that the following developments that took place during the transformation of the further education landscape respected the right to education:

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<sup>78</sup> [http://education.pwv.gov.za/DoE\\_Sites/communication/An.../Highlights&%20Achiev](http://education.pwv.gov.za/DoE_Sites/communication/An.../Highlights&%20Achiev) 1.ht. Site visited on 23 October 2002.

<sup>79</sup> *Ibid.*

<sup>80</sup> The NDE did not respond to the duty “to protect” the right to further education.

- In the case of mergers no learning sites were closed down
- Planning included site and access issues for citizens
- More programmes were added to the institutional curriculum range
- Demand-led programmes received priority allowing a link between training and economic development and the improvement of quality of life

### *Promote and Fulfil*

The NDE reported that its programme of delivery has been accompanied by a range of consultative processes, which highlighted access to training programmes, especially for the disadvantaged.

The NDE's response shows that a sincere attempt was made to respect the right to FET. The facts that the learners country-wide have access to FET institutions in their respective regions despite the merging of FET Colleges and the diversification of academic programmes in the FET band, etc., are commendable.

### *Provincial Sphere<sup>81</sup>*

#### *Respect*

The GDE only mentioned that all its policies and programmes do meet the obligation to respect the right to education as they ensure that learners access education without any hindrances. The LDE reported that the location of its seven FET Colleges in all the regions in the province makes the Public FET accessible to all learners.

#### *Protect*

The GDE referred to the draft interim policy made in terms of section 16 of the FET Act 98, 1998 on Disciplinary Measures. The policy provides that learners may appeal against a decision that could result in their exclusion from receiving the Public FET. The LDE did not give a clear explanation regarding this duty.

#### *Promote and to Fulfil*

The GDE referred to the draft interim policy based on section 17 of the FET Act on Admission to Public FET institutions. According to the GDE, this policy makes specific provisions for students previously disadvantaged by discriminatory laws and practices. Again, the LDE failed to give a clear explanation on these duties.

### *National Sphere*

#### *Respect*

The NDE's response shows that a sincere attempt was made to respect the right to FET. The facts that the learners country-wide have access to FET Institutions in their

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<sup>81</sup> The ECDE and KZNDEC responded to this section the same way they did in the GET part. As a result, their responses will not be repeated here in the FET section on the duties imposed by the right to education.

respective regions despite the merging of FET Colleges and the diversification of academic programmes in the FET band, etc., are commendable.

### *Protect*

This obligation calls upon the state to protect the individual learner's right from interference by individuals or private companies in the exercise of the learner's right to education.<sup>82</sup> The NDE did not explain how it meets the obligation to protect the right to FET. It is important that the state demonstrates its commitment to the observance of all the constitutional obligations to guarantee everyone the right to education. As it stands, it is not clear if everyone's right to FET is protected.

### *Promote*

The obligation to promote requires the state to actively inform people of their right to education as well as how this right can be accessed. Workshops; seminars; different forms of media can be used to promote the right to education.<sup>83</sup> The NDE's response to this obligation sounds superficial. Stating clearly what 'a range of consultative processes, which highlighted access to training programmes, could have helped.

### *Fulfil*

This places an obligation on the state to take measures in order to advance the right to education. The state must take legislative or other measures in order to realise the right to education. Other measures, considered by the Committee on Economic, Social, Cultural Rights are – administrative, financial, educational and social measures.<sup>84</sup> Much as the state has taken some administrative and financial measures as seen in its various programmes such as School Building, Technical Colleges, etc., its response does not go any far in demonstrating how it fulfils the obligation.

### *Provincial Sphere*

### *Respect*

As part of the response on how the ECDE respects the right to FET, the ECDE referred to the White Paper on Inclusive Education as it allows learners who experience barriers to learning and development to be accommodated in the mainstream education. The OBE was another example cited to illustrate how the ECDE respects the right to FET. According to the FSDE, the Policy on Learner Pregnancy entrenches the respect for the right to FET in that it provides the pregnant learner the right to receive education despite being pregnant. This is in line with contemporary international norms that require education to be accessible, available, adaptable and acceptable.

The GDE's response on how it observes the obligation to respect the right to FET is not helpful, as it does not go into detail on how learners have access to FET 'without

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<sup>82</sup> Lawrence V. Mashava (ed.), *A Compilation of Essential Documents on the Right to Education*, Economic and Social Rights Series, Volume 2, Centre for Human Rights (University of Pretoria), 2000.

<sup>83</sup> *Ibid.* p.14.

<sup>84</sup> Mashava, 2000, *op.cit.*, p. 15.

hindrances.’ However, the LDE clearly demonstrates its observance of the obligation as it ensured that during the merging of the FET Colleges in the province, all of its seven FET Colleges were spread across all their regions thereby making Public FET accessible to all learners. Like the MDE, the NCDE reported that it respects the right to education through the White Paper on Inclusive Education as it purports that education be offered to all learners and potential learners regardless of their disabilities, socio-economic conditions, *etc.*

### *Protect*

The Policy on Disciplinary Measures the GDE referred to, does meet the obligation to protect the right to FET as it allows learners to appeal against a decision that may exclude them from the Public FET Institutions. Also the Policy on Admission to Public FET institutions, based on section 17 of the FET Act, to which the GDE referred, goes an extra mile making specific provisions for the previously disadvantaged learners. The assumption here is that the policy does not discriminate unfairly against other groups of learners. However, the challenge lies in the implementation of the policy.

### *Promote*

According to the FSDE, the Policy on Injury of Learners in Public Schools ensures that learners are not neglected during educational and extra-curricula activities. The GDE’s reference to the Policy on Admission to Public FET Institutions could be said to be meeting the obligation as it makes specific provisions for the admission of the previously disadvantaged learners. However, the implementation of the draft policy is yet to be tested. The NCDE referred to the White Paper on Inclusive Education as a measure that promotes access to education for learners previously denied the right to FET. The response further referred to the Whole School Evaluation Policy as another policy measure that promotes the right to FET without explaining how the policy measure meets this obligation.

### *Fulfil*

The GDE seems to be fulfilling the right to FET through the draft policy on Admission to Public FET Institutions. The KZNDEC is another department that seems to be taking a step forward in fulfilling this right through the advocacy initiatives it engaged in during the reporting period. Such advocacy initiatives comprise the training of the KZNDEC’s officials to better serve their respective communities and the education of parents and teachers about the right to education.

The LDE’s provision of FET Colleges in all their regions is also indicative of its commitment to meeting the obligation to fulfil the right to FET. All the above is consistent with the two dimensions to the obligation to fulfil the right to education under international law. The two dimensions to the obligation to fulfil the right to education would be to provide and facilitate the right to FET in the case of this band.<sup>85</sup> According to General Comment No. 13 this would require that the state take positive

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<sup>85</sup> Section on ECD, *op.cit.*

measures that enable and assist individuals and communities to enjoy the right to education and also to provide them with the right to education.

The NCDE cited the Whole School Evaluation Policy as a policy measure that fulfils the right to FET. However, the NCDE did not explain how the policy measure fulfils this obligation. All the PEDs need to demonstrate their understanding of the constitutional obligations both in the formulation and implementation of government policy, programmatic and legislative measures. Such internalisation helps to ensure that in the country's quest to provide quality education, the learners' right to FET is not infringed upon.

### **Legislative Measures**

The NDE and some six PEDs did not mention the positive legislative developments that took place during the period under review. The legislative developments referred to above include:

- The promulgation of the South African Council for Educators (SACE)<sup>86</sup> Act, 2000 (Act No. 31 of 2000)

The main purpose of the Act is to provide for the registration of educators, to promote the professional development of educators and to set, maintain and protect ethical and professional standards for educators.

- Notice No. 327 of 31 March 2000

This notice deals with regulations, which apply to managers prior to strike action. Managers are to give notice in advance of their intention to participate in a strike so as to enable the employer to make arrangements such as the appointment of temporary managers. These regulations apply to all Heads of Public Schools, Colleges of Education, Technical Colleges and other Colleges, FET institutions, Adult Basic Education and Training Centres, Early Childhood Development Centres and to all office-based educators.

The two legislative developments above indirectly contribute to the progressive realisation of the right to education. However, the two legislative developments are essential in that they try to address issues pertaining to professionalism and development of educators as well as ensuring that the right to education is not compromised by labour action such as strikes that educators sometimes engage in. One of the key elements referred to in progressively realising the right of access to housing is doing so 'within the available resources'. This phrase does not only refer to financial resources and related material; it also refers to human resources. However, having sufficient human resources to carry out the state policies is not and should not be seen as an end in itself. Human resources have to be well-trained if the implementation of the state policies is to achieve any success. Therefore, the existence of a professional and developmental body such as the SACE is desirable to also protect the integrity of the teaching profession.

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<sup>86</sup> SACE has had the legislated competence to promote the professional image of educators. The Council is a body of 30 persons appointed by the Minister. Its members have a commitment to serving the interests of the profession, and of education, on a voluntary basis.

The issue of the legal notice, that is, Notice No. 327 above, is also a positive legislative development. It indicates the seriousness on the part of the state in realising the right to education. However, the practicability of the notice is doubtful given the rarity of educators going on strike for a period of time that would necessitate the appointment of temporary educators.

### *Constitutional obligations*<sup>87</sup>

#### *Respect*

According to the GDE, the Regulations for the Admission of Learners to Public Schools ensure access to education for every learner as it purports to eliminate all discriminatory practices in the admission of learners to public schools. According to the FSDE the legislative measures that took place during the reporting period do meet the obligation to respect the right to education since they give governance structures and school communities the powers to decide on and implement education-related measures. The WCDE gave a long and unclear response on this duty and did not respond on how their legislative measures protect the right to FET.

#### *Promote and Fulfil*

The GDE submitted that the Regulations for the Admission of Learners to Public Schools do meet the obligations to promote and fulfil the right to FET as they accord learners access to education. Moreover, parents and learners are informed of their rights on matters of discipline. The WCDE reported that both national and provincial education laws ensure by means of legislation and policy that learners in each province must attend school between the ages of seven and fifteen and if a parent fails to place a child in a school, such action is perceived as a criminal offence in terms of the South African Schools Act 84, 1996. The response further said that the parent's inability to pay school fees does not affect the learner's right to education, which further respects the right to education.

### **Administrative Action<sup>88</sup> and Maladministration and/or Corruption<sup>89</sup>**

The NDE indicated that it did not have any administrative action reported to it during the period under review. The ECDE reported that some principals refused learners to attend classes owing to non-payment of school fees. However, the ECDE issued a circular calling upon the principals concerned to refrain from that action. The second administrative action that resulted in the violation of the learners' right to FET was the delay in the implementation of FET Curriculum. Interim arrangements had to be made to address the problem.

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<sup>87</sup> The LDE simply listed the Regulations for the Provincial Board for FET but did not say exactly how these meet the constitutional obligations. The NWDE gave an unclear response. Like the ECDE, the NCDE reported on policy measures and not on legislative measures as required in the protocol. The MDE did not even respond to the questions posed in this section.

<sup>88</sup> All the following PEDs reported that there was not any administrative action that resulted in the violation of the learners' right to further education during the reporting period: KZNDEC, LDE, MDE, NWDE, NCDE and WCDE.

<sup>89</sup> The ECDE, GDE, KZNDEC, LDE, MDE, NCDE and WCDE reported that they did not have any act of maladministration and/or corruption brought to their attention during the reporting period.

The GDE did not report any specific incidents of administrative action that resulted in the violation of the learners' right to FET. The only incident the GDE cited as a possible violation of learners' right to education was the fact that most schools do not inform learner applicants of their application outcome for admission to schools. Section 33(1) of the Constitution on just administrative action provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The GDE did not say what it plans to do to correct the situation. However, the GDE further reported that regular visits to schools by District officials ensure that critical issues are brought to light and addressed. The GDE has strengthened the administrative justice aspect in relation to admission to schools.

The NDE did not report any acts of maladministration and/or corruption committed during the reporting period. Although nothing pertaining to maladministration and/or corruption was brought to the KZNDEC's attention, the KZNDEC has introduced the following measures to deal with such issues:

- appointed a Chief Financial Officer;
- introduced extensive additional financial control measures, asset and personnel management systems;
- advocated the reporting of fraud, corruption and maladministration; and
- resolved to take effective steps against convicted transgressors.

### **Budgetary Measures**

Like the GET band, the FET Sector seems to be experiencing problems in the areas of project management and procurement processes. Some of the common problems cited in both the GET and FET bands in the areas of project management and procurement processes comprise understaffing and delay in the delivery of account printing works. Most PEDs did not respond to the questions posed in this section nor provided reasons for doing so.

The ECDE did not explain how the under-expenditure occurred, except mentioning that the under-expenditure occurred in the LSMs and School Building Programmes. It is disturbing that some departments do not even know how much they spent in previous financial years. The ECDE indicated that its budget allocation was inadequate for the financial years 2000/2001 but the department experienced under-expenditure in that financial year. This situation calls on the department to spend better instead of asking for more funds.

### *Technical Colleges*

The GDE under-spent in this programme in the financial year 2001/2002. The under-expenditure was ascribed to 'the financial system that made it difficult with long tender processes.' It is important that government departments do programme review regularly to ensure that their programmes do serve the purpose that they are intended for when instituted.

The under-expenditure that occurred in the GDE or in any other government department short-changes the beneficiaries in that particular programme. In the *Grootboom* judgment, for the State to progressively realise a right it 'should examine legal, administrative, operational and financial hurdles, and where possible, lower

these over time.’ In this case, it appears that the GDE has not been taking stock of the programme since the same problems have been recurring in three consecutive financial years. This kind of a situation needs to be carefully looked into, given that most students enrolled in the Technical Colleges are paying for themselves as the HRSC findings indicate.

### *Vulnerable and Marginalised Groups*

The GDE gave an elaborate account on how the programme caters for these groups in their budget allocation. Only four categories of the vulnerable and marginalised groups will be referred to here. For “persons living in informal settlements”, the GDE reported that it experienced increased migration and annual growth of learners’ demands for additional classrooms annually. It links the demand of additional classrooms to the provision of basic services such that it promised to build 500 classrooms in 2002/2003. In selecting learners for projects, it gives more consideration to women. For “persons living with disabilities”, the GDE reported that it is making institutions accessible to these learners by providing infrastructure and necessary facilities. Regarding “persons living with HIV/AIDS,” programmes on HIV/AIDS are offered at colleges, which also comprise support in social and economic areas hard hit by the pandemic.

The KZNDEC reported that Skills Centres have been established for the training of various categories of vulnerable and marginalised groups. Furthermore, the department reported that it has embarked on a Professional Researched Needs Analysis that takes into account the provincial population, growth and development points and the situation of business in the province. This is an attempt by the department to partner with the private sector to provide training to the said categories of vulnerable and marginalised groups. Another partner the department is working closely with is the Department of Labour. The Departments of Labour and Education ascertain unemployment levels and skills training needs, taking into account the Sector Education and Training Authority’s (SETA) available financial resources.

The NWDE indicated that it considers the beneficiaries when allocating funds to the programme. For instance, tutors and lecturers were trained on dealing with people infected and affected by HIV/AIDS. The WCDE reported that in its budget allocation for this programme it does consider the vulnerable and marginalised groups. For example, for “persons living in informal settlements,” the department has established Skills Development Centres in these areas: Thembalethu near George in the Southern Cape as well as in the Noordhoek Valley at Masipumelele informal settlement. Some initiatives to establish more Skills Centres have also been initiated in Caledon and Paarl.

Regarding the “low-income groups,” the department endorses and encourages the work of the Technical College Student Aid Trust, whose mission is to provide financial assistance to learners from low-income backgrounds. Lastly, a Pilot Support Programme has been developed for colleges to include learners with disabilities. This is also seen through the adaptation of physical facilities in order to make them more accessible to learners with physical disabilities.



### *Secondary Education*

In the financial year 2000/2001 the NWDE under-spent drastically and did not provide the actual expenditure figure for the 2001/2002 financial year. One point that is not clear is that the NWDE sought funding from donors, including the private sector to augment its allocation for this programme when it had under-spent in the financial year 2000/2001. If it had furnished the HRC with a figure for the financial year in question, it would have been easier to monitor and analyse its expenditure patterns. The WCDE's statement that the 'surplus' seen in the table for this programme is as a result of its 'prudent fiscal hand' is not an easy one to believe given that at one stage the department experienced shortages of teachers, classrooms, books and equipment such that its budget had to be augmented eventually.

### *Vulnerable and Marginalised Groups*

The ECDE reported that since the province is predominantly rural, it spends most of its funds on the rural areas. It was further reported that the budget allocation for 2002/2003 was allocated to schools according to poverty rating as per the Policy on Norms and Standards for School Funding. According to the KZNDEC, the criteria used to allocate funds to the programme do take into account the following categories of vulnerable and marginalised groups:

- persons living in rural areas
- persons living in informal settlements
- persons from low-income groups
- persons with disabilities

The WCDE reported that the Policy on Norms and Standards for School Funding favours the poor learners of which a number of vulnerable and marginalised groups are part, including persons living in rural areas, low-income groups as well as persons living in informal settlements. The department further reported that the White Paper on Inclusive Education takes care of "learners with disabilities."

### *School Building Programme*

One of the common weaknesses across the departments that reported on this programme relate to financial management and procurement processes specifically in the case of the WCDE. Other provinces, including the WCDE, cite inadequate budget allocations and hence over-spent. Over-expenditure might, of course, be a corollary to overwhelming needs of the people as some departments do say in their responses to questions relating to budgetary measures. However, it is important to remember that the MTEF and the Public Finance Management Act (PFMA)<sup>90</sup> guide government

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<sup>90</sup> Section 16 (1) of the PFMA provide that:

- The Minister may authorise the use of funds from the National Revenue Fund to defray expenditure of an exceptional nature which is currently not provided for and which cannot, without serious prejudice to the public interest, be postponed to a future parliamentary appropriation of funds. Section 25 (1) of the PFMA provides that:
- The MEC for finance in a province may authorise the use of funds from that province's Provincial Revenue Fund to defray expenditure of an exceptional nature which is currently not provided for and which cannot, without serious prejudice to the public interest in the province, be postponed to a future appropriation by the provincial legislature.

departments' expenditure, particularly on the use of funds in emergency situations, adjustments budgets and unauthorised expenditure. Therefore, over-expenditure may only take place under the circumstances outlined in the PFMA, if not, such over-expenditure becomes unauthorised.<sup>91</sup>

In some instances government departments might have followed the applicable procedures, referred to in this document as outlined in the PFMA, in spending or augmenting their budgets. What becomes a problem is that most government departments do not mention this in their reports to the HRC such that it appears as unauthorised expenditure in the eyes of the HRC.

In the financial year 2000/2001 the GDE experienced under-expenditure which is likely to have contributed to some learners being taught in overcrowded classrooms and thereby making the situation not conducive to learning and teaching. The shortage of instruction rooms also forces learners from areas where there are no schools to travel and/or walk long distances to receive education. If the financial resources allocated to the School Building Programme are used efficiently and effectively problems such as shortage of instruction rooms that result in overcrowding could be minimised.

It was reported that since 1996, there has been a decline in the number of schools that had buildings in excellent and good conditions and an increase in the number of schools that reported weak and very weak buildings.

- In 1996, 11 003 schools reported that they had excellent and good building conditions. This number decreased to 5 078 in 2000
- Schools that reported weak and very weak buildings increased from 4 377 in 1996 to 9 375 in 2000<sup>92</sup>

The above report indicates the lack of maintenance on infrastructure. Even if more schools can be built, if they are not maintained, the School Building Programme becomes self-defeating. However, in the School Register of Needs 2000 Survey, the NDE cites the use of different methodologies in conducting the 1996 and 2000 surveys as a possible reason for the reported increase in the number of weak and very weak buildings referred to above.

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<sup>91</sup> Section 34 of the PFMA clarifies this point even further:-

- (1) Unauthorised expenditure does not become a charge against a Revenue Fund except when-
- (a) the expenditure is an overspending of a vote and Parliament or a provincial legislature, as may be appropriate, approves, as a direct charge against the relevant Revenue Fund, an additional amount for that vote which covers the overspending; or
- (b) the expenditure is unauthorised for another reason and Parliament or a provincial legislature, as may be appropriate, authorises the expenditure as a direct charge against the relevant Revenue Fund.
- (2) If Parliament or a provincial legislature does not approve in terms of subsection
- (1) (a) an additional amount of any overspending, that amount becomes a charge against the funds allocated for the next or future financial years under the relevant vote.

<sup>92</sup> Kader Asmal, MP, Minister of Education, *The National School Register of Needs 2000 Survey*.

### *Vulnerable and Marginalised Groups*

The ECDE reported that its allocation criteria recognise the needs of low-income groups, persons living in rural areas, and communities/persons living in informal settlements. The latter category is provided with prefabricated classes whilst the former categories of vulnerable and marginalised groups are given a priority in the allocation for the programme. The GDE reported that in allocating resources to the programme, it does cater for communities/persons living in rural areas, communities/persons living in informal settlements, low-income groups, and persons with disabilities. For the first category of vulnerable and marginalised groups, (which includes communities/persons living in rural areas, communities/persons in informal settlements and low-income groups), the department has already set aside R2,8 million to move learners from dilapidated to decent buildings. An additional amount of R2 million has been set aside for the repairs to rural/farm schools.

Regarding the second category of vulnerable and marginalised groups, (comprising communities/persons living in rural areas), the department prioritises new school buildings based on need. Informal settlements that become permanent residential areas are given priority in this programme, and these are areas that are also characterised by the third category of vulnerable and marginalised groups, namely, low-income groups.

The historically disadvantaged racial groups (African, Coloured and Indian) are catered for through the White Paper on Inclusive Education such that all new schools are now built with access facilities for persons with physical disabilities. Ramps are currently being built in older schools to fully accommodate this category of vulnerable and marginalised groups. However, the response only showed how the department provides for the physically disable; it did not say how it provides for other disabilities, for instance, blindness. The KZNDEC did not elaborate on how it considers the needs of the vulnerable and marginalised groups when allocating resources to the programme.

The NCDE reported that in its budget allocation for the programme it did consider the vulnerable and marginalised groups. For instance, most infrastructure development happens in the rural areas of the province. According to the department, persons with disabilities are accommodated through the White Paper on Inclusive Education, which is reflected in the modification of ordinary schools through the building of ramps, toilets and other specialised facilities.

### *Learner Support Materials (LSMs) Programme*

The KZNDEC's submission that some schools have to use their own money to purchase LSMs is disturbing. The NDE makes a budget allocation to all the PEDs, specifically for the purchase of LSMs on an annual basis. As per section 21 of the South African Schools Act 84 of 1996, the NDE, through the Head of Department, allocates functions with financial implications to schools that are considered to have the capacity to manage financial matters.<sup>93</sup> The procurement and delivery of stationery and textbooks happens to be one of the functions that are assigned to

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<sup>93</sup> These schools are sometimes referred to as section 21 schools.

section 21 schools. However, according to the Fifth Report on the Provinces to the President from the Minister of Education, May 2002, PEDs were required to report on deliveries made to section 21 schools. Only the Northern Cape and Western Cape provided the reports on the programme. The other seven PEDs did not report on the performance of the section 21 schools. The Northern Cape reported that schools with assigned functions had provided approximately 97.82 per cent of all LSMs required. The percentage includes grades 5 and 9 requirements and a top up of LSMs in the remaining grades.

The WCDE reported that some of the schools did not order stationery as they had enough stock available from the previous year.<sup>94</sup> It is worrying that some schools, both section 21 and non-section 21, did not report to the Minister of Education on their performance on the delivery of LSMs to schools before they opened in January 2000. As a result, in his quarterly report referred to above, the Minister had the following to say about delivery on the LSMs programme:

... it can be concluded that the delivery of textbooks has not been managed as well as it should have been in most provinces. Only four provinces Free State, Northern Cape, North West and Western Cape appear to have reached the 75 per cent level of delivery by the time schools opened.

The ECDE and WCDE's submissions that since stationery and textbooks are purchased on an annual basis, expenditure on textbooks becomes smaller should be happening in all the PEDs. All the schools should develop effective textbook retrieval systems to avoid textbook losses to subsequently spend less on this item.

#### *Vulnerable and Marginalised Groups*

In considering the vulnerable and marginalised groups in its budget allocation for the programme, the ECDE reported that the Policy on Norms and Standards for School Funding is biased towards the vulnerable and marginalised category of learners. Regarding the consideration of vulnerable and marginalised groups in allocating the budget for the programme, the KZNDEC reported that it considers the following categories albeit without saying how exactly it considers these categories:

- schools/persons in rural areas
- schools/persons in informal settlements

In making allocations to the LSMs programme, the NCDE reported that it gives consideration to the vulnerable and marginalised groups through the use of the Policy on Norms and Standards for School Funding, which takes into account poverty levels of schools, learners and communities around schools. However, the department reported that there were no provisions for refugees and asylum seekers. The WCDE reported that in making allocations for the LSMs programme, it does consider the needs of the vulnerable and marginalised groups. Nevertheless, it did not say exactly how this is achieved.

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<sup>94</sup> Kader Asmal, MP, *Fifth Report on the Provinces to the President from the Minister of Education*, May 2002.

## **NAP Indicators**

### Gauteng: Indicators on the NAP

The statistics on the number of secondary schools in farming communities are unbelievable. The GDE should know how many schools are built on farms. In cases where information is non-existent, the GDE should ensure that it has the records of all the schools from physical conditions to textbook stocks to help align provincial planning across various areas.

### KwaZulu-Natal: Indicators on FET (Secondary Schools)

The learner/educator ratio of 38:1 is more by 6 percentage points<sup>95</sup>, and this is relatively high. This might be attributed to classroom shortages or a decline in educator numbers. However, the Register of Needs Report, 2000, has the following finding:

A decrease (1.3 per cent) in the number of educators nationally from 370 599 in 1996 to 365 965 was reported. The largest number and share of educators are in KwaZulu-Natal (21.1 per cent), while the Eastern Cape reported the largest increase (3 929) in the teaching service.

Regarding the matriculation results pass rate, the KZNDEC provided very meagre information. It only reported that out of 95 407 matriculation learners who wrote the examination 54 696 passed. Of the 54 696 learners who passed the examination, only 15 607 obtained university exemptions.

### KwaZulu-Natal: Indicators on the NAP

The statistics for all the indicators in table 11 are relatively high; more drastic action needs to be taken to bring down such high statistics on all the areas in the table. Almost all the indicators in the table directly affect the realisation of the right to education. Libraries, toilet facilities, computer facilities and so forth, are crucial to the realisation of the right to education. The government's effort to compile a School Register of Needs Survey Report as a planning tool is highly appreciated. However, a more vigorous action is required from the side of government, in conjunction with other stakeholders, to address the plight of the impoverished schools.<sup>96</sup>

Improvements in access to technology were noted but significant provincial variations still exist. 6 616 (24.4 %) schools indicated that they had access to computers (used for any purpose including administration, teaching and learning). Just over 70 % (19 094) of schools are still without computers for any purpose, mainly in the more rural provinces.

In 1996, 2 335 (8.7 per cent) of schools had 16 359 computers for teaching and learning between them whereas in 2000 there were 3 351 (12.3 per cent) schools with

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<sup>95</sup> The national average learner: educator ratio is 32:1.

<sup>96</sup> Studying table 15 closely, (North West province: Indicators on the NAP) the indication is that infrastructure backlogs in various areas of the schooling system in North West deserve the government's utmost attention.

70 711 computers between them. The number of computers for teaching and learning has quadrupled since 1996.<sup>97</sup>

#### North West: Matric Pass Rate

Studying the NWDE's table carefully, it can still be observed that very few matriculation learners passed with university exemption during the year 2000. At face value, the 2000 year's pass rate looks good given that well above half the matriculants passed the examination (approximately 56 per cent). However, on further analysis of the results, one finds out that only about seven per cent of the 56 per cent who passed matriculation obtained matriculation exemption. Comparing the previous year's results to the 2000 results, there appears a picture worth examining. In 1999 about 50.3 per cent of matriculation learners passed their examination. Of the 50.3 per cent, about 13 per cent obtained university exemption. The NWDE did not supply the HRC with information on the disabled learners.

#### Mpumalanga: Indicators on Further Education and Training (Secondary Schools)

The reported learner:educator ratio for the Mpumalanga province (34:1) is only 2 percentage points higher than the national average learner:educator ratio of 32:1, which is still tolerable. However, it is surprising that the same province reported the highest learner: educator ratio (39:1) in 2000, 7 points higher than the national average.<sup>98</sup>

#### Western Cape: Matric Pass Rate

The Western Cape matriculation results for 2000 are promising at face value. 79.4 per cent of learners passed the matriculation examination. Of this percentage 23.9 per cent obtained university exemption. Comparing the year 2000 results to the 1999 results, one finds that 78.7 per cent of learners passed the examination. Of this 78.7 per cent only 24.4 per cent obtained university examination. The WCDE did not provide the HRC with statistics on provincial literacy rates.

#### Western Cape: Indicators on the NAP

The table shows a number of areas in which government and other concerned stakeholders still have to do some considerable work that would contribute towards the progressive realisation of the right to education. However, other areas require the state's urgent attention. Such areas comprise the following:

- the lack of electricity in 47 secondary schools;
- the inadequate toilet facilities in 71 secondary schools (this is also a health hazard); and
- the inadequate textbooks in 64 per cent<sup>99</sup> of secondary schools in the Western Cape.

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<sup>97</sup> Department of Education, *Brochure for the 2000 School Register of Needs Report*.

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

<sup>99</sup> This is a disturbing state of affairs as this figure translates into about 950 of secondary schools without adequate textbooks. The inadequacy of textbooks in these schools hampers the education of

The WCDE's lack of statistics on secondary schools located in farming communities is problematic. Such information is crucial to the department's integrated planning.

## 7. RECOMMENDATIONS

The already existing collaboration between the Departments of Labour and Education and the private sector should be strengthened to involve more partners from the private sector. The involvement of the private sector partners in education is crucial since the private sector is in a better position to establish the skills and knowledge required in the labour market. More teachers should be trained appropriately to teach Science and Mathematics to help increase the number of learners who would do Mathematics on Higher Grade. The emphasis on Mathematics and Science is necessary to address the skills shortage in SET.

Currently, the matriculation pass rate is used as an indicator of performance in the schooling system and that learners are not performing up to the expectation. It is generally accepted that South Africa's education outcomes are poor relative to the high level of resources allocated to education.<sup>100</sup>

**Table 20** The following table shows the matriculation failure and exemption rates, 1996 – 2000

	No. of candidates	No. of candidates that failed	Matriculation failure rate (%)	Matriculation exemption (%)
1996	513868	234381	45.6	15.6
1997	558970	294175	52.6	12.5
1998	552384	279896	50.7	12.6
1999	511159	261328	51.1	12.5
2000	489941	206004	42.1%	14.0%

Source: IDASA

The above table clearly shows that South Africa needs quality education, which can only be achieved by better spending of the financial resources allocated to education. If Strategic Objective 1<sup>101</sup> of the government's HRD is to be achieved, the education system should be flexible enough to offer choices to learners. Therefore, the current education system has a direct bearing on the number of enrolments in SET in Technical Colleges and HET.

According to the study that was undertaken by the Human Sciences Research Council (HSRC) captured in the government's HRD, it was found that between 1993 and 1999 there has been a downward trend in HET in student enrolments in the humanities.

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learners. A drastic step needs to be taken to ensure that the state provides education to these learners within available resources in order to fully realise the right to education.

<sup>100</sup> Shameela Cassiem and Judith Streek, *Budgeting for Child socio-economic rights: Government obligations and the child's right to social security and education*, IDASA, 2001.

<sup>101</sup> Strategic Objective 1, Improving the foundations for human development, Mathematics and Science results. The following are part of the indicative action for the strategic objective:

- Increase number of candidates enrolling for these subjects, especially at the Higher Grade
- Identification and training of suitable teachers for these subjects
- Intervention strategies

Total enrolments in the humanities decreased from 57 per cent to 49 per cent, business/commerce enrolments increased from 19 per cent to 26 per cent, and science, engineering and technology (SET) enrolments improved marginally from 24 per cent to 25 per cent during this period. The movements are in the right direction although the growth in SET is still insufficient to meet national priorities. Increases in SET are restricted by the fact that only 25 000 matriculants per year are obtaining exemptions in Mathematics on the higher grade. In the N1 – 3 provision, 54.4 per cent of learners are enrolled in Engineering Studies and 30 per cent in Business Studies. In the post-school N4 – N6 band, this ratio is reversed with 71.9 per cent enrolled for Business Studies and only 16.5 per cent in Engineering Studies. These figures are problematic, particularly given the importance of producing sufficient skilled and highly skilled technical personnel needed in the South African labour market currently and in future.<sup>102</sup>

### **Curriculum Development**

The current economic and social conditions require that learning institutions offer relevant programmes, that is, an education that offers solutions to today's problems and challenges. It is, therefore, important that government, through SETAs, National Skills Authority and Provincial Skills Development Forums, collaborate with the private sector to directly address the question of skills shortage in the country through a responsive curriculum. The current move that sees the FET Curriculum as outcome-based and learner-centred and vocationally specific (offered in Technical Colleges) as it offers both general/academic and vocational (offered in schools), might also help in encouraging learners to take Mathematics as it has a fundamental component that comprises Communication and Mathematics and restricted choice of electives.

The Report of the Ministerial Investigation into the Senior Certificate notes that the Senior Certificate serves three different purposes, failing to achieve any of them successfully. It serves as a school leaving certificate but is not attained by the majority of learners who leave school. It serves as a university screening mechanism but is only effective as a predictor of success among high scoring students. It serves as an employment screening mechanism but does not address work-related competences and is not perceived by employers as a particularly good indicator of success.<sup>103</sup>

Therefore, the current proposal to replace the Senior Certificate (obtainable in grade 12) with the Further Education and Training Certificate (FETC) is a progressive step by the NDE. Nonetheless, this is dependent upon whether the newly proposed curriculum would address this and other related challenges within this sector since the primary purpose of the FETC is to equip learners with the knowledge, skills and

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<sup>102</sup> Human Resource Development Strategy for South Africa: A Nation at Work for a Better Life for All, 2000.

<sup>103</sup> FETC Policy document, February 2001.

(<http://www.saqa.org.za/publications/pol-docs/fetc.html>) Site visited on 14 August 2002.



values that will enable meaningful participation in, and offer benefits for, society. This will also provide a basis for continuing learning in Higher Education and Training, and thus enable learners to be productive and responsible in the workplace.

## 8. CONCLUSION

The South African education system is currently feeling the impact of the ‘new economy’ changes. According to the study conducted by the HSRC in KwaZulu-Natal, the labour market has become dysfunctional. One of the highlights of the study is the collapse of the structured apprenticeship-technical labour market that ensured the placement of most of the young graduated white artisans in the racially exclusive labour markets of the 1940s–1970s. The following paints a clear picture of both the previous and current scenarios:

In the era of great apartheid economic boom (late 1950s to early 1970s) almost all students at Technical Colleges were apprentices who were sponsored by industry to study mainly technical/engineering fields. They trained part-time in block release format, working for their employer for the rest of the time. They had access to work experience and received practical training from senior artisans on the shop floor. In the period since the statutory de-racialisation of the apprenticeship system (1981), and more recently with the rapid de-racialisation of Technical Colleges (since 1994), these social conditions have been dramatically inverted. 90 per cent of students in Technical Colleges are now black. Most study full-time with no employer sponsorship. Job placement rates after training are estimated to be at an average of about 15 per cent. Employer indenturing of new apprenticeship has dropped dramatically.<sup>104</sup>

The scenario described above requires commitment from all the sectors, public/government and private to work together to help the country gain the skills that it requires particularly in those fields that display skills shortage. The introduction of learnerships in all the nine provinces is a good move by government; it should be a continuous process that would also help the youth that does not have work experience.

Youth unemployment impacts principally on two groupings – the immediately out-of-school youth but also those young people who have not had any previous experience. Unemployment is the highest amongst this latter category.<sup>105</sup>

Initiatives such as the Colleges Collaboration Fund (CCF) formed between government and private sector in Cape Town in October 1999 should be supported and strengthened to make the FET Sector a vibrant and a responsive one to the needs of the country’s economy. The Business Trust injected an amount of R100 million

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<sup>104</sup> *Ibid.*

<sup>105</sup> HRD: A Nation at Work for a Better Life for All, *op.cit.*, p. 40.

into the CCF with an aim of transforming the vocational education in Technical Colleges so that they meet the needs of the 21<sup>st</sup> century.<sup>106</sup>

If graduates receive relevant education and experience, chances are that those who cannot find employment can create some thereby contributing to the economy of the country through their participation in the Small Micro and Medium Enterprises (SMMEs) sector. The exclusion of blacks from participating meaningfully in the economy can no longer be allowed as it now affects the entire country negatively.

The relationship between the Departments of Education and Labour and the private sector is a step in the right direction if the state is to succeed in making education responsive to the country's economic and social needs. This relationship between these parties is desirable and highly commendable. Co-operation between the two government departments and the private sector could be utilised to provide relevant skills to the qualified but unemployed and out-of-school youth.

The government's Human Resource Development (HRD) Strategy for South Africa highlights a number of challenges facing the FET and HET bands, including the following:

- Learning in areas of scarce skills;
- Placement rate of FET and HET graduates; and
- Labour market discrimination.

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<sup>106</sup> Delien Burger, *South African Yearbook*, Government Communication and Information System, 2001/2002.

## **ABBREVIATIONS**

<b>CCF</b>	Colleges Collaboration Fund
<b>ECDE</b>	Eastern Cape Department of Education
<b>FET</b>	Further Education and Training
<b>FETC</b>	Further Education and Training Certificate
<b>GDE</b>	Gauteng Department of Education
<b>HET</b>	Higher Education and Training
<b>HRC</b>	Human Rights Commission
<b>HRD</b>	Human Resource Development Strategy for South Africa
<b>HSRC</b>	Human Sciences Research Council
<b>KZNDDEC</b>	KwaZulu-Natal Department of Education and Culture
<b>LDE</b>	Limpopo Department of Education
<b>LSMs</b>	Learner Support Materials
<b>MEC</b>	Member of Executive Committee
<b>MDE</b>	Mpumalanga Department of Education
<b>NAP</b>	National Action Plan
<b>NCDE</b>	Northern Cape Department of Education
<b>NDE</b>	National Department of Education
<b>NWDE</b>	North West Department of Education
<b>PEDs</b>	Provincial Education Departments
<b>PFMA</b>	Public Finance Management Act
<b>SET</b>	Science, Engineering and Technology
<b>SETA</b>	Sector Education and Training Authority
<b>SMMEs</b>	Small Medium Micro Enterprises
<b>SRC</b>	Student Representative Council
<b>WCDE</b>	Western Cape Department of Education

## HIGHER EDUCATION AND TRAINING (HET)<sup>107</sup>

### 1. POLICY AND PROGRAMMATIC MEASURES

After the release of the National Plan for Higher Education (NPHE)<sup>108</sup> in March 2001, the Minister of Education appointed the National Working Group (NWG)<sup>109</sup> to advise him on finding the appropriate arrangements for restructuring the regional provision of higher education. There were to be development of new institutional and organisational forms, including institutional mergers and rationalisation of programme development and delivery.

### 2. LEGISLATIVE MEASURES

The NDE did not report any legislative developments for the reporting period.<sup>110</sup>

### 3. BUDGETARY MEASURES

**Table 1** University Education

Year	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure	Actual expenditure
2000/2001	5 001 000	67	15 291	5 001 000	5 001 000
2001/2002	5 355 000	66	16 332	-	5 355 000

The dash (-) in all the tables denotes that the information requested was not made available to the Commission.

#### *Accounting for variance between the financial years*

The budget allocations of the government are transfer payments, which the higher education institutions may use as they see fit. Therefore, higher education institutions do not claim state subsidy on a regular basis, which might eventually result in an over/under-spending of state subsidies.

#### *Budget adequacy*

According to the NDE, the budget for higher education for the said financial years was sufficient. Moreover, the funding formula was adjusted to increase funding for institutions such as UNITRA, MEDUNSA and Fort Hare. However, the department did mention that generally, funding levels of the majority of higher institutions has been gradually decreased over the past few years.

<sup>107</sup> Unlike the GET and FET bands, the HET band is a competence of the NDE. However, simple as this may sound, it is a complex band of the education system. For instance, the NDE does not get involved with the daily running of the higher education institutions; instead it is more concerned with issues of national policy such as access to these institutions; quality of education offered by these institutions; equity in the appointment of staff and student enrolment, funding of these institutions, and so forth. Therefore, the role of the NDE/government is regulatory in its nature.

<sup>108</sup> [http://education.pwv.gov.za/Policies%20Reports/2001\\_Report/Restruc.../Index.ht](http://education.pwv.gov.za/Policies%20Reports/2001_Report/Restruc.../Index.ht)

The Restructuring of the Higher Education System in South Africa. Site visited on the 3<sup>rd</sup> of September 2002.

<sup>109</sup> *Ibid.* p. 1.

<sup>110</sup> This refers to 1<sup>st</sup> April 2000 to 31<sup>st</sup> March 2002.

**Table 2 Technikon Education**

Year	Total allocation in Rand(s)	Allocation as % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure	Actual expenditure
2000/2001	1 977 000	26	10 752 000	1 977 000	1 977 000
2001/2002	2 104 000	26	11 875 000	2 104 000	2 104 000

*Accounting for variances between the financial years in the table*

See the same section under “University Education” table.

*Budget Adequacy*

The budget allocation for technikons was said to be sufficient.

**Table 3 National Student Financial Aid Scheme (NSFAS)**

Year	Total allocation in Rand(s)	Allocation as % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure	Actual expenditure
2000/2001	444 000	6	6 712	444 000	444 000
2001/2002	450 000	6	-	450 000	450 000

*Budget Adequacy*

The NDE reported that most higher education institutions were able to spend all their funds. Unspent funds at some higher education institutions owing to administrative restrictions applicable to those institutions were re-allocated to other institutions in need of financial resources.

**4. INDICATORS**

**Table 4 Tertiary Education**

	Universities	Technikons
Learner/Educator Ratio	35	60
Total number of learners	407 401	202 730
Female	228 462	93 832
Disabled	-	-
African	218 615	148 236
Coloured	19 956	12 490
Indian	31 987	8 189
White	132 221	33 631
Indigenous groups	-	-
Refugees and asylum seekers	-	-

## 5. CRITIQUE

### Policy and Programmatic Measures

Currently, the dominating theme in the HET band is restructuring and transformation. This resulted in the rationalisation of some programmes and reduction of institutions of higher education from 36 to 22.<sup>111</sup>

The NPHE was the culmination of a wide-ranging policy process for the transformation of the higher education system, which started in the early 1990s.<sup>112</sup> The transformation and restructuring of the higher education includes merging and incorporation of, *inter alia*, financially unstable institutions and the rationalisation of facilities between some institutions through regional collaboration. Other important factors that were taken into account in the restructuring and transformation of the higher education system comprised the following:

- the size of student enrolment in an institution
- graduation rates<sup>113</sup>
- weak leadership and governance structures<sup>114</sup>
- the size of research output<sup>115</sup>
- the quality of educational processes<sup>116</sup>
- student drop-out rates<sup>117</sup>

There is a profound contrast between the Historically Black Institutions (HBIs) and Historically White Institutions (HWIs). In the words of the Minister of Education:

The origins of the current institutional structure of the higher education system can be traced to the geo-political imagination of

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<sup>111</sup> Not 21 as initially suggested in the NWG report on the restructuring and transformation of the higher education system in South Africa.

<sup>112</sup> See 2 supra.

<sup>113</sup> For example, during their study of the higher education system, the NWG found that:

- The Eastern Cape Technikon and Border Technikon had the lowest graduation rates in the technikon sector.
- The University of Port Elizabeth had graduation rates that were all below comparable national averages.
- In 2000 Fort Hare produced a total of only 536 graduates; of whom only 12 obtained masters or doctoral degrees.

<sup>114</sup> Currently, the University of Transkei and the University of the North (in Limpopo) are both managed by administrators.

<sup>115</sup> The NWG found that Fort Hare's research publication total had been below 50 units for a number of years.

<sup>116</sup> One of the recommendations made by the NWG for the Eastern Cape was that the Eastern Cape Technikon and Border Technikon be merged into one unitary institution to improve the quality of their educational processes, and to procure the additional resources that would be needed. According to the NWG, the data obtained on Vaal Triangle Technikon in Vanderbijlpark showed that there was considerable room for improvement with regard to the productivity of its educational processes.

<sup>117</sup> The NWG found that student drop-out rates at Vaal Triangle Technikon were higher than the national averages for the technikon system. It was also found that the Northern Gauteng Technikon had high rates of student dropping out without completing their qualifications.

apartheid's master planner, Hendrik Verwoerd, and his reactionary ideological vision of "separate but equal development."<sup>118</sup>

It is important to note that most of the problem areas identified by the NWG are more common in the HBIs of higher learning. By the same token there are also those features that are only peculiar to the HWIs of higher learning. It is worth referring to them as well; they comprise the following:

- staff and student inequity<sup>119</sup>
- financial stability<sup>120</sup>
- success rate of students<sup>121</sup>
- overlap in programme offerings<sup>122</sup>

The differentiation between the types of problems and challenges facing the HBIs on one hand, and those of the HWIs on the other, does not suggest that the two types of higher learning institutions do not share the same problems. For instance, the HBIs also do experience the problem of duplicating their programme offerings. However, much as there are those problems that are common to both types of institutions, almost all of the problems referred to above seem to be salient in each type of an institution. It is such salience that justifies the reconfiguration of the higher education landscape. In its report on the restructuring and transformation of the higher education system in South Africa, the NWG paints a clear picture of the current state of the higher education system in the country:

The structural inefficiencies, furthermore, have given rise to a range of systemic problems, which adversely impact on the effectiveness and efficiency of the higher education system. These problems, as the National Plan suggests, relates to the "overall quality and quantity of graduate and research outputs; management, leadership

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<sup>118</sup> [http://education.pwv.gov.za/Policies%20and%20R.../transformation\\_and\\_restructuring.ht](http://education.pwv.gov.za/Policies%20and%20R.../transformation_and_restructuring.ht) Transformation and Restructuring: A New Institutional Landscape for Higher Education, Ministry of Education, June 2002. Site visited on 11 July 2002.

<sup>119</sup> The University of Free State, Technikon Free State, Rand Afrikaans Universiteit (RAU) and the University of the Witwatersrand are a good example of this. The NWG found that the University of Free State and Technikon Free State are below national averages with respect to staff equity. The NWG also found that the University of the Witwatersrand had made good progress in achieving equity in its student body, however, there was still more room for improvement in terms of achieving equity in its academic and administrative staff profiles. Regarding RAU, the NWG had the following to say:

Likewise, Rand Afrikaans Universiteit has gone through a process of transformation in which black students are now slightly in the majority in overall enrolments, and where English has become one of the languages of tuition. Notwithstanding this, a great deal still needs to be done to correct the imbalances in demographic profile of the contact student body, which to date remains as much as 70 per cent white.

The institution also needs to move towards a more satisfactory degree of representivity among academic and administrative staff.

<sup>120</sup> The NWG found that the University of the Witwatersrand and Rand Afrikaans Universiteit are stable, well managed and in good financial positions.

<sup>121</sup> In the case of the University of Pretoria, the NWG found that the different success rates of students, particularly those of African students in undergraduate contact programmes are further signs of inequities at the university.

<sup>122</sup> The NWG proposed that RAU, the University of the Witwatersrand and University of Pretoria rationalise some of their programmes offerings.

and governance failures; lack of representative staff profiles; institutional cultures that have not transcended the racial divides of the past; and the increased competition between institutions which threaten to fragment further the higher education system.<sup>123</sup>

The issues of distribution of students in various study fields, staff and student equity, drop-out student rates and success rate of students need to be brought to the fore and be addressed as a matter of urgency. The rationale for according these issues urgency stems from their location in the HWIs.

#### *Distribution of students in various fields of study*

This is one challenge facing the higher education system. The distribution of students across the various fields of study has improved, however, they are still skewed both in terms of race and gender.

The rapid increase in African students, however, masks an equity similar to that of female students. Large proportions of African students were in 1999 enrolled in distance education programmes, most of which were humanities and teacher-upgrade programmes. The numbers and proportions of African students in programmes in science, engineering and technology and in business/management remained low in 1999. Postgraduate enrolments across most fields are also extremely low.<sup>124</sup> Female students tend to be clustered in the humanities, and in particular, teacher education programmes. They remain seriously under-represented in science, engineering and technology and in business and management. These are programmes that produce higher levels of private benefits to successful graduates than those in education and in the humanities. (Quoted in the NPHE document).<sup>125</sup>

A recommendation by the Human Sciences Research Council (HSRC) to government is as follows:

Data will need to be continuously collected, analysed and acted upon in future – especially to measure and promote black student participation in post-graduate programmes and fields of study such as medicine, law and engineering.<sup>126</sup>

#### *Staff and student equity*

Black students (and specifically African students) are now in the majority in South Africa's HET institutions. This is an improving

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<sup>123</sup> Human Resource Development Strategy for South Africa

<sup>124</sup> [http://education.pwv.gov.za/DoE\\_Sites/Higher\\_Education/.../CHE\\_Report30June2000.htm](http://education.pwv.gov.za/DoE_Sites/Higher_Education/.../CHE_Report30June2000.htm)  
Towards a New Higher Education Landscape: Meeting the Equity, Quality and Social Development Imperatives of South Africa in the 21<sup>st</sup> Century, 30 June 2000. Site visited on 10 July 2002.

<sup>125</sup> *Ibid.* p. 18.

<sup>126</sup> Human Resource Development Strategy for South Africa: A Nation at Work for a Better Life for All, 2000. p. 9.



trend, but inequalities in the staffing of institutions still prevail. In 1998, whites still constituted 80 per cent of academic staff in HET, with Africans at 12 per cent, Coloureds at 3 per cent, and Indian academic staff at 5 per cent.<sup>127</sup>

It should be recalled that most of the HWIs were not directly affected by the process of restructuring and transformation. Most of their challenges are more internal, including the three referred to above. This is one area which government will have to monitor through the setting of clear and realistic targets. The internal transformation envisaged in NWG Report will not and cannot happen by itself; the government needs to steer the middle ground to achieve this goal. The following excerpt makes the point clearly on this matter:

As a general rule, states parties are obliged to fulfil (provide) a specific right in the Covenant on Economic, Social and Cultural Rights when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.<sup>128</sup>

#### *Drop-out student rates*

Whilst the Council on Higher Education was able to establish the number of first-time entering undergraduates who drop out of university and technikon each year, they did not provide the causes of these alarming statistics on drop-out student rates. The only cause that seemed to be mentioned, indirectly so, is the lack of student academic development programmes. It would be useful to establish the number of students who drop out of higher learning institutions on other grounds such as financial challenges and family responsibilities.

#### *Success rates of students*

The NWG found that the success rates of students in some higher education institutions were low. The University of Pretoria and RAU are some of the institutions facing a challenge of ensuring that the success rates of their students improve. The different success rates of students, particularly those of African students in undergraduate contact programmes are further signs of inequities at the university.<sup>129</sup>

One way of dealing with this challenge is the design of effective academic development programmes to bridge the gap between high school and university environments. One of the inefficiencies raised in the report on restructuring and transformation of the higher education system is the issue of students who fail their courses but are retained in the institutions of higher learning without any assistance, such as, academic development programmes.

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<sup>127</sup> *Ibid.* p. 9.

<sup>128</sup> Committee on Economic, Social and Cultural Rights: Reports on the Twentieth and Twenty-First Sessions (26 April – 14 May 1999, 15 November – 3 December 1999), Economic and Social Council, Supplement No. 2, Official Records, 2000.

A number of students report poor success rates by course (averages of 70 per cent and below), low graduation rates (often 15 per cent or below), and yet record no academic exclusions. This means that their enrolment (and their subsidy student) totals are inflated by repeating students who have little or no prospect of completing their studies. Of course, such prospects are not unrelated to whether there are appropriate academic support and development initiatives at institutions.<sup>130</sup>

The need for appropriate academic development programmes to assist the students who are struggling academically cannot be over-emphasised. Students' academic performance needs to be monitored so that financial resources can be given to those students who show greater prospects of completing their academic programmes. The funding of students who keep failing burdens the state financial resources. Higher learning institutions should do everything possible to ensure that students who are struggling academically are given an equal opportunity with those who are coping academically.

#### *Vulnerable and Marginalised Groups*

According to the NDE, to address the needs of the vulnerable and marginalised groups, the department made amounts of R60 million and R30 million available to all higher education institutions in 1999/2000 and 2000/2001.

Regarding technikons the NDE's response was that historically black technikons operate on a 90 per cent government contribution ratio in the subsidy formula, whereas historically white technikons operate on an 80 per cent government contribution ratio.

The NSFAS supports academically deserving - but financially constrained students to obtain qualification in higher education. This is an efficient mechanism of redistributing resources to the underprivileged. Most students benefiting from the NSFAS are Africans.

#### **Budgetary Measures**

The funds should not have been reallocated to other institutions in case of universities; instead the administrative restrictions placed on the use of funds should have been dealt with to ensure that the institutions that had been allocated such funds use the funds.

Taking a closer look at the budget allocation for the higher education as a whole, it could be said that the budget allocation has increased in nominal terms compared to previous years. However, it can only be hoped that once the process of restructuring and transformation has taken off, better use of resources would help leverage the scarce financial resources. The report on transformation and restructuring in higher education endorses this view as well:

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<sup>130</sup> Towards a New Higher Education Landscape, CHE Reports, op. cit.

The Ministry has, however, decided that it would not require all institutions to submit three-year “rolling” plans in 2002. This is informed by the fact that the Ministry anticipates that the institutions affected by the merger proposals are likely to be preoccupied with assessing the implications of, and developing their responses to, the merger proposals. The additional requirement to submit three-year “rolling” plans would be beyond the capacity of most institutions.<sup>131</sup>

Whilst the NDE asserted that the funds allocated to the higher education institutions during the reporting period were sufficient, there is still a need to establish the number of students who drop out in the higher education band on financial grounds. The establishment of the National Student Financial Aid Scheme (NSFAS) in 1999 was a commendable step, however, more innovative ways still have to be found to leverage the scarce financial resources for higher education.

### **Indicators**

Whilst it is acknowledged that the enrolment of African and female students in the higher education institutions has increased compared to the previous years, it is disconcerting that the NDE did not furnish the HRC with information on the enrolment statistics of the following categories of vulnerable and marginalised groups:

- The disabled;
- Indigenous groups; and
- Refugees and asylum seekers.

It is important that the statistics on these categories of vulnerable and marginalised groups are considered for the purpose of government policy planning. Any programme that does not cater for the vulnerable and marginalised groups would not pass the *Grootboom* test of reasonableness:

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.<sup>132</sup>

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<sup>131</sup> *Ibid*, p. 19.

<sup>132</sup> *Grootboom*, op.cit.

## 6. RECOMMENDATIONS

Appropriate academic development programmes need to be put in place if the state financial resources are to be used efficiently and effectively. If such programmes are put in place and other related initiatives developed, clear policies on exclusions based on poor academic performance can then be applied. In addressing the issue of poor academic performance by students in the HET sector, the report of the Council on Higher Education on the Shape and Size of Higher Education goes even beyond the “common” definition of “equity”:

Equity should mean more than access into higher education. It must incorporate equity of opportunity – environments in which learners, through academic support, excellent teaching and mentoring and other initiatives, genuinely have every chance of succeeding. Equity, to be meaningful, is also ensuring that learners have access to quality education, and graduate with the relevant knowledge, competencies, skills and attributes that are required for any occupation and profession.<sup>133</sup>

It is important for government to come up with clear targets on issues such as student and staff equity to guide the internal transformation in higher learning institutions that were not directly affected by transformation and restructuring. Leaving such a process to higher learning institutions would not be a guarantee that the process indeed takes place meaningfully.

## 7. CONCLUSION

Whilst the State has taken a bold step in leading the transformation and restructuring of the higher education system, a few post-transformation and restructuring challenges still await the Ministry of Education and the rest of the constituencies. These include the Ministry of Education ensuring that:

- the reduction of the number of higher learning institutions from 36 to 22 does not amount to an arithmetics game, but to a process that enables the higher learning sector to respond positively to the socio-economic challenges the country is currently facing;
- those higher learning institutions that are not directly affected by the process of transformation and restructuring do not become the preserve of an entrenched culture of the few;
- those institutions not directly affected by the process of transformation and restructuring undergo the necessary internal transformation proposed in the NPHE, and realistic targets are designed to achieve this goal; and
- the National Institutes of Higher Education envisaged for Mpumalanga and the Northern Cape, do not produce an oversupply of their graduates like the apartheid government did particularly in the areas of education and humanities.

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<sup>133</sup> *Op. cit.* p. 9.

The CHE Report attests to the scenario referred to above:

In terms of national development needs, there is a greater concentration of students in the humanities and education fields relative to other fields. In 1999 about 15 per cent of all students in universities and technikons were following teacher training programmes and about 35 per cent other humanities programmes.<sup>134</sup>

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<sup>134</sup>*Ibid.* p. 18.

## **ABBREVIATIONS**

<b>CHE</b>	Council on Higher Education
<b>HBI</b> s	Historically Black Institutions
<b>HET</b>	Higher Education and Training
<b>HSRC</b>	Human Sciences Research Council
<b>HRC</b>	Human Rights Commission
<b>HRD</b>	Human Resource Development Strategy for South Africa
<b>HWI</b> s	Historically White Institutions
<b>NDE</b>	National Department of Education
<b>NPHE</b>	National Plan for Higher Education
<b>NSFAS</b>	National Student Financial Aid Scheme
<b>NWG</b>	National Working Group
<b>UNITRA</b>	University of Transkei



## CHAPTER 8

### ENVIRONMENTAL RIGHTS

#### 1. INTRODUCTION

The right to a clean environment and sustainable development is fundamental and closely connected to the right to health and well-being.<sup>1</sup> It is of fundamental importance to note that there is a strong connection between the quality of the environment and the health of the people living and/or exposed to those environments.

The responsibility for the provision of a safe and healthy environment is outlined in a range of legislation and different sections of the Constitution.<sup>2</sup> Section 24 of the Constitution provides that everyone has a right to an environment that is not harmful to their health and well-being; and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. The Constitution further places an obligation in terms of section 152 (1)(b) and (d) on the part of local government as stipulated in sections 4(2)(d)<sup>3</sup> and 4(2)(i),<sup>4</sup> 73(1) and (2) of the Municipal Systems Act 32 of 2000 to ensure that the right to a clean and healthy environment is fulfilled.

One of the greatest challenges facing South Africa and the rest of the world is to improve the quality of human life for both the present and future generations through sustainable development. The principle of *sustainability* of the environment encompasses the notion of *inter-generational equity*, that is, the harm to the environment affects the present as well as future generations, what Garret Hardin calls “the tragedy of the commons”.<sup>5</sup> Hence, the public needs to be properly and broadly informed regarding any threats to the environment, whether globally, regionally, nationally or locally.

The purpose and focus of this chapter is to give a brief overview of the analysis of government’s responses mandated with section 24 of the Bill of Rights. The departments responsible for ensuring the right to a clean and healthy environment are the national Department of Environmental Affairs and Tourism; Department of Water Affairs and Forestry; Department of Minerals and Energy; Department of Agriculture; Department of Health; the provincial departments of Environment and local government. The analysis includes assessing policy measures, legislation, budgetary measures and other measures taken by the government in order to progressively meet its constitutional obligation in terms of section 24 from April 2000 to March 2002.

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<sup>1</sup> Code of Ethics for Environmental Journalists, see <http://www.oneworld.org/slejif/ethics.htm>. Site visited on 04/08/02.

<sup>2</sup> The Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>3</sup> The sub-section states that the council of a municipality, within the municipality’s financial and administrative capacity and having regard to practical considerations, has the duty to strive to ensure that municipal services are provided to the local communities in a financially and environmentally sustainable manner.

<sup>4</sup> *Ibid.*

<sup>5</sup> Garret Gardin, “The Tragedy of the Commons” 162 *Science* (1968) 1243-1248.



Reference will be made to the Constitution, the *Grootboom* judgement,<sup>6</sup> Maastricht guidelines,<sup>7</sup> CEDAW,<sup>8</sup> and the other relevant international instruments in order to facilitate the analysis of the government responses as to whether the instituted measures did or did not progressively realise the right in question during the said period.

## **2. POLICY DEVELOPMENTS AND PROGRAMMATIC MEASURES**

The part below gives a brief summary of the analysis of government responses mandated with the right to environment. The departments executing the above mandate are the national Department of Environmental Affairs and Tourism (being the key department); Department of Water Affairs and Forestry; Department of Minerals and Energy; all the provincial departments responsible for the environment; including all the municipalities. Protocols were also sent to the national Department of Health and the Department of Agriculture, which are to some extent responsible for the environment.<sup>9</sup>

### **National Sphere**

#### **Department of Environmental Affairs and Tourism (DEAT)**

##### *Climate Change Strategy*

The programme is based on the Kyoto Protocol, which South Africa still has to ratify. The above protocol sets greenhouse gas emissions objectives for industrialised countries and is aimed at the reduction of greenhouse gases, hence benefiting both South African citizens and neighbouring States. The information could have been very useful for the SAHRC and the public if DEAT had indicated how both the South African and the neighbouring States citizens would benefit from this programme in order to give effect to the right in question.

##### *Pollution Control (PC) Programmes*

DEAT in collaboration with the Department of Trade and Industry (DTI) have announced a multi-point plan to address pollution problems and the health hazards

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<sup>6</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC).

<sup>7</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22-26 January 1997. See <http://www.law.uu.nl/english/sim/instr/maastricht.asp>. Site visited on 04/03/02.

<sup>8</sup> Convention on the Elimination of all Forms of Discrimination against Women.

<sup>9</sup> As with the national Departments of Environment, provinces also have the tendency of just listing the policy developments and programmatic measures without giving a brief description of those measures. Hence, this makes it difficult for one to comprehend what the measures are about, including their aims and objectives and whom these measures are intended to benefit, including the departments' achievement with regard to the implementation of these measures. The manner in which both the national and provincial Departments of Environment presented the information on programmatic and/or policy measures introduced towards the realisation of the right in question is not very informative and helpful for the reader to appreciate the measures introduced by government and to see how these adopted measures gave effect to the right to environment.

arising from the different types of pollution around most industrial areas, Durban South, being the departments' pilot site. What the department failed to report on was the type of pollution and health hazards both departments are intending to address in order to give effect to the right.

#### *Waste Management (WM) Programmes*

According to DEAT, the main focus of the waste programmes is on waste minimisation at source, re-use and recycling, whose central objective is sustainable utilisation. The programmes range from waste collection, recycling, re-use and composting.

#### *Coast Based Poverty Alleviation Projects*

According to DEAT, the aforementioned projects offer opportunities in subsistence fisheries and tourism, at the same time ensuring that the coasts are maintained in a clean and healthy state, so as to enhance their recreational state. What the department failed to indicate was how the above offer these opportunities and how sustainable these projects are in order for them to give effect to the right to a clean and healthy environment. Also of importance was for the department to indicate who are the beneficiaries of the above projects.

#### *Environmental Indicators Initiative*

According to DEAT, the above programme is based on NEMA<sup>10</sup> and that the environmental indicators can be used to enhance the current state of the environmental reporting. Those who will benefit from the programme are mainly provincial government and local authorities in order for them to come up with their provincial and cities' State of the Environment Reports (SoER) to help people be aware of their environment, that is, social, economic and biophysical.

#### *The establishment of the Transfrontier Conservation Areas*

The purpose of these areas is mainly to alleviate poverty by creating jobs for the unemployed and at the same time ensuring that the country's valuable resources are protected. DEAT indicated that so far the Kgalagadi, Great Limpopo, Lumbombo, Ais Richtersved and the Maluti-Drakensberg Transfrontier Parks have been established. It would have been very helpful if the department had indicated how the above could be achieved in order to give effect to the right to a clean and healthy environment.

#### *The National Environmental Education Project*

DEAT in collaboration with the Department of Water Affairs and Forestry (DWAF) and the Department of Education signed a partnership regarding the aforementioned project, which capacitates and supports teachers to effectively implement environmental learning in their curriculum. Of concern is that the department did not indicate what this new curriculum it is referring to entails.

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<sup>10</sup> National Environmental Management Act 107 of 1998.

*Pilot project(s) targeted at the proper disposal of medical waste*

DEAT indicated that it is working in collaboration with the Department of Health (DoH) on the aforementioned project, which is aimed at resolving the problem of the improper disposal of medical waste. The only problem is that the department failed to report on the manner in which this collaboration is hoping to achieve the above objective in order to enhance the right to a clean and healthy environment.

*Provincial State of the Environment Initiative (Provincial SoER)*

The above initiative is based on NEMA and is aimed at capacitating provinces in the compilation of their respective Provincial SoER and that the provincial departments mandated with the right in question are the main beneficiaries of the above initiative. The department indicated that so far, a lot has been achieved in line with the department's set goals, amongst others, securing donor funding and preparing training material(s).

**Department of Water Affairs and Forestry (DWAF)**

*White Paper on Basic Household Sanitation*

DWAF reported that the above policy was published during September 2001 and that its objective(s) are mainly intended at highlighting the impact of poor sanitation on the health of the people, their living conditions and the environment at large. Its focus is mainly at targeting the rural communities and those communities in informal settlements by providing basic household sanitation.

*Clean-up Programmes*

The above programmes' objectives are based on section 19 of the NWA.<sup>11</sup> The aim is mainly to ensure that the health of those communities living closer or in the vicinity of the waste disposal sites are not at risk. So far, the department has managed to ensure the proper removal of hazardous waste from these sites and in the process ensuring that the above waste is properly disposed off at the appropriate or licensed sites.

*Environmental Implementation and Management Plan (EIMP)*

DWAF reported that the above document was published on 14 December 2001 as required by chapter 3 of NEMA and that the department exercises those functions, which may both affect the environment and also involve the management of the environment. The only problem is that the department did not mention those functions that are to be exercised and the manner in which the exercise should be carried out.

*Forest Management*

DWAF indicated that the above programme is based on the National Forest Act (NFA) of 1998, the objectives of which are aimed at encouraging communities to manage forests in a sustainable manner in fulfilling their requirements in terms of

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<sup>11</sup> National Water Act of 1998.

wood, fruits, and medicines, amongst others. The department mentioned that with regard to the aforementioned programme, South African communities are the main beneficiaries, but failed to indicate how different categories of these communities will be benefiting from the above.

#### *National Monitoring Systems on Water Resources*

DWAF indicated that the above programme is based on section 137 of the NWA, its objective(s) being mainly to ensure collection of data in order to assess among other things, the quantity and quality of water resources as well as their intended use and rehabilitation programmes. Those benefiting from the programme are mainly the public at large, the water management institutions and DWAF.

#### *Water Quality and Water Resources Assessment*

DWAF reported that the above programme is based on section 137 of the NWA and the Water Quality Management Policy. Its objectives are mainly to encourage protection and sustainable use and management of water resources; research and development; public safety and disaster management and capacity building within DWAF's staff, local authorities, communities, amongst others.

Those benefiting from the above-programme are mainly communities, local authorities (especially those from disadvantaged groups) and DWAF's staff. Amongst DWAF's achieved goals the following were highlighted, the department managed to complete state of river reports in four major catchments; ensure that pollution in settlements was reduced; raise awareness with regard to the above-mentioned programme. In addition to this, the department ensured that the National Information Systems (NIFs) for surface water, ground water and water quality were fully operational.

#### *Working for Water Programme (WWP)*

According to DWAF, this is a multi-departmental project based on the NWA. The programme is aimed at alleviating poverty through job creations and those benefiting from WWP are the previously disadvantaged communities. The only problem is that DWAF failed to mention the other departments involved in this programme and the extent of their involvement. Also of significance, the department did not indicate how the previously disadvantaged would be benefited through the successful implementation of this programme in order for the above programme to give effect to the right to environment.

## **Department of Minerals and Energy (DME)**

*Policy concerning financial provision for the rehabilitation of land disturbed by mining activities*

*Policy concerning the granting of a certificate in terms of section 12 of the 1991 Minerals Act*

In terms of this policy, the holder(s) of a prospecting permit or mining authorisation remains liable for complying with the provisions of the Act until a certificate has been issued.

*Excellence in Mining Environmental Management (EMEM) Awards - for Excellence in Mining Environmental Management ongoing since 2000*

This programme is based on the White Paper for Minerals and Mining Policy for South Africa. The project's objective is mainly to ensure that the mining industry is motivated in ways to excel and continually improve in matters regarding their environmental endeavours. Furthermore, the programme aims at promoting technology transfer, raising public awareness regarding environmental management and promoting responsibility and regulation as far as environmental matters are concerned. Those benefiting from the programme are all government departments responsible in the regulation of mining or any aspect relating to mining in SA, communities affected by mining practices (including landowners) and the South African mining industry.

*Mining Legacy Programme (March 2002 and ongoing)*

This programme is based on the same policy mentioned under the EMEM programme and its main objective is to develop a holistic national strategy aimed at addressing pollution problems and rehabilitation measures at abandoned, and existing (operational) mines. The programme benefits those categories of people as outlined in the above EMEM programme. Amongst the department's achievements the draft strategy has been compiled and will be distributed to role-players for comment.

*Rehabilitation of derelict ownerless mines*

The above process has been on-going since 1986 and is aimed at the rehabilitation of ownerless mines. This programme is based on the requirements in terms of the 1991 Minerals Act; the 1996 Mine and Safety Act; APPA;<sup>12</sup> Standard protocol for the rehabilitation of derelict and ownerless asbestos mines and section 19 of the NWA. According to DME, asbestos pollution problems in the Northern Cape (NC) and the Limpopo (LP) regions have already been addressed. DME indicated that amongst its priorities is to ensure that funds are budgeted for in order to address the rehabilitation of the remaining derelict and ownerless asbestos mines. At the present moment, rehabilitation of derelict and ownerless coal or gold mines is limited to Delgoa Bay Colliery in Mpumalanga; Vierfontein Colliery in the Free State (FS) and the Government Mining Engineer's (GME) Gold dumps in Gauteng.

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<sup>12</sup> The 1965 Atmospheric Pollution Prevention Act (APPA).

## **Provincial Sphere**

### **FS Department of Tourism, Environmental & Economic Affairs**

During the current reporting period, the above department reported that no new policies, programmes and/or projects were introduced during the current reporting period, that the department only reviewed policies on Conservancies, Honorary Nature Conservators, Environmental Education and WM.

The department reported that the objective(s) of its Environmental Education policy is to ensure promotion of environmental awareness within the province and the beneficiaries being mainly schools and communities. The department reported that as part of the department's achievements, about 100 000 people received training, but failed to indicate as to whether this was done during the reporting period or since the project started.

Furthermore, the department reported that the Programme on Conservancies is primarily based on the province's Conservancies Policy whose objective(s) is to ensure promotion of environmental awareness (EA) and that about 680 people (schools and communities) have benefited through training. In conclusion, the Environmental Impact Assessment (EIA) programme is based on the ECA<sup>13</sup> and NEMA. The objectives of the above programme are to protect and control any negative impact on the environment. The public and the private sectors are the main beneficiaries.

### **Gauteng Department of Agriculture, Conservation, Environment and Land Affairs (DACEL)**

DACEL (Gauteng) listed the following policies as the ones instituted during the current reporting period:

#### *Environmental Education & Awareness (EE & EA)*

The above department indicated that the following programme is based on NEMA; APPA; HSA;<sup>14</sup> EIA regulations<sup>15</sup> and the NCR,<sup>16</sup> the objective(s) of which is to ensure promotion of environmental and public awareness support around environmental issues. The public, local authorities, communities and school children are the ones benefiting from the above programme.

#### *Industrial Impact Management (IIM)*

This programme is based on similar Acts and Regulations as the ones outlined under the EEA programme and seeks to facilitate the development and implementation of Pollution Control (PC) strategies for air and water quality strategy and action plan. Furthermore, the programme is aimed at ensuring the management of the pollution incidence strategy and action plan and the management of the environmental impact

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<sup>13</sup> Environmental Conservation Act 73 of 1989.

<sup>14</sup> Hazardous Substance Act of 1973.

<sup>15</sup> Environmental Impact Assessment Regulations of 1997.

<sup>16</sup> Noise Control Regulations of 1999.

of new industrial developments. Those benefiting from the above programme are the local authorities, public at large and businesses. The department indicated that amongst its set goals it managed to hold capacity building workshops on NCR with local authorities, complete and circulate guidelines of requirements for the establishment of filling stations, complete draft EIA requirements for abattoirs, including water supply and sanitation projects and monitoring requirements for Air and Water Catchments Management within the WHS<sup>17</sup> areas.

#### *Integrated Environmental Management (IEM) for Rural and Urban Development*

The above programmes are based on similar Acts and Regulations as the ones outlined under the EEA and IIM programmes. The IEM (for Rural Development) seeks to implement EIA regulations and IEM objectives in decision-making, monitor authorised development, protect sensitive environments, co-ordinate environmental management and decision-making and disseminate environmental spatial information to both the provincial and municipal authorities. Those benefiting from the programme are mainly the public at large, including local authorities. The department reported that it has successfully achieved its goal of undertaking policy consultations for low density groups, incorporating the findings of the smallholdings in the provinces decision-making process with regard to the EIA applications.

The IEM (for Urban Development) seeks to continue to develop, implement and extend policies, plans and programmes as well as legislation aimed at environmental sound and sustainable urban development in Gauteng. Local authorities and the public at large are amongst those that will benefit from the programme. With regard to the above programme, the department indicated that amongst its achievement was the completion of the Bronberg SEA<sup>18</sup> followed by a Management Strategy proposal and that the department contributed to the development of the national IEM regulations, establishment of an environmental management forum in Alexander, strengthening of the partnerships with local authorities especially with regard to Integrated Development Plans (IDPs) amongst others.

#### *Integrated Environmental Management (IEM) - Transport and Communication*

This programme seeks to develop systems/policies/legislation that promote integrated environmental management; develop SEA on the PWV road and communication networks; review and update the Gauteng SoER.

#### *Integrated Waste Management (IWM)*

The above programme is based on similar Acts and Regulations as the ones outlined under the EEA, IIM, IEM (for Rural and Urban Development) and its objective(s) is mainly to prioritise waste avoidance as a component of WM. This programme intends benefiting the public at large, local authorities, communities, business and other government institutions. As part of the department's plan to achieve its set objectives, DEAT indicated that it participated in the following strategic activities: Service Standard and Monitoring, Recycling, provincial WM, General WM, Health Care WM and Hazardous WM Strategies.

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<sup>17</sup> World Heritage Site.

<sup>18</sup> Strategic Environmental Assessment.

### *Resource Management and Resource Protection*

The department indicated that the above programmes are based on the Nature Conservation Ordinances of 1983; Conservation Act and CITES.<sup>19</sup> With regard to the Resource Management, DEAT indicated that the programme's primary objective is to ensure sound management of bio-diversity, communities landscape processes and systems through the establishment and maintenance of protected areas.

With regard to the Resource Protection, DACEL (Gauteng) indicated that the programme ensures the promotion of the wise use of natural resources whilst ensuring enforcement and compliance of the Nature Conservation Act and CITES. According to the department, the public benefits from this programme. As a measure of the department's achieved goals towards this programme, DACEL indicated that 3097 CITES applications and 2667 general permits were processed and approved; Hunting Gazette Regulations were compiled and submitted; investigations into the illegal sale, import and export of wild animals and animal products were being undertaken.

### *Working for Water Programmes (WWPs)*

DACEL (Gauteng) indicated that the primary objective of this programme is to initiate the clearance of the alien vegetation in the riparian zone of strategic river catchments in the Gauteng province. So far amongst DACEL's achieved goals, the department reported on the successful removal of alien plant vegetation and job creations.

### *Spatial Development Projects*

The above programme is based on similar Acts and Regulations as the ones outlined under the EEA, IIM, IEM (for Rural and Urban Development) and IWM. Amongst its key objectives, DACEL (Gauteng) indicated that the department seeks to provide capacity building to the local authorities and the public at large with regard to promotion of participative and co-ordinated environmental management.

## **KwaZulu-Natal Department of Health**

The above department indicated that the *Health Care Waste Management Policy* was introduced during the current reporting period.

## **KwaZulu-Natal Department of Traditional and Local Government Affairs**

The department reported that since the right to environment does not fall under the core functions of its department, it is not in the position to respond to all the questionnaires within the protocol, but provided information where the department may have had an indirect impact on the right in question.

With regard to new policy measures that were introduced by the department during the current reporting period, the department reported that it supported the process of

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<sup>19</sup> The Convention on International Trade in Endangered Species of Wild Fauna and Flora.



the IDPs preparations, which included the preparation of an environmental management plan for the municipal area. The department also prepared a Local Agenda 21 Provincial Policy, intended to support municipalities in the consideration of the environment during the development process.

### **Limpopo Department of Finance, Economic Affairs, Tourism and Environment**

The above department reported that no new policies were developed during the current reporting period and that the department participated in the development of the national IWM & PC Policy. Furthermore, the provincial Elephant Policy and the Lion Policy, whose main objectives are the management of elephants and lions respectively, are still in the development process. The department did not explain what it really means by the management of elephant and lions and also the department failed to indicate in what stages these policies are and when are they expected to be in effect.

### **Mpumalanga Department of Health**

The Mpumalanga DoH stated that during this period, no new policies were introduced with regard to the right in question and that the department implemented the following programme(s)/projects:

#### *Domestic Water Quality Monitoring Programme*

The programme is based on the *Domestic Water Quality Management Guidelines* and its objectives is mainly to ensure improved access to safe water supply in the province aimed at benefiting the rural and disadvantaged groups. The department has managed to reduce the number of incidences relating to exposure to water related health risks.

#### *Safe handling and storage of pesticides, poisons and paraffin*

The programme is based on the HSA the objective(s) of which is to ensure that safety measures are provided to the communities, especially the farm-workers. So far the department has managed to introduce systems that ensure that usage of dangerous pesticidal poisons is reduced.

*Sanitation for rural schools,<sup>20</sup> Collaborative Sanitation Provision for the disadvantaged Rural Communities and Participatory Hygiene and Sanitation Training (PHAST)*

The three programmes are based on the National Sanitation Policy and their objective is to ensure improvement of access to safe sanitation in the province. About twenty rural schools and rural and disadvantaged communities benefited from this project. The department managed to reach its goal regarding the safe disposal of human excreta that affected both rural schools and settlements.

### **North West Department of Health**

During the current reporting period, the NW DoH reported that the department introduced the *Water Quality Guidelines Volume I & II* together with the *Provincial Medical WM Strategy* as new policy measures by the department. In addition to the above, NW DoH introduced the following programme(s)/project(s):

#### *Management of Health Care Waste (HCW)*

The NW DoH reported that the above programme is based on the Minimum Requirements and Codes of Practice and a diversity of legislation<sup>21</sup> and that those benefiting from the programme/project are mainly communities at large and health care workers especially those at health care facilities.

#### *PHAST programme<sup>22</sup>*

The NW DoH reported that the above programme is based on the National Sanitation Policy, whose primary objective(s) is to enhance sound and acceptable sanitary practices, whilst the communities are involved in the construction of their sanitary facilities. Those benefiting from the above programme are the communities (especially the rural communities). As part of the department's achieved goals, the department has witnessed the improved sanitation status and trained community members training others in issues relating to PHAST.

#### *Water and Sanitation Projects*

According to the NW DoH, the above project, which has been funded by WHO, is based on the 1997 Health Act and the NWA and the objective(s) of which is the proper management of HCW<sup>23</sup> facilities with regard to collection, storage, transportation and treatment. With regard to any goals achieved, the department indicated on VIP<sup>24</sup> toilets that were set-up in the province. Those benefiting from the project are mainly community clinics, public schools, including small-scale building contractors.

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<sup>20</sup> World Health Organisation (WHO) and DWAF's fund the programme.

<sup>21</sup> The department failed to mention the legislation including minimum requirements and codes of practice on which this programme is based.

<sup>22</sup> Participatory Hygiene and Sanitation Training, which is an inter-sectoral collaboration between DWAF, the Department of Health (DoH) and the Mvula Trust.

<sup>23</sup> Health Care Waste.

<sup>24</sup> Ventilated Improved Pit Toilets.

## **Western Cape Department of Health**

During this period, the WC DoH reported that no new policies or measures were introduced.

### **3. LEGISLATIVE DEVELOPMENTS**

Below is a summary of the legislative measures that were introduced by government departments during the reporting period in order to ensure that the right to a healthy and protected environment is realised.<sup>25</sup>

#### **National Sphere**

##### **DEAT**

DEAT listed the following measures as the developments that took place during the current reporting period:

- Production of the National Waste Management Strategy (NWMS)
- Regulations
  - (i) Control of vehicles on the coastal zone regulations
  - (ii) Environmental Impact Assessment regulations
  - (iii) Plastic bag regulations
- Compilation of the following Bills
  - (i) Air Quality Management
  - (ii) Bills on Bio-diversity
  - (iii) Chemicals and hazardous substances
  - (iv) Coastal Management
  - (v) Integrated Environmental Management
  - (vi) Pollution and Waste
- Compilation of the Environmental Management Plans (EMPs) and Environmental Implementation Plans (EIPs)
- Establishment of the Transfrontier Conservation Areas (TFCAs)
- Declaration of the RAMSAR<sup>26</sup> sites
- The ratification of the Kyoto Protocol

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<sup>25</sup> *Op cit.*, note 9. It should be noted that here reference is made to legislative measures as opposed to programmatic and policy measures referred to in note 9 above.

<sup>26</sup> Ramsar Convention is the Convention on Wetlands of International importance especially as Waterfowl Habitat. South Africa became the fifth Contracting Party to the Convention on 12 March 1975. The Convention came into force on 21 December 1975 and at the end of 1994, there were 83 contracting parties throughout the world. DEAT is responsible at the national level for implementing the Convention.

## **DWAF**

DWAF listed the following measures as the developments that took place during the current reporting period:

- Promulgation of the directions in terms of section 20(5)(b) of the ECA, with regard to the control and management of General Communal as well as General Small Waste Disposal sites.
- Promulgation of the Conservation of Agricultural Resources Act.

## **DME**

DME indicated that during the current reporting period, the department did not introduce any new legislative measures, except the Mineral and Petroleum Resource Bill of 2002.

## **Provincial Sphere**

Most provincial departments failed to provide the SAHRC with the required information on legislative measures, with the exception of a few. The Free State (FS) Department of Environment indicated that the department is still in the process of revising the provincial legislation on Nature Conservation and that the department formulated the FS EIPs.

DACEL (Gauteng) indicated that the department implements the EIA regulations and NEMA, since these instruments provide decision-making powers to authorise activities with a potentially detrimental impact on the environment. The department further reported that the law reform process is still underway and that a new biodiversity strategy and action plan will be given effect through the National Biodiversity Bill currently under consideration.

The KwaZulu-Natal (KZN) Department of Traditional and Local Government Affairs reported that although the right to environment is not its competency, the department has ensured that the Land Use Management Legislation of KZN, namely the KZN Planning and Development Act is fully aligned with current environmental legislation, but failed to indicate which legislation the department is referring to. The NW DoH only mentioned the 2000 South African White Paper on IPC & WM.

With regard to the above, the Limpopo (LP) Department of Finance, Economic Affairs, Tourism and Environment reported that it has drafted a comprehensive Environmental Management Bill that it was still awaiting tabling at the provincial legislature at the time of reporting.

#### 4. BUDGETARY MEASURES

##### National Sphere

##### *Total Budget Allocation*

##### DEAT

**Table 1** Total Budgetary Allocation

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	760 603 000	-	750 603 000
2001/2002	1 078 454 000	-	1 067 657 000

The dash (-) in this table and tables to follow denotes that no information was made available to the Commission by the responsible departments

##### *Variance(s)*

According to DEAT, there were no variances with regard to the allocated budget during the current reporting period. The department reported that the budget allocated to the department was adequate to accomplish the objectives set in the 2001 Estimate of National Expenditure (ENP).<sup>27</sup> The department further stated that it could make use of additional funding in order for it to ensure that service delivery is extended. When comparing the figures supplied by DEAT with that of the 2001 ENP, it can be reported that there are some irregularities, especially with regard to the 2000/2001 and 2001/2002 financial years. The 2001 ENP's figure is more than the one reported by DEAT by R30 997 000 for the financial year 2000/2001. For 2001/2002 financial year, the figure provided by DEAT is R96 754 000 more than the one provided by the 2001 ENP. It could be assumed that this variance could be due to donor funds the department received, especially for the 2001/2002 financial year.

In order to address the budgetary inadequacies within the department, DEAT reported that it had to outsource some donor funding and/or sponsorships. With regard to any over- and/or under-spending within the department, it is unacceptable for DEAT to report that the department experienced none of the above, when there was an under-spending of R1 797 000 and R10 000 000 for the financial years 2000/2001 and 2001/2002 respectively.

##### DWAF

**Table 2** Total Budgetary Allocation (Forestry)

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	-	-	-
2001/2002	420 123 000	420 123 000	435 230 000

##### *Variance(s)*

According to DWAF, the variances that occurred during the 2001/2002 financial year were due to employees who did not take their severance packages and this resulted in

<sup>27</sup> National Treasury, *Estimates of National Expenditure*, South Africa, 2001.

increased personal expenditure. The department reported that less than 1000 of the expected 1500 employees opted out. The department did not report on whether the total allocated budget for the department was adequate or not. The department only stated that the forestry budget was adequate and that the one for WWP was not adequate. DWAF reports that according to the current information available to the department, an amount approximated at R600 million (inflation excluded) is required over the next 20 years for the control of invading alien plants.

With regard to whether there has been any over- or under-spending of the total revenue, the department reported an over-spending amounting to R15. 1 million, resulted in the granting of severance packages in the area of forestry. The department believes that over-spending on these severance packages meant more cash saved from the government for social plans in the long term. The department further reported that it put in place proper reporting and financial control measures in order to address any over- or under-spending.

## DME

**Table 3 Total Budgetary Allocation for the Derelict and Ownerless Mines**

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	11 272 000	11 272 000	11 272 000
2001/2002	21 771 000	21 771 000	21 771 000

### *Variance(s)*

There are some inconsistencies with figures provided by DME for the current and previous Economic and Social Rights Reports. For instance, for the 2000/2001 financial year, the figure reported in the previous report exceeds the one in this report by a significant amount estimated at R10 147 000. DME reported that the variances experienced during the current reporting period were due to inflation escalation(s) and the increased budget for the rehabilitation of derelict and ownerless mines, which increased by an estimated amount of R10 million. The department further reported that the budget allocated during the reporting period was inadequate in that the department requires about R150 million in order to ensure completion of the rehabilitation of derelict and ownerless mines, which is government's priority. This amount excludes the rehabilitation at other derelict and ownerless mines, specifically gold and coal mines.

In order for DME to address the budgetary inadequacies within the department, it reported that it had to motivate for a budget increment, which was increased by an amount of R10 million during the 2001/2002 financial year. Furthermore, the department joined forces with DWAF and DEAT with regard to Pollution Control activities. DME stated that DWAF has budgeted an amount of about R10 million per year aimed at controlling pollution emanating from derelict and ownerless coalmines limited to the KwaZulu-Natal province, whilst DEAT is also contributing about R175 000 aimed at controlling dust on derelict gold dumps in Gauteng. Since these budgets are not adequate for the rehabilitation of these derelict ownerless mines, DME is in the process of trying to secure some international donor funding within this regard.

With regard to any over- and or under-spending within the department, DME reported that during 2001/2002 financial year, the department experienced some under-spending approximated at R328 000 due to invoices that were received late. This under-spending had no impact on the realisation of the right in question, due to the fact that upon discovering its under-spending the department made a motivation to the National Treasury to roll-over funds and the appointed contractors completed the rehabilitation work that was assigned to them.

**Waste Management and Pollution Control**

**DEAT**

**Table 4 Waste Management and Pollution Control**

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	103 063 000	-	103 063 000
2001/2002	142 231 000	-	128 182 000

*Variance(s)*

DEAT reported that there were no vast variances regarding the aforementioned programme(s), which is very unacceptable, considering the fact that according to the table above, an amount estimated at R34 049 000 was not spent during the 2001/2002 financial year, which is definitely not insignificant. Furthermore, some of the figures provided in this report do not tally with the ones in the previous report for the same financial year. For instance, for the financial year 2000/2001, the figure provided in this report exceeds the one in the 3<sup>rd</sup> report by R57 001 000, almost twice the amount. This is a huge variance that calls for an explanation on the part of the above department.

The department reported that due to the cross-cutting nature of the inclusion of the above identified vulnerable groups in the various projects that have been undertaken within the Waste Management and Pollution Control (WM & PC) component, no specific allocation was made to those groups. However, the department reported that when planning and implementing the WM & PC programmes, the department specifically within the poverty alleviation projects, which do have a separate budget, identifies the above groups.

**DWAF**

**Table 5 Waste Management and Pollution Control (Urban Development and Agriculture)**

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	25 035 000	-	21 360 000
2001/2002	27 644 000	-	27 644 000

*Variance(s)*

DWAF is of the opinion that the variances between the above financial years are insignificant and is also of the view that those variances are not worth being

accounted for. This is unacceptable as according to the table above, an amount estimated at R3 675 000 was under-spent during the 2000/2001 financial year. Surely these figures are not insignificant and it is very irresponsible for the department for not accounting for these variances.

DWAF further reported that the budget allocated towards the WM & PC programme (Urban Development and Agriculture) was inadequate and that more funds are required that would be channelled towards policy developments. The department further indicated that some donor funds, an amount of which, was not disclosed to the SAHRC were secured from the Danish Government that will enable the department to some extent to address the budgetary inadequacy towards the implementation of the above programme. In addition to the financial assistance, the aforementioned government also provided some human resources to ensure the management of those additional funds.

### **DME**

No relevant information was provided to the SAHRC by the above department with regard to budgetary allocation towards the WM & PC programme.

### ***Nature Conservation***

### **DEAT**

**Table 6 Nature Conservation**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	108 019 000	-	108 019 000
2001/2002	211 072 000	-	187 456 000

### ***Variance(s)***

The department reported that the variance(s) during the reporting period were minimal to be accounted for, this is unacceptable especially not when according to the table above, for the financial year 2001/2001, the department under-spent by an amount estimated at R23 616 000. Surely DEAT should have accounted for this huge and significant variance. Of concern is the information provided towards this programme that does not correspond to the one the same department provided in the previous report. For instance, for the 2000/2001 financial year, the figure in the previous report exceeds the one in this report by an amount estimated at R489 776 000, surely this is not an insignificant variance.

The department further reported that due to the cross-cutting nature of the inclusion of the above-identified vulnerable groups in the various projects that have been undertaken within the Nature Conservation component, no specific allocation was made to those groups. However, the identified vulnerable groups have been considered within these programmes, more specifically within the poverty alleviation projects, which do have a separate budget.

With regard to any over- or under-spending of the allocated budget during the reporting period, DEAT reported that since the allocated budget was adequate the



department instituted no additional measures in order to address the budget inadequacies. The above statement is very much misleading and also it is very irresponsible for DEAT to report such information, especially not with the kind of findings illustrated in the first paragraph above.

## **DWAF**

The above department failed to provide the SAHRC with any relevant information with regard to total budgetary allocation towards the Nature Conservation programmes for the 2000/2001 and 2001/2002 financial years during the current reporting period.

### ***Soil Erosion Management***

#### **DEAT and DWAF**

Both DEAT and DWAF indicated that no funds were allocated to their departments channelled towards the above programme since it does not fall within their competency and mandate, but that it is a mandate of the Department of Agriculture.

#### **DME**

On the other hand, with regard to the aforementioned programme, DME indicated that the department has adopted the “polluter pays principle” and that the mining entrepreneur is responsible for all cost pertaining to the impact of the operation of the environment, soil erosion management included.

### ***Capacity Building and Information Dissemination***

#### **DEAT**

**Table 7 Capacity Building and Information Dissemination**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	18 717 000	-	18 717 000
2001/2002	61 971 000	-	57 673 000

#### ***Variance(s)***

The department reported that the variances to be accounted for were minimal, which is unacceptable since an under-spending of R4 298 000 for the financial year 2001/2002 is surely not minimal. Also of concern, for the financial year 2000/2001 the figures DEAT provided in this report differs with those that were provided for the 3<sup>rd</sup> Economic and Social Rights Report. The current report’s figure is less by an estimated figure of R26 283 000 for the financial year 2000/2001 as compare to those reported in the 3<sup>rd</sup> Economic and Social Rights Report.

With regard to the vulnerable and previously disadvantaged groups, the department reported that there is no specific budgetary allocation for these groups, but that the total budget towards the above programme does cater for these groups. Of concern is

that the department did not indicate as to how their needs are being addressed and as to whether the budget aimed at benefiting these groups is sufficient and if insufficient what measures the department will institute in order for the plight of this category of people to be addressed so that their needs could be progressively advanced.

## DWAF

**Table 8 Capacity Building and Information Dissemination**

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	500 000	-	296 000
2001/2002	1 200 000	-	852 000

### *Variance(s)*

DWAF did not account for the variance(s) with regard to budget allocated towards the aforementioned programme. The department further reported that with regard to the needs of the identified vulnerable groups, there was no specific budget allocated and indicated that these groups benefited indirectly from the budget allocated towards the above programme.

DWAF further reported that the budget allocated towards this programme was not adequate in that the department only managed to secure less than half of the requested training funds and that more funds were requested without success. This is a bit surprising and unacceptable considering the information provided in the table above, as the department under-spent by about R204 000 for the 2000/2001 financial year towards this programme and yet still claims that the allocated budget was inadequate.

## Provincial Sphere

### *Provincial total budgetary allocation*

The KZN Department of Traditional and Local Government, DACE (NC) together with the Western Cape (WC) Department of Environmental and Cultural Affairs failed to provide the SAHRC with the information regarding the total budgetary allocation of their departments during the current reporting period.

The KZN province reported that its budgetary allocation was not allocated directly towards environmental services, but only to enable municipalities to prepare IDPs and because of that, it is not possible to apportion these funds to environmental services. Furthermore, the Gauteng DoH indicated that it is not easy for the department to single out the allocated budget towards this programme, since the department's budget is incorporated within that of the Public Health Directorate.

**Free State Department of Environment****Table 9 Total Budgetary Allocation**

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	59 669 000	59 669 000	59 669 000
2001/2002	135 605 000	135 605 000	135 605 000

*Variance(s)*

The FS provincial Department of Environment indicated that the variances were due to the provincial allocations and that the funds allocated were not sufficient for the departmental projects and programmes. The department reported that it over-spent due to the fact that it inherited the Qwa-Qwa National Park, but more funds have been requested from the Treasury in order to address problems that led to the department's over-spending. This is in contradiction to what the department has reported in table 10 above, where the department claimed to have adequately utilised its allocated budget. This further raise a serious concern as to whether these are true figures of what was really allocated to the department.

Of concern are also the figures that do not tally between the previous and the current report. For instance, for the 2000/2001 financial year, the figure reported in this report is R29 969 000 more than compared to that in the previous report.

**DACEL (GAUTENG)****Table 10 Total Budgetary Allocation**

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	118 576 000	7 451 000	-
2001/2002	-	-	-

*Variance(s)*

The department reported that the allocated budget was adequate with the available resources within the department and that the impact to the right in question as a result of under-spending was insignificant. This is quite confusing, as it can be argued that under-spending by R38 104 000 will have a significant impact on the realisation of the right in question.<sup>28</sup>

It is also unacceptable for the department to fail to provide the SAHRC with the requested information regarding total budget allocated and also the actual expenditure during both the 2000/2001 and 2001/2002 financial years as tabulated above. The department further stated that in making the necessary allocations, priority was given to all the previously disadvantaged individuals and/or communities.

<sup>28</sup> Referring to table 11 above, during the 1999/2000 financial year, a figure estimated at R 38 104 000 was not spent by the above department and reasons as to why this was the case were not furnished to the Commission.

**Limpopo Department of Finance, Economic Affairs, Tourism and Environment**

***Total Budgetary Allocation***

**Table 11 Total Budgetary Allocation**

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	80 000 000	-	80 000 000
2001/2002	95 000 000	95 000 000	89 000 000

*Variance(s)*

When comparing figures reported by most departments in this report and the previous report, the above province being no exception, it can be highlighted that there seems to be a trend to have figures that do not correspond for the same financial years. This defeats the whole purpose of this exercise, as the reliability of this information is highly questionable. For instance, there is an excess of about R5 384 000 for the 2000/2001 financial years in this report as compared to the previous report for the same financial year.

**WC Department of Environmental and Cultural Affairs**

The above department failed to provide the SAHRC with the information relating to the total budgetary allocation of the department and no explanation was provided as to why the department cannot avail that information. This is unacceptable especially if the department can manage to provide the SAHRC with budgetary information towards the different environmental management programmes and also if in the past the department did comply.

***Waste Management and Pollution Control***

**FS Department of Environment**

**Table 12 Waste Management and Pollution Control**

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	5 520 000	5 540 000	5 540 000
2001/2002	9 948 000	9 948 000	9 948 000

*Variance(s)*

The above department should be commended for the effort of providing the SAHRC with the information requested above, as in the previous report it failed to provide such information and the reasons for this were not furnished. With regard to the above-mentioned programme, the department could not account for the variances in the department's budget for the periods indicated above.

Furthermore, the department reported that the department's budgetary allocation does accommodate the needs of the listed vulnerable groups, especially poor communities

and persons living in rural areas. Of concern is that it was not indicated as to what fraction of the above figures is channelled towards the vulnerable groups.

The department further indicated that the budgetary allocation towards the above-mentioned programme was inadequate, this being the results of the national allocations. In order to address these inadequacies, the department requested more funds through the Provincial Treasury that would be channelled towards this programme.

### **DACEL (Gauteng)**

**Table 13 Waste Management and Pollution Control**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	7 451 000	7 451 000	-
2001/2002	3 653 000	3 653 000	5 243 000

#### *Variance(s)*

The above department could not account for the amount of about R1 590 000, which was over-spent during the 2001/2002 financial year. With regard to the vulnerable groups, the department reported that in making allocations, the identified special categories of people are being catered for, since major environmental transgressions are often spatially located in proximity to the poor and marginalised communities. Of importance is that the department did not indicate how much of the budget was intended for the above-identified group.

### **Limpopo Department of Finance, Economic Affairs, Tourism and Environment**

**Table 14 Waste Management and Pollution Control**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	500 000	-	500 000
2001/2002	700 000	-	700 000

#### *Variance(s)*

There are noticeable inconsistencies in the figures provided in this report and the previous report. For the 2000/2001 financial year, the figure reported in this report is less than the one reported in the 3<sup>rd</sup> report by an estimated amount of about R3 160 000.

### **WC Department of Environmental and Cultural Affairs**

**Table 15 Waste Management and Pollution Control**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	-	-	-
2001/2002	4 741 000	4 741 000	4 741 000

*Variance(s)*

The above department must be commended for providing the SAHRC with the budget allocated towards the above programme as for the past two reports no information within this regard was made available to the Commission. The department did not account for any variance(s) with regard to the budget allocation towards the above-mentioned programme. Instead, the department reported that the R4 741 million allocated during the 2000/2001 financial year was intended for the running of the Western Cape Clean-up Operation, which is a programme that funds NGOs, CBOs and Local Authorities in establishing projects that will add to the improvement of the physical environment of the province.

The department further reported that the R5 250 million, which is also intended to fund the above for the 2002/2003 financial year, has not been allocated to the above department as yet, hopefully the funds will be disbursed in the second-half of 2002. The province should be commended for prioritising the above programme; this is supported by the fact that during the 1999/2000 financial year, the above department was allocated R265 000 towards the WM & PC.

**Gauteng DACEL**

**Table 16 Capacity Building and Information Dissemination**

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	1 392 000	1 392 000	-
2001/2002	949 000	3 536 000	2 586 000

*Variance(s)*

The variances towards the above programme are very much noticeable, decreasing by an estimated figure of about R338 000, to which the department did not provide the SAHRC with any explanation as to why during the 2001/2002 financial year the budget allocated towards this programme was cut so drastically. It could be wondered as to whether government does not see the need for building capacity both within the government structures and the public at large within the province in regard to environmental management issues.

**Limpo Department of Finance, Economic Affairs, Tourism and Environment**

**Table 17 Capacity Building and Information Dissemination**

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	2 500 000	-	2 500 000
2001/2002	3 000 000	-	3 000 000

*Variance(s)*

The above department failed to account for any variances with regard to the above programme. Furthermore, no account was made as what amount of the total budget allocated towards the above programme was channelled towards benefiting the vulnerable groups, including the previously disadvantaged.

## 5. INDICATORS

Statistical indicators are a powerful tool in the struggle for human rights.<sup>29</sup> The availability of data and indicators is by itself a recognised right of persons to access information. Hence, the most respectful and scientific way to make the right information available is through statistics and progress cannot be evaluated in any field or effort unless the change can be measured over time.<sup>30</sup>

Indicators for human rights need to be explored for four interlocking objectives:<sup>31</sup>

- *Asking whether states respect, protect and fulfil rights*: the overriding framework of accountability for the role of the state.
- *Ensuring that key principles of rights are met*: asking whether rights are being realised without discrimination, and with adequate progress, people's participation and effective remedies.
- *Ensuring secure access*: through the norms and institutions, laws and enabling economic environment that turn outcomes from needs into rights realised.
- *Identifying critical non-state actors*: highlighting which actors have an impact on realising rights and revealing what impact is.

### National Sphere

#### DEAT

With regard to the environmental indicators, DEAT reported that the department is not in a position to provide any information in this regard, as the department does not collect information in the format required by the SAHRC. What the department failed to do was to present the information on indicators in whichever way the department is able to communicate the above information. The department further indicated that currently no methodologies exist for these indicators.

However, DEAT reported that the department has completed consultation workshops with regard to the development of a core set of environmental indicators, which at the time of reporting were still in the process of being finalised. Since DEAT has created database information for the SoER, it cannot be comprehended as to why the above department failed to provide the SAHRC with the requested information.

#### DWAF

With regard to the above, DWAF could only provide the SAHRC with information relating to the number and percentage of communities without adequate sanitation facilities. The department reported that the total number of about 23 451 (91 per cent) of communities still lack adequate sanitation facilities and that of that total, 878 (3.4 per cent) are from the urban population. The department indicated that these figures include those communities where 20 per cent or more of the population still lack basic

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<sup>29</sup> Using Indicators for Human Rights Accountability, see [www.undp.org/hdr2000/english/book/ch5.pdf](http://www.undp.org/hdr2000/english/book/ch5.pdf). Site visited on 06/09/02.

<sup>30</sup> Human Rights and Statistics see <http://www.huridocs.org/omar.htm>. Site visited on 28/08/02.

<sup>31</sup> Using Indicators for Human Rights Accountability, *op cit*.

sanitation. It should be noted that the department failed to divide this total number of those without adequate sanitation facilities into the different racial categories.

## **DME**

The above department failed to provide the SAHRC with the information on indicators as requested. DME indicated that atmospheric, water and soil pollution and exposure of the affected communities are not monitored in terms of the numbers or percentages of communities affected. The department indicated that the approach followed is to require operational mines to assess the impact and management of mine residue deposits, (which is categorised as hazardous waste) on the environment and to determine the significance thereof after the implementation of the mitigatory and/or management measures. DME indicated that in order to strive for minimising pollution, it monitors compliance to the requirements as well as the effectiveness of the mitigatory or management measures.

## **Provincial Sphere**

Most of the provincial Departments of Environment did not provide information regarding indicators. The FS province advised that this information might be obtained from the GCIS. This is unacceptable for the department to request the SAHRC to do so, as it is within its constitutional mandate to have this information. The best thing for the department was for it to make sure that it obtains this information from the said department and after analysing it to include that in this report.

The Gauteng DoH indicated that environmental indicators are not for public health and that this information could be obtained from DACEL (Gauteng). The NW DoH indicated that the department does not keep such information and suggested that the information could be obtained from DEAT. Since it is not within its mandate(s) to keep the above-mentioned information, the department did not introduce any measures aimed at improving the right in terms of the above-mentioned indicators.

With regard to the Gauteng province it could be argued that if the department had referred to the Johannesburg SoER, the department could have managed to provide the SAHRC with some of the requested information with regard to environmental indicators.

With regard to the information on indicators, the LP Department of Environment indicated that presently these statistics are unavailable and that measures are being taken by the province to develop the provincial SoER that will make information like the one requested above available.

## **6. NATIONAL ACTION PLAN (NAP)**

In the Vienna Declaration and Programme of Action, adopted in June 1993, the World Conference on Human Rights recommended that States should consider the desirability of drawing up a national action plan identifying steps whereby States would improve the promotion and protection of human rights.<sup>32</sup> In order for

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<sup>32</sup> National Plans of Action for the Promotion and Protection of Human Rights see [http://www.unhcr.ch/html/menu2/plan\\_action.htm](http://www.unhcr.ch/html/menu2/plan_action.htm). Site visited on 20/05/02.



government to reverse the past legacy South Africans have inherited as a country, government needs to set national priorities, which it will not achieve without facing great difficulties and challenges.<sup>33</sup>

The NAP is an integrated and systematic national strategy to help realise the advancement of human rights in SA.<sup>34</sup> Government should ensure that the greatest needs of the most disadvantaged and vulnerable people are prioritised and this will mean emphasising the realisation of socio-economic rights. This can be justified on the basis of South Africa's history of systematic discrimination and racial inequality. Thus, central to the NAP is the socio-economic inequality and structural disparity inherited from the past.<sup>35</sup>

## **National Sphere**

### **DEAT, DWAF and DME**

DEAT indicated that the information with regard to the above-mentioned is currently not available since the Waste Management Information System is still under development. The department therefore hopes to make available the requested information in the near future. This will include information on General Waste Collection; Waste Treatment and Disposal; Waste Minimisation and Recycling; Cleaner Production; Decisions on remediation and pollution; Pollution Hotspots and Compliance with national laws and international treaties. Other national departments failed to provide the information as requested in the protocol. One would expect DWAF to have information regarding the above matter since the department is responsible for issuing permits for waste disposal sites, in addition to this ensuring proper monitoring of those sites. In addition to the above, DME should at least have provided the SAHRC with information regarding the rehabilitation of derelict and abandoned mines, handling and disposal of the generated hazardous waste and the effect it has on the population at large. Also of concern is the effect mining of asbestos has on the people.<sup>36</sup>

## **Provincial Sphere**

All the provincial departments with the exception of the FS province failed to provide the SAHRC with the information requested with regard to the table below and no explanation was provided regarding failure to do so. This is unacceptable for the departments not to provide this information, because even if the information is not available within a particular department, this can be obtained from other departments and other spheres of government, for instance DWAF and local government structures. Of concern is that how can these departments monitor their performance if they do not have such information at hand.

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<sup>33</sup> National Action Plan for the Protection and Promotion of Human Rights, see <http://www.unhchr.ch/html/menu2/safrica1.htm#dev>. Site visited on 20/05/02.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Refer to paragraphs 4 & 5 of section 7 below.

## FS Department of Environment

**Table 18 Waste Disposal Management Challenges**

	Total	Urban	Rural	African	Coloured	Indian	White
No. and % of communities with inadequate dumping sites	80	60	20	-	-	-	-
No. and % of communities with ineffective refuse removal	20	15	5	-	-	-	-
No. and % of communities that are exposed to hazardous waste disposal	70	60	10	-	-	-	-
No. and % of communities contaminated by hazardous chemicals	20	19	1	-	-	-	-
No. and % of communities affected by toxic waste imported into the country	-	-	-	-	-	-	-
No. and % of communities affected by radioactive waste	10	10	0	-	-	-	-

## 7. CRITIQUE

### National and Provincial Spheres

#### *Policy, programmatic and/or legislative measures*

Currently, no single government department is solely mandated with the responsibility of fulfilling section 24 of the Bill of Rights and a number of legislation is channelled/aimed at fulfilling the section. The legacy of a fragmented approach on environmental legislation and/or policies, including regulations, impacts negatively on the realisation of the right in question.

It is very disappointing that some government departments, especially DME and most provincial departments still fail to report on the short- and medium-term strategies or measures the departments implemented and as such it becomes difficult if not impossible to say whether the instituted measures were reasonable or not.

The manner in which both the national and provincial Departments of Environment presented the information on policy and programmatic measures, including projects and legislative measures introduced towards the realisation of the right in question is not very informative and helpful. Hence, it is very difficult for the reader to appreciate the adopted measures and to see how the adopted measures gave effect to the right to environment. Its manner of presentation raises a concern as to whether government understands its constitutional mandate as stipulated in section 7(2) of the Bill of Rights.

There is a greater need for government to ensure that the rehabilitation of mine dumps is facilitated as stipulated in the Minerals Act 50 of 1991. Mine dumps are known to contribute significantly to atmospheric pollution. As a result of the asbestos problem cited below, and any other related cases, one cannot be way out of line by concluding that though government attempted and still attempts to address the atmospheric pollution, health threats were never taken seriously as they were supposed to.

The asbestos pollution crisis is still a very sensitive and critical situation to be addressed by government. South Africa was once the third biggest producer of asbestos and the only major producer of crocidolite<sup>37</sup> in the world. Despite the well-known dangers of asbestos, people are still being exposed to it on a daily basis, and there are also fatal cases, which have been reported.<sup>38</sup> It is a sad case to note that even though the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) provides for compensation for workers who have contracted Asbestos Related Riseases (ARD), most people who are now ill are not covered under the Act, since it only came into effect in 1993.<sup>39</sup> This is in contradiction to section 24 of the Bill of Rights and Principles 13 and 16 of the Rio Declaration, amongst others.<sup>40</sup> In short, environmental justice has not as yet been ensured to the victims of the asbestos, as a health hazard.

Without a clean and healthy environment, none of the other social and economic rights can be attained, and society needs to be educated about this. Most of the three tiers of government are still not committing themselves to civic capacity building/awareness/education, leading to lack of access to information.<sup>41</sup> This is a sad scenario as government always indicates that its policies, regulations, legislation,

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<sup>37</sup> Crocidolite is a type of blue asbestos, one of the most dangerous substances taken out of the earth, which puts everyone who, comes into contact with it at risk and it is almost destructible.

<sup>38</sup> LA Feris, "The asbestos crisis – the need for strict liability for environmental damage" *Acta Juridica* 1999, 287. Huge multinational companies, most of whom have now left the country after having abandoned or sold the mines, have predominantly mined asbestos. They have left behind a legacy of waste dumps that are slowly killing their previous employees and the surrounding communities. The Northern Cape province being the mostly affected province, since it is one of the regions with the richest crocidolites deposits globally.

<sup>39</sup> *Ibid*, p. 294.

<sup>40</sup> Section 24 of the South African Constitution guarantees everyone the right to an environment that is not detrimental to their health and/or well-being. Principle 13 states that States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. Furthermore, States shall also co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects caused by activities within their jurisdiction or control to areas beyond their jurisdiction. Principle 16 states that national authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

<sup>41</sup> Monitoring socio-economic rights in South Africa at <http://www.case.org.za/htm/soceco3.htm>. Site visited on 01/06/02. In this report it is indicated that as a result of lack of education/awareness, communities often credit the national government, parastatals and sometimes the local government for any development that has taken place, over the provincial government. It is indicated that national government gets credit for development in the areas of housing, health, education, and social security, whereas parastatals (ESKOM) get credit for electricity and Telkom for communication improvements. Local government is credited with the main responsibility for improvements of roads, refuse removal, sanitation, drainage and water. Provincial government does not feature in peoples' minds as an important actor in service delivery. This is the case possibly because no distinction is made between its work and that of the national government, because the provinces are relatively new, having been created in 1994, and seen as executing policies determined at the national level, with no policies and delivery mechanisms of their own. It is especially notable as most of the areas for which the national government gets credit for improvement actually falling within the powers of the provincial government. That many people are still not sure where the responsibility for socio-economic delivery actually lies means that it is more difficult for them to organise to press their demands and assert their rights. It also creates a false impression on delivery, when credit is given where it is not due, or not even where it is due.

programmes and/or projects are aimed at alleviating poverty, since poverty eradication/relief without empowerment has never been sustainable.

### *Budgetary Measures*

Article 2(1) of the ICESCR,<sup>42</sup> states that each State must take steps through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised.

Whilst it is a known fact that budgetary constraints and human resources present a greater obstacle to the prompt/progressive realisation and delivery of the environmental rights and other related socio-economic rights, government should also learn to utilise its allocated budget in an efficient manner in order to ensure that the right in question is progressively realised. It is acknowledged that without sufficient resources (both financial and human), government would not be in a position to execute its mandate accordingly and efficiently. This is attested to when it comes to the delivery of services (such as, water, roads, waste and refuse removals) to communities. It is in this regard that the generally slow delivery of services by local government is due to both lack of financial and human resources.

In support of the above, paragraph 46 of the *Grootboom* judgement states that the State needs to plan and deliver within its available resources. That is, the rate at which any particular obligation is achieved as well as the reasonableness of the measures employed could only be governed by the availability of the resources. No particular constitutional obligation expects more from the State than could be achievable. That is there should be some form of balance between goal(s) and means.

There is a greater concern of the inconsistencies with regard to government's reporting in relation to budgetary allocation towards different programmes in order for it to realise the right in question. The most disappointing fact is that though government always indicates that their annual budget allocation is generally insufficient, it is surprising to note that government departments still under-spend on their allocation as indicated above under section 4. Under- or over-spending contradicts or violates the above paragraph that says that government should strive for a balance between goals and means.

Government needs to adopt plans, programmes, projects in which it will be in a position to utilise the available resources in an efficient and goal-oriented manner. In situations where government departments are not capacitated, there is a need for these departments to liaise and capacitate one another, involve the relevant NGOs, CBOs and the international community. By so doing, those consulted would render some technical advice on how to handle budget, set short-, medium- and long-term objectives in order for the implementation and delivery to be regarded as being reasonable and measurable.

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<sup>42</sup> International Covenant on Economic, Social and Cultural Rights.

## *Indicators*

### **National Sphere**

#### **National (DEAT, DWAF and DME) and provincial departments**

The lack of good indicators at national level is hampering the government in the adoption of comprehensive programmes that will give effect to section 24 of the Bill of Rights.<sup>43</sup> Lack of statistics is an indication of lack of will to ensure that human rights are promoted or maybe a way of hiding information to enable people to see that government did not do enough in promoting human rights or promoting any of the socio-economic right. Whilst it is still appreciated that DEAT came up with a set of environmental indicators, it must be pointed out that DEAT's environmental indicators project still lack the social aspect.

Whilst it is important for the physical environment to be protected, it should also be noted that the lives of all human beings also need to be improved. It is important for all the departments mandated with section 24 of the Bill of Rights to note that whatever indicators government should come up with, should be indicators of sustainable development.

Government needs to provide information on indicators since indicators can be used as a tool for:<sup>44</sup>

- Making better policies and monitoring progress.
- Identifying unintended impacts of laws, policies and practices.
- Identifying which actors are having an impact on the realisation of rights.
- Revealing whether the obligations of these actors are being met.
- Giving early warning of potential violations, prompting preventive action.
- Enhancing social consensus on difficult trade-offs to be made in the face of resource constraints.
- Exposing issues that had been neglected or silenced.

## *NAP*

Failure by government to ensure that proper and efficient monitoring, enforcement and compliance strategies with regard to waste management and pollution control legislation are in place hampers government in executing its mandate efficiently. This is so because government would not be in a position of holding industry or any polluter(s) accountable for any environmental harm/damage they have caused. It is important to note that promotion of human rights without monitoring, policies and plans and assistance from the international community is not possible.<sup>45</sup>

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<sup>43</sup> The problem being that there is still lack of sufficient co-operation between the departments mandated with the environmental rights, as most departments seem to shift the responsibility to DEAT, forgetting that the right to environment cuts across all the other rights, that is, water and sanitation, health, land, agriculture, food and the others.

<sup>44</sup> Using Indicators for Human Rights Accountability, *op cit.*

<sup>45</sup> Human Rights and Statistics, *op cit.*

*Implementation difficulties*

**National Sphere**

**DEAT**

The above department reported that regarding the indicator project, there were no major difficulties experienced within this regard, since the project was still in its developmental phase and not in the implementation phase. Furthermore, the department indicated that with regard to both the WHS as well as the Cultural Resources Programmes, problems of co-operation between implementing agencies and communities were being experienced. This was believed to be due to lack of clear understanding of the programmes' objectives by the communities.

**DWAF**

The above department indicated that the implementation difficulties identified during the reporting period were mainly with regard to the following three areas, the Algoa Recycling Project, the Forestry and Water Resources Programme as well as the WWPs.

*Algoa Recycling Project*

Due to the hazardous nature of the materials most of which were removed from the plant in Port Elizabeth were to be disposed in Cape Town. It was important for the department to ensure that those people who were involved in this project were properly protected.

*Forestry and Water Resources Programme*

With regard to the above programme, lack of human capacity within the department in order to ensure enforcement of the National Forest Act (NFA) was of major concern. In addition to the above, of concern is also the development of practical administrative procedures, which must be accessible to all forest users, in particular rural communities.

*Working for Water*

The department indicated that lack of empowerment opportunities in the environmental sector was the only major problem experienced during the current reporting period. In addition to the above, DWAF indicated that also of major concern is lack of capacity within the department to ensure interaction within communities at various levels.

**DME**

With regard to the implementation difficulties experienced during the reporting period, the department reported that of major concern was funding and lack of capacity within the department. DME further indicated that extra funding and

capacity building within the department could improve on the implementation of the instituted measures.

### **Provincial Sphere**

With the exception of some provinces, most provincial departments reported that they did not experience any difficulties with regard to the implementation of the listed measures, which raises a concern as most provinces always indicate that human capacity, budget allocation amongst others contributes significantly towards implementation.

DACEL (Gauteng) reported that the difficulties, which the department experienced, resulted from both the external and internal environment. With regard to the external environment, the department indicated that these were due to regulatory responsibilities within the three spheres of government that have objectives that are sometimes different and/or even contradictory. This also includes the different objectives between the three spheres of government and industries and/or businesses with regard to environmental management.

With regard to internal factors, the above department reported that a multi-disciplinary approach is needed when dealing with the functional responsibilities of the department. The other concern was the ever-increasing scope of work within the department with minimal resources, that is, both human and financial. The results of shortage in human resources, being due to the fact that after government has spent its resources by capacitating its staff, some if not most of them are recruited by the private sector, which results in difficulties with regard to the implementation and monitoring of the introduced measures. Furthermore, lack of implementing compliance measures and law enforcement, due to plans that change annually and lack of sharing responsibilities with other sectors with regard to conservation functional responsibility are of greater concern.

The KZN Department of Traditional and Local Government reported that difficulties experienced during the current reporting period were largely related to lack of adequate capacity in especially new established municipalities in order to manage the IDP process, particularly in the preparation of the required EMPs.

The LP Department of Environment indicated that the implementation difficulties experienced were due to severe budget constraints, staffing of the component and lack of an appropriate environment management structure since 1995.

### *Constitutional obligations*

All three (national, provincial and local) spheres of government have the primary obligation to ensure that all economic and social rights are respected, protected, promoted and fulfilled. Failure to do so by the responsible government departments would be considered a serious violation of the government's mandate and as such government could be held accountable.

When assessing as to whether government has respected, promoted, protected and fulfilled the right in question, it is also of critical importance that the allocated

resources, constraints, historical background and natural conditions be taken into account.<sup>46</sup>

## **National Sphere**

### **DEAT**

#### *Respect*

DEAT reported that the production of the SoER and the Indicator initiative aim at ensuring that the constitutional obligation to respect the right to a healthy environment is achieved. The department indicated that the objective(s) of the above two projects is to identify what causes the changes in the quality of the environment and also coming up with the corrective measures aimed at correcting the situation. Furthermore, the department indicated that the WHS as well as the Cultural Resources Programmes do ensure that there is a balance between conservation and the utilisation of both natural and cultural heritage resources within the environment for the benefit of South African communities at large. The concern with the above information is that the department failed to explain what the above measures are all about and how they are achieved.

#### *Protect*

DEAT reported that the above constitutional obligation is achieved through programmes such as the Conflict Management Programme, which ensures that the mechanisms to facilitate conflicts within the environmental sector are provided.

#### *Promote and fulfil*

DEAT reported that the constitutional obligation to ensure promotion of the right to a healthy and protected environment is achieved through having access to information, examples of which being the state of the environment report. The department further reported that the co-operative governance programme does ensure that those departments mandated with environmental functions or whose functions do impact on the environment do so in a co-operative responsible manner. The department also reported that the new draft legislation on pollution and waste, bio-diversity, air quality management, coastal management and IEM all contribute towards ensuring the promotion and fulfilment of a healthy and protected environment.

### **DWAF**

#### *Respect*

With regard to the aforementioned obligation, DWAF reported that the White Paper on Basic Household Sanitation ensures community participation. Regarding forest management, the department indicated that in order to achieve the above, it encourages stakeholders to participate in management and decision-making relating to the state of the forests. The department further indicated that it encourages the enhancement of respecting the culture of communities with regard to forest access,

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<sup>46</sup> International Covenant on Economic, Social and Cultural Rights, *op cit.*



utilisation rights, and agreements, amongst others. Of concern is that the department did not indicate how the above can be achieved.

*Protect*

DWAF indicated that the aforementioned obligation is achieved through ensuring that the water resource and forestry policy measures are being promoted. The department indicated that the former ensures that communities are being empowered to look after the water resources in the areas in which they reside, as this will improve their own environment.

*Promote and fulfil*

With regard to water resources management, DWAF reported that the aforementioned constitutional obligation is achieved through awareness raising and training or capacitating communities in understanding the causes of pollution and the impact thereof. Concerning forest management, the department indicated that the aforementioned obligation is achieved through the formation of participatory forest management, community and/or stakeholder forums and also seeking to ensure the sustainable management of the forests for the benefit of present and future generations.

**DME**

*Respect*

DME failed to give a satisfactory answer with regard to the above constitutional obligation. The department only mentioned that in order to ensure that the above obligation is met, it ensured that the above policy measures did not discriminate against any particular group(s) or individual(s).

*Protect*

With regard to the above constitutional obligation, DME failed to provide the SAHRC with a satisfactory answer. The department vaguely mentioned that the obligation to protect was achieved through positive actions that were taken by the department, which resulted in the production of policies, programmes and projects that are aimed at ensuring that the right to a healthy and protected environment is realised. The department failed to mention those policies, programmes and projects and also how these policy and/or programmatic measures achieve the above was not explained.

*Promote and fulfil*

DME reported that through producing policy measures that ensure that the right to a healthy and protected environment is realised and also ensuring that no particular group is discriminated against such measures, ensures that the constitutional obligation to promote and fulfil is achieved. Of concern is that the department failed to identify those policy measures and also how they ensure that the vulnerable groups are not discriminated against. Furthermore, DME failed to categorise among the vulnerable groups the department was referring to.

## **Provincial Sphere**

Most of the provincial Departments of Environment failed to answer the question on constitutional obligations, with the exception of a few. The FS province indicated that in order for the department to meet the constitutional obligation to protect the right in question, the department strives to ensure that the compliance and review measures are implemented so as to protect the public interest. Of concern is that it would have been very helpful and more informative if the department had explained what the above measures are all about and how the department ensures that there has been proper implementation of these measures.

DACEL (Gauteng) indicated that even though the resources of the department are limited, the department has been promoting sustainable development intended at ensuring that the lives of the people are protected in order for the department to meet the constitutional obligation.

### *Promote and fulfil*

With regard to the above constitutional obligations, the provincial departments failed to provide the SAHRC with any relevant and useful information as to how the provinces made sure that the above obligations were met in order to enhance the right in question.

In conclusion, whilst what the current government is doing is in line with its constitutional obligation/mandate, there is no doubt that government still has a long way to go before achieving its goal(s) and mandate entirely. Proper systems still need to be put in place, before government could convince society about its delivery and also whether there has been progressive realisation of the right in question. Of concern is also the quality of the responses received from both the national and provincial governments. It is disturbing to discover that government still does not understand what the four constitutional obligations entail and also their significance with regard to the right in question.<sup>47</sup>

### *Vulnerable and marginalised groups*

When analysing different government's responses with regard to the above, it could be concluded that there is still a lack of understanding of what social and economic rights entail, especially with regard to the vulnerable groups of our society. Of greater significance, government still fails to indicate how their policy/legislative measures, including programmes and/or projects, provide for the previously disadvantaged and/or vulnerable groups. This could lead to the wrong judgement and/or conclusion that the current government still does not have the interests of the marginalised groups of the society at heart and also on its priority list.

This is confirmed by the report in the Star newspaper,<sup>48</sup> which indicates that at the dawn of the 21<sup>st</sup> century, some 1,1 billion people on earth are still without access to a safe water supply and 2,4 billion are without adequate sanitation. Furthermore, in SA

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<sup>47</sup> Section 7(2) of the Bill of Rights states that the state is required to respect, protect, promote and fulfil the rights in the Bill of Rights.

<sup>48</sup> 'Wash gets ready to clean up' The Star, March 19, 2002, p.18.

alone, approximately 18 million people are still without adequate sanitation.<sup>49</sup> It is sad to note that in SA, the majority are still the ones affected by environmental injustices. It is reported that in SA alone, a population of which is about 37,9 million people (75 per cent of whom are Africans and 13 per cent whites), the majority are still the ones suffering from environmental injustices as opposed to the minority.<sup>50</sup> Although somewhat dated, there is nothing to suggest that these statistics have improved; the plight of the vulnerable groups is still not attended to. This could be marked as a violation to the right in question, as access to sanitation facilities is a basic human right that safeguards health and human dignity.

Lack of proper sanitation and poor hygiene are responsible for killer diseases such as, diarrhoea (mostly in children), cholera and typhoid, amongst others. The sad part is that, currently, the ones mostly affected are still children and women. This is reflected in the fact that, in SA alone, over 200 000 children die yearly from diseases caused by contaminated water.<sup>51</sup> This is a violation of Article 24 of the Convention on the Rights of the Child.<sup>52</sup> Although these figures express nothing about the race of those who suffer from the lack of portable water, the reality is that the vast majorities are still Africans. Furthermore, it is reported that pollution of surface and groundwater resources in SA exacerbates the scarcity of water, with typical pollutants including, industrial effluents, domestic and commercial sewage, acid mine drainage (especially from the coal and gold mines), agricultural runoff, and litter.<sup>53</sup> The report further states that of concern to water resource managers are the diffuse sources of pollution that is difficult to quantify. In the past, agricultural run-off, including nutrients, pesticides and herbicides was of major concern, however the increase in informal settlements, with high poverty levels and inadequate sanitation, may become one of the greatest localised pressures on water quality in SA.

## National Sphere

### DEAT

The department only stated that provision has been made predominantly through poverty alleviation projects, with regard to women, female-headed households, child-headed households, persons living in rural areas, poorer communities, persons living

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<sup>49</sup> *Ibid.*

<sup>50</sup> Michael Kidd, “Environmental Justice – A South African Perspective” *Acta Juridica* 1999, pp. 148-152.

<sup>51</sup> *Ibid.*

<sup>52</sup> Article 24(1) on the Convention on the Rights of the Child states that, States Parties should recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illnesses and rehabilitation of health. Furthermore, Article 24(2) (a) (c) and (e) respectively states that, States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures to: (a) diminish infant and child mortality; (c) combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution and (e) ensure that all segments of society, in particular, the parents and children are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents.

<sup>53</sup> FreshwaterSystems and Resources, see [www.environment.gov.za/soer/nsoer/issue/water/pressure.htm](http://www.environment.gov.za/soer/nsoer/issue/water/pressure.htm). Site visited on 20/03/02.

close to industries and waste disposal sites as vulnerable groups but failed to make specific mention of those projects and policy measures.

Furthermore, with regard to the manner in which each of the identified policy measures have catered for the identified vulnerable groups, the department reported that this was achieved through the development of income generating projects, which created a few jobs that benefited the above. Furthermore, the department stated that the vulnerable groups were also catered for through addressing the adverse effects of industry on the environment and the impact it has on the people's health.

### **DWAF**

The department indicated that the community forestry project created in terms of the National Forests Act of 1998, benefit rural communities by ensuring that they benefit from the fruits, wood and medicine through community forestry agreements. Other projects that benefited the aforementioned vulnerable groups, especially the homeless people were the Algoa Recycling Clean-up Project. The WWP benefited all of the above listed vulnerable groups with the exception of older persons, persons with disabilities, persons living close to industries and waste disposal sites and workers exposed to toxic and hazardous substances.

Furthermore, with regard to the manner in which each of the identified policy measures have catered for the identified vulnerable groups, DWAF indicated that by ensuring that waste from the Algoa Recycling premises was removed, people like vagrants who slept in the abandoned buildings, could no longer come into contact with extremely toxic, carcinogenic and/or explosive waste. The department also mentioned that sound waste management and proactive prevention of pollution at source, ensures that people especially the vulnerable groups are protected as they are the once most likely exposed to pollution.

### **DME**

DME indicated that the department does not specifically categorise people/communities into these vulnerable groups when implementing its programmes. The department further indicated that the department's policy measures; focuses on better environmental governance and co-operation and thus strengthens enforcement and make provision for workers and the affected communities or those that are affected and/or exposed to hazardous waste. These may include vulnerable groups such as, women, older persons, disabled persons, children, poor people, homeless people, to name but a few.

### **Provincial Sphere**

DACEL (Gauteng) indicated that the department's WM and Assessment policy measures made specific provision to some of the identified vulnerable groups.

### *Waste Management*

- Persons living with disabilities - ensuring that monitoring committees are set up
- Female headed households - where proposals for job creation within waste management sector(s) were made to DEAT
- Persons living in rural areas
- Persons living in informal settlements - the Gauteng Provincial Government (GPG) tender procedure designed to ensure the encouragement of small, micro and medium enterprises (SMME's)

### *Assessment*

With regard to the above, the department indicated that there is no particular consideration of any of these vulnerable groups, with the exception of persons living with disabilities.

### *Awareness*

With regard to the above measure, the department reported that the project design and choice of implementation areas are such that the programmes benefit all of the above-identified vulnerable groups.

DACEL (Gauteng) reported that with regard to WM, Air and Water Quality and Environmental Assessments, the department ensures that consultation with all interested and affected parties is a requirement. Furthermore, the department ensures that monitoring committees for landfill sites are established and that proper systems are in place for the monitoring of the Holfontein Hazardous Waste Site. The department further reported that the GPG tender procedure for the removal of public sector general and medical waste is designed to ensure the participation of SMME's.

In conclusion, it is questionable as to whether the measures implemented by government are reasonable or not, especially when taking into consideration the situations most of the previously disadvantaged communities live in or are still exposed to. There is still a lack of information with regard to how the vulnerable groups and the previously disadvantaged groups are being catered for, hence it is questionable as to the effectiveness of the implemented measures.

The *Grootboom* judgement,<sup>54</sup> states that to be reasonable, measures cannot leave out of account the degree and the extent of the denial of the right they endeavour to realise and that the measures aimed at achieving the realisation of any particular right must not ignore those whose needs are the most urgent and whose ability to enjoy any particular right are most in peril.

In addition to the above, with regard to the government's responses as to whether the right in question has or has not been realised, it could be reported that responses from the national departments seem to be more informed than those from the provinces. With regard to the former, DEAT (as a key department) seems to have a better

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<sup>54</sup> *Grootboom, op cit.*, para 44.

understanding and cover broader and wider aspects of issues as opposed to other national departments responsible also mandated with environmental issues.

It is also of critical importance to indicate that DME's responses were not satisfactory, in that the department did not seem to have made any effort in providing the SAHRC with the required information that could help the Commission in carrying out its monitoring the observance of socio-economic rights as per its constitutional mandate.

Paragraph 45 of the *Grootboom* judgement,<sup>55</sup> states that 'progressive realisation' contemplates the reality that the right in question cannot be realised immediately, but can only be realised over time, due to legal, administrative, operational and financial hurdles. It is also reiterated in the Maastricht Guidelines<sup>56</sup> that the full realisation of most economic, social and cultural rights can only be achieved progressively and that it is very crucial for States not to use the "progressive realisation" provision as a pretext for non-compliance.

## 8. RECOMMENDATIONS

CASE's<sup>57</sup> full report clearly indicates that it is somehow difficult to distinguish between the realisation of the socio-economic rights and the delivery of social services, since the distinction between failure to deliver services at a satisfactory rate on the one hand, and failure to observe socio-economic rights on the other, is not defined in the Constitution. Therefore, it is crucial to note that delivery is subject in principle to parliamentary and public scrutiny, and does not impose any legal (as distinct from moral and political) burden on the State.

- All tiers of government should ensure implementation, monitoring and enforcement of all the state's regulations, policies and legislation.
- Most if not all the three tiers of government are failing to commit themselves to civic capacity building/awareness/education - leading to lack of access of information. Vulnerable groups are still not attended to.
- Medical/hospital/pharmaceutical waste is also of critical concern in the country, and as far as this type of waste is concerned, there is a need for stricter monitoring and enforcement strategies. Government needs to come up with clearer and implementable strategies on how this type of waste should be handled, treated and disposed off in an appropriate and safe manner at the approved registered disposal sites. Provinces need to come up with stricter regulations on defaulters, as improper handling and exposure of this type of waste can lead to high incidences of communicable and fatal diseases.
- GPG to ensure the implementation, monitoring and enforcement of the already developed provincial Medical WM Strategy.

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<sup>55</sup> *Ibid.*

<sup>56</sup> Maastricht Guidelines, *op cit.*

<sup>57</sup> Monitoring Socio-Economic Rights in South Africa, *op cit.*

There are few cases where illegal dumping of this type of waste occurred and one can link this to lack of proper monitoring strategies regarding the transportation and to a certain extent the disposal of the wastes. In Gauteng, medical waste, which belonged to a blood bank, was found in Tembisa, north of Johannesburg. It is believed that this was the result of a kombi that was hijacked, whilst transporting blood, blood samples and medical equipment.<sup>58</sup>

Although government is critical of the usage of incinerators in the handling of the medical and hospital waste, it has ruled out the complete ban on their usage. It could be concluded that we really do not have a toxic waste crisis in the country, but all we have is industry that puts profit above the environmental integrity, and a government that cannot decide on what to do about the situation and waste management companies, which lack the expertise in the handling, treatment and disposal of these types of waste.<sup>59</sup>

The generation of trans-boundary movements of hazardous waste and their disposal poses a significant threat to human health and the environment.<sup>60</sup> As disposal facilities for hazardous waste become scarcer and more costly in industrialised countries, less developed countries are being increasingly targeted as dumping grounds. This places a disproportionate burden on countries that frequently lack the capacity to deal with the wastes in an environmentally sound manner. The practice of exporting hazardous wastes to developing countries has been described as environmental racism on a global scale.<sup>61</sup> Although the international community has adopted a number of measures aimed at addressing the transportation of hazardous wastes to developing countries, South Africa having ratified or being a signatory to some of these, has not as yet come up with relevant domestic legislation or regulations with regard to the above. For example, with regard to hazardous waste, South Africa has acceded to the Basel Convention<sup>62</sup> and is also a signatory to the LOME 4 Convention.<sup>63</sup> SA has also ratified the United Nations Framework Convention on Climate Change,<sup>64</sup> and the Convention on Nuclear Safety of 1994.<sup>65</sup> Furthermore, SA

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<sup>58</sup> Hijackers dump medical waste in Tembisa, see <http://www.iol.co.za/index.php>. Site visited on 20/11/01.

<sup>59</sup> Toxic Waste in South Africa, see [http://www.earthlife.org.za/campaigns/toxics/tox\\_intro.htm](http://www.earthlife.org.za/campaigns/toxics/tox_intro.htm). Site visited on 20/11/01.

<sup>60</sup> Z.Lipman, "Trans-boundary movement of hazardous waste: environmental justice issues for developing countries" *Acta Juridica* 1999, 266.

<sup>61</sup> *Ibid.*

<sup>62</sup> Basel Convention regulates the trans-boundary movement of hazardous waste and has been acceded to in March 1989 and ratified on 5 May 1994. No specific legislation has been passed in this regard. However, it has been reported that the Hazardous Substance Act 15 of 1973 and Environment Conservation Act, section 2: Draft policy on management of hazardous waste; and the White Paper on Integrated Pollution and Waste Management for South Africa, which was tabled in parliament in August 1998 are applicable to this convention.

<sup>63</sup> Article 39 of the Fourth African and Caribbean and Pacific-European Economic Community Convention of 15 December 1989 (LOME 4), which South Africa has signed but not as yet ratified is dedicated to the control of international movement of hazardous and radioactive waste. This article specifically prohibits all direct and indirect export of such waste by the European Community to the African, Caribbean and Pacific states and provides that these states shall prohibit the import of such waste into their territory.

<sup>64</sup> United Nations Framework Convention on Climate Change (1992) South Africa has ratified this convention in August 1992, the objectives of this convention is the "stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate change system". The convention requires, *inter alia*, that developed countries

has ratified the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that deplete the Ozone Layer.<sup>66</sup>

- It is also pivotal for government to come up with a clear strategy that is aimed at addressing the importance and/or dangers of nuclear energy and the nuclear waste. This is prompted by the fact that there is a strong belief amongst the people that this type of energy and its waste pose serious threats to the health of the people, the catastrophe at Chernobyl being its strongest point of reference.<sup>67</sup>
- Tips on how to reduce waste and consumption should be supplied by government to industry, parastatals and communities.
- Education and awareness should be high on the priority list of government, so that the society could start to prioritise the right in question and not separate it from other social and economic rights they regard to be of importance. From the CASE full report, it could be concluded that the environmental rights are still the least prioritised rights within the society.<sup>68</sup>
- A need for the implementation of the National Waste Management Strategy (NWMS) by all the three tiers of government, including the parastatals and stakeholders.

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formulate and implement programmes, which mitigate the adverse effects of climate change and facilitate adaptation to it.

<sup>65</sup> Convention on Nuclear Safety of 1994, which South Africa ratified in December 1996, and which the Council for Nuclear Safety has initiated a process to develop a national policy and domestic legislation in this regard. The objective of this convention is to achieve and maintain a high level of nuclear safety world-wide through the enhancement of national measures and international co-operation, including safety-related technical co-operation, where appropriate.

<sup>66</sup> The purpose of the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol (both ratified on 15 Jan 1990) is to protect human beings and the environment from the harmful effect of activities, which modify the ozone layer. It requires the parties to co-operate according their means, in research and legislative measures and to formulate agreed standards, procedures and measures in the form of protocols and annexes. The 1987 Montreal Protocol sets out a timetable for the reduction of controlled substances, which deplete the ozone layer.

<sup>67</sup> The catastrophe at Chernobyl has demonstrated the global connections that nuclear waste is a universal concern. There, according to the Soviets, only a small portion (3-5 per cent) of the radioactive material in the reactor core leaked out just from one reactor. Yet the immediate effects of the accident (cesium fallout) threatened a whole culture, the Saami in Scandinavia, thousands of kilometres away. Since 70-85 per cent of the long-lived isotope (i.e. plutonium) fell inside the drainage basin in the Baltic Sea, the general long-term effects on Sweden cannot yet be determined. If only a single country that has nuclear waste fails to handle it safely, life on earth will be threatened.

<sup>68</sup> Monitoring Socio-Economic Rights in South Africa, *op cit*. The study was done on the most marginalised groups and on the whole, there is no doubt that jobs and housing are the biggest socio-economic concerns government must address in order to meet public demands. At the same time, the lack of adequate infrastructure in rural areas means that the provision of water, electricity, and roads should also be an important priority for government, if it is to meet the concerns of the marginalised constituencies. Compared to these, social services such as, education and health, and environmental concerns are not seen as priorities. This is not because people in disadvantaged communities disregard the latter, but it's all because of survival requirements taking precedence.



- SA as a developing country and technically the more advanced in Africa with regard to technologies, need to come up with efficient domestic legislation that would be implementable and aimed at capacitating its inhabitants and the neighbouring African States on ways of dealing with waste (i.e. handling, treating and disposing off) in an environmentally sound and effective manner.
- SA as a country needs to ensure that Trans-boundary Movements of Hazardous Waste need to be properly monitored, in order to ensure that the environment, lives and health of the inhabitants of the country and the neighbouring states are not compromised.<sup>69</sup>
- Stringent and effective regulatory measures should be introduced by the government of today, on the rehabilitation of all the mine dumps, in order to protect the lives of the inhabitants and the environment at large.
- The Polluter Pays Principle needs to be more enforced as stated in Principle 16 of the Rio Declaration.<sup>70</sup> The fact that the South African Constitution guarantees everyone a healthy environment, free from pollution could be interpreted to mean that in the South African context, environmental justice requires not only everyone should have equal access to a clean and healthy environment, but should also bear the burden of environmental damages.
- Where medical waste and other type of toxic industrial wastes are involved, cleaner technologies need to be encouraged or rendered compulsory by government. Although these technologies are believed to be expensive, people's environment, health and lives need to be protected.<sup>71</sup> Hospitals, clinics, laboratories and other medical institutions, produce millions of tons of medical waste per year and much of this waste is disposed off in incinerators. A certain fraction of this hospital waste is regulated as infectious. At the moment in South Africa, incinerators are still used for burning or destroying medical/hospital waste. It is a known fact that this type of waste when incinerated could still be classified as being hazardous and/or toxic, since it does not get treated. Medical waste incinerators are the second largest known source of dioxins in the United States.<sup>72</sup> Health effects of prolonged dioxin exposure include impairment of immune, nervous and endocrine systems; furthermore, dioxin is a known human carcinogen.<sup>73</sup> In addition to dioxins, toxic air pollutants from medical waste incinerators

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<sup>69</sup> Principle 19 of the Rio Declaration states that States should provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse trans-boundary environmental effect and shall consult with those States at an early stage in good faith.

<sup>70</sup> Although the Constitutional Court has fully recognised the concept in principle of polluter pays; the industries still fail to compensate the victims of pollution as well as to bear the costs related to ecotourism.

<sup>71</sup> There is a perception that the costs attached to other cleaner technologies in the handling, treatment and disposal of this type of waste at proper landfill sites, are very exorbitant (approximated at billions of rands), this type of waste end up being dumped illegally and causing irreparable damages to the country's soils, water resources and the health of people, especially the poor.

<sup>72</sup> Medical Waste Incinerators, see [http://www.bredl.org/medwaste/HawRiver\\_facility.htm](http://www.bredl.org/medwaste/HawRiver_facility.htm). Site visited on 25/02/02.

<sup>73</sup> *Ibid.*

include arsenic, chromium IV, cadmium, lead, hydrochloric acid, and mercury.<sup>74</sup>

- Industry should not profit at the expense of the well-being of the societies. The reality is that, in SA, certain communities carry a heavier burden of environmental degradation than others, particularly those that are from previously disadvantaged communities, that is the poor and black. This is in fact, in contradiction with the environmental clause, which guarantees everyone a healthy environment that is free from any form of pollution. Furthermore, where incinerators and some form of burners are used in order to destroy any type of hazardous and/or toxic waste, there should be proper and frequent monitoring of these equipment and the emissions should fall within the acceptable emitting set standards as stipulated by the national DoH.

## 9. CONCLUSION

Whilst what the current government is doing is in line with its constitutional obligation/mandate and also appreciated, there is no doubt that government still has a long way to go before achieving its goal(s) and mandate entirely. Proper systems still need to be put in place, before government can convince the society about its delivery. Apartheid's legacy of inequalities to South African communities is particularly visible in the provision of basic services such as, sanitation, safe drinking water, and electricity. Furthermore, the right to a healthy environment is still far from being reached, as both air and water pollution, waste removal and disposal facilities (solid waste being of critical importance), clean and hygienic working environments are also still of critical significance.

Most of the government departments still fail to provide the SAHRC with sufficient information with regard to whether the respective departments have ensured that section 24 of the Bill of Rights is and/or was progressively realised. Though the above is the case, it would be wrong and misinforming to conclude that currently environmental rights are still not being realised and/or fulfilled in SA. Whilst the above is the case, it is also clearly indicated in CASE's<sup>75</sup> full report, that it is difficult to distinguish between the realisation of the social and economic rights and the delivery of social services, since the distinction between failure to deliver services at a satisfactory rate on the one hand, and failure to observe social and economic rights on the other, is not defined in the Constitution. Therefore, it is crucial to note that delivery is subject in principle to parliamentary and public scrutiny, and does not impose any legal (as distinct from moral and political) burden on the state.

It is important to note that in SA, the brunt of environmental neglect has been borne by the poor, as sources of pollution and environmental hazards are located most often next to poor residential areas.<sup>76</sup> More vulnerable have been the women in the impoverished communities, which is contradictory to Article 14 of CEDAW.<sup>77</sup>

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<sup>74</sup> *Ibid.*

<sup>75</sup> Monitoring Socio-Economic Rights in South Africa, *op. cit.*

<sup>76</sup> *Ibid.*

<sup>77</sup> Article 14(1) of CEDAW states that States Parties shall take into account the particular problems faced by rural women and the significant roles, which rural women play in the economic survival of

Women are still faced with conditions where they have to fetch water and firewood needed by the household. The polluted water streams forces women to utilise more distant water sources, or else suffer the health consequences. The time spent on collecting wood and water becomes correspondingly longer, leaving them more vulnerable to violence and ill-health. Daily living conditions of the society in former black townships, urban areas, rural areas, squatter camps are marked by lack of electricity, inadequate sanitation and waste removal facilities. Lack of sanitation and waste removal facilities results in unhealthy environments. With regard to waste disposal sites, lack of such facilities could lead to, bad smell (odour), pest nuisance, flies (which could be a nuisance and vectors of diseases), and these correlate with a high prevalence of illnesses, such as diarrhoea, sneezing, asthma and any other related respiratory illnesses. Recent cholera outbreaks in the EC and the KZN provinces are the results of polluted water and lack of appropriate sanitation facilities, as diseases spread from unhealthy environments. The sad part is that the vulnerable citizens are the ones affected due to unhealthy environments, which is in contradiction with section 24 of the South African Bill of Rights. This also results in the societies environmental rights being violated.

In conclusion, in order for States to be in a better position of improving the lives of their inhabitants, whilst protecting the global environment, governments should focus on the following five areas:<sup>78</sup>

- **Water and sanitation:** More than one billion people globally still lack clean drinking and about two billion still lack proper sanitation.
- **Energy:** A total of about a billion people are currently without modern energy services; promotion of renewable resources, and ratification of the Kyoto Protocol in order to address climate change.
- **Health:** Address the effects of toxic and hazardous materials; reduce air pollution, which contributes to thousands of global mortalities each year; lower the incidence of diseases linked with polluted water and poor sanitation.
- **Agricultural and food security:** The degradation of land affects about two thirds of the world's available agricultural land, and there is a need to come up with strategies aimed at land degradation.
- **Bio-diversity and ecosystem management:** Processes that have destroyed most of the world's natural support system(s) need to be reversed.

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their families, including their work in the non-monetised sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas. Whilst Article 14 (2) (h) states that, States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right to have enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity, and water supply, transport and communications.

<sup>78</sup> United Nations Secretary General Kofi Annan's speech, see [http://www.johannesburgsummit.org/html/media\\_info/speeches/sg\\_speech\\_amnh.pdf](http://www.johannesburgsummit.org/html/media_info/speeches/sg_speech_amnh.pdf).

## **ABBREVIATIONS**

<b>APPA</b>	Atmospheric Pollution Prevention Act of 1982
<b>ARD</b>	Asbestos Related Diseases
<b>CASE</b>	Community Agency for Social Services
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CITES</b>	The Convention on International Trade in Endangered Species of Wild Fauna and Flora
<b>COIDA</b>	Compensation for Occupational Injuries and diseases Act 130 of 1993
<b>DEAT</b>	Department of Environmental Affairs and Tourism
<b>DACEL</b>	Department of Agriculture, Conservation, Environment and Land Affairs
<b>DME</b>	Department of Minerals and Energy
<b>DWAF</b>	Department of Water Affairs and Tourism
<b>ECA</b>	Environmental Conservation Act of 1989
<b>EIA</b>	Environmental Impact Assessment
<b>EIPs</b>	Environmental Implementation Plans
<b>EIMP</b>	Environmental Implementation and Management Plan
<b>EMPs</b>	Environmental Management Plans
<b>HAS</b>	Hazardous Substance Act
<b>HCW</b>	Health Care Waste
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IDPs</b>	Integrated Development Plans
<b>IEM</b>	Integrated Environmental Management
<b>IP&amp;WM</b>	Integrated Pollution and Waste Management
<b>NAP</b>	National Action Plan for the Promotion and Protection of Human Rights
<b>NCR</b>	Noise Control Regulations of 1999
<b>NEMA</b>	National Environmental Management Act of 1998
<b>NSoER</b>	National State of the Environmental Report
<b>NWA</b>	National Water 1998 Act of 1998
<b>NWMS</b>	National Waste Management Strategy
<b>PHAST</b>	Participatory Hygiene and Sanitation Training
<b>RAMSAR</b>	The Convention on Wetlands of International Importance
<b>SEA</b>	Strategic Environmental Assessment
<b>SME's</b>	Small, medium enterprises
<b>SMME's</b>	Small, micro and medium enterprises
<b>WHO</b>	World Health Organisation
<b>WHS</b>	World Heritage Sites
<b>WWP</b>	Working for Water Programme
<b>WSSD</b>	World Summit on Sustainable Development



## CHAPTER 9

### RIGHT TO SUFFICIENT WATER

#### 1. INTRODUCTION

Water is a powerful symbol throughout the world, carrying with it ideas of baptism and new life, cleansing and healing, and the promise of growth and prosperity. In contrast, in a region of growing demands on a limited resource, the increasing scarcity of water could result in devastating conflicts and catastrophes.<sup>1</sup> Due to the fact that water has become a scarce, limited natural commodity in South Africa and elsewhere in the world, its high demand has brought about the need for government to promote its proper and efficient usage through reviewing, amending and repealing some of the past water laws. This is aimed at ensuring that this scarce resource sustains the current generations and on the other hand, is preserved for future generations.

The right to have access to sufficient water is provided in section 27(1)(b) of the South African Constitution. Section 27(1)(b) read in conjunction with section 27 (2) provides that the state must take reasonable legislative and other measures to respect, protect, promote and fulfil the progressive realisation of the right to access of water within its available resources. The provision of clean water in sufficient quantities is important in its own right, as well as in its implications for health, food security and overall economic development.<sup>2</sup>

While the water programmes since the post apartheid government took over has been heralded by many as government's most successful initiative, there is concern about the methods that have been used, consultation processes, the use of privatisation schemes, and most importantly the sustainability of operation and maintenance of completed projects.<sup>3</sup> All in all, the 1996 Constitution of the Republic of South Africa places a duty on all the spheres of government to work together in order to ensure that the well-being of the people of the republic is secured.<sup>4</sup>

Most international and regional instruments do not explicitly recognise the right to sufficient water. Specific provisions on the right to water are found in the International Convention on the Elimination of All forms of Discrimination against Women (CEDAW) and Draft Protocol to the African Charter on the Rights of Women.<sup>5</sup> CEDAW recognises the right of women in rural areas to enjoy adequate living conditions, particularly in relation to sanitation and water supply.<sup>6</sup> The right to water is also provided for in the Copenhagen Declaration and Programme of Action that States are supposed to focus their efforts and policies to provide basic needs for

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<sup>1</sup> White Paper on Water Policy for South Africa, 1997, Speech by the previous Minister of Water Affairs and Forestry, Professor Kader Asmal.

<sup>2</sup> Monitoring Socio-Economic Rights in South Africa, see <http://www.case.org.za/htm/soceco3.htm>, p. 55. Site visited on 11/09/02.

<sup>3</sup> *Ibid.*

<sup>4</sup> The Constitution of the Republic of South Africa, Act 108 of 1996, chapter 3.

<sup>5</sup> Article 17(1)(a) of the Draft Protocol recognises the right to have access to nutritious and Adequate food. In this regard State parties to this Protocol shall take appropriate measures to provide women with access to clean water.

<sup>6</sup> Article 14(2)(h) of the Convention of Elimination of Discrimination Against Women, 1981.

all. The efforts should be directed at providing safe drinking water and sanitation to everyone.<sup>7</sup>

The provisions mentioned above confirm the fact that there is a link between food, water, environment, housing and health. Although the right to sanitation has no explicit provision in the Constitution, it can be derived from section 24(a), read together with the right to have access to sufficient water, that people have a right to sanitation. Therefore, this places an obligation on the State to provide clean drinking water for human consumption, conserve water and provide basic services for sanitation for the protection of the environment. Water is essential for human survival and must be protected against contamination and unhygienic environmental practices for drinking purposes.

The purpose of the chapter is to give a brief summary of the analysis of the government's responses mandated with the right to water. The two departments responsible for the provision of water in the country are the Department of Water Affairs and Forestry (DWAF) and the Department of Provincial and Local Government (DPLG) and its provincial subsidiaries. The report will outline the developments that took place during the period under review for both these departments. Using the Constitution and the interpretation of its provisions in the *Grootboom* case, and applicable international instruments, the report will provide an analysis of measures instituted by the government departments during the said reporting period to 'progressively realise the right' of access to sufficient water.

## **2. POLICY DEVELOPMENTS AND PROGRAMMATIC MEASURES**

### **National Sphere**

#### **DEPARTMENT OF PROVINCIAL AND LOCAL GOVERNMENT (DPLG)**

The DPLG reported that the following is the measure instituted for the period under review:

##### *Municipal Service Partnership (MSP)*

The MSP's main aim is to provide a clear policy framework within which to influence and gather the resources of public institutions, non-governmental organisations (NGOs), community based organisations (CBOs), and the private sector towards meeting the country's overall development objectives. The policy proposes that municipalities look for innovative ways of providing and accelerating the delivery of municipal services.

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<sup>7</sup> UNDP Copenhagen Declaration on Social Development Commitment No. 2, para (b).

**Table 1 Programmes instituted by the DPLG**

<b>Program me/ Projects</b>	<b>Policy on which programme/ Project is based</b>	<b>Objective(s)</b>	<b>Beneficiaries</b>	<b>Achievement(s) or Goal(s) attained</b>
Municipal Partnership Capacity Building	MSP	Enhance capacity of municipalities to structure service partnerships	Municipalities, NGOs, CBOs	Since the programme was introduced over 1000 municipal officials and councillors have been trained on MSP techniques
Municipal Infrastructure Investment Unit	MSP	To persuade the private sector to invest in municipalities	Municipalities	Over 6 million people have received water and sanitation through partnerships
Consolidated Municipal Infrastructure Programme (CMIP)	Municipal Infrastructure Investment Framework (MIIF)	To minimise infrastructure backlogs	Municipalities	People have received water, sanitation, public lighting and people have been employed and SMMEs have been established

*Consolidated Municipal Infrastructure Programme (CMIP)*

The CMIP is also aimed at contributing to other government strategic and intervention policy objectives, which include:

- The utilisation and empowerment of affirmative business enterprises.
- The targeting of the most vulnerable communities and sectors of society such as women, youth and the disabled for job creation.
- Implementation of those projects identified by municipalities aimed at benefiting the most needy communities.

**DEPARTMENT OF WATER AFFAIRS AND FORESTRY (DWAF)**

The following measures were reported by DWAF to have been introduced during the current reporting period:

*Free Basic Water (FBW) Policy*

The primary intention of the free basic water policy is to alleviate poverty by ensuring that no one is denied access to a basic water supply. Underlying this is the recognition that it will improve community health and free women from drudgery. This programme was initiated by DWAF in December 2000 and brought out a policy/strategy document. The reason for embarking on this programme was precipitated by the realisation that many local authorities were unable to provide basic water free of charge to those who were unable to pay; a requisite of them by DWAF's Water Services Act and Constitution. DWAF reported that to date, 57 percent of



South Africans are receiving free basic water and that 214 of the 309 municipalities are already implementing the FBW Policy.<sup>8</sup>

*White Paper on Basic Household Sanitation of September 2001*

Whilst included in the environmental protocol, the above policy is also covered under the right to adequate water. In terms of the Water Services Act of 1997, “water services” include “water supply and sanitation services”. This policy highlights how poor sanitation impacts on the health, living conditions and the environment. It focuses specifically on the provision of a basic level of household sanitation to mainly rural communities and informal settlements. Furthermore, it ensures that sanitation improvement programmes are adequately funded, and that mechanisms are put in place intended to monitor its implementation.

*Water Services Capital Programme*

The above programme is based on the White Paper for Basic Household Sanitation of September 2001 and is aimed at benefiting the poor communities from both the rural areas and informal settlements. Its main objective is to align DWAF’s functions with local government’s planning framework and other legislation in order to provide basic level of household sanitation for the above. DWAF reported that during the current reporting period, approximately 1, 897, 896 people and 61, 356 households got access to basic water supply and sanitation respectively.

**Provincial Sphere - DPLG**

The Eastern Cape and Free State Department of Local Government and Housing did not provide information on the policy measures, and no explanation was provided for the lack thereof. The Mpumalanga Department of Local Government, Traffic Control and Traffic Safety reported that the provision of water is not the core function of the Department. The measures instituted and being implemented by the other provincial departments are mainly the CMIP and the National Cholera Strategy.

*CMIP*

The Gauteng, Limpopo, Northern Cape and the Western Cape departments reported that they are continuing to implement the CMIP. The CMIP is meant to provide capital grants to municipalities in order to fund the installation of new or upgrade infrastructure and services for low-income groups. In Limpopo, the achievements for the period under review include a total of 295 projects being implemented, of those 179 have been completed. To date, 116 water projects were supported by the CMIP budget of R214 million, and 28 sanitation projects to the value of R39 million. The total CMIP grant was R347 million, and to date R295, 3 million has been spent.

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<sup>8</sup> Section 9(1) regulations in terms of the Water Services Act of 1997, provides for free basic water supply. According to these s 9(1) regulations, 25 litres of portable water per day must be provided for each individual or when calculating it in terms of households, 6 kiloliters of portable water should be provided per household per month. This should be done at a flow rate of not less than 10 litres per minute, within 200 metres of a household and with effectiveness such that no consumer is without a supply for more than seven full days in any year.

In the Western Cape during the reporting period the CMIP was restructured for the prioritisation of projects being transferred from the Provincial Administration to the District Municipalities. Also during the period under review 76 water projects were undertaken, of that total 55 were undertaken during the year 2000/2001 and the remaining 21 were for the year 2001/2002. This resulted in 855 198 people benefiting from the projects, of those 340 102 were for the year 2000/2001 and 515 102 were for the year 2001/2002.

#### *National Cholera Strategy*

Only the KwaZulu-Natal Department of Traditional and Local Government Affairs reported on the above measure. The department indicated that the above measure was developed in response to the cholera outbreak in the province and was also in line with the National Cholera Strategy launched in 2001. The department indicated that it developed the Provincial Policy Framework, Strategy and a Methodology to operationalise the policy and strategy for the management of the cholera epidemic. The policy was developed as part of the KwaZulu-Natal Cholera Management Project, whose main objective is to assist in the containment of the present cholera outbreaks, curtailing its spreading to other areas not yet affected and to prevent future outbreaks within the province. The communities that would benefit are those in the cholera hotspots. The department's achievement during the period under review is that cholera infections are currently less than 10 percent as compared to the period 1999/2000.

### **3. LEGISLATIVE MEASURES**

#### **National Sphere**

##### **DPLG**

The legislative development that took place during the reporting period in order to realise the right to have access to sufficient water, is the following:

##### *Municipal Systems Act No. 32 of 2000*

The DPLG reported that the Municipal Systems Act provides the legislative framework for the Municipal Services Partnership Policy.

##### **DWAF**

Below are the legislative measures that occurred during the reporting period intended for the realisation of the right in question:

##### *Promulgation of section 9(1) regulations*

During June 2001 regulations were promulgated in terms of section 9(1) of the Water Services Act, 1997 (Act No. 108 of 1997), referred to as the "section 9(1) regulations". These regulations set compulsory national standards and measures to conserve water.

*Promulgation of section 10(1) regulations*

During July 2001 regulations were promulgated in terms of section 10(1) of the Water Services Act, referred to as the “section 10(1) regulations”. These regulations set norms and standards in respect of tariffs for water services.

**Provincial Sphere - DPLG**

KwaZulu-Natal instituted the Draft Provincial Water and Sanitation Bill, 2002. The Bill draws from the provisions of the Constitution and Water Services Act, for the functions and powers of provincial departments. The Eastern Cape, Free State, Gauteng and Northern Cape departments did not institute new legislation during the period under review.

**4. BUDGETARY MEASURES**

**National Sphere**

*Total budget allocation*

**DPLG**

**Table 2 Total budget allocation**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	3 812 691 000	-	3 647 651 000
2001/2002	4 373 734 000	-	4 653 066 000

The dash (-) in this table and tables to follow denotes that the information requested was not made available to the Commission

*Variance(s)*

The above department failed to account for the variances experienced by the department over the above two financial years. Referring to table 2 above, it can be deduced that DPLG’s budget allocation had nominally increased between the 2000/2001 and 2001/2002 financial years. Furthermore, deducing from the same table, for the financial year 2000/2001, an amount estimated at R165 040 000 was under-spent by the above department, whilst an estimated amount of about R279 332 000 was over-spent during the 2001/2002 financial year, reasons of which were not provided. This is under no circumstances acceptable due to the simple reason that both the committed under- and over-expenditure by the above department was under no circumstances insignificant, both in real and in nominal terms.

***Consolidated Municipal Infrastructure Programme (CMIP)***

The DPLG provided the following information on the CMIP budgetary<sup>9</sup> allocation for the period under review.

<sup>9</sup> According to DPLG funds are allocated to the District Municipalities on a poverty-based formula in terms of the Division of Revenue Act No 1 of 2001. CMIP provides the basic level of services to the low-income households earning less than R3 500 a month. In support of rural and urban development

**Table 3 Budget allocation for the CMIP**

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	883 000 000	883 000 000	851 070 000
2001/2002	1 025 980 000	1 002 010 000	1 009 640 000

*Variance(s)*

DPLG attributes lack of capacity within some municipalities, including the unreasonable long time that elapses in the review of environmental impact assessment (EIA) reports, as the major contributory factors, which resulted to the above over- and under-spending the department experienced during the past two financial years. The department further indicated that capacity-building programmes at municipal level were amongst measures instituted by DPLG aimed at addressing the above.

## DWAF

### *Total budgetary allocation*

**Table 4 Total budgetary allocation**

Year	Total allocation in Rand(s)	Per capita allocation in Rand(s) after inflation adjustments	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	3 177 330 000	3 177 330 000	3 177 330 000	3 041 185 000
2001/2002	3 518 441 000	3 518 441 000	3 518 441 000	3 477 798 000

*Variance(s)*

DWAF reported that the variances were very minimal and insignificant, which is not true when referring to the table above. DWAF further failed to defend any over- and/or under-spending experienced by the department during the financial years 2000/2001 and 2001/2002 respectively, since estimated amounts of about R136 145 00 and R70 643 000 were not spent between the 2000/2001 and 2001/2002 financial years.

The department also failed to indicate, which measures the department has put in place aimed at addressing the inadequate budget, any over- or under-spending and the impact this over- or under-spending had on the realisation of the right in question during the reporting period. This is under no circumstances as both in real and nominal terms the above un-spent amounts are very significant.

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an additional amount of R300 million has been given to the CMIP for funding the nodal areas during the 2002/03 financial year.

### ***Integrated Water Resources Management***

**Table 5** Integrated Water Resources Management

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Allocation as a % of the department's total revenue</b>	<b>Per capita allocation in Rand(s) after inflation adjustments</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	89 654 000	2	89 654 000	-	77 568 000
2001/2002	81 177 000	2	81 177 000	-	73 967 000

#### *Variance(s)*

With regard to any over- or under-spending experienced by the department, DWAF indicated that the figures were insignificant and had little impact if any at all on the realisation of the right in question. Referring to the table above, amounts estimated at R12 086 000 and R7 210 000, which were not spent for both the 2000/2001 and 2001/2002 financial years, are definitely not insignificant both in real and nominal terms.

Furthermore, DWAF elaborated that whatever under-spending the department experienced was due to unfilled vacancies in key positions and also to the transference of funds to other priorities within the department.

With regard to vulnerable groups, the department highlighted that the above programme is responsible for the development of policy and regulations regarding water quality management, water utilisation, catchment management and water conservation and that it is not directly responsible for the delivery of services on the ground. The department further indicated that all policies and regulations developed under this programme takes into account the needs of previously disadvantaged groups as specified in the National Water Act 36 of 1998.

### ***Water Resources Development***

**Table 6** Water Resources Development

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Allocation as a % of the department's total revenue</b>	<b>Per capita allocation in Rand(s) after inflation adjustments</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	329 609 000	10	329 609 000	-	325 797 000
2001/2002	363 201 000	10	363 201 000		359 190 000

#### *Variance(s)*

With reference to the above programme, DWAF failed to account for any variances experienced by the department for the above respective financial years. According to the table above, amounts estimated at R3 812 000 and R4 011 000 were not spent between the 2000/2001 and 2001/2002 financial years. Both in real and nominal terms these are fairly enough significant amounts that can be accounted for.

With regard as to whether the above programme does cater for the needs of the vulnerable groups, DWAF indicated that the dams that were constructed within the given budget were primarily meant to address the needs of such groups; especially those disadvantaged communities in rural areas.

Furthermore, the department indicated that during the current period, it embarked on a project of constructing Inyaka (completed during 2002) and Nandoni (still under construction) dams. The former intended for providing water for water supply to rural and poor communities, whilst the latter, provided water for rural water supply and agriculture to resource poor farmers in ex-homeland areas of Lebowa and Gazankulu.

### ***Water Services***

**Table 7 Water Services**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Allocation as % of the department's total revenue</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	97 146 000	3	-	63 085 000
2001/2002	75 766 000	2	-	67 497 000

#### *Variance(s)*

According to the department, variances were very minimal and therefore insignificant. This is not true, not when the department has under-spent by amounts estimated at R34 061 000 and R8 269 000 towards the above programme between the 2000/2001 and 2001/2002 financial years; the under-expenditure committed was under no circumstances minimal or insignificant, both in real and in nominal terms.

### ***Regional Implementation***

**Table 8 Regional Implementation**

<b>Year</b>	<b>Total allocation in Rand(s)</b>	<b>Allocation as % of the department's total revenue</b>	<b>Projected expenditure in Rand(s)</b>	<b>Actual expenditure in Rand(s)</b>
2000/2001	1 932 462	60	1 932 462	1 941 989
2001/2002	2 225 663	63	2 225 663	2 195 697

#### *Variance(s)*

The department indicated that the variances were due to an increased budgetary allocation, aimed at enhancing the delivery of services. With regard to making any provision(s) to the vulnerable and/or marginalised, the department indicated that the programme for delivery of basic services is primarily aimed at the provision of services to the poor rural communities.

With regard to whether the budget allocated was or was not adequate in order to render services efficiently, DWAF indicated that the budget allocated was not adequate for all the services to be carried out efficiently, and that the department had to source more funding from donors. DWAF also indicated that there was no significant over- or under-spending by the department during the reporting period.

## Provincial Sphere

### DPLG

The only provinces that provided information on the total budget allocation were the Free State, KwaZulu-Natal and the Northern Cape, as summarised in the table below. The other provincial departments did not provide reasons for the lack of information.

**Table 9** Departmental budget allocation for provinces

Province	Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
Free State	2000/2001	58 820 000	58 820 000	58 820 000
	2001/2002	81 090 000	81 090 000	81 090 000
KwaZulu-Natal	2000/2001	-	-	-
	2001/2002	1 800 000	1 800 000	1 800 000
Northern Cape	2000/2001	125 955 000	-	124 908 000
	2001/2002	144 743 000	-	139 985 000

#### *Variance(s)*

The Free State Department of Local Government and Housing indicated in its report that the variance is due to un-spent funds for projects that could not be completed during 2001/2002. Reasons as to why the projects could not be completed were not furnished.

In terms of the vulnerable groups the department reported that projects target low-income groups, but most of their projects benefit communities as a whole. The department highlighted that the budget is never adequate; the reason being that the demand is greater than the supply. The transition within the municipalities resulted in funds being under-spent, owing this to the District Councils, which were still adjusting to the new CMIP process.

The KwaZulu-Natal Department of Traditional and Local Government Affairs reported that the provision of water is not its core function and that the total allocated budget was adequate in order for the department to ensure that the right to have access to sufficient water is realised.

In addition to the information in table 4 above, the Northern Cape Department of Local Government and Housing reported that the allocation as a percentage of the GGP nominally increased from 0,013 in the year 2000/2001 to 0,015 in the year 2001/2002. Furthermore, the department indicated in its report that the budget was inadequate for the provision of services; hence more funds were requested through the provincial budget process. There was under-spending on conditional grants due to vacant posts not being filled, and professional and special services roll-over. However, this under-spending did not have any significant impact on the realisation of the right.

**Consolidated Municipal Infrastructure Programme****Table 10 Budget allocation for CMIP at provincial level**

Province	Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
Eastern Cape	2000/2001	145 300 000	145 300 000	145 300 000
	2001/2002	238 190 000	237 860 000	237 860 000
KwaZulu-Natal	2000/2001	186 282 000	191 600 000	186 279 582
	2001/2002	219 516 000	219 516 000	219 516 000
Limpopo	2000/2001	90 022 000	90 022 000	90 022 000
	2001/2002	94 405 000	94 405 000	94 405 000
Northern Cape	2000/2001	19 830 000	-	19 830 000
	2001/2002	39 230 000	-	39 230 000
Western Cape	2000/2001	86 724 000	86 724 000	86 724 000
	2001/2002	77 010 000	77 010 000	77 010 000

*Variance(s)*

In the Eastern Cape, approximately 80 percent of the CMIP projects are in the rural areas targeting low-income groups and those living in informal settlements. For the period under review, the department indicated that the budget for the provision of access to sufficient water was adequate. The KwaZulu-Natal Department of Traditional and Local Government Affairs indicated that additional funds had to be requested from the DPLG, due to the fact that the need for services was greater than the allocation. In the Northern Cape, a very large proportion of the programme is dedicated to the rural areas and informal settlements. CMIP has served 437 982 beneficiaries in rural areas and 591 074 in urban areas.<sup>10</sup> Approximately 48 percent of the funds were spent in rural areas. The budget was inadequate for the above-mentioned programme because of the demand.

The largest surface area characterises the Northern Cape province and the smallest population compared to other provinces, but the allocation from national is population based and as a result there are not enough resources to cover the needs of the province. Therefore, the department requested counter funding from municipalities in order to address budget inadequacy. It was also indicated by the department that with regard to the provision of water, some progress has been made.

<sup>10</sup> No clear indication was given for the year or period.



**CMIP - Water Projects**

**Table 11 Allocation for CMIP - Water Projects**

Province	Year	Total allocation in Rand(s)	Actual expenditure in Rand(s)
Eastern Cape	2000/2001	73 702 569	73 702 569
	2001/2002	90 660 948	90 660 948
Free State	2000/2001	33 540 000	33 540 000
	2001/2002	39 569 000	39 569 000
KwaZulu-Natal	2000/2001	102 000 000	102 000 000
	2001/2002	155 000 000	155 000 000
Northern Cape	2000/2001	27 770 000	27 770 000
	2001/2002	14 670 000	14 670 000
Western Cape	2000/2001	32 927 000	32 927 000
	2001/2002	12 580 000	12 580 000

*Variance(s)*

The budget was inadequate because the need for water in KwaZulu-Natal exceeds the allocated amount of R3 billion.

**CMIP - Sanitation Projects**

**Table 12 Allocation for the CMIP - Sanitation Projects at provincial level**

Province	Year	Total allocation in Rand(s)	Actual expenditure in Rand(s)
Eastern Cape	2000/2001	8 039 281	8 039 281
	2001/2002	22 700 728	22 700 728
Free State	2000/2001	5 433 000	5 433 000
	2001/2002	9 067 000	9 067 000
KwaZulu-Natal	2000/2001	18 820 000	18 820 000
	2001/2002	9 680 000	9 680 000
Limpopo	2000/2001	7 705 400	5 918 725
	2001/2002	15 220 188	7 703 696
Northern Cape	2000/2001	5 820 000	5 820 000
	2001/2002	3 880 000	3 880 000
Western Cape	2000/2001	20 150 000	20 150 000
	2001/2002	18 190 000	18 190 000

*Variance(s)*

The above provinces did not report on any variances. According to the table above, with the exception of the Limpopo province, most provinces utilised their entire allocated budget towards the implementation of the above project. During the financial years 2000/2001 and 2001/2002 respectively, R1 786 675 and R7 516 492 amounts were not spent by the above province and reasons as to why these funds could not be spend towards the above programme were not furnished to the SAHRC by the responsible department. This is under no circumstances acceptable, as the above under-expenditure committed is under no circumstances insignificant, both in real and in nominal terms.

## 5. INDICATORS

### DPLG

**Table 13 Indicators - Water Projects**

Category	Total (%)
Number of households with piped water	78.1
Number of households that do not have piped water	21.8
Number of households with water sources within the following distance: < 200m	22.3

**Table 14 Free Basic Water (FBW)**

Category	Total	EC (%)	FS (%)	GP (%)	MP (%)	KZ N (%)	NC (%)	LP (%)	NW (%)	WC (%)
Population	100	100	100	100	100	100	100	100	100	100
Poor population	69	69	70	51	100	62	68	79	71	52
Population served by FBW	56	29	105	83	57	38	50	36	54	88
Poor population served by FBW	18	34	83	N/A	12	35	3	N/A	9	100

**Table 15 Indicators - Sanitation Projects**

	Total (%)
Number of households with flush toilets	46.5
Number of households that do not have flush toilets	53.5
Number of flush toilets installed in the year	-
Number of households using Ventilation Improved Pit latrines (VIPs)	7.6

The DPLG does not have all the above information available, however the department indicated that the required data is being collected through the MIIF, which is currently under revision and has the relevant information on the levels and distribution of services both in rural and urban areas.

### DWAF

DWAF indicated that the department measures basic access to water as defined in the Water Services Act of 1997 and sections 9 and 73 regulations of the same 1997 Act.

**Table 16 Indicators-Water Projects Progress (April 2000-March 2002)<sup>11</sup>**

	Total	Urban	Rural
Number of households with piped water <i>in house or yard as at March 2002.</i>	5 390 902*	4 620 511	1 310 391
Number of households that do not have piped water <i>in house or yard as at March 2002.</i>	3 694 618	456 974	3 237 644
Number of taps installed for individual households <i>in the period April 2000 to March 2002.</i>	220 500	210 000	10 500
Number of communal taps installed <i>in the period April 2000 to March 2002</i>	203 000	45 000	158 000
Number of households with water sources within the following distances			
a) < 200m	7 625 000	4 830 000	2 795 000
b) < 300m 200 to 500m	800 000	250 000	550 000
c) < 500m	-	-	-
d) < 1000m >500m	1 200 000	-	1 200 000
e) > 1000m	-	-	-

\*: The figure supplied by DWAF was not precise, from the table above, it should read as 5 930 902, that is, the sum of figures assigned to urban and rural areas.

In the table below, DWAF provided the requested information in numbers not in percentages as was requested.

**Table 17 Free Basic Water (FBW)**

	Total	EC	FS	GP	MP	KZN	NC	LP	NW	WC
Population (P)	45 152 600	6 876 131	3 791 602	7 328 081	4 078 555	8 414 727	743 693	5 888 628	3 901 475	4 129 683
Poor P	30 721 000	5 035 000	2 150 249	4 088 910	3 199 291	5 760 943	55409 2	4 728 797	2 909 361	2 294 270
P served by FBW	25 966 000	2 081 079	3 173 159	6 668 206	1 786 872	3 496 853	369 604	2 168 793	2 283 682	3 937 787
Poor P served by FBW	*7 477 345	1 630 039	1 120 908	*0	396 664	1 997 096	*0	*0	46 775	2 285 863

\*: This figure could not be precise, since according to the above table not all provinces provided the SAHRC with the requested information.

<sup>11</sup> The above department indicated that it is in the process of compiling a National State of the Water Sector report through integrating progress of all the national departments and local authorities dealing, to some extent, with the right in question. The department indicated that because of that, the above information might therefore still need to be refined after all the information from the said departments has been collated.

**Table 18 Sanitation Projects Progress**

	Total	Urban	Rural
Number of households with flush toilets	4 608 704	4 147 833	460 870
Number of households that do not have flush toilets as of March 2002.	5 016 816	929 652	4 087 162
Number of toilets installed in the year (Period April 2000 to March 2002).	44 099	44 099	-
Number of households using VIPs as at March 2002.	+/- 300 000	200 222	100 000
Number of VIPs constructed in the period April 2000 to March 2002.	+/- 147 000	88 000	59 000

### **Provincial Sphere - DPLG**

The Eastern Cape Department of Local Government (ECDH) only provided information on the number of households with piped water, households with no piped water and those households with taps in the yards, the numbers of which are 377 778; 207 463 and 32 380 respectively. Furthermore, the above department also indicated in its report that there are 74 416 households with a water source which is greater than 200 metres, and 93 885 with a water source which is more than 300 metres away from their homes.

With regard to the Northern Cape province, it was indicated in its report that the CMIP database does not provide information as requested. However, the provincial DPLG indicated that within the province, about 92 913 households do have access to piped water in opposition to 32 511 households that do not have access to piped water.

## **6. NATIONAL ACTION PLAN FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (NAP)**

### **National Sphere**

#### **DPLG**

The DPLG indicated in its report that the information requested in terms of the National Action Plan is not available. The only information provided by the department was that 45,9 percent of households do not have access to basic sanitation facilities such as pit latrines. Of those 75 percent live in urban areas, and 25 percent live in the rural areas.

Progress achieved to improve the right to have access to sufficient water includes the DPLG completing 1 482 projects to the value of R4, 3 billion, as part of the CMIP. Approximately 3 million households that had previously no access to a basic level of service are already benefiting from the different project categories provided by CMIP

viz., water, sanitation, roads, storm-water, solid waste, community lighting and community facilities. During this process, greater support has been given to rural development as 56 percent of CMIP funds are allocated to projects implemented in rural areas.

Presently more than 50 percent of the CMIP funds are allocated to water projects particularly in the rural areas, targeting mainly women who are the most vulnerable group. At the time of compiling the report, the DPLG had a national average of only 16 percent of women employed in the CMIP projects. This figure is still far less compared to the national target of 30 percent.

The Northern Cape, however, is the only province, which boasts 45 percent of women employed within the CMIP projects. The CMIP projects are aimed at alleviating poverty by using labour-intensive construction methods and maximising job-creation opportunities, especially with regard to single-headed households, women, youth and people living with disabilities. Through the CMIP projects, the DPLG managed to create 14-million person days of short and long term employment for skilled, semi-skilled and local labourers during the construction of the projects. However, permanent jobs are mainly at operational and maintenance level for engine pumps in rural water schemes.

With regard to the Eastern Cape province, it has been reported that about 376 234 households have access to flush toilets, whilst 209 007 households still have no access to flush toilets facilities and about 6 976 households are still using the VIP latrines.

## DWAF

**Table 19 National Action Plan**

	<b>Total</b>	<b>Urban</b>	<b>Rural</b>
Number of households that do not have access to basic sanitation facilities like pit latrines	3 663 000	663 000	3 000 000
Number of households with taps that are not in working order	*	*	*
Number of communal taps that are not in working order	*	*	*
Number of households that rely on carriers/ tankers for access to water	*	*	*
Number of households that rely on water from boreholes/rain-water tanks for access to water	*	*	*
Number of households that rely on water from dam/river/stream/spring	*	*	*
Number of flush toilets installed in the year and have since fallen into disrepair due to overload in use	*	*	*

\*: DWAF is currently undertaking a functional assessment of all DWAF's schemes and will receive similar information for all local authority schemes via the WSDPs, a consolidated figure can then be determined for the sector as a whole and as a rural/urban split.

The National Action Plan identifies numerous challenges with respect to the right of access to sufficient water that needs to be addressed. It provides information as per table above.

The only information provided by DWAF with regard to the above is with regard to the number of households that do not have access to basic sanitation facilities like pit latrines of which 18.1 percent was from urban whilst 81.9 percent from rural areas.

From the above information, it is obvious that government should try to channel its resources to the rural areas in order to improve the sanitation situation and improve the lives of the communities within those areas, as the 81.9 percent figure is rather high. It is important for government to target its programmes to rural areas and not just concentrate only in urban areas, as the rural communities, being categorised as being vulnerable and previously disadvantaged are also protected by the country's Constitution.

## 7. CRITIQUE

### *Policy and/or legislative measures*

#### **DPLG**

The provision of the right to have access to sufficient water needs a collaborative effort from different governmental and non-governmental organisations. Therefore, the measure instituted by the Department of Provincial and Local Government (DPLG) is seen as a positive initiative to ensure access to services. The problem of lack of basic services is so immense that government would not be able to do it alone, if it wants to ensure that every citizen has access to water. Therefore, the Municipal Service Partnerships (MSPs) will ensure the rapid delivery of services, which is especially important because in some areas there already is an outbreak of cholera. Furthermore, the policy through the Municipal Partnership Building Programmes will enhance the capacity of municipalities to structure service partnerships.

The MSP and the CMIP are reasonable measures, and with proper implementation will be effective as defined by the *Grootboom* judgement and international instruments,<sup>12</sup> because they will ensure the facilitation and promotion of access to sufficient water to vulnerable and marginalised groups.

Although there has been some progress with regards to implementation of the CMIP, however the DPLG still faces a lot of challenges. Government's policy of making available FBW to poor households is good and necessary in a society characterised by poverty. The high unemployment level generates this poverty, and the massive under-development has meant that many households simply cannot afford to pay for water.<sup>13</sup> Although the policy has already been adopted for implementation, no proper financial arrangements have been made.

The South African Local Government Association (SALGA) made a plea for municipalities to be assisted in the task of providing free basic services, because it is

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<sup>12</sup> Such as the CEDAW, Draft Protocol to the African Charter on the Rights of Women and the Copenhagen Declaration and Programme of Action.

<sup>13</sup> "Joint RSDN-SAMWU Press Statement" Monday, 21 August, 2000, see <http://www.rsdn.org.za/news/RSDN%20SAMWU%20RE%20WSA%20amendments.html>. Site visited 17/04/2002.

currently being financed from its normal allocation from national government.<sup>14</sup> SALGA maintains that the provision of free basic services should be accompanied by a specific transfer of funds and not be funded through the equitable share. This is because SALGA believes that the equitable shares, which are funds from national to local governments, was constitutionally intended for the provision of basic municipal services and not poverty alleviation. The lack of additional funds for free basic services means the DPLG through the CMIP grant has to allocate funds for the provision of the necessary infrastructure. The non-existence of proper infrastructure in some areas means the dream to benefit from governments policy of free basic water will not be realised.

The policy on FBW is based on the principle of cross-subsidisation. Opportunities for cross-subsidisation are limited in rural areas and small rural towns because the areas are far apart and not densely populated. Therefore, this would result in local authorities not generating enough revenue to support the provision of free basic water.

The National Cholera Strategy in terms of the *Grootboom* judgement passes the reasonableness test, because it is not only a comprehensive programme, but seems to be also flexible enough to address the immediate and future needs of vulnerable and marginalised groups.

## **DWAF**

### *FBW Programme*

The FBW programme had a phenomenal success due to the fact that to date approximately 26 million (+/-57.5 percent) of a total population of about 46 million people in the country have access to 6000 litres of water per household.<sup>15</sup> Although to a certain extent government can be commended in regard to the above programme, much still needs to be done in order for the above programme to be successful in all the nine provinces within the country, especially in benefiting the poor and those communities in rural areas and informal settlements in ensuring that everyone has access to clean and safe basic water.

The table below represents the total population benefited by the FBW Programme according to the above department.

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<sup>14</sup> 'SALGA seeks relief on free service: Municipalities want special funding' *Business Day*, Monday March 11, 2002, p. 3.

<sup>15</sup> Refer to table 19 below, deduced from table 17 provided to the SAHRC by DWAF.

**Table 20 Population benefited by the FBW Programme**

	Total	EC	FS	GP	MP	KZN	NC	LP	NW	WC
Population (P)	45 152 600	68761 31	3 791 602	7 328 081	4 078 555	8 414 727	74369 3	5 888 628	3 901 475	4 129 683
P served by FBW	25 966 000	2 081 079	3 173 159	66682 06	1 786 872	3 496 853	36960 4	2 168 793	2 283 682	3 937 787
P served by FBW in %	57.5	30.1	83.7	91.0	43.8	41.6	49.7	36.8	58.5	95.4
Poor P served by FBW <sup>16</sup>	7 477 345*	1 630 039	1 120 908	-	396 664	1 997 096	-	-	46 775	2 285 863
Poor P served by FBW <sup>17</sup> in %	28.8*	78.3	35.3	-	22.2	57.0	-	-	2.0	58.0

Considering the statistics provided in table 20 above, it could be deduced that the FBW programmes were successfully implemented in the Western Cape and Gauteng provinces with the total population served being 95.4 percent and 83.7 percent respectively. In contradiction to the above, the FBW programme was not successfully implemented in the Eastern Cape, Limpopo and the KwaZulu-Natal provinces, with a total population of about 30.1 percent, 36.8 percent and 41.6 percent respectively benefiting from this programme.

With regard to the national total poor population benefiting from the FBW programme, only 28.2 percent<sup>18</sup> is benefited and this is contradictory to the programmes objective, as DWAF indicated that the primary objective of the FBW policy is to ensure that poverty is alleviated by ensuring that no person is denied access to a basic water supply and that those benefiting from the programme are mainly the poor and those residing in rural areas.

The Eastern Cape province needs to be commended for addressing the plight of the poor with regard to the FBW programme. Even though the total population in the province served by the FBW programme is estimated at a mere 30.1 percent, the poor constitutes roughly 78.3 percent of the total population benefiting from the FBW programmes.

Whilst this is the case with the Eastern Cape province, it is sad to note that only 2 percent (of a total population of 58.2 percent) in the North West; 22.2 percent (of a

<sup>16</sup> The asterisk (\*) denotes that the figures provided could not be precise, since some provinces did not supply the South African Human Rights Commission with the requested information.

<sup>17</sup> *Ibid.*

<sup>18</sup> It should be noted that the above figure could slightly be higher since the South African Human Rights Commission was not furnished with the statistics information regarding a total poor population served by the FBW programme in the Gauteng, Limpopo and the Northern Cape provinces.



total population of 43.8 percent) in Mpumalanga and 35.2 percent (of a total population of 83.7 percent) of the poor population in the Free State are served by the FBW programme.

It is also unacceptable that DWAF failed to furnish the SAHRC with the statistics regarding the total number of the poor population served by the FBW policies in the Gauteng, Northern Cape and the Limpopo provinces, especially when only the programme benefited only 36.8 percent and 49.7 percent of the total population in the Limpopo and the Northern Cape provinces respectively.

As it can be deduced from the above table, the reason for the failure to implement the above programme can be attributed to lack of infrastructure. Thus, the lack of infrastructure in those provinces where the above programme was not successfully implemented could be the hindering factor to the provision of FBW to some communities, especially those in rural areas and informal settlements. It is therefore critical for government to secure some funds aimed at the provision and/or improvement of the infrastructure as a means of trying to implement the FBW programmes successfully.

DWAF needs to be commended for ensuring that a separate fund has been channelled towards the improvement and provision of the necessary infrastructure in order to enable everyone to have access to clean water and basic sanitation.<sup>19</sup> A high incidence of mortalities has resulted due to cholera, whilst others have resulted due to violence in the struggle to get clean water. In Reiger Park in the East Rand five people were killed at an informal settlement. The victims amongst them a young girl were killed in a dispute over the supply of water in the area. Apparently a certain section paid for their water, while the other sections were receiving their water for free.<sup>20</sup> Such incidents are not necessary and can be avoided by ensuring equal access to services for everyone.

#### *White Paper on Basic Household Sanitation*

Whilst the South African Bill of Rights clearly acknowledges that clean and healthy water is a basic need and a necessary commodity, ensuring that the well-being of communities is satisfactory, this is still far from being reached. Although some progress has been achieved during the first four months of the 2001 financial year due to 17 576 toilets, which were built by government,<sup>21</sup> government still needs to ensure that the Water Services Capital Programme<sup>22</sup> based on the White Paper on Basic Household Sanitation of 2001 is fully implemented and does benefit the poor and the people from rural areas and informal settlements as it was primarily intended.

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<sup>19</sup> Donor funding received by DWAF during the 2000/2001 financial year amounted to R11 million in cash and R54 million was through non-monetary services. In addition to the above figures, an agreement of about R2.2 billion was signed between DWAF and the European Union (EU) in December 2000 of which DWAF will only utilise R613 million of the grant for a three year programme of support to the water services sector also known as the Masibambane Water Services Sector Support Programme. The rollout commenced in April 2001.

<sup>20</sup> 'Killings over water: several suspects held' *Sowetan*, May 15, 2001, 11.

<sup>21</sup> 'Kasrils reveals massive backlog in providing water and sanitation' *The Star*, September 18, 2001, 3.

<sup>22</sup> In terms of the Water Services Act of 1997, "water services" include "water supply and sanitation services".

It is reported that according to the United Nation's 2002 Human Development Report, 2 billion people in the developing world still lack access to basic sanitation and 1,1 billion have no access to clean drinking water.<sup>23</sup> Lack of environmental sanitation is a public health disaster.<sup>24</sup> Access to adequate sanitary facilities is a basic human right that safeguards health and human dignity, and yet in South Africa about 18 million people do not have adequate sanitation.<sup>25</sup> Poor sanitation impacts on the health of the people, living conditions and the environment.

When implemented effectively, the FBW and the White Paper on Basic Household Sanitation could be regarded as reasonable measures that can pass the reasonableness test in terms of the *Grootboom* judgement. According to DWAF's reporting, only 28.8 percent of the poor are benefited from the FBW nationally, whilst only 2.0 percent; 22.2 percent and 35.3 percent of the total poor population in the North West, Mpumalanga and the Free State provinces respectively benefited from the above programme. Furthermore, a lot of vulnerable people still have no access to proper sanitation facilities. As a result of the findings above, it can be deduced that the two above programmes do not as yet pass the reasonableness test as stipulated in the *Grootboom* judgement, since the plight of the poor and the other vulnerable groups is still being ignored by the measures introduced by government aimed at achieving realisation of the right in question.

#### *Budgetary Measures*

#### **DPLG**

The DPLG should be commended for nominally increasing the budget to include special projects related to cholera and new innovation projects. According to the CMIP monthly report for March 2002, the DPLG allocated R70 951 million for special cases.<sup>26</sup> Of this amount R1 690 million was allocated to water projects, and since the inception of the CMIP R492 million has been allocated for sanitation projects. This means the additional budget will be used to ensure that the communities in the cholera hot spots have access to clean and safe water, and proper sanitary facilities. This budget increase suggests that the DPLG has realised the interrelation between budget allocation and development of policy and programmes. According to *Grootboom* judgement, a reasonable measure ensures that the appropriate financial resources are also available.<sup>27</sup>

The Free State, KwaZulu-Natal, Limpopo, Northern Cape and Western Cape Departments of Local Government showed an expenditure pattern, which is highly unlikely for the CMIP. All these provincial departments indicated that the entire amounts allocated for the financial years 1999 to 2002 were spent to the last cent. The reason as to why this is highly unlikely is because the projects are capital in nature and contractors that have to tender for them do work.

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<sup>23</sup> 'State of water resources' *The Star*, August 29, 2002.

<sup>24</sup> Sanitation includes access to toilets or latrines.

<sup>25</sup> 'Wash gets ready to clean up' *The Star*, March 19, 2002, 18.

<sup>26</sup> Department of Provincial and Local Government *CMIP - Building communities through infrastructure provision*. March 2002, p. 3

<sup>27</sup> *Government of the Republic of South Africa and others v Grootboom and others*, 2000 (11) BCLR 1169 (CC) para 39.

It is a known fact that the tender and procurement process is a lengthy one, because of its technical nature. This in turn delays the commencement of projects; therefore meaning some projects will be delayed and not be completed before the end of the financial year. Thus resulting in funds being rolled over to the next year, due to the fact that funds are only paid out when the project has been completed. This is just an observation made by the SAHRC, and does not necessarily encourage under-spending by the departments. Departments are requested to provide information that is correct and accurate, to enable a proper analysis to be made on the progress made in the progressive realisation of the right to have access to sufficient water.

## **DWAF**

With regard to the budget allocated towards certain water programmes, there is a bit of confusion and unreliability as to the figures provided to the SAHRC by the above department.

### *Water Resource Development Programme*

For instance, with regard to the above programme (table 10 and 11 above), figures furnished by DWAF to the SAHRC do not correspond and that makes it very difficult to comprehend as what was the actual budget allocated.

When referring to the 3<sup>rd</sup> Socio-economic right report, for the same programme, DWAF reported that for the financial year 2000/2001 a total amount of R194 994 000 was allocated towards this programme, as opposed to an amount of R363 201 000 indicated in this report, a significant variance of about R168 297 000.

### *Water Services Programme*

When referring to the 3<sup>rd</sup> Economic and Social Rights Report for the financial year 2000/2001, DWAF reported that a budget of about R 472 121 000 was allocated to the department, as opposed to an amount of R97 146 000 that was reported by DWAF for the current reporting period. The variance estimated at R373 975 000, which under no circumstances the above variance could be rendered insignificant. It should be stated that this kind of discrepancy hampers with the Commission's reporting procedure, as there are a lot of inconsistencies with regard to the budget.

Referring to the budget allocated towards different programmes (table 9-12), it is noted that there has been a lot of under-spending by the departments during the different financial years, instead of DWAF furnishing an explanation as to why this under-spending, the department just states that the under-spending was insignificant. This is by no means acceptable as these variances are quite significant and there should be a valid reason as to why the department failed to sufficiently use its allocated resources. For instance, with regard to the Water Services Programmes, for the financial year 2000/2001, roughly R8 269 000 was under-spent by the department; the under-expenditure of which was under no circumstances insignificant, both in real and in nominal terms.

It should be noted that there is a tendency of government departments saying that they could not perform their functions efficiently and diligently due to the insufficient

budgets allocated towards different programmes, whilst these departments cannot even use what is allocated to them entirely, efficiently and/or reasonably. This in turn prevents the reasonable realisation of the right in question.

### *Sustainability of services*

It has already been mentioned that water is a scarce natural resource; therefore its preservation is crucial for sustainable development. According to Rand Water, water loses through leaking toilets and taps results in higher water prices.<sup>28</sup> Hence, it is important that communities be adequately educated and made aware of the proper use of water and how they can prevent water being wasted in their own homes. To promote proper water usage, a leak repair project was undertaken by the Krugersdorp Council and Gauteng Education Department. The project targeted 27 schools in Kagiso. The aim of the project was to reduce wastage and make water more affordable to schools, by reducing leaks from taps and pipes.<sup>29</sup>

The importance of access to clean water has been emphasised, therefore the launching of Water, Sanitation and Hygiene for All (WASH) Campaign is regarded as a positive step for the elimination of water-borne diseases such as cholera and typhoid. The above campaign focuses on the importance of washing your hands after using the toilet, and before eating or handling food. Washing hands helps in reducing illness and death from water-borne diseases by 40 percent.<sup>30</sup>

### *Indicators*

#### **DPLG**

According to the information provided by the DPLG on the implementation status for FBW, the Free State province had 105 percent implementation. This means it is the only province that has implemented fully the FBW Policy in the country. The reasons for the successful implementation of the policy were not cited. These reasons would have been very helpful for the benefit of other provinces, such as the Eastern Cape, KwaZulu-Natal and Limpopo where less than 50 percent of the population has been served with FBW. The three provinces that are lagging behind did not provide reasons for the slow delivery of the FBW services. The figures are especially disconcerting when information from the DPLG indicates that 21,8 percent of households still do not have access to piped water.

#### **DWAF**

##### *Water Projects Progress*

With regard to the above programme, 77.9 percent and 22.1 percent of the urban and rural households respectively were provided with piped water, in contrast to 12.4 percent and 87.6 percent of the urban and rural households that do not have access to piped water.<sup>31</sup> In addition to the above, 95.2 percent and 4.8 percent of taps were

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<sup>28</sup> 'Corporate social responsibility programmes at Rand Water' *The Star*, March 19, 2002, 19.

<sup>29</sup> 'Water management can save billions' *The Star*, March 19, 2002, 19.

<sup>30</sup> 'Kasrils reveals massive backlog in providing water and sanitation', *op. cit.*

<sup>31</sup> Refer to table 16 above.

installed for individual households for both the urban and rural populations respectively. Furthermore, communal taps installed during the reporting period constitutes 22.2 percent and 77.8 percent for both the urban and rural households respectively.

The rural population are the only ones with water sources between 500m and 1000m, whilst 36.7 percent and 68.3 percent of both the urban and rural households have water sources within the distance of about 200m.

### *FBW*

With regard to the information and conclusion drawn in relation to the FBW programme, reference should be made to section 7 under DWAF with emphasis on table 19. According to table 19 above, 57.5 percent of the population benefited from the FBW programmes, whilst 28.8 percent of the total population benefiting was the poor communities. The North West province is the worst in addressing the plight of the poor, since in this province only 2.2 percent of the total population benefiting from the above programme are the poor communities.

### *Sanitation Projects Progress*

According to table 18 above, the number of total flush toilets installed during April 2000 to March 2002 was 89.99 percent for urban and 9.99 percent for rural areas. In addition to the above, some households both in rural and urban areas have been provided with the VIP latrines, of which 66.7 percent was for urban and 33.3 percent for rural households. With regard to those households provided with flush toilets, 81.5 percent were urban households as opposed to 18.5 rural households. As at March 2002, 18.5 percent of urban and 81.5 percent rural households were still without flush toilets.

From the information above, it is noted that in rural areas government is only introducing the VIP toilets as opposed to the flush toilets and the reason as to why this option was not supplied to the Commission.

It is reported that during the first four months of the 2001 financial year, 17 576 toilets were built by government<sup>32</sup> and that about 18 million people still do not have adequate sanitation.<sup>33</sup>

### *Implementation difficulties*

#### **DPLG**

The existence of functional, competent municipalities is crucial for sustainable water and sanitation development. Therefore, the lack of capacity, which has been cited as one of the reasons for slow delivery of services, needs to be addressed as soon as possible especially because the lack of capacity at local government level has resulted in most of the budget allocated for water and sanitation programmes not being spent.

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<sup>32</sup> 'Kasrils reveals massive backlog in providing water and sanitation', *op. cit.*

<sup>33</sup> 'Wash gets ready to clean up', *op. cit.*

The Gauteng Department of Development Planning and Local Government has evaluated the extent of the lack of capacity, and training for some officials started during the period under review, and will continue in the next financial year.

In Gauteng the difficulties experienced were due to the difference in financial years of the province and local authorities, which makes planning difficult. In the Northern Cape the difficulties experienced in the implementation of the measures were due to lack of funds and capacity to meet the demand. To address this problem, the Northern Cape reprioritised its projects.

## **DWAF**

Lack of capacity within DWAF and the local government and lack of infrastructure were some of the implementation difficulties that both spheres of government were faced with during the current reporting period.

### *Policy on FBW*

#### *(a) Financial*

- Equitable share allocation, limited funds for basic infrastructure.
- Equitable share utilisation and allocation - not always used by local authorities to provide services to the poor (it is an unconditional grant).
- Cost recovery not adequate on levels of consumption above the FBW.

#### *(b) Institutional*

- Local authorities often lack capacity.
- Lack of clarity regarding powers and functions, i.e. responsibility split between District Municipalities and Local Municipalities not finally resolved.

#### *(c) Technical*

- FBW policy requires measurement of water supplied. In some cases there are technical difficulties in doing this.
- Those still without basic infrastructures are not able to benefit from the FBW policy.

*Division of Revenue Act (DORA)-2001: Constraints and bottlenecks in complying with sections 8 and 12 of DORA 2001/02 including common interpretation of requirements*

- Compliance with section 8 of DORA<sup>34</sup>
- Complying with section 12 of DORA and negotiations on certain revisions of allocations/grants to DMs as a result of additional infrastructure funding, delayed the implementation of the Community Water Supply and Sanitation Programmes (CWSS-P) in many instances.
- Lack of understanding and clarity around issues such as transfer of funds, council resolutions, roles and responsibilities of municipalities in planning and decision-making of CWSS was prevalent in municipalities and DWAF.

*Constitutional obligations*

**DPLG**

The DPLG reported that the *MSP* policy respects and protects the right because it assists municipalities to identify and use appropriate partnership arrangements in their efforts to address infrastructure backlogs and build a foundation for equitable growth in their communities. The *MSP* respects, protects, promotes and fulfills the right to have access to sufficient water as it endorses universal access to basic services and the progressive improvement in service standards. It also promotes openness and transparency in the processes used for selecting service providers. It fulfils the provision of the right because its core principle is that services should be affordable and delivered efficiently. The department further indicated that the above policy has the potential to promote the right because it supports and encourages better information flow, value for money for services provided, avenues for citizen's redress and most importantly, courtesy in service delivery.

The *CMIP* respects and protects the right because it acknowledges the right to have a basic level of water for all South Africans, and provides the funding to access these basic levels of services. The funds assist in the provision of internal bulk and connector infrastructure in support of household infrastructure to those in need. Most unfortunately, most departments provided very general and/or irrelevant information on the question about how the legislative measures respected, protected, promoted and fulfilled the right to have access to sufficient water. For instance, the DPLG only stated that the *Municipal Systems Act* respects, protects, promotes and fulfils the right to have access to sufficient water because it provides the legislative framework for municipalities to implement the *MSP*. The KwaZulu-Natal Department of Traditional and Local Government Affairs only discussed their role in supporting local authorities.

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<sup>34</sup> Compliance with s8 of DORA requires that District Municipalities (DM) sign resolutions on the purpose and outputs of the grants. DM's refused to sign resolutions on final ownership of projects and schemes because Local Municipalities (LM) receive the equitable share for O&M, which leaves the DMs without a source of funding for the O&M where cost recovery is problematic. This delayed implementation of the Community Water Supply and Sanitation (CWSS-P) in many instances because a project cannot proceed to the construction phase without a resolution from the DM. There was a lack of flexibility and a complicated process to be followed to change financial allocations/grants between DM's within Regions.

## DWAF

DWAF reported that the aforementioned policy measures meet the constitutional obligation to *respect, protect, promote* and *fulfil* the right to adequate water in the following ways:

### *Respect*

DWAF reported that this is attainable through targeting rural areas where most of the people live without infrastructure and by providing basic level of water and sanitation services, including free water to those who cannot afford. Furthermore, the department indicated that the introduction of the two pieces of legislation during the reporting period that ensures that the right to access to sufficient water is not infringed does provide for the above obligation.

### *Protect*

With regard to ensuring the constitutional obligation to protect the right in question, the department indicated that the implementation of the *FBW* policy ensures that people are not denied their constitutional right of access to sufficient water, simply on the grounds of inability to pay. Furthermore, the setting of tariffs and control of the investment are regulated in order to protect the consumers.

### *Promote and fulfil*

The department reported that it ensures that the obligation to promote and fulfil the right of access to sufficient water is attained by giving effect to sections 4; 5 and 9(1) Regulations of the Water Services Act of 1997.<sup>35</sup> In addition to this, by assisting local government in making sure that those who cannot afford to pay for access to water are allowed access to at least basic supply; by establishing infrastructure and by setting standards for supply and tariff. Furthermore, the White Paper on Basic Household Sanitation of September 2001 ensures community participation and integrated planning and development and further strives that services provided should be affordable and sustainable to the household and to local government.

Whether government has attained the constitutional obligation to promote and fulfil the people's right to have access to sufficient water is not convincing enough, as thousands of people, especially these from rural areas still not have access to clean water supply accentuated by the lack of basic infrastructure. Whilst the *FBW* Policy and the *White Paper on Basic Household Sanitation* are intended to benefit the people of South Africa, especially the poor, it is sad to note that those previously affected and disadvantaged are still the ones having to bear the difficulties of having to cope without those facilities.

Furthermore, whilst the South African Bill of Rights clearly acknowledges that clean and healthy water is a basic need and a necessary commodity, ensuring that the well-being of communities is satisfactory, this is still far from being reached. It is reported

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<sup>35</sup> Section 9(1) regulations of the Water Services Act (WSA), *op. cit.* Furthermore, Regulation 4 of the WSA prescribes what steps need to be implemented by water services institution when interruption of water services occurs. Regulation 5 deals with the quality of portable water.



that according to the United Nation's 2002 Human Development Report, 2,4 billion people in the developing world lack access to basic sanitation<sup>36</sup> and 1,1 billion have no access to clean drinking water.<sup>37</sup> Inadequate access to water can have adverse effects to people, especially the poor. On yearly basis, thousands of mortalities, especially child mortalities are reported resulting from diseases caused by lack of clean water and poor sanitation. It is crucial for government to note that lack of environmental sanitation is a public health disaster.

### *Vulnerable and Marginalised Groups*

#### **DPLG**

The DPLG and provincial departments provided general statements on the impact the measures had on vulnerable groups. Most reports only stated that the CMIP targets households earning less than R3 500 per month, which includes most of the vulnerable groups, without explaining how this was achieved. Only the KwaZulu-Natal Department of Traditional and Local Government Affairs reported that the National Cholera Strategy ensured accelerated implementation of projects that provide alternative safe water sources and access to sanitation facilities for all the vulnerable groups listed especially those in cholera hot spots.

#### **DWAF**

DWAF reported that the Capital Programme, which includes the FBW, is primarily targeting the poor.<sup>38</sup> These being those *people living in rural areas*,<sup>39</sup> *people living in informal settlements*,<sup>40</sup> *low-income groups*<sup>41</sup> and those *racial groups disadvantaged by past discriminatory laws and practices*. The department further indicated that the above-mentioned policy measures did not make any provision with regard to the *homeless persons*, as these policies are not specifically designed to cater for such a category of people. The department further indicated that the whole FBW policy is aimed at assisting the marginalised and vulnerable groups through cross-subsidisation of their water supply by the wealthier higher consumers or by the fiscus.<sup>42</sup>

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<sup>36</sup> According to UNICEF's report, some 3 billion people, almost half of humanity still lack access to toilets or latrines and are therefore unable to practice good hygiene. Sanitation, Hygiene and Water at <http://www.unicef.org/programme/wes/info/about.htm>. Site visited on 28/08/02.

<sup>37</sup> 'State of water resources' The Star, August 29, 2002.

<sup>38</sup> The Free Basic Water policy is aimed at the poor people, most of who are from racial groups disadvantaged by past discriminatory laws and practices.

<sup>39</sup> This is where most people from disadvantaged communities live.

<sup>40</sup> Informal settlements still exist even after the finalisation of the demarcations (Note: Informal settlements can include non-formalised towns and recent informal development). Nevertheless they must still be included in the Integrated Development Plans (IDP) and Water Services Development Plans (WSDP). This means that the department will also render services through Water Services Authority (WSA) and Water Services Provider (WSP) and other water institutions. However, this does not include the informal settlements located on privately owned land.

<sup>41</sup> These groups are catered for by the FBW policy that has been approved and communicated to all the District Municipalities as well as the suggested delivery mechanisms. This policy provides 6kl or 6000l per month per household to the entire poor South African population, where water infrastructures have already been constructed. However, the actual determination of who qualifies to receive FBW is left with the municipalities to deal with it in terms of their own tariff and indigent policies.

<sup>42</sup> According to DWAF, Regulations of the Water Services Act 108 of 1997 do make specific provision for the poor as vulnerable/marginalised groups. The standard regulations for water supply form a basis

Inadequate access to water can have adverse effects on people, especially the poor. It is an unfortunate situation that thousands of people, especially children, die yearly as a result of diseases caused by lack of clean water and poor sanitation practices.<sup>43</sup> With regard to *vulnerable groups* our government is still failing the people because most of its programmes and/or projects still exclude this category of people, especially the *poor, those people from rural areas*<sup>44</sup> and *informal settlements, women and children*.

The above information provided by DWAF with regard to the FBW programmes is actually in contradiction with the information deduced from table 19 above, especially with regard to the poor of our societies. Referring to the table above, there is no doubt that the plight of vulnerable groups especially the poor is not satisfactorily addressed and that the FBW programmes still do not benefit the poor, as the latter are still the ones to bear the brunt of having to cope without sufficient water and basic sanitation services.<sup>45</sup>

It cannot be argued more that sanitation is a gender issue and that women and girl-children suffer the most from inadequate sanitation. Of major concern are not only the health reasons; the safety of the above-identified groups is also of major concern. In rural areas, *women and girl-children*<sup>46</sup> still have to walk a couple of kilometres in order to access water, as if this was not enough, they still have to stand in long queues for hours before they could access this basic necessity through having to fill-up their buckets. This makes them vulnerable and prone to some form of violence.

Although most of government's programmes, policies and other related measures are well-intended, they still are not at the stage of passing the reasonableness test of the

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for any person to claim their basic water if they cannot afford to pay and that the above provision also provides/includes the marginalised groups. Standards for tariffs ensure the protection of consumers.

<sup>43</sup> The shift from rural to urban living in all parts of the world is causing vast numbers of people to subsist in crowded settlements without adequate sanitation, safe drinking water or environmentally safe living conditions. Children in such urban settlements and high-risk environments are likely to suffer from diarrhoea and other water- and hygiene-related diseases. The improvement of environmental sanitation and access to water is a crucial element in the reduction of under five-mortality and morbidity rates in urban poor areas. See *Water, Environment and Sanitation for the Urban Poor* at <http://www.unicef.org/programme/wes/info/about.htm>. Site visited on 28/08/02.

<sup>44</sup> The Rural Development Initiative, which is aimed at prioritising rural issues, needs to be strengthened. It is a known fact that generally rural communities are poor and cannot afford to pay for water and other related services. A big question is, since they cannot afford to pay for these services does it mean that they cannot be guaranteed the right to water? In order to address the above-identified problem and to ensure that whatever initiated water projects possess the element of sustainability; government needs to start encouraging the formation of rural unions where those communities could be widely represented. It is also a serious concern that most of the water projects initiated by government within these areas do not possess the element of sustainability.

<sup>45</sup> Refer to section 7 above.

<sup>46</sup> Children's rights to an adequate standard of living and to the highest attainable standard of health are enshrined in the Convention on the Rights of the Child. The fulfilment of these rights is central to UNICEF's objectives for water, sanitation and environmental programmes, as stated on at <http://www.unicef.org/programme/wes/info/about.htm>, 'Children and the Environment'. Site visited 02/09/02. Furthermore, it is reported that children are more susceptible to environmental hazards and degradation than adults due to their physiological immaturity and behavioral characteristics. Common threats to their survival, growth and physical/mental development often come from the immediate environments, such as home, school and community. Lack of clean water and adequate sanitation services, unhygienic practices, and poor living conditions remain the prevailing environmental problems faced by children in developing countries.

measures since they still do not respond to the needs of the most vulnerable; especially the poor, those people living in rural areas and informal settlements, including women, children and other vulnerable groups. The rights of the child and the women are still not protected, in addition to the country's Constitution, government still fail to refer to and make application of the international instruments.<sup>47</sup>

## **8. RECOMMENDATIONS**

### **DPLG and DWAF**

The information in tables 17 and 20 above indicates that free basic water has not been provided to everyone, especially the poor. The lack of bulk infrastructure is cited as one of the impediments to delivery of such and requires more funds to be allocated to programmes such as the CMIP and municipalities, since FBW to everyone is dependent on municipalities having a sound revenue base.

Capacity-building is a pre-requisite for a functional and competent local government and for sustainable water and sanitation development. Therefore, the DPLG and its provincial subsidiaries should do more to build the capacity within municipalities. As long as the problems of capacity still persist, government will not be able to realise its goal of providing basic services to the poor and the marginalised, furthermore, addressing the inequalities of the past.

The provision of the Municipal Systems Act on the recovery of debt contradicts those in the Constitution, because it means households will have their water cut off because of arrears either from rates or electricity. There should be other methods employed to recover costs, because the high unemployment rate means the poorest of the poor will continue to have their water disconnected if this method of collecting debt continues to be used by the municipalities.

The poorest of the poor in rural areas have to be the main focus in the actual delivery of water and sanitary facilities. This is because although they are recognised in policy documents, in practice the poor are excluded through projects that require connection fees and full cost recovery in tariffs.<sup>48</sup>

Government needs to ensure that the White Paper on Basic Household Sanitation of 2001 is reasonably implemented. Whilst covered under the right to environment, this policy is also covered under the right to sufficient water and it is critical for all the departments responsible for the above two rights to co-ordinate their functions in such a manner that sanitation problems are properly addressed.

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<sup>47</sup> Amongst these international instruments, reference can be made to CEDAW, Convention on the Rights of the Child, Draft Protocol to the African Charter on the Rights of Women and the Copenhagen Declaration and Programme of Action.

<sup>48</sup> David Hemson, "Policy and Practice in Water and Sanitation", in *Indicator SA: Focus on the Public Sector*, Vol. 17, No. 4, Dec 2000, 49.

## **9. CONCLUSION**

### **DPLG and DWAF**

The right to have access to water can be seen to place two interrelated but distinct obligations on the State:<sup>49</sup>

- It must ensure that all people have physical access to water. This means that the facilities that give access to water must be within safe physical reach for everyone, especially the vulnerable and the marginalised.
- It must ensure that all people have economic access to water. This implies that the cost of accessing water should be pegged at a level that would ensure that all people are able to gain access to water without having to forgo access to other basic needs.

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<sup>49</sup> The Free Basic Water Supply Policy, in Economic and Social Rights (ESR) Review, Vol. 3 No. 1.

## ABBREVIATIONS

<b>CBOs</b>	Community Based Organisations
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CMIP</b>	Consolidated Municipal Infrastructure Programme
<b>CWSS-P</b>	Community Water Supply and Sanitation Programme
<b>DMs</b>	District Municipalities
<b>DORA</b>	Division of Revenue Act of 2001
<b>DEAT</b>	Department of Environmental Affairs and Tourism
<b>DPLG</b>	Department of Provincial and Local government
<b>DME</b>	Department of Minerals
<b>DWAF</b>	Department of Water Affairs and Tourism
<b>ECDH</b>	Eastern Cape Department of Local Government
<b>FBW</b>	Free Basic Water
<b>IDPs</b>	Integrated Development Plans
<b>MIIF</b>	Municipal Infrastructure Investment Framework
<b>MSA</b>	Municipal Systems Act No. 32 of 2000
<b>MSP</b>	Municipal Service Partnership
<b>NAP</b>	National Action Plan for the Promotion and Protection of Human Rights
<b>NGOs</b>	Non-Governmental Organisations
<b>NWA</b>	National Water 1998 Act of 1998
<b>PHAST</b>	Participatory Hygiene and Sanitation Training
<b>SALGA</b>	South African Local Government Association
<b>SMME's</b>	Small, micro and medium enterprises
<b>VIP toilets</b>	Ventilated Improved Pit toilets
<b>WASH</b>	Water, Sanitation and Hygiene for All Campaign
<b>WSDP</b>	Water Services Development Plans
<b>WSA</b>	Water Services Authority
<b>WSP</b>	Water Services Provider
<b>WWP</b>	Working for Water Programme
<b>WSPD</b>	Water Services Capital Programme

## CHAPTER 10

### METROPOLITAN COUNCILS

#### 1. INTRODUCTION

This chapter seeks to evaluate how the Metropolitan Councils (metros) complement the national and provincial governments in realizing socio-economic rights. As provided in the Constitution in terms of section 184(3), and section 7(2) of the Bill of Rights, local governments are required to take measures that respect, protect, promote and fulfil those rights.

The South African Human Rights Commission has undertaken to request information from all six metropolitan councils. Firstly, to evaluate their understanding of their constitutional obligations and secondly, to see if that understanding was duly applied to satisfy the socio-economic needs of citizens, particularly vulnerable groups, thus testifying to good governance.

This is the first time the Commission has embarked on evaluating the work of the metros; hence the responses point to shortcomings relating to the work of the respective metros, some of which are transforming their offices and operations. The first part of this chapter deals with the account of each metro's understanding of the constitutional obligations, including the meanings of the terms "access," "adequate," "sufficient," "progressive realization and responsibilities". The second part comprises the critique of the responses and recommendations.

#### 2. OBLIGATIONS

##### *Obligation to Respect*

Only four metros addressed the questions on obligations, and the responses were varied. The City of Tshwane understood respect to mean that that local government must hold these rights in high regard and ensure that its legislative, policy and other measures that it takes do not infringe on, deny or militate against these rights. Rather, it should serve to support, enhance, and preserve the objectives of these rights. The Ekurhuleni Metropolitan Municipality for the City of Germiston (EMM) gave a similar response saying the basic principle to that obligation is that the Council must recognize socio-economic rights and conduct its affairs in such a way that it does not violate any of these rights.

The eThekweni Municipality for the City of Durban (or the Durban Metropolitan Council -- DMC) gives a different perspective, saying that it is obliged to respect all the rights in Chapter 2 and not just the second generation human rights alluded to.

Meanwhile, the Nelson Mandela Metropolitan Municipality (NMMM) for the City of Port Elizabeth said that its understanding of its Constitutional obligations with regard to the terms 'respect, protect promote and fulfil' must be explained in accordance with socio-economic rights. This interpretation, according to the municipality, means that judges do not go by the literal meaning of the words or by the grammatical structure of the sentence, but also take into account the design or purpose the legislature sought

to achieve.<sup>1</sup> This approach is inevitable and must consider not only the Constitution, but the very founding principles and the purpose behind the White Paper processes that give rise to National legislation in various spheres.

Thus, when the Municipality interprets rights that pertain to the community within the Metro area, it must do so in terms of section 217 of the Constitution as well as with legislation. Further, socio-economic rights must be shown consideration and proactively protected against violation. This can be promoted by improving the quality of service through workshops and other events aimed at increasing the facilitation of empowerment. Socio-economic rights must also be monitored to ensure their protection, promotion and gradual fulfillment.

The Municipality's interpretation of the various terms used in the Constitution is that it is not possible to have an official interpretation. The best that the municipality can do is to have a policy for interpretation, which takes into account the teleological approach. All these terms must be interpreted in a way that is consistent with the Municipality fulfilling its Constitutional mandate, subject to the availability of resources.

The City of Cape Town did not respond, while the City of Johannesburg (CoJ or the Johannesburg Municipality) said, in a rather cursory manner, that its policies and actions must not impede its inhabitants from having access to socio-economic rights.

#### *Obligation to protect*

The City of Tshwane understood the obligation to protect the socio-economic rights to mean that local government must take the necessary legislative and other steps to shield these rights against any act or omission which might limit or erode the extent of the rights and to create conditions that are conducive to the realisation of the objectives of such rights.

The eThekweni Municipality said that it is obliged to protect the second generation human rights, guided by the following conditions:

- if it elects to administer a particular local government matter which it has the right to administer in terms of section 156 of the Constitution, through enacting by-laws in terms of sections 156(2) and 160(6), and directives which are compatible with such rights and its objects as set out in section 152 and consistent with any national and provincial legislation of the kind referred to in sections 155(6)(a) and (7);
- through exercising its rights in terms of any assignment under section 44(1)(a)(iii) or 104(c) of the Constitution of enacting legislation which is compatible with such rights and its objects.

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<sup>1</sup> Cited by Friedman J in *Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197 (B) at 241H-242A [1995 (8) BCLR 1018 at 1061H-J].

Ekurhuleni purports that matters pertaining to socio-economic rights are protected by the application of legislation, that is, acts or by-laws. The EMM is in a position to protect these rights by acting against those who may contravene legislative provisions that govern these areas.

*Obligation to promote*

The City of Tshwane said that the promotion of socio-economic rights meant that local government must create an operational framework which not only supports, enhances and encourages the actual materialisation of the objectives of the specific right, but one that also informs, educates and facilitates access of the beneficiaries to such rights.

The eThekweni Municipality maintains that the promotion of the second generation human rights alluded to should be through –

- the exercise of the local government matters which it has the right to administer in terms of section 156(1) of the Constitution in a manner consistent with its objects and any national and provincial legislation of the kind referred to in sections 155(6)(a) and (7) consistent with such rights: Provided, that the Municipality elects to exercise its right to administer the local government matter concerned;
- the exercise of powers assigned to it in terms of sections 156(4) of the Constitution in a manner consistent with the relevant agreement, its objects and any national and provincial legislation of the kind referred to in sections 155(6)(a) and (7) consistent with such rights; and
- the exercise of powers assigned in terms of sections 99 or 126 of the Constitution in a manner consistent with the relevant agreement, its objects and any applicable national and provincial legislation consistent with such rights.

Ekurhuleni Municipality promotes and fulfills these rights in terms of the development projects undertaken regarding socio-economic rights in various areas under its jurisdiction.

*Obligation to fulfill*

According to the City of Tshwane, the obligation to fulfill to mean that local government must nurture an environment which enables the beneficiaries of socio-economic rights to accomplish the aims and objectives and to enjoy the benefits inherent in such rights.

eThekweni Municipality said that it did not have full responsibility to fulfil any of the rights referred. Thus, it can fulfil none of them, but may contribute to their fulfilment where it has jurisdiction. However, it does not indicate how much responsibility it had toward achieving that goal.

Such are the responses of the three metros of Tshwane, eThekweni and Ekurhuleni. As stated above, the other metros either gave general remarks or did not respond.



Following is the account of the interpretation of other terms, namely access, adequate, sufficient, progressive realization and responsibilities.

### *Access*

According to the City of Tshwane, access to the rights contained in sections 26 and 27 of the Constitution means that local government does not have an obligation as such to provide these services to the beneficiaries, but should also provide them with “at least an opportunity to obtain such service” or “... a mode, means or vehicle to obtaining such service.”

The City of Cape Town understood access to mean that community cohesion and leadership must be promoted so that they could have the authority/capability to manage their communities. It also meant facilitating the creation of an enabling environment for women, youth, and the disabled, so as to organize themselves into sectors that will be able to engage with local government and other structures of government. This is done under the theme, ‘promotion of good governance’.

Ekurhuleni interpreted the word access in accordance with the implication of each specific right. For example, the right to health care involved the provision of basic services like hospitals and clinics, while the right to public safety meant the creation and maintenance of a safe environment within the EMM, thus ensuring that there is protection of the community’s personal rights and property. This also meant providing access to clean water, electricity and all other related infrastructural services. Further, access included providing modes of transport and roads, which ensures access to destinations within and outside the Metro.

The NMMM said that Access is interpreted to mean progressive realization as driven by reality. Thus, the availability of resources would obviously affect the way that the Municipality interpreted “access”.

The City of Johannesburg understood the term to mean that people are to be given means through legislation and other policies of government to enable them to have access to socio-economic rights.

### *Adequate*

Tshwane understood the term to mean that it has to provide shelter to its citizens. The metro said that, in terms of Section 26 of the Constitution, it was obliged to ensure that the beneficiary has “access to” housing or shelter which not only protects the him/her against the elements of nature, but which also complies with certain minimum standards which reasonably meet the needs and aspirations of the beneficiary in this respect. It is also emphasized that the term ‘adequate’ is a relative concept that could differ considerably depending on its application.

To the Ekurhuleni Municipality, adequate refers to basic, acceptable standards and sustainability. The metro did not elaborate on this point.

The Port Elizabeth Municipality looked at the term adequate solely in relation to housing and, therefore, referred to the Municipal Housing specifications for low-income groups.

The City of Johannesburg found it difficult to give a definitive and conclusive interpretation of adequate, as what is adequate at a certain time may not be at a later stage due to different circumstances. Adequate has to be looked at taking into account the particular circumstances and challenges facing the municipality, for instance, the finances of the municipality as well as the backlog in fulfilling certain rights.

To the City of Cape Town, adequate implied the full range of services relating to the need of a specific community. For example, some communities are more developed than others; this implies that the intervention required in terms of the lack of social capital is not as high as it might be in other communities.

The eThekweni Municipality said that the words “access to” and “progressively available and accessible” are not defined in the Constitution. Therefore, the only “official” interpretation can thus be that they words can mean whatever the Constitutional Court wishes them to mean. Thus, one employs the usual techniques of relying on case law as well as on dictionaries.

### *Sufficient*

Tshwane interpreted access in relation to food and water as per section 27 of the Constitution. This section provides that local government has an obligation to provide the beneficiary with “access to a quantity of food and water which is enough to satisfy his/her hunger and to support his/her normal physical need for such nourishment”. However, this does not only imply that the local government must itself provide the food and water to the beneficiary. It also means that local government may refer the beneficiary to a welfare organization (government, community based or non-government organization), which can supply these needs to him or her on behalf of [the] local government.

For the Port Elizabeth Municipality, the term sufficient was interpreted through comparing what is being planned and by what has been achieved.

The Johannesburg City Council understood the meaning of sufficient to be that the through its policies, it must ensure that communities can access water for example, and that it has an obligation to ensure that the quality of food and water is hygienic and geared towards promoting health care.

To the City of Cape Town, sufficient meant the facilitation of an understanding of the resource (water). In terms of food this meant the facilitation of community gardens, co-operatives etc. Capacity building with regard to this is to create opportunities as well as the facilitation of life skills programmes to manage the resource.

### *Progressive realization*

According to Tshwane metro, progressive realization of a right in section 26(2) and section 27(2) of the Constitution implies that local government has an obligation to

ensure that there is a gradual movement towards the achievement of the aims and objectives of the right in question and that those aims and objectives will be achieved after a measurable period of time. Progressive realization seeks to ensure that the said rights are actively and progressively pursued. To the Nelson Mandela Metropolitan Municipality, progressive realisation meant that the realization must be in successive stages; the same meaning was attached to the term progressively available.

To progressively realize rights, according to the Johannesburg City Council, municipalities must examine legislation, its policies, administration and other means, identify and eliminate, over time, hurdles which impede the realization of access to such rights. In view of the political history and the socio-economic status of the country, it is clear that a strategic implementation process is required to ensure that the process is progressive and irreversible.

#### *Progressively available and accessible*

To the Tshwane Municipality, section 29(1)(b) of the Constitution obliges local government to create opportunities for further education which must be qualitatively and quantitatively incremental. It means that these opportunities must not be static or passive, but they must be actively and vigorously pursued with noticeable gradual increment in the quantity of the educational ‘outlets’, in the process ensuring the quality and increased “accessibility” of further education.

### **Responsibilities**

The City of Johannesburg supplied the only response to this question. According to this metro, the constitutional mandate demands that it provide services that take care of what has been termed responsibilities. The various departments, as well as the entities formed by the Municipality, are responsible for ensuring that this mandate is fulfilled. These entities as well as the various policies adopted by the City will be discussed below.

Following below is the account of measures taken by the respective metros to realize the various economic rights they are charge with respecting, protecting, promoting and fulfilling. Five rights are being considered, namely: the right to housing, the right to education, the right to health, the right to environment, and the right to water. Each right is examined in turn.

### **3. RIGHT TO HOUSING**

#### **Policy Measures**

Only the City of Johannesburg has provided account of its policy relating to housing. Other municipalities either did not have policies or, like Tshwane, were in the process of formulating one or, like the City of Cape Town and the Nelson Mandela Metropolitan Municipality, the policy is linked to the right to water.

The City of Johannesburg has adopted a housing allocation policy whose objective is to promote good governance by facilitating equitable, fair and transparent allocation practices and processes in enabling home seekers to access housing opportunities in

the City. The policy will alleviate queue jumping and land invasion by desperate home seekers and provide them with choices based on their finances.

In terms of the Johannesburg municipality policies, the following are the category of people that are eligible for housing:

- Single parents
- The aged
- Married couples
- The disabled
- People living in backyard rooms and in shacks, and extended families
- Displaced persons and families due to relocations, institutional and hostel upgrading, and
- Special cases due to unforeseen circumstances for example, political instability, and extremely hazardous living conditions.

The general rules for eligibility for government housing subsidy as prescribed in the National Housing Subsidy Implementation manual, as well as the (Member of the Executive Council) MEC Housing directives, will apply. At the same time the municipality is aware of people that do not qualify for this subsidy but are in need of accommodation. Only those on the provincial waiting list and who actually qualify for a housing subsidy will benefit from housing opportunities within the service area of the municipality. In cases where these criteria cannot be complied with, an exemption will be sought from the MEC or Council.

There are different housing options that are offered by the Johannesburg municipality, ranging from in-situ upgrading; Greenfield developments; relocations; and backyard accommodation. To qualify for upgrading, Greenfields developments and relocation options, the beneficiaries must satisfy the following requirements:

- they must on the Council registers;
- they must be on the Provincial waiting list; and
- they must qualify in terms of the Subsidy Implementation manual.

In addition, the Greenfields developments cater for a range of income groups. The backyard accommodation and extended families options also need to be in the Provincial waiting list to qualify for a house.

The Johannesburg municipality offers rental accommodation in the form of flats or houses. For flats, the regional managers evaluate and sign leases on behalf of the municipality. In cases of minors living alone, trusteeship arrangements have to be made by the regional director on behalf of the municipality. The same procedure applies to people who rent houses.

Vacant rental stock must be reported and the information be captured at the central database of the municipality. The property should then be advertised in the newspaper with a cut-off date. If no interest is shown in the leasing of the property, then it should be put up for sale. To ensure an integrated and comprehensive allocation of housing opportunities to home seekers within the Johannesburg

municipality, it is proposed that the allocation committee attach proportionate percentages to all categories of home seekers.

There are categories of non-qualifiers in the housing allocation process, which are divided into conventional and non-conventional categories. The conventional category includes South Africans that are not in the Provincial waiting list. The possible recourse available for people who qualify in this category is that the municipality must encourage them to apply, with an option to purchase a stand. For those that do not qualify, the municipality must refer them to alternative housing options such as rental accommodation. The non-conventional category includes non-South Africans who are in the country illegally, and who are eventually deported. However, the municipality offers non-South Africans that are in the country legally alternative accommodation, either to buy or to rent.

To guarantee that the allocation process is equitable, transparent and non-prejudicial, the Johannesburg Municipality established a committee comprising representatives from Section 80 of the Housing Portfolio Committee (Chairperson and nominees), and housing officials from the Allocation Unit and Housing Facilitation officials.

The committee is tasked with ensuring that adherence to the principles and processes of allocation. Also, it would give direction in the allocation of units in housing projects. The directives will include the following:

- preference to be given to qualified persons on the Provincial Waiting List who applied in 1996 and later;
- a percentage of the units to be reserved for the disabled, aged and displaced;
- relocation of particular settlements to specific housing projects;
- to verify the approved Provincial List of beneficiaries against the allocated site number;
- the allocation committee should resolve disputes arising from allocations;
- the committee should meet bimonthly or when the need arises; and
- the Chairperson of the Section 80 Housing Portfolio Committee should convene all meetings.

The allocation of units is aimed at eliminating shacks and improving the residential areas. Area Managers would ensure that formal units are handed over to beneficiaries after the old shacks are demolished and disposed of. Development agreements must be concluded with the Regional Manager and the facilitation unit to ensure that the vacated land is put to good use. The municipality believes this measure will prevent beneficiaries renting out their old shacks and taking occupation of new units.

The Ekurhuleni and eThekweni municipalities did not provide any information on policies and programmes instituted for the realisation of the rights to have access to housing. Ekurhuleni only mentioned in its report that the right to housing is promoted and fulfilled through its developmental projects that are undertaken to provide housing, water and sewer services. Both municipalities cited the slow transformation process as a major stumbling block to policy formulation, with Ekurhuleni saying that it was also involved with integration and consolidation of municipalities, as well as their policies and by-laws.

At the time of reporting, the Tshwane Municipality was still in the process of reviewing all its existing policies and by-laws. This is done with a view to formulate municipal by-laws in relation to matters that will enable compliance with obligations relating to ensuring access, adherence to building regulations and planning with regard to housing.

Some municipalities, like City of Cape Town and the Nelson Mandela metro treat housing in relation to water supply. However, for our purpose the information on water will fall under the right to water discussed below.

#### **4. RIGHT TO EDUCATION**

##### **Policy Measures**

The Cape Town Metropolitan Council, City of Johannesburg, and Ekurhuleni Metropolitan Municipality did not report on any policy or programme pertaining to the progressive realisation of the right to education.

As part of its Integrated Development Plan (IDP), the Durban Metropolitan Council envisages getting involved in skills training and development through the Poverty Alleviation Programme to address unemployment, particularly rife among the youth. Further, the DMC came up with a transformation plan known as eThekweni Municipality Transformation Plan.<sup>2</sup> The following are some of the key goals the transformation programme intends to achieve:

1. More customer-oriented service;
2. Outcomes-led service delivery;
3. Co-ordinated and integrated service delivery; and
4. A more demographically representative and culturally sensitive organisation.

A planning programme, dubbed Long Term Development Framework in May 2001, preceded the eThekweni Municipality Transformation Plan. The programme discussed key challenges facing the city, including its vision, its development strategies, and its transformation framework. A series of workshops, composed of the Durban Metropolitan City officials, communities, business and tertiary education institutions, took place between June and December 2001.

Meanwhile, (NMMM) electrification programme saw Previously Disadvantaged Individuals (PDIs) from local communities benefiting through a tendering programme, which had skills transfer as its component. The Tshwane Metropolitan Council reported that it offered internal training and development through its Finance Division. In addition, bursaries are given to those employees who wished to further their education. Further, the Tshwane Metropolitan Council supports and actively participates in the Adult Basic Education programme and subscribes to the Skills Development Act, 1998.

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<sup>2</sup> The details of the transformation plan are captured in a draft discussion document entitled “eThekweni Municipality Transformation Plan: Implementing our Municipality’s Vision,” 25 February 2002. The draft discussion document was sent along with the municipality’s report.

Moreover, the Electricity Division of the TMC reported that it was investigating co-operation alternatives with various training institutions in Tshwane. It was also reported that the Division had put aside funds for projects in which local communities and firms with Previously Disadvantaged Individuals (PDIs) would be integrated in the Tshwane economic activities. Internally, the Electricity Division focuses on the following:

- Training of employees in technical careers using the National Qualifications Framework (NQF) as a guiding instrument;
- Marketing and promoting Electrical Engineering as a career (to this end the Division is working with both the University of Pretoria and Technikon Pretoria and actively participates in career exhibitions and other functions); and
- Development of career plans with training options for all its employees.

According to the Tshwane Metropolitan Council, the Electricity Division is struggling to find qualified PDIs with skills in electrical engineering. To this effect, the Division is planning to create at least 20 posts that would be supported by a mentorship programme.

## **5. RIGHT TO HEALTH**

The City of Johannesburg discussed the problem of HIV/AIDS under the Indigent Management Policy where the problems were outlined and the concern was raised that a higher infection rate amongst unskilled labour force, the loss of breadwinners and the increase number of aids orphans would impact negatively on a generation of children.

Ekurhuleni Municipality introduced the [No] Smoking Policy (2002). The municipality's report pointed out that several other proposed policies were not yet operational.

Although the Tshwane Municipality did not have specific policies and legislation, it had several projects. For instance, the health care division of the Social Development Department had been involved in health promotion campaigns, educational sessions, exhibitions and seminars were held at schools, businesses and community groups. A comprehensive HIV/AIDS strategy, which was approved in December 2001, was implemented through an inter-sectoral approach.

In addition, 71 functional clinics and Community Health Centres throughout Tshwane rendered Primary Health Care (PHC) services of which only 43% had a comprehensive PHC package. Most facilities delivered preventive services and treatment for communicable diseases, sexually transmitted infections (STIs) and tuberculosis (TB).

The report also mentioned that the total clinic yearly headcount for people that received treatment during 2000/2001 was 1 965 410.

The Nelson Mandela Metro, the City of Durban, and the City of Cape Town municipalities did not report any new policy, programmatic or legislative measures for the reporting period.

### **Responsibilities**

The City of Johannesburg's Department of Health monitors pollution, provides health services and regulates abattoirs. Additionally, the department provides ambulances and emergency services for disasters. It also has the Service Delivery Strategic Plans which Cholera response in conjunction with Johannesburg Water, Communicable Diseases, Tobacco products control- smoking in public places

Meanwhile, the eThekweni Municipality reported that other responsibilities are under negotiated and involve the departments of all three spheres of government. It is anticipated that further legislation or recommendations will clarify the role of local government in Primary Health Care delivery.

### **Future Goals**

The City of Johannesburg plans to table by-laws for public health by the end of 2002. With the adoption of the Integrated Development Plan [IDP] as required by Chapter 5 of Municipal Systems Act, 32 of 2000, the City aims at integrating health and other sectors like transport into a system that embraces community needs and available resources, including human skills. It also assists in assessing set community goals, and in monitoring and reassessment of the programme itself.

The eThekweni Municipality aims at building additional clinics, hospitals, and establishing more ambulance services. The report states that the municipality plans to establish an integrated and affordable PHC. The municipality reported that there also was a need for 24 hour clinic services, and better access to medication, vital information or education, appropriate AIDS centres. The Municipality also plans to create a support base for AIDS orphans and other vulnerable groups.

However, the municipality pointed to several challenges involving children. Its report revealed that of the 60-70% of all children who lived in abject in poverty, 96 5000 might die of AIDS in the next 10 years. It was also reported that 42 000 children live in residential foster care, while Sexual abuse against children has increased by 30%, and 25% children have stunted growth.

The statistics present a bleak picture, but the City of Durban said that it was determined to reverse the situation.

The City of Tshwane reported that it had a five-year plan for its Health Care department, the goals and objectives of which are summarised as follows:



**Table 1 City of Tshwane 5 Year Plan for Health Care**

Development of the District Health System in the City of Tshwane	To develop a five year work plan as part of the DIP within six months and revise it annually
	To ensure that 50% of staff are appropriately skilled by 2004
	To ensure effective and efficient financial management
	To ensure that PHC services are accessible to 50% of the community by 2004
	To ensure integration of clinic level PHC services by 2004
Improve the health status in the City of Tshwane	To improve the overall health outcomes by at least 3% by 2004. This includes TB, STI's HIV/Aids, Immunisation, etc.
Community empowerment and participation	To reach 50% of the community through health promotion campaigns by 2004
	To improve community participation in Health Care with 10% by 2004
Promote inter-sectoral collaboration	To ensure the establishment of partnerships and networks annually

The municipality said that evaluation would be done following agreements of respective managers based on the envisaged performance management system for the municipality.

## **6. RIGHT TO ENVIRONMENT**

### **Policy developments**

The Johannesburg Metropolitan Council did not have specific policies developed during the current reporting period. However, the city has adopted a number of projects with regard to its mandate. The first is the Service Delivery Strategic Plan which entails the following:

- cholera response service delivery strategic plan;
- pest control services;
- complaint procedures; and
- reporting system for environmental health.

The second project is the Service Policy Guideline Document, which is basically a guideline for environmental health officers regarding the informal food traders and farmers markets. In addition, the Johannesburg metro has the Standard Accreditation Forms that is responsible for establishing accommodation and restaurants, amongst others.

Finally, the city has special projects involving the development of citywide uniform set of Public Health by-laws

The City of Tshwane Metropolitan Council indicated that all its activities are executed in accordance with approved policies, and legislation and by-laws, including the 1996 Constitution and the Municipal Systems Structures Act of 1998. The only other development during the current reporting period was the Treasury Management Bill.

Given their restructuring, the eThekweni and Ekurhuleni municipalities did not have any policy or legislative developments. Hence, eThekweni municipality is still operating in terms of the old legislation not yet repealed. Subsequently, issues such as noise pollution, abattoirs and gas reticulation have not been carried to any significant extent.

The Ekurhuleni Municipality, established only in December 2000, is undergoing transformation that involves integrating ten separate municipalities, each of which has previously had its own policies and by-laws. Nonetheless, parliament approved a policy on Integrated Environmental Management Strategy during the current reporting period.

The Nelson Mandela Metropolitan Municipality and the City of Cape Town developed no policies were developed during the current reporting period. Like Ekurhuleni, the Cape Town municipality cited the massive transformation that entails amalgamating different municipalities into one metropolitan council.

## **7. RIGHT TO WATER**

### **Policy Measures**

Only the municipalities of Johannesburg, Tshwane, Cape Town and Port Elizabeth provided information relating to policy developments during the reporting period. The municipalities of Tshwane and Cape Town reported on their adoption of the Free Basic Water Supply Policy which is aimed at providing households with free six kilolitres of water every month.

The Johannesburg municipality has the Basic Municipal Services Subsidy Policy through which it addresses the issue of free basic water services and free electricity supply. The Services Subsidy Supply Policy also covers free basic refuse removal and sanitation for residents who cannot afford to pay for these services.

In order to qualify, residents must satisfy one of the following criteria:

- They must be accountholders that are pensioners receiving a Government Pension; or
- An accountholder with a total family income of less than R1100; and
- HIV/AIDS breadwinners and/or their orphans.

The Nelson Mandela Metropolitan Municipality reported that while it provided water and sanitation, the supply was still insufficient. For instance, people who reside in their municipal area do have access to clean water, which is delivered through pipes from the various water treatment works. Basic service water is received via standpipes, which should be located within a distance of 200 metres of a residence. The municipality admitted, however, that there were areas where standpipes are located at a distance greater than 200 metres.

It also reported that households within the service area accessed waterborne sanitation. However, there are other areas where the bucket system is still being used, such as in squatter camps and areas marked for housing construction. The

municipality is in the process of developing plans to decrease the number of people that use the bucket system. Use of Ventilation Improved Pit latrines is not promoted due to the ground conditions and the location of the underground aquifer.

The Ekurhuleni and eThekweni municipalities did not report on policy developments.

## **8. LEGISLATIVE MEASURES<sup>3</sup>**

### **Durban Metropolitan City**

The Durban Metropolitan City referred to the following legislative pieces as the ones on which their work is based:

- Municipal Systems Act (2000)
- The Structures Act (1998)
- The Municipal Demarcation Act

The Tshwane Council reported that it had compiled a draft of Building Control by-laws that was expected to be complete by 30 April 2002. It had circulated the draft on Solid Waste by-laws, and proposed other by-laws concerning the Control of Municipal Hostels. These draft and proposed by-laws had a completion date set for 31 May 2002.

The City of Tshwane implemented the Municipal Structures Act of 1998 and the Municipal Systems Act of 2000. It said these laws were necessary for its proper and efficient function. It also indicated that all their departmental activities are executed in accordance with by-laws and approved-Council policies, comprising the following:

- The Constitution (1996)
- Municipal Structures Act (1998)
- Municipal Systems Act (2000)
- Treasury Management Bill (?)
- Financial by-laws (to be promulgated in due course)

### **City of Tshwane**

The City of Tshwane municipality is still developing legislation for the realisation of the right to housing, which have been summarised in the table below. The municipality intends to review and amend, repeal or replace existing laws and other measures that hinder the provision of access to socio-economic rights. These include laws that interfere with the municipality's responsibilities (the target dates in the table have already passed.)

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<sup>3</sup> The legislative pieces listed in this section are applicable to all the municipalities. Therefore, they will not be repeated for each municipality.

**Table 2 City of Tshwane Proposed By-Laws**

<b>SUBJECT OF BY-LAWS</b>	<b>PROGRESS TO DATE</b>	<b>TARGET DATE FOR COMPLETION OF PROJECT</b>
Building Control by- laws	Compiling draft no 1	30 April 2002
Proposed by-laws on the Control of Municipal Hostels	Compiling draft no 1	31 May 2002
Proposed by-laws pertaining to the management and control of Flats-Buildings owned by The City of Tshwane Metropolitan municipality	Compiling draft no 1	31 May 2002
Proposed by-laws on the Management and control of informal settlements	Compiling draft no 1	31 May 2002

These pieces of legislation will in some ways affect access to water.

### **City of Johannesburg**

The Johannesburg municipality promulgated the following pieces of legislation toward fulfilling its housing obligations:

Municipal Structures Act  
 Municipal Systems Act  
 Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act  
 National Building Regulations and Building Standards Act No. 103 of 1977  
 Accommodation Establishment by-laws  
 Housing Act  
 Development and Housing Act, No. 103 of 1985  
 Housing Consumer's Protection Measure Act  
 Rental Housing Act  
 Gauteng Housing Act  
 Development Facilitation Act  
 Town Planning and Township Ordinance  
 Water Act, No. 92 of 1993

The Nelson Mandela municipality, in respecting, protecting, promoting and fulfilling the right to housing and water enacted the following:

Section 118 of the Local Government Municipal Systems Act, 32 2 of 2000, which deals with the restraint on the transfer of immovable property has provoked an outcry and a series of court cases claiming that it is unfair. As a result, an amendment to this section is presently under consideration.

Before this act, the Local Government Municipal Structures Act 117 (1998) has guided the municipality. The Johannesburg Metropolitan Council implemented the Municipal Systems Act of 2000. Other legislation listed as having been implemented during the reporting period include the following:

- the Environment Planning Amendment Act
- the Municipal Demarcation Act of 1998
- the Occupational Health and Safety Act 85, 1993
- the Noise Regulations promulgated in terms of the Environment Conservation Act 73 of 1989
- the Health Act 63 of 1977
- the Hazardous Substances Act of 1973
- the Atmospheric Pollution Prevention Act (APPA) of 1965; and
- the Water Act

The Johannesburg Council was in the process of drafting the by-laws listed below the completion of which was expected by end of 2002:

- Waste Management By-laws
- Water Management By-laws
- Cemeteries and Crematoria
- Parks and open spaces By-laws
- Noise Control By-laws
- Water Pollution By-laws

Like the City of Johannesburg, the Tshwane Metropolitan Council had the Municipal Systems Act of 2000. There are by-laws pertaining to public amenities whose commentary stage is completed, including the Cemetery and Crematoria by-laws (which was still at the draft stage by the time of reporting) and was targeted for completion by 2 March 2002.

Other proposed by-laws were on the Management and Control of Informal Settlements whose date of completion was not provided, while by-laws on the city's finances were still to be promulgated.

Ekurhuleni Metropolitan Municipality did not provide information on legislative developments during the current reporting period. However, by-laws on water supply, solid waste and wastewater were also introduced, covering a plethora of issues such as prevention of water pollution; collection and removal of business and domestic refuse; industrial and trade refuse; garden and bulky refuse, builders refuse; special industrial, hazardous, medical and infectious refuse; landfill sites, mini disposal sites and refuse transfer stations; littering, dumping and ancillary matters; storm-water, sewage, industrial effluent; transportation of sewage by road haulage; waste food and other disposal units; disposal of sludge, compost and manure; private treatment plants including charges, access to premises and offences and penalties.

Other than the implementation of the Municipal Systems Act, 32 of 2000, the Nelson Mandela Metropolitan Municipality did not pass any new legislation. The City of

Cape Town Metropolitan Council and the eThekweni Municipality did not report any new legislation.

The Johannesburg Metropolitan Council reported that it only implemented the Municipal Systems Act of 2000.

Other municipalities did not report on the legislative developments. The Ekurhuleni Municipality reported that while it did not have legislative measures for the period in question, its by-laws were being redrafted but not approved. The municipality did not indicate when these by-laws would be approved.

The Nelson Mandela Metropolitan Council and the City of Cape Town municipalities did not explain why information regarding legislative measures.

It is further appreciated that due to the transformation process that municipalities have been undergoing in the past few years, there may be problems with regard to some of the policy and/or legislative measures, including the by-laws, which were passed prior to the amalgamation.

## **9. CRITIQUE**

It is of great concern that the municipalities do not exert themselves in responding to the protocols. From their responses, it may be deduced the municipalities are not clear on their Constitutional mandate regarding the socio-economic rights.

Most of these municipalities did not furnish the Commission with satisfactory answers with regard to their constitutional mandate as elaborated in sections 27 and 152 of the Constitution. For instance, the eThekweni Municipality has tended to make reference to legal submissions which the Commission could not identify. Moreover, the information from this municipality revealed that it is slack in advancing the needs of vulnerable groups.<sup>4</sup>

### *Right to Housing*

The policy measure that the Johannesburg municipality has implemented for housing respects the right in that it will facilitate an equitable, fair and transparent allocation of resources, thus promote good governance. The policy also protects the right because it will do away with queue jumping.

By giving citizens options for financial assistance, the municipality created grounds for end user financing as it is necessary for access to housing. Accordingly, the *Grootboom* judgement concluded that a measure is reasonable if appropriate financial resources are available for its implementation.<sup>5</sup> The commitment of the Johannesburg municipality to provide housing is evidenced by requests for exemptions for those people that do not qualify in terms of the eligibility criterion. The establishment of

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<sup>4</sup> It is noted that the municipality's IDP attempts to address some of the above groups, especially children, women, the aged, the unemployed and those from rural areas).

<sup>5</sup> *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC) para. 39

the allocation committee protects the right to housing by eliminating corruption and misappropriation of funds.

The different housing options are reasonable because they do not limit one's choice to gain access to housing, and will cater for the financial needs of vulnerable groups. For instance, the provision of rental housing will ensure that those who cannot afford to buy houses would still have a house to live in.

While the City of Cape Town municipality did not provide information on instituted measures indicated that it adheres to basic minimum standards in the provision of services such as water. The standards are reasonable because they are in compliance with Reconstruction and Development Programme (RDP) framework.

The reports from the municipalities of Cape Town, Ekurhuleni, eThekweni, and Nelson Mandela showed that their restructuring impacts negatively on service delivery. The eThekweni Metropolitan Council also reported that the Municipal Systems Act, of 2000 and the Municipal Demarcation Act are obstacles in the execution of its constitutional mandate.

### *Right to Health*

As for the health section, the Metros did not provide the information requested on policy and legislative measures. This created problems in assessing whether the metros met their goals. However, information on future goals of the health sector indicates that the Metros are cognisant of their responsibilities and constitutional obligations. The transformation process they are presently undertaking hampers these Metros.

### *Right to Education*

In most developing countries, including South Africa, education is usually responsibility of the national and/or provincial governments and not local government. Some of the responses of the Metropolitan Councils testify to this fact. However, those Councils that do contribute to the progressive realisation of the right to education are commended. In addition, the definition of education, therefore, should be broad, so local government may have a role.

Education should not only refer to formal classroom activities. As the South African Qualifications Authority might attest, skills-based activities should be part of the of the general education system; hence such inclusion will, in turn, define the role of the municipalities. The youth need skills-based projects and programmes to make a meaningful contribution to the country's economic growth specifically in science, engineering and technology.

The NMMM and TMC are contributing to the empowerment of the PDIs through their electrification programmes that provide local communities with skills development and thus with employment through tenders. Partnerships between municipalities, learning and other institutions involved in skills development are a relevant vehicle toward bridging the gap between theory and practice. It is for this reason that the TMC must be commended for its efforts to involve the University of Pretoria and Technikon Pretoria in developing the electrical engineering area.

Tendering can provide employment to the unskilled since most government projects are labour-intensive. In turn this add to the number of the Small, Medium and Micro Enterprises (SMMEs). Great results could be achieved if these projects were merged with programmes like the Human Resource Development (HRD) Strategy for South Africa,<sup>6</sup> that also seek to further the objectives of the Skills Development Act, 1998.

The White Paper on Local Government of 1998 obliges municipalities to promote social development by providing recreational and community facilities, and deliver social welfare services. Also, the Constitution empowers municipalities to provide childcare facilities and grants to associations and – in terms of the Child Care Act, 1983<sup>7</sup> grants to associations. It is not clear if all municipalities are aware of the contribution they are expected to make toward the progressive realisation of the right to education, as only one municipality addressed itself to that effect. It is clear, however, that the right to education, specifically the provision of ECD, calls for collaboration between various spheres of government.

Such collaboration is in line with the spirit of co-operative governance encouraged by Chapter 3 of the Constitution. This is an important provision that local government should not take lightly as it appears in their responses to the questionnaires.

#### *Right to Environment*

The majority of the municipalities are presently engaged in restructuring. As a result, nothing much was achieved as far as implementing new measures is concerned. Still, some municipalities hardly reported on the programmes or projects in place.

Only the Nelson Mandela Metropolitan and the City of Cape Town municipalities reported on the delivery of electricity to some areas to curb atmospheric pollution. The Nelson Mandela Municipality reported that between mid 1992 and 30 June 2002, it spent about R100 million to service about 32 882 erven, compared to an estimated 35 696 erven in the informal/low cost housing areas serviced between 1994 to June 2002 at approximately R60, 5 million. Carried out in this manner, the process leaves out approximately 32 087 un-serviced erven, and a balance of about R96 million. This is unacceptable specially that the project has been going on since 1992.

The Nelson Mandela Metropolitan Municipality (as well as other municipalities) is still faced with a challenge of implementing sanitation measures as some households were still using the bucket system. The municipality indicated, however, that it was in the process of phasing out the bucket systems and introducing Ventilated Improved Pit (VIP) toilets.

Also of concern is the fact that most municipalities are still not catering for the needs of the vulnerable groups within their own localities. For example, there are areas which still do not have proper sanitation, including refuse removal services. This results in people being exposed to some form of unhealthy environments. This is common mostly in rural and informal settlements. Lack of electricity in most of the

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<sup>6</sup> This programme was co-released by the Departments of Education and Labour in April 2001.

<sup>7</sup> Kader Asmal, National Policy: Education White Paper Five (5) on Early Childhood Development; Meeting the challenge of early childhood development in South Africa, Pretoria, May 2001. [http://www.polity.org.za/govdocs/white\\_papers/education.html](http://www.polity.org.za/govdocs/white_papers/education.html) Site visited on 20 August 2002.



rural, informal and formal areas also poses a concern, as lack of these facilities and other energy sources results in people using coal and other forms of energy that end up in exacerbating air pollution.

Overall, it is encouraging that some municipalities are revising existing measures with a view to formulating new ones. However, in many cases, dates of completion of the revision were not provided.

## **10. RECOMMENDATIONS**

Whilst it is appreciated that the municipalities are still inadequately capacitated, and that it is their first time responding to the protocols, it is unwarrantable that they did not understand their constitutional obligations when addressing the questionnaires.

It is further appreciated that due to the transformation process that municipalities have been undergoing in the past few years, there may be problems with regard to some of the policy and/or legislative measures, including the by-laws, which were passed prior to the amalgamation.

Municipalities are still facing a huge challenge of providing services such as water supply, sanitation, and refuse removal, particularly for people with disabilities, women, and the aged in rural areas, and in informal and some formal settlements. Therefore, policies should be instituted to ensure that the needs of these vulnerable groups are catered for. As for housing, some initiatives have been taken by the national and provincial departments to ensure that these vulnerable groups benefit, and their needs are provided for in the budgets.

Municipalities must report on those measures that impede access socio-economic rights. The municipalities should also indicate what corrective measures they are taking, as a result. Equally important is that these municipalities should clearly identify those measures that were not repealed but were being implemented. It is not acceptable for municipalities, for example, the eThekhwini Municipality, to merely state that there are measures, which were redrafted without stating which parts or sections of those measures were being repealed. This makes it difficult to analyse whether or not constitutional obligations were met.

It is also recommended that the municipalities fast track the process so they may dedicate enough time to the development of measures relevant for the enhancement of their obligations.

Everything possible should be done to further the envisaged government skills development plans. This should not be viewed as the sole responsibility of the Departments of Education and Labour, but other government departments and spheres should play should be involved in skills development.

The partnership that exists between the TMC's Electrical Engineering Division and University of Pretoria and Pretoria Technikon is an innovative way to make the skills development possible. Other municipalities should follow the example of the government HRD Strategy by providing apprenticeships so the youth may gain work experience.

Sector Education and Training Authorities (SETAs), the national Department of Education, Department of Labour and other role players concerned with skills development should emulate the efforts of the TMC. Initiatives such as that of the TMC fit in very well with the government's HRD Strategy whose success depends on effective co-ordination of its strategic objectives which comprise the following:

- A solid foundation, consisting of early childhood development, general education at school, and adult education and training;
- Securing a supply of skills, within the Further and Higher Education and Training bands of the NQF, which anticipate and respond to specific skill needs in society, through state and private sector participation in lifelong learning;
- An articulated demand for skills, generated by the needs of the public and private sectors, including those required for social development opportunities, and the development of small business; and
- A vibrant research and innovation sector which supports industrial and employment growth policies.<sup>8</sup>

Local government should seriously consider the 1998 provision in order to fulfil its obligation to social development by establishing recreational community facilities.

There is a need for national legislation to define which health services are to be provided by municipal structures. Duplication of services by provincial health departments should be phased out especially the delivery of the PHC package. Clinics should be the first line of defence in the fight against AIDS and should receive sufficient funds to maintain and re-train staff. Education on HIV/AIDS prevention and its treatment should be made available to all.

## 11. CONCLUSION

It is appreciated that this is the first time the municipalities have ever engaged in this exercise. Their responses are still lacking on some aspects, but it is hoped that they will be improved in time. As we have seen, most of the municipalities are in the process of transformation, with only Tshwane Metropolitan Council having reached some semblance of stability. Nonetheless, it is important that the rest of the metropolitan councils speed up their process of restructuring so they are not impeded in their service delivery mandate.

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<sup>8</sup> Departments of Education and Labour, Human Resource Development Strategy: A Nation at Work for a Better Life for All, April 2001.

## **ABBREVIATIONS**

<b>APPA</b>	Atmospheric Pollution Prevention Act
<b>CoJ</b>	City of Johannesburg
<b>CTMC</b>	Cape Town Metropolitan City
<b>DMC</b>	Durban Metropolitan City
<b>EMM</b>	Ekurhuleni Metropolitan Municipality
<b>IDP</b>	Integrated Development Plan
<b>MEC</b>	Member of the Executive Council
<b>NQF</b>	National Qualifications Framework
<b>PDI</b>	Previously Disadvantaged Individuals
<b>PHC</b>	Primary Health Care
<b>SETAs</b>	Sector Education and Training Authorities
<b>SMMEs</b>	Small, Medium and Micro Enterprises
<b>STIs</b>	Sexually Transmitted Infections
<b>TB</b>	Tuberculosis
<b>TMC</b>	Tshwane Metropolitan Council
<b>VIPs</b>	Ventilated Improved Pit (toilets)

## CHAPTER 11

### PARASTATALS

#### 1. INTRODUCTION

This chapter is devoted to the parastatals whose activities are pertinent to the fulfilment of economic and social rights as provided for in the Bill of Rights of the Constitution. An analysis of the information provided will be utilised to assess whether there is a progressive realisation of the fulfilment of the right in question.

Each parastatal was requested to identify which of its activities are relevant to the following economic and social rights. These are as follows:

- the right to environment<sup>1</sup>
- the right to adequate housing<sup>2</sup>
- the right to have access to health care services, including reproductive health care<sup>3</sup>
- the right to water<sup>4</sup>
- the right to have access to social security<sup>5</sup>
- the right to education<sup>6</sup>
- the right to land<sup>7</sup>

Each right is divided into three sections. The first section under each right focuses on primary activities of the parastatal whose activities are pertinent to that particular right.<sup>8</sup> The second section addresses the constitutional obligations of the parastatal. The third and the last section under each right is concerned with implementation difficulties experienced by a parastatal in delivering its mandate.

A critique on the constitutional obligations and implementation difficulties will follow at the end of the chapter. The critique section will then be followed by recommendations, which will be followed by a conclusion.

#### 2. RIGHT TO ENVIRONMENT

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<sup>1</sup> The Agricultural Research Council (ARC), The Council for Scientific and Industrial Research (CSIR), the Land Bank, Rand Water and Umngeni Water were the parastatals that responded to the Human Rights Commission's (HRC) protocol dealing with the right to the environment.

<sup>2</sup> The National Housing Finance Corporation (NHFC) was the respondent to the HRC's protocol on the right to adequate housing.

<sup>3</sup> CSIR and the Medical Control Council (MCC) were the respondents to the HRC's protocol on the right to health.

<sup>4</sup> Rand Water and Umngeni Water were the respondents to the HRC's protocol on the right to water.

<sup>5</sup> South African Council for Social Service Professions (SACSSP) was the respondent to the HRC's protocol on the right to social security.

<sup>6</sup> National Student Financial Aid Scheme (NSFAS) responded to the HRC's protocol on the right to education.

<sup>7</sup> The Land Bank was the respondent to the HRC's protocol on the right to land.

<sup>8</sup> Note that in some cases there are more than one parastatal involved in activities related to a right, these parastatals' constitutional obligations will not be dealt with as such parastatals are not directly dealing with the right in question. Their constitutional obligations will only be dealt with where the parastatals are directly involved in the activities pertinent to a right.

## **2.1 Primary Activities:** The Council for Scientific and Industrial Research (CSIR)<sup>9</sup>

The CSIR is the largest scientific and technological research, development and implementation organisation in Africa. Its mandate is to foster industrial and scientific development by itself and through partnerships with public and private sector institutions.

## **2.2 Constitutional Obligations**

In response to its constitutional obligations to respect, protect, promote and fulfil the right to the environment, the CSIR stated that it is not directly involved in the provision of services but that it does play an enabling role by providing support with regard to science and technology to some of the institutions mandated with economic and social rights responsibilities. The CSIR further reported that the right to the environment as stipulated by section 24 of the Constitution is among those activities that are of relevance to the organisation. With regard to the CSIR's performance in relation to the activities, which are aimed at supporting and promoting the right, the organisation reported on the following:

- The CSIR is developing and strengthening its record of accomplishment as a relevant contributor to the effective conservation and use of the country's natural resources. Environmental issues have increasingly come to the fore in global trade and the CSIR assists the South African government and companies to achieve internationally acceptable environmental practices.

### *The fishing industry*

- The CSIR has completed a project, which is aimed at encouraging cleaner production technologies within the fishing industry in order to support sound, sustainable and cost-effective environmental practices. The use of the above technologies often result in water, electricity and raw materials being conserved and production yields being increased.

### *The Climate Change Project*

- The CSIR is involved in the climate change project in partnership with other institutions. It is also involved in an initiative known as SAFARI 2000<sup>10</sup>, which is aimed at explaining and predicting climate changes. The aim of this project is mainly to assist in the management of regional trans-boundary pollution.

### *The Cape Action Plan for the Environment*

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<sup>9</sup> Note that it is only the CSIR that responded to the constitutional obligations question. The reason for that is that the rest of the parastatals referred to in this right, engage in activities that are not pertinent to the right. Their responses on the constitutional obligations will or should be found where their activities are pertinent to such rights.

<sup>10</sup> SAFARI 2000 is a southern African three-year environmental field campaign headed by the CSIR and the University of the Witwatersrand, in collaboration with the National Aeronautical and Space Administration and the University of Virginia, which will help to predict and explain climate changes.

- The Cape Action Plan for the Environment (CAPE) is the first international conservation plan for the Cape flora. The CSIR has been closely involved in the development of the long-term strategy and implementation programme of the Cape fynbos and adjoining marine environment.

### **2.3 Implementation Difficulties**

The CSIR did not mention any of these. It only committed itself to working with government and other institutions in ensuring that South Africa complies with internationally acceptable environmental practices.

#### **b) The Agricultural Research Council (ARC)**

The ARC indicated that with regard to the right to environment, its understanding is not only limited to the natural environment, but that its stewardship extends to all the elements of the environment, including, human, cultural and economic. The organisation further stated that it is committed to sustainable agricultural production practices in the interests of economic and social development. The response further indicated that, amongst the ARC's objectives, it continually strives to direct its research and technology development to minimise the negative impacts on the environment. That is, impacts occurring as a result of pollution. It is also the ARC's objective to make a positive contribution through remediation(s), conservation and sustainable economic value addition.

#### **c) The Land Bank**

The Land Bank is an agricultural financial institution established in 1912 to provide financial assistance to farmers. However, it has now changed focus to address imbalances of past discriminatory practices and has come to the assistance of Black farmers.

The Bank indicated that whilst all of the economic and social rights are relevant to it, of major importance is the right to access to land and that the right to environment is indirectly relevant to the functions of the Bank.

With regard to the Bank's performance in order to ensure that the constitutional obligations to the right to environment are satisfied, the Bank reported that though it is indirectly involved in the protection of the environment, it does so during the land evaluations it conducts. These evaluations, to a certain extent, ascertain that the land's carrying-capacity is not over extended. The Bank does this by ensuring the prevention of ecological degradation and securing the use of natural resources and ecologically sustainable development.

Furthermore, the Bank indicated that it did embark on a flood relief emergency programme during the year 2000, together with the National Department of Agriculture (NDA). The aim of the programme was to protect and restore the natural resources following the devastating floods during the same year. The Bank's involvement was basically through providing financial assistance in the form of non-payable grants in order to provide effective relief to agriculture in flood disaster areas for land restoration and for certain forms of agricultural infrastructure repair.

#### d) Rand Water

The above organisation indicated that its activities are mainly in the areas of bulk potable water supply and sanitation services, where the latter is more relevant to the right in question.

With regard to Rand Water's performance in relation to the activities, which are aimed at supporting and promoting the right to environment as stipulated in section 24 of the Constitution, the organisation reported that it has ensured that the following is achieved:

- Compliance with all the relevant legislation
- Entrenchment of environmental management in the organisation's overall management strategy
- Compliance with the South African Bureau of Standards (SABS) and International Standards Organisation (ISO) 17025
- Striving towards ISO 9001 and 14001 accreditation
- Rehabilitation of natural wetlands
- Promotion of various Water Wise projects
- Promotion of Environmental Education programmes aligned with Curriculum 2005

#### e) Umgeni Water

The Umgeni Water reported that the right to environment, as stipulated by section 24 of the Constitution, is among those activities that are of relevance to the organisation. This includes the provision of water and sanitation services to municipalities (provided in the Water Services Act of 1997), health care and related environmental management services. The Umgeni Water reported that in addition to providing treated bulk water to people residing both in rural and urban southern KwaZulu-Natal, the organisation also manages a number of waste waterworks in the region, and has provided on-site sanitation to over 200 schools and a number of households in rural KwaZulu-Natal.

### 3. RIGHT TO HAVE ACCESS TO ADEQUATE HOUSING<sup>11</sup>

#### 3.1 Primary Activities: The National Housing Finance Corporation (NHFC)

The National Department of Housing established a number of institutions that offer guarantees in order to facilitate the flow of finance to low income-housing delivery.<sup>12</sup> The institutions were also meant to create funding intermediaries that would promote greater access to housing finance and to normalise the lending process. The NHFC is one such institution.

The NHFC's primary activity is to address the problem of lack of finance for housing for low and moderate-income families. The NHFC does this by mobilising finance through forming partnerships with other organisations outside the State parameters.

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<sup>11</sup>Section 26 of South African Constitution, Act 108 of 1996.

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

The reason for focusing on these groups was due to the fact that mainstream financial institutions either lacked capacity to address their demands or were unwilling to assist because of the high risk nature of the market.

### **3.2 Constitutional Obligations**

#### *Respect*

In its quest to mobilise funding for housing from sources outside the state, the NHFC has formed partnerships with a variety of institutions.<sup>13</sup> The organisation respects the right to adequate housing because it has ensured that there is equality in the housing market by using intermediaries for providing low-income housing. The funding provided will, in the long term, ensure that people with a regular source of income gain access to finance for buying or renting, incrementally building or improving their homes.

#### *Protect*

The NHFC protects the right to adequate housing because it funds or endorses funding for institutions that promote broader access to housing finance. The organisation also facilitates capacity building within housing institutions. The partnerships the NHFC has are meant to ensure the delivery of innovative housing finance solutions.

#### *Promote and Fulfil*

The NHFC believes it promotes the right to adequate housing as it ensures the creation of better quality housing and living environments. The NHFC has embarked on a study to increase access to affordable housing finance for every citizen. The study is meant to assist in identifying and understanding clearly what the blockages are in the housing finance sector for the low to moderate-income market. The findings from this study will inform the National Housing Policy Revision process. Other activities the NHFC has been involved in include working on the Social Housing Policy, through assisting government with the community reinvestment legislation.

### **3.3 Implementation Difficulties**

The NHFC's clients suffered a major setback when government stopped payroll deductions. The payroll deductions served as a mechanism that had provided relative security in terms of loan repayments. This resulted in some housing institutions reassessing their client base, and subsequently redirecting their attention away from the public service. Some of these institutions were forced to close down because they could not meet this challenge, thus leaving a gap for communities they serviced.

Some of the NHFC's clients need the government subsidies to fulfil their projects. Therefore, the slow release of subsidies, delays the implementation of the projects. The NHFC thus has to communicate with its clients and the provincial government

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<sup>13</sup> Rural Housing Loan Fund, Housing Institutions Development Fund, Housing Equity Fund, Niche Market Leaders.



departments to ensure that government honours its responsibility to keep projects growing and housing delivery increasing. The NHFC will develop mechanisms for a more efficient process for the allocation of housing subsidies.

#### b) The Land Bank

Although the Land Bank is an agricultural financial institution that provides finance to farmers in South Africa, it has also used this process to ensure the enjoyment of other economic and social rights such as housing. The enjoyment of the right to housing has been made possible through the Land Bank introducing a financial product that serves as an incentive to commercial farmers to contribute to the development of their emerging counterparts and farm workers.

The measure that the organisation uses to ensure access to housing is the Social Discount Product (SDP). The Bank uses the SDP to encourage socially responsible behaviour amongst commercial farmers, by recognising and rewarding farmers that promote development for their farm labourers and the rural communities where they operate. The clients that build houses and ensure service provision for their farm labourers are rewarded by getting a discount on the interest rate that is calculated on the existing or new loan held with the Bank. The discount is provided in the form of an annual rebate depending on the project progress. Through the SDP, the Bank is indirectly contributing to the farm labourers' right to have access to adequate housing.

## **4. RIGHT TO HEALTH CARE, INCLUDING REPRODUCTIVE HEALTH**

### **4.1 Primary Activity: The Medicines Control Council (MCC)**

The MCC was established in terms of the Medicines and Related Substances Control Act of 1965 for the registration and control of medicines based on quality, efficacy and safety. Since its inception, there are approximately 20 000 medicines that have been granted marketing approval through registration, or allocation of a reference number only for those medicines that were on the market prior to 1995.

#### **4.1.1 Legislative Measures**

The MCC reported that it undertook the following legislative measures to deliver on its mandate:

- The amendment of the National Drug Policy of 1996, which was mainly aimed at ensuring that drugs improve everybody's health within the country's available resources. Amongst others, this was to be achieved through proper pricing of drugs, testing of drugs, planned procurement of drugs especially for the rural poor and rationalisation of the structure for Pharmaceutical Services.

- The South African Medicines and Medical Devices Authority Act, aimed at transforming the MCC was also passed.<sup>14</sup>

Administrative steps taken to assist the MCC to fulfil its section 7 (2) obligations included the following:

- Development and formulation of regulations and guideline to make the Act and other policies operational;
- Upgrading the structure of the Chief Directorate and establishment to four new committees;
- Skills audit and training of personnel in line with the Skills Development Act; and
- Implementation of an Information Management System.

## 4.2 Constitutional Obligations

### *Respect*

The MCC cited the 1996 National Drug Policy (NDP), which was aimed at ensuring availability, accessibility, safety and efficacy of quality drugs and also to lower the cost by promoting cost-effective and rational use of drugs. Furthermore, the MCC reported to have come up with a framework for the registration and control of Complementary Medicines and African Traditional Medicine has been implemented.

### *Protect*

In meeting this obligation, the MCC reported that they offer protection to the public by ensuring that:

- all medical and scientific experiments are subject to regulatory control and follow informed consent processes;
- the public does not use unlawful and counterfeit medicines; and
- the public does not fall victim to the harmful effects of dependence-producing substances through restricting access and promoting education.

### *Promote and Fulfil*

The MCC approves the sale of medicines and thus has a role in promoting health and protecting the public as well as respecting life. The MCC further reported that it promotes access to generic medicines. This is done through the distribution of a Patient Information Leaflet to consumers. Furthermore, the MCC also ensures the registration and safety monitoring of anti-retroviral drugs (ARVs). Lastly, the MCC reported that it collaborates with SADC regulators to harmonise regulatory requirements for effective control of cross border flow of medicines.

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<sup>14</sup> The purpose of establishing a South African Medicines and Medical Devices Regulatory Authority is to serve the public interest by ensuring efficient, effective and ethical evaluation and registration of the legal supply of safe and effective medicines and devices that are of good quality.

### 4.3 Implementation Difficulties

The following difficulties were reported as impeding the progress in fulfilling the right:

- Budgetary under-allocation to provide for efficient administration
- Excessive reliance on external experts
- Promoting transparency in line with the Promotion of Access to Information Act of 2000
- Conflict of interest with members and consultants
- Control of counterfeit and illegal medicines e.g. The Adlam case where R200 million worth of medicines resulted in a plea bargain and a suspended sentence
- Audit of clinical trials to ensure compliance with GCP guidelines\improved turn around time for approval to ensure timely access to medicines

### 5. PRIMARY ACTIVITIES: Centre for Scientific and Industrial Research (CSIR)

The CSIR, is, by its own definition "the largest scientific and industrial research, development and implementation organisation in Africa." It is constituted as a Science Council by an Act of Parliament. As a research institution, it is not the direct supplier of goods and services pertinent to economic and social rights, but plays an enabling role by providing science and technology support to the providers of these.

#### 5.1 Policy and Programmatic Measures

The CSIR reported the following activities which promote the right to health:

##### *Reproductive Health*

- The development of a diagnostic tool for screening placental development (intra-uterine deaths account for 30 out of 1,000). The use of this device could increase the chances of survival for impaired foetuses from 48 to 80 per cent.

##### *HIV/AIDS*

- The Medical Research Council is engaged in collaborative research with the CSIR in the development of a vaccine against HIV. The focus is on viral-cell membrane fusion.
- The development of nutritional food additives to boost the immune system for immuno-compromised HIV patients.

##### *Bio-prospecting Programme*

- Obesity treatment using the Hoodia plant is in the process of being commercially patented. Currently the patent (P57) is in the third year of a seven to ten year clinical trial in the UK. If successful the San people who

are the custodians of ancient traditional knowledge systems will share in the benefits with the CSIR.

### *Child Abuse*

- The CSIR hosted the third in a series of seminars on the role of volunteers in support of the national effort to reduce and prevent child abuse. This was in response to an appeal for assistance by Business Against Crime.

### *Small Scale Medical Waste Management*

- The CSIR has developed and is optimising a small-scale medical waste incinerator for the safe and effective incineration of medical waste in rural clinics to reduce infection risks.

## **5.2 Constitutional Obligations**

In response to the question as to the CSIR's understanding of its obligations vis-a-vis section 7(2) of the Constitution, the CSIR did not provide any information

The CSIR identified the laws listed below to assist it in fulfilling its obligations with regard to socio-economic rights:

- The South African Constitution
- The Labour Relations Act
- The African Renaissance and the New Partnership for Africa's Development (NEPAD)
- National Imperatives as an Integral Part of the National System of Innovation

## **5.3 Implementation Difficulties**

The decreasing grant funding from Parliament was quoted as a reason for the declining ability to deliver on economic and social rights.

## **6. RIGHT TO WATER**

### **6.1 Primary Activities: Rand Water**

According to the response received from Rand Water, its primary focus is on the supply of bulk portable water and the provision of sanitation services. However, in terms of the Water Services Act of 1997, Rand Water would undertake other non-core activities, which may include but not limited to:

- activities related to the water services sector;
- activities undertaken to support and enhance the performance of Rand Water's primary activities for the benefit of stakeholders;
- activities aimed at supporting and strengthening the capacity of water service authorities and institutions in providing effective, efficient sustainable and

cost effective water services provision to customers in Rand Water's service area.

## **6.2 Constitutional Obligations**

This water utility also did not provide a precise response on its constitutional obligations. The Rand Water's was a comprehensive and indirect response included in its strategic objectives. The Rand Water strives to:

- become the preferred water service utility for municipalities
- ensure that Rand Water continues to be a viable and sustainable regional water utility
- satisfy all customers
- improve efficiencies in the provision of quality services
- achieve social transformation
- minimise raw water tariff increase

### b) Umgeni Water

In accordance with its response, Umgeni Water's primary activity is the provision of water and sanitation services and related environmental management.

## **6.3 Constitutional Obligations**

Umgeni Water gave an elaborate response that does not explain precisely how it respects, protects, promotes and fulfils the constitutional obligations.

In providing the primary services, Umgeni Water has incorporated a number of other services to its customers to further enhance their quality of life and to protect, promote and fulfil the economic and social rights enshrined in the Constitution. These include:

- Environmental Management Policies and systems to prevent pollution and ecological degradation
- Promotion of conservation and security of ecologically sustainable development
- Monitoring programmes which results in analyses of some 13 000 water samples on a weekly basis
- Provision of leadership and institutional support on managing the catchments in its 24 000 km area
- Formulation of a Water Conservation Policy and Implementation Strategy dating back to 1999

## **6.4 Implementation Difficulties**

Rand Water reported that internal transformation has been a stumbling block to the achievement of its constitutional obligations. However, it was further reported that measures were being put in place to address this challenge.

Umgeni Water reported that the legislative environment has not been a favourable one for Water Boards. The fact that Water Boards are not mentioned in the Constitution,

the Water Services Act of 1998, and Local Government legislation puts them in a weaker position. The meaning of “a weaker position” was not explained.

## **7. RIGHT TO SOCIAL SECURITY**

### **7.1 Primary Activity: The South African Council for Social Service Professions (SACSSP)**

The SACSSP is governed by the Social Services Act 110 of 1978 as amended. The Act provides for the establishment of the SACSSP and the registration with it. It is also vested with disciplinary powers for unethical and unprofessional conduct accorded by the regulations and rules made under the Act.

The SACSSP has the responsibility to ensure that its policies and guidelines for the professions under its auspices are adhered to. If practitioners neglect to follow guidelines, it is the SACSSP's responsibility to investigate and evaluate the alleged unprofessional conduct and to determine whether the practitioner dealt with the parameters and domain of the specific profession concerned to ensure the utilisation of resources to promote the economic and social rights of clients.

### **7.2 Constitutional Obligations<sup>15</sup>**

#### *Respect*

The SACSSP has to ensure that practitioners' conduct does not:

- deprive the client of any economic and social rights or access to these rights;
- deny or obstruct the client in obtaining or accessing such rights; and
- unfairly discriminate against the client in obtaining or accessing the rights.

#### *Protect*

The SACSSP has to protect the interests of consumers from poor service delivery and neglect by social service professionals registered with it.

### **7.3 Implementation Difficulties**

According to the organisation's response, it was asserted that since it is not involved in direct service-rendering to the public, it does not have specific policies presenting themselves as stumbling blocks to the achievement of the constitutional obligations.

## **8. RIGHT TO EDUCATION**

### **8.1 Primary Activity: National Student Financial Aid Scheme (NSFAS)**

The NSFAS core function is to provide financial assistance to needy and academically able students, who wish to attain a higher education qualification.

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<sup>15</sup> The SACSSP did not respond to the question on how, as an organ of state, it promotes and fulfils the right to social security.

## **8.2 Constitutional Obligations**

According to its response, the NSFAS has done the following to satisfy its constitutional obligations:

- It has provided funding to over 275 000 financially needy students with awards worth R3 billion in order that they might access higher education. These students would not have been able to access higher education had NSFAS's funding not been available.

## **8.3 Implementation Difficulties**

The organisation reported that they have not experienced any difficulties in meeting the constitutional obligations, hence they do not have policies and or other measures that present difficulties in as far as meeting the constitutional obligations is concerned.

## **9. RIGHT TO ACCESS TO LAND**

### **9.1 Primary Activity: The Land Bank**

The Land Bank is an agricultural financial institution established in 1912 to provide financial assistance to farmers. However, it has now changed focus to address imbalances of past discriminatory practices and has come to the assistance of black farmers.

The Land Bank reported on how it assisted the in the following programmes instituted by the Department of Land Affairs:

#### *Land Redistribution*

Recently the Bank has concentrated its efforts on improving land tenure security and on extending property ownership and access to production resources to historically disadvantaged communities. Thus, according to the Land Bank, support for Land Reform and Development is seen as its primary objective and the Bank's constitutional obligation to assist emerging African farmers. A qualifying farmer can access a loan of R1 million from the Bank to develop the land the farmer would have purchased through the government grant.

#### *Bought-in Properties*

According to the report, the Bank uses the Bought-in Properties Scheme to help farmers to takeover under-performing farms that are due for liquidation and are repossessed by the Bank. The Bank is working closely with Enathi Empowerment Company to empower entrant farmers with management skills. The Bank sees this scheme as one of its foremost strategies to contribute to the Land Redistribution programme.

The Land Bank concedes that this scheme reduces the burden of the emerging farmers and is beneficial in the short term. However, it stands to profit in the long-term, as more inexperienced farmers would face liquidation.



### *Land Restitution*

The Bank is party to the Trilateral Agreement with the Land Claims Commission (LCC) and the NDA. This agreement was signed with a view to give land back to the “formerly dispossessed peoples”, with the Land Bank charged with supporting the financial needs of the beneficiaries, so that they can develop the land for agriculture.

### *Special Mortgage Bond*

According to the report, the Bank offers smaller farmers a 25-year Special Mortgage Bond of up to R50 000 at 10% interest. This, according to the Bank, is lower than the 15% lending rate, for which qualifying farmers can access “up to 80% of a property’s value in loan”. This “concessionary interest rate” is reviewed every two years.

### *Capacity-Building Development Fund*

The Land Bank has a Capacity-Building Fund in access of R2 million which is geared toward developing skills of the emerging farmers. The Bank says that since it is not always possible to provide everything toward empowerment of farmers, it looks for partners and allies. Hence the Bank has forged partnerships with other organisations to develop agricultural skills of new farmers. This, according to the institution, will ensure collective delivery.

Capacity development has meant annually sponsoring 20 tertiary students who study agriculture. The long-term objective is to have more South Africans with qualifications in agriculture that would apply their skills in both the Bank and various other agriculture development institutions. It is for this reason that the Bank offered the University of Fort Hare R120 000 grant to be used toward research and training in Agricultural Economics.

The Bank states that annually, through the Corporate Social Investment (CSI), it spends at least R5 million towards training of Black farmers, especially women and youth in the rural areas. It is hoped that agricultural skills will elevate these groups from the level of subsistence farmers to that of commercial farmers. The Bank also has projects that involve “broader community participation and impact” and it insists that the beneficiaries participate directly.

The Land Bank says that it is also responsible for developing new and innovative products for emerging farmers. It has a focus on development nodes identified for urgent infra-structural development and social upliftment.

## **9.2 Constitutional Obligations**

The Land Bank understands its obligation to respect as that of paving a way for aspiring farmers to enter the agricultural sector. In this respect, the Bank is charged with supporting emergent African farmers financially and non-financially so they may access land for agricultural activity and for on-farm housing. The Bank is also responsible for the development of measures and policies to ensure adherence to its mandate.

The Land Bank says that it is also responsible for developing new and innovative products for emerging farmers. It has a focus on development nodes identified for urgent infra-structural development and social upliftment.

## **9.3 Implementation Difficulties**

The Bank reported that there are primarily two pieces of legislation that inhibit it to address economic and social rights. The Land Bank Act 13 of 1944 has security and collateral rules, which restrict the participation of entrant farmers in commercial farming. Often emerging farmers hardly access the Bank's finance because they lack the necessary security or collateral. The Bank reported that the Act is in the process of being amended, so as to address such impediments.

The other restrictive provision in the Act is section 3(d) of the sub-division of the Agricultural Land Act, which "prohibits the lease of agricultural land for longer than 10 years without ministerial consent." This legislation is used in conjunction with the Stamp Duties Act, which due to high stamp duties discourages the lease of land for agricultural development. As such, an otherwise potentially vibrant market in the rural areas is rendered ineffectual and dysfunctional. According to the Bank, leasing is important in that leased land serves as collateral for the financial loans from the Bank.

The Bank also posits that understanding of, and resistance to its new role as a Development Finance Institution makes it difficult for it to do its work effectively. The other impediment involves the conflicting interests of government and investors. Whereas the government wants to see the development of new farmers, the investors want to get profit. Thus, the Bank hopes to synthesise these priorities so that both the conflicting stakeholders continue to have confidence in its work.

## **10. CRITIQUE**

### *Right to Environment*

The CSIR, ARC, Rand Water and Umgeni Water need to be commended on what they are doing with their limited resources with regard to section 7(2) of the Constitution where environmental rights are concerned. The above-mentioned organisations are within their limited resources striving to conserve the environment. In particular, the Rand Water needs to be commended on the alien vegetation project it has been involved with, as not only does this project create jobs for the previously disadvantaged communities, but will ultimately generate far more water than is currently available.

The CSIR provides key information and technology solutions to both the public and private sector organisations as their major clients. Moreover, it ensures that community needs are met throughout South Africa, including the Southern African Development Community (SADC) region. Owing to its wealth of expertise with regard to section 24 of the Constitution, the CSIR compiles Environmental Impact Assessment (EIA) reports for other organisations. Furthermore, the CSIR, in collaboration with the Department of Environmental Affairs and Tourism and other relevant stakeholders, has developed a set of environmental indicators aimed at enhancing the State of the Environment Reporting at the national, provincial and local spheres of government.

The ARC should be commended on ensuring that the organisation interfaces with all the spheres of government, higher learning institutions, agricultural unions and farmers' associations in South Africa, including other Science Councils in order to achieve its goals with regard to section 24 of the Constitution. The organisation's research programmes comprise a range of multidisciplinary agricultural activities and services aimed at ensuring that the environment is protected for the benefit of the present and future generations. This is done through supporting the agricultural policy analysis systems at national, regional and industry level, participating and collaborating at international and local networks. In addition to the above, capacity is also built with regard to EIA, implementation, monitoring and evaluating agricultural practices.

In conclusion, it is also encouraging to note that most of the above organisations are trying hard to comply with all the relevant environmental legislation and complying with the SABS policies and the ISO's.

### *Right to Adequate Housing*

The mandate of the NHFC is in line with the interpretation of the right to have access to adequate housing as provided for in General Comment No. 4 of the Committee on Economic, Social and Cultural Rights. One of the prerequisites for the right to housing to be considered adequate is that it should be affordable. To this end the State must establish forms and levels of housing finance that reflect housing needs. The NHFC as a State entity has the ability to ensure that it provides access to finance that will result in people getting their own homes, improving the already existing ones or getting houses to rent.

The response from the NHFC highlights its core function in so far as it facilitates people's access to affordable housing. The duty to respect the right to have access to adequate housing requires that an organ of State refrains from taking any action which prevents people from satisfying the right when they are able to do so themselves. The NHFC has therefore met the obligation to respect the right to adequate housing by ensuring that everyone has an equal opportunity in the housing market, by providing finance directly or indirectly through intermediaries. The aforementioned clearly point to the NHFC's commitment to respecting the right to have access to adequate housing.

The duty to protect the right of access to adequate housing requires that measures be taken to ensure that any possible violation of this right by other powerful individuals

and groups in society is prohibited. The NHFC did not provide any information on how it protects the right.

The NHFC did not provide any figures for the number of houses built in 2001 and 2002 even though it showed a substantial increase in the Rand value of the loans disbursed.

The duty to promote requires that the public is educated about their rights, and that the right to adequate housing be made a reality. The information provided by the NHFC shows the limited understanding of its obligation to promote and fulfil the right. The institution was supposed to have provided information on how it educates its clients and beneficiaries about the services they offer to ensure the provision of housing. Also how their clients and beneficiaries can access the services provided by the NHFC. Merely stating that the right is promoted by the creation of better quality housing and living environments is not sufficient, especially when no explanation is given on how this is achieved.

Lastly, the mandate of the NHFC is in line with the interpretation of the right to have access to adequate housing as provided for in General Comment No. 4 of the Committee on Economic, Social and Cultural Rights. One of the prerequisites for the right to housing to be considered adequate is that it should be affordable. To this end the state must establish forms and levels of housing finance that reflect housing needs. The NHFC as a state entity, provides access to finance that will result in people getting their own homes, improving the already existing ones or getting houses to rent.

#### *Right to Health Care, Including Reproductive Health Care*

Both the CSIR and the MCC are not directly responsible for health care delivery. The former is a leading research institution, which conducts research into areas, which are relevant and important to promote the health of South Africans. The MCC on the other hand is a regulatory body whose main function is to ensure that medicines available to the public are safe, affordable and efficacious.

Although the CSIR did not respond to the question on how its activities comply with section 7 (2) on constitutional obligations, it can be said however the research programmes *vis-a-vis* reproductive health care, the development of an AIDS vaccine and immune boosters, obesity treatment, and small scale waste management incinerator are measures aimed at fulfilling the right the health care. Seminars and information packages distributed by the CSIR promote the right to health. According to the General Comment No.14, one of the requirements to promote and fulfil the right is for State parties to foster research and provide information.

The MCC provided a generalised, but detailed response on how its policies, programmatic and legislative measures respect, protect, promote and fulfil the right the health.

The MCC has succeeded ensuring accessibility to quality drugs, lowering the cost of generic drugs thereby making them available to more people. This fulfils the core obligation to provide essential drugs as defined by the World Health Organisation's

Action Programme on Essential Drugs.<sup>16</sup> The MCC regulatory functions protect the public against harmful medicines and practices. The production and dissemination of patient information and leaflets promotes health.

However, available and affordable anti-retroviral drugs are still not readily accessible to the majority of people with living with AIDS.

#### *Right to safe drinking water*

Umgeni – This water utility's response shows that the utility does not have an understanding of what it means to observe constitutional obligations. It is important that the four obligations are understood so that people's rights are not violated. Whilst the utility's response refers to disabling legislative measures, the response does not state what precisely the problems are with regards to legislation. The non-mention of the water utility in the Constitution, Water Act of 1998 and in Local Government legislation, does not precisely explain how this puts the water utility in a weaker position, as it is claimed in the response.

Rand Water – Based on the response Rand Water gave on the constitutional obligations, it does not understand what each of the four obligations mean with regards to the right to water. It is important the Rand Water sticks to its future goals as these are important for communities that do not have access to water.

#### *Right to Education*

Based on its response on the constitutional obligations, the NSFAS does not understand the meaning of the constitutional obligations to respect, protect, promote and fulfil the right to education. It is important that the NSFAS, as a state organ, understand the four constitutional obligations aforementioned so that these inform its policies in financing the financially challenged students. General Comment No. 13, adopted at the twenty-first session (49<sup>th</sup> meeting), on 29 November 1999 has the following to say regarding the benefits of education:

Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments states can make. But the importance of education is just not practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.<sup>17</sup>

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<sup>16</sup> General Comment No. 14: *The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant of Economic, Social and Cultural Rights). United Nations Committee on Economic, Social and Cultural Rights, 2000, para. 1.

<sup>17</sup> *Committee on Economic, Social and Cultural Rights: Reports on the Twentieth and Twenty-First Sessions* (26 April – 14 May 1999, 15 November – 3 December 1999), Economic and Social Council, Supplement No. 2, Official Records, 2000.

The fact that it is only recent that it had planned to make aware the rural poor of its financial assistance to access higher education, means that the it has been failing to promote and fulfil the right to further education. This is a cause for concern; it has to be addressed urgently. Moreover, this means that most of the rural poor who are not aware of the NSFAS's financial assistance to access higher education are deprived of the benefits of education.

Higher education includes the elements of availability, accessibility<sup>18</sup>, acceptability and adaptability which are common to education at all levels.<sup>19</sup> If the state has to progressively introduce free higher education, institutions such as the NSFAS have to ensure that all those in need benefit from them. This requires that the NSFAS establish the number of students who are academically able but not enrolled in the higher learning institutions due to, *inter alia*, financial constraints. These are potential students who are not benefiting from the financial assistance of the State either due to the NSFAS not doing enough to meet its constitutional obligations as it appears through its response, or due to some other unknown factors.

### *Right to access to Land*

The Land Bank is a multi-tasked parastatal with a clear understanding of its obligations or responsibilities and well-pronounced goals. The protocol reveals that the Bank is ready to give money to all qualifying applicants it is responsible for. The emphasis of its tasks involves building the capacity of all its beneficiaries. It should be commended that the Bank sponsored 20 students every year.

What is not clear, however, is how many people have already benefited from the projects of the Land Bank, and how long ago the efforts started. This creates a problem in that there are no statistics, which may allow in-depth analysis. The Land Bank should be urged to supply statistics concerning the number of people that have benefited from its projects, or those beneficiaries that will be supported in future. Providing statistics will make it easier to appreciate the work done by the Bank.

The concern raised by the Bank concerning legal constraints should be given some consideration, for its efforts could be slowed down. Subsequently beneficiaries would

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<sup>18</sup> It is especially this element of the four on the right to higher education that the point to be made is concerned with. This element means that educational institutions have to be accessible to everyone, without discrimination, within the jurisdiction of the state party. Accessibility has three overlapping dimensions:

- i) Non-discrimination: education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds
- ii) Physical accessibility: education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g., a neighbourhood school) or via modern technology (e.g., access to a “distance learning programme”);
- iii) Economic accessibility: education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13, paragraph 2 in relation to primary education, secondary and higher education: whereas primary education shall be available “free to all”, states parties are required to progressively introduce free secondary and higher education; ...

<sup>19</sup> *Ibid.*p. 116.

stand to lose, or their benefits delayed. Such laws must be reviewed to enable the Land Bank to provide essential services to all concerned.

## **11. RECOMMENDATIONS**

### *Right to Environment*

The CSIR, Umgeni Water, Rand Water and the NSFAS should be given training on the constitutional obligations so that they are in a position to make these part of their policy-making and implementation. It is not clear at this stage if these organisations' policies are informed, *inter alia*, by the constitutional obligations.

### *Right to adequate Housing*

The NHFC clients suffered a major setback when government decided to stop payroll deductions. The payroll deductions served as a mechanism that had provided relative security in terms of loan repayments. Other means to guarantee loan repayments will have to be found so as ensure that the NHFC is able to continue to service the needs of poor. Furthermore, since the many of the clients depend on government subsidies, the NHFC should liaise with government departments to facilitate and expedite the process in favour of the clients to service the needs of those most in need.

It is recommended that the NHFC provide details of how many low cost houses are built each year, who the beneficiaries are and their geographical distribution. Given the level of poverty and acute shortage of housing it is imperative that loans are disbursed efficiently and timeously.

### *Right to Health Care, including reproductive health care*

The MCC needs to fast track the approval of ARVs, which have already been tested in other countries and make them readily available to stem the tide of the AIDS pandemic. The use of generic drugs should be actively encouraged and local pharmaceutical companies should be assisted to produce generic drugs to mitigate the high cost of medicines.

### *Right to Education*

It is important that in its funding, the NSFAS considers the restructuring and transformation process taking place in the Higher Education and Training band to allocate funding appropriately to the newly-formed institutions of higher learning. The NSFAS's move to consider funding part-time students is a commendable one since not all part-time students are employed.

As part of its strategic goal, one of the measurable outcomes of the NSFAS should be to find out if ever it has succeeded in targeting students from the rural poor communities. Whilst the measurable outcome is an indication that the NSFAS is trying its best to help the financially challenged students access higher education, setting specific targets that would be closely monitored would help the NSFAS achieve this strategic goal. Specific targets should also be set for the funding of disabled and women students as well.

### *Right to access to Land*

What is not clear, however, is how many people have already benefited from the projects of the Land Bank, and how long ago the efforts started. This creates a problem in that there are no statistics, which may allow in-depth analysis. The Land Bank should be urged to supply statistics concerning the number of people that have benefited from its projects, or those beneficiaries that will be supported in future. Thus providing statistics will make it easier for us to appreciate more the work done by the Bank.

The concern raised by the Bank concerning legal constraints should be given some consideration, for its efforts could be slowed down. Subsequently beneficiaries would stand to lose, or their benefits delayed. Such laws must be reviewed to enable the Land Bank to provide essential services to all concerned.

## **12. CONCLUSION**

Generally, it appears that most parastatals that were sent protocols by the HRC do not understand what is meant by constitutional obligations. This requires that such parastatals be trained on the constitutional obligations so that they incorporate these into their strategic plans to deliver on their respective economic and social rights.

## **ABBREVIATIONS**

<b>ARC</b>	Agricultural Research Council
<b>CAPE</b>	Cape Action Plan for Environment
<b>CSI</b>	Corporate Social Investment
<b>CSIR</b>	Council for Scientific Industrial Research
<b>EIA</b>	Environmental Impact Assessment
<b>HRC</b>	Human Rights Commission
<b>LCC</b>	Land Claims Commission



<b>MCC</b>	Medical Control Council
<b>NDA</b>	National Department of Agriculture
<b>NEPAD</b>	New Partnership for Africa's Development
<b>NHFC</b>	National Housing Finance Corporation
<b>NSFAS</b>	National Student Financial Aid Scheme
<b>SABS</b>	South African Bureau of Standards
<b>SACSSP</b>	South African Council for Social Service Professions
<b>SADC</b>	Southern African Development Community
<b>SDP</b>	Social Discount Product

## CHAPTER 12

### RIGHT OF PRISONERS

#### 1. INTRODUCTION

This chapter seeks to critically examine whether the government, through the Department of Correctional Services (DCS), has complied with both its constitutional and international obligations to respect, protect, promote and fulfil prisoners' rights as stipulated in section 7(2) of the Constitution and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.<sup>1</sup> The discussion focuses on the right of prisoners as guaranteed by section 35(2)(e) it touches on the right of prisoners to adequate housing, the prisoners right to health and then education. The critique will consider the loopholes identified in the measures adopted by the government to give effect to these rights, and followed by recommendations.

Section 35(2)(e) of the Constitution makes provision for the conditions under which the prisoners are to be detained. It provides:

Every prisoner who is detained, including every sentenced prisoner, has a right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

The binding principle at an international level is that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of a human person."<sup>2</sup> In particular, that prisoners will not be tortured or subjected to cruel, inhuman or degrading treatment or punishment.<sup>3</sup> According to Article 10 the United Nations Human Rights Committee on International Covenant on Civil and Political Rights, the State party has a positive obligation towards those persons who are particularly vulnerable because of their status as persons deprived of their liberty.<sup>4</sup> The Committee considers the treatment of all persons deprived of their liberty with humanity and dignity a fundamental and universally applicable rule, the application of which, as a minimum, does not depend on the material resources available within a State party.<sup>5</sup> All the State parties are obligated to apply the UN standards relevant to the treatment of prisoners.<sup>6</sup> The UN Committee, in its general comments indicated,

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<sup>1</sup> *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, Maastricht Guidelines on Violations of Economic, Social and Cultural Right, International Commission of Jurists, 1997, Para 6 provides:

"Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any of these three obligations constitutes a violation of such rights."

<sup>2</sup> International Covenant on Civil and Political Rights, 1966, Article 10(1). This is also reiterated by Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1979, and Article 2 of the Code of Conduct for Law Enforcement Officials, 1979.

<sup>3</sup> Article 7 of the International Covenant on Civil and Political Rights.

<sup>4</sup> General Comments No. 21, UN Human Rights Committee on Civil and Political Rights, 1992, para 3.

<sup>5</sup> *Ibid*, para 4.

<sup>6</sup> The relevant United Nations standards applicable to the treatment of prisoners are: the Standard Minimum Rules for the Treatment of Prisoners (1957); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); the Code of Conduct for Law

*inter alia*, the following factors as being relevant to its consideration whether the conditions of detention in any country are humane as required by the Covenant. First, whether the Standard Minimum Rules for the Treatment of Prisoners and other UN standards are being implemented.<sup>7</sup> Second, details about prisoners' diet, in terms of both quality and quantity; prison sanitation; over-crowding, that is, the average number of prisoners per cell; and health care.<sup>8</sup>

The Constitutional Court in the Government of the *RSA and Others v Grootboom and Others*<sup>9</sup> affirmed that human dignity, freedom and equality are the foundational values of our society and that those without food, clothing or shelter are denied these rights. Affording people these socio-economic rights enables them to enjoy the other rights enshrined in the Bill of Rights.<sup>10</sup> More pertinent to this discussion is the UN Standard Minimum Rules for the Treatment of Prisoners<sup>11</sup> that describes in detail what is "generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions."<sup>12</sup> It stipulates in detail, amongst others, the type of accommodation,<sup>13</sup> food,<sup>14</sup> education<sup>15</sup> and medical services<sup>16</sup> that should be afforded to prisoners.

The Human Rights Committee emphasised in its general comments, that penitentiary system should essentially seek the reformation and social rehabilitation of the prisoner, and not only retributory.<sup>17</sup> This was underscored by Dr. W Jonas AM Aboriginal and Torres Strait Islander Social Justice Commissioner, in his keynote presentation at the Prisoners as Citizens Workshop in Sydney, when he pointed out that:

the right to humane detention which aims for individual rehabilitation and social reintegration is not vague or abstract aspiration but a concrete obligation to be implemented by a set of detailed measures. Failure to do so is a violation of the prisoner's rights which should be capable of an effective remedy.<sup>18</sup>

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Enforcement Officials, 1979; the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982; The African Charter on Human and Peoples' Rights and the Kampala Declaration on Prison Conditions in Africa, 1996.

<sup>7</sup> General Comment No. 21, *op.cit.*, para 5 also lists other UN standards.

<sup>8</sup> Paul R Williams, *Treatment of Detainees: Examination of Issues Relevant to Detention by the United Nations*.

<sup>9</sup> 2001 (1) SA 46, para 23.

<sup>10</sup> *Ibid*, para 23.

<sup>11</sup> The Standard Minimum Rules for the Treatment of Prisoners, was adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and was subsequently approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>12</sup> *Ibid*, Preamble, para 1.

<sup>13</sup> *Ibid*, Rule 9.

<sup>14</sup> *Ibid*, Rule 20.

<sup>15</sup> *Ibid*, Rule 40 and 77,

<sup>16</sup> *Ibid*, Rule 22.

<sup>17</sup> General Comment No. 21, *op. cit.*, para 10.

<sup>18</sup> "Citizens Inside" Keynote presentation by Dr W Jonas AM Aboriginal and Torres Strait Islander Social Justice Commissioner, at the "*Prisoners as Citizens*" Workshop, Sydney, 27 November 2000.

Criticising Australia's failure to provide effective remedies in the event of violations of Covenant rights, the Human Rights Committee, in June 2000 held that:

In the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.<sup>19</sup>

The Committee urged the Australian government "to take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated shall have an effective remedy."<sup>20</sup>

In *Grootboom*, the Constitutional Court stressed that the Constitution obliges the State to give effect to the rights enshrined in the Bill of Rights and that Courts must in appropriate circumstances enforce such an obligation.<sup>21</sup> Recently the *Minister of Health and Others v Treatment Action Campaign and Others (1) (TAC)*<sup>22</sup> also acknowledged that "a dispute concerning socio-economic rights is . . . likely to require a court to evaluate State policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged in terms of section 172(1)(a) [and (b) to either] make a declaration to that effect"<sup>23</sup> or grant an order that is just and equitable.<sup>24</sup> This judgment was giving effect to the provisions of section 38 of the Constitution, which contemplates a court to grant an appropriate relief where it is established that a right in the Bill of Rights has been infringed.

As the watchdog of the Constitution, the Constitutional Court on previous occasions played a significant role with regard to the protection of inmates. In line with the International Covenant on Economic, Social and Cultural Rights which recognises the inherent dignity of every person irrespective of their status. The Constitutional court in *S v Makwanyane and others*;<sup>25</sup> *S v Williams and others*;<sup>26</sup> *August and another v Electoral Commission and others*,<sup>27</sup> affirmed the role and willingness of the of the Court to protect and enforce prisoners' rights by granting appropriate remedies.

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<sup>19</sup> The Committee's findings and recommendations at [www.hreoc.gov.au/human\\_rights/un\\_committee](http://www.hreoc.gov.au/human_rights/un_committee).

<sup>20</sup> *Ibid*.

<sup>21</sup> , *Grootboom*, *op. cit.*, para 24 and *Minister of Health and Others v Treatment Action Campaign and Others (1) (TAC)* 2002 (10) BCLR 1033 (CC) para, 24.

<sup>22</sup> 2000 (10) BCLR 1033 (CC).

<sup>23</sup> *Ibid*, para 102.

<sup>24</sup> *Ibid*, para 101-2.

<sup>25</sup> 1995 (6) BCLR 665 (CC). In this case the Constitutional Court had to decide whether the use of the death penalty was constitutional or not. The court unanimously found that it was not constitutional. The Court held that the death penalty was a cruel and inhumane punishment, and an invasion of human dignity.

<sup>26</sup> 1995 (3) SA 632 (CC). The Constitutional Court was faced with the question whether corporal punishment by organs of state was constitutional or not. The court unanimously found that it was not.

<sup>27</sup> 1999 (4) BCLR 363 (CC). The Constitutional Court found that both sentenced and awaiting trial South African prisoners were entitled to the right to vote in the general and local elections. Apposite is Justice Sachs' remarks at page 372 where he held that "universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order . . . The vote of each and every citizen is a badge of dignity and of personhood."

## **2. POLICY MEASURES AND PROGRAMMES**

### **Adequate Accommodation**

The DCS submits that it acknowledges and respects the rights and legitimate expectations of prisoners regarding accommodation and incarceration conditions consistent with human dignity. The DCS contends that it strives to provide adequate prison accommodation that complies with accepted standards. According to the department, the provision of items such as floor space, cubic content of air, ventilation, natural and artificial light, ablution and sanitary facilities in prison institutions are in accordance with the Standard Minimum Rules.<sup>28</sup>

It is further submitted that for the period under review, the department had instituted a policy on the Monitoring of the Mother and Child units. This programme addresses the specific needs of infants with their mothers in prison, including pregnant women. The programme caters for young children up to five years of age that are admitted in prison with their mothers. Achievements to date include the implementation of the programme in the eight female prisons countrywide.

According to the department, prisoners' right to adequate accommodation is a prerequisite to the building of prisoners self respect as well as an encouragement to positive participation in their rehabilitation and training. The DCS contends that it is striving to provide adequate prison accommodation that complies with acceptable standards. Its complaint is that it is on the receiving end of the Criminal Justice System with very little control over the numbers of prisoners referred to prisons either as sentenced prisoners or prisoners awaiting trial or sentence. The department is, therefore, faced with overcrowding in most of its prisons, a situation tantamount to blatant violation of the rights of prisoners to adequate accommodation and humane incarceration conditions. According to the DCS, overcrowding in South African prisons have been found to be:

- Be a contributory factor to health risks of prisoners;
- Impacts on the rendering of effective developmental and rehabilitative programmes;
- Impacting on the effective safe custody services;
- Resulting in inhumane incarceration conditions;
- Creating unsafe working conditions for DCS officials;
- Resulting in abnormally high maintenance of prison facilities;
- Adversely affecting the normal prison management; and
- Results in high levels of frustration amongst prisoners and custodial officials.

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<sup>28</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, 1957, para 9(2).

To address the challenges presented by overcrowding, the DCS indicated that it is currently involved in a number of interdepartmental projects developed within the Crime Prevention, Justice and Safety Cluster which enabled (the DCS) to formulate and embark on the following strategies to combat overcrowding in prisons:

- The established of multi-sectoral teams to identify blockages and devise solutions to the awaiting trial prisoner problem which resulted in the Awaiting Trial Prisoner projects; and the setting up of Inmate Tracking and Saturday Courts;
- The release of offenders that have committed less serious crimes, once they have serving set minimum period of their sentences;
- Alternative imprisonment that involves offenders doing community service, under supervision;
- The establishment electronic monitoring system with the ability to strengthen and enhance community corrections;
- The establishment partnerships with the private sector for the provision of additional accommodation. through the Capital Works Programme;
- The provision of assistance to prisoners that cannot afford to pay bail or fines;
- The provision of a support system for all prisoners that are due to be paroled or released under correctional supervision;
- The acceleration of the rate at which prisoners with fines are placed on correctional supervision; and
- The strengthening of the rehabilitation programmes for prisoners to prevent re-offending, by focusing on education and training, and social development programmes.

## Vulnerable and Marginalised Groups

### *Female Prisoners with Children*

The DCS allows mothers with infants to keep their babies in the Mother and Child Unit until they are two years old. Mothers in these units are allowed to keep the baby up to the age of five years only in exceptional circumstances. According to the department, the surroundings and facilities in these units are conducive to sound physical, social and mental care and development of children. The standard of care provided by the DCS in these units are regularly upgraded to correspond with the international norms and standards. The conditions provide the mother with the opportunity to exercise and develop her parental duties, responsibilities, and skills. Childcare facilities are also provided to maximise the potential for the child's proper development. The policy emphasises that the mother be helped to learn good childcare practices to the benefit of the child as well as boost her self-esteem and confidence.

### *Prisoners with Disabilities*

The diversity of the general population in prisons, has led the DCS to establish a sub-directorate on special categories of prisoners. This special category sub- directorate was established because of the need to provide humane custody within a human rights culture. The prisoners in the special category are treated in a manner befitting their condition.

For example, before the building of new buildings, the category of prisoners with disabilities was not given special consideration. To cater for the needs of prisoners with disabilities, the DCS prepared a Draft Policy for Prisoners with Disabilities. This policy referred to as Mvelaphanda, is a departmental strategy specifically designed to address the removal of structural barriers that restrict reasonable access for people with disabilities in prisons. This strategy identifies areas that are not accessible and then approach the departmental Management Board to make funds available. Emergency evacuation exits that are disability-friendly are being developed. Personnel are also being trained on disability issues, and partnerships have also been formed with locals and individuals that deal with people with disabilities.

### *Child Offenders*

Child offenders are accommodated separately from adult offenders. There are currently 13 Youth Centres countrywide that accommodate only sentenced males under the age of 21 years. Pollsmoor Prison accommodates mainly unsentenced male youths. The Kroonstad prison accommodates sentenced male children under 18 years of age. Female prisoners are accommodated in separate sections of prisons.

### *Racial Groups Disadvantaged by Past Discriminatory Laws and Practices*

The DCS does not separate prisoners in terms of racial preferences, however care is taken that those with irreconcilable cultures or opposing factions are not housed together.

### *Prisoners Infected and Affected by HIV/AIDS*

Prisoners are not separated based on their HIV status, only when the prisoner is sick with full-blown AIDS and depending on his/her medical condition, is she/he isolated in a single hospital cell. The same applies to prisoners infected with Tuberculosis (TB), who are also accommodated separately only when they are in the active phase of TB.

### *Refugees and Asylum Seekers*

DCS in South Africa has no line function responsibility towards this category of persons. However, if such persons enter the Criminal Justice System as a result of committing and being sentenced for a crime, they receive the same treatment as any other prisoner with regard to access to accommodation, nutrition, education, reading material and medical treatment. They also have access to Consular Representatives.

### Separate Accommodation for Offenders

The Correctional Services Act 111 of 1998 is being implemented by the DCS, and regulations to support the Act are in the process of being drafted. In terms of section 7(2) of the Act:

- Sentenced offenders must be kept separate from unsentenced offenders.
- Male and female offenders must be kept separately.
- Children must be kept separately from adult offenders, and in accommodation appropriate for their age.
- A female offender is allowed to have a child with her until that child is five years of age, and the department is responsible for food, clothing, health care and facilities for sound development of the child whilst in prison. Where feasible, the Commissioner must ensure that a mother and child unit is available for the accommodation for female offenders and the children whom they may be permitted to have with them.

### *Youth and Children*

As already pointed out, the DCS presently has 13 Youth Correctional/Development Centres where some young offenders are accommodated separately from adult prisoners. In these centres, development programmes and services are rendered to children and the youth. The aim of the programmes is to provide treatment and rehabilitation to sentenced children in order to enhance their personal and social functioning. A team of social workers; psychologists; chaplains; educators; correctional service officials; and others (external community) offer the programme. The DCS has special protection measures in place to manage the detention of awaiting trial children, pending the outcome of the Child Justice Bill.

## 3. BUDGETARY MEASURES

**Table 1** Accommodation of Prisoners

Year	Total allocation in Rand(s)	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
2000/2001	351 059 000	351 059 000	-
2001/2002	743 384 000	743 384 000	706 053 816

The dash (-) in all the Tables denotes that the information requested was not made available to the Commission.

### *Vulnerable and Marginalised Groups*

The Capital Works budget is used for building new prisons and related infrastructure, including the renovations, maintenance and upgrading of existing prisons and related infrastructure. Although the repair and maintenance does not result in increased accommodation capacity, it nevertheless, improves the quality of the existing accommodation.



### *Budget Adequacy*

Since the budget allocation for accommodation was insufficient, the DCS requested R1, 279 billion from National Treasury for the 2002/2003 financial year, but only R739, 9 million was allocated for accommodation. The DCS had to prioritise its needs to ensure that the most crucial needs are addressed within the allocated budget. Other options being explored include the alleviation of overcrowding and the building of new prisons.

### *Under-spending*

The budget is allocated within a three-year Medium Term Expenditure Framework cycle, and because of the project being apital-intensive, it is under certain circumstances acceptable to roll over funds to the following financial years. To ensure that under spending does not occur in future, the DCS established forums to monitor progress on capital projects on a monthly basis.

### **Challenges Confronting the DCS**

The DCS submits that its biggest challenge is to reduce the number of people incarcerated to a level, which does not pose serious health risks to inmates. The DCS states that other challenges facing the Department as a result of overcrowding is the effective rendering of development and rehabilitative programmes. Overcrowding has also increased the cost of maintenance of prison facilities, and this has had an adverse effect on normal prison management.

The DCS indicated that it has introduced measures to prevent and deal with the problem of overcrowding, such as:

- the employment of prison management teams;
- the enhancement of community corrections;
- the release of prisoners with bail less than R1 000;
- Saturday Courts, which is an ongoing initiative of the Department of Justice has resulted in a 12 percent reduction in the number of awaiting trial prisoners during the period February 2001 to October 2001. Saturday Courts resumed during January 2002 and are expected to continue until October 2002.

**Table 2 Indicator - Prisoner population by 31 January 2002**

Category	Total	% of Total	Female	Child-prisoners
Prisoner population	177 701	-	4 315	4 148
Convicted prisoners	120 635	67.89%	2 949	1 765
Prisoners awaiting trial	57 066	32.11%	1 366	2 383
Prisoners above 60 years of age	786	0.44%	29	N/A
Disabled prisoners	371	0.21%	8	-

**Table 3 Indicators: Accommodation**

Prisoners	Total	Female	Male *2	Child – Prisoners *3
Number of prisoners per cell	-	-	-	-
Number of prisoners per ward	-	-	-	-
Number of overcrowded prisons	206	7	192	7
Percentage of overcrowded prisons	91.15%	87.55%	93.66%	53.85%

\*1 The size and capacity of cells/wards varies from single cells for one prisoner to communal cells/wards for up to 32 prisoners. The level of overcrowding in the different cells determines the occupancy levels of cells.

\*2 The number of male prisons includes those in prisons that accommodate both male and female as well as children/juveniles.

\*3 This includes all youth facilities that cater for offenders younger than 21 years of age.

The table below shows how accommodation capacity of prisons increased in each of the following years:

**Table 4 Accommodation capacity of prisoners**

Month	Male Prison	Male Hospital	Female Prison	Female Hospital	Total
1 April 1999	91.151	3.204	4.295	273	98.923
31 March 2000	92 541	3 225	4 098	266	10 0130
<b>Change</b>	<b>1 390</b>	<b>21</b>	<b>-197</b>	<b>-7</b>	<b>1 207</b>
1 April 2000	92 541	3 225	4 098	266	10 0131
31 March 2001	94 365	3 316	4 101	266	10 2048
<b>Change</b>	<b>1 824</b>	<b>91</b>	<b>3</b>	<b>-</b>	<b>1918</b>
1 April 2001	94 365	3 316	4 101	266	10 2048
31 January 2002	98 663	3 353	3 822	244	10 6048
<b>Change</b>	<b>4 298</b>	<b>37</b>	<b>-279</b>	<b>-22</b>	<b>4 034</b>

The utilisation of available accommodation capacity and occupancy levels of prisons over the past two years was as follows:

**Table 5 Utilisation of accommodation capacity**

Gender	31/01/2000			31/01/2001			31/01/2002		
	Accom. Capacity	Prisoners	Occupation	Accom. Capacity	Prisoners	Occupation	Accom. Capacity	Prisoners	Occupation
Female	4 454	4 180	93.85%	4 367	4 157	95.19%	4 066	4 315	106.12 %
Male	9 5380	16 2243	170.10 %	9 7646	16 3612	167.56 %	10 2024	17 3386	169.95 %
	9 9834	16 6423	166.70 %	10 2013	16 7769	164.46 %	10 6090	17 7701	167.50 %

## PRISONERS' RIGHT TO HEALTH CARE

### 4. POLICY MEASURES AND PROGRAMMES

The DCS reported no new measures during this reporting period, but stated that it is in the process of reviewing and amending the existing ones based on the Correctional Services Act 111 of 1998, to ensure that they comply with the Constitution of the RSA, the UN Standard Minimum Rules for the Treatment of Prisoners, the requirements of the National Department of Health, the World Health Organisation and International law relating to prisoners. The policies under review were:

- The Health Policy
- The HIV/AIDS Policy
- A Draft Policy for Prisoners with Disabilities<sup>29</sup>

The Health Policy was reviewed to comply with National Guidelines for the delivery of quality care. Protocols and procedure manuals were developed to improve the health care services for prisoners, children and babies born in prison. Programmes to train nurses were instituted in the areas of Primary Health Care, Occupational Care and the Management of HIV/AIDS and TB. The DCS reported that medical, dental and emergency services were now available to all prisoners on a 24-hour basis.

The existing HIV/AIDS Policy was reviewed so as to conform to the prescripts of the HIV/AIDS Strategic Plan 2000-2005.<sup>30</sup> An HIV/AIDS co-ordinating body was established for the effective management of AIDS in the prison population including children and babies born in prison.

### **Vulnerable and Marginalised Groups**

The DCS catered for the following vulnerable groups: female prisoners; female prisoners with children; prisoners with disabilities; child offenders; racial groups disadvantaged by past discriminatory laws and practices; prisoners awaiting trial; prisoners infected with and affected by HIV/AIDS; prisoners infected with TB; and refugees and asylum seekers.

The department did not identify any new policy measures but reiterated that the above-mentioned policies had been reviewed to comply with the Constitution of the RSA and international law. The department, reiterated that because of the diversity of the prison population, it had established, a sub-directorate on special categories of prisoners in prison. The sub-categories include mothers with babies, young children, prisoners with disabilities and elderly prisoners. The reason for these categories was to establish more humane conditions based on human rights.

In response to the question of how policy and programmatic measures catered for vulnerable groups, the department gave the following response:

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<sup>29</sup> This draft policy has been developed which *inter alia* provides for catering to their special needs. As already pointed out, these include removal of structural barriers that restrict reasonable access for people with disabilities, emergency evacuation, training of personnel to deal with disabilities and create partnerships with local organisations and individuals that deal with disabilities.

<sup>30</sup> The HIV/AIDS and STD Strategic Plan for South Africa, 2000-2005, was developed in 1999 through a participatory consultative process managed by the Ministry of Health. The plan emphasises the following four broad areas to address HIV/AIDS: Prevention; Treatment, Care and Support; Human and legal rights; and Research, monitoring, and surveillance. The Plan targets youth as a priority population group, especially for prevention efforts, and the impact of HIV/AIDS on individuals, families, and communities.

### *Female Prisoners*

The DCS indicated that in compliance with the non-discrimination clause of the Constitution,<sup>31</sup> it had implemented the revised dietary scale for female prisoners, who are now receiving larger portions to meet their energy needs.

### *Pregnant Prisoners*

The DCS submits that its Reproductive Health Policy makes provision for pregnant prisoners and covers ante-natal, delivery and post-natal care as well as family planning services. A pregnant prisoner is required to attend an antenatal clinic at least once every month. During the last four weeks of pregnancy, she is examined by a medical doctor at least once a week. Access to services outside the prison is also ensured where necessary.

### *Female Prisoners with Children*

An immunisation programme is followed to prevent infectious childhood diseases and the information and guidance is provided to the mother for the continuation of the programme after being released from prison. When an infant is HIV positive, the National Department of Health's (NDH's) guideline on management of these children is followed.

The policy on infants stipulated that a medical practitioner may prescribe required food on medical grounds. Heating and cooking facilities are accessible at all times for preparing infant feeds.

### *Prisoners with Disabilities*

The needs of the elderly and prisoners with different disabilities are currently being investigated with a view of creating a database. It is envisaged that categories of prisoners with special needs will be catered for. Presently, devices prescribed by a medical practitioner are provided.

### *Other Groups*

Child Offenders,<sup>32</sup> awaiting trial prisoners, racial groups disadvantaged by past discriminatory laws and practices, and refugees and asylum seekers are provided the same medical care as other prisoners. The latter group also has access to consular representation.

### *Prisoners Infected with HIV/AIDS*

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<sup>31</sup> Section 9(3) provides:

"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. "

<sup>32</sup> The Department of Correctional services indicated that the category of child offenders includes all youth up to the age of 21.

Guidelines on the management of the HIV/AIDS have been developed and distributed in all prisons. Psychologists, social workers and nurses have been trained as part of an education and awareness campaign regarding the epidemic. Offenders are also trained as peer educators. Programmes include provision of condoms, access to Voluntary Training and Counselling.

## 5. BUDGETARY MEASURES.

The DCS provided the following budget for medical treatment:

**Table 6 Medical Care budget**

Year	Total revenue in Rand(s)	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Actual expenditure
2000/2001	5 320 553 000	149 000 700	2.8	860	143 301 960
2001/2002	6 581 454 000	158 574 100	2.4	916	15 7 5 7 4181

### *Vulnerable and Marginalised Groups*

The Departments reported that the medical care budget made provisions for all categories of offenders and for all general medical conditions.

**Table 7 Medical Care Indicators**

	Total	Female	Male	Child-prisoners
Number of health care officials within the prison	Nurses: 562 Pharmacists: 12	-	-	-
Health care worker/prisoner ratio	1:306	-	-	-
Number of prisons with separate cells for ill prisoners	146	7	132	7
Average number of clinics/treatment rooms within the prison	2	-	-	-
Number of prisons with clinics with access to essential drugs	226	-	-	-
Number of prisoners with HIV/AIDS	110 336	5 618	104 718	-
Percentage of prisoners with HIV/AIDS	2.03	0.11	1.92	-
Percentage of prisoners with STDs	0.01	0	0.01	-
Percentage of prisoners with TB	1.2	Information not centrally available on the Management Information System		
Percentage of prisoners with Hepatitis	0	0	0	0
Number of prisoners suffering from malnutrition	24	1	21	2
Number of prisoners suffering from iron deficiency	43	4	39	0

## **PRISONERS' RIGHT TO EDUCATION**

### **6. POLICY MEASURES AND PROGRAMMES**

The DCS reported that unlike in the past, its focus now extends to rehabilitation. To this end, all development programmes are aimed at providing treatment and rehabilitation for sentenced prisoners in order to enhance their personal and social functioning. A multi-disciplinary team consisting of social workers, psychologists, chaplains, educators, correctional officials and other stakeholders from communities are addressing the basic needs of the sentenced prisoners through a variety of programmes and services.

The DCS further stated it did not have a rehabilitation policy at the time of reporting. However, this lack of policy on rehabilitation necessitated a revision by the department of its policy guidelines and activities on the following:

- Education of offenders
- Training of offenders
- Social Work services
- Psychological services
- Religious Care
- Library services

According to the department, policy changes on the above addressed a number of themes, including:

- Re-skilling
- Learning a trade
- Oral and spiritual enlightenment
- Personal development and preparation for release

**Table 8 Educational Programmes/Projects for Offenders**

<b>Programme/Project</b>	<b>Policy on which programme/project is based</b>	<b>Objectives</b>	<b>Beneficiaries</b>	<b>Achievements or goals attained</b>
Revision of Services Orders: Education Training Social Work	The Constitution of the Republic of South Africa, 1996.  Correctional Services Act 111, 1998.	To align policies and directives with national legislation and international instrument		Implementation of new policy directives according to the needs of prisoners and in line with government policy objectives.
Combating illiteracy amongst prisoners in partnership with external role-players	The Constitution of the Republic of South Africa, 1996  Correctional Services Act 111, 1998.	To provide programmes addressing the needs of prisoners.  To assess prisoners in order to identify the level of intervention and needs.  Implementation of Adult Basic Education and Training(ABET) in all prisons.		Entered into a two year tender contract with external providers for the provisioning of ABET levels 1 to 4 Learning Support Materials.
Establishment of 14 Training Centers at identified prisons		To provide basic technical skills combined with business skills.  To equip prisoners with market-related skills to be applied after release.  To provide accredited training by the DCS's officials.		12 Training Centers have already been completed and in use with two of these in the process of being finalised.

The DCS reported that it has committed itself to a new paradigm as it has moved from a punitive approach to a rehabilitative one. It also reported that emphasis is placed on balancing safe custody, humane detention and rehabilitation. Reference was also made to section 2 of the Correctional Services Act 111 of 1998 in this regard. The purpose of the correctional services system is to contribute to maintaining and protecting a just, peaceful and safe society by:

- Enforcing sentences of the courts in the manner prescribed by this Act;
- Detaining all prisoners in safe custody whilst ensuring their human dignity; and
- Promoting the social responsibility and human development of all prisoners and persons subject to community corrections.

#### *Vulnerable and Marginalised Groups*

Regarding the vulnerable groups, the DCS reported that the provision of rehabilitation programmes incorporates all sentenced prisoners, males, females, youth, persons with disabilities and the aged and does not differentiate between the various sexes and groups. The response further said that services are provided according to available capacities, which meet the basic needs of all prisoners and assist them to develop their full potential to live an acceptable law-abiding lifestyle.

The DCS states that it is in addition, making professional services available to all prisoners through the use of psychologists, social workers, religious workers and educators. The DCS ensures the availability of such services by offering:

- Individual/Group therapy
- Family therapy
- Religious/spiritual services
- Education and training

## **7. LEGISLATIVE AND RELATED MEASURES**

There were no legislative developments related to education that took place during the reporting period. However, the DCS indicated that the development programmes that the it had designed were based on the White Paper on Education of 1995 and Skills Development Act of 1998.

### **Administrative Measures**

The DCS reported overcrowding in most prisons, which was said to be violating the right of prisoners to adequate accommodation and human incarceration conditions. The department has, therefore, found the situation to have implications for the effective development and rehabilitation programmes, amongst other things. To address this problem the department suggested a number of possible solutions, including the following:

- Provincial Prison Management Teams would be actively involved in the management of overcrowding in prisons to ensure the effective utilisation of available cell accommodation.



- High-level discussions between the DCS Executive, Inspecting Judge, National Treasury, South African Police Services and Department of Justice would be arranged on the responsibilities regarding awaiting prisoners.
- Community Corrections would be enhanced as an effective and suitable community-based sentencing option.
- The blue print for planning and low-cost design construction of New Generation prisons would be fast-tracked.

These measures have been effective as about 8 262 low-risk prisoners awaiting trial on bail of less than R1000 were released. In addition, parole dates of 8 978 selected sentenced prisoners were advanced. The introduction of Saturday Courts had reduced the number of awaiting trial prisoners to 12 percent during the period February 2001 to October 2001 thus alleviating overcrowding. The Saturday Courts resumed again in January 2002 and are expected to continue to October 2003.

**Table 9 Budgetary Measures**

Year	Total allocation in Rand(s) R'000	Allocation as a % of GDP	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure R'000	Actual expenditure R'000
2000/2001	5 474 924	0.60	81. 92	5 474 924	5 190 345
2001/2002	6 581 454	0.67	100. 92	6 539 829	6 581 454

*Accounting for Variances between the Financial Years in the table*

The DCS only accounted for the period 2001/2002, during which the department reported that the capital budget was expropriated from the Department of Public Works to the benefit of the DCS's budget vote.

*Budget Adequacy*

The DCS reported that its budget allocation was inadequate due to a need for additional prison accommodation owing to the dramatic increase in the prison population. For that reason, the DCS made a presentation to the National Treasury motivating for more funds. It indicated that it delayed some of its building projects, but reported that it had attended to other priorities.

**Table 10**                    **General Education and Training**

<b>Year</b>	<b>Total revenue in Rand(s)</b>	<b>Total allocation on Rand(s)</b>	<b>Allocation as a % of the Department's total revenue</b>	<b>Per capita allocation in Rand(s) after inflation adjustment</b>	<b>Projected expenditure</b>	<b>Actual expenditure</b>
2000/2001	5 320 553	52 138 800	0. 98	402. 23	-	49 545 654
2001/2002	6 581 454	54 342 000	0. 83	500. 96	-	53 896 285

*Accounting for the Variances in the table*

The DCS ascribed the nominal increase in the budget allocation to the increase of the total number of educators from 1999/2002. However, much as the Department noted that the budget was increasing in nominal terms, they also noted that the percent share allocated to education and training programmes was decreasing between 1999/2000 and 2002/2003. This concerned the Department as the number of prisoners in need of these services was increasing.

*Budget Adequacy*

The DCS reported that the budget was inadequate such that only 2 percent of the total budget was allocated to development and rehabilitation programmes for prisoners. This was shared between Psychological services, Social work services, Religious Care, and Education and Training. According to the department, an average of 0. 97 percent was allocated to education during 1999/2000 and 2000/2001. Due to budgetary constraints as well as lack of human resources in the form of educators, only 13 percent of the total prison population was involved in formal education and training programmes during the 2001 academic year.

To address the budget inadequacy, the department took the following steps:

- Submitted the business plans for their various programmes, which, amongst others, include “Combating of illiteracy” and “Development of needs-based rehabilitation programmes”;
- Mobilised donor funding which is received on an ad hoc basis; and
- Liased with the Directorate Human Resources Maintenance for the filling of all vacant posts and financing of approved establishment in order to address the question of under-capacity within the DCSt.

**Table 12 Vocational and Occupational Skills Training**

Year	Total revenue in Rand(s)	Total allocation on Rand(s)	Allocation as a % of the Department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure	Actual expenditure
2000/2001	5 320 553	10 420 000	0.2	310.57	-	8 990 392
2001/2002	6 581 454	10 162 100	0.15	511.21	-	99 356 676

*Accounting for the Variances in the table*

The DCS reported that there was not any major change in the budget allocation for training purposes. However, the percent share of the total budget for the department allocated to education and training between 1999/2000 and 2002/2003 decreased. As a result, in the decline of the percent share of the budget allocated to education and training programmes, the number of prisoners participating in these programmes also declined.

*Budget Adequacy*

The DCS reported that the budget was inadequate such that only 2.9 percent of the total DCS budget was allocated to rehabilitation programmes. According to the department, during 1999/2000 and 2002/2003 an average of 0.19 percent of the total DCS budget was allocated for the training of prisoners in various vocational and occupational fields. The situation compelled the DCS to negotiate with the Department of Labour for the provisioning of occupational skills training.

The department reported under-spending of about 14 percent of the funds allocated to the programme. However, the Department ascribed the under-spending to delays in the tender procurement processes for the requisitioning of equipment for training centres. According to the DCS the delay in the procurement processes led to some of the projects not taking place in the envisaged financial year. The department, however, did not report on any steps it had taken in order to expedite the procurement processes. The tender procedure was, however, reported to have been successful the following year.

**Table 13 Indicators: Prisoner Population (31 January 2002)**

	Total	Percentage of total	Female	Child-prisoners
Prisoner population	177 701	Statistics not available	4 315	4 148
Convicted prisoners	120 635	67.89	2 949	1 765
Prisoners awaiting trial	57 066	32.11	1 366	2 383
Prisoners above 60 years of age	786	0.44	29	-
Disabled prisoners	371	0.21	8	-

**Table 14 Indicators: Education**

	Total	Female	Male	Child-prisoners
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What is the literacy rate (as a percentage of prisoner population)	This information is not available because the DCS has not yet developed a mechanism to monitor the literacy rate of prisoners other than verbal information received from prisoners. This will be attended to.			
Number of prisoners enrolled for Basic Education including Adult Basic Education (as a percentage of prisoner population)	3.7	0.1	2.4	1.2
Number of prisoners enrolled for Further Education (as a percentage of prisoner population)	3.5	0.1	2.8	0.6
Number of prisoners enrolled for Vocational Education (as a percentage of prisoner population), occupational skills not included	0.9	0.05	0.7	0.1
Provide learner/teacher ratio the prison	73: 1	-	-	-
Provide the number of learners	23 174	1 166	17 111	4 897
Provide the number of teachers (excluding Head Office and Provincial personnel)	317	-	-	-
Provide number of prisons with education facilities	120 prisons were qualified educationists render services	-	-	-

## 8. CRITIQUE

Although shortcomings have been identified in the measures instituted by the DCS towards the protection and safety custody of prisoners, the government should, however, be commended for its efforts in complying with some of the provisions of the SMR such as:

- The establishment of Mother and Child Units in prisons,<sup>33</sup> and
- Separating different category of prisoners,<sup>34</sup> by keeping them in separate institutions or separate sections of the prison.<sup>35</sup>

As it is evident from the report, the DCS had indeed adopted and implemented some measures in an endeavour to fulfil its constitutional and international obligations. According to *Grootboom*, the question that must now be addressed is whether the measures taken by the state to realise the right afforded to prisoners by section 35(2)(e) are reasonable or not.<sup>36</sup>

### *Overcrowding*

The DCS has indicated in its report that it is complying with Rule 10 of SMR<sup>37</sup> which stipulates all the requirement for the prisoners' sleeping accommodation specifically

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<sup>33</sup> Section 23 provides:

" (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers."

<sup>34</sup> *Op.cit.*, Rule 85 and 86 respectively provides:

"85. (1) Untried prisoners shall be kept separate from convicted prisoners.

(2) Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.

86. Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate." Section 7(2) of the Correctional Services Act 111 of 1998, also makes provision for sentenced and unsentenced offenders, male and female offenders and children and adult offenders to be kept separate, as well as the creation of sub-categories of prisoners in order to cater for the special needs of the diverse prison population such as babies, young children, prisoners with disabilities and elderly prisoners

<sup>35</sup> *Ibid.* According to Rule 8:

" The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;

(b) Untried prisoners shall be kept separate from convicted prisoners;

(c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;

(d) Young prisoners shall be kept separate from adults. Accommodation."

<sup>36</sup> *Grootboom, op. cit.*, para 33.

<sup>37</sup> In terms of 10:

"All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic

designed to meet the prisoners' health needs with regard to cubic content of air, minimum floor space, lighting, heating and ventilation, and adequate sanitary and bathing facilities as provided by Rule 12<sup>38</sup> and 13<sup>39</sup> respectively. This is, however, doubtful, as overcrowding in prison remains the biggest challenge to the department. The DCS itself conceded that its biggest challenge is to reduce the number of people incarcerated to an acceptable level that does not pose serious health risks to inmates. As will be demonstrated below, overcrowding causes a variety of problems and also leads to an infringement of a number of constitutional rights, which are inextricably linked to prisoners' right to adequate accommodation. For example, the Kampala Declaration<sup>40</sup> considers the level of overcrowding in prisons, inhuman as it results in the lack of hygiene; insufficient or poor food; difficulty in accessing medical care; a lack of physical activities or education; as well as the inability to maintain family ties.<sup>41</sup> This point serves to confirm that all socio-economic rights are indivisible and interdependent. A fact underscored by the Constitutional court in the *Grootboom* case when it held that:

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supportive. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chapter 2.<sup>42</sup>

One of the challenges that flows directly from overcrowding is the difficulty in rendering an effective development and rehabilitation programme for prisoners due to shortage of resources. As already pointed out, overcrowding affects normal prison management due to the increase in the cost of maintenance of prison facilities. The inevitable consequences of the difficulty in prison management is the inability to maintain good order within prisons, and the creation of tension among inmates. A fact emphasised by the [UN] Economic and Social Council in its Resolution on International Cooperation for the Improvement of Prison Conditions, when it urged Member States to be "Mindful of the fact that the physical and social conditions associated with prison overcrowding may result in outbreaks of violence in prisons

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conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation."

<sup>38</sup> *Op. cit.*, Rule 12 provides:

"The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner."

<sup>39</sup> *Ibid*, Rule 13 states that :

"Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate."

<sup>40</sup> The Kampala Declaration was adopted at the closure of the conference, which was held between 19-21 September 1996 in Kampala, Uganda, attended by about 133 delegates who came together to address prison conditions in Africa.

<sup>41</sup> *Op.cit.*, The Preamble of the Kampala Declaration on Prison Conditions in Africa.

<sup>42</sup> *Grootboom op. cit.*, para 23

and that this could pose a grave threat to law and order.”<sup>43</sup> Making it hard for prison staff to administer rehabilitation programmes effectively in order to prepare inmates for reintegration into the society.

### *HIV/AIDS*

It is common cause that homosexuality is rife amongst inmates, with stronger prisoners practising sodomy towards weaker inmates. Lack of order in prison due to overcrowding creates a conducive atmosphere for the spread of sexually transmitted diseases such as HIV/AIDS.<sup>44</sup>

### *Nutrition and Sanitation*

The preamble of the Kampala Declaration on Prison Conditions in Africa states categorically that the universal norms on human rights places an absolute prohibition on torture of any description. According to Amanda Dissel, “how and where a person eats, sleeps and uses the toilet have enormous effect on a person’s mental and physical well being.

Overcrowding in prison will automatically affect the quality and quantity of the food given to the prisoners, and prison sanitation. One of the issues highlighted in the report is the difficulty by the DCS to implement the three meals per day policy for the prisoners due to shortage of personnel to manage this system within the department's current personnel establishment. The department, however, submits that it is in the process of compiling a personnel-provisioning plan for approval, for acquiring additional funds from the National Treasury for the appointment of personnel, which will address the problems experienced with providing three meals per day. The report unfortunately, is silent on the short- term measures adopted by the DCS to alleviate the difficulty of providing prisoners with three meals per day while waiting for the response of the National Treasury with regard to additional funds.

In addition to violating a person’s dignity, poor nutrition and sanitary conditions may constitute cruel, inhuman or degrading treatment and also affect the health of prisoners. The Constitution lists the right to dignity as one of the non-derogable rights. It is crucial to note that prisoners are deprived of their liberty as a punishment and not for punishment. The Kampala Declaration recommends that the detrimental effects of imprisonment should be minimised so that prisoners do not lose their respect.

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<sup>43</sup> The Preamble of the International Cooperation for the Improvement of Prison Conditions, Economic and Social Council Resolution 1997/36.

<sup>44</sup> Recently the Jali Commission, which was set up in 2001 to look into the allegations of prison corruption around the country, heard how HIV-positive prisoners rape prison inmates when they refuse to join a gang. They say they give the victim a 'slow puncture', meaning he will die over a period of time," See, [http://www.samedical.org/current\\_affairs/article\\_archive.asp?sitesection=8](http://www.samedical.org/current_affairs/article_archive.asp?sitesection=8). The Commission also heard evidence on sexual assaults of juveniles by both prison warders and older inmates, <http://www.q.co.za/2001/2002/07/18-prison.html>

According to *Grootboom*, a program will only be considered to be reasonable if ever it is "balanced and flexible and make appropriate provision for short, medium and long-term needs."<sup>45</sup> The failure to take steps to address the difficulty of providing three meals per day to the prisoners, renders the measures adopted by the DCS, short of both its international and constitutional obligations.

### *Education*

The infringement of the right to education is one of the challenges that flows directly from overcrowding due to shortage of personnel and educational materials as the prisoners exceed the resources.

The second shortfall of the report with regard to the right to education is its failure to indicate the figures or the type of education afforded to child offenders and children of female offenders. This contrary to the provisions of Rule 77<sup>46</sup> of the SMR which specifically deals with education and recreation. In terms of Rule 77, education for both the illiterates and young prisoners is compulsory. Prison administration is urged to pay special attention to the prisoners right to education.

### *Reading Material*

Contrary to Rule 40 of the SMR which provides that:

[e]very institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.

There is nothing in the report, which indicates whether prison institutions, have got libraries or not. This is so despite the fact that regulation 13(2) of the Correctional Services Regulation which also makes provision for the establishment in every prison of a properly organised library containing literature of constructive and educational value.

### *Refugees and Asylum Seekers*

The DCS contends that refugees and asylum seekers are not discriminated against in that they are given the same type of treatment like any prisoner. It is crucial to note that it is not sufficient to give refugees and asylum seekers the same treatment as any other prisoner and disregard their legal, cultural, social, linguistic and health needs.

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<sup>45</sup> *Grootboom, op. cit.*, para 43.

<sup>46</sup> *Op. cit.*, Rule 77 (1) states:

"(1) Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.

(2) So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty. 78. Recreational and cultural activities shall be provided in all institutions for the benefit of the mental and physical."



Despite that treating refugees and asylum seekers like any other prisoner could have serious detrimental and humiliating effect on them, it is in fact a violation of South Africa's international obligation under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention.<sup>47</sup>

### *Budget Allocation*

The DCS seems to be concerned with the decrease in the budget allocated to education and training programmes between 2000/2001 and 2001/2002. For example, the DCS indicated that during the period under review, only 2percent of the total budget was allocated to development and rehabilitation programmes and 0.9percent to education. According to the Department, these could only cover 13percent of the total prison population. Only 0.19percent was said to have been allocated for vocational and occupational fields. The DCS indicated that this budget inadequacy made the programme to suffer in that it only benefited a limited number of prisoners. This is contrary to the general comments of the Human Rights Committee, which puts more emphasis on teaching, education and re-education, vocational guidance and training and work programmes for prisoners inside the penitentiary establishment as well as outside.<sup>48</sup> To ensure that once released, they may fit well in their societies and not go back to doing crime.

### *Under expenditure*

Although the figures in table 1 indicate under-expenditure for both reporting fiscal years, the department provided no explanation for this in spite of their complaint of the inadequate budget allocation owing to the daily dramatic increase in the average prison population and the impact the treatment of HIV/AIDS and related diseases had on the health budget. An under-spending of 14percent, for vocational and occupational fields, which was attributed to delays in the tender procurement processes, was also reported.

## **9. RECOMMENDATIONS**

As already pointed out in the introduction, the State enjoys a margin of appreciation in selecting means for implementing their human rights obligations.<sup>49</sup> The burden will, however, be on the State to justify the measures it had adopted to give effect to section 35(2)(e) to demonstrate that it is making measurable progress towards the full realisation of the rights of prisoners. As stated in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, the fact that the full realisation of

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<sup>47</sup> A good example would be the case of *Franklin v District of Columbia*, 960 F. Supp. 394 (D.D.C.) 1997, where a Federal District judge held that the correctional department's failure to provide interpreters for the Spanish-speaking prisoners in health care and other situations was unconstitutional. The judge specifically cited the department's inability to provide adequate HIV counselling and care, diagnosis and treatment of illness, and mental health services for Latin American inmates. "It is difficult to conceive of an example of [a] medical care system that can be more deliberately indifferent than one in which illnesses are diagnosed and medication is prescribed based upon the patient pointing to a region of his or her body and saying the Spanish word for pain, "dolor." . . . For medical care to be adequate, a doctor and patient must be able to understand each other."

<sup>48</sup> General Comments No. 21, *op. cit.*, para 11.

<sup>49</sup> *Grootboom, op. cit.*, para 38.

most economic, social and cultural rights can only be achieved progressively, does not alter the nature of the legal obligation of States which requires that certain steps be taken either immediately or as soon as possible.<sup>50</sup> Although the rights to adequate accommodation, nutrition, reading material and medical treatment were not designed to be achieved immediately, the DCS is nevertheless obliged to adopt appropriate progressive measures in order to realise the rights guaranteed by section 35(2)(e). As already pointed out above, the Committee on International Covenant on Civil and Political Rights considers the treatment of all persons deprived of their liberty with humanity and dignity a fundamental and universally applicable rule, and that the application of this rule, as a "minimum" does not depend on the material resources available within a State party. The minimum has been defined as including "at least the minimum decencies of life consistent with human dignity."<sup>51</sup>

### *Vulnerable and Marginalised Groups*

#### *HIV/AIDS*

The DCS should adopt appropriate measures to prevent the spread of HIV infection amongst inmates. HIV/AIDS policies and programmes in prison should put more emphasis on education, training and awareness among inmates on HIV infection so that they may be informed of the risks, and the best possible methods for prevention. For example the minimisation of unprotected anal penetration. Education and training of prison staff should similarly be emphasised, as education and training are crucial factors in minimising the spread of HIV/AIDS infection. The policies should outline the responsibilities of inmates to one another regarding the prevention of the spread of HIV/AIDS. This will not only benefit the inmates, but the health of the communities they are returning to as well. Community based HIV/AIDS organisation should be encouraged to get involved.

#### *Asylum Seekers and Refugees*

It is crucial that the incarcerated refugees and asylum seekers' legal, cultural, social, linguistic and health be taken into consideration. In *Grootboom*, the Constitutional Court stressed that the Constitution requires that "everyone" be treated with "care and concern".<sup>52</sup> Because a programme that excludes a significant segment of the society cannot be said to be reasonable.<sup>53</sup> This is underscored by the language of section 35 of the Constitution. It guarantees to "everyone" the rights set forth in section 35 without distinction of any kind, such as race; language; sex; colour; ethnic origin; national or social origin; birth or other status. The DCS should, therefore, come up with comprehensive measures which will adopt a holistic approach towards refugees and asylum seekers. Note that in both *Soobramoney* and *Grootboom*, the Constitutional Court interpreted the economic and social rights and the corresponding obligations of the State in their social and historical context.<sup>54</sup> This was also reiterated in the *Treatment Action Campaign* case.<sup>55</sup> In giving effect to economic and

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<sup>50</sup>Maastricht Guidelines, *op. cit.*, para 8.

<sup>51</sup>*TAC, op. cit.*, para 28.

<sup>52</sup>*Grootboom, op. cit.*, para 44.

<sup>53</sup>*Ibid*, para 43.

<sup>54</sup>*Soobramoney*, para 11; *Ibid*, para 25.

<sup>55</sup>*TAC, op. cit.*, para 24.

social rights, the department has to take into consideration the individual prisoner right to cultural, social, linguistic rights.

### *Overcrowding*

The DCS should put more focus on and resources for the rehabilitation of prisoners, more especially child prisoners. The department should also develop a long-term prison development plan and stop upgrading the prison facilities in a piecemeal fashion as these outdated old designs are the main source of obstruction in implementing an effective policy directed towards the rehabilitation of prisoners in order to facilitate the prisoners social reintegration, and the application of the SMRs for the Treatment of Offenders and the Basic Principles on the Treatment of Prisoners as urged by the United Nations Economic and Social Council.<sup>56</sup>

### *Nutrition and Sanitation*

Although it is the responsibility of prison management to develop a policy that will ensure adequate sanitation and that each prisoner is provided on regular hours, with a well-balanced diet which will accommodate different types of therapeutic and medical diets for prisoners, the national government bears the responsibility to provide the DCS with financial resources in order to fulfil its constitutional obligations.<sup>57</sup>

### *Education*

Education for prisoners should be considered a priority for a variety of reasons. The Kampala Declaration on Prison Conditions in Africa recommends that “prisoners should be given access to education and skills training in order to provide them with a chance to a better reintegration into society after their release. The government should introduce legislation that will correspond with international declarations to which it is a signatory. It should develop and implement a comprehensive prison education programme designed to maximise social integration after the release of the prisoner.

### *Under-spending*

The government should have a mechanism to ensure that its policies and programmes are fully implemented and the allocated resources effectively utilised. Checks and balances should be put in place for this purpose.

### *Budget Allocation*

According to *Grootboom*, an "effective implementation requires at least adequate budgetary support by national government."<sup>58</sup> To facilitate the realisation of a right the State should provide sufficient material and financial resources.

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<sup>56</sup> Resolution 1997/36 of the United Nations Economic and Social Council, International Cooperation for the improvement of prison conditions.

<sup>57</sup> *Grootboom, op. cit.*, para 40.

<sup>58</sup> *Grootboom, op. cit.*, para 68.

## **10. CONCLUSION**

As demonstrated above, the government still has much to do in order to realise the rights of prisoners as guaranteed by section 35(2)(e). Overcrowding, education and medical treatment remain the biggest challenge to the department. Although maladministration and corruption were not really highlighted in the report, the recent inquiry into the South African prisons by the Jali Commission whose findings will probably be discussed at length in the next economic and social report reveals the daunting task that is still facing the government with regard to the treatment of prisoners.

## **ABBREVIATIONS**

<b>DCS</b>	Department of Correctional Service
<b>NDH</b>	National Department of Health
<b>SMR</b>	The Standard Minimum Rules for the Treatment of Prisoners
<b>TAC</b>	Minister of Health and Others v Treatment Action Campaign and Others
<b>TB</b>	Tuberculosis

## CHAPTER 13

### PUBLIC FINANCE

#### 1. INTRODUCTION

As part of public finance, the budget allocation process is key to the government's roles of allocation, redistribution of resources, and economic stabilisation. As an emerging economy with a wide gap in the distribution of public goods, South Africa still needs government to play the three roles mentioned above.

The aim of this chapter is to analyse the responses received from both the Provincial Treasury and the National Treasury. Sufficient funds have to be allocated for the achievement of policy priorities set out by the provincial departments and the national departments. South Africa uses a budgeting system known as the Medium Term Expenditure Framework (MTEF), which is a three-year budgeting cycle. Like any other budgeting system, the MTEF has to have policy priorities that go with it, and these are articulated in various government programmes.

A report on all the various policy and programmatic measures instituted and legislative measures enacted during the reporting period by the National and Provincial Departments of Finance will be given. An assessment of all the policy, programmatic and legislative measures relevant to the realisation of the economic and social rights will also be undertaken. The assessment exercise should enable the Human Rights Commission (HRC) to determine whether the departments referred to in this chapter have achieved the progressive realisation of economic and social rights, and if not, establish the challenges that could have confronted the government departments. Both domestic and international reports such as the United Nation's Human Development Report, 2002, the Copenhagen Declaration, 1995, and the Report of the Auditor General (on Audit Outcomes for the Year ended 31 March 2001), and/or applicable legislation such as the Public Finance Management Act (PFMA) 1, 1999, will be used to analyse the various Provincial and National Treasuries' reports.

Other sections that are covered in this chapter comprise:

- Budgetary Measures;
- The State's obligation to 'respect, protect, promote and fulfil' the other economic and social rights (other than education, health and welfare);
- Provincial influence on budget allocation,
- The government departments' understanding of available financial resources required for the realisation of economic and social rights; and
- The monitoring of financial resources and its related sections.

## **2. POLICY AND PROGRAMMATIC MEASURES**

None of the Provincial Treasuries, including the National Treasury, instituted policy measures that directly sought to advance the economic and social rights during the reporting period.

## **3. LEGISLATIVE MEASURES**

None of the Provincial Treasuries instituted any legislative measures that sought to advance the economic and social rights during the reporting period.

### **National Sphere**

The National Treasury cited a number of legislative measures taken during the reporting period. However, none of these had a direct bearing on the realisation of the economic and social rights.<sup>1</sup>

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<sup>1</sup> Most of these legislative measures should by law be enacted on a yearly basis to enable the national Treasury allocate the budget to the three spheres of government, i.e., the national, provincial and local. See pages 384 to 388 in Chapter 11 of the HRC's 3<sup>rd</sup> Economic & Social Rights Report, 1999/2000. The following are some of the legislative measures referred to above:

#### *The Division of Revenue Act, 2001*

This Act is passed every financial year; it is part of the budget allocation process. It determines the equitable division of revenue between the three spheres of government, and the horizontal division among provinces, in accordance with section 214 of the Constitution. The importance of the Act lies in it being used as a tool to finance government programmes used as mechanisms to realise the government's policies that seek to progressively realise all the economic and social rights enshrined in the Bill of Rights of the Constitution.

#### *The Appropriation Act, 2001*

The Act provides for the appropriation of money out of the National Revenue Fund for the executive's requirements in respect of the financial year ending 31 March 2002. The Act is supported by the 2001 *Estimates of National Expenditure*, which details the spending outcomes and plans of national departments in order to strengthen the accountability of government. These are reflected alongside provincial and local government expenditure in the MTEF. For instance, during the reporting period, an amount of R328 million was appropriated from the National Revenue Fund to local government for the following purposes:

- to help some local municipalities implement the policy on free basic services;
- to fund councilor allowances following the promulgation of new remuneration scales; and
- to offer relief to municipalities that lack sufficient tax capacity to perform basic functions.

## 4. BUDGETARY MEASURES<sup>2</sup>

### Division of Revenue

**Table 1** Total Budget allocations for provinces

Name of Province	Year	Total transfer to the province (including conditional grants)	% Allocated for Housing	% Allocated for Food	% Allocated for Water	% Allocated for the Environment	% Allocated for Land
		R'000					
Eastern Cape	1999/2000	16 718 537	-	-	-	-	-
	2000/2001	18 710 610	-	-	-	-	-
	2001/2002	19 823 598	-	-	-	-	-
Free State	1999/2000	6 687 560	-	0.59	-	0.16	-
	2000/2001	7 601 089	2.87	0.52	-	0.41	-
	2001/2002	8 625 771	3.02	0.46	-	0.46	-
KwaZulu-Natal	1999/2000	21 348 020	2.49	0.82	-	-	0.04
	2000/2001	23 651 334	2.75	0.60	-	-	0.05
	2001/2002	26 462 477	2.61	0.58	-	-	0.05
Limpopo	1999/2000	14 621 932	1.88	-	0.02	0.50	-
	2000/2001	15 987 160	2.22	-	0.02	0.45	-
	2001/2002	17 662 618	2.69	0.01	0.01	0.58	-
Mpumalanga	1999/2000	6 339 975	-	-	-	-	-
	2000/2001	6 858 216	17	-	-	-	-
	2001/2002	9 661 341	30	-	-	9	-
Northern Cape	1999/2000	25 404 28	0.3	0.4	-	0.2	-
	2000/2001	28 583 71	2.9	0.4	-	0.3	-
	2001/2002	32 509 22	2.8	0.4	-	0.3	-
North West	1999/2000	9 216 855	0.7	0.45	-	0.19	0.07
	2000/2001	10 054 603	2.96	0.42	-	0.15	0.04
	2001/2002	10 944 903	2.99	0.40	-	0.18	0.03
Western Cape	1999/2000	11 908 349	0.4	0.3	-	0.5	0.05
	2000/2001	12 604 734	3.2	0.2	-	0.5	0.04
	2001/2002	13 678 161	3.1	0.2	-	0.6	0.05

The (-) dash denotes that the information requested was not made available to the Commission.

The National Treasury made a submission that it augments provincial financial resources from the equitable share through conditional grants. The submission further stated that the grants system was introduced in the Division of Revenue Act of 1998, and that the criteria for the allocation of grants and the allocation of revenue between

<sup>2</sup> The aim of this section is to establish if the financial resources allocated to the rights in the table during the reporting period were sufficient.



provinces are based on concerns of equity, capacity building, and the phasing in of programmes depending on capacity at sub-national government.

The Eastern Cape and Limpopo Treasuries did not respond to the questions posed in this section. The Free State Treasury indicated that it had a difficulty determining whether the financial resources were sufficient to enable it to deliver services for the economic and social rights. It cited the fact that funding for the rights listed in the table comes from national departments. Both the Gauteng and KwaZulu-Natal Treasuries indicated that the financial resources allocated to their treasuries were sufficient to provide adequate service delivery for the economic and social rights listed in the table.

Both the Northern Cape and North West Treasuries reported that their needs exceed the allocated budget. However, the former went even a step further pointing out specifically the areas that need additional financial resources. The rights to have access to sufficient food, adequate housing and the right to environment were but some of the rights that were said to be in need of additional financial resources. Briefly, the following was said on each right:

The right to have access to sufficient food:

Additional financial resources are needed to make some more food gardens part of the feeding scheme programme to assist needy learners in schools.

The right to have access to adequate housing:

Additional funding is needed to provide retail infrastructure in new houses.

The right to environment:

Additional funding is required for the extension and promotion of environmental education. The Work for Water Programme needs additional funding for the eradication of alien vegetation.

The Western Cape Treasury also indicated that the public needs always exceed available financial resources. Despite this, the Western Cape Department of Planning, Local Government and Housing made some headway in addressing the housing backlog during the reporting period. The department spent R341 million of a conditional grant creating 23 505 'housing opportunities'. At the time of reporting, a submission was made that the backlog in housing for the poor stood at 316 000 which, according to the department, will not be sufficiently covered by the medium-term funds. However, the department is positive about their strategic housing delivery plan; it is viewed as a tool that has the potential to assist in improving the housing delivery system in the Western Cape.

### **Budget Analysis<sup>3</sup>**

The following graphs show the trends in the budget allocation from the financial year 1999/2000 to 2001/2002. The budget analysis includes the following economic and social rights:

- The right to adequate housing
- The right to of access to sufficient food;
- The right to environment; and
- The right to land.

The budget allocation for the right to water was not analysed as only one provincial department, in Limpopo, filled in the table the required budgetary information. The graphs below show that during the financial years 1999/2000 and 2000/2001 the real value<sup>4</sup> of the budget allocated to the Provincial departments of Housing was higher than the nominal value.<sup>5</sup> However, the graphs show that in the financial year 2001/2002, the real value and the nominal value of the budget allocated to the Provincial departments of Housing were equal. This means that during the financial years 1999/2000 and 2000/2001 the budget allocated to the Provincial Departments of Housing had more buying power than the budget allocated to the same departments in 2001/2002.

It should be noticed that the same trends prevailed in the same financial years for other economic and social rights. The ideal situation would be the one where the real value exceeds the nominal value of the financial resources allocated to government departments to deliver on the economic and social rights. The financial years 1999/2000 and 2000/2001 show the upward trend in the real value whereas in the financial year 2001/2002 a downward trend in the real value of the financial resources allocated to government departments charged with delivering on the economic and social rights.

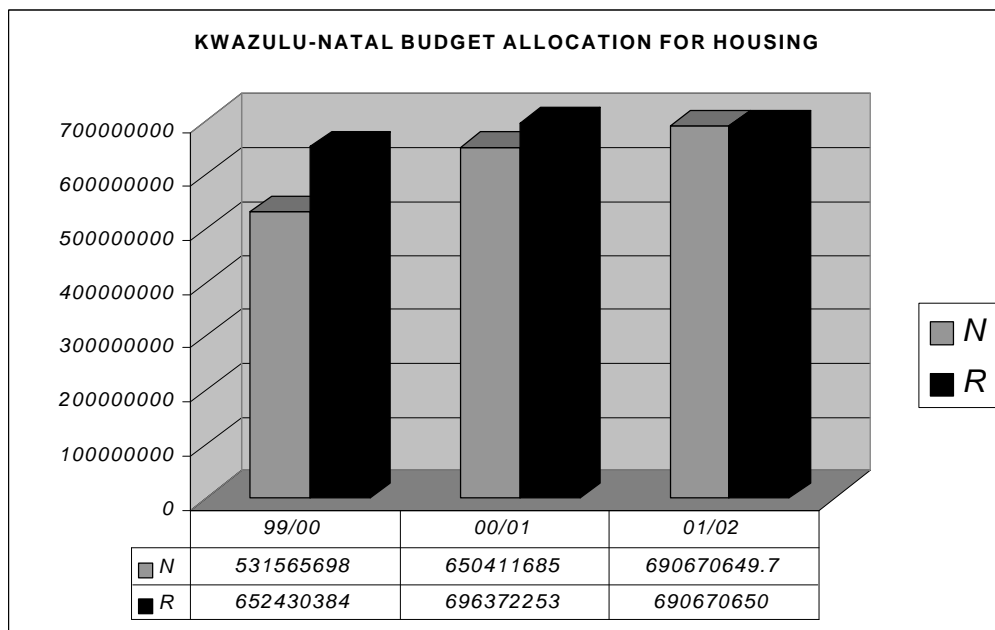
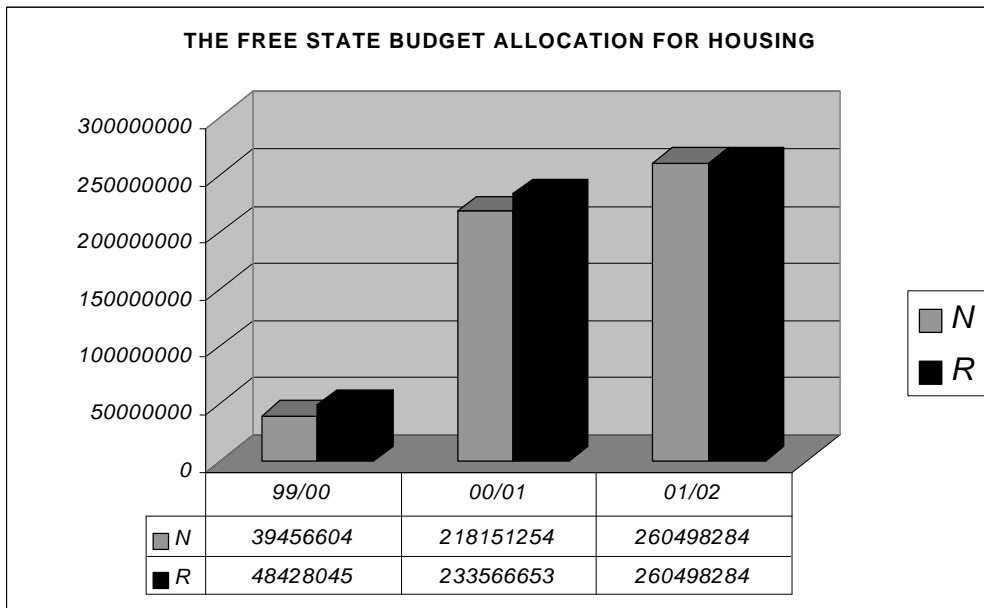
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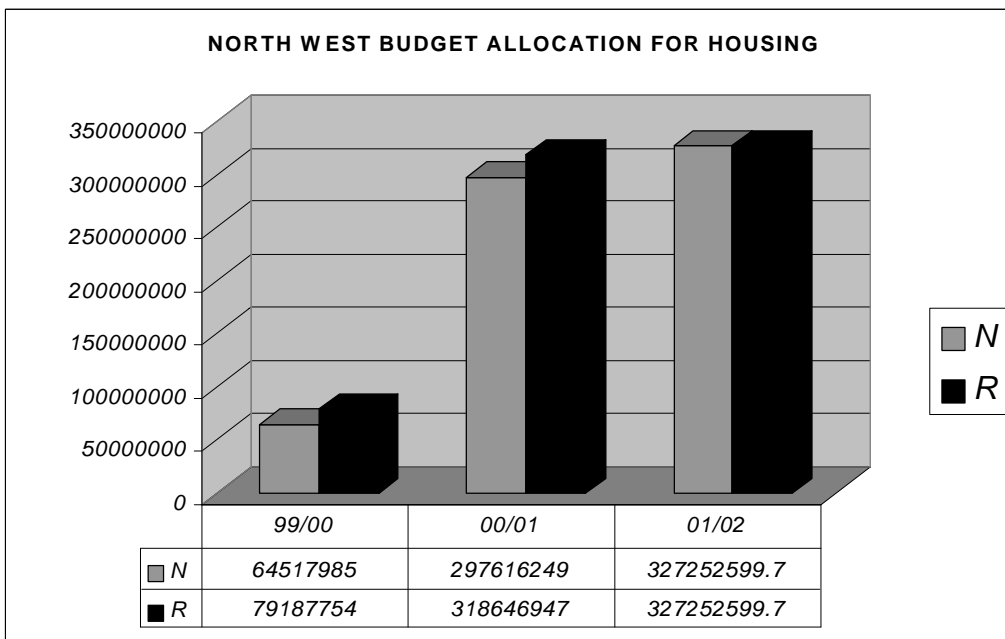
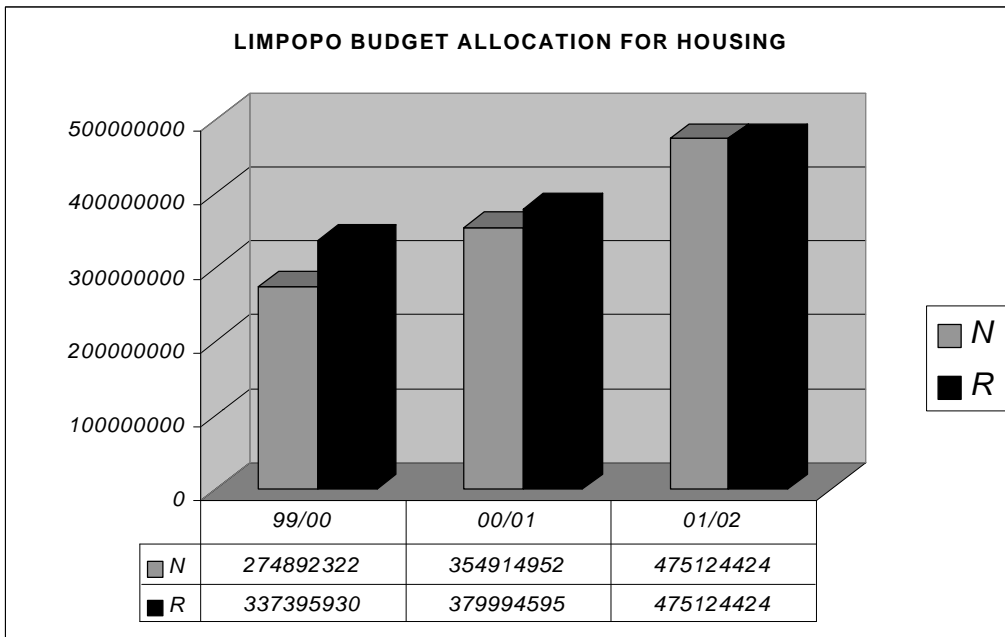
<sup>3</sup> The budget analysis only includes those provincial departments that furnished the HRC with the budgetary information it required on each economic and social right.

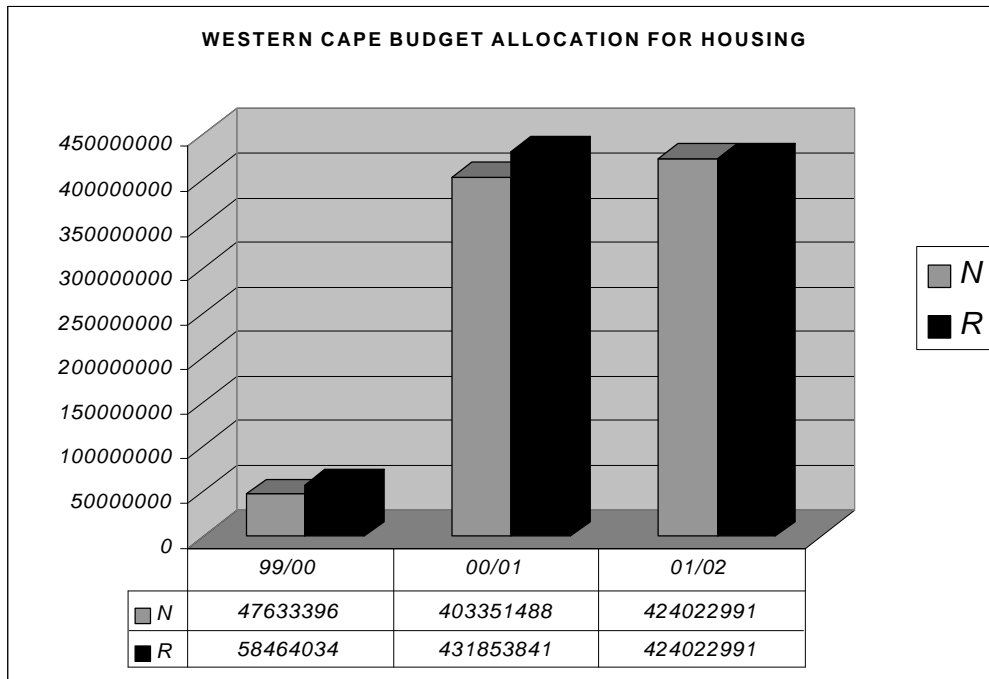
<sup>4</sup> Real value refers to the buying power of the financial resources allocated to a department. This is represented by an “R” on the graph.

<sup>5</sup> Nominal value refers to the absolute amount of the financial resources allocated to a department. This is represented by an “N” on the graph.

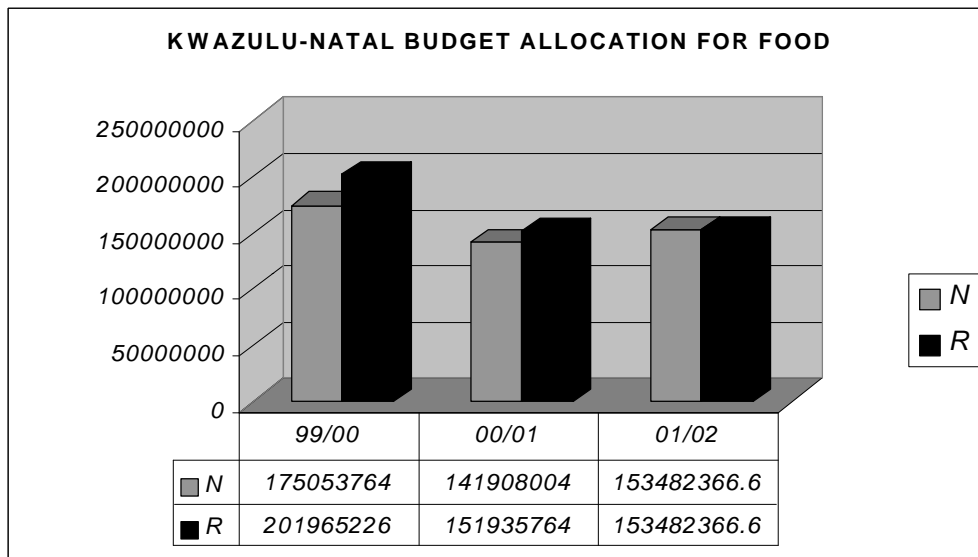
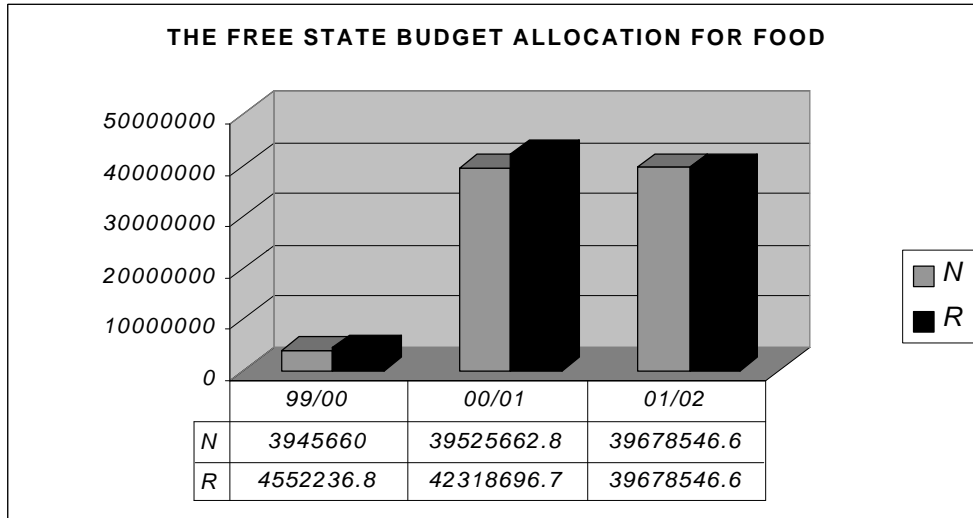
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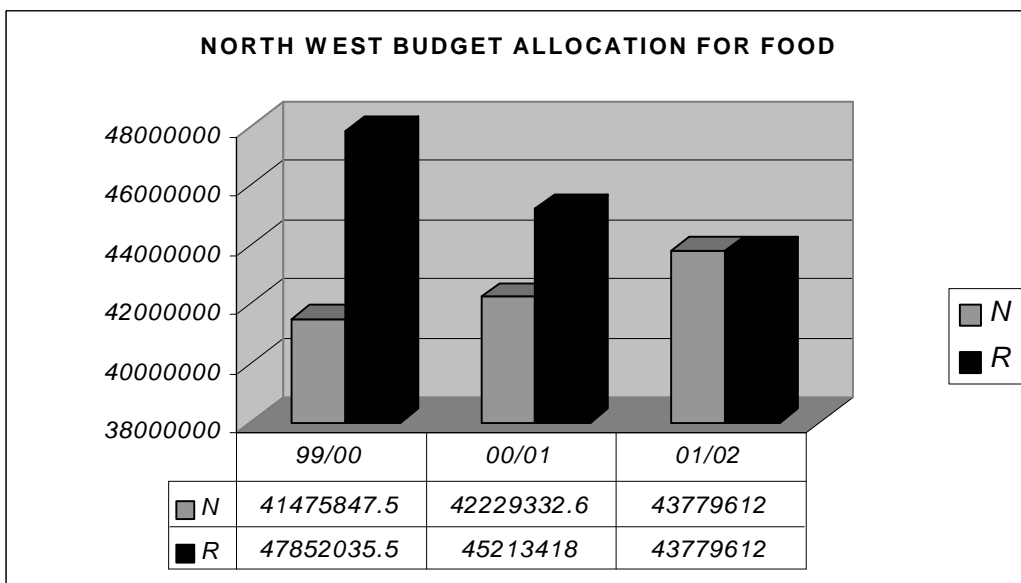
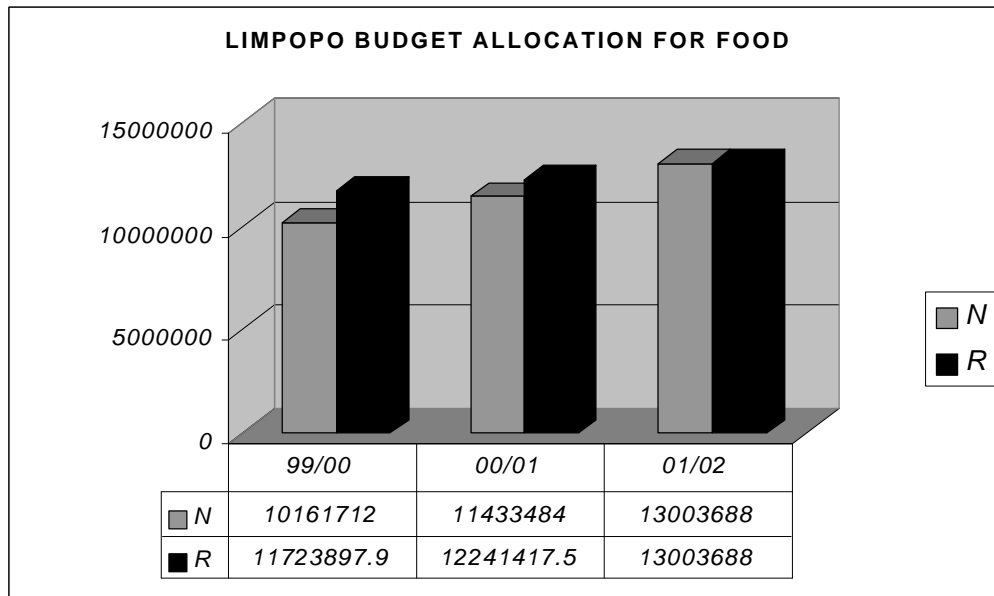


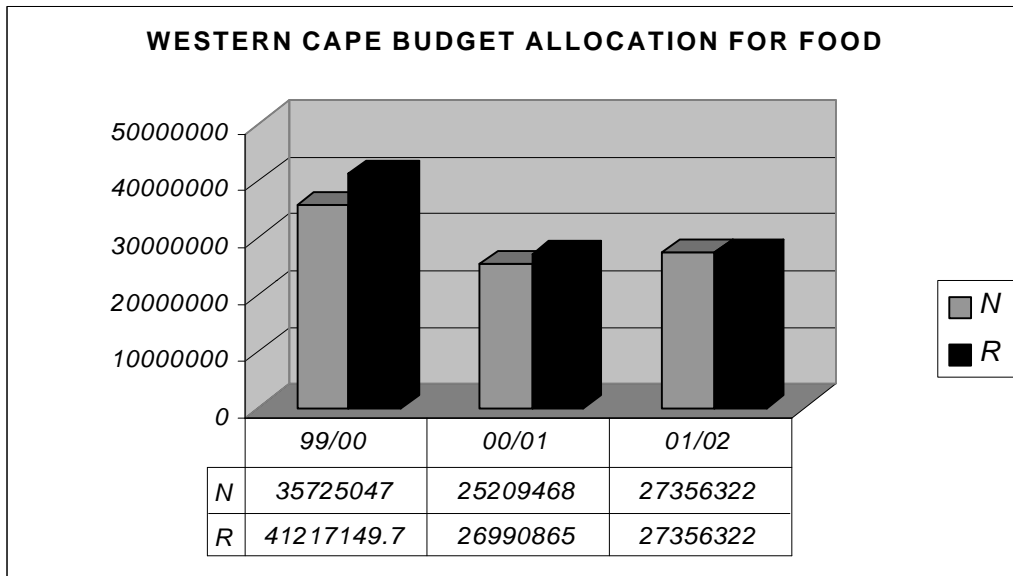




The right of access to sufficient food

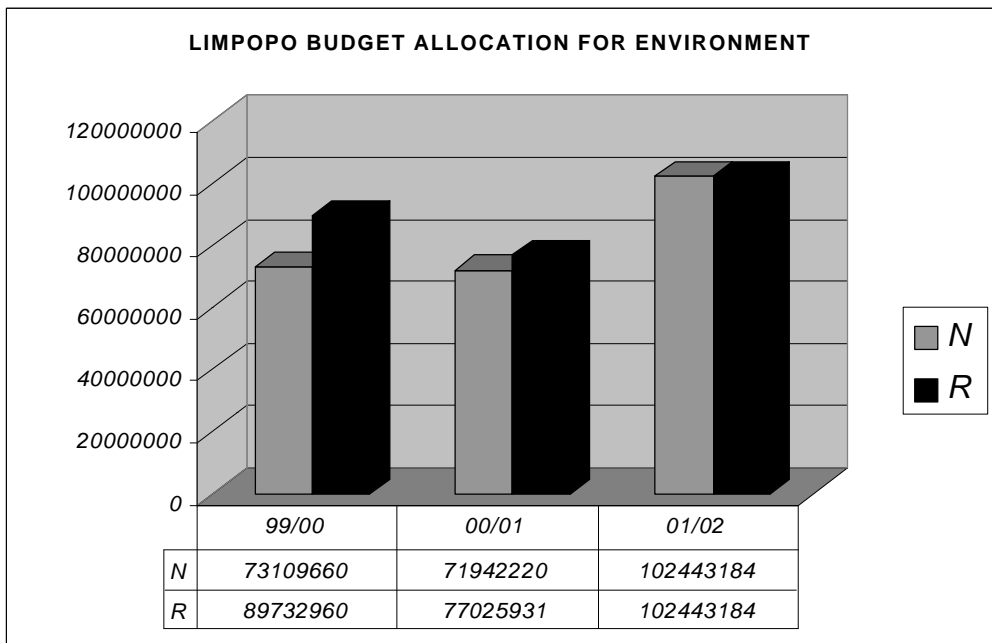
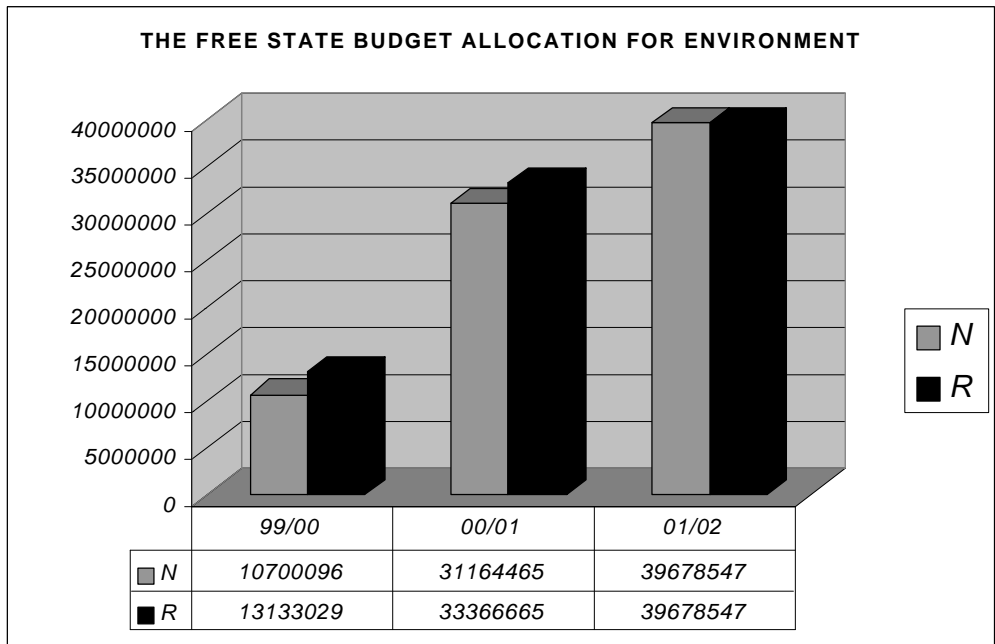


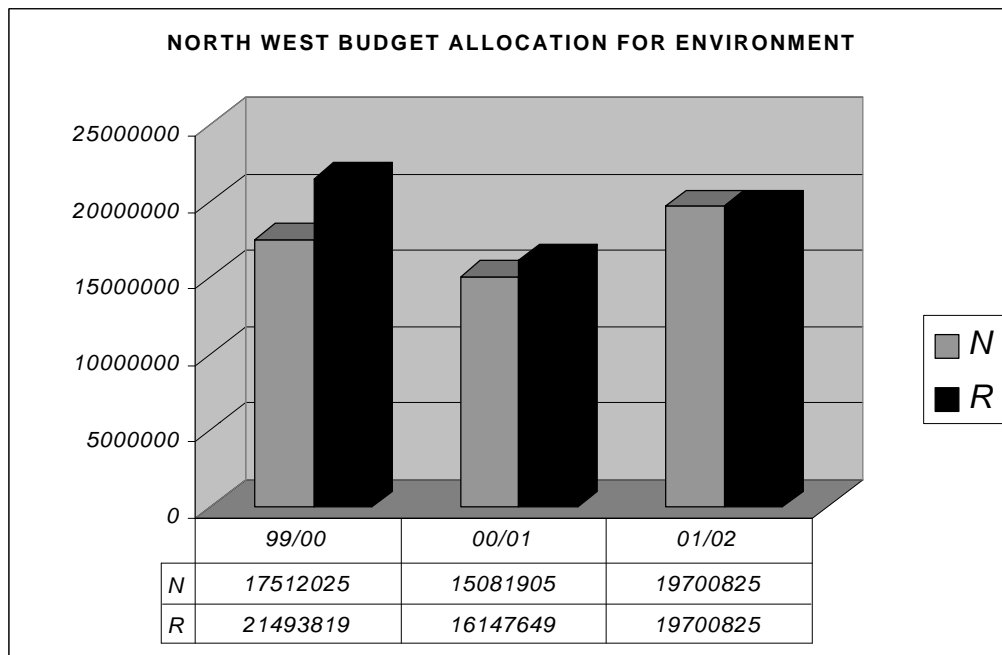
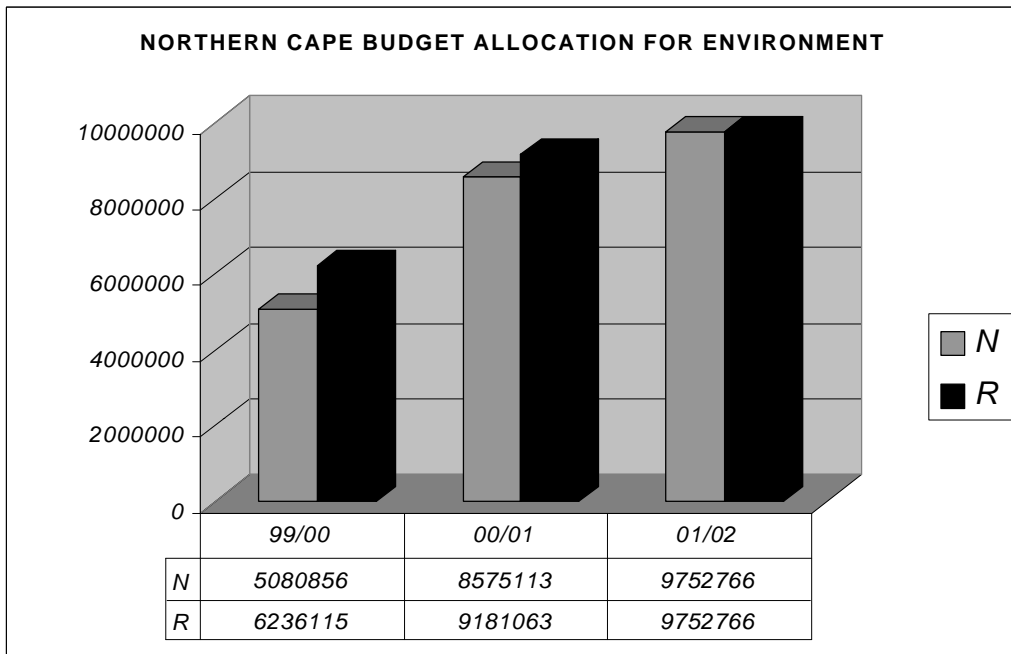


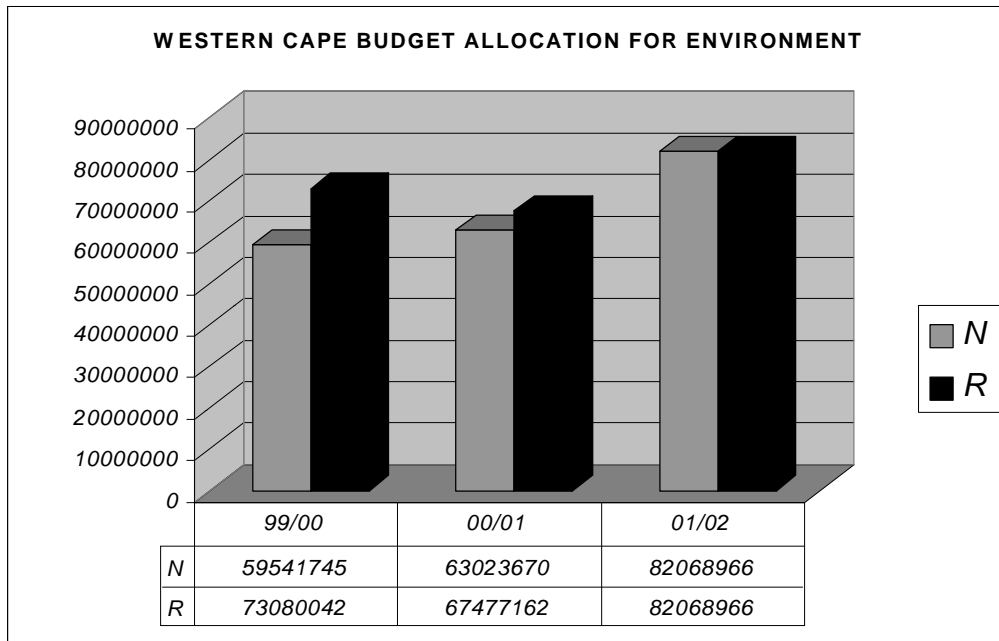




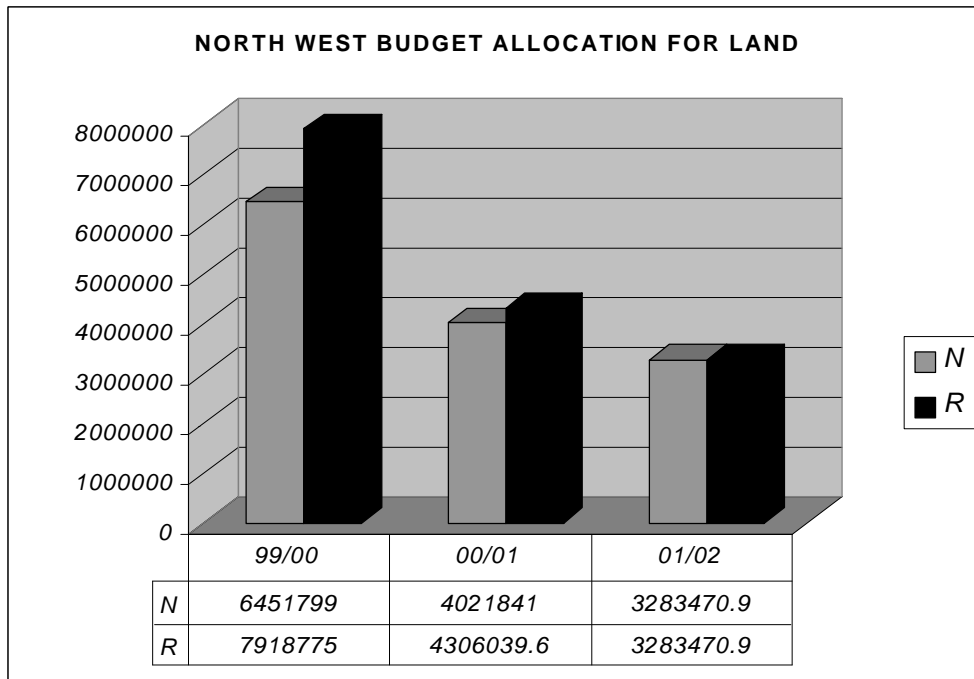
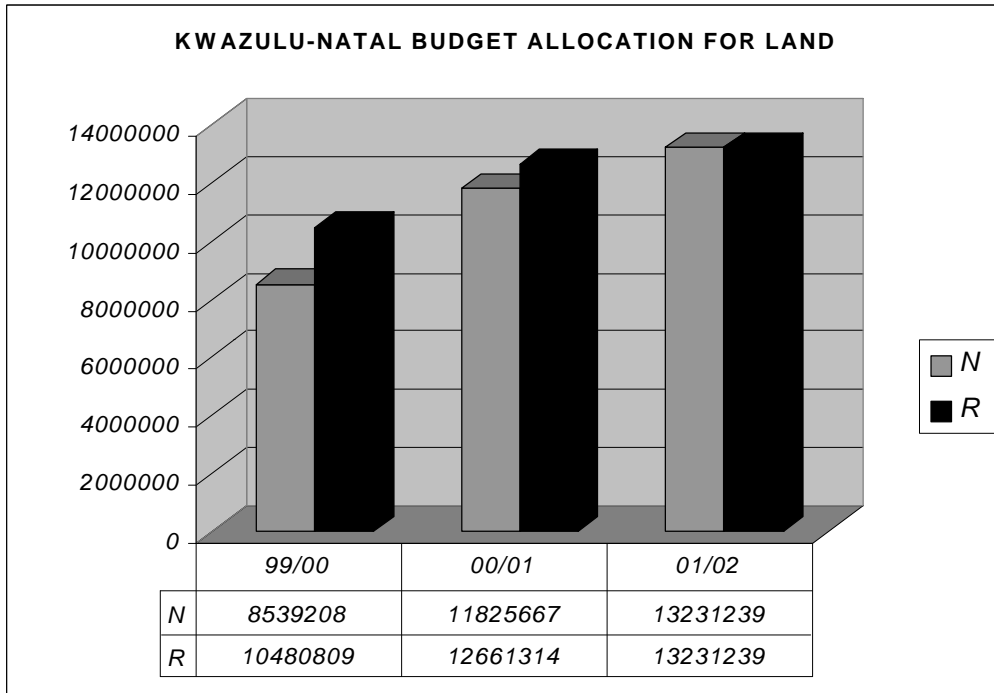
The right to the environment

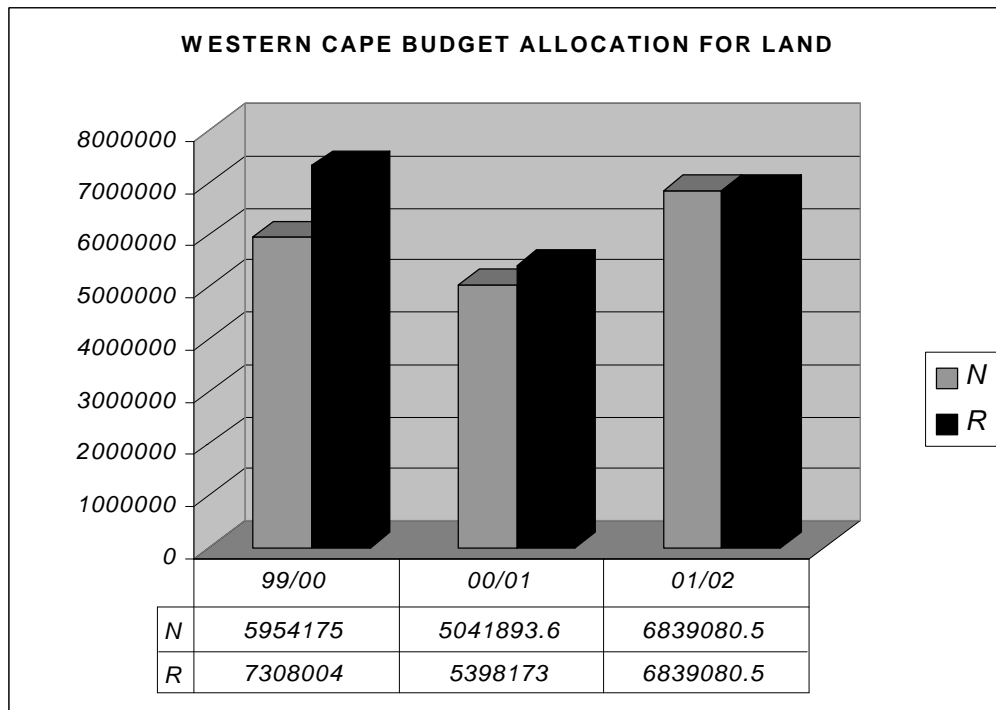






Right to land





## 5. CONSTITUTIONAL OBLIGATIONS<sup>6</sup>

### National Sphere

The National Treasury referred to section 214 (a) to (j)<sup>7</sup> of the Constitution as the section that helps it ensure that during the budget allocation process it respects, protects, promotes and fulfils the other economic and social rights (besides education, health and welfare).

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<sup>6</sup> The question posed here intended to find out if the Departments of Finance took into account the obligations to ‘respect, protect, promote and fulfil’ the other economic and social rights (other than education, health and welfare) during the division of revenue.

According to the United Nations Committee on Economic, Social and Cultural Rights *Report on the Twentieth and Twenty-First Sessions* (26 April –14 May 1999, 15 November – 3 December 1999), the constitutional obligations mean the following:

The obligation to respect requires states parties to avoid measures that hinder or prevent the enjoyment of a right. The obligation to protect requires states parties to take measures that prevent third parties from interfering with the enjoyment of a right. The obligation to fulfil (facilitate) requires states parties to take positive measures that enable and assist individuals and communities to enjoy a right. Finally, states parties have an obligation to fulfil (provide) a specific right. As a general rule, states parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.

In “*A Compilation of Essential Documents on the Right to Education*”, Economic and Social Rights Series, Volume 2, Mashamba defines the obligation to promote in the following manner:

This duty requires that the state actively inform people of their right to education and explain how they can gain access to this right. This duty is related to the whole idea of bringing human rights the people. It would include activities such as workshops, seminars, and publications in the written media and other medium, such as radio and television.

<sup>7</sup> This section of the Constitution requires that an annual Act of Parliament, the Division of Revenue, determine the equitable division of nationally raised revenue between the three spheres of government, and the horizontal division of revenue among provinces. It also spells out the criteria for determining the division of revenue and consultations necessary before enactment of Division of Revenue Bill. The criteria that are spelt out in section 214 of the Constitution are made up of the following matters:

- (a) the national interest ;
- (b) any provision that must be in respect of the national debt and other national obligations;
- (c) the needs and interests of the national government, determined by objective criteria;
- (d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
- (e) the fiscal capacity and efficiency of the provinces and municipalities;
- (f) developmental and other needs of provinces, local government and municipalities;
- (g) economic disparities within and among provinces;
- (h) obligations of the provinces and municipalities in terms of national legislation;
- (i) the desirability of stable and predictable allocations of revenue shares; and
- (j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

## Provincial Sphere

The Eastern Cape Treasury cited the following programmes as indications that it respects, protects, promotes and fulfils the rights other than education, health and welfare:

- Integrated Rural Development (with specific attention devoted to infrastructure development);
- Food production and food security;
- Capacity-building at the local level of government; and
- Transformation and development of the public service (to ensure effective and efficient financial management in the sector).

The Limpopo Treasury reported that one of its programmes is aimed at reducing poverty and unemployment levels and improve economy growth. The Mpumalanga Treasury made a submission that funds are also allocated to other areas such as road construction and maintenance.

The Northern Cape Treasury had its expenditure prioritised for infrastructure backlogs: maintenance, rehabilitation and expansion to ‘stimulate economic growth. Other sectors that were also prioritised included Public Order and Safety (allocated 1,0 percent of budget); Economic Affairs (allocated 7,6 percent of budget); Housing and Community Amenities (allocated 4,4 percent of budget); and Recreation, Culture and Religion (allocated 0,9 percent of budget).

In the case of the North West Treasury the Provincial Executive Committee (PEC) identified five priorities two of which have to do with the ‘development of infrastructure (social and economic) and job creation.’ It was reported that an amount of R250 million per annum, was ‘topliced for the reporting period to address infrastructure’ backlogs. Furthermore, the province implemented a rural development programme to address unemployment in the rural areas.

Other initiatives included the upliftment of the SMME sector. Two Community Entrepreneurial Support Centres were established to help promote budding entrepreneurs.

Housing was one sector that was given attention as well, during the reporting period. In 2000/2001 the housing sector was allocated R265 million and R277 million in 2001/2002.

The Gauteng Treasury designed programmes to deal with HIV/AIDS, environmental issues, poverty and unemployment. Other programmes that have been implemented during the reporting period comprise the Alexandra Urban Renewal Strategy, Expanded HIV/AIDS Campaign, *Zivuseni*, Elimination of backlogs of Water and Sanitation Services and Air and Water Pollution Control.

The new Western Cape Cabinet set up a Strategic Framework for Policy Formulation in December 2001, which forms the basis for resources allocation. According to the Provincial Treasury, the 2002 budget seeks, within the above-mentioned framework, to promote people-oriented service delivery. The following are some of the areas that the framework seeks to address:

- HIV/AIDS: To fight HIV/AIDS and other diseases in a co-ordinated and comprehensive manner which includes the provision of anti-retroviral drugs, lifestyle intervention and sustained action against poverty;
- To develop the capacity of local government to ensure the rapid and comprehensive implementation of Integrated Development Programmes (IDPs) and free basic services;
- To stimulate economic growth – both in the traditional and emerging sectors – with appropriate infrastructure development, and to the benefit of all through, amongst others, procurement reform;
- To focus on agriculture and tourism towards rural development so that all inhabitants can live harmoniously and in safety;
- To promote policies which maintain a healthy balance between protecting the environment and developing the economy;
- To contain and eradicate crime through good intergovernmental co-operation so that the Western Cape can be a safe and secure home, especially for its own women and children; and
- To nurture diversity and promote various cultures, religions and languages to become the source of our unity and strength.

The KwaZulu-Natal Cabinet developed a policy framework that it uses as a tool to analyse and assess the 2002/2003 provincial budget proposals, and particularly requests submitted by various provincial departments for additional funding for the 2002/2003 – 2004/2005 MTEF years.

In determining the policy priorities for the 2002/2003 MTEF budget, the Provincial Cabinet identified the following six strategic policy priorities:

- Reducing poverty and inequality;
- Addressing the impact of HIV/AIDS;
- Re-engineering service delivery in government
- Investing in infrastructure;
- Strengthening governance; and
- Human capability development.

In support of the above policy priorities, some provincial departments were given additional funding. The Department of the Premier, for example, was allocated additional funding in the amounts of R13, 6 million, R11, 32 million and R11, 6 million over the MTEF period. Amongst other things, the department would capacitate a specific programme to promote human rights in the province. The programme would focus on youth, gender and disability- related issues.

The Department of Economic Development has secured additional funding for empowerment, capacity-building and job creation projects. The Department of Agriculture allocated additional funding specifically to promote food security and emerging farmers and farmers' settlement campaigns whilst the Department of Traditional and Local Government Affairs was allocated additional funding to improve administrative facilities for traditional leaders.



## 6. PROVINCIAL INFLUENCE ON BUDGET ALLOCATION

The Eastern Cape Treasury reported that it advises the Budget Council<sup>8</sup> and that four of the PEC members form the Cabinet Budget Committee. This Committee gives political guidance to the budgeting process, holds budgeting hearings and budget achievability meetings with other departments.

The Free State Treasury reported that it advises the Budget Council and Budget Forum<sup>9</sup> through the Technical Committee on Finance. The response further said that the department puts a particular emphasis on ensuring that constitutional obligations with respect to economic and social rights, are adequately catered for by ensuring:

- the continuation of a formula-driven revenue-sharing as well as formula-driven rather than discretionary grants;
- a transparent process for setting grants;
- avoidance of bailouts resulting from ineffective management of resources that could negatively impact on basic service delivery in or between provinces and other spheres of government;
- that new policy announcements, are as far as possible, based on costed norms and standards that takes into account the reality of differing demographic features of provinces; and
- that constitutional principles and legal mandates are strictly adhered to in respect of intergovernmental fiscal relations.

Gauteng Treasury emphasized the point that provincial priorities are determined at a political level by the PEC, which consequently influences budget allocation. Gauteng Treasury made the point that it performs the advisory role to the Member of Executive Committee (MEC) for Finance and Economic Affairs. The MEC is a member of the Technical Committee for Finance that also forms part of the Budget Council.

The KwaZulu-Natal Treasury engages with the Budget Council and Budget Forum through the Office of the MEC for Finance and Economic Affairs. The Treasury plays a technical and advisory role to the MEC assisting with the preparation of input to national forums on issues related to horizontal and vertical division of revenue. The Treasury asserts that it had tremendous influence, through the Budget Council, on the adjustment of the social welfare component from 17 percent to 18 percent. Another prominent player in the budget allocation process this used, was the Technical Committee to which regular inputs on issues such as HIV/AIDS, cholera and malaria were made.

According to the KZN Provincial Treasury, these inputs have been premised precisely on the need to reprioritise the State's constitutional obligations with respect to basic social rights in the field of social security and health care. Limpopo reported that it advises the Provincial Medium Term Expenditure Committee (PMTEC) and Budget Council. It was further reported that the prioritization of the economic and social

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<sup>8</sup> This body was established by the Fiscal Relations Act 97, 1997 as a consultative intergovernmental forum representing the provincial sphere of government in the budget allocation process.

<sup>9</sup> This body was established by the Fiscal Relations Act 97, 1997 as a consultative intergovernmental forum representing the local sphere of government in the budget allocation process

rights is, in most cases, based on the PGDS. Mpumalanga reported that the PMTEC submits its recommendations to the PEC.

The Northern Cape Treasury reported that the Budget Council considers the departmental MTEF budgets and the PMTEC -consisting mainly of National Treasury officials and the MEC: Finance, discuss departmental inputs enabling the MEC to compile recommendations to the PEC. The PEC then thoroughly debates the inputs and decides on allocations.

The accounting officer of each department, together with finance staff and programme managers, appear before the Provincial Budget Council when their departmental inputs are discussed. The evaluation and recommendations of the Provincial Budget Council and the PMTEC are based on the MTEF budgets as submitted by the departments to the Provincial Treasury including an indication of the consequences of the indicative MTEF allocations. The final allocations to each department are determined after a thorough process led by the executive political office-bearers to ensure government's policy choices are indeed addressed.

The North West Treasury reported that it advises the Budget Council which is supported by a Technical Committee on Finance. The Technical Committee on Finance formulates and analyses policy to ensure that top government priorities receive first preference in the division of revenue. The Budget Council's recommendations are taken into consideration during the division of revenue.

The Western Cape Treasury reported that the MEC for Finance, in his capacity as the Head of Treasury, is a member of the Budget Council and Budget Forum. The MEC for Finance participates actively in the above-mentioned forums to reach agreements on spending priorities, the vertical division of revenue, the horizontal division of revenue, adjustments to the equitable share formula after taking due cognisance of inputs from the Technical Committee on Finance as well as in the recommendations of the Financial and Fiscal Commission (FFC). The inputs are based on government's policy directions, findings from research, socio-economic indicators, spending trends, sectoral analysis, affordability and the macro-economic environment.

## **7. DEPARTMENT'S UNDERSTANDING OF AVAILABLE FINANCIAL RESOURCES REQUIRED FOR THE REALISATION OF ECONOMIC AND SOCIAL RIGHTS**

### **National Sphere**

According to the National Treasury, budgeting within the MTEF requires that the level of available resources, or the 'resources envelope for available expenditure', be determined by sustainable, consistent macro-economic and fiscal policies. The response further elaborated that the government's aggregate revenue, borrowing and spending plans have an important impact on the macro-economy, and contributes to the wider policy framework for growth and social development. However, the National Treasury is satisfied with the limited financial resources made available to the provinces during the course of the annual division of revenue. The National Treasury further advised that maximum funding is being made available to the

provincial departments mandated to address basic economic and social rights as an integral part of their core functions.

### **Provincial Sphere**

The Eastern Cape Treasury reported that the economic and social rights inform the division of revenue. Further, the distribution of resources is mainly guided by the number of the province's population, which was estimated at 6,7 million in 1999 based on the 1996 population census.

The Free State Treasury reported that it finds it difficult to cost the full realisation of economic and social rights that should inform the division of revenue. Its response further explained that policy is often announced without proper pre-planning around the following areas:

- Envisaged minimum norms and standards;
- Infrastructure and services backlog between provinces;
- Phasing in of policy measures with costed service delivery targets for each phase of implementation;
- Agreed service levels necessary for each expenditure programme executed in reaching the envisaged service delivery goal;
- Unavoidable trade-off between policy options, emanating from the reality of a given fiscal envelop; and
- A simple and generally acceptable yardstick for measurement, and accountability for meeting declared service standards.

However, the Free State Treasury ensures that each department costs its mandated functions so that they are able to establish the actual cost of the services to be executed. According to the Free State Treasury's report, this exercise helps the department to ensure that the actual cost of the mandated services are reflected in the Treasury's budget inputs.

The KwaZulu-Natal Treasury reported that it has a very clear understanding of the limited financial resources available to address the spectrum of economic and social rights enshrined in the Bill of Rights. The Limpopo Treasury reported that all the provincial departments are allocated financial resources equally, however, needs always exceed financial resources. The Mpumalanga Treasury understood 'department's available resources', as resources that are available within a financial year and must be prioritised for service delivery.

The Northern Cape Treasury reported that revenue sharing is informed by the constitutional assignment of revenue-raising and expenditure responsibility. Its response further said that the province has significant requirements that exceed the available revenue resources. The following were cited as areas that cause increased budgetary pressures: HIV/AIDS; Child Support Grant (CSG); the need to increase infrastructure spending, including maintenance backlogs to enhance job creation; and poverty alleviation. The North West Treasury reported that the division of revenue is informed by provincial priorities. It said that funds are available in line with provincial priorities.

The Western Cape Treasury reported that the Provincial Fiscal Policy 2002-2005 does not only describe funding possibilities available to the province, but also contain the Sequential Priority Framework that influences the budget allocations. The Treasury further reported that its budget aims to be pro-growth (anti-poverty), disparity and vulnerability-reducing, in line with both the provincial and national governments' objectives.

## **8. MONITORING**

### **National Sphere**

The National Treasury reported that it is using the In-Year Monthly (IYM) reporting system as a requirement of section 32 of the PFMA<sup>10</sup> since 1 April 2000. The specified formats for monthly reporting require managers to indicate and explain variances between the actual result for the period and that budgeted, and a revised projection of expenditure to the end of the financial year.

### **Provincial Sphere**

The Eastern Cape Treasury reported that the Early Warning System was introduced to help them monitor and assess the utilisation of funds allocated to provincial departments responsible for the realisation of the economic and social rights.

The Free State reported that monthly expenditure reports are published for all departments. These reports show levels of expenditure against budgeted expenditure as well as projected full-year expenditure investment returns on all expenditure programmes, including infrastructure and conditional grants. The response further explained that the monthly expenditure reports are also tabled in the PEC and distributed to all members of the Provincial Legislature so that they can measure expenditures against output delivered.

The Gauteng Treasury reported that its involvement in the monitoring and assessment of the utilisation of funds is at the macro-level. Provincial departments are asked to submit their monthly reports to Provincial Treasury. The Provincial Treasury reviews and consolidates these reports and then forwards them to the National Treasury. The Provincial Legislature receives the quarterly reports. In addition to the reports already mentioned, the department has to submit Annual Reports to the Legislature at the end of each financial year.

The KwaZulu-Natal Treasury reported that it has a Budget Monitoring and Evaluation component in the Budget Office with the specific task of monitoring and evaluating

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<sup>10</sup> This section of the PFMA focuses on the publishing of reports on the state of the budget Section 32 (1) provides that within 30 days after the end of each month, the National Treasury must publish in the national *Government Gazette* a statement of actual revenue and expenditure with regard to the National Revenue Fund.

(2) After the end of a prescribed period, but at least quarterly, every provincial treasury must submit to the National Treasury a statement of revenue and expenditure with regard to the Revenue Fund for which that treasury is responsible, for publication in the national *Government Gazette* within 30 days after the end of each prescribed period.

departmental expenditure, including the utilisation of funds allocated to the realisation of human rights.

The mechanisms used by the Treasury include the preparation of a monthly departmental budget evaluation report. This report is compiled on the basis of information submitted by provincial departments. In these reports major cash flow projections and actual expenditure are analysed and explained, be they under or over-expenditure of allocated funds. This information is then aggregated into an Early Warning System report and submitted to the National Treasury on a monthly basis.

Quarterly bi-lateral meetings are also held between the Provincial Treasury and provincial departments to analyse and discuss expenditure and revenue trends. As part of the annual budget preparation and allocation process, the Provincial Treasury meets with individual departments in the months of September and October to assess and analyse budget proposals and requests for additional funding. This process culminates in the publication of the Annual Budget Statements in which departments report on their achievements and plans in respect of their core functions. The Budget Statements are in turn subjected to scrutiny of the relevant portfolio committees in the Provincial Legislature as part of parliamentary oversight function.

In the review period, the Provincial Treasury has also co-ordinated the implementation of a performance budgeting and reporting system in provincial departments. *Inter alia*, the aim of the performance budgeting is to measure and report on the effectiveness of service delivery in meeting the provincial government's responsibilities in the area of economic and social rights.

The Provincial Treasury also reported that it has developed a management tool (a monthly management reporting format) to assist accounting officers of provincial departments in meeting their financial management and reporting responsibilities in terms of the PFMA. The reporting tool provides information on both qualitative and quantitative aspects and includes information on general ledger reporting, risk management and service delivery indicators.

The Limpopo Treasury reported that its main mechanism is the Early Warning System (monthly expenditure report). For grants, it uses monthly conditional grants expenditure reports. The Mpumalanga Treasury uses the Early Warning Reports as well. The Northern Cape Treasury reported it has an IYM and early warning system and an on-going analysis of expenditure trends.

The North West Treasury reported that provincial departments prepare activity/performance reports for the various portfolio committees. Its response further explained that the role of the National Treasury is to assess whether these reports are in line with the strategic plans of departments and also whether funds are used for the purpose for which they are requested.

The Western Cape Treasury reported that it uses section 40 (4) (c) of the PFMA<sup>11</sup> as a mechanism that monitors and assesses the utilisation of funds allocated to various

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<sup>11</sup> Section 40 (4) (c) of the PFMA stipulates that the accounting officer of a department must, within 15 days of the end of each month submit to the relevant treasury and the executive authority responsible for that department-

government departments responsible for the realisation of economic and social rights. The Treasury advised that, for this purpose, the Provincial Treasury utilises the IYM, which is prescribed by the National Treasury.

The response further clarified that after executive authorities and accounting officers approve of their provincial departments' monthly IYM- reports on actual and projected expenditure and revenue, the reports are submitted to the Provincial Treasury. In turn the reports are submitted to the National Treasury by the 22<sup>nd</sup> of the month.

Reporting does not only end with the financial resources that are allocated as part of the equitable share, it extends to grants as well as per the Annual Division of Revenue Act, and as part of the IYM-report. Departments have to report on the cash received from national department, actual and projected expenditure, compliance with conditions and funds delayed. Virement<sup>12</sup> that results in increases in personnel expenditure and transfer payment to other institutions, as well as the introduction of new transfers, are subject to National Treasury approval.

The Western Cape Treasury reported that, in terms of the PFMA the Provincial Treasury must prepare a provincial budget, exercise control and ensure that its fiscal policy does not prejudice national economic policy. Given the provincial strategic goals, departments were asked (for the 2002/2003 financial year) to formulate explanatory documents and develop service delivery key measurable objectives (KMOs) that take into account existing planning documents, develop service delivery programmes, set service delivery indicators, identify monitoring and reporting requirements, categorise spending plans with respect to the new Cabinet goals, and take cognisance of sectoral provincial policies.

To assist accounting officers in compiling their KMOs, the Provincial Treasury prepared a generic format for strategic plans. Departments were requested to develop minimum service level indicators, adequate performance measures and indicators, monitoring and reporting mechanisms, benchmarks and linkages to the desired outcomes.

Departments will also have to monitor their own performance on an-ongoing basis against the objectives set in the provincial budget 2002/2003 and their own departmental strategic plans. In turn the Provincial Treasury will monitor progress during 2002/2003. At the end of 2002/2003 all provincial departments will compile annual reports. According to the Western Cape Treasury, despite the progress made, much remains to be done to further develop and improve measurable service delivery objectives, to effectively link these with set strategic objectives, sectoral policies and actual requirements to enhance and measure service delivery. A new approach has

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- i) the information for that month
  - ii) a projection of expected expenditure and revenue collection for the remainder of the current financial year; and
  - iii) when necessary, an explanation of any material variances and a summary of the steps that are taken to ensure that the projected expenditure and revenue remain within budget.

<sup>12</sup> The transfer of resources between different programmes within the same department vote during the financial year. In terms of section 43.2 of the PFMA not more than 8 per cent of what was originally budgeted for a programme may be moved to another in the same vote.

thus already started during 2001/2002 for 2002/2003 to further transform budgeting and its evolution.

### **The Effectiveness of Monitoring Mechanisms<sup>13</sup>**

Given the fact that the other monthly IYM and reporting systems, were recently introduced the National Treasury reported that the system is to be reviewed. The Eastern Cape Treasury reported it does not use any mechanism or mechanisms to assess the effectiveness of the Early Warning System which it said it uses as a tool to monitor and assess the utilisation of funds allocated to various government departments.

The Free State Treasury reported that it executes quarterly budget credibility exercises together with the National Treasury to ensure that methods of tracking delivery are adequate and that observed expenditure trends reflect the policy priorities of the provincial government.

The KwaZulu-Natal Treasury reported that the effectiveness of the various mechanisms used by the Provincial Treasury to monitor the utilisation of financial resources by departments is regularly reviewed and refinements are made when necessary. Examples are the introduction of the monthly management reporting pack, introduced on the Provincial Treasury's own initiative. The Annual Departmental Budget Review Hearings have also been restructured to provide for a more detailed assessment and scrutiny of the effectiveness of service delivery in the various provincial departments.

The Limpopo Treasury only reported on the conditional grants' assessment mechanisms. It said that conditional grants are no longer rolled over but are spent within a financial year. So, that in itself is a mechanism that assesses the use of conditional grants. Mpumalanga reported that it relies on the monthly monitoring of the expenditure by the PEC as a mechanism that assesses its expenditure.

The Northern Cape Treasury reported that expenditure is monthly-controlled; expenditure trends are analysed to ensure that funds are utilised for the programmes/activities they were budgeted for. North West reported that the effectiveness of the mechanisms is assessed by the cabinet committees appointed by the Premier. The Western Cape reported that the assessment of the reporting mechanisms centers around the ability to, *inter alia*, identify:

- Under-spending per programme, resulting in request for roll-over of funds to the following financial years, in advance;
- Over-expenditure (projected or actual), with possible remedial steps that are to be implemented to curb such over-expenditure;
- Shifts between programmes;
- Expenditure trends per programme; and
- Spending on programmes related to the provincial government.

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<sup>13</sup> Gauteng did not respond to the question.

## **Difficulties with Monitoring of Funds at Departmental Level**

### **National Sphere**

The National Treasury reported that the system does not necessarily monitor the effectiveness of expenditure in terms of the realisation of economic and social rights. It was said that rather, the system monitors deviations of actual expenditure to budgeted expenditure by programme on a monthly basis, and departments are required to explain the deviations that occur

### **Provincial Sphere<sup>14</sup>**

The Eastern Cape Treasury reported that it experienced problems since it depends on the provincial departments' reports. The Free State Treasury reported that it has not yet experienced serious difficulties during the reporting period regarding the monitoring of funds. However, the Free State Treasury referred to bottlenecks in the areas of infrastructure investment (which is one of the vehicles used to create jobs and thus contribute to economic growth). In particular, it referred to the slow pace at which both the national and provincial grants were being spent.

The response further said that the Free State Treasury, in collaboration with the National Treasury, has embarked on the process of reviewing and assessing the public infrastructure delivery mechanisms in the province to address the problems of roll-overs and under-spending in the two areas already referred to in the preceding paragraph.

The KwaZulu-Natal Treasury cited the poverty alleviation programmes and projects as areas of difficulty regarding the utilisation of funds during the review period. The lack of clearly identifying some of the sub-programmes made it difficult for people charged with the responsibility of implementing these, as they could not be ring-fenced. Consequently, reporting and monitoring progress on this area became 'problematic'. The following were cited as the causes of the said difficulties:

- The absence of measurable objectives, clearly defined targets, performance targets and performance measures;
- Poor reporting, monitoring and evaluation standards and protocols in some instances;
- The absence of accurate, consolidated data on poverty relief projects and results; and
- The lack of project management capacity in departments.

However, it was mentioned in the response that both the Provincial Treasury and line departments were addressing these challenges in a 'systematic way'. It was further mentioned that the introduction of the Cabinet Cluster should assist greatly in eliminating the monitoring difficulties.

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<sup>14</sup> Gauteng did not respond to this question.



The Limpopo Treasury reported that it experienced the following difficulties in monitoring the utilisation of funds:

- Late awarding of tenders delay the rolling-out of conditional grants projects.
- The long distance between the Head Office and the location of projects make frequent project sites visits difficult.

The Northern Cape Treasury reported that it did not experience any difficulties in as far as the utilisation of funds was concerned. The North West Treasury reported that some provincial departments utilised funds for other things other than what they were initially intended for. Another problem cited was under-spending, mainly on capital projects. This consequently delayed infrastructure development.

The Western Cape Treasury reported the following difficulties it experienced during the reporting period in the area of monitoring the utilisation of funds:

- Greater emphasis placed on quantitative monitoring and less on qualitative monitoring;
- Lack of capacity with the emphasis on analytical and interpretive skills within the Provincial Treasury;
- The prescribed tight reporting time-frames that do not allow for qualitative analysis of expenditure;
- Key measurable objectives which are only a requirement in strategic plans/budgets with effect from 2003/ 2004; and
- Service delivery indicators, more especially in the social sector require further development.

## **8. CRITIQUE**

### **Budgetary Measures**

The Free State Treasury's response that it is not in a position to determine whether the funds allocated for the realisation of the economic and social rights are sufficient is inappropriate. Regardless of the reasons given by the Free State Treasury, it is a fact that public needs will always exceed government revenue. However, departments are expected to respond to the question relating their responses to the MTEF giving an idea of their achievements as well as financial and other challenges. The fact that the allocation of budget in the form of the equitable share and conditional grants, comes from the national sphere of government through the process of vertical division of revenue.

There are constitutional structures that were established to perform a variety of roles in as far as the budgetary and financial-related matters are concerned. To mention but a few, the FFC<sup>15</sup>, the Budget Council, the Budget Forum and others, all contribute to the allocation of budget to the three spheres of government. All the departments are

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<sup>15</sup> Section 220 of the Constitution provides for the establishment of the FFC, which is an independent technical advisory body whose role is to ensure that an effective, equitable and sustainable system of intergovernmental fiscal relations is created and maintained.

represented in the processes that lead to the final stage of the budget allocation process. For any department to say that it is not in a position to determine whether it was allocated sufficient financial resources is inappropriate. Each department should be in a position to point out where it feels it is lacking as well as where it has made some headway. This is important, as it is noticeable that more often than not, each financial year the nominal value of the financial resources allocated to departments increases.

Whilst it is understood that the government budget allocation process is a process that seeks to achieve a rational allocation of financial resources, the MTEF as a budgeting tool does somehow assist government departments to at least establish whether the financial resources allocated to them in the beginning of each financial year are sufficient to enable them to meet the targets they set themselves before the beginning of the financial year. It is common knowledge as well, that government cannot meet all the needs of the people in one financial year, hence the economic and social rights have to be progressively realised within the available resources.

Amongst other things, the PFMA provides for departments to have strategic planning as part of an informed distribution of public finance to help them achieve, amongst many other goals, the progressive realisation of economic and social rights. This as well, involves a number of stakeholders such as Provincial Legislatures since they assess the provincial departments' proposed programmes and funding which in turn assist departments in prioritising policy objectives.

Strategic planning cannot be developed in isolation but should rather be the result of thorough consultation with all relevant stakeholders. The reporting cycle begins with the strategic plan of the department. During the strategic planning process, strategic objectives must be determined which must be in line with the vision of the department. These objectives are reflected in the annual budgets and the performance of the department will be measured against these set objectives.<sup>16</sup>

### **Constitutional obligations**

Despite the effort some of the Provincial Departments of Finance made to demonstrate their observance of the constitutional obligations to respect, protect, promote and fulfil the economic and social rights, their responses fell short of a clear demonstration. The departments referred to a number of programmatic measures to demonstrate their observance of the economic and social rights enshrined in the Bill of Rights, however, this was not followed by any explanation as to how such programmatic measures observe the four obligations. Such a demonstration is important to ensure that in their quest to deliver services to the public, government departments do not violate related human rights.

### **Provincial influence on budget allocation**

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<sup>16</sup> David Fourie, *Annual Reports and the Public Finance Management Act*, South Africa, Health Systems Trust, 2001.

It appears in the departments' responses that in one way or another, each Provincial Department of Finance does have a certain degree of influence on the budget allocation process through the various structures such as the PEC, Budget Council, and others. However, it is important that independent research agencies are created either in provincial parliaments or in the national parliament to strengthen the work of the National Treasury and the FFC.

The FFC's recommendations on the costed norms approach give a clear indication that such agencies are desirable. Having studied the provincial transfer system (for the 2001 budget) that takes into account the variations among the provinces, the FFC recommended that the budget system be based on a costed norms approach to determine the cost of constitutionally mandated basic services. This approach entails estimating the cost of basic services in education, health and welfare based on each sector's norms and standards.<sup>17</sup> The government has not been able to implement the costed norms approach for two reasons. One, the government lacks the precise information to determine the cost of basic services for each sector. Two, the government still has to come up with a clear definition of constitutionally-mandated basic services.

### **Departments' Understanding of Available Financial Resources Required for the Realisation of Economic and Social Rights that Informs the Division of Revenue**

Principles 24, 25 and 26 of the Maastricht Guidelines on the Implementation of the International Covenant on Economic, Social and Cultural Rights help explain the phrase "available resources":

Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realisation by everyone of the rights recognised in the Covenant. "*to the maximum of its available resources*" States parties are obligated regardless of the level of economic development, to ensure respect for minimum subsistence rights for all. "Its available resources" refers to both the resources within a state and those available from the international community through international co-operation and assistance.

Again, the *Grootboom* judgment<sup>18</sup> throws some light on the phrase "within available resources":

...the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.

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<sup>17</sup> Treasury Guidelines on Preparing 2002 Budget submissions.

<sup>18</sup> *Government of the Republic of South Africa and others v Grootboom and Others* 2000 (11) BCLR 1169 (CC). p. 1192.

It is clear from both the Maastricht Guidelines and the *Grootboom* judgment that the Provincial Departments of Finance should ensure that they do not under spend make use of the budgeting tool, the MTEF, which spans over a three-year period. It is equally important to understand that economic and social rights should be progressively realised.

The obligation “to achieve progressively the full realisation of the rights” requires states parties to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for states the right to defer indefinitely efforts to ensure full realisation. On the contrary all states parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.

According to the United Nation’s Human Development Report 2002:

The financial flows that developing countries receive from exports dwarf those from other sources, indicating how integrated many of these countries already are. And during the 1990s foreign direct investment grew faster than other financial flows to developing countries, from 0,9% of their GDP to 2,5%. Developing countries – especially the poorest countries – still receive only a tiny fraction of total foreign direct investment, but that inflow is now greater than official development assistance.

The underlying message in this statement is that developing countries do have the potential to achieve economic growth despite political challenges relating to trade, which of course cannot and must not be ignored for their serious negative impact on the developing countries economic development. However, the challenge still stands before the developing countries to revive their economies internally given that the current official development assistance from industrial countries is around \$56 billion a year, and this is not enough to ameliorate the economic and social conditions of the developing countries. This \$56 billion amounts to 0,5 percent of Gross National Product (GNP) of Development Assistance Committee (DAC) of the Organisation for Economic Co- operation and Development it is substantially less than the 0,7 percent agreed to at the United Nations General Assembly in 1970.<sup>19</sup>

It was agreed in the World Summit for Social Development held between the 6<sup>th</sup> and the 15<sup>th</sup> of March, 1995 in Copenhagen that the following action was going to be undertaken by the developed countries:

Increasing official development financial assistance, both in total and for social programmes, and improving its impact, consistent with countries’ economic circumstances and capabilities to assist, and consistent with commitments in international agreements, and striving to attain the agreed upon target of 0,7 percent of gross

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<sup>19</sup>United Nations Human Development Report, 2002.

national product for official development assistance and 0,15 percent to the least developed countries, as soon as possible.<sup>20</sup>

The reality is contrary to the agreements undertaken in both major conferences alluded to above. That is why under-expenditure on infrastructure investment is a serious under-investment for the country amidst the declining official development assistance. This state of affairs also has implications for the New Partnership for Africa's Development (NEPAD).

One-way financial transfers will not be enough to build a global partnership, nor should they be. Developing countries need to compete and prosper in the world economy to drive their own development.<sup>21</sup>

One of the crucial points the Western Cape Treasury raised relates to the lack of capacity within their Finance Department. The department reported that its reports on the monitoring of funds put more emphasis on the quantitative aspect and nothing on the qualitative aspect of it. It is not sufficient for officials to report on the quantitative side of financial management only; the qualitative side also needs to be reported upon. This is where the public finds out whether they are getting value for money or not. Efficiency has to be balanced with effectiveness of services and goods provided by government.

The information should reflect the key attributes of performance. For example, focusing only on the cost of outputs is not sufficient to describe the quality of performance. If costs are decreasing, what about quality – is it also decreasing? If the quantity or volume of goods and services is staying consistent, what about the population the programmes are servicing?<sup>22</sup>

### **Monitoring of Government Departments' Financial Resources**

The Provincial Treasury uses the monthly expenditure reports as a monitoring tool to help guide spending in provincial departments. These reports are also tabled in the PEC and distributed to all members of the Provincial Legislature to enable them to measure expenditures against outputs delivered. Notwithstanding the monthly expenditure reports that help guide departments' spending, and quarterly budget credibility exercises that are used to delivery-tracking methods; there are still cases of over-/under-spending and other problems in some of the departments.

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<sup>20</sup> *The Copenhagen Declaration and Programme of Action: World Summit for Social Development*, 6-12 March, 1995, United Nations.

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

<sup>22</sup> See note 18 above.

Whilst the Free State Treasury reported that it did not experience any problems, including monitoring utilisation of funds during 2000/2001, the Auditor-General's report (on Audit Outcomes for the year ended 31 March 2001) came up with the following audit outcomes:

- The Free State was one of the five provinces that overspent their budgets. It overspent by a total of R42 682 000.<sup>23</sup>
- The province was one of the two provinces that did not have an internal audit committee.<sup>24</sup>
- The province's financial statements could not be accepted for auditing<sup>25</sup> by the deadline of 31 May 2001.

It is important to know though that the Free State was one of the provinces, which made some progress with respect to both financial and compliance audits.<sup>26</sup> In 1999/2000 out of 13 budget votes it had nine financial audit opinions qualified and four compliance audit opinions qualified.<sup>27</sup> In 2000/2001, which falls within the reporting period for the HRC, out of 13 budget votes it had four financial audit opinions qualified and six compliance audit opinions qualified. Compared to other provinces, the Free State has done much better.

The Free State Treasury raises some concerns around the area of infrastructure development. It cites a slow delivery on infrastructure development as a result of the slow pace of spending both national and provincial infrastructure grants as well as the incidents of roll-overs. This scenario automatically impacts on economic growth and consequently job creation. The slow pace on infrastructure grants spending has a direct bearing on the realisation of the economic and social rights. Under-spending and/or slow pace of spending of infrastructure grants translate into deprivation of the basic services for some population segments. Deprivation of the basic services means that the progressive realisation of the economic and social rights is not achieved.

According to the Report of the Auditor-General (on Audit Outcomes for the year ended 31 March 2001), only four of the nine provinces complied with the legal requirement of having Internal Audit Committees in their departments. The said four provinces were: Eastern Cape, KwaZulu-Natal, Limpopo and the Western Cape. However, in none of the provinces reliance could be placed on the work done by the internal audit in respect of the 2000/2001 financial year.

It is ironical that some provinces overspent by such a magnitude and yet there is a system in place to address issues pertaining to the utilisation of funds, the IYM. It is important that government departments respect the provisions of the PFMA. The

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<sup>23</sup> In terms of the Public Finance Management Act 1 of 1999, overspending is regarded as illegal and may lead to charges of financial misconduct.

<sup>24</sup> According to the Auditor General's report, only four of the provinces complied with the requirement of establishing internal audit committees within their departments.

<sup>25</sup> General Report of the Auditor-General on *Audit Outcomes For The Year Ended 31 March 2001*, Pretoria, Government Printer, 2002.

<sup>26</sup> 'Financial audit' is concerned with financial statements only, whereas 'compliance audit' refers to compliance with financially related laws and regulations relating to other financial matters.

<sup>27</sup> See note six above.

following excerpt clearly elaborates on the specific responsibilities of accounting officers:

The PFMA confers specific responsibilities on accounting officers. The Act vests four key responsibilities, which are to:

- Implement effective, efficient, economic and transparent systems for controls in the department
- Eliminate unauthorised expenditure by ensuring that departments do not overspend their budget or a specific programme within the budget
- Report on expenditure and revenue against the budget on a monthly basis and submit annual financial statements two months after the end of a financial year
- Introduce performance reporting against pre-determined measurable indicators on a quarterly basis and Annual Report 5 months after the end of the financial year.

## **9. RECOMMENDATIONS**

It is accepted that it is only ideal in an economy that the real value of the financial resources allocated to departments should always exceed the nominal value. By the same token, it is important that the financial resources allocated to government departments charged with delivering on the economic and social rights have a buying power to enable the government departments to discharge their duties. The question of sufficient resources is important. However, the table on the budgetary measures does not show over/under-expenditure incurred by government departments in each financial year. This is found in each chapter dealing with each specific economic and social right. A point could still be made, nonetheless, that it is important that government departments spend the financial resources allocated to them meaningfully and account for the management of such resources appropriately.

The area of public infrastructure investment is an important one as it is one of the highlights of the budget framework reflected in the 2001 Medium Term Budget Policy Statement. Public infrastructure investment is one of the instruments government uses to create jobs as it has a bearing on the acquisition of foreign direct investments (FDIs) as well as local investment, which the country needs for economic growth. Moreover, public infrastructure investment is important, as it is where delivery on economic and social rights starkly comes to be tested. One province referred to this area as one area in which their departments need capacity. The problems that were cited range from roll-overs to slow pace of spending both National and Provincial Infrastructure Grants.

Some of the skills needed in these government departments comprise project planning, project finance and project management. Like in other areas, the government collaborates with other organisations, including the Municipal Infrastructure Investment Unit (MIIU), which has expertise in the area of infrastructure investment. Such organisations should be made use of to expedite infrastructure investment in the country.

It would be advisable that those provincial departments experiencing problems in infrastructure delivery work hand in hand with the National Treasury as it is involved in a process of assessing and reviewing public infrastructure delivery mechanisms with a view to reforming and enhancing delivery on public infrastructure. Much as it is not so clear what causes problems in public infrastructure delivery, it would be recommended that municipalities make use of institutions such as the MIIU to help them improve capacity particularly in the areas of project preparation and planning as well as municipal financial management.

It is incumbent upon government, in conjunction with both the Budget Council and Budget Forum as sub-national government tiers representing provincial and local spheres of government, to do research and come up with a definition of ‘constitutionally-mandated obligations including the basic services’. Initiatives such as the Municipal Infrastructure Investment Framework (MIIF) of 2000/2001 could go a long way in helping these tiers determine the number of backlogs in infrastructure as well as the costs involved. Basically, the MIIF provides national estimates of backlogs and corresponding costs. If the MIIF could be revised, taking into account the latest census delivery on the basic services could be fast-tracked. This would make the implementation of the costed norms approach possible.

## **10. CONCLUSION**

Public finance-related processes should not be regarded as the preserve of the few, as it is currently the case. The budget allocation process in particular, should be a transparent process that takes the public opinion into account. Currently, the process is dominated by political structures. Whilst there is nothing wrong with this, there is a need for civil movements to influence the budget process. The national parliament has the powers to amend the budget, and should use it more. The Constitution<sup>28</sup> empowers the parliament to amend any money bill put before it. The exercising of such powers by parliament should at least advocate the channeling of more financial resources into economic and social rights-related programmes.

The actors involved in the budget allocation process must be well-informed about issues affecting their constituencies if these structures are to play a meaningful role in the process. The co-operative forums, the Budget Council and Budget Forum need to engage in research to influence policymaking and the budget process. These structures should be helping government in establishing what constitutes constitutionally-mandated basic services, for instance.

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<sup>28</sup> Section 77 (1) of the Constitution provides that a Bill that appropriates money or imposes taxes, levies or duties is a money Bill. A Money Bill may not deal with any other matter except a subordinate matter incidental to the appropriation of money or the imposition of taxes, levies or duties.

(2) All money Bills must be considered in accordance with the procedure established by section 75. An Act of parliament must provide for a procedure to amend money Bills before parliament.



## **ABBREVIATIONS**

<b>CSG</b>	Child Support Grant
<b>DAC</b>	Development Assistance Committee
<b>FDIs</b>	Foreign Direct Investments
<b>FFC</b>	Financial and Fiscal Commission
<b>GNP</b>	Gross National Product
<b>IDPs</b>	Integrated Development Programmes
<b>IYM</b>	In-Year Monitoring System
<b>KMOs</b>	Key Measurable Objectives
<b>MIF</b>	Municipal Infrastructure Investment Framework
<b>MIU</b>	Municipal Infrastructure Investment Unit
<b>MTEF</b>	Medium Term Expenditure Framework
<b>NEPAD</b>	New Partnership for Africa's Development
<b>PFMA</b>	Public Finance Management Act 1, 1999
<b>PEC</b>	Provincial Executive Committee
<b>PMTEC</b>	Provincial Medium Term Expenditure Committee

## APPENDIX

## SAMPLE PROTOCOL – ENVIRONMENTAL RIGHTS

4<sup>th</sup> ECONOMIC AND SOCIAL RIGHTS PROTOCOL

**For Period: 1 April 2000 to 31 March 2002**

*Everyone has the right to an environment that is not harmful to their health or well-being; and the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. The state is required to respect, promote and fulfil these rights.*

## 1. POLICY MEASURES

### 1.1 Policies, Programmes and Projects

1.1.1 List and briefly describe all new policies instituted during the reporting period in order to realise the right to a healthy and protected environment.

1.1.2 Provide information according to the table below on programmes and/or projects instituted during the reporting period based on present and past policies.

Programme/ Projects	Policy on which programme/ Project is based	Objectives	Beneficiaries	Achievements Or Goals attained

### 1.2 Constitutional Obligations

1.2.1 In what way do the above-mentioned policy measures meet the constitutional obligation to *respect* the right to a healthy and protected environment?

1.2.2 In what way do the above-mentioned policy measures meet the constitutional obligation to *protect* the right to a healthy and protected environment?

1.2.3 In what way do the above-mentioned policy measures meet the constitutional obligation to *promote and fulfil* the right to a healthy and protected environment?

### **1.3 Vulnerable Groups**

1.3.1 Identify which of the above-mentioned policy measures made specific provisions for each of the following vulnerable groups:

- a) women
- b) older persons
- c) persons with disabilities
- d) female-headed households
- e) child-headed households
- f) persons living in rural areas
- g) persons living in informal settlements
- h) homeless people
- i) poor communities
- j) persons living close to industries and waste disposal sites
- k) workers exposed to toxic and hazardous substances
- l) Groups disadvantaged by past discriminatory racial laws and practices

1.3.2 How has each of these policy measures catered for the vulnerable groups identified above?

### **1.4 Implementation difficulties**

1.4.1 What were the difficulties experienced, if any, in the implementation of these policies, programmes and/or projects?<sup>1</sup>

1.4.1.1 What measures has the department put in place to address these difficulties?

## **2 LEGISLATIVE MEASURES**

### **2.1 Legislative and related measures**

2.1.1 List and briefly describe legislative developments<sup>2</sup> that took place during the reporting period in order to realise the right to a healthy and protected environment?

### **2.2 Constitutional Obligations**

2.2.1 In what way do the above-mentioned legislative developments meet the constitutional obligation to *respect* the right to a healthy and protected environment?

2.2.2 In what way do the above-mentioned legislative developments meet the constitutional obligation to *protect* the right to a healthy and protected environment?

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<sup>1</sup> National departments should also respond to national policies implemented by provincial departments.

<sup>2</sup> Legislative developments referred to here include new legislation, reviews and amendments to legislation and Bills, but exclude technical amendments such as amendments to grammar.

2.2.3 In what way do the above-mentioned legislative developments meet the constitutional obligation to *promote and fulfil* the right to a healthy and protected environment?

### **2.3 Vulnerable Groups**

2.3.1 Identify which of the above-mentioned legislative measures made specific provisions for each of the vulnerable groups listed in 1.3.1.

2.3.2 How has each of these legislative measures catered for the respective vulnerable groups listed in 1.3.1?

2.4 What were the difficulties experienced in the implementation of these legislative measures?<sup>3</sup>

2.4.1 What measures has the department put in place to address these difficulties?

### **3. ADMINISTRATIVE ACTION**

3.1 Were there any administrative action(s) taken by the department, which resulted in the violation(s) of the right? If yes, elaborate on the nature of the administrative action(s) and the extent and impact of the violation(s).

3.2 How did the administrative action(s) result in the violation(s) of the right in question?

3.3 Identify and describe any measures that the department introduced to address and prevent the recurrence of the violation(s).

3.3.1 How effective were these measures?

### **4. MALADMINISTRATION AND/ OR CORRUPTION**

4.1 Were there any official complaint(s) of maladministration and/or corruption against the department relating to the realisation of the right during the reporting period? If yes, explain.

4.2 Identify and describe any measures that the department introduced to address and prevent maladministration and/or corruption?

4.2.1 How effective were these measures?

### **5. BUDGETARY MEASURES**

5.1 Provide information on the budget of the department as per table below:

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<sup>3</sup> National departments should also respond to national legislation implemented by provincial departments.

**TOTAL BUDGETARY ALLOCATION**

Year	Total revenue in Rand(s)	Total allocation in Rand(s)	Allocation as a % of GDP/GGP	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
1999 – 2000						
2000 – 2001						
2001 – 2002						
2002 – 2003						

5.1.1 Account for variances in the department’s budget for the periods indicated in the table above.

5.1.2 Was the budget adequate? If not, explain.

5.1.3 What measures were instituted to address budget inadequacy?

5.1.4 Was there any over or under-spending of the total revenue? If yes, explain.

5.1.5 What impact did over or under-spending have on the realisation of the right?

5.1.6 What measures has the department put in place to address this over or under-spending?

5.2 Provide information on the total budget for Waste Management and Pollution Control (including Waste Disposal) programmes as per table below:

**POLLUTION CONTROL AND WASTE MANAGEMENT**

Year	Total revenue in Rand(s)	Total allocation in Rand(s)	Allocation as a % of the department’s total revenue	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
1999 – 2000						
2000 – 2001						
2001 – 2002						
2002 – 2003						

5.2.1 Account for variances in the department’s budget for the periods indicated in the table above.

5.2.2 In making the allocations what considerations were given to the needs of:

- a) persons living in rural areas
- b) persons living in informal settlements
- c) persons living close to industries and waste disposal sites
- d) poor communities
- e) homeless persons
- f) workers exposed to toxic and hazardous substances
- g) historically disadvantaged racial groups

5.2.3 Was the budget adequate for the above-mentioned programme? If not explain.

5.2.3.1 What measures were instituted to address budget inadequacy?

5.2.4 Was there any over or under-spending for the programme/project? If yes, explain.

5.2.4.1 What impact did over or under-spending have on the realisation of the right?

5.2.4.2 What measures has the department put in place to address this over or under-spending?

5.3 Provide information on the total budgetary allocation for Nature Conservation by the department as per table below:

**NATURE CONSERVATION**

Year	Total revenue in Rand(s)	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
1999 – 2000						
2000 – 2001						
2001 – 2002						
2002 – 2003						

5.3.1 Account for variances in the department's budget for the periods indicated in the table above.

5.3.2 In making the allocations what considerations were given to the needs of:

- a) persons living in rural areas
- b) persons living in informal settlements
- c) persons living close to industries and waste disposal sites
- d) poor communities
- e) homeless persons
- f) workers exposed to toxic and hazardous substances
- g) historically disadvantaged racial groups

5.3.3 Was the budget adequate for the above-mentioned programme? If not explain.

5.3.3.1 What measures were instituted to address budget inadequacy?

5.3.4 Was there any over or under-spending for the programme/project? If yes, explain.

5.3.4.1 What impact did over or under-spending have on the realisation of the right?

5.3.4.2 What measures has the department put in place to address this over or under-spending?

5.4 Provide information on the total budgetary allocation for Soil Erosion Management by the department as per table below:

**SOIL EROSION MANAGEMENT**

Year	Total revenue in Rand(s)	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
1999 – 2000						
2000 – 2001						
2001 – 2002						
2002 – 2003						

5.4.1 Account for variances in the department's budget for the periods indicated in the table above.

5.4.2 In making the allocations what considerations were given to the needs of:

- a) persons living in rural areas
- b) persons living in informal settlements
- c) persons living close to industries and waste disposal sites
- d) poor communities
- e) homeless persons
- f) workers exposed to toxic and hazardous substances
- g) historically disadvantaged racial groups

5.4.3 Was the budget adequate for the above-mentioned programme? If not explain.

5.4.3.1 What measures were instituted to address budget inadequacy?

5.4.4 Was there any over or under-spending for the programme/project? If yes, explain.

5.4.4.1 What impact did over or under-spending have on the realisation of the right?

5.4.4.2 What measures has the department put in place to address this over or under-spending?

5.5 Provide information on the total budget for Capacity Building and Information Dissemination as per table below:

**CAPACITY BUILDING AND INFORMATION DISSEMINATION**

Year	Total revenue in Rand(s)	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
1999 – 2000						
2000 – 2001						
2001 – 2002						
2002 – 2003						

5.5.1 Account for variances in the department's budget for the periods indicated in the table above.

5.5.2 In making the allocations what considerations were given to the needs of:

- a) women
- b) older persons
- c) persons with disabilities
- d) female-headed households
- e) child-headed households
- f) persons living in rural areas
- g) persons living in informal settlements
- h) homeless people
- i) poor communities
- j) persons living to industries and waste disposal sites
- k) workers exposed to toxic and hazardous substances
- l) historically disadvantaged racial groups

5.5.3 Was the budget adequate for the above-mentioned programme? If not explain.

5.5.3.1 What measures were instituted to address budget inadequacy?

5.5.4 Was there any over or under-spending for the programme/project? If yes, explain.

5.5.4.1 What impact did over or under-spending have on the realisation of the right?

5.5.4.2 What measures has the department put in place to address this over or under-spending?



5.6 Provide information on the total budget for Technology and Support Services by the department as per table below:

**TECHNOLOGY AND SUPPORT SERVICES**

Year	Total revenue in Rand(s)	Total allocation in Rand(s)	Allocation as a % of the department's total revenue	Per capita allocation in Rand(s) after inflation adjustment	Projected expenditure in Rand(s)	Actual expenditure in Rand(s)
1999 – 2000						
2000 – 2001						
2001 – 2002						
2002 – 2003						

5.6.1 Account for variances in the department's budget for the periods indicated in the table above.

5.6.2 In making the allocations what considerations were given to the needs of:

- a) persons living in rural areas
- b) persons living in informal settlements
- c) homeless persons
- d) poor communities
- e) persons living close to industries and waste disposal sites
- f) workers exposed to toxic and hazardous substances
- g) historically disadvantaged racial groups

5.6.3 Was the budget adequate for the above-mentioned programme? If not explain.

5.6.3.1 What measures were instituted to address budget inadequacy?

5.6.4 Was there any over or under-spending for the programme/project? If yes, explain why.

5.6.4.1 What impact did over or under-spending have on the realisation of the right?

5.6.4.2 What measures has the department put in place to address this over or under-spending?

**6. INDICATORS**

6.1 Please provide information according to the tables below for the reporting period in question.<sup>4</sup>

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<sup>4</sup> Where information cannot be provided, please state this and give reasons thereof.

**INDICATORS: ENVIRONMENTAL**

	Total	Urban	Rural	African	Coloured	Indian	White
Number and percentage of people affected and harmed by atmospheric and water pollution							
Number and percentage of communities that experienced soil erosion							
Number and percentage of communities with inadequate recycling facilities							
Number and percentage of communities that lack environmentally friendly sources of heat and light							
Number and percentage of communities that experience industrial pollution							
Number and percentage of communities with inadequate sanitation facilities							

**6.2 National Action Plan**

6.2.1 The National Action Plan identifies numerous challenges with respect to environmental rights that need to be addressed.<sup>5</sup> Please provide information according to the tables below for the reporting period in question.

**WASTE DISPOSAL MANAGEMENT CHALLENGES**

	Total	Urban	Rural	African	Coloured	Indian	White
Number and percentage of communities with inadequate dumping sites							
Number and percentage of communities with ineffective refuse removal							
Number and percentage of communities that are exposed to hazardous waste disposal							
Number and percentage of communities contaminated by hazardous chemicals							
Number and percentage of communities affected by toxic waste imported into the country							
Number and percentage of communities affected by radioactive waste							

6.2.2 Please provide information on measures taken by the department to improve the rights in terms of indicators referred to above. What progress has been achieved by the department?

**7. PUBLIC AWARENESS**

7.1 What measures has the department put in place to raise awareness about the services rendered by the department to realise the right to a healthy and protected environment? How effective have these measures been?

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<sup>5</sup> Please answer questions that are within the competency of your department.

**8. MONITORING**

- 8.1 Describe how your department prepares its response to the Commission's economic and social rights protocols and the difficulties it experiences. How has the department addressed these difficulties?
- 8.2 Describe the department's internal mechanisms and measures used to monitor and assess the progressive realisation of the right to a healthy and protected environment and the difficulties it experiences. How has the department addressed these difficulties?
- 8.3 How could this process of monitoring and assessing the progressive realisation of the right to a healthy and protected environment be improved?
- 8.4 Provide the name(s), and designation(s) of the official(s) who compile the department's response.

**9. ADDITIONAL INFORMATION**

- 9.1 Provide any other information relevant to the realisation of the right to a healthy and protected environment.
- 9.2 In fulfilling this right, what other departments does the department work with?
- 9.3 Please advice on how the protocol could be improved.



