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SOUTH AFRICAN HUMAN RIGHTS COMMISSION

SECTION 184 (3) REPORT

TRANSFORMING SOCIETY. SECURING RIGHTS. RESTORING DIGNITY.

2012

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SECTION 184(3) REPORT

TRANSFORMING SOCIETY. SECURING RIGHTS.RESTORING DIGNITY



FOREWORD BY THE CHAIRPERSON

Section 7 (1) of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereinafter “the Constitution”) is emphatic that the Bill of Rights is the cornerstone of our democracy. The Constitution is transformative in that it was adopted to heal the divisions of the past, establish a society based on democratic values, social justice and fundamental human rights and to improve the quality of life of all citizens.

Seventeen years into our democracy, it is important to reflect on the extent of the transformation as envisioned by our Constitution. Hence the South African Human Rights Commission (hereinafter “the Commission”) has purposefully chosen “transformation” as its theme for this Section 184(3) Report. The progressive realisation of social and economic rights is central the transformation of our society.

Section 184(3) of the Constitution specifically mandates the Commission to monitor the implementation of economic and social rights by the relevant organs of the state. The Commission requests information on the measures that these departments have taken towards the realisation of these socio-economic rights. ‘Protocols for requesting information’ were sent to eight national departments on 29 August 2011, with an extended response date of 10 October 2011. However, only three national departments submitted their protocols to the Commission. Thus this submission is limited to reporting on the rights to adequate housing, environment and social security.

Non-compliance by the national departments is in violation of the relevant provision of the Constitution as well as Section (7) (2), which states that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 237 of the Constitution further provides that all constitutional obligations must be performed diligently and without delay. The Commission is concerned about the lack of responsiveness of these state departments. Chapter Nine institutions, such as the Commission were established to assist in the project of nation building. Its role is as a cooperative functionary that guides and oversees the promotion, protection and development of human rights, it should not be seen as oppositional. It is in this spirit that the Commission raises its concern.

The Commission would also like to reiterate its call for the ratification of the International Covenant for Economic, Social and Cultural Rights. The covenant is fundamental in international law and its ratification can only serve to expand South Africa's jurisprudence and discourse on economic and social rights.

Yours faithfully



Advocate M.L. Mushwana

Chairperson
South African Human Rights Commission

INTRODUCTION BY THE HEAD OF PROGRAMME

This Section 184 (3) Report represents the eighth publication on economic and social rights produced by the South African Human Rights Commission (hereafter “the Commission”) The Commission has also produced specific publications in respect of the rights to basic education, adequate housing and health care services.¹ In 2012, the Commission will host a national conversation on the right to food to determine the status of food security in South Africa and will also conduct provincial public hearings on the right to water and sanitation.

Despite the significant strides in economic and social rights over the past 18 years, it can be argued that much of the success resided in quantitative as opposed to qualitative access. Consequently, the notion of progressive realisation remains an elusive concept and many challenges continue to prevail across every economic and social right. For example, with respect to the right to access sufficient food, the *Sowetan* Newspaper reported in November 2011 of four siblings who starved to death in the North West province. They died in their quest to find their mother and sister who had left in search of food.² In respect of the right to have access to health care services, infant and maternal mortality are still unacceptably high. Infant mortality has become particularly worrying. Between January and May 2010, 181 babies died at Nelson Mandela Academic Hospital in the Eastern Cape.³ In May 2010, 6 babies died at Charlotte Maxeke Johannesburg Academic Hospital.⁴ In respect of the right to water and basic sanitation, statistics suggest a high access rate to water and sanitation but the Commission has established that some households are still using the bucket system. Furthermore, many who have access to sanitation complain of poor qualitative access. These realities suggest the need to refocus the discussion from quantitative to qualitative access (i.e. the number of people who has access) to ensure that the quality of service delivery is not compromised in an effort to rapidly meet targets.

¹ Report on the Public Hearing on the Right to Basic Education (2006); Report of the Public Hearing on School Based Violence (2006); Report on the Public Hearing on Housing, Evictions and Repossessions (2008); Public Inquiry: Access to Health Care Services (2008).

² The *Sowetan*. *Hunger killed them*. 11 November 2011.

³ Bateman, C. (2010). ‘Crowded wards, lousy admin contribute to death and suffering.’ In *South African Medicines*

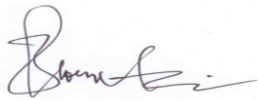
Formulary. July 2010, Vol. 100., No.7

⁴ Mail and Guardian. *Neonatal ward overcrowded at the time of baby deaths*. 19 May 2010.

In the 7th ESR Report, the Commission defined progressive realisation and this Section 184 (3) Report represents an extension of those findings and recommendations.

Appreciation is extended to all who participated in and contributed to the development of the 'Protocols for Information' and the writing of the Section 184 (3) Report. In particular, I would like to thank Yuri Ramkissoo, Cameron Jacobs, James Motha and Rashida Kalake from the Research, Documentation and Policy Analysis Programme.

Yours sincerely



Dr. Kgamadi Kometsi

Acting Head

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ABSTRACT

The first chapter sets the scene for the thematic approach of the report. The theme is of transformation, using the Commission's own vision of *transforming society, securing rights and restoring dignity* as the title. The overall argument presented in the chapter is that real transformation cannot occur without the true progressive realisation of economic and social rights. The chapter is divided into four sections: the first section provides an overview of the mandate of the Commission including an analysis of the methodology to monitor the responsiveness of state organs. Section two focuses on impediments to the realisation of economic and social rights as identified in the 7th ESR Report. This section discusses the Commission's investigation of a legal complaint in 2010 on the realisation of the right to sanitation, which serves to illustrate the existence of these impediments. Section three focuses on the methodology of the Section 184 (3) Report. In contrast to the 7th ESR Report, this report did not use a deliberate dialogical social research technique but rather used protocols to encourage responsiveness by organs of the state. The chapter concludes with the iteration of the National Development Plan which outlines where we would want our country to be by 2030.

The right to adequate housing is the focus of Chapter Two. The chapter commences with an explication of the National Housing Code (NHC). One of the central objectives of the NHC is the development of social capital by supporting the active participation of communities in the design, implementation and evaluation of projects. The quality of housing provision, the implementation of informal settlements upgrading, the increasing housing backlog as well as the confusion around the Demand Data Base are other important sections that are discussed and analysed in this chapter. The chapter concludes that the progressive realisation of the right to access adequate housing is not being achieved.

Chapter Three is concerned with the right to an environment that is not harmful to health or well being. The protocol designed by the Commission dealt with specific themes including public education and awareness, access to information as well as the recourse for the lack of access thereof. Other important aspects were the legislative developments in the 2010/11 financial year, environmental assessments, mining and its impacts and carbon emissions and climate change. The chapter concludes that Department of Environmental Affairs has made many improvements to address some of the issues that plague the environmental sector and

that were raised in the Commission's 7th ESR Report. Examples include the improved coordination between the Department of Rural Development and Land Reform and the Department Cooperative Governance and Traditional Affairs to ensure that spatial planning frameworks at a provincial level are considered at a local level and; the development of the National Climate Change Response Strategy Green Paper in 2010. However, there is a need for greater transparency with regard to how environmental impact assessments are scored. Acid mine drainage is a concern for the Commission. The limited role that the Department of Environmental Affairs plays to control and manage mining is disconcerting. Recommendations include strategies to promote awareness of the right, more effective integration of regional spatial plans at a local level and the development of a more transparent scoring system for environmental impact assessments.

A discussion on the right to access social security is the fourth chapter of this report. The social transfer system currently costs approximately R97 billion as the allocation of social grants has become one of the chief poverty alleviation tools. The government must be applauded for the significant expansion of the social grant system. However the chapter argues that the government is still falling short of giving true meaning to the progressive realisation of the right to have access to social security. It is the Commission's contention that such progressive realisation in South Africa should include considerable interventions required to ensure that the poor have the maximum possible opportunities to enter or prepare for labour market participation. This could possibly be achieved through the development of a social security "road map" that is both developmental and transformational. In addition, the Commission submits that the Basic Income Grant has enormous emancipatory potential and should be reconsidered as a means to empower proper citizenship and to reduce the depth of poverty. The final chapter of this report provides a general conclusion and represents a synopsis of the findings and recommendations of the four substantive chapters.

TABLE OF CONTENTS

1. Transforming Society, Securing Rights and Restoring Dignity	11
1.1. Overview of the Mandate of the Commission.....	13
1.1.1. Tools for Monitoring ESR.....	14
1.1.2. Responsiveness by Organs of State	15
1.2. Impediments to the Realisation of Rights.....	16
1.2.1. The Design of the Protocols	20
1.2.2. Respondents	21
1.2.3. Responsiveness by Organs of State (2011).....	21
1.3. How Do We Want to Write the Story of Economic and Social Rights for 2030	23
2. The Right to Adequate Housing.....	26
2.1. Findings on the Realisation of the Right in the 7th ESR Report	27
2.2. Findings on the Realisation of the Right.....	28
2.2.1. Awareness of the Right.....	28
2.2.2. Housing Backlog	29
2.2.3. The National Housing Code.....	31
2.2.4. Informal Settlement Upgrading.....	31
2.2.5. Quality of Housing Provision.....	32
2.2.6. The Demand Data Base	33
2.3. Conclusion.....	34
2.4. Recommendations	34
3. The Right to Environment.....	35
3.1. Findings on the Realisation of the Right in the 7th ESR Report	35
3.2. Findings on the Realisation of the Right.....	37
3.2.1. Awareness of the Right.....	37
3.2.2. Legislative and Policy Developments.....	37
3.2.3. Environmental Assessments	39
3.2.4. Mining and Acid Mine Drainage.....	42
3.2.5. Biodiversity and Habitat Management.....	44

3.2.6. Carbon Emissions and Pollution.....	44
3.3. Conclusion.....	45
3.4. Recommendations.....	47
4. The Right to Have Access to Social Security.....	48
4.1. Findings and Recommendations from the 7th ESR Report.....	49
4.2. Findings on the Realisation of the Right.....	50
4.2.1. Awareness of the Right.....	50
4.2.2. Legislative and Policy Developments.....	51
4.2.3. Reduction of Poverty.....	51
4.2.4 Social Security Road Map.....	56
4.3. Conclusion.....	58
4.4. Recommendations.....	58
5. Conclusion.....	59

LIST OF ACRONYMS

CO₂	Carbon Dioxide
Commission	South African Human Rights Commission
Constitution	Constitution of the Republic of South Africa Act, 108 of 1996
CSO	Civil Society Organisations
DBSA	Development Bank of Southern Africa
DCoGTA	Department of Cooperative Governance and Traditional Affairs
DDB	Demand Data Base
DEA	Department of Environmental Affairs
DMR	Department of Mineral Resources
DoHA	Department of Home Affairs
DoHS	Department of Human Settlements
DoSD	Department of Social Development
DRDLR	Department of Rural Development and Land Reform
DWA	Department of Water Affairs
EAP	Environmental Assessment Practitioner
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
ESR	Economic and Social Rights
HBRC	Home Builders Registration Council
IDP	Integrated Development Plan
KZN	KwaZulu-Natal

MDG	Millennium Development Goal
MPRDA	Minerals and Petroleum Resources Development Act 20 of 2002
NEAS	National Environmental Authority System
NEMA	National Environmental Management Act 107 of 1998
NHC	National Housing Code
NISIS	National Integrated Social Information System
NDP	National Development Plan: Vision for 2030
NPC	National Planning Commission
RDP	Reconstruction and Development Programme
SAIRR	South African Institute for Race Relations
SASSA	South African Social Security Agency
SDF	Spatial Development Framework
SLP	Social Labour Plan
StatsSA	Statistics South Africa
TRA	Temporary Relocation Area
UNDP	United Nations Development Programme

1. TRANSFORMING SOCIETY, SECURING RIGHTS AND RESTORING DIGNITY

“Transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is the perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.”⁵

South Africa’s constitutional democracy is 18 years old and to extend Mondli Makhanya’s⁶ eloquent metaphor of comparing this new dispensation to that of a teenager, 27 April 2012 is the celebration of South Africa becoming an adult. It is apt at this historical juncture to assess South Africa’s transformation by using the realisation of economic and social rights (hereinafter “ESR”) as a benchmark. The transformative nature of the Constitution of *“implies not only redressing the outcomes of past injustice, but a deep restructuring of the underlying institutional arrangements, which generate various forms of political, economic, social and cultural injustice.”*⁷ This means that transformation in South Africa cannot occur without addressing the causes and impacts of poverty and inequality first and attempting to alleviate these.

It is perhaps in recognition of this that the Chairperson of the National Planning Commission (hereinafter “NPC”), Minister Trevor Manuel, proposed that the *“country must write a different story in the years ahead.”*⁸ The bold vision of the National Development Plan (hereinafter “NDP”) is to eliminate poverty and reduce inequality by 2030 through focusing on the capabilities of people and the country. The plan specifies that through various measures, the government plans to increase the capability of state institutions to deliver on their mandates,

⁵ Langa, P. (2006). ‘Transformative Constitutionalism’ in Stell LR 351 -360.

⁶ Editor in Chief of the *Sunday Times* newspaper, Avusa Media.

⁷ Liebenberg, S. (2010). *Socio-Economic Rights: Adjudication under a transformative constitution*. Juta & Co, Ltd.

⁸ National Development Plan, 2011, p 16.

particularly on service delivery related economic and social rights. The plan focuses additionally, on expanding the capabilities of people, to reach their full potential and improve their lives, particularly women and the youth, by accessing basic services and rights. To achieve this freedom in capability, nine focal areas are highlighted in the plan:

- **Creating jobs and livelihoods;**
- **Expanding infrastructure;**
- **Transitioning to a low-carbon economy;**
- **Transforming urban and rural spaces;**
- **Improving education and training;**
- **Providing quality health care;**
- **Building a capable state;**
- **Fighting corruption and enhancing accountability; and**
- **Transforming society and uniting the nation.**

The vision and ambition of the NDP is certainly laudable. The official unemployment rate as of the second quarter of 2011 was measured at 25.7% and if the expanded definition⁹ is taken into account, the figure rises to 36.9.¹⁰ Approximately 51% of all unemployed are women, and the unemployment rate for women and the youth is higher than the national average.¹¹ Similarly, inequality in South Africa is unacceptably high as the Gini coefficient increased to approximately 0.7 between 1996 and 2009, with an estimated 40% of the population living in poverty.¹²

However, as with all projects, the success of the NDP will depend on the ability to identify and manage the risks or impediments that it may face. In the Commission's 7th Economic and Social Rights Report, which was submitted to the Parliament of South Africa in December 2010, four such risks were identified in respect of the realisation and enjoyment of all ESR.¹³

⁹ The expanded definition includes the criterion of discouraged work seekers which does not form part of the strict definition.

¹⁰ South African Institute for Race Relations.

¹¹ "Stats SA: unemployment rate increases" Mail and Guardian (4 May 2012)

¹² South African Human Rights Commission. (2010). *7th Report on Economic and Social Rights – Millennium Development Goals and the Progressive Realisation of Economic and Social Rights 2006 -2009*.

¹³ See section 1.2 on the impediments to the realisation of rights.

The anticipation in its submission was that strategies could be developed to mitigate these risks. However, the report has yet to be considered. As the provision of ESR is essential to poverty alleviation for the poorest and most vulnerable in the country, it is essential that impediments to effective service delivery be considered.

This chapter provides a contextual background to the Commission's 2011 Section 184 (3) report (ESR report). The theme is one of transformation, using the Commission's own vision of *transforming society, securing rights and restoring dignity* as the title. It focuses mainly on the Commission's mandate, the impediments to effective service delivery of ESR and will expand on the findings of a recent report by the Development Bank of Southern Africa (hereinafter "DBSA"),¹⁴ which explains that political governance structures must be enhanced if South Africa wants to meet its development objectives. This resonates well with overcoming the four impediments identified in the Commission's 7th ESR Report.

It is important to note that the lack of response of government departments and the lack of attention given to the report by the Parliament of the Republic of South Africa also hinders progress in realising economic and social rights.

1.1. Overview of the Mandate of the Commission

The Commission is a constitutional body governed by section 184 of the Constitution of the Republic of South Africa. Section 184 (1) and (2) clearly underlines the mandate, functions and powers of the Commission whereas S 184 (3) is specific in respect of the Commission's requirement to monitor and assess ESR. In particular, section 184 (3) requires that:

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

However, such monitoring and assessment is not just for the purposes of constitutional compliance but also to ensure the advancement of ESR so that South African citizens,

¹⁴ Development Bank of Southern Africa. (2011). *Prospects for South Africa's future*.

particularly the poor and vulnerable in society may enjoy the full benefits of democracy. Thus, the Commission's objectives are to:

1. Determine the extent, to which the organs of State have respected, protected, promoted and fulfilled human rights.
2. Determine the reasonableness of measures, including legislation, by-laws, policies and programmes adopted by organs of State to ensure the realisation of human rights in the country.
3. Make recommendations that will ensure the protection, development and attainment of human rights.

1.1.1. Tools for Monitoring ESR

The Constitution in section 184 (3) specifically mandates the Commission to monitor the implementation of ESR by the relevant organs of State through requesting information on an annual basis on the measures that they have taken towards the realisation of these rights. South Africa, therefore, has a constitutionally sanctioned system of monitoring ESR. As a tool to conduct such monitoring, the Commission developed protocols or questionnaires, which were sent to government departments for completion. The protocols are adaptations of the international reporting instruments on human rights. Seven protocols were developed, one for each ESR. The protocols had a basic format in common that requested the following information:

- A description of the system of gathering the information and for the monitoring of the implementation of ESR;
- Details of education and awareness programmes designed to increase access to information on the right and recourse in the event of a violation;
- A list of the legislation, policies, and other measures that were introduced in order to enhance the realisation of ESR; and
- An interpretation of the obligations emanating from the Constitution, on the realisation of ESR.

Individual protocols also had a section specific to each right, with questions based on the findings in the 7th ESR report. The interpretation of the international treaty reporting model and

the normative framework around which the protocols were designed was to assist the Commission in identifying violations of ESR.

1.1.2 Responsiveness by Organs of State

From a social research perspective, protocols are representative of self-administered questionnaires, where the respondent completes the questionnaire and submits it timeously to the interviewer. The disadvantage of this research method is that respondents generally fail to complete and return the questionnaire. Statistically, the response rate in respect of self-administered questionnaires seldom exceeds 50% and is quite often below 25%.¹⁵ The Commission found that organs of State are not immune to this statistical reality. For example, for the 6th ESR Report¹⁶, protocols were sent to organs of State in August 2004, and were requested to respond by mid-September of that year. However, very few responses were received. The Commission then took the initiative of submitting a letter of concern to office of the then director-general in Office of the President in February 2005. Despite these efforts, four government departments (Correctional Services, Health, Agriculture and Housing) and the Land Bank failed to make submissions. The provincial government responses for the same period did not yield a better response rate either and are as follows:

Table 1: Response by Provincial Governments (6th ESR Report)

Provincial Government	Response Rate (out of 9)	Percentage Response Rate
Education	2	22%
Housing	3	33%
Water	5	56%
Environment	5	56%
Food	5	56%
Social Security	5	56%

In an attempt to mitigate the challenges attached to the poor response rate by organs of State, the Commission shifted its methodology from protocols for its 7th ESR Report, to public

¹⁵ Haralambos, M. and Holborn, M. (1990). *Sociology Themes and Perspectives* (3rd edition). Unwyn Hyman Limited.

¹⁶ South African Human Rights Commission. (2006). *6th Economic and Social Rights Report 2003 -2009*.

hearings on each right. In research, a public hearing can best be described as a large focus group, which is intended to stimulate discussion among participants and bring to the surface responses that may otherwise lay dormant. Focus groups offer unique insights for critical inquiry as a deliberative, dialogical and democratic practice.¹⁷ In the context of human rights, a focus group serves to identify and interrogate the lived experience of society and ensure that the voice of the poor is heard.

The Commission scheduled its public hearings for February and March 2009 and requested relevant information from government departments and stakeholders via advertisements in the *Sunday Times*. By the deadline on 6 February 2009, only four departments had responded and by the extended deadline of 12 May 2009, only fourteen departments across all spheres of government had responded. This is a response rate of approximately 14%.

Out of the nine provincial governments in South Africa, four did not make any submissions to the public hearings, including the Eastern Cape, North West, KwaZulu-Natal (hereinafter “KZN”) and Free State provinces. The Western Cape was the only province that showed a real commitment to the process. It made one general submission from the Office of the Premier, and five submissions from its departments, namely, from Environmental Affairs and Development Planning, Social Development, Health, Local Government and Housing and Education.

The 5-day public hearings were postponed to the first week of June 2009 and upon invitation various national and provincial government departments made presentations. The departments of Social Development (hereinafter “DoSD”) and Rural Development and Land Reform (hereinafter “DRDLR”) did not make written submissions before the hearings and only the latter attended the public hearings.

1.2. Impediments to the Realisation of Rights

Four impediments were identified in the 7th ESR report that hinders access, enjoyment and the fulfilment of ESR. The 7th ESR report also argued that the nature of the impediments were such that despite the justiciability of ESR, South Africa as a country was still far from realising ESR

¹⁷ N.K. Denzin & Y.S. Lincoln. (eds). (2005). *The Sage Handbook of Qualitative Research*. Sage Publications Incorporated.

via a *bona fide* human rights culture. This means that despite the presence of comprehensive human rights legislation and policies in South Africa, at a practical grass-roots level, rights are not being realised for the majority. The impediments that were identified are:

1. The conceptual misunderstanding by the government of its constitutional obligation to progressively realise rights.
2. The inadequate fulfilment of public participation processes and access to information, which are key elements of a rights-based approach.¹⁸
3. The social exclusion of the poor and vulnerable groups.
4. The disjuncture between legislation and strategic planning and its implementation which is a result of *inter alia*, the weak capacity of government departments to deliver on their intended outputs.

In a matter on the provision of sanitation that the Commission was asked to intervene in, the Western Cape branch of the African National Congress Youth League lodged a complaint with the Commission on behalf of the residents of Makhaza, in the township of Khayelitsha in Cape Town. The complaint alleged that the City of Cape Town installed unenclosed toilets in Makhaza. As a result, residents were forced to enclose the toilets themselves with whatever material they could obtain. A total of 1316 unenclosed toilets were installed and all but 55 toilets were enclosed by the residents. The complaint stated that it was a violation of the right to human dignity that the residents had to use the unenclosed toilets and in some cases, cover themselves with blankets in full view of the public. On 4 June 2010, the Commission found in favour of the complainants that the provision of unenclosed toilets was not only contrary to the guidelines of the National Housing Code (hereinafter “NHC) but a violation of the right to one’s dignity.

On 23 September 2010, applicants Ntombentsha Beja, Andile Lili and Andiswa Nceni, who are residents of Makhaza, approached the Western Cape High Court for the following relief:¹⁹

¹⁸ A rights-based approach to development is essentially a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to integrate the norms, standards and principles of the international human rights system into development. These norms and standards are those contained in international treaties and declarations. The principles include express linkages to rights; equality and equity; accountability, empowerment and participation; and non-discrimination and attention to vulnerable groups. (www.unhrc.org)

1. To declare that the conduct of the Mayor of the City of Cape Town, the City of Cape Town and the MEC for Human Settlements in providing open toilets to the community of Makhaza to be a violation of their constitutional rights as enshrined in sections 9, 10, 12, 14, 24, 26 and 28 of the Constitution; and
2. To order the City of Cape Town and the MEC for Human Settlements to enclose all 1316 toilets.

The court held an inspection *in loco* in November 2010 and immediately concluded that the self enclosed toilets were unsatisfactory to meet the requirements of the right to dignity and privacy. In the judgment, in which the court found in favour of the applicants, it stated the following at paragraph 146: *“The City’s decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights. The legal obligation to reasonably engage the local community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents with respect and care for their dignity was not taken into account when the City decided to install the unenclosed toilets.”*²⁰

This judgment clearly demonstrates that there is a lack of understanding of a rights-based approach to service delivery and that the process of sanitation provision in Makhaza was hindered by the four impediments highlighted above and in the 7th ESR Report. Firstly, the provision of unenclosed toilets suggests that the City of Cape Town has a conceptual misunderstanding of the true nature of progressive realisation and what constitutes the fulfilment of a right. Progressive realisation implies the significant improvement of the capabilities of people to the extent that they can become active participants in shaping society. The provision of unenclosed toilets is the very antithesis of progressive realisation. In all manner of respects, it is dehumanising and represents a form of social closure. Secondly, the court held that meaningful and robust engagement with the Makhaza community by the City of Cape Town was absent, which means that there was a lack of adequate public participation and access to information. Thirdly, it was clear that there was no consideration for particular vulnerable groups such as women, the elderly and persons with disabilities when the City of Cape Town made the decision to install the unenclosed toilets. Judge Erasmus emphasised

¹⁹ Beja and Others v Premier of the Western Cape and Others. 21332/10.

²⁰ Ibid.

the exclusion of vulnerable groups in his judgment with the following statement at paragraph 102.

*The City ought to have come to the assistance of those who, due to poverty and their particular disadvantaged socio-economic status could not afford to enclose their toilets. Also no regard was had to persons with disabilities or to issues of safety for those most vulnerable to violence in terms of the structure. The City failed to take into consideration the gender impact on women and girls both in terms of different biological needs as well as their vulnerability to higher levels of gender-based violence.*²¹

Lastly, policy guidelines regulate that a sanitation facility must be enclosed to afford privacy. Specifically, the minimum standard for basic sanitation is *“a toilet which is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.”*²² There is clearly a disjuncture between policy and practice.

In conclusion, even though section 7 (2) of the Constitution provides that the State must respect, protect, promote and fulfil the rights in the Bill of Rights, it seems that officials have a limited understanding of a rights-based approach and there is therefore a tendency to revert to hierarchical forms of decision making when faced with challenges from communities or civil society organisations (hereinafter “CSOs”). The impediments further indicate that the necessary attitude towards progressive realisation is not readily apparent within government. As was argued in the 7th ESR report, and proved in this case, much progress towards the realisation of rights in South Africa has resulted from litigation. An obvious conclusion that can be drawn is that the government has not been responsive enough to progressive realisation and has adopted a defensive and autocratic approach to pressure from CSOs. This was also exhibited in another case where unenclosed toilets were erected in a township in the Free State (discussed later in this report.)

²¹ Ibid.

²² Regulation 2 of Regulations Relating to Compulsory National Standards and Measures to Conserve Water. 2001.

1.2.1. The Design of the Protocols

The research instrument in the form of “Protocols for requesting information” was designed to fulfil the following objectives:

- To determine the extent to which the organs of State have respected, protected, promoted and fulfilled human rights.
- To determine the reasonableness of measures including legislation, by-laws, policies and programmes adopted by organs of State to ensure the realisation of human rights in the country.
- To make recommendations that will ensure the protection, development and attainment of human rights.

Relevant organs of State were requested to submit a report to the Commission on its performance during the 2010/11 fiscal year using the protocol as a guide or template. The questions in the various protocols were based on the substantive matters that were highlighted in the Commission’s 7th Economic and Social Rights Report. Some information that was required may have been outside of the 2010/11 fiscal year but nonetheless was important for assessing the progressive realisation of the right. The protocol itself was divided into the following sections:

1. An introductory section that provided the constitutional mandate of the Commission, the obligations of organs of State in respect of the mandate and the objectives of the protocol.
2. A definitional section to ensure responses that are commensurate with the objectives of the research instrument.
3. A section that pertained to the development of any policies, legislation or strategies within the reporting period.
4. A section dedicated to establishing the awareness of the promotion of the right.
5. Section 5 contained the body of the protocol, which contained questions that pertained to the assessment of outcomes in relation to the constitutional obligations of the relevant organs of State.

1.2.2. Respondents

A total of eight protocols were developed in accordance with the economic and social rights that are enshrined in the Bill of Rights and these were sent to the relevant organs of State.

Table 2: Protocols sent to Organs of the State

Right	Organ of State
The right to a basic education	Department of Basic Education
The right to an environment that is not harmful to one's health or wellbeing	Department of Environmental Affairs
The right to have access to sufficient food	Department of Agriculture, Forestry and Fisheries
The right to have access to sufficient health care services	Department of Health
The right to have access to adequate housing	Department of Human Settlements
The rights in respect of land restitution, land redistribution and land tenure reform	Department of Rural Development and Land Reform
The right to have access to social security	Department of Social Development
The right to have access to sufficient water	Department of Water Affairs

1.2.3. Responsiveness by Organs of State (2011)

On 29 August 2011, the protocols were sent to directors-general of the relevant organs of State with a submission deadline of Monday, 26 September 2011. An acknowledgement of receipt was requested by 5 September 2011. The Department of Rural Development and Land Reform was the only organ of State to acknowledge receipt by the due date. On 15 September 2011, the Commission sent a general reminder to all the relevant organs of State but despite these efforts, the Department of Environmental Affairs was the only organ of State that met the submission deadline of 26 September 2011.

A few days before the submission deadline, the Department of Basic Education contacted the Commission and requested an extension of the deadline to 14 October 2011. The Commission agreed to an extension of 10 October 2011 and a general communiqué was sent to all the relevant organs of State of the extended deadline. Unfortunately, only two additional organs of State submitted the protocols by the extended deadline.

Table 3: Responses to Requests for Information from Government Departments

Name of Department	Date Request with Protocol Sent	Deadline for Submission	Actual Date of Submission
Department of Rural Development and Land Reform	29 August 2011	26 September 2011	Did not receive a submission
Department of Human Settlements			05 October 2011
Department of Social Development			28 September 2011
Department of Water Affairs			Did not receive a submission
Department of Environmental Affairs			26 September 2011
Department of Health			Did not receive a submission
Department of Education			Did not receive a submission

1.3. How Do We Want to Write the Story of Economic and Social Rights for 2030

“The trouble, for the poor, is that the forces operating against them are very much stronger than those working in their favour. What is involved here is not recognition, the discovery of the right policies, or the creation of the right administrative framework, or even the good will of the power-holders. The matter goes deeper than that, and concerns the distribution of power in society.”²³

The vision statement of the NPC is to eliminate poverty and reduce inequality by 2030, through increasing the capability of the state to provide on its given mandate and by increasing the capabilities millions of disenfranchised people of South Africa through the provision of rights and services.²⁴ As stated in the NDP, “[the state has] to ensure that poor people have the environment, services and skills to improve their lives “

The NDP recognises that any poverty alleviation strategies would have to include those marginalised and vulnerable communities and that this inclusion will go beyond passive citizenry to a system where all citizens are active champions of their own development. The NDP highlights education and employment as sectors that require particular attention, where it is anticipated that an improvement in education and growth in employment would stimulate economic growth and development. This stems from a finding on challenges that identifies *inter alia* the problem that too few people work and that the standard of education for most black learners is of poor quality. Further highlighted, is the fact that South Africa’s development path “has not sufficiently broadened opportunities for black South Africans, especially women and youth.”

As laudable as this may appear to be, it is acknowledged that this will be difficult to achieve without the necessary shift in thinking about the power relations in society. As poverty, unemployment and inequality in South Africa are inextricably linked, any significant inroads would require a paradigm shift that would go beyond the simple dichotomy of inclusion and

²³ Miliband, R. (1974). ‘Politics and poverty.’ Cited in Marais, H. (2011). *South Africa Pushed to the Limit: The Political Economy of Change*. UCT Press.

²⁴ Note 8 above.

exclusion.²⁵ Public participation will be essential to the success of the NDP. Cases mentioned above and other cases that the Commission has dealt with show that decision-making and service delivery in the absence of public participation and access to information leads to a failure in the true realisation of the right. This breakdown in communication leads to a lack of understanding of the needs communities and the aims of the state.

It is also essential that during service delivery, attention is given to quality of said services as opposed to the quick provision of services of a large quantity. As discussed later in this report, access does not necessarily translate to a fulfilment of the right. For example, universal access to education does not translate to employment for school-leavers as the quality of education might not be sufficient for entry into a tertiary institution or other skilled or semi-skilled employment.

Importantly, the state will have to use its available resources optimally. Unlike civil and political rights, the provision of ESR is made from limited resources and to ensure that the state's mandate is achieved, how these resources are allocated will be vital to the success or failure of poverty alleviation strategies. This will include the effective allocation and utilisation of the fiscal budget to ensure that spending is centred on strategies to meet the goals of the NPC. This will have to be followed by effective monitoring of the rate of success of programmes and an audit of spending that has been allocated thereof.

Additionally, the state must take reasonable measure to ensure the realisation of rights. Despite the fact that the state could provide exemplary service delivery programmes, access to the right has failed if the measures taken by the state were for reasonable, for example, meeting the needs of the most impoverished and women. It also means that provision differs between different communities and different individuals and the provision of services is unreasonable unless the actual needs of a community or individual are assessed.

It is hoped that the state recognises the interdependency and indivisibility of rights. Essentially, there must be provision of basic ESR such as housing and access to services for a person to enjoy their rights to freedom and dignity fully. Progressive realisation of ESR is the necessary nexus between the theoretical story for 2030 and the lived experience of the most

²⁵ Du Toit, A. (2005). *Chronic and structural poverty in South Africa: Challenges for action and research*. Centre for Social Science Research. Working Paper No. 121.

marginalised and vulnerable. The achievement of this link must, as a necessity, start with what the DBSA has identified as key levers of change.²⁶ These are:

1. Improving political governance as central to changing South Africa's development path, which entails improvements in political and civic leadership as well as economic stewardship.
2. Building a delivery state through improving administrative leadership in priority areas, building skills pipelines and decreasing institutional fragmentation.
3. Building effective social coalitions through national partnerships for school improvement, addressing youth unemployment and valuing excellence.

This chapter was deliberately titled *'transforming society, securing rights and restoring dignity'* not only because it is the vision of the Commission, it also embodies the journey that South Africa needs to take for 2030. To reiterate Sandra Liebenberg, the transformative nature of the Constitution *"implies not only redressing the outcomes of past injustice, but a deep restructuring of the underlying institutional arrangements which generate various forms of political, economic, social and cultural injustice."*²⁷

²⁶ Development Bank of Southern Africa. (2011). Prospects for South Africa's future.

²⁷ Liebenberg, S. (2010). *Socio-Economic Rights: Adjudication under a transformative constitution*. Juta & Co, Ltd.

2. THE RIGHT TO ADEQUATE HOUSING

The right to adequate housing is part of the right to an adequate standard of living, recognised by the Universal Declaration of Human Rights. It cannot be reduced to a roof and four walls, but should be understood in broad terms as including the right of every person to have access to a home and community, to enjoy physical and mental health, and to live in safety, peace and dignity.²⁸ The right to housing is enshrined in section 26 of the Constitution, which states that:

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

When South Africa became a democracy in 1994, the new government inherited a landscape ravaged by forced removals and evictions in terms of influx control policies which were designed to achieve racial segregation and subordination. This resulted in a huge housing crisis and in 1994 it was estimated that 18% of the population were living in informal settlements, backyard informal dwellings or in overcrowded conditions with no formal rights to their homes. It was further estimated that approximately two hundred thousand households would have to be housed annually for the backlog to be eradicated over a period of ten years.

Despite steps taken by the government to remedy the situation, the housing backlog was not eradicated and in fact has increased from the estimated 1.6 million in 1994 to 2.2 million in 2011.²⁹ The purpose of this chapter is to determine the current status of the right to adequate housing in terms of section 26 of the Constitution.

²⁸ http://direitoamoradia.org/?page_id=46&lang=en

²⁹ Protocol response from the Department of Human Settlements.

2.1. Findings on the Realisation of the Right in the 7th ESR Report

In the 7th ESR Report³⁰, it was argued that while housing policy and legislation show a commitment towards fulfilling the international and constitutional obligations, there is a chasm, however, between the policy and its implementation. Further concerns were raised about the absence of a rights-based approach in service delivery in favour of rapid delivery. As a result, despite the fact that the department has made quantitative progress towards security of tenure, the lives of slum dwellers may not be improving in the process. The rapid delivery of houses has led to a compromise in quality and often, housing projects are developed on an urban edge without adequate infrastructure or services. This limits the access that residents have to the city, which is richer in employment opportunities and services.

In respect of access to information and participation, the report found that the process of housing provision followed a top-down approach. There was also a lack of transparency, awareness and understanding of the implementation of the Demand Data Base (hereinafter “DBB”).

³⁰ It must be noted that the monitoring and assessment for 7th ESR Report covered a three year period during which there were changes to the political administration.

2.2. Findings on the Realisation of the Right

2.2.1. Awareness of the Right

In its protocol submission, the Department of Human Settlements (hereinafter “DoHS”) indicated that one of its directorates deals with Training and Skills Development, is mandated to roll out a consumer education and awareness-raising programme in collaboration with provinces and municipalities. Part of this approach is to provide hands-on support through the provision of the necessary resources so that communities are empowered to participate in developments that affect them. According to the DoHS, the outreach and education programme includes the following:

- Community partnerships.
- Training programmes such as community workshops, skills training and one-on-one meetings.
- Peer Educator Training.
- Beneficiary Education.

This programme is certainly in accordance with the NHC, the central objective of which is the development of social capital by supporting the active participation of communities in the design, implementation and the evaluation of projects. However, despite the laudable intentions of the Education and Training Programme of the DoHS, the Commission has on two occasions, found evidence when dealing with complaints on access to sanitation that projects often lack adequate participation and access to information and training. The first complaint was investigated in 2010, about the City of Cape Town (discussed previously). The second investigation, in 2011, involved the Moqhaka Local Municipality in the Free State. In both these cases, the Commission found that community participation and the creation of agency and empowerment were lacking by the respective local authorities. It is important to emphasise that deprivation, vulnerability and stress often reduce the status of poor people to one of dependency in complex and unequal relationships of patronage in which their agency and empowerment are severely constrained.³¹ This means that when a community is reliant of a private or public department for access to essential services, their already vulnerable position

³¹ Du Toit, A. (2005). *Chronic and structural poverty in South Africa: Challenges for action and research*. Centre for Social Science Research. Working Paper No. 121.

is further diminished to one of total dependency, especially through a lack of access to information and a lack of participation opportunities.

More often than not, communities in South Africa are informed but not engaged during processes of development in their own community. They become observers in a process of the development of housing that is intended for their benefit.

The DoHS should, therefore, do a lot more in respect of its Education and Training Programme and link that to the housing developments in the affected communities. This will increase the participation and more importantly the level of transparency that is required to truly realise the right to housing.

2.2.2. Housing Backlog

The table below provides an estimate of the current housing backlog disaggregated by province. These estimates were submitted by the DoHS and show an approximate backlog of 2.2 million households with 60% of the overall backlog in the Gauteng, KZN and the Western Cape provinces.

The DoHS indicated that it has several interventions in place to address the housing backlog. Firstly, the Urban Settlements Development Grant was implemented, which empowers metropolitan municipalities to manage and develop sustainable and integrated human settlements as direct receipts of the grant. The second intervention, the municipal accreditation process, allows qualifying municipalities to manage housing construction programmes and ensure technical quality assurance.³² The third intervention is refining the planning framework through a revised business planning template as it is hoped that the housing backlog can be reduced through better fiscal planning.

³² It is not certain how this is being monitored.

Table 4: Housing Backlog per Province

Province	Housing Need (Low Estimate)	Housing Need (High Estimate)
Eastern Cape	250 000	280 000
Free State	122 000	135 000
Gauteng	650 000	652 000
KwaZulu-Natal	360 000	368 000
Limpopo	86 000	90 000
Mpumalanga	110 000	120 000
Northern Cape	32 000	35 000
North West	210 000	215 000
Western Cape	280 000	300 000
National	2, 100, 000	2, 195, 000

These interventions are welcomed, particularly in response to the impediments identified in the 7th ESR report, one of which was the disjuncture between strategic planning and implementation, which is due mainly to the weak capacity of government departments to deliver on their intended outputs. It is hoped that these interventions will promote improved collaboration between the different spheres of government and empower municipalities to deliver on services. At present, only the Johannesburg, Ekurhuleni, Tshwane, Nelson Mandela Bay and Cape Town municipalities as well as the district municipalities of Frances Baard and Pixly ka Seeme have full accreditation status. The majority of these municipalities are however well resourced and the Commission believes that greater focus is required to increase the capacity of the many poorer municipalities in South Africa.

The National Housing Code

The 7th ESR report revealed numerous challenges attached to the NHC. Firstly, the discourse and method of informal settlement upgrading was criticised by many during the public hearings process as being a facade for evictions. An example of flawed “slum upgrading” is the Joe Slovo informal settlement in Langa in the Western Cape, marred by poor planning and a lack of communication, participation and consultation between the state and affected community. To upgrade the settlement, the state relocated residents to an area called Delft (an area further away from the city centre), as *in-situ* upgrading was deemed unachievable. An application was made for the eviction of approximately 20 000 people from the Joe Slovo Informal Settlement and an order was granted pursuant to the provisions of Section 6 of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998. The order was granted on 10 June 2009.

However, subsequent to the eviction order, on 25 June 2010, the provincial government filed an affidavit to the Constitutional Court, declaring an intention to undertake an *in situ* upgrade. The applicants (Joe Slovo residents) filed an answering affidavit in which they emphasised that given that *in situ* upgrading was achievable, the initial reason for the judgment no longer existed. The applicants therefore argued that the order should be discharged. The matter was decided by the Constitutional Court on the 21 March 2011 and it was held that it was “*just and equitable to discharge the order due to the following exceptional circumstances:*”³³

2.2.3. Informal Settlement Upgrading

In accordance with the National Housing Programme *in-situ* upgrading is the preferred development approach as opposed to complete resettlement. The latter is only considered when the location of the settlement is unsuitable for development. However, given that the majority of the informal settlement upgrading projects results in de-densification, the relocation of a portion of the community sometimes cannot be avoided. The DoHS also emphasised that participation in all aspects of development by the community is a principle of the National Housing Programme. This includes participation on *inter alia*, the township layout through to the services standards, the house typologies and details of the tenure rights to be awarded.

³³ Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others. CCT 22/08. 2011. ZACC 8.

It must be said that this principle accords with a human rights-based approach but unfortunately investigations conducted by the Commission in respect of housing complaints show little adherence to this principle. Complaints around housing projects in Riverlea, Alexandria Township and Pennyville in Johannesburg, Makhaza informal settlement in Cape Town and Rammulotsi Township in the Free State were investigated by the Commission.³⁴ The common factor in these complaints is the lack of public participation and access to information on the trajectory of the housing development. Problems with corruption were also cited in all complaints, confirmed through field research undertaken by the Commission in Makhaza. Critically, it seems as if the gap between policy and implementation resulting in a breakdown in the relationship between the government and the poor and marginalised people that it seeks to serve, is growing.

2.2.4. Quality of Housing Provision

In respect of the quality of housing provision, the DoHS acknowledged that many houses have been affected by poor workmanship. However, it maintains that this occurred prior to the implementation of the National Home Builder's Registration Council (hereinafter "NHBRC") warranty scheme and before the home builders were required to register with the NHBRC. For the

2010/11 financial year, a total of 4 851 houses were repaired and 758 houses were demolished at a total cost of R427.2 million to the DoHS. The registration of home builders is commendable but it must be emphasised that companies receive tenders not only

to build decent houses but to create communities. Therefore, appropriate monitoring and evaluations should be conducted by the relevant authorities and consequences should follow in the event of non-compliance with standards and regulations.

³⁴ These complaints were lodged at the Commission between 2009 and 2011.

2.2.5. The Demand Data Base

Housing waiting lists were established during the apartheid era but these were effectively abandoned under the new dispensation save for the purposes of recording housing needs. The validity of the waiting list system was questioned by the Auditor-General, which resulted in the development of the national DBB. Potential beneficiaries of housing in a specific location are invited to apply for housing subsidies when the products become available. According to the DoHS, the DBB was initiated in 2005 but provinces are still at various stages of implementation.

There is no doubt that there was perhaps merit in redeveloping the system but the complete abandonment of the housing waiting list has caused much confusion and has been prejudicial to those who have been on the list for many years. Many, particularly backyard dwellers and people who share rooms in formal townships, still believe that the waiting list still exists and have reacted angrily towards those communities who appear to have 'jumped the queue'. As a result, the common perception in many communities is that one is more likely to get a house if one lives in an informal settlement.

Secondly, anecdotal evidence seems to indicate that the allocation of houses in communities is less than scientific. When a particular site is earmarked for a housing development, there is very little proper project management, monitoring and evaluation or oversight to determine whether all the houses are assigned to the intended beneficiaries. Such procedures that leave room for corruption and for people to actually 'jump the queue', should be minimised. Some beneficiaries are informed years later that a stand had been allocated to them despite consistently contacting their relevant housing authority. During the Commission's research in Makhaza in November 2011, a community member stated that she found out in 2011 that a stand was allocated to her 2008. At the time of the interview, she was unaware of the location of the stand. There is therefore a high probability that when the stand is located, it will be occupied.

2.3. Conclusion

Although the Commission recognises the strides that have been made in providing access to adequate housing for those in need, it is disconcerting that the housing backlog has increased since the dawn of democracy. At this stage, it is highly unlikely, if not improbable, that the desired target of providing houses for all, achieving access to land tenure and eliminating slums altogether by 2015 will be achieved. It is questionable whether these targets were realistic at the outset and the consequence of chasing quantitative targets has meant that quality has been compromised.

Furthermore, it seems that a human rights-based approach to service delivery in respect of providing adequate housing has been erratic at best. The reparation bill for the poor quality of houses has cost the DoHS R427 million for the 2010/11 financial year. This is indicative that regulations and standards in respect of the tender process should be reviewed and tightened. Penalties must also be imposed for a breach in contract specifications and non-compliance with building standards. A bureaucratic top-down approach to housing development projects is also evident. This is in contradiction to the fundamental principle enshrined in the National Housing Programme and leaves many communities feeling disempowered and marginalised in a process that, in policy and legislation, is meant to enrich their quality of life. The Commission finds that the necessary systems and planning do not appear to be adequate enough for the creation of human settlements in South Africa.

2.4 Recommendations

1. All housing developments and upgrades must be accompanied by meaningful public participation and access to information.
2. The implementation of the DBB must be reviewed to obviate the unintended consequence of prejudice.
3. The DoHS must develop a strategy to adhere to the fundamental principles of the National Housing Code.
4. Standards and regulations in respect of the housing tender process must be reviewed and tightened.

3. THE RIGHT TO ENVIRONMENT

The right to a healthy environment is fundamental to the enjoyment of all human rights and is closely linked with the right to health, well being and dignity. A sound and healthy natural environment lends an enabling background for the enjoyment of other human rights. It is clear therefore that the right to a healthy environment is a fundamental part of the right to life and to personal integrity. Environmental destruction can result in discrimination as the effects of environmental change are felt mostly by socially and economically disadvantaged groups. The right to a safe and healthy environment is enshrined in section 24 of the South African Constitution, which states that everyone has the right –

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

Section 24 of the Bill of Rights makes provision for the protection of the environment from a human health perspective to ensure that an individual's right to a healthy environment is met. It further recognises the rights of future generations, which has implications on the current management of the natural environment and utilisation of natural resources. The Constitution therefore recognises the need for the protection of the natural environment purely from a conservation perspective.

3.1. Findings on the Realisation of the Right in the 7th ESR Report

Poor Implementation of Legislation and Policy: Several submissions to the Commission at the time emphasised the poor implementation or disregard for environmental policies in environmental decision-making. It was also submitted by CSOs that precedence was given to development over social and environmental issues, which undermined the progressive realisation of environmental rights.

Public Access to Information: The hearings revealed a consensus amongst most civil society organisations that information required for the effective monitoring of social and environmental issues was inaccessible.

Public Participation: One issue raised continuously during the hearings in 2009 was the varying degree of participation that occurred in practice and the inconsistent application of the public participation process. Problems with the process ranged from a lack of participation to a process that includes only a few members of the public.

Environmental Impact Assessments (hereinafter “EIA”): Many submissions raised the concern about the absence of guidelines as to how the merits of an EIA are considered. The lack of guidelines results in inconsistency with the consequence that different authorities tend to make different decisions pertaining to similar assessments.

Impacts of Mining: Social and environmental impacts of mining were raised by a few members of the public as a serious concern. These included, *inter alia*, impacts on the health of communities bordering mines, water, air and noise pollution and structural damage to infrastructure, with little positive impact by way of employment and growth at a local level.

Monitoring, Evaluation and Enforcement: The inadequate monitoring of industrial, manufacturing, development and other sectors that impact on the social and natural environment by national, provincial and local government was mentioned as a critical issue by a range of organisations. These concerns extended to the monitoring of carbon emissions and the protection of South Africa’s natural resource base, within and outside protected areas. The lack of monitoring and enforcement means that environmental transgressions go unnoticed and the transgressors are unpunished.

Biodiversity: Though South Africa has a well-developed protected area network, the protected areas tend to be small and insufficient attention is paid to the development of wildlife corridors. This has given rise, in some provinces, to the protection of some areas in isolation, which leaves the long-term achievement of conservation objectives in doubt.

Low Carbon Energy Strategies: South Africa relies heavily on industry as a contributor to the growth of the economy. Manufacturing and mining sectors are large energy users and South

Africa is the largest emitter of greenhouse gases in Africa. Cheap energy from the burning of coal may provide short term benefits but it is not sustainable in the longer term. South Africa's contribution to global climate change will have significant local impacts and is a threat to sustainability and to the progressive realisation of the MDG, environmental rights and other human rights. Despite this, there appears to be a lack of commitment to investment in low carbon and renewable energy generation options³⁵ and the government at the time did not set in place a meaningful programme to achieve a reduction of the country's CO₂ production.³⁶

3.2. Findings on the Realisation of the Right

3.2.1. Awareness of the Right

While the Department of Environmental Affairs (hereinafter "DEA") has done much work in ensuring that human resources are educated and skills are attracted and retained, its protocol response did not explain how it is addressing the issue of the awareness of the right. It is the duty of the DEA to ensure that South African citizens, particularly those in rural and outlying areas, are aware of their constitutional right to a safe and healthy environment and how people can access the right. Likewise, while there are remedies available to the public in the case of the violation of rights, it is unclear how the DEA ensures that the public is aware of such recourse.

Access to information seems to be available mainly online through government websites which means that many people who do not have access to the internet will not have adequate access to information in respect of their rights and the state of the environment. This usually means that those who are most in need of education and awareness have limited access.

3.2.2. Legislative and Policy Developments

On a positive note, the DEA indicated that it made legislative amendments to the Environmental Impact Assessment Regulations and Environmental Management Framework Regulations in 2010. The amendments ensure that public participation processes cannot occur between 15 December and 2 January of every year when most people are on their annual

³⁵ "Eskom's Energy Dilemma" *Business iAfrica*, (11 August 2009)
<<http://business.iafrica.com/news/1857243.htm>>.

³⁶ S. Fakir, pers.com, (2009).

holiday, except “*where circumstances require it.*”³⁷ The regulations also make provision for the future compulsory registration of environmental assessment practitioners (hereinafter “EAP”) to ensure that they are governed by a code of ethics and that environmental assessments are conducted by appropriately trained and experienced EAPs.

Importantly, the DEA published its National Climate Change Response Green Paper for public comment in 2010, where a wide-scale public participation process ensued. The paper provided a background on the expected impacts of climate change and how the country plans to deal with these impacts via adaptation, mitigation and disaster response strategies. The Commission, along

with various other CSOs and departments, submitted comments on the paper that will be integrated for the publication of the white paper.

Of great concern with regards to legislative developments is the lack of movement on previous amendments to the Minerals and Petroleum Resources Development Act (hereinafter “MPRDA”) and National Environmental Management Act (hereinafter “NEMA”), where the DEA drafted legislation that would require mining companies to comply with the requirements of the NEMA as well as to conduct a full EIA prior to mining or prospecting. The revised legislation may entail compliance monitoring and enforcement against mines who fail to comply with their environmental obligations.

The Minister of Mineral Resources stated in 2010 that several concerns had been raised by mining sector stakeholders and government departments related to the implementation of the Amendment Act. She therefore “*deemed it prudent to first consult and further endeavour to address the concerns raised by stakeholders before the Amendment Act takes effect.*”³⁸

To date these amendments have not come into effect despite being assented to by the President in April 2009 and it should have come into effect on 1 May 2009. When asked if the DEA was aware of the gaps in the above legislation and how it planned to address them, the response was that “*a meeting with the respective Ministers need to resolve the matter. Options*

³⁷ Department of Environmental Affairs (DEA). Response to SAHRC Request to Provide Information.

³⁸ <http://www.pmg.org.za/node/20804>

*on taking this forward will be provided to Ministers to inform the decision on the way forward.*³⁹ No timelines were provided for this proposed meeting.

The DEA's response does not provide much information save for the fact that it is aware of the gap in the legislation. No clarity was provided on when the respective Ministers will meet to discuss the problem. Furthermore, there was little acknowledgement in respect of the impact that mining may have on the environment while the gap in the legislation exists. Greater specificity is required on how the various departments are going to address the legislative amendments. In the interim, no information was provided on how the DEA plans to deal with the impacts of mining while the jurisdiction for the granting of mining and prospecting licences resides with the Department of Mineral Resources (hereinafter "DMR").

It would be expected that the DEA would have a plan of action to address this issue and should clearly delineate roles and responsibilities to various departments. Furthermore, it is important to allocate timelines to each process to ensure that the amendments are effected as soon as possible. The DEA did not specify who will take the lead in convening such meetings between the respective Ministers. What appears to be a lack of direction is disconcerting considering the impacts that mining has on the natural environment and communities that inhabit the surrounding areas.

3.2.3. Environmental Assessments

The Commission raised the issue of the disjuncture between provincial and regional spatial planning as delineated by provincial planning departments, and the actual land use that occurs at a local level. The DEA, in response, explained that the Directorate on Intergovernmental Planning and Coordination has deployed officials to different district municipalities around the country to assist in the compilation of Integrated Development Plans (hereinafter "IDPs"). Furthermore, through the Spatial Development Framework (hereinafter "SDF") the Department of Rural Development and Land Reform (hereinafter "DRDLR") coordinates sessions where provincial planning departments such as the provincial Department of Cooperative Governance and Traditional Affairs (hereinafter "DCoGTA") discuss this disjuncture and make recommendations to address it. Comments have been made to

³⁹ Ibid.

the SDF guidelines and a bilateral agreement was signed between the DRDLR and the DEA in which both departments seek to harmonise spatial planning processes.⁴⁰

The DEA also plans to utilise the National Environmental Management Biodiversity Act (bioregional planning), open space planning and the reform of the Municipal Systems Act, once open for amendment, to further this harmonisation.

The DEA did explain that this disjuncture can only be removed through multi-sectoral collaboration. The Commission will monitor the implementation of such plans to ascertain if processes work in reality to harmonise national and provincial planning with local land use in the future. The Commission would also recommend that the DEA play a greater role in coordinating provincial and local planning to ensure that land use is strategic and appropriate rather than *ad hoc*, particularly in areas of ecological sensitivity.

The Commission raised a concern over the precedence that development takes at the expense of the natural environment and indicated that there is a need for a more standardised scoring system for EIAs. The DEA was in agreement and indicated that the National Environmental Authority System (hereinafter “NEAS”) has been developed and was functional. The NEAS was primarily designed to allow data capture from the EIA application form and to assist as a decision support system.

While a NEAS will go a long way in effectively capturing the relevant information and promoting transparency, it is unclear if the system provides any guidance on how to assess and score development projects. This is fundamental for ensuring that the correct decision is made, as well as the possible mitigation measures that should be implemented. It is expected that such a system should assist in highlighting certain fundamental issues with development and ensure that all environmental and social impacts are weighted correctly. It will be helpful if the scoring system is published for public comment so that the system of assessment is transparent to all.

The DEA indicated that no-go options, alternatives and cumulative impacts are considered in all EIA applications. While in theory this might be the case, there have been cases where development has impacted on sensitive ecological areas, which should not have happened if

⁴⁰ DEA (note 39 above).

the correct systems were in place. Again, the NEAS will assist to avoid such cases in future, but greater transparency on decision-making is needed as well as a list of conditions that allow decision-makers to immediately deny an application for development, if the land is ecologically sensitive or the impacts will not be mitigated. Integration with provincial planning is also important in this case. The DEA indicated that it “*must consider any relevant guidelines, policies, environmental management instruments and other decision-making instruments including things like IDPs, EDFs etc.*,”⁴¹ when conducting an EIA. However, “*must consider*” does not require that spatial and integrated development plans have to feed into the process.

What was also highlighted as a concern was the fact that EAPs are currently paid by developers and not the government, but they are meant to serve the public sector and the public. While the DEA did indicate that recent amendments to environmental assessment regulations make provision for the professional registration of environmental assessment practitioners, it did not specify if all specialists that are involved in an EIA process would have to be registered and what the penalties or consequences would be if an EAP fails to comply with the necessary rules and standards. The Commission suggested a system whereby developers pay money for EIAs into a central fund and EAPs are then independently allocated to a project and paid for by the fund. The DEA disagreed that such a system would work due to the interest it would have in managing such a fund while acting as the major decision maker.

The DEA also highlighted a complaint by developers that EIAs “*restrict development and add costs to the process.*”⁴² While this might be true, it is up to the developer to work the costs of EIAs into project at the outset. The concern over the credibility of some EAPs remains. The Commission will have to engage further with the DEA to ensure that EAPs that register for accreditation are monitored stringently and that penalties apply should an EAP not follow the correct procedure for identifying all impacts of a development and engaging meaningfully with communities and other interested and affected individuals and parties. The system will also have to include all specialists that provide any input into an EIA process, in the future, as their professional opinions can drastically alter the outcome of an EIA application.

⁴¹ DEA (note 39 above).

⁴² Ibid.

The Commission was concerned over the Bengwenyama⁴³ case, where a mining licence was granted before the Environmental Management Plan (EMP) was submitted and there was insufficient public participation. The Commission asked if the DEA had put in place any safeguards to ensure that this does not happen in the future. The DEA did not respond to the question about safeguards but did state that this was perhaps an isolated case. Section 24 of NEMA requires that a draft environmental management programme be submitted with other draft reports.

However, Dr. Koos Pretorius from the Escarpment Environment Protection Group indicated to the Commission that there have been other cases where the EMP was submitted after the mining or prospecting licence was granted.⁴⁴ In the case of underground mining at Strathrae Colliery in Middelburg, the EMP was submitted after the mining licence was granted and without a proper public participation process being conducted. It therefore seems that Bengwenyama was not an isolated case and there is a need for safeguards or checks to ensure this does not happen in the future.

3.2.4. Mining and Acid Mine Drainage

One of the greatest concerns for the Commission remains mining. The Commission deals with various complaints on a regular basis on mining, including the environmental and social impacts, the lack of wealth accrual to local communities, the lack of public participation and access to information, the lack of adequate consideration of alternatives and the lack of monitoring of adherence to social labour plans and environmental management plans (EMPs). Of particular concern over the past year is the impact that mining has on water resources, particularly from acid mine drainage (hereinafter “AMD”).

Many of the impacts and social issues should be highlighted by the DEA when an application for a mining or prospecting licence is lodged, but currently the DEA is expected to provide comments to mining and prospecting applications within a limited period of time. If comments are not received by the DMR, it can make a decision on whether or not to grant the licence without input from the DEA. This is a fundamental flaw in the application process, which leads to various associated problems that could have been otherwise avoided.

⁴³ Bengwenyama (Pty) Ltd and Others v Genorah (Pty) Ltd and Others (2010) CCT 39/10 ZACC.

⁴⁴ Pretorius, P. pers comm.. (2012).

The limited role that the DEA plays with regards to the control and management of mining is clearly evident by the DEA's responses to questions about holding mining companies accountable, especially in the case of closure without rehabilitation and questions about AMD. The DEA responded to questions saying that most issues fall outside of their legal mandate and within the jurisdiction of the DMR and the Department of Water Affairs (hereinafter "DWA"). While the DMR is the main authority responsible for mining, all activities that relate to the environment should be a shared competency.

If a mine is violating its EMP, the DEA should take action against that mine to enforce the EMP and impose penalties and closure of the mine where necessary. While the management of water resources does fall within the ambit of the DWA, cases of water pollution that impact on the natural environment should also be addressed by the DEA. The DMR does have a vested interest to ensure that mining and prospecting licences are granted and that mining does occur. The role of the DEA should therefore be to

act as a watchdog and regulator to ensure that no-go and alternative options are considered and impacts mitigated. The DEA is best placed to identify areas of ecological sensitivity such as wetlands and heritage sites.

While the DEA indicated that it is its responsibility to monitor adherence to SLPs and EMPs, it is clear from the complaints that the Commission receives that adequate monitoring is not occurring. Furthermore, communities have to rely on the assistance from CSOs to assist in the event of the violation of rights, where access to the DEA is limited. The DEA also stated that there is no financial assistance available to communities to seek recourse in the event of violations. It is unclear how communities are expected to afford assistance, especially since many CSOs are severely under-resourced. This clearly exhibits a breakdown in the process between the time that the mining or prospecting licence is granted and the actual commencement of the activity. It seems that each mine should develop a monitoring plan which can be closely monitored by the DEA and DMR.

Public participation or the lack thereof remains a great concern for the Commission. Many of the mining matters that the Commission has investigated concern, in some way, to a lack of proper and meaningful engagement. An apt example is the Xolobeni case where a granted mining licence was withdrawn over the failure of the mining company to consult with local

communities.⁴⁵ Likewise, the Bengwenyama community argued successfully in the Constitutional Court that public participation had been insufficient when a mining licence was granted to a mining company. To this end, the Commission proposed the development of public participation guidelines to assist developers, companies and EAPs (where applicable) to engage meaningfully with interested and affected individuals and parties. These guidelines will be based on national and international best practice as much work has been done over the last few years on business principles and rules of engagement.

However, the DEA disagreed that such a review was required and indicated that “*a decision must be made which legislation should apply in mining developments, and such legislation should provide for appropriate public participation procedures, as is currently legislated in terms of NEMA and the EIA regulations 2010.*”⁴⁶ It is however clear that the legislation does not provide adequate guidance on public participation and that much can be learned from previous cases and best practice on how to approach and conduct public participation for mining and prospecting licence applications.

3.2.5. Biodiversity and Habitat Management

It seems like the DEA is continuously improving its management of open spaces and biodiversity. It has assisted municipalities to develop a Municipal Master Plan with draft management guidelines for different typologies. The map provides a summary of the programmes needed and areas where urgent rehabilitation of degraded land is required. Much of the conservation work is done in conjunction with neighbouring communities, linking initiatives to poverty alleviation strategies. Information on open space management is available on the South African National Biodiversity Institute website.

3.2.6. Carbon Emissions and Pollution

While South Africa is one of the world’s top fifteen carbon dioxide (CO₂) emitters, much work has been done over the last year to begin to reduce emission levels and over-reliance on coal as a source of energy. South Africa has done development work on its Greenhouse Gases Inventory, which will provide annual reports by 2014 and the private sector has assisted with

⁴⁵ Appeal by AmaDiba Trust against granting of mining license to Trans world Energy Minerals.

⁴⁶ DEA (note 39 above).

carbon disclosure information. The Department of Energy developed a White Paper on Renewable Energy which will assist with the diversification of energy generation.

The DEA indicated that South Africa plans to reduce the country's emissions by 34% relative to "business as usual" emissions by 2020 and by 42% by 2025, depending on the funding committed to assist with the process. As mentioned previously, the DEA published for comment, its National Climate Change Response Strategy Green Paper, which deals with, *inter alia*, adaptation and mitigation strategies for climate change impacts.

On the issue of air pollution, however, questions on complaints of cases of air pollution and penalties for transgressors were deferred to local government. As the national authority tasked with the management of the natural environment, the National DEA should have this information on record and readily available, despite the fact that pollution complaints are monitored at a local level.

3.3. Conclusion

Overall, the DEA has made many improvements to address some of the issues that plague the environmental sector and that were raised in the Commission's 7th ESR Report. For example, much coordination planning has been done with the DRDLR and DCoGTA to ensure that spatial planning frameworks at a provincial level are being considered at a local level. This is a step in the right direction in an effort to harmonise provincial and local development. However, monitoring of the implementation of such plans will be essential. Furthermore, the DEA indicated that it "*must consider any relevant guidelines, policies, environmental management instruments and other decision-making instruments including things like IDPs, EDFs etc*"⁴⁷ when conducting an EIA. However, "*must consider*" is not legally binding and does not compel one to take provincial strategic assessments and spatial plans seriously.

What is indeed positive is the development of the National Climate Change Response Strategy Green Paper in 2010 and the amendments to the Environmental Impact Assessment Regulations and Environmental Management Framework Regulations. Again, the

⁴⁷ DEA (note 39 above).

implementation of the National Climate Change Response Strategy White Paper will have to be closely monitored.

Likewise, biodiversity management seems to be improving, but a greater analysis of reports provided on the SANBI website is required.

The NEAS and professional accreditation system for EIAs and EAPs will be useful in ensuring greater credibility in the sector and more rigorous assessments. However, there is a need for greater transparency on how EIAs are scored, and how alternatives and no-go options are considered. There is also a need for specialists to be registered with a professional body to ensure their credibility.

While the DEA has done much work in ensuring that human resources are educated and skills are attracted and retained, it does not seem like it has done much to address the issue of the awareness of the right and the associated recourse in the event of a violation of the right.

The DEA's response on the issue of amendments to the MPRDA does not provide much information and no clarity was provided on when the respective Ministers will meet to discuss the problem. There was further no acknowledgement of the impacts that mining is having on the environment while the gap in the legislation still exists. Greater specificity is required on how the various departments are going to address the legislative amendments, who will convene a meeting of the relevant Ministers and by when this will happen.

Due process within the mining sector remains a major concern and the DEA should play a more active role in ensuring that it takes place. It is unacceptable that there is even one case where an EMP is submitted after the mining or prospecting licence has been granted. Furthermore, there is clearly a lack of sufficient public engagement occurring and the need for public participation guidelines is even more evident. Mining continues in areas of high ecological sensitivity and monitoring of mining activities and adherence to SLPs and EMPs is very poor.

The DEA indicated that South Africa plans to reduce the country's emissions by 34% relative to "business as usual" emissions by 2020 and by 42% by 2025, depending on the funding

committed to assist with the process. It is evident that much work has been done over the last year to begin to reduce emission levels and over-reliance on coal as a source of energy and to promote development work on its Greenhouse Gases Inventory.

More information is needed, however on air pollution cases and the National DEA should have this information on record and readily available, despite the fact that pollution complaints are monitored at a local level.

3.4. Recommendations

1. Awareness of the right should be promoted, particularly in rural and outlying areas and with people who are marginalised and have limited access to information. Awareness of recourse should be improved, so that it can be accessed in the case of a violation.
2. The urgent amendment of the MPRDA and NEMA is needed to ensure that the jurisdiction for granting mining or prospecting licence falls with the DEA.
3. Regional spatial plans should be integrated more effectively at a local level. This means that planners should not just be compelled to consider regional plans, but should be compelled to integrate them into decision-making at a local level.
4. Greater education and transparency is required around the NEAS.
5. Registrations for EAPs should be extended to specialists as well. Greater awareness around penalties for transgressors is required.
6. A transparent scoring system for EIAs should be developed and made public.
7. In addition to amendments to the MPRDA and NEMA, public participation guidelines should be drafted, with close interaction with CSOs and other interested and affected parties.
8. Checks and balances are required to ensure that due process is followed for applications for mining and prospecting licences to ensure that all necessary criteria and processes are followed.
9. Greater involvement by the DEA is required on the issue of AMD as it is an environmental and resources management issue.
10. Greater information is required on air pollution cases and monitoring of CO₂ emissions and low carbon energy strategies in the future.

4. THE RIGHT TO HAVE ACCESS TO SOCIAL SECURITY

The right to social security offers protection to the most vulnerable members of society. It guarantees that everyone will be provided with the minimum goods and services required for a dignified life.⁴⁸ Social insurance and grant schemes ensure that those that are not able to support themselves, such as the elderly, people with disabilities and children with unemployed parents, are able to afford the basic necessities required to continue living. The right to social security is enshrined in section 27 of the Constitution, which states *inter alia* that everyone has a right to have access to:

- (c) Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

A human rights-based approach to social security must defend the right of access to the basic necessities of life as having the same level of legitimacy as other human rights. It must emphasise the interdependency of social security entitlements with other critical ESR and must integrate national, regional and international standards and commitments on social security issues into public policy. The UN High Commissioner for Human Rights⁴⁹ emphasised that ESR must be considered to be on equal footing with political and civil rights. This includes, as per the *Universal Declaration of Human Rights*, the right to food, housing and social security. Key components of a human rights-based approach to social security, critical in a middle-income developing country⁵⁰, are:

- The development of strong accountable institutions, practices and mechanisms to deliver on entitlements;
- A preference for strategies to promote social and economic empowerment over “charitable” responses or mere relief;
- Maximum feasible participation from civil society and communities in the ongoing development and oversight of the social security system; and

⁴⁸ The right to Social Security (2003) Available at http://www.escr-net.org/resources/resources_show.htm?doc_id=401411

⁴⁹ United Nations Development Fund. *Applying a Human Rights-Based Approach to Development Cooperation and Programming*, (2006).

⁵⁰ Extrapolated from various sources including statements from the UN Office of the High Commissioner for Human Rights (OHCHR).

- **Meaningful opportunities for social security recipients who have the ability (prime age, able-bodied) to access broader labour market opportunities and/or opportunities for the preparation thereof.**

For a middle income country, South Africa's expenditure in respect of its social transfer system is relatively high as the allocation of social grants has become one of the country's chief poverty alleviation tools. The aim of this chapter is to briefly review the social security system in South Africa for the 2010/11 financial year through the analysis of the protocol response from the DoSD. Notwithstanding the significant expansion of the social grant system, for which the government must be applauded, the government is still falling short of giving true meaning to the progressive realisation of the right to have access to social security. The Commission's contends that such progressive realisation in South Africa should include access to interventions that assist with entry into the labour market or preparation for future entry opportunities. This could possibly be achieved through the development of a social security road map that is both developmental and transformational.

4.1. Findings and Recommendations from the 7th ESR Report

1. Evidence from the public hearings demonstrated that the South African social security system is not substantially reducing poverty.
2. Although it is acknowledged that the social security safety net had been expanded to reach more people, this expansion does not necessarily equate to progressive realisation.
3. The full realisation of the right to social security will require a much broader multi-departmental effort to integrate anti-poverty strategies.
4. It is clear that ineffective governance by key South African government agencies is a major factor militating against the realisation of both the right to social security and the first Millennium Development Goal.

Recommendations

1. A greater understanding and use of a rights-based approach to social security is required by the DoSD.

2. Social security goals should increasingly be linked to solid opportunities for economic advancement.
3. The DoSD should develop a comprehensive Roadmap for social security, which should clearly articulate, *inter alia*, how the government intends to meet the specific MDGs and how the constitutional right to social security will be progressively realised.
4. The South African government must ratify the International Covenant on Economic, Social and Cultural Rights.

4.2. Findings on the Realisation of the Right

4.2.1. Awareness of the Right

The social security system in South Africa centres on five major grants, namely, the Older Person's Grant, Disability Grant, Child Support Grant, Foster Child Grant and the Care Dependency Grant. In 1994, 2.3 million people were accessing social grants, a figure that increased to 15.5 million people in the 2010/11 financial year, at an approximate cost of R97 billion or 3.5% of the Gross Domestic Product. The phenomenal take-up rate of recipients of social grants is due mainly to the efforts of the DoSD and the South African Social Security Agency (hereinafter "SASSA"), who managed to reach many poor and vulnerable recipients through their various campaign drives. The DoSD has also been innovative by developing the National Integrated Social Information System (hereinafter "NISIS") during the 2010/11 financial year. The NISIS is a database that illustrates the extent to which people in rural and poor communities are accessing the various government services to which they are entitled. Once fully populated, the system show areas with an existing need for services and it will also serve as a tool to follow up on service delivery.

Besides the use of various media forums for awareness-raising, in 2010 the DoSD published and distributed thousands of "speaking books," which provides an audio facility that allows illiterate people to listen to messages and acquire information about the various social grants that are available. The DoSD also commissioned the development of a social grant cartoon booklet for children aged 6 to 12 years old, as an empowerment tool for children to inform their respective caregivers and communities about the various social grants available.

Over the past four years, the SASSA implemented its Integrated Community Registration and Outreach Project, a collaborative project between SASSA, the Department of Home Affairs and the South African Police Service. The aim of the project is improve the processing of grant, identity and birth applications and to facilitate enquiries.

4.2.2. Legislative and Policy Developments

The Social Assistance Act of 2004 was amended in September 2010 to provide for reconsideration of decisions to decline grant applications prior to an appeal being lodged with the Minister. The amendment was necessary to give effect to section 7 (2) of the Promotion of Administrative Justice Act 3 of 2000 as the amendment allows for another official, in a more senior capacity, to verify and validate the original decision, which should allow for the re-evaluation or appeal of the decision to be expedited. Therefore, applicants and beneficiaries who disagree with a decision and/or the reasons given by SASSA for rejecting a grant application may now appeal the decision. In addition, the applicant is also able to lodge an appeal with an independent tribunal specifically established for that purpose.

Another welcome legislative development is the Government Notice No. 232 on 15 March 2011, which provides that recipients of Social Relief of Distress are no longer required to repay the amount received in any form of social assistance in the event of a disaster.

Identifying the gaps in the social security system has been an ongoing project for the DoSD and a key challenge is the absence of mandatory retirement provisioning for the employed as well as the lack of preservation of private retirement benefits.

4.2.3. Reduction of Poverty

The Commission's 2009 public hearings on the right to social security consistently illustrated that while the aim of social grants is to alleviate poverty; these interventions have not been successful in significantly meeting that aim.

A related question is whether the expansion of the social security system amounts to the progressive realisation of the right to social security. The DoSD appears to have a good understanding of progressive realisation and it understands that policies and measures should

be in place to enable more and more people to access social grants and that such quality is increased over time. In addition, the DoSD also believes that access must be progressively facilitated through institutional arrangements, infrastructure and capacity that take the services closer to the people. According to the DoSD, a study undertaken by the Economic Policy Research Institute in 2004 found that social grants reduced the poverty headcount measure by 4.3% and that the extension of the Child Support Grant for children to the age of 18, reduces the poverty gap by 28.3%. Certainly, it is not in dispute that the social security programme has been the government's most effective weapon in reducing poverty and destitution, a view with which the Commission concurs. However, depending on the "poverty line" that is used, statistics on the reduction in poverty can be misleading. For example, in the South Africa Human Development Report 2003⁵¹, the United Nations Development Programme (hereinafter "UNDP") found that the absolute number of poor people had grown but the proportion of people living in poverty had declined marginally. Using a poverty line of R354 per month per adult, the UNDP found that 48.5% of the South African population fell below the poverty line.

Expenditure data from the 1999 October Household Survey and 2002 Labour Force Survey, found that both the number and proportion of poor people had grown.⁵² In 2002 there were approximately two million households with a monthly household expenditure of less than R800 per month and more than half of those households had a total monthly expenditure of less than R400 (approximately 7.4 million people).

Census data provided a similar conclusion that both the number and proportion of poor people had grown.⁵³ By using two poverty measures for the 1996 and 2001 census and utilising two poverty lines, it was illustrated that poverty had increased over the period.⁵⁴ The headcount ratio measures the number of poor as a percentage of the population. The table below shows that the ratio increased from 26% in 1996 to 28% in 2001 if using the poverty line of 2 United

⁵¹ United Nations Development Programme. (2003). United National Human Development Report, 2003.

⁵² Meth, C. & Dias, R. (2003). *Increases in Poverty in South Africa, 1999 -2002*. Paper presented at the DPRU/TIPS Forum.

⁵³ Leibbrandt, M.; Poswell, L.; Naidoo, P.; Welch, M. & Woolard, I. (2004). Measuring Recent Changes in South African Inequality and Poverty using 1996 and 2001 Census Data. *CSSR Working Paper No. 84*. Centre for Social Science Research. University of Cape Town.

⁵⁴ Ibid.

States Dollars (hereinafter “USD”) per day. By using the second poverty line of R250 per month, both the headcount ratio and the poverty gap ratio (average household’s proportionate shortfall from the poverty line) increased between 1996 and 2001.

Table 5: National Poverty Levels, 1996 – 2001⁵⁵

	1996		2001	
	Headcount	Poverty Gap Ratio	Headcount	Poverty Gap Ratio
R250 (1996) per month	0.26	0.11	0.28	0.11
	0.50	0.30	0.55	0.32

Statistics released by the South African Institute of Race Relations (hereinafter “SAIRR”) in 2007⁵⁶ correlate with these studies. Cumulatively, the data provided by the SAIRR revealed that for the period 1996 – 2005, poverty in South Africa worsened as more people fell into the underclass (table above). There was a significant increase in the proportion of people living in relative poverty (as well as a widening poverty gap (table below). Using the World Bank measure of less than 1USD a day as an indicator of extreme poverty, the table below shows that both the percentage and the absolute number of people living in poverty in South Africa, increased quite substantially between 1996 and 2005.

⁵⁵ Sourced from Leibrandt, M.; Poswell, L. ; Naidoo, P. ; Welch, M. & Woolard, I. (2004). Measuring Recent Changes in South African Inequality and Poverty Using 1996 and 2001 Census Data. CSSR Working Paper No. 84. Centre for Social Science Research.

⁵⁶ South African Institute of Race Relations. *South Africa Survey 2006/2007*.

Table 6: Number and Proportion of people living on less that US\$1 day, 1996 – 2005⁵⁷

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%

In the table below, people in poverty are defined as those living in households in 2005 with incomes less than R871 per month for one individual or R3 314 for a household of eight members or more.⁵⁸ Figures show a substantial increase in the proportion of people across all race groups living in relative poverty. Significantly, the proportion of white people living in relatively poverty doubled, over the ten year period. There was also an increase in the number poor people from 40.5% in 1996 to 47% in 2005 and among the African race, the poverty gap increased from R16 677 million in 1996 to R35 726 million.

⁵⁷ Ibid

⁵⁸ Ibid.

Table 7: Proportion of people living in relative poverty by race, 1996 – 2005⁵⁹

Year	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 8: Poverty Gap, 1996 – 2005 (Rands in Millions)⁶⁰

Year	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
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

⁵⁹ Source: South African Institute of Race Relations. *South Africa Survey 2006/2007*.

⁶⁰ Source: South African Institute of Race Relations. *South Africa Survey 2006/2007*.

4.2.4 Social Security Road Map

The statistics presented in this report indicate that South Africa's social security system is not necessarily alleviating poverty, although the availability of social grants is preventing utter destitution. In 2008, Statistics South Africa (hereinafter "StatsSA") found that the increase in income among the poorest 30% of South Africans since 2001 was mainly due to social grants.⁶¹ In addition, it was found that cash transfers have had positive impacts on the welfare of children, including a reduction in incidents of stunting and better nutritional levels. There was also a proportional increase between those receiving the Child Support Grant and school enrolment. Research by StatsSA also found that in 2007, approximately 43% of households received at least one social grant and in 50% of those households, the social grant was the primary source of income. This effectively means that at least 40% of jobless South African citizens live in households that survive mainly on social grants.

However, to place these statistics in the proper perspective, research in 2007 found that 40% of households relying on social grants found it difficult to consistently meet their food needs.⁶² It is therefore very difficult to comprehend what the lives of many millions of South Africans would be without social grants and even though the grants are making an impact, it does seem like a mere plaster on a gaping wound.

As such, one of the main findings from the public hearing on social security in 2009 was the need for government to develop a long term plan or road map on social security. Despite the fact that the DoSD has a basic understanding of the meaning of progressive realisation, this view is nevertheless very narrow and must be expanded from merely noting the number of people accessing social grants to the development sustainable employment and income-generation solutions that allow recipients to exit the grant system. Empowerment is fundamental to progressive realisation, therefore the Commission defines progressive realisation as a "*continuum where the rationale is to start at the minimum socio-economic provision necessary to meet people's basic needs (minimum obligation) to its full realisation of the significant improvement of the capabilities of people to the extent that they can meaningfully participate and shape society.*" To quote Ralph Miliband:

⁶¹ Marias, H. (2011) *South Africa pushed to the limit. The Political Economy of Change*. UCT Press.

⁶² Ibid.

*The trouble, for the poor, is that the forces operating against them are very much stronger than those working in their favour. What is involved here is not recognition, the discovery of the right policies, or the creation of the right administrative framework, or even the good will of the power-holders. The matter goes deeper than that, and concerns the distribution of power in society.*⁶³

This brings to the fore, a need for a more discursive analysis on the complexity of the economic, political, ideological and social relations in respect of how poor people are inserted within the broader formation of power.⁶⁴ Therefore, a social security road map should entail a proper conceptualisation of ‘social capital’ relationships and the re-conceptualisation of the poor as passive objectives of delivery.⁶⁵

The social protection system has enormous emancipatory potential as long as the beneficiaries are not seen as passive recipients but are rather active participants who exhibit agency in shaping their own destiny. One way this can be achieved is through the Basic Income Grant, which has the potential to equip people with a certain level of capability and freedom that may have a greater effect in reducing poverty. The Taylor Committee noted in 2002⁶⁶ that the Basic Income Grant would leave people *“empowered to take risks needed to break out of the poverty cycle. Rather than serving as a disincentive to engage in higher return activities [the grant] could encourage risk-taking and self reliance. Such an income could thus become a springboard for development.”*⁶⁷ The Commission therefore suggests that a Basic Income Grant should be seriously considered by the DoSD as a key component of the social security road map.

4.3. Conclusion

⁶³ Miliband, R. (1974). ‘Politics and poverty’ Cited in Marais, H. (2011). *South Africa Pushed to the Limit: The Political Economy of Change*. UCT Press

⁶⁴ Du Toit, A. (2004). ‘Social Exclusion’ Discourse and Chronic Poverty: A South African Case Study. *Development and Change*, 35 (5): 987-1020.

⁶⁵ Ibid.

⁶⁶ Cited in Marias, H. (2011) *South Africa pushed to the limit. The Political Economy of Change*. UCT Press.

⁶⁷ Du Toit, A. (2004). ‘Social Exclusion’ Discourse and Chronic Poverty: A South African Case Study. *Development and Change*, 35 (5): 987-1020.

Notwithstanding the significant expansion of the social grant system, for which the government must be applauded, this chapter argues that the government is still falling short of truly progressively realising the right to have access to social security. Progressive realisation in South Africa should ensure that interventions are in place to allow poor people the access to opportunities to enter or prepare for labour market participation. This could possibly be achieved by a social security road map that is both developmental and transformational. In addition, a Basic Income Grant has enormous emancipatory potential and should be reconsidered as a means to empower citizenship and to reduce the depth of poverty.

4.4. Recommendations

1. The DoSD should develop a comprehensive road map for social security that clearly articulates the how the right is to be progressively realised.
2. The DoSD should consider the emancipatory potential of the Basic Income Grant and how it can empower citizenship and to reduce the depth of poverty.

5. CONCLUSION

In 2011, the Commission developed protocols that were sent to national government departments for response. It was hoped that responses to these protocols would provide information detailing the steps taken by government department on the progressive realisation of economic and social rights in the 2010/11 financial year. The protocols were designed to assess departments' awareness of the findings of the Commission's 7th ESR Report and if any, the subsequent improvements in their operations and policies based on these findings. While it is the constitutional obligation of government departments to respond to requests for information, the Commission received responses from only three organs of state, the departments of Environmental Affairs, Social Development and Human Settlements.

The 7th ESR Report identified four impediments that hinder access, enjoyment and the fulfilment of ESR:

1. The conceptual misunderstanding by the government of its constitutional obligation to progressively realise rights.
2. The inadequate fulfilment of public participation processes and access to information, which are key elements of a rights-based approach.

3. The social exclusion of the poor and vulnerable.
4. The disjuncture between legislation and strategic planning on one hand and implementation on the other, which is a result of *inter alia*, the weak capacity of government departments to deliver on their intended outputs.

This Section 184 (3) report found that little progress has been made in framing decision-making and service delivery from a human rights perspective. This means that rights are not realised progressively and that little attention is given to the special needs of vulnerable groups, such as rural women, older persons and people with disabilities. Awareness of rights and access to appropriate recourse is also poorly communicated; particularly in rural and marginal communities and much more can be done to educate the general public.

Public participation, which should be the cornerstone of development in South Africa, is not implemented adequately and in many cases, particularly in environmental decision making, it is performed by the dissemination of information rather than through meaningful engagement.

The Commission recognises that strides have been made in providing access to adequate housing for those in need. However, the housing backlog has increased since 1994 and it is highly unlikely that the DoHS will meet the target of providing housing for all, access to land tenure and the elimination of all slums by 2015. The fact that service delivery goals are based solely on quantitative targets and are not framed from a human-rights perspective, means that quality of housing and settlements has been compromised. Greater engagement and community-centred decision making is also required in the housing sector, to ensure that communities are more empowered. Currently, the top-down approach to implementation of housing projects marginalises communities and hinders the desired outcome of enriched and empowered communities.

In the environmental sector, while coordination planning between relevant government departments aims to ensure that spatial planning frameworks at a provincial level are being considered at a local level, the monitoring of the implementation of such plans is essential. Further alignment is required between national, provincial and local spheres of government to ensure that strategic assessments and spatial plans are integrated at all levels. This will assist with effective land use planning and increase environmental integrity.

While the NEAS and professional accreditation system for EIAs and EAPs will be useful in ensuring greater credibility in the sector and more rigorous assessments, there is a need for greater transparency on how EIAs are scored. It is important that specialists are registered with a professional body to ensure their credibility.

The DEA's response on the issue of amendments to the MPRDA does not provide much information and no clarity is provided on when the respective Ministers will meet to discuss the problem. There is also no acknowledgement of the impacts that mining is having on the environment while this gap in the legislation still exists. Therefore, greater detail is required on how the various departments will address the legislative amendments.

Despite the DoSD's understanding of progressive realisation and the need to increase access to social security over time, results from this report show that the number and proportion of poor people has increased in South Africa, across all races, since 1994. Research also shows that the increase in income among the poorest 30% of South Africa since 2001 was mainly due to social grants. Cash transfers have a positive impact on the welfare of children,

Social grants have the potential to decrease poverty. To ensure that this aim of the disbursement of social grants is met, the DoSD must develop a comprehensive roadmap for social security that articulates how the right will be progressively realised. The social protection system has an emancipatory potential if beneficiaries are seen as active participants rather than passive recipients.

Much work is required to raise awareness and promote public participation. Framing all decision-making and development from a human rights perspective will mean that less reliance is placed on quantitative indicators for service delivery and more emphasis is placed on the meaningful, progressive realisation of rights. This will potentially lead to the transformation of our society

