

HUMAN RIGHTS DEVELOPMENT REPORT



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FOREWORD

Our young democracy was born quite miraculously, some have said out of the ruins and the injustice of apartheid. Even with the support of a progressive Constitution and the goodwill of millions of our people, the task of giving effect to the vision of a just and caring society has been a formidable one. Responding to the legitimate expectations of a 'better life for all', dealing with the massive socio-economic disparities, and healing the deep scars left by apartheid has absorbed, consumed, and sometimes, even divided us in ways we did not foresee.

Underpinning all these endeavours has been a human rights framework bold in its vision, courageous in its breadth and forward looking in every conceivable way. It does not only provide the social and economic indicators and imperatives for the nation but also the moral compass that should guide our constitutional journey. The constitutional journey, undertaken through the agency of government, civil society, the courts, independent institutions and the citizenry, has been both eventful and vigorously contested. We may have embraced a common vision about a just and democratic society but the means to achieve that vision, the choices we have had to make, the process of mediating and adjudicating competing but legitimate claims and demands has certainly challenged us in fundamental ways about the meaning and our understanding of the constitutional imperative of being 'united in our diversity'.

Whether we are dealing with race, racism and discrimination the transformation of our economy and social system, the role and place of the criminal justice system, the interventions required to deal with historical disadvantage, South Africa's place and position in the international community, finding the balance between religion and free choice, determining the parameters of free speech or defining the limits of the right of association, we have had deeply contested and at times divisive debates shaped largely by our past and our particular entry point into the constitutional space. The debate has often been emotional, partisan and sometimes irrational.

The South African Human Rights Commission, as a constitutional body mandated to promote human rights and constitutional democracy has a duty to advance and promote genuine constitutional and human rights debate. In seeking to reach consensus on what we need to achieve as a nation, we have to create the space to hear a diversity of voices and views and through such discourse we have to identify the challenges we face and the interventions required to address them.

With the launch of this first Human Rights Development Report it is the wish of the South African Human Rights Commission to contribute to the ongoing dialogue that engages us on the human rights imperatives that form the basis of our constitutional order. We wish to encourage honest, robust critical reflection on the state of our society, the progress we have made, and the

shortcomings and under-achievements for which we must take responsibility. We seek to identify and critique the policy choices that have been successful and those that are less successful. We also seek to set the debate against the context of the letter and the spirit of the Constitution and to ensure that in all that we do there remains a fidelity to the Constitution and its values.

It is our hope that we will encourage those outside the South African Human Rights Commission to contribute and participate in this process.

I would like to thank the authors who contributed to the writing of the Human Rights Development Report, and those who contributed in the production process of the publication. We welcome your views on any matter relevant to this report as we are committed to ensuring that it becomes a relevant contribution to the advancement of human rights culture in our country.

Jody Kollapen
Chairperson

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ACRONYMS

AGRISA	Agriculture South Africa
AIDS	Acquired Immune Deficiency Syndrome
APRM	African Peer Review Mechanism
ATDs	Awaiting Trial Detainees
BAC	Business Against Crime
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment.
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEDW	Committee on the Elimination on of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESRC	Committee on Economic, Social and Cultural Rights
CCTV	Closed Circuit Television
CMW	Committee on Migrant Workers
COSATU	Congress of South African Trade Unions
CPF	Community Policing Forum
CRC	Convention of the Rights of the Child
CRPD	Convention of the Rights of Persons with Disabilities
DHA	Department of Home Affairs
HIV	Human Immune-Deficiency Virus
HRDR	Human Rights Development Report
HRC	Human Rights Committee
HSRC	Human Sciences Research Council
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPED	International Convention for the Protection of all Persons from Enforced Disappearance
ICRMW	International Convention on the Protection of all Migrant Workers and Members of their Families
JCPS	Justice, Crime Prevention and Safety Cluster and Government Communications
NAFCOC	National African Federated Chamber of Commerce
NCOP	National Council of Provinces
NGO	Non-Governmental Organisation
NPM	National Preventative Mechanism

OPCAT	Optional Protocol to the Convention against Torture
PAIA	Promotion of Access to Information Act
PGM	Provincial Gender Machinery
SAIRR	South African Institute of Race Relations
SAPS	South African Police Service
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WCAR	World Conference Against Racism, Xenophobia and Related Intolerances

INTRODUCTION TO HUMAN RIGHTS DEVELOPMENT REPORT

Jo Mdhlela

INTRODUCTION

What are human rights? In a country beset by so many inequalities, it would be a misnomer to look at human rights in isolation of socio-economic and political factors. If we have to ask this question, it cannot be successfully answered without contextualising it within the social, economic and political milieu – and many other factors that relate to the ‘exclusion’ and marginalisation of communities. In initiating the Human Rights Development Report (HRDR), the South African Human Rights Commission (Commission) hopes to achieve this objective by using the five chapters that constitute the HRDR to assess the progress that has been made towards addressing all that violates human dignity in South Africa. The focus will be on International Treaty Body Monitoring, Crime and Human Rights, Equality, Promotion of Access to Information and Poverty Discourse, and Human Rights in South Africa.

The real test for democracy must be determined by whether communities are able to lead their lives free from the threats of poverty and crime. As provided in section 32 of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), communities must have a sense in which they believe that access to information is not the privilege or the luxury of the wealthy and the powerful, but rather is a right that must be enjoyed by all. The development of a human rights culture helps communities to feel confident that their rights are wholly protected – even by the United Nations Treaty Bodies that include the Human Rights Committee (HRC); the Committee on Economic and Social and Cultural Rights (CESRC); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Elimination of Discrimination against Women; the Convention against Torture (CAT), the Convention on the Rights of the Child (CRC); and the Committee on Migrant Workers.

These instruments and structures are important as they give assurance to communities that they are protected against autocratic, undemocratic regimes and military juntas, among others, and that national governments are kept in check in terms of adhering to internationally recognised treaties, conventions and protocols.

In the South African context, what has 14 years of democracy meant for the country’s citizens? Undoubtedly, there have been positive gains, but there are still huge pockets of poverty and suffering; vulnerable communities are still unaware of their rights; many, including children and women, are victims of crime. Many have had their right to life and security threatened. The prevalence of crime is not only a threat to life itself, but greatly impacts on the quality of life. Many continue to be denied access to information – the right to which everyone is entitled. There is a dearth of awareness in this area and much more needs to be done by public bodies to educate

communities on the Promotion of Access to Information Act. Finally, many South Africans are denied access to economic and social rights and other rights essential to human dignity. They are shackled by crippling socio-economic conditions, and can barely eke out a decent, dignified existence.

The chapters in the HRDR will interrogate many of these human rights concerns as part of an assessment of where South Africa is as a nation, what progress has been achieved, the challenges as well as the panacea to meeting the obstacles that stand in the way of human rights being enjoyed by all.

The Commission, as a national human rights institution to promote and protect human rights, was established along the guidelines provided by the Paris Principles. Its mandate and powers are derived from section 184 of the Constitution of South Africa and the South African Human Rights Commission Act 54 of 1994. Its specific functions in terms of section 184 is to promote respect for human rights and a culture of human rights; to promote the protection, the development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa.¹ Section 184 (2) of the Constitution confers powers on the Commission to investigate and report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research as well as to educate the public on human rights. Concomitant, the Constitution in section 184 (3) specifically mandates the Commission to monitor the implementation of economic and social rights by the relevant state organs through requesting information on an annual basis on the measures that they have taken towards the realisation of these rights. The Commission's mandate is broad and its functions and powers range widely. At a practical level, its activities include gathering information from organs of state on an annual basis, holding investigations into specific human rights issues, and carrying out public awareness campaigns, education and training on human rights. In addition, the Commission's mandate extends to the monitoring and assessment of the implementation of the Promotion of Equality and Unfair Discrimination Act 4 of 2000 and the Promotion of Access to Information Act 2 of 2000.

The HRDR will reflect the Commission's vision on human rights, and its commitment to being the conscience of the nation in so far as the observance of human rights is concerned.

BACKGROUND

The five chapters constituting the Human Rights Development Report engage with various components of human rights, and reflect on what it means to be a society that subscribes to a human rights culture, as well as the consequences of human rights violations. The HRDR is an addition to the Commission's many reports, and will be published annually. It has been inspired by the knowledge that the Commission has a constitutional obligation to develop and promote a

¹ Section 184 (1) of the Constitution of the Republic of South Africa, Act 108 of 1996.

culture of human rights, and to track the progress of human rights development consistent with the provisions of section 184 of the Constitution. Another objective is to further the discourse of human rights in South Africa. This is an imperative aim as South Africa is a country with a deep rooted legacy of injustice, inequality and oppression. As a consequence, the majority of South Africans were left with festering social scars and deep wounds. Some progress has been made to address and correct the oppressive legislative framework but the journey to a more egalitarian society will only be realised when all issues of injustice and inequality have been eradicated. Fourteen years into democracy and South Africa continues to be an unequal society afflicted by racism, patriarchy and xenophobia whilst the scourge of crime and poverty threaten the very foundations of its fledgling democracy.

THE HRDR AND THE LEGISLATIVE FRAMEWORK

South Africa, prior to the ushering of democracy in 1994, was a country that lacked political credibility. As a result of its discriminatory policies, particularly those directed against black people, the country acquired pariah status and had a range of economic, cultural and social sanctions imposed upon it. The democratic dispensation of 1994 resulted in a new legislative framework informed by the principles of constitutional democracy with the founding provisions of the democratic South Africa based on the values of human dignity, non-racialism and non-sexism, supremacy of the Constitution and the rule of law, universal suffrage with a common national voters roll, regular elections and multi-party democratic government.

The Commission's work is to ensure that human rights are respected. Its work is strengthened by other international instruments including the Universal Declaration of Human Rights adopted and proclaimed by the United Nations General Assembly resolution 217 A (III) of December 1948, the African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity (OAU) on 27 June 1981, and the National Institutions for the Promotion and Protection of Human Rights (Paris Principles).

CONTENTS OF THE HUMAN RIGHTS DEVELOPMENT REPORT

The Human Rights Development Report seeks to give a perspective on a number of key development issues as dictated to by the Constitution and the Bill of Rights including issues on equality.

The report will reflect on issues of poverty, providing a broader perspective of what poverty is and its implications as a violator of human rights. It will also reflect on crime and its effects on the enjoyment of human rights, and determine the extent to which the Promotion of Access to Information Act impacts on the enjoyment of human rights, and what mechanisms there are to ensure that everyone benefits from the legislation.

The report will also enumerate and describe the functions of the current Treaty Bodies which include the Human Rights Committee (HRC); the Committee on Economic Social and Cultural

Rights (CESRC); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Elimination of Discrimination Against Women (CEDAW); the Convention Against Torture (CAT); the Convention on the Rights of Child (CRC) and the Committee on Migrant Workers. It will describe how these bodies contribute to the enjoyment of human rights, and how the Commission relates to these bodies in its function of fulfilling its constitutional obligations.

METHODOLOGY

The methodology used included collecting information from public entities and the use of desktop research.

CHAPTER SYNOPSIS

The chapters in this report will trace human rights development in South Africa and locate the challenges facing the country as it adapts to aspects of constitutional democracy after decades of inequality and injustice.

International Treaty Body Monitoring

In great detail, the chapter explains the committees that conduct the International Treaty Body Monitoring, their functions and how they carry out their obligations under the convention. The chapter discusses the core international human rights treaties currently in existence through examining developments by the Treaty Body, country reports that were considered and major themes emanating from these treaties and their significance to South Africa as well as developments in South Africa during 2007 that are of significance to Treaty Bodies.

Crime and Human Rights

The chapter gives an analysis of crime and the negative impact it has on the enjoyment of human rights. It argues that crime is contradictory to everything the Constitution stands for in terms of promoting respect for human rights and a culture of human rights.

Equality

The chapter on equality traces the origins of inequality as informed by colonial and apartheid regimes, and how over many years a person's racial classification determined their destiny in life. The chapter reflects on how the Commission and other chapter 9 institutions, using the Constitution and the legislation, continue to address these injustices. This serves as a backdrop for a critical engagement of the key developments of 2007 in race, gender and disability.

Access to Information

Celebrated as a milestone, the Promotion of Access to Information Act faces grave implementation impediments in the South African public sector. Considered against the backdrop of its policy and legislative framework, these implementation challenges are explored, with particular reference to compliance, application, enforcement and realisation of the right to access information. A commitment in political will can shift implementation to a priority agenda – but is

this sufficient? Emerging from the monitoring functions of the Commission in 2007, practical recommendations are proffered in response to identified challenges in implementation.

Poverty

The chapter on poverty argues that poverty is an affront to human dignity. In part, the chapter argues that the state is obligated by the Constitution to ensure that the minimum legal rights to social security, housing, education and water, among others, need to be satisfied in order to help the poor to 'escape extreme poverty and deprivation'. This chapter also describes the dual economy thesis and the advantages and disadvantages of this school of thought.

**CHAPTER ONE:
TREATY BODY MONITORING IN SOUTH AFRICA**

INTRODUCTION

The United Nations oversees a number of international treaties that bind state parties to protect and to take positive action to facilitate the enjoyment of basic human rights. By adopting these treaties, member states send a strong message to the world community about their commitment to defending human rights. This commitment is not only symbolic as states that ratify international human rights treaties must implement domestic measures and legislation compatible with their treaty obligations and duties.

To demonstrate their compliance, states must abide by the treaty guidelines and periodically report to the United Nations committees. Independent bodies of experts form the committees that monitor implementation by reviewing state reports and issuing concluding observations and recommendations. Although the exact reporting requirements vary, typically state parties must submit an initial report within one year of ratifying a convention. Periodic reports are subsequently due at regular intervals set by each committee. Additional reports may be required if state parties have acceded to any optional protocols.

In addition to reviewing state reports, the United Nations committees may issue General Comments to clarify treaty obligations and provide further guidance on the steps necessary for effective implementation. In 2007, the Human Rights Committee, the Committee on Economic, Cultural and Social Rights, the Committee Against Torture, and the Committee on the Rights of the Child, each issued General Comments regarding their respective treaties.

Some treaty bodies also provide a mechanism that allows individuals to file complaints against state parties when they believe their rights have been violated. Such communications must be considered in closed private meetings. When an individual files a complaint, the reviewing committee investigates the claim and gives the named state an opportunity to respond. After a thorough enquiry, the committee publishes its findings. However, a committee may only consider complaints regarding states that have agreed to be subject to this process.

In considering the year 2007, this report will discuss the core international human rights treaties currently in existence through examining developments by the treaty body, country reports that were considered and major themes of significance to South Africa and developments in South Africa during the year in relation to the treaty bodies. As of 2007, South Africa has ratified the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT); and the Convention on the Rights of the Child

(CRC). South Africa has ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD), but it has not yet entered into force.

The International Covenant on Economic, Social and Cultural Rights (ICESCR); the Optional Protocol to the Convention Against Torture (OPCAT); the International Convention on the Protection of All Migrant Workers and Members of their Families (ICRMW); and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) have yet to be ratified, although South Africa is a signatory to OPCAT.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The Human Rights Committee

The International Covenant on Civil and Political Rights (ICCPR) is a treaty that safeguards the right to life, liberty, and security; freedom from torture and slavery; equality before the law; freedom of movement, association, thought, religion and expression; privacy; and the enjoyment of culture. Additionally, two optional protocols to the Covenant establish an individual complaints mechanism and abolish the death penalty, respectively. The ICCPR, along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights, forms what is commonly known as the International Bill of Rights.

The Human Rights Committee (HRC) monitors the implementation of the ICCPR and its optional protocols. The HRC is composed of 18 independent experts who are elected to four-year terms and normally meets three times per year.² Nine new members of the committee commenced duties in January 2007, including the Commission's Deputy Chairperson, Dr Zonke Majodina.

Pursuant to the Covenant, state parties must submit an initial report within a year of ratification, and periodic reports afterward whenever the Committee requests (usually every four years). In 2007, the Committee considered 11 state reports, including those of Madagascar, Zambia, Sudan, Libya and Algeria.³ Common themes and issues that were of interest to the Committee may also concern South Africa. In particular, the HRC expressed disappointment over reports of violations of the rights of persons with mental disabilities, human trafficking, the relation of customary laws to women, and police treatment of detainees. The Committee also received a number of individual complaints throughout the year.

Recent Developments

In 2007, the HRC issued General Comment 32 to clarify the right to a fair trial and equality before courts, as established by Article 14 of the Covenant.⁴ According to this Comment, tribunals with faceless judges do not satisfy basic standards of a fair trial; tribunals must be independent and

² In 2007, the Committee held sessions in New York (12 – 30 March 2007) and Geneva (9 – 27 July 2007; October 2007 – 2 November 2007).

³ The Committee also considered reports from Chile, Barbados, the Czech Republic, Georgia, Austria, and Costa Rica. See General Comment No.32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007.

⁴ Human Rights Committee, Ninety-first session, 15 October – 2 November 2007.

impartial; and statements obtained under torture cannot be invoked as evidence except if they are used as evidence that torture occurred. Furthermore, appropriate measures must be taken to ensure that proceedings before religious and customary law courts meet the basic requirements of a fair trial and are limited to minor civil and criminal matters. The text also states that trials of civilians by military or special courts should be exceptional and limited to cases where the state party can show that resorting to such trials is necessary and justified.

South Africa and the Human Rights Committee

South Africa ratified both the ICCPR and its Optional Protocols on 10 December 1998. The Covenant entered into force in March 1999 and South Africa's initial report before the Committee was due in March 2000. South Africa has yet to appear before the Committee.

The Committee concluded the first individual complaint lodged by a South African citizen. After being seized with the individual complaint of Mr Gareth Prince since October 2005 the Committee released its view in October 2007.⁵ Prince, a law graduate and practising Rastafarian was refused permission to register for articles, a requirement to become an attorney, due to his two previous criminal convictions for possession of cannabis and his expressed intention to continue using the substance for religious purposes. The matter, having wound its way through the South African legal system up to the Constitutional Court, was not found in Prince's favour. Prince took the matter to the African Commission on Human and People's Rights under the African Charter and was unsuccessful too. The Committee also did not find in Prince's favour and stated that there were no breaches of articles 18 (1) (right to freedom, thought, conscience and religion), 26 (non-discrimination) and 27 (ethnic, religious and linguistic minorities rights) of the ICCPR.

Back in South Africa, Sunali Pillay was more successful with the Constitutional Court in February 2007 recognising her cultural and religious rights to wear a nose stud to school. In *KwaZulu-Natal MEC of Education v Pillay*,⁶ the Constitutional Court went on to uphold the High Court decision on appeal, ruling that prohibitions against wearing jewellery may result in indirect discrimination by allowing certain learners to express their religious and cultural identity freely while denying that right to others. According to Chief Justice Langa, the Constitution requires the community to affirm and reasonably accommodate differences, not merely to tolerate them as a last resort.⁷

In April 2007, the United Nations Special Rapporteur on Human Rights and Counter Terrorism, Martin Scheinin, conducted a ten day visit to South Africa at the invitation of the government. High-level meetings were held with ministers and officials responsible for foreign affairs, justice, defence, safety and security, intelligence, correctional services, and home affairs. During the visit, the Rapporteur also met with the Commission. The purpose of the visit was twofold: first, to examine South Africa's counter-terrorism laws, policies and practices and to assess their effect

5 Communication No. 1474/2006, CCPR/C/91/D/1474/2006, 31 October 2007.

6 CCT 51/06.

7 Ibid.

on the protection and promotion of human rights; and second, to examine the role South Africa plays in Africa in countering terrorism in the international context.⁸ In his findings the Special Rapporteur found that current immigration detention practices might raise issues concerning the right to personal liberty under Article 9 of the ICCPR. The Rapporteur recommended detention reform to allow mandatory judicial review of detention decisions, access to legal counsel, and the establishment of an independent body for oversight of immigration detention. With regards to the violence against Somali nationals, particularly in Cape Town, the Special Rapporteur encouraged South Africa to formulate clear policy objectives and concrete programmes for the eradication of xenophobia and inter-ethnic violence. The Rapporteur also recommended the insertion of a general non-refoulement clause in legislation, prohibiting the removal of a person from South Africa where there is the real risk of capital punishment, torture or any form of inhuman, cruel or degrading treatment or punishment.

January 2007 marked the release of the last eight death row prisoners in South Africa, commemorating a monumental step toward protecting human rights. From 1980 to 1989, South Africa executed 1109 prisoners and had the highest judicial execution rate in the world.⁹ In 1995, the Constitutional Court declared the death penalty unconstitutional¹⁰ and by November 2006 all death sentences had been replaced with alternate sentences.¹¹ Despite these significant achievements there are frequent calls for South Africa to reintroduce the death penalty given the persistently high levels of crime and the erroneous belief that it would act as a deterrent. The reintroduction of the death penalty would violate South Africa's obligations under the ICCPR's second Optional Protocol and would constitute a step backward for the protection of human rights in South Africa.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Committee on Economic Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects a range of economic, social, and cultural rights without prejudice to creed, political affiliation, gender or race. The Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the ICESCR, meets twice a year in Geneva, Switzerland. The CESCR is comprised of eighteen independent experts who are elected to four-year terms. In 2007, Mr Chandrashekhara Dasgupta (India), Ms Barbara Wilson (Switzerland), and Mr Daode Zhan (China) joined the Committee.

State parties to the ICESCR must submit an initial report within two years of ratification, and every five years afterward. The Committee considered reports from fifteen countries in 2007,

8 UN Special Rapporteur on Human Rights and Counter Terrorism issues preliminary findings on visit to South Africa, 26 April 2007" United Nations Press Release. Available online at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/2972818321758A90C12572C900476EA5?>, 15 November 2007.

9 See *S v Makwanyane and Another*, 1995 (3) SA 391 (CC).

10 *Ibid.*

11 "SA's Death Row now empty," *News24.com*. Available online at http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2038238,00.html, 30 November 2006.

including a report from Kenya.¹² A number of recurring themes in the Committee's observations are of particular relevance to South Africa, including discrimination against disadvantaged ethnic and linguistic groups; gender equality and gender-based violence; access to quality medical care; quality of education; alcohol and drug abuse; and the rights of people with disabilities.

Recent Developments

The Committee drafted and adopted in part a General Comment on Article 9 of the Convention regarding the right to social security, including social insurance. Also, the Joint Expert Group on the Monitoring of the Right to Education (JEG) is continuing its examination of the scope and meaning of 'free' and 'compulsory' primary education. It also explores ways to ensure non-discrimination and equal opportunities for boys and girls, including through temporary special measures and minority language education. Finally, the Committee adopted a statement on the "Evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant"¹³

During May 2007, the Committee held a meeting with 59 state parties to discuss a proposed unified standing treaty body to revise reporting guidelines and to harmonise the working methods of treaty bodies. An Optional Protocol, which would provide a mechanism for individual complaints, was also drafted.¹⁴

South Africa and CESCR

Although South Africa signed the ICESCR on 4 October 1994, it has yet to ratify the Covenant. There have been suggestions that South Africa has not ratified the ICESCR because it guarantees the right to work, which is not directly protected by the South African Constitution.¹⁵ A recent report by Parliament's joint Co-ordinating Committee on the South African Peer Review Mechanism countered that there "is no apparent reason for the country's failure to ratify the Covenant because it imposes no greater duties than the Constitution".¹⁶

Many of the issues South Africa faces regarding economic and social rights are relevant to the rights enshrined in the Covenant. Pertinent issues during 2007 included increasing income/wealth inequality, N2 gateway evictions, lack of housing and inability to process the housing waiting-list, school violence and the quality of education, prison overcrowding, medical care spending cuts, drug abuse, and service delivery protests. The provisions of the Covenant specifically address

12 The Committee also considered reports from Nepal, Hungary, the Netherlands (Antilles), Finland, Latvia, Costa Rica, Ukraine, San Marino, Belgium, Paraguay, Sweden, Philippines, Bolivia and Nicaragua.

13 (E/C.12/2007/1). Available online at <http://www.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf>, 10 May 2007.

14 Note on the 38th session of the Committee of Economic, Social and Cultural Rights, and its Pre Sessional Working Group, 21 – 25 May 2007, p.1. Available on line at <http://www.ohchr.org/english/bodies/cescr/docs/notes38session.pdf>, 30 April – 18 May 2007.

15 COSATU, COSATU Submission on The APRM Focus Area Of Corporate Governance, p. 6. Available online at <http://www.cosatu.org.za/docs/2006/corpgov.pdf>. 23 January 2006

16 National Assembly and National Council of Provinces Parliament of South Africa Joint Coordinating Committee on the African Peer Review Mechanism, A Response to the African Peer Review Mechanism. *Self-Assessment Questionnaire* Synopsis. Available online at www.pmg.org.za/docs/2007/070210adhocreviewreport.htm

many of these issues and ratification would be a powerful step toward showing South Africa's commitment to alleviating these concerns.

A number of legislative developments during 2007 relate to articles in the Covenant. For example, the South African legislature passed the Children's Amendment Bill, which strives to provide improved care and social services to children, including those living in child-headed households. The Act particularly emphasises the provision of resources and services in poor, rural areas. The Education Laws Amendment Bill revises the education system in order to provide education that is safer and of a higher quality than that currently available in many public schools.¹⁷ The Correctional Services Amendment Bill¹⁸ was also considered in 2007, but was not finalised. The debates on the Correctional Services Amendment Bill raised questions of prison conditions, the provision of anti-retroviral drugs to individuals upon release from prison, and the fairness of parole proceedings.

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The Committee on the Elimination of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is a comprehensive instrument prohibiting discrimination based on race or national origin, sex, language, or religion. The Committee on the Elimination of Racial Discrimination (CERD), which monitors the implementation of the ICERD, meets in Geneva twice a year for three-week sessions, normally in February and August.¹⁹ The Committee is composed of eighteen members, each of whom is elected for a term of four years. There is currently one South African member on the Committee, Ms Patricia Nozipho January-Bardill. Her term ends in 2008, although she may be re-elected if nominated.

State parties to the ICERD must submit an initial report within a year of ratification and every two years afterward. In 2007, the Committee examined fourteen state party reports, including the reports of Mozambique and the Democratic Republic of the Congo.²⁰ CERD made a number of recommendations, many of which may have applicability to current issues in South Africa. In particular, the Committee focused on the treatment of indigenous or aboriginal peoples, trafficking and violence against women, the failure to prosecute hate crimes, and discrimination against racial minorities and immigrants. This is notable because CERD made recommendations on similar issues regarding the need to implement effective measures to eliminate discrimination against foreigners after considering South Africa's report in August 2006. In 2007, the Committee also considered individual complaints brought against a number of countries.²¹

17 <http://www.pmg.org.za/bills/070920b33B-07.pdf> [B 33 B-2007] 19 September 2007.

18 <http://www.pmg.org.za/bills/070919b32B-07.pdf> [B 32B-2007] 18 September 2007.

19 <http://www2.ohchr.org/english/bodies/cerd/sessions.htm>.

20 The Committee also considered state reports from Israel, Antigua and Barbuda, Canada, the Czech Republic, India, Liechtenstein, The Former Yugoslav Republic of Macedonia, the Republic of Indonesia, the Republic of Korea, New Zealand, Kyrgyzstan and Costa Rica.

21 Specifically, individual complaints concerning Belize, Brazil, Nicaragua, the Philippines, Peru and Chile were

Recent Developments

The Committee held discussions on treaty body reform, heard updates on progress made in several working groups, and continued its work on a draft study on procedures. During the second session, it made several changes to its working methods, including the adoption of draft guidelines for reports to be presented by state parties under Article 9 of the Convention. The Committee was also briefed on follow up activities to the Durban Declaration and Programme of Action that was adopted at the World Conference Against Racism, Xenophobia and Related Intolerances (WCAR).

South Africa and CERD

South Africa signed the ICERD on 3 October 1994 and ratified it four years later on 10 December 1998.²² According to the Convention, state parties must file a report with the Committee within one year of joining the Convention and then every two years thereafter. South Africa's initial report was due in January 2000 while the second and the third reports were due in 2002 and 2004, respectively. However, the South African government decided to submit all three of these reports in one document in 2004.²³ These reports were examined during the 69th session of the CERD, and in August 2006, the Committee issued its observations and recommendations. At the time, the Committee requested that South Africa report on progress regarding hate crimes, hate speech, xenophobia and racist behaviour by 15 August 2007. At the close of 2007, this report was still not submitted.

There were no legislative developments in South Africa regarding racial discrimination during 2007. In particular, no new legislation on the issue of hate crimes or hate speech was proposed. Although a draft Hate Speech Bill was circulated in April 2004 it is unclear what became of the Bill. The proposed Bill would have prohibited the public advocacy of hatred against a person or groups of persons based on their race, ethnicity, gender or religion. South Africa continues to face difficulties in overcoming hate crimes and xenophobia.²⁴ Increasing numbers of hate crimes, including the rape and murder of two female lesbians in Soweto, were reported in 2007.²⁵ On 27 July 2007, the Commission hosted a roundtable to discuss the occurrence of hate crimes. The Commission is committed to continuing the public discourse on possible hate crime legislation.

The scourge of xenophobic attacks against non-nationals, and Somalis in particular, also remains a major concern for South Africa. Somali businesses have been ransacked and looted. At times, local communities have forcibly driven Somalis out of the townships. Some of these attacks have resulted in serious injury and even death. Many non-nationals were affected by attacks in Motherwell, Delareyville, Duncan Village, and Delmas. The Commission has been actively

considered.

22 <http://www2.ohchr.org/english/bodies/ratification/2.htm>.

23 http://www.sahrc.org.za/sahrc/cms/downloads/CERD_Shadow%20Report.pdf.

24 World Conference Against Racism Sept 2001 and National Conference against Racism, Xenophobia and Related Intolerances, August 2000.

25 S Sigaga and S Masooa, 7 July 2007.

involved in interventions and has spearheaded strategic interventions with various critical stakeholders.²⁶

In July 2007, the Department of Justice's Secretariat of the Forum on Racism hosted a consultative workshop in Durban²⁷ in order to further the process of implementing specific recommendations on combating xenophobia from the 2001 WCAR.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Committee On The Elimination Of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) establishes an International Bill of Rights for Women by defining gender equality and setting an agenda for state action to guarantee the enjoyment of equal rights. The Committee on the Elimination of Discrimination Against Women monitors the Convention and meets three times annually in New York in the United States of America. The CEDAW is comprised of 23 independent experts who are elected to four-year terms. During 2007, there was one South African member on the Committee, Ms Hazel Gumede-Shelton. Ms Ferdous Ara Begum (Bangladesh), Ms Saisuree Chutikul (Thailand), Ms Ruth Halperin-Kaddari (Israel) and Ms Violeta Neubauer (Slovenia) joined the Committee in 2007 as well.

Article 18 of CEDAW requires each state to submit a report within one year of ratification and regular periodic reports afterward. In 2007, the Committee examined a number of state reports, including that of Kenya. In concluding observations, the Committee expressed concern about violence against women, prostitution and trafficking and women's health. The Committee also noted its disappointment over Kenya's rejection of a draft constitution because it included gender equity provisions and criticised Kenya for not updating its gender equality legislation as required by the treaty. It expressed concern about the prevalence of polygamy and the number of regimes governing marriage in Kenya. Although South Africa's Constitution includes gender equality, the Committee's concerns regarding polygamy and the marriage regimes are relevant to South Africa due to the popularity of traditional laws in the country.

South Africa and CEDAW

South Africa signed the Convention in January 1993 and ratified CEDAW in December 1995.²⁸ As of May 2007, South Africa's second and third periodic reports were overdue with the respective due dates of 14 January 2001 and 14 January 2005.²⁹

26 Department of Home Affairs, UNHCR, SA Police Service, the South African Council of Churches, Islamic Relief, ANC ward councillors, Somali and community of Motherwell.

27 According to the Director, Adv N Mogale, the secretariat aims at hosting a similar workshop for the remaining provinces in the near future. The National Plan of Action therefore remains a work in progress.

28 UN Division for the Advancement of Women CEDAW States Parties Chart, <http://www.un.org/omenwatch/daw/cedaw/states.htm>.

29 Status of submission of reports by States parties under Article 18 of the Convention, United Nations CEDAW Committee 39th session.

Whilst there is progress in the area of gender equality, violence against women, particularly in the form of sexual and domestic violence, remains a considerable threat.³⁰ Furthermore, women remain economically disempowered as significant salary discrepancies between women and men persist.³¹ Political parties still consider gender equity issues a priority, publicly noting that women have not fully realised the freedoms guaranteed in the Constitution.³² In December 2007, at its conference in Polokwane, the ANC discussed the 50/50 gender principle, which would require that every alternative position available for leadership be reserved for a female candidate, with an amendment to the ANC constitution that gender equity applies to the National Executive Committee (NEC) as a whole and not in alternative positions. Thus it need not be the case that the parties' top six office-bearing officials necessarily include women.³³

Parliament's Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women had a diverse programme during 2007, including briefings on the implementation of the Civil Union Act, the impact of Equality legislation on women's lives, and the constitutional court judgment that extended the definition of rape.³⁴

The long awaited Sexual Offences Bill was finally passed in December 2007 at the culmination of the annual 16 days of Activism in opposition to violence against women and children. The Bill amends the old Sexual Offences Act of 1957 and provides significant changes to the common law definition of rape. It extends the act of rape to include men and boys and codifies the offences of rape, sexual violence and oral genital violence. The new law also introduces a range of crimes that relate specifically to the sexual exploitation of children and persons with mental disability. The announcement of the legislation was marred by a furore from teenagers who claimed that the Act criminalised young persons between the ages of 12 and 16 years who kiss in public. Protestation was voiced through the internet social network web site, "Facebook" and at shopping malls throughout the country.³⁵

During 2007, the South African government acknowledged that the National Gender Machinery was not functioning as desired. In an effort to address this challenge, the government undertook efforts to revitalise the national machinery.³⁶ In 2005, the process of establishing a Provincial

30 *The Mail & Guardian* "Reporting Rape Equals Being Raped Again in Court" [10 August 2007] http://www.mg.co.za/articlePage.aspx?articleid=316315&area=/breaking_news/breaking_news__national/; *The Cape Argus* "Police Not Enforcing Domestic Violence Laws" [29 October 2007] <http://www.capeargus.co.za/index.php?fArticleId=4103999>.

31 "Gender Commission Focuses on Salary Discrepancies" *Mail & Guardian*. Available online: http://www.mg.co.za/articlePage.aspx?articleid=309287&area=/breaking_news/breaking_news_national/, 23 May 2007.

32 "Buthelezi: Gender Equality a Priority for IFP," *Mail & Guardian*, Available online: http://www.mg.co.za/articlePage.aspx?articleid=324582&area=/breaking_news/breaking_news_national/, 11 November 2007.

33 "Gender parity plan in trouble," *M&G Online*, available at http://www.mg.co.za/articledirect.aspx?articleid=328074&area=anconference_insight, 19 December 2007.

34 For a full list of the Committee's 2007 meetings go to: <http://www.pmg.org.za/minutes.php?q=2&comid=43>

35 'Angry SA teens plan mass kissing protest' *Independent Online* available at http://www.iol.co.za/index.php?set_id=1&click_id=3045&art_id=vn20071228110459992C98717, 28 December 2007.

36 Provincial Gender Machinery Draft Framework document, Lizelle Henn, PGM Coordinator. The Gender Advocacy Programme.

Gender Machinery (PGM) began. During the past year, the process gained momentum and the PGM is set to be launched in 2008.³⁷

The Constitutional Court is currently in the process of hearing the case of Shilubana and Others v Nwamita.³⁸ This case addresses fundamental questions regarding the relationship between traditional customary law and the Constitution and courts of law.³⁹ Tinyiko Phyllia Shilubana, the complainant, was next in succession to the position of *hosi* (chief), but she was sidelined by her cousin Sidwell Nwamita because the community believed in male succession.⁴⁰ Shilubana argued that because the Constitution overrides customary law, lineage cannot be based on gender and should therefore be restored to her side of the family. Due to multiple postponements of the case, judgment has not been rendered, as of the end of 2007.

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT

The Committee Against Torture

The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT) is an international human rights instrument that requires states to implement measures to prevent torture within their jurisdiction and forbids them to return persons to a country where there is reason to believe they will be tortured. The Committee Against Torture, which monitors CAT, meets twice a year in Geneva, Switzerland.⁴¹ In October 2007, Myrna Kleopas (Cyprus) and Abdoulaye Gaye (Senegal) were elected to replace those delegates whose terms of office expired on 31 December 2007.⁴²

State parties to CAT must submit an initial report within a year of ratification, and every four years thereafter. During 2007, the Committee Against Torture considered thirteen state reports.⁴³ Although none of the reports considered came from African states, a number of issues that concerned that Committee are of interest to South Africa. The Committee was concerned that state parties had not criminalised torture in domestic law and that detained criminal suspects were subject to abuse. Other concerns included insufficient training regarding the provisions of the Convention for law enforcement personnel and difficulties of asylum seekers. The Committee

37 Ibid.

38 *Shilubana and Others v Nwamitwa* CCT3/07 (unreported 8 June 2007 Judgment).

39 *Ibid.* In the High Court and the Supreme Court of Appeals the respondent prevailed. Both courts allowed traditional customary laws to prevail. The courts observed that the Bill of Rights recognizes the existences of other rights and freedoms conferred by customary law to the extent they do not conflict with the Bill of Rights. The courts held that the patrilineal succession and male primogeniture do not conflict with the Constitution or any legislation involving customary law. Further, the court recognized a constitutional duty to apply customary law when valid and not in conflict with the constitution. *Nwamitwa Shilubana v Nwamtaw* [2006] SCA 174 (RSA).

40 *Independent Online*. Woman chief case scrapes into Concourt.

http://www.iol.za.org/index.php?set_id=1&click_id=13&art_id=nw20071127120812236C350166, 27 November 2007.

41 In 2007, the first session was held from 30 April–18 May; the second took place from 5 November – 23 November.

42 An additional three members of CAT, including Felice Gaer (United States of America), Luis Gallegos Chiriboga (Ecuador), and Claudio Grossman (Chile), were re-elected to the Committee at that time as well. See <http://www2.ohchr.org/english/bodies/cat/docs/electionscat.doc>

43 The Committee considered reports from of Denmark, Luxembourg, Italy, the Netherlands, Ukraine, Japan, Poland, Latvia, Uzbekistan, Norway, Estonia, Portugal and Benin.

also considered individual communications and reviewed its methods of work, particularly in the context of ongoing reform of the human rights treaty bodies.

Recent Developments

In the November 2007 session, the CAT adopted a General Comment on Article 2 of the Convention,⁴⁴ which requires state parties “to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”⁴⁵ The General Comment reinforces CAT’s absolute prohibition against torture, stating that “no exceptional circumstances whatsoever may be invoked by a state party to justify acts of torture”. This non-derogable prohibition includes both threats of terrorist acts and violent crime as well as international and domestic armed conflict. Additionally, the General Comment emphasises states’ obligations to prevent and redress torture by making the offence of torture punishable under domestic criminal law.

OPCAT and the Sub-committee on Prevention of Torture

The Optional Protocol to the Convention Against Torture (OPCAT) was introduced in January 2003 to prevent torture by establishing a system of regular visits to places where violations are known to occur frequently.⁴⁶ February 2007 marked the inaugural meeting of the United Nations Sub-committee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment, following OPCAT’s entry into force on 22 June 2006. The ten-member⁴⁷ sub-committee has the power to make unannounced visits to places of detention in those countries that have ratified the OPCAT. The mandate of the sub-committee enables it to complement the existing framework to combat torture, that is, the Committee Against Torture, the Special Rapporteur on Torture, as well as the Voluntary Fund for Victims of Torture. On 20 November 2007, the CAT and sub-committee held their first joint meeting.

South Africa, CAT and OPCAT

South Africa has been a state party to CAT since August 1998. Despite signing the OPCAT on 20 September 2006, South Africa has yet to ratify the Optional Protocol and there appears to be little movement towards this. Apart from its obligations under the Convention Against Torture, South Africa and other African states are also encouraged by the Robben Island Guidelines, adopted by the African Commission on Human and Peoples’ Rights in October 2002, to put mechanisms and processes in place to prohibit torture, criminalise torture, investigate allegations of torture, and to respond to the needs of victims of torture.

44 CAT/C7GC/2/CRP.1/Rev.3, as amended.

45 Article 2, paragraph 1 of the Convention Against Torture.

46 Article 1 of OPCAT.

47 Silva Casala (United Kingdom), Leopoldo Torres Boursault (Spain), Miguel Sarrel Iguiniz (Mexico), Mario Luos Coriolano (Argentina), Zdenek Hajek (Czech Republic), Hans Draminski Petersen (Denmark), Victor Manuel Rodriguez Rescia (Costa Rica), Zbigniew Lasocik (Poland), Wilder Tayler Souto (Uruguay) and Marija Definis Gorjanovic (Croatia).

In April 2007, the alleged terrorist Khalid Rashid who disappeared after being handed over by the South African government officials to agents of the Pakistan government in November 2005, finally appeared after 18 months of secret detention.⁴⁸ Concerns were raised during 2006 when it was alleged that the South African government breached its obligations in terms of Article 3 of the CAT through participating in the enforced disappearance of and exposing Rashid to the risk of torture.⁴⁹ Rashid broke his silence in 2007 and contradicted the claims made by the South African Department of Home Affairs that he was deported as an illegal immigrant in terms of standard procedure.⁵⁰ Rashid claimed that whilst in South Africa, he was held incommunicado, was denied access to a lawyer or contact with the Pakistani embassy and was tricked into waiving his right to challenge his deportation.⁵¹

Although South Africa has demonstrated commitment to eradicating torture by ratifying CAT, torture continues to be an issue of concern. During the last two years, the number of unnatural deaths of prisoners increased from 30 to 62 in South African prisons.⁵² Furthermore, deaths as a result of police action increased from 315 cases for the 2005–2006 reporting period to 439 cases for the 2006–2007 reporting period.⁵³ Recent examples include the alleged torture and intimidation of five accused armed robbers in the notorious Booyens police station⁵⁴ and repeated assaults on a Pastor and his son in the Grahamstown police station.⁵⁵ In both cases, torture was used in an attempt to obtain a confession.

The criminalisation of torture in South Africa is also a necessary tool in holding non-state actors accountable for such acts. There are a number of examples of incidences that may well fall within the international definition of torture. For example, an Mpumalanga primary school teacher, Zandile Nkosi, is currently on trial for attempted murder and abduction after allegedly torturing an “unruly” 11 year-old pupil whom she accused of stealing her handbag. She called in the help of other adult men who then beat the boy. According to a news24.com report, the boy was “repeatedly dunked head-first into the Crocodile River. Molten plastic was systematically dripped all over his bare body and genitals. He was also repeatedly burned with cigarettes.”⁵⁶ As a result, the boy continues to suffer from grave physical and psychological harm. Other such incidents include the case of two youths who allegedly poured boiling water over the head and genitals of a

48 *Mail & Guardian*. (24 August 2007). “Rendered Rashid speaks.” Available online at http://www.mg.co.za/articlePage.aspx?articleid=317418&area=/insight/insight__national/

49 “Pakistan/South Africa: Khalid Mehmood Rashid appears after 18 months of secret detention’ *Amnesty International Press Release* available online at <http://www.amnesty.org/en/library/info/AFR53/003/2007>, 17 April 2007.

50 *Mail & Guardian*. “Rendered Rashid speaks.” Available online at http://www.mg.co.za/articlePage.aspx?articleid=317418&area=/insight/insight__national/, 24 August 2007.

51 *Ibid.*

52 “ Report Card: Cabinet ministers from A to G” *Mail & Guardian*, available online at http://www.mg.co.za/articlePage.aspx?articleid=328230&area=?insight/insight__national/, 21 December 2007.

53 *Ibid.*

54 *The Pretoria News*. “Prisoners ask not to be tortured.”; A 2005 SABC Special Assignment programme captured six police officers from Booyens police station extorting bribes for the release of illegal immigrants, 30 October 2007.

55 <http://www.grocotts.co.za/article.php?aID=1112>

56 <http://www.news24.com/News24/0,,21386881,00.html>

two year old, causing him serious injury;⁵⁷ and the “night of barbaric torture and humiliation” visited upon an elderly man and his son during a robbery in Laudium.⁵⁸

Despite these alarming incidents during 2007, there were no legislative responses or developments in South Africa regarding torture. In October 2007, however, the Commission held an inaugural meeting of its Section 5 Torture Committee to advise and to co-ordinate efforts to raise awareness and advocate for the criminalisation of torture and the establishment of a National Preventative Mechanism. Additionally, the Commission submitted a comment on the Special Rapporteur’s Counter-Terrorism Report on 13 December 2007, taking advantage of new United Nations Human Rights Council procedures that permit statements to be made in Council proceedings.

CONVENTION ON THE RIGHTS OF THE CHILD (CRC) (1989)

The Committee on the Rights of the Child

The Convention on the Rights of the Child (CRC) is a comprehensive instrument that sets out rights and defines universal principles and norms regarding the status of children. There are two Optional Protocols to the CRC. The first requires state parties to criminalise the sale of children, child prostitution, child pornography, and certain associated activities and to take measures to ensure prosecution. The second optional protocol focuses on halting the active participation of children under the age of eighteen in warfare and keeping them out of the armed forces entirely. The Committee on the Rights of the Child monitors the CRC and the two optional protocols to the convention.⁵⁹ The Committee meets three times a year in Geneva, with each session consisting of a three-week plenary and a one-week pre-session working group.⁶⁰ The Committee is composed of eighteen members, each of which is elected for a term of four years.⁶¹

State parties must submit regular reports to the Committee with the initial report due two years after acceding to the Convention and then every five years thereafter. During 2007, the Committee examined 28 state reports including those of Kenya, Mali and Sudan.⁶² Several common themes that emerged and are applicable to current South African domestic issues include the high rate of HIV infection among children, female genital mutilation, physical and

57 “Torture attack earns accused 27 years in jail,” *Mail & Guardian Online* available online at http://www.mg.co.za/articlePage.aspx?articleid=323420&area=/breaking_news/breaking_news_national/, 29 October 2007.

58 *Mail & Guardian Online*. “Boys in court over alleged torture of toddler.” Available online at http://www.mg.co.za/articlePage.aspx?articleid=322363&area=/breaking_news/breaking_news_national/, 18 October 2007.

59 General Comment No 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child, p.6 (2005).

60 <http://www2.ohchr.org/english/bodies/crc/index.htm>

61 Nine members were re-elected in 2007: Ms Agness Akosua Aidoo (Vice-Chair, Ghana); Mr. Luigi Citarella (Italy); Mr. Kamel Filati (Vice-Chair, Algeria); Ms Lothar Friedrich Krappmann (Rapporteur); Ms. Rosa Maria Ortiz (Vice-Chair, Paraguay) and Mr Dainius Puras (Lithuania).

62 During the first session of 2007, the Committee considered the state reports of Kenya, Mali, Honduras, Marshall Islands, Suriname, Malaysia and Chile. During the second session in 2007, the Committee considered and issued observations and recommendations about the state reports of Slovakia, the Maldives, Uruguay, Kazakhstan, Sudan, Guatemala, Ukraine, Bangladesh, Monaco, Norway, Sweden and Guatemala. In the final session of 2007, the Committee considered the state reports of Venezuela, Bulgaria, France, Spain, Croatia, Lithuania, Luxembourg, Qatar, and Syria.

sexual abuse of children, and child prostitution. The CRC cannot consider individual complaints, although child rights concerns may be raised before other committees with competence to consider these complaints.⁶³

Recent Developments

During 2007, the Committee adopted a General Comment regarding children's rights in juvenile justice. Noting that the CRC requires states to "develop and implement a comprehensive juvenile justice policy," the Comment aims to encourage states to develop a comprehensive policy, provide them with guidance on how to implement such a policy, and promote the adoption of other international standards within the developed policy.⁶⁴ The Committee emphasises that such a policy must rely on principles of non-discrimination, the best interests of the child, the right to life, survival, and development; the right to be heard, and dignity.⁶⁵ Core elements of a comprehensive juvenile justice policy include the prevention of juvenile delinquency, intervention/diversion, age and children in conflict with the law, guarantees for a free trial, measures, and deprivation of liberty, before and after trial.⁶⁶

The Committee also emphasised the importance of the Study on Violence Against Children and encouraged state parties, including South Africa, to raise awareness and ensure adequate institutional capacity to implement recommendations contained in the Study.⁶⁷ In addition, the Committee gave support to the Machel Study 10-Year Strategic Review which addresses, amongst other issues, children used in armed conflict. The Committee agreed to improve current working methods and create greater efficiency and effectiveness. Lastly, the Committee collaborated with other human rights institutional bodies and participated in annual Inter-Committee meetings among the treaty bodies.

South Africa and the CRC

South Africa signed the CRC on 29 January 1993 and ratified it two years later, on 16 June 1995.⁶⁸ After ratifying, South Africa presented its initial report to the Committee in November 1997.⁶⁹ In May 1999, the NGO sector, led by the National Children's Rights Committee, presented their First Supplementary Report to the Committee.⁷⁰ Both the government and civil society were commended for their initial reports.⁷¹

63 <http://www2.ohchr.org/english/bodies/crc/index.htm>

64 See General Comment No. 10, Section II: The Objectives of the Present General comment, CRC/C/GC/10, 25 April 2007.

65 *Ibid.*, Section III: Juvenile Justice: The Leading Principles of a Comprehensive Policy.

66 *Ibid.*, Section IV: Juvenile Justice: The Core Elements of a Comprehensive Policy.

67 UN Study on Global Violence against Children: 2005, This study provides for the first time a comprehensive global view of the range and scale of violence against children.

68 <http://www2.ohchr.org/english/bodies/ratification/11.htm>

69 "Presentation of the South Africa Country Progress Report on the Implementation of the Convention on the Rights of the Child" at <http://www.gcis.gov.za/media/minister/000125.htm>.

70 *Ibid.*

71 South Africa's 2nd Children's Rights Country Report to the UN Committee on the Rights of the Child: 2006.

South Africa also ratified the first and second optional protocols on 30 July 2003 and 8 February 2002, respectively. During this period the Committee made its observations and recommendations and posed questions to the government. South Africa responded to these questions in its Supplement to the Initial Country Report, which is a follow-up to the Initial Country Report of January 2000.⁷²

South Africa's second country report was due in the year 2002 and the third country report was due in the year 2007. At the end of 2007, both reports were still outstanding. Despite indications that the second country report would be submitted during 2007, this did not occur. South Africa has also not complied with its Optional Protocol reporting requirements.

During 2007, there were several significant legislative developments in South Africa regarding children's rights. The Sexual Offences Act⁷³ redefines sexual crimes against adults and children and creates a range of new sexual offences against children in the areas of exploitation, trafficking, and child pornography. There are concerns that the Act does not go far enough in protecting child witnesses in sexual offence cases.⁷⁴

The Children's Amendment Bill made its way through Parliament during the course of 2007. The Bill addresses the right to family or appropriate alternative care; social services; and protection from abuse or maltreatment. The National Assembly passed the Children's Amendment Bill on 6 November 2007. However, moments prior to passing the Bill, the Assembly removed a prohibition on the use of corporal punishment in the home, purportedly for technical reasons. The Bill is yet to be finalised by the Parliament's Second House, the National Council of Provinces (NCOP). The Commission has been very active in its support for a total ban on corporal punishment.⁷⁵

In late December 2007 the long awaited Child Justice Bill was returned to Parliament, and it is anticipated that it will be processed during 2008. The Bill focuses on restorative justice, keeping young offenders out of prisons, integration of young offenders into families and communities, and diversion. The Bill is important considering the ongoing concerns for the high numbers of children in prisons.⁷⁶

During 2007, the Department of Social Development worked on developing a yet to-be-finalised strategic framework for children with disabilities. Also, the National Task Team on Child Abuse and Neglect is in the process of developing a strategy document. The Commission is involved in both of these processes.

72 See "Implementation of the Convention on the Rights of the Child" at <http://www.children.gov.za/Publications/policies3.htm>.

73 Sexual Offences Act [Act 32 of 2007], available online at http://www.southafrica.info/public_services/citizens/your_rights/sexual-offences-bill3.htm

74 Lee Rondganger, *Tough new sex law means no more teen kisses*, Cape Times, p. 1, 17 Dec. 2007.

75 http://www.sahrc.org.za/sahrc/cms/publish/article_283.shtml

76 <http://fs/www.childlinesa.org.za/ChildrensRights.htm>

The violation of children's rights continues to receive media attention. In October 2007, a newspaper exposé revealed that children were being mistreated at the Soweto Chris Hani-Baragwanath Hospital.⁷⁷ The article alleged that several newborn babies were placed in cardboard boxes as a result of budget cuts at the hospital. In addition, the hospital recorded a large number of maternal and infant deaths in 2006 and 2007. The Commission continues to receive a number of child rights violations related to equality and access to social security.

INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

The Committee on Migrant Workers

The International Convention on the Protection of All Migrant Workers and Members of their Families (ICRMW) firmly establishes the economic, social, cultural, civil and political rights of all persons who are currently engaged or will engage in employment in a country of which they are not a national. The Committee on Migrant Workers (CMW) monitors the ICRMW and it is the newest treaty body of the United Nations. The ICRMW entered into force on 1 July 2003 and the CMW held its first session in March 2004. The CMW is comprised of ten committee members and meets once a year in Geneva, Switzerland. One new member, Ms Myriam Poussi Konsimbo (Burkina Faso), was elected to the Committee and commenced duties in 2007.

State parties must report to the CMW one year after acceding to the Convention and every five years thereafter. In 2007, the Committee only reviewed the state report of Ecuador. After considering this report, the CMW emphasised the need to protect particularly vulnerable groups of migrants, especially children, and recommended that steps be taken to eliminate hazardous forms of labour for migrant children, to prevent commercial sexual exploitation of migrant children, and to ensure that migrant children involved in trafficking and/or prostitution are properly treated as victims. In the future, the Committee may also be able to consider individual complaints, pending the acceptance of this procedure by at least ten state parties.

South Africa and the ICRMW

South Africa has neither signed nor ratified the ICRMW and is thus not bound by the Convention's obligations. Nationals of neighbouring African countries, particularly Zimbabwe, Mozambique, and Lesotho continue to migrate in large numbers to South Africa due to its relative prosperity in the region. Although the Immigration Act⁷⁸ seeks to limit this trend by setting out stringent admission criteria, many who do not meet these requirements still enter the country and work illegally. Undocumented workers are often relegated to menial jobs in hazardous conditions where they are increasingly vulnerable to abuse and exploitation due to an inability to seek recourse from the authorities because of their immigration status.

77 http://www.sahrc.org.za/sahrc_cms/publish/article_282.shtml

78 No 13/2002.

Undocumented migrants who are detected by the authorities are returned to their countries of origin, often passing through the Lindela Detention Centre. The Commission in conjunction with non-governmental organisations monitors the conditions of detention. However, a number of complaints of prolonged detentions continue to be received.⁷⁹ In May 2007, the Commission assisted a group of 40 Ethiopians who had been detained in Lindela for more than the requisite 90 day period as set out in the Immigration Act.⁸⁰

In August 2007, the Commission undertook a fact-finding and monitoring visit to the Zimbabwe-South Africa border area and visited a holding facility, located just outside Musina town, run by the South African Police Service (SAPS) to detain undocumented migrants pending deportation. The Commission noted and brought to the attention of both the SAPS and the Department of Home Affairs (DHA) that the police were irregularly carrying out deportations whilst this function belongs to the DHA. This has since been rectified.

There is no official regular monitoring system of places of detention although some monitoring is currently carried out by the Commission and local non-governmental organisations and advice offices. Authorities are currently building a bigger facility to accommodate the increasing numbers of Zimbabweans who are arrested, detained, and deported.⁸¹

UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Recent International Developments

The Convention on the Rights of Persons with Disabilities is a treaty that ensures that persons with disabilities are able to exercise the same rights as all other persons and receive the accommodation required to do so. The Convention was opened for signing on 30 March 2007. South Africa signed the Convention and its Optional Protocol that same day and ratified these instruments on 30 November 2007.⁸² As of 31 December 2007, 120 countries signed the Convention and 14 ratified it.⁸³ The Optional Protocol has been signed by 67 countries and ratified by eight.⁸⁴

The Convention will come into effect when it has been ratified by 20 countries.⁸⁵ The Committee on the Rights of Persons with Disabilities will be formed at that time.⁸⁶ As one of the first 20

79 Statistics from Lindela/DHA for Jan-Oct 2007, with one person detained for 527 days. Reasons mainly relate to the difficulties of national verification, lack of cooperation by foreign embassies or the stringent rules they have in what type of assistance to render their nationals who are in contravention of South African's immigration laws.

80 Section 34 of the Immigration Act 13/2002.

81 IRIN "Stop Zimbabwean deportations say refugee organizations" <http://www.irinnews.org/report> notes that from Jan-July 2007, 117737 people were processed as deportees on the Zimbabwean side

82 United Nations Enable, Countries that have Ratified the Convention, <http://www.un.org/disability/default.asp?id=257>. United Nations Enable, Countries, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166>. The other 13 countries to have ratified the Convention are: Bangladesh, Croatia, Cuba El Salvador, Gabon, Hungary, India, Jamaica, Mexico, Namibia, Nicaragua, Panama, Spain. United Nations.

83 United Nations Enable, Countries, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166>. The other countries to have ratified the Optional Protocol are: Croatia, El Salvador, Hungary, Mexico, Namibia, Panama and Spain. *Id.* United Nations Enable, Countries, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166>

84 Convention on the Rights of Persons with Disabilities, Art. 45(1)

85 *Idem*, Art. 34.

86 *Ibid*

countries to ratify the Convention, South Africa will be able to nominate its nationals as committee members to the initial committee.⁸⁷ Countries will be required to submit reports to the Committee a minimum of every four years, with additional reports required if requested by the Committee.

South Africa and the UNCRPD

During 2007, various government and non-governmental organisations in South Africa have been involved in raising awareness around the Convention and disability rights. For example, the Western Cape celebrated the International Day of Persons with Disabilities with a large event and a march protesting the failure of business to achieve employment targets for persons with disabilities. The Commission also designed a Toolkit for training and awareness raising on the Convention, which was launched at a conference in December.

There is urgent need to redress violations of disability rights. Children with disabilities, for example, often face major barriers to education, including the refusal to accommodate them in mainstream schools. There are also insufficient places available in special schools, particularly for learners with multiple disabilities. There are also long delays in processing the necessary paperwork for admittance to these special schools.⁸⁸

Physical accessibility for persons with disabilities continues to be a major challenge in South Africa. Despite legislation, inaccessible buildings continue to be constructed. Additionally, the public transportation system is virtually impossible for persons with paraplegia.⁸⁹ As a result, a report in 2007 stated that it is "highly unlikely that South Africa's government and tourism industry would be ready to accommodate an estimated one million disabled visitors to the 2010 World Cup."⁹⁰

Employment also continues to be a major area of concern, with the 2007 Employment Equity Report finding that persons with disabilities made up only 0.3% of persons who were recruited during the report period. An estimated "1.4 million people receive disability grants, but the department has determined that as many as 64 percent of them could actually work if there were opportunities for them."⁹¹ Bias against persons with disabilities is also evident. For example, a 2007 study found that South Africans underestimate the capacity of persons with mental disabilities.⁹²

87 *Idem*, Art. 35(2).

88 See, e.g., Candes Keating, Special Needs Facilities Dwindle, Cape Argus, 4 Feb 2008, p. 4 (discussing ongoing problems with special needs education in the Western Cape).

89 Tsabeng Nthite, We're in cul-de-sac with taxis, say disabled, page 2 of *Pretoria News* on December 20, 2006 http://www.iol.co.za/index.php?set_id=1&click_id=594&art_id=vn20061220025834687C151891 (discussing the situation of a man who was refused access by a taxi); Melanie Peters, Disabled 'have very little to celebrate', IOL 2 Dec 2007 at http://www.iol.co.za/index.php?set_id=1&click_id=3045&art_id=vn20071202082830114C15090

90 2010 readiness for disabled 'unlikely', IOL, March 28 2007, available at http://www.iol.co.za/index.php?set_id=1&click_id=139&art_id=nw20070328144410303C125655

91 Christina Gallagher and Sheree Russouw, Social grants given dependency shake-up, *The Star*, Jan 27 2007, available at http://www.iol.co.za/index.php?set_id=1&click_id=594&art_id=vn20070127092407406C661563

92 Linda Mbongwa, Intellectual disability exists - what is it?, *The Star*, p. 9, available at http://www.iol.co.za/index.php?set_id=1&click_id=139&art_id=vn20070502004325283C144160.

During 2007, the Commission handled complaints of discrimination against persons with disabilities and brought a case to the Hermanus Equality Court regarding access to a shopping centre at the Village Square Centre.⁹³ The Commission is also engaged in Equality Court litigation against a local airline that charges an extra fee to persons with physical disabilities who need to make use of the Passenger Aid Unit when taking a flight. The Commission is receiving a number of cases regarding access to education of children with mental disabilities.

Finally, the long-standing debate concerning the status of Sign Language took a step forward in 2007 with a submission to the Joint Constitutional Review Committee by the Deaf Federation of South Africa (DEAFSA) for Sign Language to be added to the country's list of official languages.⁹⁴ The request has been referred by the relevant parliamentary committee to the executive to investigate the feasibility of doing so.⁹⁵

INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

On 20 December 2006, the newest Convention, the International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the United Nations General Assembly and opened for signing on 6 February 2007. By December 2007, 71 countries had signed the Convention, and four had ratified the Convention.⁹⁶ The Convention will enter into force when it is ratified by 20 countries. Upon entry into force, the Convention provides for the establishment of a Committee on Enforced Disappearances, which will carry out the functions under this Convention.⁹⁷

This Convention is significant as it defines enforced disappearances as a human rights violation and imposes a duty on state parties to criminalise such acts. The Convention recognises the right of families to know what happened to victims and also the right to reparations for victims of enforced disappearances. The Convention is novel in that family members are also recognised as victims. South Africa has yet to sign or ratify the Convention.

RECOMMENDATIONS

- South Africa should ratify the ICESCR, OPCAT, ICRMW, and ICPED as soon as possible as they are important sources of protection for human rights. Doing so would be an important step toward demonstrating South Africa's ongoing commitment to improving human rights for all persons, particularly victims of torture, migrant workers, and the disabled.

93 See, e.g. Access for Citizens Committee: WC/26/244-bs.

94 PMG, Joint Constitutional Review Committee, DEAFSA Submission, 25 May 2007, available at <http://www.pmg.org.za/viewminute.php?id=9049>; see also Janine Stephen, SA may get a 12th language, Cape Times, 15 June 2007, p. 3, available at http://www.iol.co.za/index.php?set_id=1&click_id=3015&art_id=vn20070615002716827C79440

95 Ibid.

96 Albania, Argentina, Mexico, Honduras

97 See Article 26, International Convention for the Protection of All Persons from Enforced Disappearance.

- South Africa should ensure that all outstanding reports are completed and delivered to the Treaty Bodies (ICCPR, supplementary ICERD and CAT, CEDAW and CRC).
- The Commission should maintain a leadership role in monitoring the government's performance in relation to its international treaty obligations. The Commission must also continue to engage with stakeholders, raise public awareness, encourage government commitment on these issues and submit NHRI reports to Treaty Bodies.
- South Africa should criminalise torture and establish a National Preventative Mechanism (NPM) in terms of compliance with OPCAT.
- South Africa should criminalise hate speech and other forms of hate crime. These are important and necessary steps to address xenophobia and discrimination.

CONCLUSION

While South Africa has made significant progress in promoting, protecting and monitoring human rights, continued work is still necessary to bring the country into full compliance with its treaty obligations. South Africa is still a new entrant within international circles and is held in high regard in the international community for its successful transition from apartheid to constitutional democracy. The time has come to demonstrate to the international community that there is the political will and capacity to take these international obligations seriously and, most importantly, to ensure the successful and full implementation of these treaty obligations.

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**CHAPTER TWO:
CRIME AND HUMAN RIGHTS IN SOUTH AFRICA**

INTRODUCTION

*“Crime and violence and their often devastating effects continue to engage South Africans in more ways than we could ever have envisaged fourteen years ago when we boldly crafted a new constitutional dispensation. From a variety of perspectives – confidence in the economy, moral regeneration, the dysfunction of many communities, schooling and education, governance and democracy and even the prospects for the 2010 World Cup – the prevalence of and the effect of crime becomes woven into the text and subtext of many a discussion on the state of our nation – sometimes warranted but often not.”*⁹⁸

The scourge of crime continues to plague South Africa and public confidence in the government’s ability to radically turn the tide is at an all-time low. Several surveys have indicated that South Africans of all races list crime as one of their major concerns which impacts negatively on their enjoyment of life, and their ability to realise their rights as provided for in the Constitution.⁹⁹ Although recent statistics have shown that crime is on a general downward trend, the actual number of crimes committed remains at unacceptable levels.¹⁰⁰ The violent nature of crime in South Africa is often highlighted, but white collar crimes, especially those committed by leaders of our business community, are also rampant and impact negatively on the rights of our citizens.

South Africans are bombarded on a daily basis with grim stories of violent crime. The nature of some of the violence being perpetrated upon victims defies any logic, whether it is pouring boiling water over the face of a woman whose house had just been burgled, raping and killing a child and then hiding her body in an attic, or burglars gluing a victim to his exercise bike. Jody Kollapen, Chairperson of the Commission, stated in his foreword to the Crime Conference Report, that “crime also affects the moral fibre of the nation, especially the morale of victims.” It also has seriously prejudiced South Africa’s profile at the international level. Crime has led to perceptions that the Constitution as well as the criminal justice system are criminal-friendly. There are also perceptions that “the transformation of the criminal justice system, in order to bring it in line with international human rights norms and standards, hampers law enforcement agencies from effectively dealing with crime in the country. These perceptions have led to the loss of faith in the entire criminal justice system to prevent and combat crime in the country.”¹⁰¹ Given these sentiments, an inescapable conclusion is that South Africans want crime to be dealt with as a matter of priority.

98 Kollapen, J. *Crime, Violence and Social Justice*. Unpublished Paper. 2007

99 Burton P. *et al.* (2004). National Victims of Crime Survey South Africa 2003. *Institute for Security Studies*. Pretoria, pp. SABC/Markinor Survey. *Government Performance: Expectations and Perceptions*. (2005), at <http://www.ipsos-markinor.co.za/news/government-performance-expectations-and-perceptions>.

100 This is evident from the Crime Statistics that were released on 03 July 2007 that covered the reporting period April 2006 – March 2007, as well as the Crime Statistics that was released on 06 December 2007 that covered the period April 2007 – September 2007.

101 South African Human Rights Commission. *Crime and its Impact on Human Rights: Ten Years of the Bill of Rights*. Crime Conference Report, p.4. 2007.

In the majority of crimes that are committed in South Africa, the perpetrator and the victim are acquainted with each other.¹⁰² As such, it can be safe to assume that crime, as it manifests itself in South Africa, is more of a social problem than a matter of inadequate policing. On the contrary, no sufficient evidence exists that increased policing by itself will sufficiently reduce the alarming levels of crime in the country. According to Jamrozik and Nocella "... the term 'social problem' applies to social conditions, processes, societal arrangements or attitudes that are commonly perceived to be undesirable, negative and threatening certain values or interests such as social cohesion, maintenance of law and order, moral standards, stability of social institutions, economic prosperity or individual freedoms."¹⁰³ To be considered a social problem, there must be a general acceptance that such a problem can be overcome through concerted joint efforts by the society affected by it. In his State of the Nation address, President Thabo Mbeki stated that "*none of the great social problems we have to solve is capable of resolution outside the context of the creation of jobs and the alleviation and eradication of poverty.*"¹⁰⁴ The emphasis of the President of looking at crime from a social perspective is welcoming, given the fact that an over reliance on criminal justice processes provides no guarantee of creating a more peaceful society.

Legislative and policy interventions during 2007 had been minimal despite talks of a restructuring of the criminal justice system. Great concern was raised when the ruling African National Congress passed a resolution at its 52nd Conference asking for the disbanding of the Directorate of Special Operations, better known as the Scorpions, despite the unit's effectiveness. The suspension of Vusi Pikoli, head of the National Prosecuting Authority, caused a frenzy in the legal community, with some pundits declaring that it makes up a constitutional crisis.¹⁰⁵

This chapter will look at the levels of crime in South Africa by analysing the most recent crime statistics, as well as taking a closer look at legislative and policy developments in 2007. It will further scrutinise South Africa's response to the African Peer Review Mechanism Report which was highly critical of the levels of crime in South Africa. The Justice, Crime Prevention and Safety Cluster's activities will also be discussed as well as a special look at crimes perpetrated by businesses. The chapter will conclude with critical recommendations that will assist in positively addressing the scourge of crime.

102 According to a sample police docket analysis conducted by the South African Police Service in 2007, victims and perpetrators knew each other in 89% of reported common assault cases, 82% of murder cases, and 76% of all reported rape cases.

103 Jamrozik, A. and Nocella, L. *The Sociology of Social Problems. Theoretical Perspectives and Methods of Intervention*. Cambridge University Press, p. 36. 1998.

104 State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament, 09 February 2007.

105 The initial reason given for Mr Pikoli's suspension was that the irrevocable breakdown of the relationship between him and the Minister of Justice and Constitutional Development, Ms Brigitte Mbandla. Mr Pikoli's suspension became embroiled in controversy after it was discovered that the Directorate for Special Operations (Scorpions) had obtained a warrant of arrest against the National Commissioner of Police, Jackie Selebi, with Mr Pikoli's approval. According to the Constitution, the National Director of Prosecutions exercises his authority to institute criminal prosecutions independent of anybody, and many believed that his suspension was interference in such independence.

CRIME STATISTICS

The crime statistics that are released by the South African Police Service reflect only crimes that are reported to the police. It is widely accepted that crime remains under-reported in South Africa, with the major reasons advanced for this state of affairs being the lack of trust of the people in our criminal justice system, the inaccessibility and lack of user-friendliness of police stations, and the harsh treatment of victims of crime when they come into contact with the criminal justice system. The police also released crime statistics on a six-monthly basis for the first time in 2007 which is a positive development as they adhered to calls for a more frequent release of crime statistics.

The first crime statistics were released on 03 July 2007, which covered the period April 2006 – March 2007. The following table gives a good synopsis of the crime situation in its various categories:

Crime Statistics (Sourced from South African Police Service)

Crime Category	April 2001 – March 2002	April 2002– March 2003	April 2003 – March 2004	April 2004- March 2005	April 2005 – March 2006	April 2006 – March 2007
Murder	21 405	21 553	19 824	18 793	18 545	19 202
Attempted murder	31 293	35 861	30 076	24 516	20 553	20 142
Rape	54 293	52 425	52 733	55 114	54 926	52 617
Indecent assault	7 683	8 815	9 302	10 123	9 805	9 367
Assault with the attempt to inflict grievous bodily harm	264 012	266 321	260 082	249 369	226 942	218 030
Common assault	261 886	282 526	280 942	267 857	227 553	210 057
Common Robbery	90 205	101 537	95 551	90 825	74 723	71 156
Robbery with aggravating circumstances	116 736	126 905	133 658	126 789	119 726	126 558
General aggravated robbery (subcategory of aggravated robbery)	96 963	96 166	105 690	100 436	91 068	92 021
Carjacking (subcategory of aggravated robbery)	15 846	14 691	13 793	12 434	12 825	13 599
Truck hijacking (subcategory of aggravated robbery)	3 333	986	901	930	829	892
Robbery at residential premises (subcategory of aggravated robbery)	N.A.	9 063	9 351	9 391	10 137	12761
Robbery at business premises (subcategory of aggravated robbery)	N.A.	5 498	3 677	3 320	4 387	6 689

Robbery of cash in transit (subcategory of aggravated robbery)	238	374	192	220	385	467
Bank robbery (subcategory of aggravated robbery)	356	127	54	58	59	129
Arson	8 739	9 186	8 806	8 184	7 622	7 858
Malicious damage to property	145 451	157 070	158 247	150 785	144 265	143 336
Burglary at residential premises	302 657	319 984	299 290	276 164	262 535	249 665
Burglary at business premises	87 114	73 975	64 629	56 048	64 367	58 438
Theft of motor vehicle and motorcycle	96 859	93 133	88 144	83 857	85 964	86 298
Theft out of or from motor vehicle	199 282	195 896	171 982	148 512	139 090	124 029
Stock theft	41 635	46 680	41 273	32 675	28 742	28 828
Illegal possession of firearms and ammunition	15 494	15 839	16 839	15 497	13 453	14 354
Drug-related crime	52 900	53 810	62 689	84 001	95 690	104 689
Driving under the influence of alcohol or drugs	24 553	22 144	24 886	29 927	33 116	38 261
All theft not mentioned elsewhere	576 676	620 240	606 460	536 281	432 629	415 163
Commercial crime	58 462	56 232	55 869	53 931	54 214	61 690
Shoplifting	68 404	69 005	71 888	66 525	64 491	65 489
Culpable homicide	10 944	11 202	11 096	11 995	12 415	12 871
Kidnapping	4 433	3 071	3 004	2 618	2 320	2 345
Abduction	3 132	4 210	4 044	3 880	3 345	3 217
Neglect and ill-treatment of children	2 648	4 798	6 504	5 568	4 828	4 258
Public violence	907	1 049	979	974	1 044	1 023
Crimen injuria	60 919	63 717	59 908	55 929	44 512	36 747

The crime statistics released for the period 2006–2007 show an overall reduction of 2.6% for all reported crime.¹⁰⁶ The actual number of crimes committed, however, still remained alarmingly high. Of particular concern was the rise of contact crimes, especially murder, robbery with aggravating circumstances, burglary at residential premises, hijackings and robbery at residential premises. Murder increased by 2.4% in 2006/2007. Robbery with aggravating circumstances increased by 4.6% and cash-in transit robberies by 21.9% while hijackings increased by 6% and bank robberies increased by a staggering 118.6%.

¹⁰⁶ Violent crime has been reduced by 3.4% within the last five years per SAPS statistics covering that period.

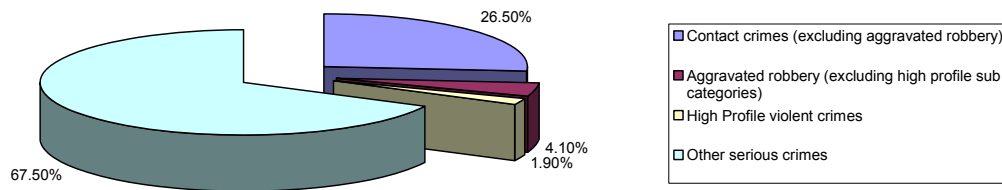
The above statistics also illustrate that social contact crimes remain unacceptably high. Social contact crime is defined as crime that happens between people who are acquainted with each other. A sample docket analysis undertaken by the South African Police Service indicated that perpetrators and their victims knew each other in 89% of cases involving assault with the intention to inflict grievous bodily harm.¹⁰⁷ They also knew each other in 89% of common assault cases, 82% of murder cases, and 76% of reported rape cases. These figures clearly point to a serious problem of social cohesion which is mainly beyond the policing capability of the South African Police Service. It also clearly illustrates the negative attitude that so many South Africans harbour towards their fellow citizens.

The first six-monthly statistics, covering the period 01 April 2007–30 September 2007 was released on 06 December 2007. The Commission was cautiously encouraged by the decrease in reported crime as indicated in the crime statistics. The Commission, however, still finds the sheer number of offences committed to be unacceptable. This is exacerbated by the massive under-reporting of crime which scathingly speaks to the continued mistrust and unwillingness of South African citizens to avail themselves to the protection of the state.

Specifically encouraging was the decrease in contact crimes committed, most notably murder which went down by 6.5%, attempted murder which went down by 7.6%, common robbery which went down by 12.2%, and robbery with aggravating circumstance which went down by 9.7%. The statistics also show encouraging signs with regard to the decrease in burglaries at residential premises which went down by 7.9%, and theft of motor vehicles which went down by 10%. Of particular concern was the increase of robberies and burglaries at business premises which went up by 29.3% and 3.4% respectively. South Africans also still remain unsafe at their homes as robberies at residential premises had increased by 7% for the 6 months covered.

¹⁰⁷ South African Police Service Annual Report 2005/2006, p.56.

Violent crimes



Pie Chart¹⁰⁸

The increase in the detection of drug-related crimes and driving under the influence of alcohol or drugs should most probably be ascribed to more vigilance and increased police activities as these crimes depend heavily on police action for detection. It is also apparent from the released crime statistics that special initiatives undertaken by the police, like Operation Trio in Gauteng, are bearing fruit. Operation Trio has resulted in a 2.4% decrease in car-jackings in Gauteng (KwaZulu-Natal showed a 8.6% increase over the same period); a 7.7% decrease in robberies at residential premises (KwaZulu-Natal showed a 32.5% increase); and only a 2.6% increase in robberies at business premises (KwaZulu-Natal showed a 71% increase, and the North West, the Eastern Cape and the Western Cape showed a 47.6%, 112.3% and a 168.5% increase respectively). These figures clearly show the need to share success stories and to replicate police efficiencies in the various provinces with the necessary changes to suit unique provincial circumstances.

Although crime statistics cannot provide a full picture of the real extent of crime in South Africa, they nonetheless provide valuable insight into crime in general, especially crime patterns and trends. The crime statistics in their current form, however, leaves much to be desired and there exists a real need for improved crime statistics. South Africa must produce co-ordinated and joint crime statistics which will include data from the South African Police Service, the Department of Justice and Constitutional Development as well as the Department of Correctional Services. It is important to ascertain how many reported cases make it to prosecution as it correlates with the efficiency of the criminal justice system. For example, the British Crime Survey is a large-scale

¹⁰⁸ Data provided by the South African Police Service, and covers the period April 2007–September 2007.

victim survey conducted annually by the British Home Office. The combination of these statistics with the statistics from the police and the courts provide a better picture of the extent of crime in Britain. A similar approach in South Africa may assist in developing a better sociological understanding of crime.

In South Africa, as in the majority of other countries in the world, the collation of crime statistics favours measurement over description. In other words, crimes are merely recorded for statistical purposes in a generic sense. As an example, when a person is stabbed with a knife, the only recording that will be made is “assault with the intent to inflict grievous bodily harm.” A description of the circumstances under which it happened is not recorded. While this approach gives the lay person a better understanding and grasp of the extent of crime in the country, it does not promote the effective use of such data in policy formulation.

Other ways of improving our crime statistics may involve:

- Police detection rates in statistics (i.e. Crime that is actually detected by police as opposed to the public);
- Number of offenders cautioned;
- Number of offenders convicted and sentenced;
- The nature of the sentences; and
- Breaking the statistics up by offence, age and sex of the offender, as well as family income level so as to ascertain the underlying class dynamics at play with regard to crime.

LEGISLATIVE AND POLICY DEVELOPMENTS

Many of the legislative and policy developments of 2007 related to crime have placed a lot of emphasis on the plight and the need to protect the rights of victims of crime. Some of the major legislative and policy developments of 2007 include the Criminal Law Amendment Bill, Service Charter for Victims of Crime and the proposed restructuring of the criminal justice system.

Criminal Law (Sentencing) Amendment Bill [B15-2007]

The Criminal Law Amendment Bill [B15-2007] aims to expedite the finalisation of serious cases, and also seeks to avoid secondary victimisation of complainants which often occurs when vulnerable witnesses have to repeat their testimony in more than one court. This is especially onerous when the complainants are children. In terms of the proposed amendments, regional courts will be granted jurisdiction to impose life sentences, thereby eliminating the requirement of having to refer a case to the high court for sentencing purposes. To mitigate this new power bestowed on regional courts, convicted persons will have an automatic right of appeal when they are sentenced by a regional court to a sentence of life imprisonment.

In terms of the Bill, when a sentence must be imposed in respect of the offence of rape, none of the following shall constitute substantial and compelling circumstances, justifying the imposition of

a lesser sentence, namely:

- Any previous sexual history of the complainant,
- An accused person's cultural or religious beliefs about rape, or
- Any relationship between the accused person and the complainant prior to the offence being committed.

The Bill is to be applauded for its provisions regarding secondary victimisation of complainants, especially in cases of a sexual nature, or where minors are involved. It is hoped that this will aid the cause of encouraging victims to report rape cases and lay charges against their violators.

The Bill was referred to the Justice and Constitutional Development Portfolio Committee, which in turn voted on 21 November 2007 to reject the amendments proposed by the National Council of Provinces dealing with the unintended consequences of the provisions of the Bill. The Portfolio Committee instead agreed that the Department of Justice should, within 24 months, review and report to the Portfolio Committee whether there had been any unintended consequences pertaining to the proposed amendments. The Bill is set to pass in early 2008.

The Criminal Law Amendment Act 105 of 1997 (hereinafter referred to as the Act), which came into operation on 1 May 1998, deals with the abolition of the death penalty and created a legal regime of discretionary minimum sentences in respect of certain serious offences. Sections 51 and 52 of the Act make provision for the imposition of minimum sentences in respect of serious offences. These offences are categorised in terms of their degree of seriousness and are listed in Parts I-IV of Schedule 2 to the Act. In terms of section 51 (3), a high court or regional court is given a discretionary power to impose a lesser sentence, if satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed minimum sentence.

The constitutional validity of both sections 51 and 52 of the Act was tested in 2000 (*State v Dzukuda*)¹⁰⁹ and 2001 (*State v Dodo*),¹¹⁰ respectively. These cases dealt with two major challenges on two different grounds, namely an accused's right to a fair trial and the independence of the judiciary. The Constitutional Court rejected both these challenges. The Constitutional Court in *Dzukuda* held that "it had not been established, either for the reasons furnished in the High Court judgment, or for any other reason, whether taken individually or collectively that the provisions of section 52 of the Act limited an accused's right to a fair trial under section 35 (3) of the Constitution."¹¹¹ The Constitutional Court in *Dodo*, in interpreting the words "substantial and compelling circumstances" in section 51 (3) of the Act endorsed the step-by-step sentencing procedure set out in *S v Malgas* (2001).¹¹² The Court held in this regard that

109 *S v Dzukuda and Others* 2000 (4) SA 1078 (CC).

110 *S v Dodo* 2001 (3) SA 382 (CC).

111 AD paragraph 60.

112 *S v Malgas* 2001 (2) SA 1222 (SCA).

the interpretation of the Supreme Court of Appeal “steers an appropriate path, which the Legislature doubtless intended, respecting the Legislature’s decision to ensure that consistently heavier sentences are imposed in relation to the serious crimes covered by section 51 and at the same time promoting the spirit, purport and objects of the Bill of Rights.”¹¹³

In dealing with the issue of the separation of powers and the court’s role in sentencing, the court concluded as follows: “While our Constitution recognises a separation of powers between the different branches of the state and a system of appropriate checks and balances on the exercise of the respective functions and powers of these branches, such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons. Both the legislature and the executive have a legitimate interest, role and duty, in regard to the imposition and subsequent administration of penal sentences.”¹¹⁴

The Constitutional Court in both instances dismissed the constitutional challenges against these provisions and upheld the constitutional validity of the Act. Despite the fact that the legislation has been found to be constitutionally sound, certain practical problems with the application of sections 51 and 52 have been identified, based on inputs by the judiciary, the National Prosecuting Authority and other stakeholders. The Bill aims to address these practical problems whilst retaining the principles underlying the Act.

Service Charter for Victims of Crime

The Service Charter for Victims of Crime, commonly known as the Victims Charter, was adopted by Cabinet in 2004 to give added protection to victims of crime, whose rights were widely perceived by the public to have been subsidiary to those of their perpetrators. The implementation of the Victims Charter was held back until a national implementation plan was finalised.

The National Implementation Plan for Victims of Crime represents the government’s commitment to the realisation of the rights for victims and is a blueprint upon which government departments will provide services and interventions in an attempt to make abstract rights a living testament to the Constitution.

The Victims Charter affirms existing rights afforded to victims of crime contained in the Constitution, and other legislation such as the Criminal Procedure Act 51 of 1977 and the Witness Protection Act 112 of 1998. Essentially the Victims Charter affirms the rights of all victims of crime to ensure that they are central and not subsidiary to the criminal justice system. The seven rights contained in the Victims Charter include:

113 AD paragraph 54.

114 AD paragraph 67.

- The right to be treated with fairness and with respect to dignity and privacy;
- The right to offer information;
- The right to receive information;
- The right to protection;
- The right to assistance;
- The right to compensation; and
- The right to restitution.

The National Implementation Plan to the Victims Charter was drafted by an inter-departmental committee representing the departments of Justice and Constitutional Development; the National Prosecuting Authority, Correctional Services, Social Development, Health, the South African Police Service, Government Communications and Information Service, as well as the Commission.

The Commission recognised the rights of victims of crime as human rights, and given the high incidents of crime in our country, it was appropriate for the Commission to ensure that it also focused on advancing the rights of victims of crime. In this regard, in March 2006, the Commission hosted a Seminar on the Victims Charter to which a variety of stakeholders were invited. The Commission also hosted a successful national conference on *Crime and its Impact on Human Rights* during March 2007 and appointed a Co-ordinator for Human Rights and Crime to streamline, co-ordinate and drive the activities of the Commission in relation to human rights and crime, as well as to provide support within the Commission to develop a human rights-based response to crime.

In responding to the challenges of the Victims Charter, the Commission has chosen an approach to ensure that the work relevant to and arising out of the Charter is integrated into all its functions in accordance with its core mandate of promoting, protecting and monitoring human rights.

Proposed Restructuring of Criminal Justice System

The Sunday Times¹¹⁵ reported an unpublished policing plan by the National Police Commissioner, Jackie Selebi. According to the paper, the document contained findings that:

- Conviction rates are low due to the poor quality of investigations by detectives;
- Some policemen are corrupt as they enter the force; and
- Many recruits do not pass even a basic psychometric test – although the standard of testing is low – and many are accepted into the force despite failing to meet all the minimum requirements.

115 Govender, P. In *Sunday Times*, 28 October, 2007. "Criminals rule the roost, cops admit."

According to the Sunday Times, some of the more substantive proposals of the plan include:

- A comprehensive 12-point plan detailing how investigations should be conducted and improving the ability of police detectives to assess crime scenes;
- Providing a 24-hour service, with proper management of crime scenes and ensuring that police take quality statements from witnesses and complainants;
- That decisions on case dockets be taken within 24 hours; and
- Addressing, with investigators, the number of dockets that are not court-ready and monitoring new and outstanding cases to ensure investigations are completed within a reasonable timeframe.

Commissioner Selebi also stated that the new strategy was designed to tap the full potential of commanders and police officers.¹¹⁶

The Cabinet also approved a seven-point strategy in November 2007 to address the problems that are afflicting the criminal justice system. According to The Sunday Independent, the new plan is “influenced by a British review of that country’s criminal justice system and intends to empower those at the coalface – with crime-battered citizens the ultimate winners.”¹¹⁷ The article also quoted Johnny de Lange, Deputy Minister of Justice and Constitutional Development, as saying that the new strategy would strive to change the current system in a fundamental way, and would try to, inter alia improve the capacity of detectives, prosecutors and forensic experts. Some of the highlights of the plan include:

- Increasing the number of detectives in the police force to at least 25%, growing to an eventual 33%;
- An increase in facilities and equipment;
- Attracting and retaining experienced detectives as well as graduates;
- The introduction of new salary incentives to make the detective service a more specialised branch;
- The creation of new senior detective posts in designated courts;
- Employing detectives with a legal background;
- Expedited and appropriate training programmes;
- Increasing the number of forensic experts that deal with DNA, ballistics, fingerprints, crime-scene mapping and photography;
- Maintaining the services of experienced prosecutors; and
- Transforming the criminal court processes to ensure that trials are brought to a conclusion at a faster pace by especially clamping down on unnecessary postponements of cases.

¹¹⁶ Ibid.

¹¹⁷ *The Sunday Independent*. “It’s war on crime,” 11 November, 2007.

The above initiatives are to be welcomed, since they will definitely increase the ability of the police to fight crime more effectively. They will also help to ensure that crimes are solved more expeditiously, and to bring closure for victims of crime more swiftly. The government, however, did not commit itself to a timeframe which flies in the face of their ostensible commitment to turn the criminal justice system around as a matter of priority. Also absent is the setting of specific and measurable targets related to the reduction of crime in most categories.

In order to create a human rights-based approach to crime, the creation of a participatory legislative and policy framework is essential. Although many of these processes are institutionalised, especially with regard to the legislative framework, these processes remain elusive to a large sector of the South African society.

Since everybody in the country can be regarded as a victim of crime, the imperative for greater participation is so much bigger. For processes to be truly participatory, however, they have to be active, free and meaningful. It is therefore important for the government and civil society to act together at every single level in order to develop a sustainable policy with regard to creating an effective criminal justice system.

KEY DEVELOPMENTS

South Africa's Response to the African Peer Review Mechanism Report

The African Peer Review Mechanism Report (APRM Report) on South Africa stated that stakeholders have stressed the alarming rates of crime across South Africa.¹¹⁸ In its official response to the APRM Report dated 18 January 2007, the South African government acknowledged that crime poses a serious challenge. The South African government continued to state the following in its response to the Report:

“... an impression should not be created that the Government is not taking steps to curb it [crime]. In addition to a number of initiatives, the Justice, Crime Prevention and Safety (JCPS) Cluster and Government Communications are working with the private sector and other stakeholders to formulate a National Anti-Crime Campaign focused on community mobilisation and improving popular partnership with the criminal justice system. Community police forums are expected to play a key role in the campaign which is aimed at strengthening society's hand in the fight against crime.”¹¹⁹

It should be noted that the National Anti-Crime Campaign of the South African government only got off the ground in October 2007 when the Minister of Home Affairs, Nosiviwe Mapisa-Nqakula, organised a meeting with several stakeholders to set out the objectives of the campaign and to get relevant input from such stakeholders. The Commission also participated in that meeting and

¹¹⁸ African Peer Review Mechanism Report on South Africa, p.86 at paragraph 172.

¹¹⁹ Comments from the Government of South Africa to the African Peer Review Mechanism Report, p.17.

is convinced that the National Anti-Crime Campaign as articulated by the Minister is too narrowly construed with an over-emphasis on crime-related issues that afflict the Department of Home Affairs.

The Commission believes that a more co-ordinated approach involving other departments and civil society would be a better way to get an Anti-Crime campaign off the ground. The fact that this ad-hoc Anti-Crime campaign was launched so late in the year, devoid of any serious or meticulous planning, makes the South African government's pledge to strengthen society's hand in the fight against crime ring hollow.

The APRM Report also drew the government's attention to the following areas that require attention in order to fight corruption:

- Private funding of political parties;
- Post-public sector employment regulation;
- Bribery of foreign public officials by South African business persons;
- Improving the co-ordination and roles of the different anti-corruption bodies; and
- Promotion of the knowledge and application of key legislation in the anti-corruption framework, particularly access to information and protection of whistle blowers.

The South African government's response was that all the above areas, with the exception of the bribery of foreign public officials, are being addressed in the Public Service Anti-Corruption Strategy, the resolutions of the second National Anti-Corruption Summit and the National Anti-Corruption Programme.¹²⁰ The government also stated that they feel comfortable that the Prevention and Combating of Corrupt Activities Act of 2004 can adequately deal with South African business people who bribe foreign public officials. Despite the government's reference to the above strategies and programmes, its response to the APRM Report is conspicuously silent on whether or not these strategies and programmes are successful or have any effect on reducing the levels of corruption in the country.

South Africa was ranked 51st out of 163 countries in Transparency International's Corruption Index for 2006. Official corruption across government departments, but especially in the Department of Home Affairs, is widespread. South Africa is a signatory to the United Nations Convention against Corruption but is yet to become a signatory to the OECD Convention on Combating Bribery.¹²¹ Perhaps, the time has come for the South African government to show its resolve in combating official corruption by acceding to the OECD Convention.

Justice, Crime Prevention and Safety (JCPS) Cluster

The Justice, Crime Prevention and Security (JCPS) Cluster is made up of the Departments of

¹²⁰ Ad paragraph 109.

¹²¹ See chapter 1 in this report on Treaty Body Monitoring in South Africa.

Safety and Security, Correctional Services, and Justice and Constitutional Development. The JCPS Cluster is primarily responsible for the fight against crime, and releases reports on progress made on a two-monthly basis, that is, a yearly reporting schedule of six cycles.¹²²

The JCPS Cluster listed the following as areas in which they achieved success in the fight against crime in 2007:¹²³

- Crime prevention and public safety;
- Organised crime;
- Improving effectiveness of the criminal justice system;
- Upholding national security; and
- Planning for major events.

CRIME PREVENTION AND PUBLIC SAFETY

Contact Crimes

Various integrated cluster operations were conducted to reduce contact crimes in the priority station areas. Contact crimes refer to murder, attempted murder, rape, indecent assault, aggravated robbery, common assault and robbery. During the reporting period of 01 July 2007 to 30 September 2007, 3 339 law enforcement operations focusing on contact crimes were conducted and 30 515 arrests were made relating to contact crimes.

Interventions from Correctional Services

An Inmate Tracking System, amongst other initiatives, assists in tracking wanted criminals in correctional facilities. Video Arraignment Systems between correctional facilities and the courts were installed which prevent and minimise the risk of escapes by awaiting trial offenders, while being transported. This is useful for high risk criminals. Forty four courts aligned to twenty two correctional facilities have been established.

Management of Overcrowding

In August and September 2007, 4 805 sentenced offenders were released on parole, 509 offenders were sent to community corrections after serving 1/6th of their sentences while offenders who are regarded as posing little or no danger to society are increasingly being released to serve their sentences outside. For example, there are 20 137 awaiting trial detainees (ATDs) who were granted bail of less than R2000.00 in prison facilities, whose placement must be managed such that a balance is struck between public safety and the costs of keeping them in government facilities at R193.00 a person a day. These interventions are informed by the Department of Correctional Services' aim to prioritise aggressive and sexual offenders whose numbers are continuously increasing, constituting 63% of the ATDs and 72% of the sentenced offenders during the reporting period.

¹²² It is not, however, clear whether this cluster deals with crime related to xenophobic attacks. See Chapter 3 in this report on the right to equality for further analysis on xenophobia.

¹²³ Excerpts from various briefings.

Public and Stakeholders Mobilisation

The Department of Correctional Services' drive to intensify public mobilisation for effective correction, rehabilitation and social re-integration reached new heights as they celebrated the second Corrections Week between the 15 and 19 October 2007. Some of the highlights of the week were:

- The signing of a memorandum of understanding with the Provincial Legislature of the Eastern Cape and the Women's Caucus;
- A crime prevention campaign run by the JCPS cluster in collaboration with the Social Sector cluster and NGOs targeting students from problematic schools, who were motivated not to exchange their school uniform for a uniform of shame worn by offenders;
- Partnerships with the business community as showcased during the official opening of a nearly R1 million business sponsored food processing plant at Pollsmoor Correctional Centre; and
- A moral regeneration campaign run in collaboration with various faith-based organisations where a collective decision was taken to collect over one million signatures of people committed to joining a national partnership against crime.

Railways

Four permanent contact points at railway stations where the public can report crime were established from April 2007 to June 2007. These are situated at Johannesburg, Denneboom in Pretoria, KwaMashu and Reunion in Durban – in response to crime experienced by rail commuters. There are currently 1 654 Railway Police members deployed nationally to combat crime in the rail transport environment. This is an increase of 454 from the previous reporting cycle.

Reservists

During the reporting period July – August 2007, 1498 paid reservists were called up and 4 522 new reservists were recruited. A number of ex-Commandos have joined the reservists. This will have a major impact in assisting the police to combat crime and increase police visibility.

Other Police Activities and Initiatives

The police continued with "flood and flush" operations in the nine provinces focusing on high-crime precincts. Daily Public Order Police deployments in support of the identified station areas (crime hot spots) yielded the following interventions in the quarter, July-September 2007: 5 061 roadblocks; 134 200 stop and search operations; 171 759 vehicle patrols; 7 956 firearms checked; 1 468 014 vehicles searched. Other notable initiatives include:

- Cross-referencing of records to identify repeat offenders;
- Establishment of provincial and cluster tracing teams;
- Co-ordination of investigations and prosecutions;
- Priority prosecutions for organised-crime suspects;

- Deployment of technology such as Morpho Touch, Mobile Computer-based notebook and other software analyses, as well as cell phone linkages; and
- Improved crime scene management and evidence gathering.

These initiatives have over a period of two months contributed to the arrest of more than 2 730 suspects in 2 582 cases.

IMPROVING THE EFFECTIVENESS OF THE CRIMINAL JUSTICE SYSTEM

SAPS Organisational Structure

The new SAPS provincial organisational structures, including functional structures were finalised and will be presented to Top Management and should be launched in early 2008.

Courts

A total of 22 additional courts are currently functioning in support of the case backlog reduction project. Twenty new sites were identified for development. This is in addition to the current twenty one development sites. Between 1 November 2006 and September 2007, 3 434 cases were permanently removed from the rolls through these additional courts. During the same period 2 199 cases had been finalised with a verdict of guilty in 79.9% of the cases, with 104 plea bargaining processes being concluded.

Training

Training was provided for lower court prosecutors and magistrates.

Children in Conflict with the Law

There has been progress with regard to the establishment of secure care centres for children in conflict with the law – in Bloemfontein in the Free State and Mogale City in Gauteng. Twenty thousand children have been diverted from the criminal justice system to these centres. Digital Court Recording Solutions were installed in all courtrooms, excluding children's courts which are fitted with CCTV systems.

ID Track and Trace System

The new ID track and trace system is being piloted as an internal management tool within the Department of Home Affairs. The project was designed to help to tighten security and to eliminate corruption.

Magistrates Conference

The Magistrates' conference held on 15–16 September 2007 was a milestone in many respects. For the first time, all levels of the judiciary met to discuss lower court transformation, and in particular, issues of accountability and independence. The concept of a single judiciary was also discussed in detail. Converging and conflicting views were presented. Overall, the conference was a dynamic space, alive with knowledge, intellect and passion for the social and judicial transformation.

Launch of the Victims Charter

The implementation plan of the Victim Services Charter was launched on the 8th of December 2007. The launch took place during the 16 Days of Activism campaign against women and child abuse. An integrated implementation plan attempted to show a commitment by the government to deliver victim-friendly services to those affected by crime.

UPHOLDING NATIONAL SECURITY

Sea Border Control

Bases were improved at Simonstown and Richards Bay for Sea Border Control.

Cargo Scanner

Negotiations were completed and an order placed for the first cargo scanner in Durban in May 2007 to help with the detection of illegal goods.

CRIME AND BUSINESS

The scourge of crime in South Africa is by no means limited to violent crime. The moral decay also manifests itself in the proliferation of crimes being committed in the business sector. The effect of this kind of crime is not always highlighted, but it is widely accepted that it also contributes to the denial and limitation of rights of South African citizens. What is also of concern is the relative impunity with which these so-called white collar crimes are being committed. There are, however, positive signs that the tide is turning and that a new urgency in tackling white collar crime is on the cards.

The Commission commenced its March 2007 Human Rights Month activities with focused community dialogues within the provinces in order to engage communities on the issue of fighting crime within the context of their specifically situated challenges. Several recommendations relevant to the business sector were made and tabled at the national conference referred to below, including the monitoring of alcohol sales, inter-sectoral programmes and awareness campaigns and increased partnerships among all community stakeholders.¹²⁴

On the 22nd and 23rd of March 2007, the Commission held a conference on the theme of “Crime and its Impact on Human Rights: Ten Years of the Bill of Rights.” Both Business Against Crime and AGRISA made presentations. Business Against Crime discussed the strategies, policies and partnerships underlying their commitment to fighting crime, emphasising partnerships between business and the government.¹²⁵ AGRISA then made representations on behalf of their agricultural sector members. Several recommendations were made, including proposal for the

124 See South African Human Rights Commission. *Crime and its Impact on Human Rights: Ten Years of the Bill of Rights*. Human Rights Month Report - Dialogues at 36–39, March 2007.

125 See South African Human Rights Commission. *Crime and its Impact on Human Rights: Ten Years of the Bill of Rights*. Crime Conference Report at 30–31, 22–23 March 2007.

establishment of a ministerial position located within the office of the Deputy Presidency to specifically focus on the fight against crime.¹²⁶

The Competition Commission and the Bread Cartel

In December 2006, complaints were lodged with the Competition Commission by bread distributors in the Western Cape alleging price-fixing activities by, inter alia, Premier Foods, Pioneer Foods and Tiger Brands, which affected consumers directly.¹²⁷ In its press statement of the 12th of November 2007¹²⁸ the Competition Commission confirmed its finding that these actions contravened section 4 (1) (b) (i) of the Competition Act, 89 of 98 concerning prohibited restrictive horizontal practices, which provides that:

4. (1) *“An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if:*
 - (b) *It involves any of the following restrictive horizontal practices:*
 - (i) *Directly or indirectly fixing a purchase price or any other trading condition.”*

Ismail Mukaddam, who runs a business in Elsies River near Cape Town, said that price-fixing “had an immediate impact on our business ... and we had to pass that loss on to the consumers.”¹²⁹ While COSATU stated that they would support an action against the perpetrators,¹³⁰ Tiger Brands chief executive blamed the illegal actions on “renegade” staff.¹³¹

Although fines will be imposed upon guilty parties, greater emphasis needs to be placed on the real cost of companies’ anti-competitive behaviour from a human rights perspective. Firstly, anti-competitive behaviour should not be characterised as a more civilised form of illegal corporate activity. Anti-competitive practices taint businesses to the same extent as criminal findings of fraud and corruption perpetrated by companies and individual employees. Secondly, especially when dealing with basic commodities like bread, one cannot separate the illegal activities of companies from their impact on the economic and social rights of the communities who comprise their customer base and from whom they derive their profit. The human rights obligations of business and the impact of their policies and actions cannot be segregated from their core business.

The Effect of Crime on Small, Medium and Micro Enterprises

Addressing the issue of crime from a different perspective, it is important to note that individual businesses are also negatively affected by crime in South Africa. A short note in the press reminds us that small, medium and micro-enterprises are at great risk of suffering losses due to

126 *Idem* at 32.

127 Competition Commission of South Africa. “Tiger Brands admits to participation in bread and milling cartels and settles with Competition Commission” <http://www.compcom.co.za/resources/media2007.asp>, 12 November 2007.

128 *Ibid.*

129 *Business Report*. “Bread distributors, Cosatu consider class action against Tiger Brands,” <http://www.busrep.co.za>, 13 November 2007.

130 *Ibid.*

131 *Business Report*. “Bread maker to hand over dough,” <http://www.busrep.co.za>, 13 November 2007.

crime.¹³² In fact, a study conducted by Fujitsu Siemens Computers and Standard Bank between March and August 2007 revealed that one of the main concerns facing these businesses is that of crime and not financial fears.¹³³

Corporate Fraud on the Rise

Another perspective from which to view the problem of crime and its impact is that of corporate fraud, having both internal repercussions for businesses and knock-on effects for consumers and stakeholders. In October 2007, Pricewaterhouse Coopers published its fourth biennial Global Economic Crime Survey.¹³⁴ The survey was undertaken in forty countries. More than 5 400 interviews were conducted with executives responsible for white-collar crime related monitoring and prevention activities.¹³⁵ The findings revealed that 72% of South African companies included in the survey were the victims of economic crime. This is significantly higher than the 42% global average.¹³⁶

Although the incidence of economic crime in South Africa has decreased since the last survey, South Africa still recorded a figure higher than the global average.¹³⁷ Bribery and corruption are perceived to be the most prevalent crimes in South Africa, while money laundering is seen as being on the increase.¹³⁸ There has been a 110% increase in the number of economic crimes reported in South Africa,¹³⁹ and various detection mechanisms do not seem to serve as a deterrent to make a significant difference to the number of incidences uncovered.¹⁴⁰

As for the future, the survey revealed that respondents were not optimistic, risk mitigation would remain a problem, and that mechanisms themselves were insufficient without an appropriately entrenched culture and ethical guidelines.¹⁴¹

Conference on Crime and its Impact on Human Rights

As mentioned above, the Commission hosted a conference entitled *Crime and its Impact on Human Rights* in March 2007. By hosting the Conference, the Commission wanted to contribute to the prevention and eradication of crime in South Africa. The Commission is also hopeful that the recommendations from the Conference would contribute to policy development and the adoption of new strategies by the government, law enforcement agencies, as well as communities in dealing with crime. The official conference report was launched on 24 October 2007 and was submitted to Parliament as well as other government departments and

132 *Business Report*. "Crime, not finance, is top worry – survey," <http://www.busrep.co.za>, 3 October 2007.

133 *Ibid*. See Standard Bank, Fujitsu Siemens Computers *SME Survey: What Keeps you up at night?* October 2007 http://www.smesurvey.co.za/small_company_big_voice/.

134 <http://www.pwc.com/extweb/home.nsf/docid/29CAE5B1F1D40EE38525736A007123FD>. See *Business Report*. "Corporate fraud on the rise," <http://www.busrep.co.za>, 16 October 2007.

135 PricewaterhouseCoopers Advisory Services (Pty) Ltd. *Economic crime: people, culture & controls*. October 2007. http://www.pwc.com/za/eng/pdf/pwc_global_crime_survey_report_07.pdf, at 2.

136 *Ibid*, at 2.

137 *Ibid*.

138 *Idem*, at 3.

139 *Ibid*.

140 *Idem*, at 4.

141 *Idem*, at 7.

stakeholders. The crime report contains a lot of recommendations which emerged out of various group discussions, and these include:

Improved Co-ordination of the National Crime Prevention Strategy and Crime Prevention Efforts.

There is a need to review the National Crime Prevention Strategy and policies and legislation should be revisited to improve integration, co-ordination and co-operation across the criminal justice system and ensure a more holistic approach to the participation of the Secretariat for Safety and Security in the Integrated Development Programmes, especially with regard to the role and empowerment of Community Policing Forums. In addition, the government should take the primary leadership responsibility to create an enabling environment to review the criminal justice system and explore how integration and co-ordination across the system could be strengthened. It was suggested that the co-ordination should take place at the office of the Deputy President.

Improved Police Efficiency and Effectiveness

Immediate steps should be taken to improve police effectiveness and efficiency, improve effectiveness and accessibility to the courts as well as systems to monitor and hold institutions accountable. This would include exploring mechanisms to create partnerships between communities and the government for the purposes of providing security to communities.

Improvement of Crime Statistics

While crime statistics are important and appreciated, it was also acknowledged that they are also challenging as they do not always reflect the accurate state of affairs. Some statistics are only based on reported cases. Unreported case statistics may bring different perspectives and understanding of what is going on in the country in terms of crime. To that effect, the Conference resolved that in order to give a more balanced view, statistics should also consider, for example, cases that failed to make prosecution. This will assist in assessing the level of the effectiveness of the police.

Review of Alcohol Advertising

Alcohol and drug abuse were highlighted as some of the challenges that contribute to crime within families and communities. It was reported that in the Northern Cape, every sixth child in a classroom was born with Foetal Alcohol Syndrome. This may cause the child to become dependent on alcohol and eventually commit crime. It was agreed that the advertisement of alcohol should be educational and precise in spelling out the side effects of alcohol.

Review of Batho-Pele Principles and Corruption

The Batho-Pele Principles should be revisited to review the extent to which there are service level agreements between different departments as well as how performance indicators for different departments were aligned with each other. In addition, it was suggested that corruption should be

dealt with by putting in place measures such as appointing appropriate people to relevant positions to look into the salaries of the police.

Review of Economic Policies

In order to address socio-economic concerns in the country, there is a need to move from macro-economic strategies to micro-economic policies. This would strengthen small and medium enterprises so that communities can benefit from economic growth.

Review of Crime Communication Strategy and Improving Stakeholder Relations

A communication strategy to involve various stakeholders in an effort to prevent and eradicate crime should be developed. This would invariably strengthen relations amongst stakeholders and assist in improving community participation. The communication strategy could also be used to reach inmates in prisons to create awareness about the value of citizenship responsibility. A monitoring and evaluation strategy could be developed to assess the impact of the communication strategy and all other interventions.

Victim Empowerment

Victim empowerment programmes should be improved. At the moment victims of crime feel marginalised. There is a perception that the law favours the rights of perpetrators at their expense. This perception and other concerns that lead to the loss of confidence in the criminal justice system need to be tackled. In addition, the development of a Bill of Moral Ethics should be considered.

Education System

The recent escalation of violence in schools was highlighted as another area needing attention. For example, there are dysfunctional schools which provide fertile ground for crime and violent activities. Youth Committees that were previously effective in bringing education and instilling a culture of responsibility among young people should be resuscitated.

Reviewing Community Police Forums

Strategies developed should take into account the diversity in the country. For example, the model of Community Policing Forums may need to be reviewed to accommodate various community peculiarities. In addition, it was recommended that the government should create an environment that is conducive for people to report crime, especially in rural areas where there are no telephones and accessible police stations.

RECOMMENDATIONS

Actively Promote Crime Prevention through Social Development

The current crime prevention strategies are focused on the protection of the person and property. It is imperative, therefore, to move away from defensive crime prevention towards a more engaging crime prevention strategy with social development activities at its core. Defensive crime prevention strategies fail to engage with the social problems underlying crime and rarely have

initiatives that are geared towards positively influencing potential offenders. Crime prevention activities and the social development needs of the community should thus be integrated to create a more cohesive and sustainable response to the challenge of crime prevention strategy.

Improve the Quality of Policing with Greater Emphasis on Crime Intelligence

Although it is important to increase the numbers of our law enforcement community, more emphasis should be placed on increasing the quality of policing in South Africa. Improving the detective and forensic capabilities of the police should be prioritised in order to ensure that more cases make it to prosecution, and to make sure that a strong message is sent out that crime does not pay. Increased capacity in the gathering of crime intelligence coupled with a closer and more sincere working relationship between the police and the community will also aid this effort.

Establish Community Safety Fora to Deal with Crime Comprehensively

The current structure of Community Policing Fora is too limited in scope to effectively assist in the reduction and prevention of crime, and primarily because of its narrow focus on policing aspects alone. The establishment of Community Safety Fora should bring together a wider array of skills and interventions that goes beyond mere policing by engaging and addressing the root causes of crime. Community Safety Fora do not only have to be confined to the collection of crime intelligence but should also assist in the identification and nurturing of at-risk youth, as well as playing a hands-on role in the social reintegration of parolees in order to minimise recidivism. The Community Safety Fora will thus be made up of members from various government departments and institutions (most notably the South African Police Service, the Department of Social Development, and the Department of Correctional Services), as well as diverse community representatives, both in terms of skills and demographics. Adequate financial backing should be provided for such Community Safety Fora to increase their effectiveness.

Appoint a High-Profile Person or Committee to Oversee the Restructuring of the Criminal Justice System

The South African government should show its commitment to making safety and security a priority by appointing a high-profile person or committee to oversee the restructuring of the criminal justice system. The main task of the person or committee would be to secure proper co-ordination between the various government departments involved in the criminal justice system and to ensure proper and meaningful consultation with communities and all other relevant stakeholders.

Prioritise the Implementation of the Victims' Charter

Victimisation has a serious effect on victims of crime. It would only be proper that one take a closer look at this serious problem in order to better understand and assist in finding more humane and effective ways to meet the needs of thousands of victims of crime in South Africa. Currently victims of crime are an underserved constituency and every effort should be made to change the status quo. Extra-governmental social support should also be encouraged in order to

give victims of crime the special attention they deserve. Given the above, the implementation of the Victims Charter should become a genuine priority.

CONCLUSION

The levels of crime and violence experienced by ordinary South Africans on a daily basis, and the complete disregard of their fundamental human rights is leaving a huge stain on the cloth of our constitutional democratic dispensation. Addressing the scourge of crime should become one of the biggest priorities of the government as the primary guarantor of rights as set out in the Bill of Rights. The Commission must therefore call on all South Africans to live up to the spirit of the Constitution by joining hands with the law enforcement agencies in the fight against crime. This will go a long way towards a peaceful South Africa where respect for the bodily integrity, property and the dignity of others will prevail. The policies and legislation should be revisited to improve integration, co-ordination and co-operation across the criminal justice system and to ensure a more holistic approach to the participation of the Secretariat for Safety and Security in the Integrated Development Programmes, especially with regard to the role and empowerment of Community Policing Fora.

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CHAPTER THREE: THE RIGHT TO EQUALITY

INTRODUCTION

The right to equality is the first substantive right in the Bill of Rights. It forms the cornerstone of South Africa's democracy and features in the preamble, founding provisions, sections 9 and 39 of the Constitution. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) has been enacted in terms of section 9 (4) of the Constitution to give effect to the letter and spirit of the Constitution and, amongst others, provide measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability.

The main objective of the Equality Act, as denoted in its title, is to promote equality and to prevent unfair discrimination, thereby transforming South Africa into a society based on respect for the dignity and equal worth of all human beings. It further acknowledges the inequalities and discrimination that are embedded in our social structure, practices and attitudes.¹⁴² Concomitant, the importance of the Equality Act on the prevention, prohibition and elimination of unfair discrimination on the ground of race, gender and disability lies in its expressed intent to prevent unfair discrimination and promote equality through the use Equality Courts and other measures.¹⁴³ The Equality Courts are informal and participatory institutions that provide easy access for victims of unfair discrimination to obtain appropriate relief.¹⁴⁴

This chapter critically engages with the key developments of 2007 in race, gender and disability by assessing court decisions and implementation measures that advance the cause for equality. Reference is made to international and domestic policy and legislation. It also reflects on the challenges in realising equality at the grassroots level and outlines the great need for education and awareness-raising on the Equality Act and the use of Equality Courts.

RACE

Although we live in an era where the expression of explicit racism is taboo, the effect of racism on South African society is more profound than meets the eye. Its legacy pervades all areas of human activity and as much as we have gained in the field of promulgating relevant legislation to deal with institutionalised racism, intolerance and racial discrimination have shifted to other fields¹⁴⁵ such as racial exclusivity, racial intolerance and intra-racism. It manifests in the form of cultural and ethnic discrimination as well as material and political gains.

The discussion on race below is based on the notion that the government and all other interest groups should integrate an anti racism strategy that identifies and eliminates the structures and

142 Ntlama, N. The Equality Act: Enhancing the Capacity of the Law to Generate Social Change for the Promotion of Gender Equality. *Speculum Jums. 2001. Volume (21) (1)*. p. 113.

143 The promotional regulations have not been promulgated as yet.

144 Albertyn, C. et al. *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*.

145 Harris, L. *Key Concepts in Critical Theory-Racism. 1999*.

systems that continue to perpetuate racism.¹⁴⁶ The discussion further questions whether the legislative framework is sufficient to address the different forms of racism emerging in South Africa. The purpose is to make human rights a reality for all by empowering people to access their rights and to create a culture of racial tolerance.

Prohibition of Unfair Discrimination on Ground of Race

The prohibition of unfair discrimination in terms of section 7 of the Equality Act means that no one can be unfairly discriminated against on the ground of race. In its preamble, the Equality Act makes reference to South Africa's international obligations in terms of the International Convention on the Elimination of Racial Discrimination. The Convention affirms the necessity of speedily eliminating racial discrimination in all its forms and to secure the understanding of, and respect for, the dignity of people. It encourages universal respect for the observance of human rights and freedoms for all without distinction as to race, sex, language and religion. South Africa ratified this Convention on the 10th December 1998.

Racism in South Africa

Despite South Africa's transformation agenda, it is clear that the envisaged constitutional non-racist society has not as yet been attained. Inhumane and racist conduct such as that reported at the University of Free State¹⁴⁷ is perhaps indicative of a flawed legislative framework in respect of the enforcement, promotion and protection of equality. For example, sections 25–28 of the Equality Act place a general duty and responsibility on the state and persons in public domain to promote equality. It serves effectively as a monitoring mechanism on government, public and private bodies. However, it is not enforced.

Such lack of enforcement led to the bizarre use of the repealed Group Areas Act in a lease agreement in the *Brown Ellen Gerber v Dunmarsh Investments Pty (Ltd)* case to enforce the exclusive use of a building by white people. Gerber, the complainant, was denied accommodation on the basis that her husband is Indian. Although the lease agreement provision is obviously unconstitutional, it is indicative that much more must be done to redress the legacy of immense inequalities based on race. A similar case of racial exclusivity in terms of section 7 (b) and (c) was reported in an article in the *Sunday Times*¹⁴⁸ indicating the existence of racial segregation on allocation of university accommodation. The article reported that university residences are still racially segregated and when black students apply for accommodation in a predominantly white residence, they would be advised against it, thus allowing for the exclusive occupation of that university residence by white students.¹⁴⁹ This is a form of indirect discrimination that is referred to in the Equality Act.

146 NAC at the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

147 The emergence of a racist mock initiation by white students on black workers made world headlines.

148 Govender, P. In *Sunday Times*. "Race still rules in some campus hostels."

149 The racist video at the University of Free State was made by white students to deter black students from applying for accommodation at predominantly white residences, April 2007.

Other unfair racial discrimination cases presented before the equality courts in 2007 are indicative that people continue to be victimised on basis of their skin colour. Racial intolerance, negative racial perceptions and racial slurs continue to find their way in the corridors of South African society. The case of Salah Akasha¹⁵⁰ was a matter of racial harassment in terms of section 7 (a) of the Equality Act. In this case the complainant (black), who was a new member of a golf club, was harassed by white golf club members and accused of loitering in the ground. Without inquiring about his membership status, police were called to arrest him. Upon raising his concerns with the golf club management his golf club membership was terminated. The case was filed in the Equality Court and an out of court settlement in favour of the complainant was reached and made an order of court. The racial slur case of Zandile Magubane is further evidence that racism and many of its other attributes may be with us for longer than anticipated.¹⁵¹ Zandile Magubane, a 36 year old domestic worker alleged that her employer referred to her as a 'kaffir bitch'¹⁵² in a cellular phone text message intended for the employer's wife but sent to Magubane's cellular phone. Her employer claimed that it was a mistake as the message was intended for his wife. Magubane alleged that she found numerous missed calls and messages on her cellular phone from her employer. One of the messages was, "*I tried to get hold of that kaffir bitch*"¹⁵³ The employer apologised to Magubane who did not accept his apology and instructed the Commission to take her matter to the Equality Court.

These cases are cogent signs that the legislation has done little to eliminate racism and racial discourse in South Africa. One can argue that the failure to implement the provisions of the Equality Act in respect of monitoring the promotion of equality freely allow those unwilling to let go of the old order to continue practicing systemic racial discrimination with impunity. Continued racial exclusivity at universities also shows the dearth of awareness and lack of empowerment of the student population in resisting racism as unconstitutional. The above cases further underscore the lacuna in the legislative framework of failing to acknowledge the multiple manifestations of racism in South Africa. The architecture of the legislation seems to be more focused on dismantling institutionalised discrimination but has not taken into account how to address the various forms of subliminal racism on a practical level. Similarly, blatant racism appears to be on the increase. This is perhaps a reflection of the trajectory of the prevailing racial discourse in South Africa that has fuelled both inter and intra racism rather than ameliorating it. Consequently, it has posed serious challenges in respect of racial integration at schools. Schools are institutions of primary socialisation but evidence of racial violence and ethnic tensions is suggestive of very little success is fostering racial integration. A key factor in the racial discourse is the racial categorisation which, by any stretch of the imagination, is exclusionary. Blacks are

150 *Salah Akasha v Piet Retief Country Club*. Case number 01/2006. Piet Retief Equality Court.

151 *Zandile Goodness Magubane v Cameron Forsyth*. Case number 01/2008. Durban Equality Court.

152 *Ibid*.

153 *Ibid*.

categorised as African and by extension every other racial category is therefore non-African. Is this categorisation not discriminatory and is the unintended consequence further racial intolerance?

The question as to whether the legal framework is successful in eliminating racism cannot be answered without considering the effectiveness of the redress mechanisms put in place by the Equality Act. The Equality Courts, which according to the Equality Act, are supposed to be structured in such a way as to render them user friendly and less formal do not seem to be effectively assisting the eradication of racism. Those who were previously disadvantaged do not seem to be making adequate use of the Equality Courts. However, when they do make use of these courts, the respondents, who are generally not financially viable, appear with legal representation. As a result, the financial disparity often renders access to the court and access to justice difficult for the poor.

It is therefore clear that although the legal framework is progressive and advanced, without a genuine acknowledgement of the multiple manifestations of racism ideas of non-racism will not be embraced. In this respect, it is important that form follows function. The truth of the matter is that until the legislative framework has enforced the practice of social responsibility exploitation of the most vulnerable racial groups will continue. It is therefore evident that legislation alone cannot succeed in eliminating racism. Deeply entrenched social attitudes are reproducing new forms of racial prejudice. It is submitted that the elimination of racism may require that the same amount of energy levelled towards the enforcement of the provisions of the Equality Act be met with the corresponding responsibility and duty to empower people. It is only then that senseless killings of one race by another¹⁵⁴ and racial harassment, that lately seem to be the rule rather than the exception, can be eradicated.

GENDER

Gender equality is often misunderstood as the right to equality for women. Gender equality simply means that women and men enjoy the same status. It means that women and men should have equal conditions for realising their full human rights and potential to contribute to all spheres of political, economic, social and cultural development and to benefit from the results. It is the equal valuing of similarities and differences between women and men and the varying roles that they play. If gender equality means that women and men enjoy the same status, surely receiving a pension at the same age would be considered as gender equitable. *Roberts v the Minister of Social Development* (case unreported), confronts that this matter deserves commentary as it contributes to the development of gender equality in 2007.

Government pension is given to women at the age of 60 and to men at the age of 65. The point of contention in this case arose from section 8 (d) of the Equality Act. This case was brought to

¹⁵⁴ Reference here is made to the alleged murder of black people by a white teenager in Swartruggens.

court by group of elderly men who wanted to test the validity of the state pension that is paid to men from the age of 65. The Social Assistance Act 13 of 2004 entitled men to apply for a state old age pension, based on a needs test, when they reach the age of 65, but entitles women to start receiving the pension at the age of 60. The Legal Aid Board's Port Elizabeth Justice Centre argued on behalf of the elderly men. The Commission, the Centre for Applied Legal Studies of the University of the Witwatersrand and the Community Law Centre of the University of the Western Cape (represented by the Public Interest Law Department at Webber Wentzel Bowens) were admitted as friends of the court. The team argued that the Bill of Rights states that nobody may discriminate on the basis of age, race or gender. It was argued that the Social Assistance Act discriminated against poor men between the ages of 60 and 64 and excluded them and their families from social assistance which would ensure their very survival. In addition, it was argued that the state had failed to apply its mind and simply ignored the plight of this group of disadvantaged citizens, who were being discriminated against based on their gender. The team also argued that the government had resources to accommodate this group of poor men and could find the R2.7 billion that was needed. The friends of the court argued that the pension should be given to everyone at the age of 60 in terms of the right to social security and equality in the Constitution.

The matter was heard in the Pretoria Court on the 13th of September 2007. At time of writing this chapter, the court's judgement was reserved. If this matter is won, it will be a landmark decision against gender discrimination.

South Africa's Constitution is one of the most progressive in the world in respect of gender equality. The Constitution guarantees the right to bodily integrity and it supersedes customary law should there be a contradiction between the two. In addition to the Constitution, the Equality Act prohibits, in section 8 (c), (d) and (e), discrimination that arises under customary and religious law. The case of *Shilubana and Others v Nwamitwa 2007 (14) CC*, underscored the discrimination against women arising from customary law and the extreme patriarchy in society.¹⁵⁵ This case challenged the customary law concept that only men may be chiefs. Tinyiko Shilubana and Sidwell Nwamitwa each insisted that they are the rightful head of the Valoyi tribe in a dispute sparked off by the death of Shilubana's father, Hosi Fofozwa, in 1968. Fofozwa did not have a male heir, so his title was passed to his brother Richard Nwamitwa, and his son Sidwell, who had expected to take over from him when he died. However, in later years, while Nwamitwa was still alive, the tribe decided that it was unconstitutional to exclude women from succession and agreed that Shilubana should become chief and that the Fofozwa line be reinstated.

The Pretoria High Court and the Supreme Court of Appeal found in favour of Nwamitwa and therefore the matter was taken to the Constitutional Court on the point of gender equality. Customary law does allow for making choices and for changing circumstances, and in this case

¹⁵⁵ See chapter 1 on International Treaties, page 13 for additional information.

the principle of constitutionality was the circumstance. If Shilubana's argument were to be applied, the position of Fozwa's sister, who was also overlooked at the time of succession, would have to be reviewed. Judgment in this case is reserved.¹⁵⁶ If the judgment finds in favour of Shilubana, it will give effect to the letter and spirit of the Constitution, particularly the equal enjoyment of all rights and freedoms by every person, the promotion of equality and the value of non sexism.

The difficulty of such cases is how to reconcile culture and tradition with human rights, equality and the Constitution. South Africa is a society steeped in traditional culture and rites of passage. But such traditions are often deeply patriarchal and paternalistic. In a similar fashion to racism, patriarchy and paternalism are deeply embedded within the social structure and social system of the South African society. Therefore, South Africa finds itself in a rather tenuous and contradictory position as the suppression and subjugation of women is prohibited in law but in fact the pervasive nature of patriarchy in every facet of cultural life means that many women continue to fall prey to gender-based violence and exploitation. For many women the prohibition in law has done little to ease their suffering when the right to culture supersedes the right to equality in fact. It is therefore important to interrogate such contradictions and find a way to reconcile the right to equality with cultural tradition.

South Africa has among the highest levels of gender-based violence in the world, despite the legislation that specifically protects the rights of victims of gender-based violence. The South African court system is still ill-equipped to deal with gender-based violence cases quickly and sensitively. The legislation in place includes:

- The Domestic Violence Act 116 of 1998, the purpose of which is to afford domestic violence victims the maximum protection from domestic abuse as provided by the law. Under Section 7 of the Act, the court can issue a protective order prohibiting the abuser from committing any further acts of abuse or entering a residence shared by the abuser and the victim. It is therefore an important legislative tool for women in abusive relationships to attain protection and redress through the criminal justice system, as well as access to the appropriate support from other sectors, such as health. According to the Act, domestic violence includes intimidation, harassment, stalking, damaging of property, entry into the residence of the victim without consent where the parties do not share the same residence or any other controlling or abusive behaviour towards a victim, where such conduct harms, or may cause imminent harm to the safety, health or well-being of the victim.¹⁵⁷
- The Sexual Offences Act 32 of 2007 has undergone reform since 1996 and was signed by the President on the 13 December 2007. It creates a range of new offences and addresses a wide range of matters relating to the management of sexual offences. In the

¹⁵⁶ *Legal Brief*, 12 November 2007.

¹⁵⁷ Department of Justice, Domestic Violence Act 116 of 1998, Government Gazette, Cape Town, Vol. 402, No. 19537, 2 December 1998,

Act the definition of rape is extended to include the penetration of the mouth, anus and genital organs of one person with the genital organs or another body part of another person, or an object or part of the body of an animal. The Act recognises the seriousness of oral and anal penetration and recognises the seriousness of the sexual violation of boys and men. In a country like South Africa where domestic violence, sexual assault and rape are common occurrences, the Commission applauds the decision to recognise oral and anal penetration. The Act further introduces a range of crimes that relate specifically to the sexual exploitation of children and people with mental disability. These include sexual grooming, sexual exploitation and the use of children or people with mental disabilities in pornography or the display of pornography to children. It creates tighter laws relating to consenting acts between teenagers and criminalises any sexual activity no matter how light between teenagers under the age of 16 in spite of the willingness of both parties.

In addition, the Equality Act in section 8 prohibits unfair discrimination on the ground of gender. It provides that no person may unfairly discriminate against any person on the ground of gender in any form, be it, gender-based violence, pregnancy or the limitation of access to services. The purpose of this section is to ensure that men and women are treated equally and that gender equality is established and upheld in our society. Section 8 of the Equality Act states that no person may unfairly discriminate against any person on the ground of gender, including:

- Gender-based violence;
- Female genital mutilation;
- The system of preventing women from inheriting family property;
- Any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- Any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
- Discrimination on the ground of pregnancy;
- Limiting women's access to social services or benefits, such as health, education and social security;
- The denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons; and
- Systemic inequality of access to opportunities by women as a result of the sexual division of labour.

In accordance with section 8 of the Equality Act, South Africa has also passed and implemented legislation to further protect women and children by empowering them with access to resources and legal status. Among others, laws relating to inheritance include the Recognition of Customary

Marriages Act 120 of 1998; Maintenance of Surviving Spouses Act 27 of 1990; Intestate Succession Act 81 of 1987; Divorce Act 70 of 1979; Administration of Estates Act 66 of 1965, the Maintenance Act No. 99 of 1998 and the Termination of Pregnancy Amendment Act No 38 of 2004.

However, such legislation is not enough. This is evident in the numerous cases that have been reported in the newspapers, to the Commission, as well as in Equality Courts. Some of the cases are mentioned below:

- In July 2007, Sizakele Sigasa and Salome Mosooa, two lesbian women, were murdered in Meadowlands, Soweto. At the time of writing the chapter, police were still investigating and no arrests were made.¹⁵⁸
- In April 2007, a 16 year old black lesbian, Modoe Mafubedu, was raped and repeatedly stabbed to death. At the time of writing this chapter, the police had not made an arrest.
- On 22 July 2007, the body of a 23 year old lesbian, Thokozane Qwabe, was found by people herding cattle in a field in Ladysmith. Her clothes were laying about 70m from where her body was found. The body had a number of wounds to the head suggesting she had been stoned to death. A suspect was arrested and charged with murder.¹⁵⁹
- A complainant alleged that the amount of maintenance money she received from her husband was not enough to sustain her and their two children. She alleged that she had opened a case against her husband, but on every occasion when her husband was subpoenaed to appear before the court, he defaulted.¹⁶⁰
- A student constable complainant, in the employ of the SAPS, was suspended because she fell pregnant before the completion of her probation period. Preliminary investigations by the Commission pointed to *prima facie* discrimination on the basis of pregnancy in terms of section 9 (3) of the Constitution. The complainant elected to opt for a settlement offer without engaging the Commission. The offer is being discussed between her and the SAPS including amending the SAPS recruitment policy which is to be monitored by the Commission for Gender Equality.

The occurrence of these crimes on the ground of gender in 2007 alone affirms that South Africa should draft legislation that addresses the issue of hate crime and further promote and uphold the existing legislation. South African law does not recognise a separate category of hate crimes and are consequently handled as ordinary criminal offences. However, there are still many challenges of hate crimes based on gender/sex violence. As a result, gay, lesbian and transgender people are still perceived as a threat to the normative social order by seeking to exercise autonomy over their body and sexuality.¹⁶¹ Hatred of gay, lesbian and transgender people is completely overlooked within the criminal justice system. There is therefore a need to develop legislation that

158 http://www.sapsjournalonline.gov.za/dynamic/journal_dynamic.aspx?pageid=414&jid=2088

159 www.sangonet.org.za

160 January 2007, H. N. GP/2006/00101 - (DM).

161 www.sangonet.org.za

will address hate crimes within the arena of equality to allow all people to exercise their rights without fear. However, legislation will not be enough and gears need to shift toward action and from patriarchy to changed attitudes. Therefore, there must be a consideration of implementation plans that bring results and a meaningful statistical reduction on gender based violence.

However, attitudes are slowly changing. This is evidenced by an increase in the discourse around gender equality amongst men through initiatives such as the Fatherhood Project and Men as Partners in the fight to end gender violence. This is clear from the South African 2007 United Nations Country Report to the Commission on the Status of Women (CSW). The report highlighted the needs and challenges that face South Africa with regard to gender equality and some of the key themes to emerge from the 2007 UN Country Report were:

- The growing number of men taking a stand against gender based violence and for gender equality;
- The occurrence across South Africa of the groundbreaking work with men to achieve gender equality;
- There is visible support by some senior government officials for work with men – but more sustained commitment is needed;
- There is a need for greater clarity of purpose about the goals of work with men, as well as increased co-ordination and planning;
- Men’s violence against women remains unacceptably pervasive;
- Greater dialogue and accountability between organisations working with men and women’s rights organisations is needed;
- Efforts to increase men’s involvement in achieving gender equality rely too heavily on workshops and community outreach;
- Efforts to involve boys in achieving gender equality should be expanded;
- South African funding for gender equality work with men is insufficient while some international funding comes with strings attached; and
- Not enough work with men was taking place in rural parts of the country or with traditional leaders.¹⁶²

South Africa has committed itself to the implementation of mechanisms to involve men and boys in the achievement of gender equality. This was done at the 48th session of the Commission on the Status of Women in 2004 and shows South Africa’s commitment to the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁶³ The Convention identifies specific areas where there has been extensive discrimination against women, for example, in regard to political, economic, socio-cultural and civil rights. In these and other areas, the Convention spells out specific goals and measures that are to be taken by state parties to facilitate the creation of a global society in which women enjoy full equality in relation to men and thus full realisation of their

¹⁶² <http://www.genderjustice.org.za/sub-project/south-africa-country-report-to-the-un-csw-2007.html>
¹⁶³ CEDAW.

fundamental human rights. It sets out, in a legally binding form, internationally accepted principles on the rights of women. The basic legal norm of the Convention is the prohibition of all forms of discrimination against women. In addition to demanding that women be accorded equal rights with men, the Convention goes further by prescribing the measures to be taken to ensure that women everywhere are able to enjoy the rights to which they are entitled. The Convention was signed by South Africa in January 1993 and ratified on 15 December 1995.

In assessing gender equality in 2007 against the objectives of the Equality Act, it is clear that in terms of section 2 (b) the rights women have are still being violated on the basis of gender-based violence. The measures that are in place are not adequate and because of this, forms of gender-based violence such as the trafficking of women and children are on the increase. South Africa also has a very high number of people living with HIV/AIDS, the majority of whom are female. The pandemic further exacerbates the already huge burden of care that women shoulder. Women still constitute the majority of poor, homeless, jobless and dispossessed. These conditions are exacerbated by the AIDS pandemic.¹⁶⁴ State maintenance systems are highly bureaucratic and involve lengthy delays while women and children are often without food and shelter. Women, particularly young women, are most vulnerable to the HIV/AIDS pandemic because of their powerlessness to negotiate safe sex. This requires changing attitudes so that the status of women is changed, which will lead to their empowerment.

In terms of section 2 (c), there are no measures to facilitate the eradication of unfair discrimination between culture and law with regard to women's rights. However in terms of section 2 (e), progress has been made in raising awareness and challenging gender stereotypes within the media. This needs to continue in order to achieve the type of society that is gender sensitive.¹⁶⁵ In summary, South Africa has not seen the kind of development on gender equality that is needed for it to progress towards eradicating gender inequality. Issues such as poverty need to have a gender focus. In addition, legislation needs to be developed that talks specifically to issues of gender inequality, gender-based violence and HIV/AIDS.

DISABILITY

South Africa played an active role in the drafting of the Convention on the Rights of Persons with Disabilities. In March 2007, South Africa was one of the first countries to sign the Convention. The signing was symbolic of the commitment to the rights contained in the Convention. South Africa ratified the Convention and its Optional Protocol in November 2007. Many of the articles contained in the Convention already appear in the Constitution. However, there are also articles that are particularly important because they are disability-specific, such as accessibility, personal mobility, and rehabilitation. The Convention highlights the need to prioritise the rights of persons

¹⁶⁴ Parents die from AIDS or AIDS related diseases leaving behind their children who are often left to the care of grandmothers. This is also linked to the increase in child headed households with the oldest female caring for younger siblings.

¹⁶⁵ <http://www.info.gov.za/speeches/2007/07041016151001.htm>

with disabilities. People with disabilities are the largest minority group and the Convention is a shift towards a human rights based approach to disability away from the social and medical model.

The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. It reaffirms the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination. Its principles are respect for inherent dignity; individual autonomy, including the freedom to make one's own choices and the independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; respect for the evolving capacities of children with disabilities; and respect for the right of children with disabilities to preserve their identities.¹⁶⁶

In line with this, section 9 of the Equality Act prohibits unfair discrimination on the ground of disability. It provides that no person may unfairly discriminate against any person on the ground of disability, including:

- Denying or removing from any person who has a disability any supporting or enabling facility necessary for their functioning in society;
- Contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility; and
- Failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

In addition, the Mental Health Act asserts the right to respect, human dignity, privacy, consent and equality for persons with mental disabilities. Its key achievement is the establishment of the Mental Health Review Boards which act as protective and monitoring instruments for persons with mental disabilities within health institutions.

The objects of the Mental Health Act are to:

- a) Regulate the mental health care in a manner that
 - i. Makes the best possible mental health care, treatment and rehabilitation services available to the population equitably, efficiently and in the best interests of mental health care users within the limits of available resources;
 - ii. Co-ordinates access to mental health care, treatment and rehabilitation services to various categories of mental health care users;

¹⁶⁶ Convention on the Rights of Persons with Disabilities.

- iii. Integrates the provision of mental health care services into the general health services environment;
- b) Regulate access to and provide mental health care, treatment and rehabilitation services to:
 - i. Voluntary, assisted and involuntary mental health care users;
 - ii. State patients; and
 - iii. Mentally ill prisoners;
- c) Clarify the rights and obligations of mental health care users and the obligations of mental health care providers; and
- d) Regulate the manner in which the property of persons with mental illness and persons with severe or profound intellectual disability may be dealt with by a court of law.

The Mental Health Act, the Equality Act and the signing of the Convention led to a National Disability Summit which took place in July 2007. The purpose of the Summit was to engage all stakeholders involved in addressing disability issues. The summit discussed the following:

- The establishment of a National Disability Machinery (NDM);
- The Review of the Integrated National Disability Strategy (INDS); and
- Implementation of the UN Convention on the Rights of Persons with Disabilities.

THE CRITICAL RESOLUTIONS OF THE SUMMIT

National Disability Machinery

- The Office on the Status of Disabled Persons (OSDP) is responsible for the budget for the NDM and its processes and deliberations.
- The NDM must establish a presidential working group, of a maximum of ten people, with emphasis on self-representation.
- The final terms of reference for the NDM incorporates appropriate and relevant comments from the Summit such as clarifying the legal status of the machinery.

Economic Empowerment

- The disability sector must promote the establishment of a Disability Fund to support the economic empowerment of people with disabilities.
- The OSDP must engage with relevant government representatives on the establishment of the Disability Fund.
- DPOs must re-align their strategic approach, policies and programmes to government's programmes and the goal of halving poverty and unemployment.
- The Thabo Mbeki Development Trust establishes a disability economic empowerment forum, in conjunction with partners such as NAFCOG and SETA's, that will facilitate and increase the participation of people with disabilities in mainstream economic activities, including through skills development and capacity building.

Social Inclusion

- There must be a preference for disability mainstreaming over disability special projects, unless disability special projects further the social inclusion of people with disabilities.
- The Commission must implement a programme that will assess the current extent of social and economic inclusion and participation of people with disabilities, and identify the gaps that need to be addressed in realising the full and equal human rights of people with disabilities.

International Obligations

- The OSDP must develop an implementation plan for the Convention, taking into account the inputs made at the Summit.

CASE LAW

In 2007, the Access for Citizens Committee instituted proceedings against Top Presteeders (Pty) Ltd. in the Hermanus Equality Court, in terms of section 20 of the Equality Act. The complainant alleged that the renovations at the Village Square (owned by the respondent) were not disabled-people friendly and did not comply with the provisions of the Equality Act. The conduct of the respondent in denying proper access to people with disabilities to the Village Square Centre constituted unfair discrimination on the ground of disability. Such unfair discrimination is expressly prohibited by section 9 (c) of the Equality Act. The Commission acted for and on behalf of the complainant and a settlement agreement was reached between the parties and made an order of court. In terms of the settlement agreement the respondent would, inter alia, comply with the Equality Act and other enabling legislation and also appoint a disability consultant who will assess and report on the progress of the renovation and compliance issues. The renovations would be monitored and a final report lodged with the Court once it was completed.

This case reflects the general trend of complaints received by the Commission. Matters of unfair discrimination on the ground of disability mainly focused on physical access to buildings and other facilities that are necessary for the disabled people to exercise their rights and livelihood like any other able bodied member of the society. Other matters dealt with stigmatisation on the grounds of HIV/AIDS and mental health and thus affecting the disabled people's right to education.

In general there appears to be a greater awareness of mainstreaming disability. However, implementation and service delivery is sparse and there is inadequate research to inform proper planning. The Office on the Status of Disabled Persons is in the process of finalising the National Disability Policy Framework and Guidelines for Implementation documents. It is hoped that this will provide clarity for the way forward. The National Disability Machinery will also be highly

influential in moving the disability agenda forward, due to its effective representation of government departments, disabled people's organisations, business, labour and chapter 9 institutions.

RECOMMENDATIONS

- The current trend of training and awareness raising needs to be reviewed and restructured. This includes the changing of current training methods and adapting training material for specific audiences. There is an urgent need for attitudes and perceptions to change regarding issues of equality. The Commission should be the driving force in this by reviewing its training needs, material and methods.
- To adequately grapple with the discourse of equality, the Commission should engage with the public in terms of public enquiries.
- Schools should become a priority in terms of training on equality issues. This can be done by recommending to the Department of Education to allocate time within the school day to train the youth on matters of equality, human rights, and cultural diversity.
- Research and public inquiries to engage South Africans to genuinely acknowledge dialogue about the multiple manifestations of race, gender and disability.
- The Commission to work on the level of attitudes and prejudice and effectively contradicting the ideology of superiority.¹⁶⁷
- The Commission to use the existing policy frameworks to strengthen co-ordination and planning to achieve the goals of equality.
- There needs to be effective monitoring of government by the Commission with regards to race, gender and disability plans.

CONCLUSION

This report captured the developments in Equality with regard to race, gender and disability for the year 2007. These include court cases, media reports and cases lodged with the Commission. In assessing the developments in equality, one can see that there have been developments, especially around Equality Court cases. This is indicative of a level of awareness on the Equality Act and Equality Courts, including the remedies that are available. However, the media reports for 2007 show the contrary. The media reports that were discussed above do not refer to the use of Equality courts or the Equality Act in any way. This is a serious concern and calls for awareness to be raised as a priority in South Africa. Achieving success in enforcing the right to equality in South Africa will depend on the effectiveness of the law to bring about social change.

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CHAPTER FOUR:
**ACCESS RESTRICTED? THE PROMOTION OF
ACCESS TO INFORMATION ACT AND
IMPEDIMENTS TO DELIVERY**

INTRODUCTION

The Promotion of Access to Information Act¹⁶⁸ (PAIA) is a relatively new piece of legislation in South Africa. The legislation, which is explored in greater detail below, places positive obligations on the public sector and on private entities to provide access to information to requesters and to report on their compliance with PAIA. Underpinning the motivation for PAIA is its necessity in the amalgam of elements desirable for a progressive democracy. Its key elements, therefore, encompass both the principles of good governance and informed public scrutiny. These laudable principles are meant to inform the frameworks for democratic transformation and delivery, but whether any tangible delivery on PAIA has been achieved is questionable.

With regard to the obligations it places upon the public sector, the legislation bears some resemblance to other legislation emanating from Parliament during this time.¹⁶⁹ The similarities between such legislation, however, end at this point, since the PAIA legislation is the only one of its kind globally to place positive duties on both public and private entities with regard to accessing information.

The Commission has a specific mandate dictated by the provisions of PAIA. These provisions in turn, confer obligations which are specific to the Commission and are supplemented by certain broader, but separate, directives targeting the implementation and the popularising of the legislation. The Commission thus has the dual function as a custodial and monitoring body, and a catalyst in the implementation of the Act. The implementation of the legislation insofar as promotion, education and monitoring functions are delineated, therefore also finds its seat at the Commission.¹⁷⁰

Historically, the right to access information is an acknowledged fundamental right, finding its formal roots in the Universal Declaration of Human Rights¹⁷¹ and also in a limited sense, the African Charter on Human and Peoples Rights,¹⁷² and, subsequently, in the South African Bill of Rights.¹⁷³ Promulgated in line with the constitutional directive for its enactment in 2000, the legislation acknowledges the critical role it plays in the South African context for individuals in the assertion of their rights, as a catalyst to attain governmental reform and to advance informed public scrutiny. In this sense, the access to information legislation is a key vehicular right for the assertion of other fundamental rights. Despite its formal entrenchment, however, practical delivery in terms of PAIA is impeded by a number of complex factors.

168 The Promotion of Access to Information Act 2 of 2000. The right to access information was encompassed in the Draft Open Democracy Bill 67 of 1998.

169 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Financial Intelligence Center Act 38 of 2001, Financial Advisory and Intermediary Services Act 37 of 2002.

170 The Commission was formally launched in March 1996.

171 The Universal Declaration of Human Rights, Article 19.

172 Article 9.

173 The Bill of rights is part of the Constitution of the Republic of South Africa, Act 108 of 1996.

The Constitution, in line with the Paris Principles ensures that the mandate conferred on the Commission is one which is executed without fear, favour or prejudice and independently from government interference. However, both the Constitution and PAIA require the Commission to report on its activities to the National Parliament annually. PAIA requires a specific report on the activities of the Commission in relation to its broad PAIA responsibilities and specifically with regard to its monitoring and custodial role in terms of the reports submitted to the Commission in terms of section 32 of PAIA. The Paris Principles are, however, departed from on the question of resources. With regard to the latter, the activities of the Commission are significantly circumscribed by resource restrictions. The financial resources required by the Commission to execute its custodial functions under PAIA are far from realistic. Resource restrictions dictate the spread of the interventions the Commission has the capacity to undertake. These limitations also impact significantly on the realisation of the PAIA objectives for the public, and are discussed more fully in the considerations made with regard to legal reform and litigation in particular.

The issue of accessibility and enforcement as impediments to the implementation of PAIA is also placed within the context of the emerging jurisprudence with regard to access to information matters. At present, traditional judicial enforcement mechanisms continue to inform the need to rescue PAIA from being exclusionary and elitist. To this end, a brief summary and discussion of key case law is included in the chapter. PAIA based litigation is therefore an area of grave concern and presents a number of impediments to the tangible realisation and assertion of rights. The challenges emanating from the enforcement mechanism form a common thread in the substance of the chapter.

Apart from formal impediments restricting the enforcement of PAIA, the chapter explores implementation within the three tiers of government. The section 32 reports submitted to the Commission allude to grave implications for its implementation. However, a section 32 report is not a conclusive tool in assessing implementation. It reveals at a minimal level that the processes and degree of operational efficacy within the public sector is weak. Specific instances of non-compliance, accessibility and quality of delivery under PAIA are noted. Related criticisms levied at implementation and enforcement therefore ground the report and the suggested recommendations arise from these issues.

POLICY AND LEGISLATIVE FRAMEWORK: DOMESTIC AND INTERNATIONAL

The process of reform and transformation post-1994 saw the development and formation of policies to entrench and advance the new democratic constitutional dispensation. These policies found form in “primary legislation” to give substance to specific rights listed in the Bill of Rights. South Africa’s PAIA is an example of legislation born of a constitutional directive. The time of its enactment also places it within the rapid global mass of states enacting access to information laws. Information laws have been enacted most rapidly in the course of the decade by states classified as ‘developing nations’. The shift to formally entrench an information regime is

sometimes attributed to being the response of developing nations to the dictates of organisations which influence international policies. The adoption of information laws for purposes of compliance with international agendas underscores concerns about the actual government commitment to legislation like PAIA. The increasing trend to create information regimes is mirrored on the continent as well.¹⁷⁴

The right to access information is entrenched in both South Africa's interim and final constitutions. Traditionally finding its roots in the Universal Declaration of Human Rights, the contemporary utility of the right-now underpins good governance. The preamble to the legislation records the import of the Act as an instrument which in one breath recognises the history of the country and which sets out an aspirational intent for the future by fostering a culture of transparency and accountability within an informed South African society.¹⁷⁵ In the South African context, access to information, as it is formally expressed in PAIA, is accorded an extended utility beyond good governance, specifically when it is engaged in the realisation of socio-economic rights.

The regulation framework established in terms of PAIA dictates:

- The process through which information may be accessed from the public and private sectors;
- The circumstances and grounds on which access may be justifiably refused;
- Recourse for dispute resolution where access is contested; and
- Mandatory reporting obligations for public and private sectors.

In terms of the legislative framework, PAIA closely mirrors freedom of information regimes globally. It does, however, contain two significant differences from these regimes. One of these rests on the right of requesters to access information from private bodies. This expansion of access characterises PAIA's unique distinction from access to information frameworks globally. The second key difference between PAIA and comparative international information regimes rests with the mechanisms for enforcement. In most comparative jurisdictions, dispute resolution and enforcement mechanisms are centrally located in the offices of an information commissioner or information ombudsman.¹⁷⁶ By contrast, in terms of PAIA, ultimate enforcement powers are accorded exclusively to the courts.

While the existing framework to facilitate access to information has been celebrated in PAIA, the latter is not without limitation. Its practical utility as a tool to realise and assert rights in the South African context is not above challenge. Its rather legalistic processes and onerous reporting

174 Uganda passed its Access to Information Act in 2005. Other countries in the course of developing their legislation include Kenya, Nigeria, Angola, Malawi and Sierra Leone. The following websites list FOI developments globally: <http://www.faculty.maxwell.syr.edu/asroberts.foi/links.html>.

175 The Preamble to PAIA.

176 The Canadian, Irish, Norwegian and Australian models with Information Ombudsman and Information Commissioners differ significantly from the South African model in this respect.

obligations have informed popular perception, and this could see PAIA relegated to the status of a white elephant if not addressed adequately.

PAIA encompasses a broad right to access information and the state is viewed as a custodian of information to which the public is entitled. Its impact is seen in the general unqualified right to access of public records and information for the requester. Access may be refused only exceptionally under PAIA. However, even these exceptions may be overridden when the public interest clauses are engaged. The PAIA legislation impacts integrally on all the tiers of the public administration.¹⁷⁷ It has the potential, and often does appear, to be inconsistent with legislation enacted before 1994 and sometimes with contemporary legislation as well. In these circumstances, PAIA is to be read as prevailing over inconsistencies between its provisions and that of other legislation.

In the South African context, PAIA underpins transparency, good governance, and informed decision making. It is also viewed as a critical instrument in seeking and securing the attainment of socio-economic rights. The utility herein needs to be viewed as more than a happy coincidence. Access to information in South Africa is potentially much more than a mere accession to the dictate of international institutions of power. It has a tangible and necessary role to play in the developing landscape of the country.

LAW REFORM AND JURISPRUDENTIAL DEVELOPMENTS

PAIA related legislative and jurisprudential developments are informed through three key processes. The first of these addresses formal amendments submitted to the Department of Justice and Constitutional Development on specific issues impacting on application, interpretation and compliance provisions. The Commission has played an instrumental role in securing reform to accelerate implementation and enforcement of PAIA.

Technical amendments in the form of regulations amending certain provisions of PAIA abound. These have been primarily initiated through recommendations by the Commission and interest groups in the course of law reform. An example of such an amendment is the regulation amending the timeframes within which public bodies are to submit reports to the Commission. Submissions have also been made with regard to the delegation of duties by Information Officers to deputy information officers (DIOs). This amendment permits heads of departments who are designated Information Officers to delegate the duty of receiving and processing requests for information to appropriate personnel.

While the recommendations cited above have improved application and implementation to some degree, a key recommendation as yet awaits address by the Department of Justice. The

¹⁷⁷ Traditionally the three tiers of government in South Africa are the National, Provincial, and Local Government / Municipalities. The fourth category includes Parastatals and other Government entities.

proposed amendment directly impacts on accessibility and enforcement of PAIA and is explored further in the discussions on enforcement challenges and recommendations tabled below.

Legislation monitoring is the second component informing law reform. The process entails monitoring new and amended legislative drafts, to ensure consistency with access principles with regard to information. Its necessity must be seen in the context of the evolving and dynamic area of legislative reform in South Africa.¹⁷⁸ The Commission plays a vital role in this regard, ensuring both consistency with PAIA in relation to legislative enactments and amendments; and as a champion of the right to access information itself. To date a number of submissions have been made to drafting committees within Parliament and to specific ad hoc review committees constituted to review regulations, practice, procedure and legal review. These proposals have scrutinised legislation with due regard to its potential impact on the right to access information despite the PAIA provisions which are deemed to override those in other pieces of legislation to the extent of the inconsistency with PAIA. The submissions¹⁷⁹ have included recommendations on fee structures, the classification of documents by state security departments, the impact of PAIA in relation to the Protection of Personal Information Act, and the Key Installations Act.¹⁸⁰

The third component in informing legal developments arises primarily from the monitoring of case law on PAIA. Reliance on judicial interpretation remains a fundamental interpretative tool in South Africa's dynamic constitutional democracy. Judicial precedent from lead cases are summarised and included in this discussion to highlight issues which have arisen for resolution and interpretative trends in decision making.

COMPLAINTS TO THE COMMISSION

The Commission's role and constitutional mandate have resulted in an overlapping and reinforcing of functions when viewed in the context of PAIA. The Commission has not been accorded any specific traditional judicial functions under the Constitution or under PAIA.¹⁸¹ These jurisdictional factors dictate how PAIA based complaints to the Commission are processed.

However, the Commission's powers as a human rights watchdog, together with its powers in terms of PAIA, lend statutory weight to its obligations to assist members of the public and private bodies. Thus the complaint resolution mechanisms employed by the Commission dictate the type of assistance provided in terms of PAIA.¹⁸² The approach of the Commission in executing this

178 The African Peer Review Mechanism (APRM) report on South Africa ,puts the number of legislative enactments in the country since 1994 to 800. The report may be down loaded from:www.nepad.org, May 2007.

179 Some of which are already discussed in preceding paragraphs. Others include submissions made to the Ministerial Review Commission on intelligence;

180 The Protection of Personal Information Act 84 of 1982, National Key Points Act 102 of 1980 and the Asmal Ad hoc Review Committee on Chapter 9 and Associated Institutions.

181 The litigious capacity of the Commission is hugely undermined by its lack of adequate resources in this regard. Litigation which is PAIA based is therefore routed through the Legal Services Programme of the Commission. It has however, recently been decided that on a policy level, PAIA-based litigation is to be accorded key priority.

182 Most complaints also reach the Commission through mail, telephonically and electronically through the PAIA email

function is dictated largely by its resource capacity. Its resources, both financial and operational, impact significantly on the volumes and nature of litigious matters and mediatory services it can realistically render.¹⁸³ The preferred route for dispute resolution has therefore been through mediatory services offered to the parties. The profile and credibility of the Commission has contributed hugely to its success in this regard and this soft approach has therefore resulted in an effective non adversarial means of providing recourse to requesters. The overwhelming success rate enjoyed by the Commission in this regard has informed its recommendation that inexpensive and expeditious resolution can be attained through an intermediary structure before ultimate recourse to the courts.¹⁸⁴

JUDICIAL PRECEDENT

The PAIA-based litigation is fraught with a number of difficulties. In essence, litigation is complex, costly, and time consuming, rendering most action out of bounds for ordinary litigants. Private individual requests are notably fewer than litigation by interest groups¹⁸⁵ and corporations. It would seem that in matters before the provincial high courts, access to information applications are made in conjunction with, or as peripheral applications to, the central issues being litigated. At present only a few PAIA-based matters have gone to the highest courts on appeal or as direct urgent applications. Interestingly, these matters have focused largely on the classification of records by state security departments,¹⁸⁶ privacy rights,¹⁸⁷ and freedom of the press. The more recent of these matters have included public figures and have drawn significant media attention. Earlier matters have focused on definitional and interpretational issues.¹⁸⁸

Albeit that the jurisprudence on PAIA has not been prolific, the emerging jurisprudence indicates a trend towards advancing the right to access information by the repeated and emphatic pronouncements of the courts that the right of access to information can only be limited when there is justification for such a limitation vis-à-vis other fundamental rights considerations.

Brief summaries of PAIA specific cases are presented below. These cases highlight the considerations made by the country's highest courts with regard to the right to access information. The precedent and interpretative value of the rulings impact on how PAIA is interpreted and implemented. It is anticipated that, over time, the provisions of PAIA will increasingly be tested and a strong body of precedent will result. In most matters it becomes apparent that requesters require expensive representation to litigate; and that the actual final

box. Internal referrals are sometimes made by the Commission's legal services programme.

183 A diverse range of matters have been referred to the Commission. They are typically cases where sensitive or contentious records are sought. Requesters have ranged from NGO's and CBO's, but are most often indigent members of the public with requests to service delivery agents within government. Matters referred are not limited to those ripe for litigation. Inasmuch as several of these matters are at the internal appeal stage, there have been cases where assistance is sought even after judgment is pronounced.

184 The average time taken to conclude such matters is approximately eight weeks.

185 A key organization in this regard is the South African History Archives which lodged a record 120 PAIA-based cases in the initial years of the coming into operation of the Act.

186 Ministerial Review Commission on Intelligence, July 2007.

187 *Mantombazana Edmie Tshabalala-Msimang and Another v Mondli Makhanya and Others*, WLD Case Number 18656/07.

188 *Transnet Ltd and Another v SA Metal Machinery CO*, 2006(4)BCLR473(SCA).

rulings of the courts are delivered some time after the initial lodging of a request.¹⁸⁹ These factors have serious implications for the enforcement of PAIA.

Mittalsteel SA (Ltd) (formerly ISCOR Ltd) v Hlatshwayo¹⁹⁰ (Private Requester/Public Body)

The case decided by the Supreme Court of Appeal focused on the definition of a public body. A student requested access to minutes of meetings held by an entity before it had become private. In essence, definitions of a public body are contained both within the constitutional provisions and within PAIA itself. The PAIA provisions closely mirror the provision in section 239 of the Constitution.¹⁹¹ But whether 'institutions' referred to in the PAIA provision permitted the inclusion of bodies such as the appellant within its definition required an assessment of comparative law and jurisprudential precedent.

The court examined both the control and function tests in assessing the relevancy and applicability of these tests to the facts of the case. In as much as the court considered the tests discussed above, it advanced the argument that the developments in trade and commerce which permit the privatisation of public services may render the tests inapplicable as gauges. The court pointed out that due to the mixture of control and function inherent in the operations of such privatised entities neither test should be relied on exclusively in making a classification. Despite a ruling in favour of the requester, actual delivery was set at some forty days after the date of judgment.

Transnet Ltd and another versus SA Metal Machinery Co¹⁹² (Public Body/Private Entity)

A requested document was made available to the requester with pricing details omitted. The omissions were defended by the public body on the basis of prejudice to the contracting private party. The court found in favour of the requester on the facts of the case, and was alive to the fact that "parties cannot circumvent the terms of the Act by resorting to a confidentiality clause."¹⁹³ The court also felt that the appropriate interpretation of the confidentiality sections is one where a necessary proportional balancing of competing rights should be made. The court stated that once the tender had been awarded, the confidentiality element no longer remained an issue to be considered. By virtue of confirmation of award, the tender document became open to scrutiny because an organ of state is obliged to conduct its operations transparently and accountably.¹⁹⁴

189 In discussions with Eskom, it was established that in the matter against it by Biowatch, the estimated cost to Eskom is approximately one million rands, spanning a period of two years before the courts. The matter is currently on appeal.

190 *Mittalsteel SA (Ltd) (formerly ISCOR Ltd) v Hlatshwayo* 2007 (1) SA 66.

191 Section 239 of the Constitution gives the meaning 'of organ of state'. The definitions 'organ of state' means , any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution : (i)exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

192 *Transnet Ltd and another versus SA Metal Machinery Co* 2006 (4) BCLR 473 (SCA).

193 Para 55 p 490.

194 Para55 p 489.

The court reiterated that the primary purpose of the Act was to give effect to the constitutional right of access to information held by the state.¹⁹⁵

Inasmuch as the courts appear to accept that a broad right to access information exists in relation to requests to public bodies, its expectation that applications based on PAIA have to first meet formal procedural requirements under PAIA demonstrates the difficulties most requesters can expect to experience in securing final redress on their requests.

Unitas Hospital v Van Wyk and Another¹⁹⁶ (Private Individual/Private Entity)

A request for access to a record generated by a private hospital was lodged by the widow of a patient who had died at the hospital. The lower court granted the request for access, but that decision was appealed against in the Supreme Court of Appeal. The court pronounced on the minimum a requester has to demonstrate to gain access to the records of private entities and on the use of PAIA in the course of legal proceedings. The consideration of substantial advantage as a minimum also engaged policy considerations resulting in a substantially restrictive interpretation of the requester's right to access information guarantees.

Some of the policy-based considerations included the possible potential increase in litigation where applicants are permitted in terms of section 50 of PAIA to meet a 'less exacting standard' to avoiding speculative litigation¹⁹⁷ and that a less than strict approach in Section 50 matters would result in fishing expeditions,¹⁹⁸ causing defendants to disclose their whole case before an action is taken, to the undermining of the pre-action discovery process.¹⁹⁹ The latter consideration implies that PAIA will currently only be invoked before the initiation of any litigation. Requests for information during litigation will therefore be governed by the court rules for discovery. The court reasoned that since a delictual claim had already been lodged, the applicant did not require the requested information in terms of PAIA to assist in the assertion of this right.

The dissenting judgment in this matter, however, warrants closer consideration. The court acknowledged that in matters of this nature a finding was dependant on assessing the interpretation of the word 'required' in section 50, in relation to the practical facts of each case. It went further however, and balanced policy considerations with legislative intent. The dissenting judge examined the history and intent of PAIA²⁰⁰ and commented on the need for bodies that are deemed to be private entities but perform public functions²⁰¹ to be transparent, accountable and to engage in effective governance. The less restrictive interpretation of section 50 is commendable for its consideration of the history and intent of PAIA with practical needs of the

195 para 58 p 490.

196 *Unitas Hospital v Van Wyk and Another*, 2006 (4) SA 436 (SCA).

197 para 20.

198 para 21.

199 para 21–23.

200 paras 30–46.

201 para 40.

requester. The rationale for such an approach is more readily appreciated when seen in the context of private entities which perform public functions, a key issue in this case.

Perhaps the most welcoming aspect of the minority dissenting judgment is the cognisance it takes of the costs of proceedings in terms of time, effort, money and other resources. This type of consideration, it is submitted, would result in decisions based on increased equity and is therefore most applicable to South African society.

CHALLENGES IN ENFORCEMENT

The courts remain the primary arbiter in PAIA-based matters. The South African courts are structured with Magistrates courts at the bottom of the hierarchy and the Supreme Court of Appeal and the Constitutional Court at the apex. The lower courts currently do not hear PAIA-related matters. The PAIA legislation does make allocation for the courts to have special jurisdiction to entertain such matters in specific circumstances.

PAIA's formal structure is highlighted by plotting a typical request from the point of inception to resolution to demonstrate the impediments in enforcement. The legislation creates specific processes for the lodging and processing of requests. In general, a DIO has a period of thirty days within which to process a request. This period may upon notification to the requester be extended to a further thirty days. When the request for access is denied, the requester may lodge an internal appeal with the same public body to which the initial request was made. Thus where no response is received after the first thirty day period, the request for access is deemed to have been declined. Denial of access is deemed to occur once no response is received from the public body after an internal appeal is lodged and the timeframe for responses have elapsed. Requesters are then obliged to pursue their claims for access before the ordinary courts.

The decision to pursue litigation is fraught with difficulties for most requesters. The key challenges in having to follow this route are the complex procedural requirements associated with litigation; significant costs in having to litigate before the high courts and the time taken from date of lodging a request to the time taken to obtain a judgment from the courts. In practice even a judgment from the courts does not translate into immediate delivery for the requester since the delivery date is usually fixed by the court. Resources and time are therefore key impediments to litigation before the courts.

Litigation also presupposes a rights conscious society. The South African populous is by and large not adequately rights-aware to pursue litigation to assert their rights. Most litigation will therefore be largely at the instance of civil society and non-governmental organisations during the transitional periods. The matters litigated are consequently dictated by prospects of success and, collective and/or public interest based as opposed to individual rights assertive litigation.

MONITORING COMPLIANCE

Assessment of Progress

The country report on South Africa, released by the African Peer Review Mechanism (APRM), states:

“It is imperative that the nation should facilitate and even compel local units to behave and perform as governmental bodies vested with constitutional responsibilities.”

This comment in the report captures the essence of the commitment that must be exacted from policy makers for any progress to be made with regard to achieving efficacy in PAIA-based delivery in the country. The country report also clearly identifies PAIA implementation as weak.²⁰²

The review panel made several recommendations regarding capacity, monitoring commitment by government and specific recommendations for service delivery at local government level. Government’s response to the report has been accepting the recommendations to prioritise local government service delivery outputs, but, submitted no tangible response in its budgetary evidence indicating resources to be deployed for the implementation of PAIA specifically.

On a policy level therefore, it may be argued that on the basis of authoritative recommendations made, policy makers must be alive to the need for commitment in facilitating and ensuring the implementation of PAIA throughout the public sector. The lack, however, of any PAIA-specific plan of action, budgetary allocation, or specific timeframes for delivery evidenced by the responses to the APRM panel is cause for grave concern when addressing progress in implementation at this level.

The Section 32 Monitoring Tool

The section 32 reports lodged with the Commission annually are ideally a record of statistics collated by every public entity in the country. The report must indicate the number of requests for access to information received by the public body and how these requests are processed in terms of outcomes. In this sense the reports serve as a quantitative indicator of the levels of accountability and transparency within the public sector. The reporting obligation, if complied with by the public sector, could serve as a critical monitoring and evaluating tool.

Despite its potential as a tool for monitoring and evaluation, section 32 reports carry serious substantive limitations. Some of these vulnerabilities are evidenced in the potential for inaccurate or deliberately misleading information. The report is also limited to the extent that it does not reflect requests processed telephonically. In as much as these types of requests are not formal requests, they do account for a number of requests for access to information.

²⁰² See note 178.

The accuracy of the report content has the potential to be impacted on by the availability of resources and appropriateness of systems in place to record data.²⁰³ Thus, in instances where requests are manually captured the risk of inaccuracies increase significantly. The vulnerability of recorded information is further evidenced by the lack of formal mechanisms to enable the testing of the veracity of these reports. These problems are further exacerbated by the fact that inasmuch as PAIA requires public bodies to submit section 32 reports to the Commission, it imposes no sanction on public bodies which do not submit reports. Submissions are therefore based largely on co-operation between the public body and the Commission.

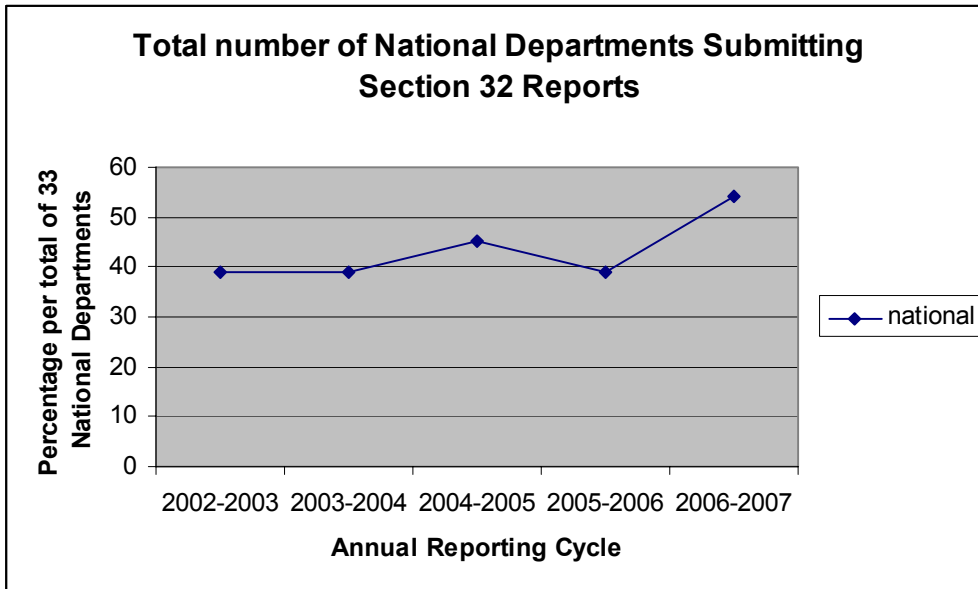
A series of graphs are tabled on the pages below. The first three graphs reflect the number of section 32 reports submitted to the Commission by the three tiers of government over a period of five years between 2002 and 2007. The statistics submitted are cause for concern. While low submission rates in the initial reporting cycles may logically be anticipated, the continued pattern of underreporting carries graver possibilities. The statistics reveal that low reporting rates are not concentrated to any particular level of public department or entity, but rather appears to be widespread for all sectors of public bodies. The slight increase in the number of section 32 reports submitted by national government departments in the 2006/2007 reporting cycle does little to alleviate the concern. Municipalities or local government departments consistently form the lowest percentage of public entities reporting. Statistics also indicate that of the municipalities which have reported in terms of section 32, rural and peri-urban municipalities rank the lowest. Primarily metropolitan municipalities have reported in terms of PAIA. Rural and peri-urban municipalities have been reporting minimally and in most cases not at all. The pie chart (Pie Chart 1) below illustrates this point. Under-reporting has been raised at the national parliamentary level on several occasions. Opposition party members have raised the under-reporting and the low percentages of departments granting access as flags indicating that government is still secretive and suspicious.²⁰⁴ The identification of under-reporting as being reflective of secretive and suspicious governance must surely mobilise policy makers to accelerate delivery in the public sector.

203 At least 43% the public service departments of the sample in the survey conducted by the Public Service Commission (PSC) had not any kind of systems to manage requests. The study was conducted in 2007 and is titled: Implementation of the Promotion of Access to Information Act (Act 2 of 2000) in the public service, published by the Public Service Commission, August 2007.

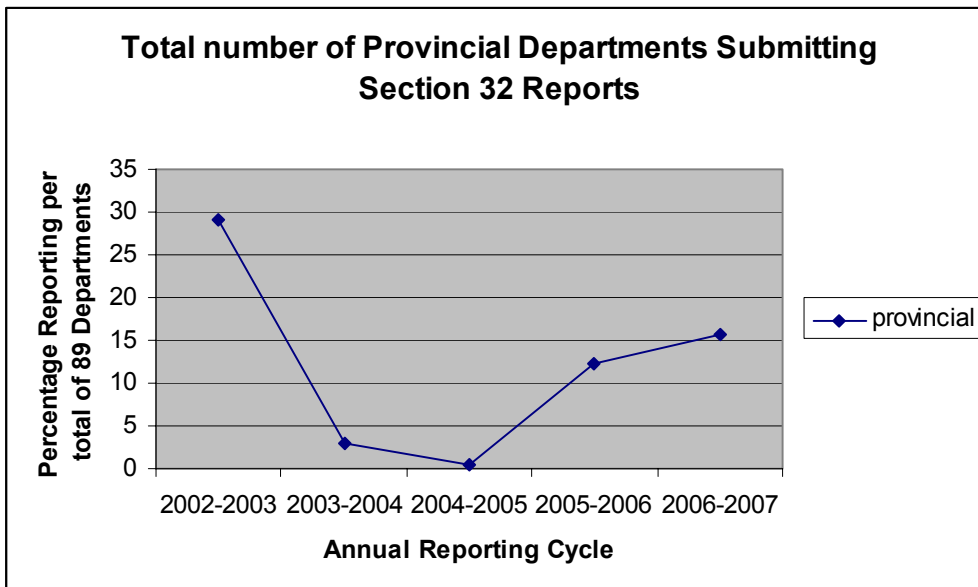
204 Wyndham Hartley. In *Business Day*. 'Departments flout right to information', p.3, 2 March 2007.

Reports submitted in terms of section 32

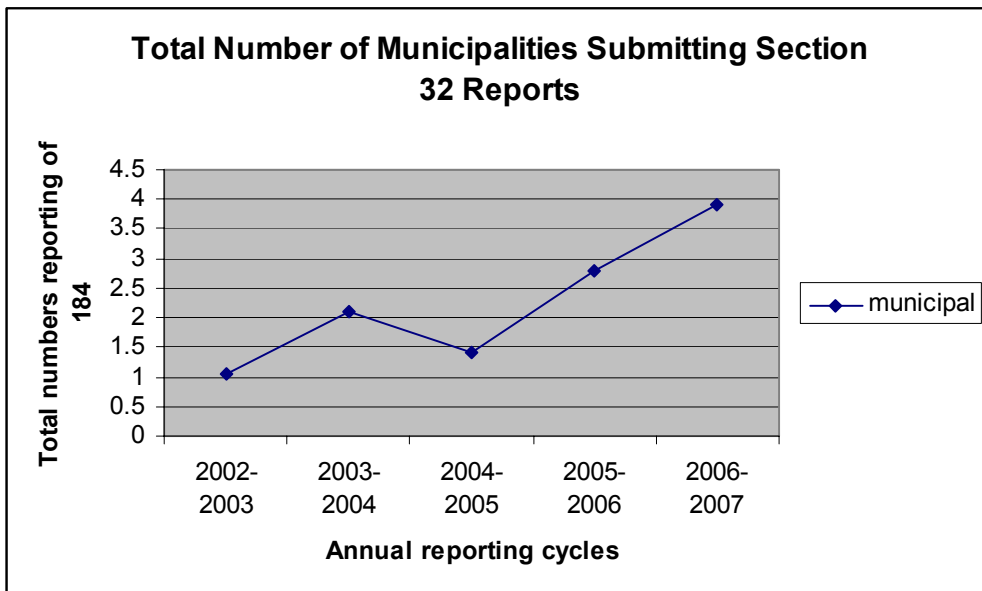
Graph 1



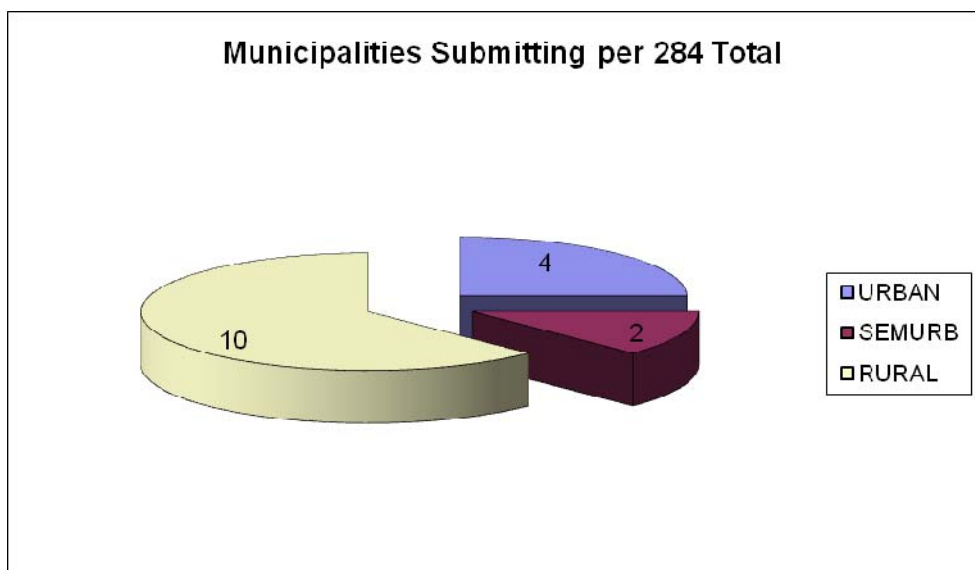
Graph 2



Graph 3



Pie Chart 1: Breakdown of Municipalities submitting Section 32 Reports



Singling Out Local Government

Local government structures are usually the first interface for the public in pursuing delivery, particularly with regard to socio-economic rights. To this end, these structures need to be operationally equipped to facilitate delivery. In particular, enhanced operational processes should address key areas like records management systems and skills development for staff to facilitate implementation and compliance. The low number of section 32 reports received from local

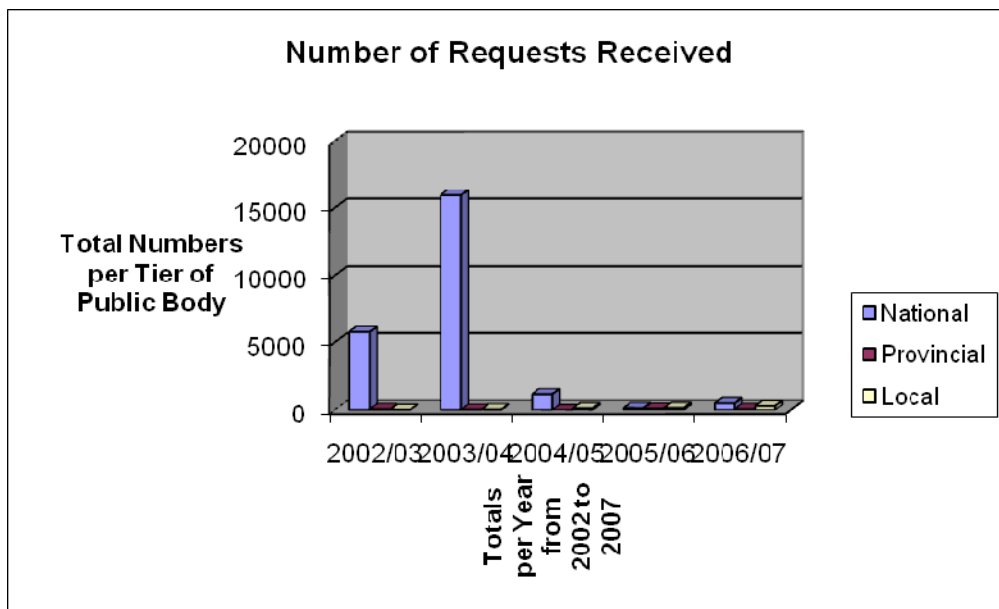
government indicates serious impediments to PAIA-based compliance and delivery. Some of the impediments to tangible delivery may be attributable to:

- The process of consolidation of municipalities and local government structures post 2000,
- Inadequate systems and processes to administer requests and monitor and evaluate specific requirements to address impediments to delivery,
- Poor records management systems,
- Insufficient resource allocations,
- Absence of a dedicated and trained PAIA component,
- Insufficient commitment from senior management, and
- PAIA is not identified as a priority service delivery area on local government agendas.

ACCESS TO INFORMATION REQUESTS STATISTICS

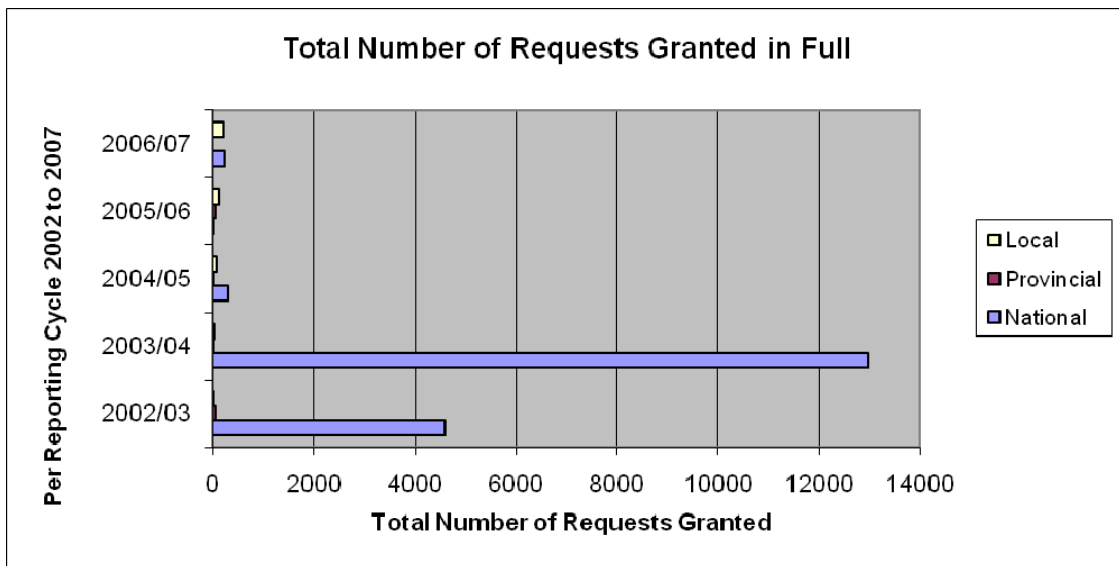
Graphs four, five and six five illustrate the total numbers of requests received, granted in full and declined respectively. The empirical data in these graphs are composite statistics from 2002 to 2007 for all three tiers of government. Notably traditional service delivery departments like the South African Police Service and Departments of Housing at the national and provincial levels respectively have consistently processed the highest volumes of requests.²⁰⁵ This may be attributable to the well-entrenched administrative and information provision mechanisms already in place prior to the enactment of PAIA.

Graph 4: Total Number of Requests Received

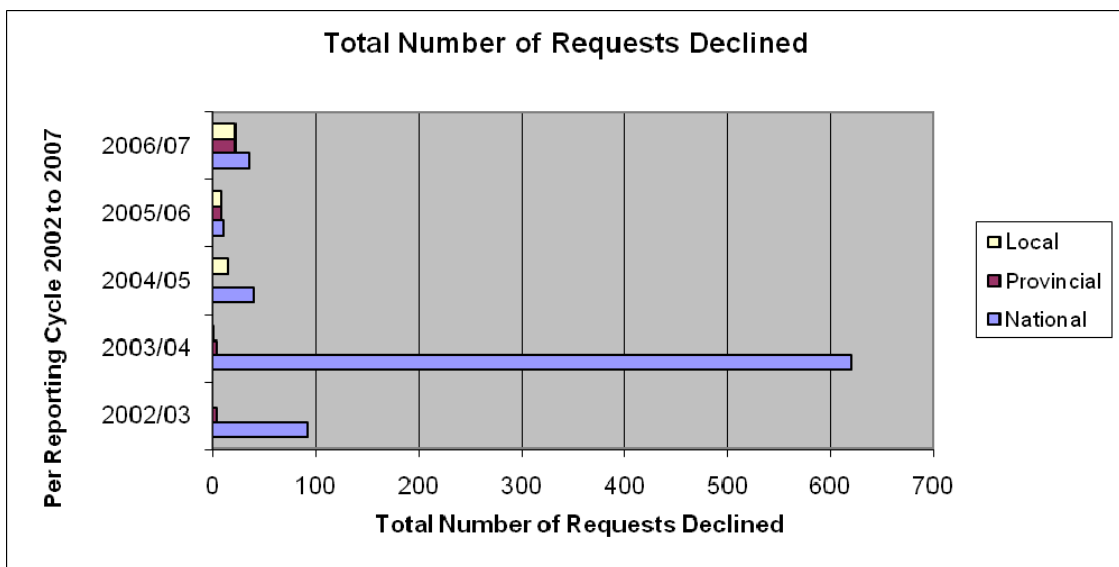


²⁰⁵ The Public Service Commission survey states that the SAPS employ 1210 DIOs. This type of capacity is commendable and is probably ideal for an entity processing consistently high volumes of requests.

Graph 5: Total Number of Requests Granted



Graph 6: Total Number of Requests Declined



A number of factors appear to have contributed to the low numbers of public bodies reporting under section 32. These range from a basic lack of awareness of the legislation to inefficient records management systems. One of the significant contributing factors for low reporting must however be the absence of any sanction for non compliance with reporting obligations. Interestingly, during the first two reporting cycles, the low numbers of submissions were attributed to a lack of information on the part of deputy information officers to compile reports. The Commission has since made a number of interventions ranging from training and briefing sessions with DIOs, to sending off directives to public entities reminding them of their obligation to

submit the report annually.²⁰⁶ These measures have resulted only in a marginal increase in the number of national departments reporting. They have however, had little or no effect on the reporting rates of the provincial and municipal tiers.

Identified Challenges

Discernible patterns have emerged from briefing sessions with DIO's that the PAIA reporting requirements are viewed in general as overly burdensome on already scarce resources. The onerous reporting obligations, together with the common view that PAIA is too legalistic pose serious threats to its application.

Other factors which have impeded reporting, application and implementation relate to the high staff turnover within the public sector and the consequent need for ongoing training. A striking example of formal compliance attempts with legislative directive is the common occurrence in many local government structures of relegating PAIA to administration or legal officers in addition to their existing functions. There is also a detectable general reluctance by civil servant information officers to apply the provisions of PAIA with confidence. Many share the view that the release of too much information make their employers vulnerable to litigation.²⁰⁷

Inasmuch as PAIA poses implementation and application hurdles, some of which are detailed above, the formulation of the legislation presents an imposing challenge for the realisation of PAIA objectives. Admittedly, PAIA is ambitious in its ambit and while this component of its drafting is celebrated, the legislation does pose serious application challenges.

The actual use of PAIA has been critical in evidencing weaknesses in formulation, warranting reform. It is often the case however, that despite formal law reform, the reforms contained in amending regulations are not always practically implemented within the public entity. It may be said that the patterns which have emerged with regard to implementation may be categorised by virtue of two root characteristics in the public service. Broadly, these challenges may be attributable to that category which stems from a lack of commitment evidenced by public bodies to deliver on access to information objectives; and the second broad group, housing the challenges linked with operational processes and systems to overcome the first set of challenges. The realisation of PAIA deliverables can only be attained if these broad issues are addressed within the South African dynamic.

The section 32 report is by no means an entirely accurate or comprehensive tool in ascertaining the extent of use of PAIA by the general public. Nor does it provide sufficient substantive information on the manner in which the public sector is responding to requests for information for

206 The Public Service Commission survey reveals an acknowledged and pressing need by the majority of the Deputy Information Officer sample for PAIA based training.

207 Porogo, D. *Report on the Proceedings of the PAIA Indaba: May 22–23. Perspectives from the Department of Justice and Constitutional Development*, Jan 2004.

the reasons discussed above. However, the very lack of compliance with the reporting obligations itself appears to be indicative of a more serious systemic malaise in the public sector. What has clearly emerged is that the application of PAIA within the public sector is indeed one of the key challenges in successful implementation. The submission therefore needs to be made that despite the formal adjustments to the legislation to facilitate access and implementation, and interventions by the Commission, these have done very little to alleviate the troughs in the reports submitted.

A recent survey testing views of South Africans in metropolitan areas has revealed that more requesters in these areas are now receiving requested information quicker than those in the past year.²⁰⁸ The survey also indicated that the numbers of people who have felt they needed, but were not given, information from local government on service delivery issues have dropped. These findings could possibly be following the trends evident in jurisdictions with established information regimes. The commendable response rates in these metropolitan areas however may bear some connection to the patterns in relation to compliance with section 32 reports as well.

RECOMMENDATIONS

The challenges posed by the implementation of new legislation are best assessed for resolution when approached holistically and in context. The approach must view application, implementation and enforcement within the broader South African socio-economic and political context. The right to access information as it is entrenched in PAIA poses a number of challenges on almost every level. These challenges are not limited to individual South African right holders/requesters, but extend to public and private bodies too.

The challenges for PAIA-based delivery are multi-dimensional. They arise predominantly from challenges experienced with resources and in attempting to achieve operational efficacy in implementation. To this end, it has to be borne in mind that PAIA is one of the first pieces of legislation to impose positive duties on the state. The imposition of this duty has a number of implications for the state. Primarily amongst these, is to facilitate and encourage a change in the prevailing culture of secrecy in the public sector, a throwback seemingly of the apartheid era. The recommendations targeting operational efficacy ideally should include:

- Increased resource capacity²⁰⁹ to ensure adequate delivery based on a realistic costing for implementation;

208 Markinor. *Whistle Blowing, the Protected Disclosure's Act, Accessing Information and the Promotion of Access to Information Act: Views of South Africans, for the ODAC*. Available at: <http://www.opendemocracy.org.za/ documents, 2007>.

209 The argument for improved capacity, and therefore delivery is extended by the demonstrable need for adequate human resources in the processing of requests. The psychology and numbers of staff dedicated to this process are critical to the realisation of the right. In terms of the political and geographical terrain of the country, it often transpires that pockets of municipalities who serve rural people are vastly understaffed and under-resourced. Not surprisingly these vulnerable areas have perhaps the most critical needs with regard to access of information, specifically on socio-economic rights. Capacity-based resource considerations therefore have to be tailored to address specific needs.

- Accepted records management processes and standards;
- Co-ordinated processes and reasonable timeframes for interdepartmental references;
- Ongoing training for personnel;
- PAIA specific audits, including an annual costing for the PAIA component;
- Strategic planning ensuring implementation is not relegated to a low priority agenda; and
- Committed 'buy-in' from senior management for implementation and delivery.

Apart from recommendations for the deployment of adequate financial and human resources, are recommendations which favour self audits within each department with regard to the implementation of PAIA. Basic logistical assessments will explore capacity and infrastructural issues, such as systems to process request payments and the provision of receipts for access fees, and so forth, need to be highlighted and addressed. These assessments must begin at a threshold level from the point of inception of a request; ideally culminating with delivery impediments and successes. The inclusion of a monitoring and evaluation component cannot be sufficiently emphasised as a tool for informing enhanced delivery. A co-ordinated collaboration between potential stakeholders for audit informed delivery and implementation could see the services of the National Archives and Auditor-General integrate PAIA in their processes.

Recommendations with regard to private individuals focus primarily on the need for continued education and application of PAIA. The apparent apathy to human rights may appear at first blush to be ignorance based, but it is submitted that the lack of any readily apparent indicators to measure this should permit for other explanations. First among these would be the high levels of general poverty which results in rights prioritisation for the majority. The reference by Cameron Jacobs of the 'chronic risks' of poverty must also mean that there are chronic symptoms of poverty, which inform priorities in South Africa.²¹⁰ Rights education as a tool to ensure that the right to access information is realised must therefore include clear and accessible directions on how to assert this right in itself or as a tool to realise other rights expeditiously and economically.

The key recommendation tendered in this report impacts both on the issue of accessibility and enforcement under PAIA. Raised in the discussion under limitations, it remains an area of critical focus for law reform. The recommendation focuses largely on the manner in which requests are processed and the economy with which they are finalised. In terms of the PAIA legislation, a denial to access leaves only the courts as a forum of final redress. Litigating any matter in the high courts is an expensive, time consuming and cumbersome process.

The experience of the Commission reveals a dire need for an intermediary functionary. The Office of an Information Commissioner has been actively advocated as a workable solution to address enforcement and accessibility shortcomings in the PAIA legal framework. The advantages of such

²¹⁰ See Chapter 5 in this report on Poverty Discourse and Human Rights in South Africa.

a functionary are many. This office would typically contribute to addressing the exclusive and elitist nature of the current dispute resolution mechanisms and lessen the adversarial nature of dispute resolution in access to information matters as well. It would necessarily be the point of entry for requesters who have been denied access but who wish to avoid going the route of litigation for the reasons stated above.

A number of submissions have been tendered to the relevant state department²¹¹ for the creation of such an office. The submission made by the Commission advocates the granting of extra judicial powers to the office of the Commissioner.²¹² The recommendation has also gained popular support amongst advocates for the right to access information and other interest groups. The proposal also found support from a special review committee convened to critically consider the status of human rights institutions created under the Constitution.²¹³

The recommendations tendered above extend beyond the ‘teething problems’ evidenced in the implementation of new legislation within the public sector. Adequate implementation of PAIA must urgently be secured in the immediate short term. Implementation must also be strategically designed, within realistic timeframes for delivery, sustained efficiency and relevance in the long term through integrated organisational systems, and a commitment of resources as well as political will.

CONCLUSION

The right to access information as it is embodied in PAIA has been enacted with the key objective of fostering a culture of transparency and accountability in South Africa. It is also the key to informed scrutiny and decision making for all South Africans. To this end the right to access information may potentially be the key for the realistic realisation and assertion of other fundamental rights themselves. As a society we cannot but be extra vigilant for the successful implementation of the right to access information, to ensure that the success celebrated at its enactment is translated into a reality for all South Africans.

The milestone PAIA legislation is not without practical difficulties evidenced in application. It is, however, in line with contemporary legislation on an international level and clearly delineates norms and standards mirrored in the global arena. This alignment is disjointed if close scrutiny is not accorded to its actual implementation in the context of the South African dynamic.

211 In terms of the PAIA legislation the state department charged with the administration of PAIA is the Department of Justice and Constitutional Development.

212 The original task team advocated an information court within each division of the provincial high courts, subject to rules which would ensure simplified procedural processes and cheaper access. The current position is that the cheaper lower courts – Magistrates courts are to have jurisdiction to hear PAIA matters. This will only take effect when the existing rules for Magistrates Courts are amended and promulgated.

213 The Asmal *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions chaired by former Minister of education Kader Asmal. The findings of the Commission can be located on the following website: http://www.polity.org.za/html/gov_docs/bills. Also see, Klaaren, J. The Right of Access to Information at age Ten. In *Reflection on Democracy and Human Rights: A decade of the South African Constitution Act 108 of 1996*.

The slow advance in implementation in the public sector and challenges impacting on enforcement of PAIA requires urgent address if tangible delivery is a realistic expectation for policy makers. The critical success in implementation will therefore be rooted in political commitment and equal priority for resources on the reform agenda. A recommended approach then must be to accelerate processes to realise delivery on PAIA for the short term at the very least. Progress on this front will impact significantly on both the fabric of South African lives internally and externally as the country increasingly engages economically through global commerce.

While compelling perspectives on poverty within dual economies, crime, HIV/Aids elicit justifiably gut-wrenching reactions for their resolution, other equally compelling needs are impacted by being relegated to the bottom end of the priority list. This type of relegation will be disastrous for access to information, which by its very nature seems inclined to suffer disaster. PAIA needs to be rescued and must be initiated through the commitment in political will to see it translated into a working reality for South Africans. Bearing characteristics of both civil and political rights and socio-economic rights, access laws with regard to information underpin and form the foundation for realisation of both groups of rights. The logical result must therefore be that the foundation grounding rights such as these must form part of the mix which underpins all South African policy, reform and redress processes. Arguments for prioritisation of particular rights at the expense of PAIA must therefore not prevail.

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**CHAPTER FIVE:
POVERTY DISCOURSE AND HUMAN RIGHTS IN
SOUTH AFRICA**

INTRODUCTION

“... freedom translates into having a supply of clean water; having electricity on tap; being able to live in a decent home, and having a good job, to have accessible healthcare. I mean what is the point of having this transition if the quality of life of these people is not enhanced and improved? If not, the vote is useless!”²¹⁴

“Like slavery and apartheid, poverty is not natural. It is man-made and it can be overcome and eradicated by the actions of human beings. And overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life. While poverty persists, there is no true freedom ...”²¹⁵

There are a few commonalities between the above quotations. The first is a concord that one cannot do justice to political freedom without economic liberation. Secondly, poverty is about the right to, and the fulfilment of, basic resources. Thirdly, fighting poverty is about protecting the right to dignity. Poverty is further a social construction and therefore can be overcome. The above quotations and the commonalities between them shall serve as the basis around which the argument on the theme of this chapter shall be shaped, that is, freedom from poverty should be seen as a human right. This proposition is not only based on moral arguments of justice but also a legal one. The minimum legal rights to social security, housing, education, water and the like in the Constitution implies at the very least that the enjoyment and fulfilment of those rights will help the poor to escape extreme poverty and deprivation. Synergistically, it can be argued that when one puts these rights together there is a constitutionalisation of the right to basic resources and, in the context of human rights, poverty can be described as the violation of the rights to basic resources. When these rights are not fulfilled and enjoyed, extreme poverty worsens and persists. The state has an obligation to ensure the fulfilment and enjoyment of these rights both in national and international law.

This chapter will also explore the extent of the South African government's progress in fulfilling its obligations. It goes beyond the assessment of progress for 2007 to an analysis of the government's stance and interpretation of poverty in South Africa. There is no doubt that there is a commitment to poverty alleviation and a political will to help the poor. However, is there a proper understanding of poverty in South Africa? Are the various poverty alleviation projects addressing the genuine plight of the poor, and will they improve the lives of future generations of the poor? Equally important, is there a proper understanding of the dual economy thesis in South Africa? Does the first economy help or hinder the poor and is there significant mobility? Finally, does South Africa have a comprehensive policy on the poor?

²¹⁴ Tutu, D. in Gumede, W.. *Thabo Mbeki and the Battle for the soul of the ANC*. Zebra Press, Cape Town. p. 67, 2005
²¹⁵ Nelson Mandela pledging his support for the GCAP, London , 3 February 2005.

These are some of the questions that merit discussion in this chapter through an analysis of vulnerability, social exclusion, marginalisation as well as the partnerships that are required to overcome poverty and ensuring development. Its overall purpose is to contribute to the discourse on poverty and human rights. It should not be viewed as a critique of government policy, or lack thereof, but rather to further an important debate as South Africa struggles to consolidate its young democracy. With this in mind, one is reminded of the adage that the journey to discovery is not to seek new landscapes but to see through new eyes. Part of seeing through new eyes is the integration of economic and social policy such that the ordinary lived experience of the poor is properly comprehended and not trapped in consumption-based and maintenance orientated social services and poverty alleviation projects.

FREEDOM FROM POVERTY AS A HUMAN RIGHT

Poverty has always been considered a degradation of human dignity as the poor are afflicted with hunger, malnutrition, ill health, unsanitary housing and living conditions, and often a lack of proper education. Poor people acutely feel their powerlessness and insecurity, their vulnerability and lack of dignity and are constantly subjected to the decisions of the non-poor and powerful in practically every aspect of their lives. Therefore, poverty and a poor person's ability to gain access to assets, and his/her ability to translate them into income, are shaped by the workings of the labour and product markets, by their access to skills, information and social networks, by norms governing resource use within and beyond the household, and by gendered power relations. It is against this background that one can appreciate the appeal for the concept of poverty to be viewed as a human rights violation.

The Universal Declaration of Human Rights was adopted on 10 December 1948; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1966. Through these instruments every human being was recognised to possess inalienable human rights and freedoms, the protection, promotion and fulfilment of which is not only the obligation of nation states but also of the international community. The Universal Declaration of Human Rights expresses a whole range of human rights and for the purposes of the present discussion, the key right is the right to an adequate standard of living in Article 25. Similarly, Article 11 of the International Covenant of Economic, Social and Cultural Rights provides that 'State parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family.'²¹⁶ In both these documents, an adequate standard of living includes food, clothing, housing, medical and necessary social services.

Therefore, if poverty can be shown to be a violation of human rights, its removal will become a binding obligation. However, is freedom from poverty a human right, and if so, how can it be protected and fulfilled? A useful point of departure is that all rights contain obligations and all

²¹⁶ International Covenant on Economic, Social and Cultural Rights. Resolution 2200A (XXI).

rights contain a relationship between duty bearers and right-holders. In the context of poverty one would need to identify the agents obligated to fulfil the right as well as the beneficiaries. Secondly, it will also be important to establish an indicator of the right to poverty such that one can ascertain whether the right is being realised or not. From a human rights perspective and given that the International Covenant for Economic, Social and Cultural Rights recognises the rights to an adequate standard of living, adequate food, health, social security and education,²¹⁷ one can argue that poverty can be described as the violation of the right to these basic resources that have already been recognised in international law.

It is estimated that 850 million human beings are chronically undernourished, 1 000 million lack access to safe water and 2 600 million lack access to basic sanitation. A further 2 000 million lack access to essential medicines, 1 000 million do not have adequate shelter, 2 000 million lack electricity and approximately 781 million adults are illiterate.²¹⁸ These harsh realities have made many scholars question the existing paradigms to poverty reduction and further that poverty is not simply a matter of material deprivation but also an issue of dignity, justice and fundamental freedoms. It has also led to the discourse on the myth of human rights and the perception that covenants, declarations and global summits are mere rhetoric to maintain the global status quo. This prompted UNESCO to propose that poverty be regarded as a violation of human rights and therefore be abolished and in this manner link the first generation civil and political rights with the second generation economic and social rights.²¹⁹ The shift in emphasis can be seen as an attempt to place the relative neglect of economic and social rights on the same footing as civil and political rights. To quote Campbell, *“torture is seen as unacceptable, poverty merely unfortunate.”*²²⁰ The shift in paradigm goes beyond the moral message of poverty eradication to developing legal remedies that seek to empower the poor to obtain their rights.

In the Millennium Declaration, 189 member states of the United Nations signed and reaffirmed the commitment of the international community to eradicate poverty.²²¹ The Declaration is a consolidation of eight interconnected development goals and constitute a set of agreed and measurable targets and quantifiable indicators. The first Millennium Development goal is to halve extreme poverty and hunger. More precisely, the goal has two targets, namely, to halve, between 1990 and 2015, the proportion of people whose income is less than USD 1 a day. The second target is to halve, between 1990 and 2015, the proportion of people who suffer from hunger. In the World Summit Outcome in 2005, heads of state and government reaffirmed ‘the right of all individuals to live in freedom and dignity, free from poverty and despair.’²²² It furthermore recognised that ‘all individuals, in particular, vulnerable people, are entitled to freedom from fear

217 See Articles 11, 12, 9 and 13. In International Covenant on Economic, Social and Cultural Rights.

218 Pogge, T, (ed). Severe Poverty as a human rights violation. In *Freedom from Poverty as Human Right*. UNESCO. Oxford University Press, 2007.

219 Campbell, T. Poverty as a violation of human rights: Inhumanity or Injustice? In Pogge, T.(ed). *Freedom from Poverty as Human Right*. UNESCO. Oxford University Press. p. 57, 2007.

220 Ibid.

221 United Nations Millennium Declaration. General Assembly Resolution 55/2. 8 Sept 2000.

222 United Nations General Assembly. *2005 World Summit Outcome*. Adopted September 2005.

and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential.²²³ In April 2005, the Commission on Human Rights drafted Resolution 2005/16 on Human Rights and Extreme Poverty. The resolution expressed concern and reaffirmed that extreme poverty and exclusion from society constitutes a violation of human dignity.²²⁴ The resolution further called upon states to foster participation and empowerment of the poorest people in the development, implementation and evaluation of policies that affect them.

Flowing from the resolution were the draft guiding principles on Human Rights and Extreme Poverty. The principles are comprehensive, detailing three key sections: Participation by the poor; indivisibility and interdependence of rights, and state obligations and international co-operation. The significance of the principles and its content lies in the description of poverty. It defines poverty as a 'human condition characterised by sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights. It further advocates that persons living in extreme poverty are fully entitled to demand the development of policies aimed at the eradication of poverty at both the national and international level and in turn states have the obligation to ensure effective action to eliminate extreme poverty.

Resolution 2005/16 and its guiding principles are perhaps the closest documents, and certainly represent a paradigm shift, to freedom from poverty as a human right. Conventionally, poverty is defined in economic terms as manifested in very low income and consumption per capita or per household. By extension then, the solution is to raise the level of income. The first Millennium Development goal of halving the proportion of people living on less than USD 1 per day, however well intentioned, falls into the same trap.

THE ECONOMIC AND STRUCTURAL CONTEXT OF POVERTY AND INEQUALITY IN SOUTH AFRICA

South Africa's transition from authoritarianism to democracy in 1994 was nothing less than a miracle and although there have been substantive improvements in the provision of infrastructure and the delivery of services, these have been too slow relative to expectations. In fact, it can be argued that in the fourteen years since the dawn of democracy, the state has not made any significant impact in respect of resolving unemployment, poverty and inequality in South Africa.

The Human Sciences Research Council reported in 2004 that the proportion of people living in poverty has not changed significantly between 1996 and 2001. However, it argued that the depth of poverty for those households living in poverty had increased and the gap between the rich and poor had widened. A somewhat different analysis by Meth in 2004 revealed that approximately 19.5 million people were living below the poverty line in 2002. This represents an increase of 2.2

223 Ibid.

224 Office of the High Commissioner for Human Rights, Human Rights and Extreme Poverty. Human Rights Resolution 2005/16, 2005.

million from the reported 17.2 million people living below the poverty line in 1997.²²⁵ Meth's analysis further holds that of those living below the poverty line, between 7 and 15 million people live in utter destitution. Furthermore, the United Nations Development Programme reported in 2004 that the poverty rate in South Africa stood at 48% and this is in congruence with the report by the Taylor Commission²²⁶ of a poverty rate of between 45 and 55%. Statistics released by the South African Institute of Race Relations in 2007²²⁷ appear to correlate well with the studies conducted by the Human Sciences Research Council and others. Cumulatively, the data by South African Institute of Race Relations revealed that between the period of 1996-2005, poverty in South Africa had worsened as more people fell into the underclass (table 1), there was a significant increase in the proportion of people living in relative poverty (tables 2 and 3) and as well as a widening poverty gap (table 4).

Using the World Bank measure of less than a USD 1 a day of extreme poverty, the table below shows that both the percentage and the absolute number of people living in poverty in South Africa has increased quite substantially between 1996 and 2005.

Table 1

NUMBER AND PROPORTION OF PEOPLE LIVING ON LESS THAN \$1 DAY, 1996 – 2005²²⁸		
YEAR	NUMBER	PROPORTION
1996	1 899 874	4.5%
1997	2 243 576	5.2%
1998	2 604 366	6.0%
1999	2 931 253	6.6%
2000	3 205 217	7.1%
2001	3 653 756	8.0%
2002	4 451 843	9.7%
2003	4 374 079	9.4%
2004	4 296 654	9.1%
2005	4 228 787	8.8%

225 Meth, C. In Desai, A. (2005). *Uprooting or re-rooting poverty in post apartheid South Africa? A literature Review*. Prepared for SANPAD Poverty Reduction Workshop, 2004.

226 The Taylor Commission, named after its Chairperson, Prof. Vivienne Taylor, was appointed and charged with developing recommendations on the establishment of a comprehensive social security system in South Africa.

227 South African Institute of Race Relations. *South Africa Survey 2006/2007*.

228 Ibid.

In table 2 below, people in poverty are defined as those living in households with incomes less than the poverty income which ranges from R871 per month for one individual to R3 314 for a household of eight members or more in 2005.²²⁹ As can be deduced from the table there has been a substantial increase of people across all race groups living in relative poverty. This correlates well with the proportion of people living in relative poverty by race in table 3. Significantly, the amount of whites living in relative poverty has doubled representing a 100% increase over the ten year period. According to these statistics there has been an increase in the poor from 40.5% in 1996 to 47% in 2005. Needless to say, the poverty gap has widened quite considerably (see table 4). Among the African race, the poverty gap increased from R16 677 million in 1996 to R35 726 million in 2005, but statistically the biggest is among whites with a change of 177.8 % over the ten year period.

Table 2²³⁰

NUMBER OF PEOPLE LIVING IN RELATIVE POVERTY BY RACE, 1996 – 2005					
YEAR	AFRICAN	COLOURED	INDIAN	WHITE	TOTAL
1996	16 316 321	619 664	66 081	98 654	17 100 720
1997	17 448 746	663 386	70 756	123 930	18 306 819
1998	18 676 149	710 042	75 734	132 654	19 594 579
1999	19 514 473	741 934	79 118	138 601	20 474 127
2000	19 831 697	754 787	80 504	161 836	20 828 824
2001	20 640 781	786 394	83 872	190 318	21 701 364
2002	21 016 828	800 715	85 407	193 788	22 096 738
2003	20 957 036	798 447	85 167	193 237	22 033 887
2004	21 381 677	814 615	86 888	197 154	22 480 335
2005	21 389 782	815 154	86 945	197 289	22 489 170

229 Source: South African Institute of Race Relations. *South Africa Survey 2006/2007*.

230 Ibid.

Table 3²³¹

PROPORTION OF PEOPLE LIVING IN RELATIVE POVERTY BY RACE, 1997 – 2006					
	AFRICAN	COLOURED	INDIAN	WHITE	TOTAL
1997	50.3%	16.8%	6.2%	2.0%	40.5%
1998	52.9%	17.8%	6.6%	2.5%	42.7%
1999	55.6%	18.7%	6.9%	2.6%	45%
2000	57.1%	19.3%	7.2%	2.7%	46.3%
2001	57.1%	19.3%	7.2%	3.2%	46.9%
2002	58.5%	19.9%	7.4%	3.7%	47.7%
2003	58.6%	20.0%	7.5%	3.8%	47.9%
2004	57.6%	19.7%	7.4%	3.8%	47.2%
2005	57.9%	19.9%	7.5%	3.9%	47.5%
2006	57.2%	19.7%	7.5%	3.9%	47%

Table 4²³²

POVERTY GAP, 1996 – 2005 (IN MILLIONS OF RANDS)					
	AFRICAN	COLOURED	INDIAN	WHITE	TOTAL
1996	16 677	618	56	176	17 527
1997	19 388	713	61	214	20 376
1998	22 168	816	70	256	23 310
1999	24 337	897	77	307	25 618
2000	25 504	940	81	328	26 852
2001	26 707	985	84	366	28 142
2002	28 650	1 057	91	392	30 189
2003	33 488	1 235	106	459	35 288
2004	34 216	1 262	108	469	36 055
2005	35 726	1 318	113	489	37 646

231 Source: South African Institute of Race Relations. *South Africa Survey 2006/2007*

232 Ibid.

The high poverty rate in South Africa is a direct consequence of the high unemployment rate and analysts have described the labour market situation in South Africa as chronic and structural. Statistically, the figures are alarming. By the narrow definition, unemployment was recorded at 31% in March 2003 and if one uses the expanded definition, the figure increases to 42%.²³³

Desai, however, argued that the figure is higher and cited figures released by the South African Reserve Bank that the expanded unemployment figure for males was 46.6% and that for females was 53.4%.²³⁴ Data by the South African Institute of Race Relations (see table 5) revealed a somewhat similar analysis and showed a static unemployment trend between 2005 and 2006. By the narrow definition the unemployment figure in 2006 was 25.6% and by the expanded definition, 39%. The official unemployment figure makes use of the narrow definition and therefore only includes those economically active people who are not working but who are taking active steps to look for jobs. In contrast, the expanded definition includes discouraged job seekers that are unemployed but have stopped looking for work.

The expanded definition seems a more appropriate measure to use in South Africa because it provides a more accurate picture of a labour market that suffers from long term unemployment and therefore that the crisis is structural. The expanded definition also shows a significant number of discouraged job seekers which is indicative of the loss of hope and apathy attached to finding employment.

233 See McCord, A. & van Seventer, D. *The Economy-wide impacts of the Labour Intensification and Infrastructure and Expenditure in South Africa*. Forum Paper for the Conference on African Development and Poverty Reduction, the Macro-Micro Linkages, 13 –15 October 2004.

234 Figures from South African Reserve Bank. In Desai, A. *Uprooting or re-rooting poverty in post apartheid South Africa? A literature Review*. Prepared for SANPAD Poverty Reduction Workshop, 2005

Table 5²³⁵

UNEMPLOYMENT BY PROVINCE²³⁶				
	STRICT DEFINITION		EXPANDED DEFINITION	
PROVINCE	2005	2006	2005	2006
EASTERN CAPE	27.1%	22.1%	43.6%	36.9%
FREE STATE	30.6%	28.3%	39.1%	38.7%
GAUTENG	22.7%	23.3%	34.1%	34.3%
KWAZULU-NATAL	31.7%	29.9%	45.5%	44.0%
LIMPOPO	32.4%	35.6%	57.3%	59.0%
MPUMALANGA	27.4%	27.4%	42.1%	39.4%
NORTH WEST	28.8%	31.8%	45.6%	45.6%
NORTHERN CAPE	29.4%	23.5%	41.3%	36.3%
WESTERN CAPE	17.6%	15.9%	24.8%	23%
SOUTH AFRICA	26.5%	25.6%	40.5%	39.0%

In trying to explicate South Africa's apparent failure to make significant inroads into the unemployment rate, interpretations and re-interpretations of the dual economy thesis have emerged over the last couple of years. There is, however, much disagreement over the relationship between the first and second economies. Some observers hold that the two economies are structurally disconnected which, to them, would explain the severe limitations of the trickle-down approach to poverty reduction. Others have argued that to explain the relationship as a structural disconnection is to simplify matters since a nexus exists and has existed for a very long time. Therefore, one should perhaps speak about the articulation of the two economies, the origins of which are rooted in the creation of the migrant labour system. For example, Du Toit argues that one cannot speak of the impoverished as being 'disconnected' from the South African economy. Rather, he argues that their impoverishment is directly related to the dynamics of 150 or more years of forcible incorporation into racialised capitalism. For Du Toit, the focus of analysis should not be on the social exclusion of the impoverished, but rather the terms and conditions of their inclusion. Habib makes a similar argument and poses the hypothesis that it is perhaps the policies and interventions of the first economy that is creating the impoverishment of the second economy.²³⁷

235 Source: South African Institute of Race Relations. *South Africa Survey 2006/2007*.

236 Ibid.

237 Habib, A. In Desai, A. (2005). *Uprooting or re-rooting poverty in post-apartheid South Africa? A literature review*. Prepared for SANPAD Poverty Reduction Workshop, 2004

Such debate has certainly reinvigorated the discourse of poverty, inequality and underdevelopment in South Africa and what the best policy prescription should be. The argument that is presented here is that poverty, unemployment and inequality are inextricably linked and any significant inroads would require a research study that would go beyond the simple dichotomy of inclusion and exclusion.²³⁸ This would require an analysis and an understanding of the structural dynamics of the South African society that shape the social, economic and power relations of the poor. These relations, what Du Toit²³⁹ coins as the political economy of poverty and livelihoods, create marginality, maintain vulnerability and undermine the agency of the poor.

The definition of poverty and its measurement is a contested area and although it is unnecessary to enter such a polemic here, one must agree with Desai that it is a rather trite and hollow debate whether one must add or extract 10% of South Africa's population from being defined as poor.²⁴⁰ The fact is simply that no matter how one measures or defines poverty, millions of people in South Africa are living under conditions of extreme poverty and therefore below any acceptable minimum poverty line. The evidence further suggests that both poverty and inequality have worsened over the past fourteen years. It is therefore critical to examine the political, economic and social impediments to the alleviation of poverty and inequality in South Africa by placing the policies of government under the microscope and understanding and analysing the lived experiences of those in poverty. This will allow for the development of solutions that will shift away from the pure quantitative aspects of government service delivery to the monitoring, assessment, and generation of solutions that has as its focus improving the quality of lives of the most vulnerable in society.

This can be achieved only if one internalises that poverty and people's ability to gain access to assets, and their ability to translate them into income, are shaped by the workings of the labour and product markets, by their access to skills, information and social networks, by norms governing resource use within and beyond the household and by gendered power relations within and beyond households. In other words, people are subject to a set of conditions that leave them vulnerable, and often the access to resources is shaped by their relationships with the non-poor and powerful. Wood makes the succinct point that 'poor people face chronic risks, which are institutionally and relationally generated, in the form of inequality, class relations, exploitation, concentrations of unaccountable power and social exclusion.'²⁴¹

SOUTH AFRICA'S POVERTY INTERVENTIONS

The South African government's poverty interventions have been wide ranging which shows its commitment to addressing the many inequalities inherited from the apartheid regime. A clear

238 Du Toit, A. *Chronic and structural poverty in South Africa: Challenges for action and research*. Centre for Social Science Research. Working Paper No. 121, 2005

239 Ibid.

240 Desai, A. Uprooting or re-rooting poverty in post apartheid South Africa? A literature Review. Prepared for SANPAD Poverty Reduction Workshop, 2005

241 Wood, G. In Francis, E. *Poverty: Causes and Consequences in Rural South Africa*. Chronic Poverty Research Centre Working Paper No. 60, 2003.

example of this is the support given through social security and social assistance grants that have increased from a total of ten billion rand in 1994 to seventy billion rand in 2006.²⁴² Consequently, the amount of beneficiaries has increased from the initial 2.5 million in 1994 to over 10.5 million. Further evidence of the commitment of government is the amount of poverty reduction programmes. In categorising poverty reduction programmes based on programme type, the Audit of Government's Poverty Reduction Programmes and Projects by the Public Service Commission revealed 40 programmes that contain more 29 900 projects.²⁴³ However, what is concerning is that the audit revealed that the government does not possess its own integrated database on poverty reduction programmes. It has further revealed that many projects do not have budget information attached to them as well as the amount of beneficiaries said to benefit from the programmes. This implies that many departments can unknowingly be duplicating projects without the necessary information of the success of the project. The lack of budget information could further imply a waste of resources and without proper data one cannot be sure whether the projects are making a qualitative difference.

Table 6: Major types of existing programme interventions in South Africa

PROGRAMME TYPE	PROGRAMME
SOCIAL SECURITY	<ul style="list-style-type: none"> • CHILD SUPPORT GRANT • OLD AGE PENSION • DISABILITY GRANT • FOOD PARCELS
FREE/SUBSIDISED BASIC HOUSEHOLD SERVICES	<ul style="list-style-type: none"> • WATER AND SANITATION • ELECTRICITY • TRANSPORT • REFUSE REMOVAL
SUBSIDISED INDIVIDUAL SERVICES	<ul style="list-style-type: none"> • EDUCATION AND TRAINING • HEALTHCARE
HOUSING	<ul style="list-style-type: none"> • RECONSTRUCTION AND DEVELOPMENT PROGRAMME HOUSING
LAND REFORM	<ul style="list-style-type: none"> • LAND REDISTRIBUTION • LAND RESTITUTION • LAND TENURE REFORM
INCOME GENERATING PROJECTS AND SMALL MEDIUM MICRO ENTERPRISES	<ul style="list-style-type: none"> • PROGRAMMES BY DTI • VARIOUS DEPARTMENTAL PROGRAMMES
PUBLIC WORKS	<ul style="list-style-type: none"> • COMMUNITY-BASED PUBLIC WORKS PROGRAMME • WORKING FOR WATER • LANDCARE • COASTCARE • OTHER COMPONENTS OF THE • EXTENDED PUBLIC WORKS PROGRAMME

242 Public Service Commission , *Report on Audit of Government's Poverty Reduction Programmes and Projects*, 2007.

243 Ibid.

Table 7: Breakdown of projects in Audit database according to programme category

PROGRAMME CATEGORY	NUMBER	SHARE
SOCIAL SECURITY	16 697	63%
INDIVIDUAL SERVICES	122	0.5%
LAND REFORM	2 513	9.5%
INCOME GENERATING PROJECTS AND SMME'S	2 014	7.6%
PUBLIC WORKS	3 682	14%
NOT CATEGORISED	1 348	5.1%
TOTAL	26 276	100%

Government thinking on poverty, as alluded to in the previous section, has been around the dual economy thesis. In 2004 President Thabo Mbeki addressed Parliament about the three pillar formulation of addressing poverty:

“At the core of our response to all those challenges is the struggle against poverty and underdevelopment, which rests on three pillars. These are: encouraging the growth and development of the First Economy, increasing its possibility to create jobs; implementing our programme to the challenges of the Second Economy; and building a social security net to meet the objective of poverty alleviation.”²⁴⁴

The Public Service Commission’s analysis is correct that the formulation does reflect the government position to foster a stronger and inclusive economy. Secondly, it is also clear that there is a distinction between the welfare interventions that are required and the developmental interventions that are needed in the second economy. However, the discussion in the previous section has suggested that unless one’s analysis of the dual economy thesis is correct, the targeted poverty reduction projects will do no more than temporarily and superficially decrease the depth in poverty and therefore it will continue to shift from one generation to the next. Despite the wide-ranging government poverty reduction programmes and projects, there is no agreed government definition on poverty and there is still contestation over what the poverty datum line should be. To a certain extent, this may explain why there is no comprehensive policy on poverty in South Africa. Is the three pillar formulation based on the dual economy thesis appropriate in addressing poverty in South Africa?

Consider that almost half of the South African population survive on earnings below the “poverty datum line” and that over 8 million people are unemployed, 70% of whom are unskilled. Within the first economy, 44% of those employed in the formal sector earn R2500 or more. Fifteen percent of South Africans in formal employment earn less than R1000 per month. A study conducted by Devey, Skinner and Valodia²⁴⁵ revealed two important things. Firstly, there is a lot

²⁴⁴ Address of the President of South Africa, Thabo Mbeki, of the first joint sitting of the third democratic Parliament, Cape Town. 21 May 2004.

²⁴⁵ Devey, R., Skinner, C. & Valodia, I. *Second Best? Trends and Linkages in the Informal Economy in South Africa*. Development Policy Research Unit. Working Paper 06/102, 2006.

of job swapping at the lower end of the salary scale and therefore a lot of movement between the formal and informal sector. This is in contrast to the common assumption of a structural disconnection and little mobility. Secondly, the above statistics show that poverty exists quite strongly within the formal sector. In this regard Andries du Toit has posed the following comment: *“All too often, the situation of those on the margins of the formal economy was framed in normative and teleological terms, as if the problem was with the informal sector itself, and as if enough economic growth was the solution. What if informal is normal? What if the marginalisation of hundreds of millions of people in today’s informal economy is not a function of ‘not enough development’ and ‘not enough growth’? What if it is a structural feature, a function of the present nature and direction of growth itself?”*

How can one make sense of this? The dual economy thesis is perhaps a false dichotomy and perhaps one needs to reconfigure the informal economy as part of the overall formal economy. If one were to change one’s mindset then it is entirely possible that the focus is misplaced. The point is that economic marginalisation can have a different meaning, depending on one’s frame of reference. It could mean an outcome or a process. If it is a process, it refers to the adverse integration into market or state structures. If this is the case, then it is not a question of social exclusion but a matter of the terms and conditions of incorporation.

In South Africa, the concept of social exclusion has become a buzzword, but very few have taken the time to interrogate what it means and whether it is appropriate to use the language of social exclusion to describe poverty and propose developmental solutions. Furthermore, it makes the assumption that integration, incorporation and inclusion are the panaceas for chronic poverty but no proper analysis is entered into about how such integration will affect the poor.

More importantly, there is no discursive analysis on the complexity of the economic, political, ideological and social power relations embedded in the functioning of the market economy. As a result, there is incomprehension of how poor people are inserted within the broader formation of powers.²⁴⁶ As Du Toit argues, this requires attention to be paid to both the vertical and horizontal links, the reconfiguration of discourses on race, gender and identity; a proper conceptualisation of ‘social capital’ relationships and the reconceptualisation of the poor as passive objectives of delivery.²⁴⁷

Therefore, for policy planners the focus would be to look at the monopolistic structures that marginalise the poor and design interventions or programmes that will alter the terms and conditions of their incorporation. It is in this social context in which a comprehensive policy on the poor has to be formulated and implemented.

246 Du Toit, A. ‘Social Exclusion’ Discourse and Chronic Poverty: A South African Case Study. *Development and Change*, 35 (5): 987 -1020, 2004.

247 Ibid.

RECOMMENDATIONS

As a result of the above analysis, the Commission recommends the following:

- The state hosts a frank and robust discussion about the real nature of poverty in South Africa.
- The core of such a discussion should be around the state meeting its constitutional and international obligations in respect of economic and social rights through the development of a comprehensive policy on the poor.
- The state develops certainty on what it means by poverty alleviation, poverty eradication and poverty reduction in its policy documents as well as to develop certainty on the associated variables.
- The state reviews its current approach to poverty reduction programmes.
- The state develops certainty on what the poverty datum line in South Africa is.
- The state ratifies the International Covenant on Economic, Social and Cultural Rights.

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CONCLUSION

Jo Mdhlela

As we conclude this volume, let us highlight and restate the constitutional imperative of the Commission as the promoter, protector, monitor and assessor of human rights, and our endeavour to inculcate the culture of dignity and respect for human rights at every level of our life as a community. Much progress has been made in this project of human rights development but it must be emphasised that more must be done.

The recent incident in which a group of white students at the Free State University displayed raw and unmitigated racism in which elderly black women were subjected to humiliation and indignity is a constant reminder of a nation that is in danger of regressing in respect of human rights. Human rights are about the affirmation of human dignity, equality and freedom. As a nation we need to do more to inculcate and imbibe a human rights ethos.

The same can be said of the killings that took place at Skielik, Swartruggens, in the North West. In that racist tragedy, innocent black people were allegedly gunned down by a 17 year old white man for no apparent reason. Incidents of racism replicate easily. They reflect fixed racial attitudes of racial hatred and stereotyping; they are pervasive in every facet of our common life – be it in schools, universities, informal settlements or businesses. They are to be found in every nook or corner of our life, and are clear indicators that the work of the Commission to champion the gospel of human rights must be taken to new levels.

The work of promoting respect for human rights is the mandate of the Commission. The Human Rights Development Report has reflected widely on the mandate and on the areas in which the Commission engages in its efforts to promote a human rights culture. We also have to state that the failure to carry out this mandate aggressively may have the consequence of retrogression – almost taking back the country to the dark ages of apartheid and colonial years.

The reflections in this report illustrated the importance of the country's constitutional journey on a variety of human rights issues. In addition, parallels and connections are drawn between the theoretical understanding and appreciation of human rights and the lived experience of communities who are the supposed recipients of human rights. Do the people enjoy human rights as prescribed by the Constitution, or is this an idealised dream far removed from their day-to-day lived experience? The five chapters that form this report – Poverty and Treaty Body Monitoring, Crime and Human Rights, Equality, the Promotion of Access to Information – attempt to provide answers to this question. In part, the answers can never be straightforward – they are complex because the issues are complex.

However, we cannot, and dare not, oversimplify our world. Creating a human rights culture fourteen years into the country's democracy still presents a huge challenge. It took more than 300 years to perfect colonialism and apartheid. This becomes even more challenging if one considers that the cultures of colonialism and apartheid have been structural, not to speak anything about the social engineering that was contrived to exclude the majority from the mainstream politics and economic and social spheres of life.

We trust this report will contribute to a better understanding of where South Africa should be in relation to a proper development of a human rights ethos. There are many challenges that still lie ahead. As we march together towards the promised land of justice and fairness and equality in which the culture of human rights will be second nature, effortlessly practiced and lived out in every sphere of our human existence, we hope for real transformation that will engender the spirit of justice in South Africa.

Crime, a chapter in this report, is having paralysing effects on all South Africans. It has no respect for race, creed or colour. In its wake it leaves a trail of destruction and hopelessness, while at another level it is becoming a single factor that is denying millions of South Africa the right to safe communities. In the words of the Commission's Chairperson, Jody Kollapen, "*Violent crimes affect the right to life, the right to personal security, the right to dignity and the right to personal integrity.*" If crime is having so much negative impact on the country, we need to see it as a human rights violation that needs to be eradicated. We hope, after reading the reflections on crime, the country will strive to develop strategies to fight for its eradication.

Similarly, poverty is a scourge that is also a violator of human rights that needs eradication. For as long as the resources of the land are unevenly distributed, so will socio-economic disparities continue to widen. Again, the chapter on equality should help us to grapple with the issues of equality, and wrestle with a difficult question: why is there so much inequality in our land? We trust all the country's institutions – all tiers of government, universities, research institutions and Non-governmental Organisations (NGOs) and Faith-based Organisations (FBOs), among others, will work together to develop strategies to eradicate underdevelopment which is a breeding ground for all forms of inequality.

In conclusion, we hope that the Human Rights Development Report will prove a useful resource to all who will read it, serving as resource for purposes of research, as we all strive to make South Africa a country conscious of issues of human rights.

